No. 23-3404

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TINA ROOT,
Plaintiff-Appellant,

v.

DECORATIVE PAINT, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Ohio – Western Division
No. 3:21-cv-1552

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE IN SUPPORT OF APPELLANT AND IN FAVOR OF REVERSAL

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STATEMENT OF INTEREST

The Equal Employment Opportunity Commission ("EEOC") is charged with interpreting and enforcing Title I of the Americans with Disabilities Act of 1990 ("ADA"). *See* 42 U.S.C. §§ 12116, 12117. In granting summary judgment to the defendant, the district court erroneously found the plaintiff unqualified for her position. Moreover, in contravention of this Court's precedent, the district court failed to recognize that a reasonable jury could find the defendant bypassed the ADA's mandatory interactive process. Based on these errors, the district court improperly rejected the plaintiff's failure-to-accommodate and disability-discrimination claims. Because the EEOC has a substantial interest in the proper application of the ADA, the EEOC offers its views to the Court. Fed. R. App. P. 29(a).

STATEMENT OF THE ISSUES[1]

1. Whether the district court erred in finding the plaintiff unqualified for her position based on its misunderstanding of her requested ADA accommodation as calling for "zero" exposure to paint fumes.

[1] We take no position on any other issue in the case.

2. Whether the district court erred in granting summary judgment to the defendant on the plaintiff's failure-to-accommodate claim where a trier of fact could find both that a reasonable accommodation was available and that the defendant failed to engage in the ADA's mandatory interactive process.

3. Whether the district court erred in granting summary judgment to the defendant on the plaintiff's disability-discrimination claim where a reasonable jury could find that the defendant called her a "liability" and immediately fired her upon receiving her accommodation request.

STATEMENT OF THE CASE

A. Statement of the Facts

Plaintiff Tina Root has suffered from chronic obstructive pulmonary disease ("COPD") and asthma for several years, including prior to her employment with defendant Decorative Paint, Inc. ("DPI"). R.18-2/Root Decl.¶1/PageID#111; R.25/Hagerman Dep./PageID#1109. For three and a half years, Root worked as a production associate at DPI, which provides painting and injection molding to the automotive and consumer products industry. R.18-2/Root Decl.¶4/PageID#111; R.19/Def. MSJ/PageID#417. Root was able to control her COPD and asthma symptoms during this time

because she worked primarily in an area with no paint fumes. R.18-2/Root Decl.¶¶6-8/PageID#112; R.22/Ankney Dep./PageID#727,729; R.23/Fuller Dep./PageID#844. She had no disciplinary issues in this role. R.23/Fuller Dep./PageID#853.

The DPI facility is divided into several areas, including a "rework" area and a "D-line" area. R.22/Ankney Dep. Ex.1/PageID#737-38. The rework area is located near the main employee entrance in the front of the facility, adjacent to several employee offices. *Id.* No painting occurs in the rework area. R.23/Fuller Dep./PageID#843,845; R.22/Ankney Dep./PageID#727. Indeed, Defendant's expert explained that there is no presence of any solvent, compound, or other paint-related material in the rework area. R.18-7/Sullins' Air Testing Report/PageID#404.

The D-line area, in comparison, is in the back of the facility, sealed from the rest of the facility by a hallway with plastic dividers. R.22/Ankney Dep. Ex.1/PageID#737-38; R.23/Fuller Dep./PageID#843; R.24/Roberts Dep./PageID#994-95. The D-line area is connected to an industrial-sized paint room where parts are freshly painted and pass through an oven system whereby the wet paint is dried and cured. *Id.* Unlike the rework area, the D-line area contains various paint-related

chemicals and fumes. R.23/Fuller Dep./PageID#843,845; R.24/Roberts Dep./PageID#994-95; R.18-7/Sullins' Air Testing Report/PageID#403-05.

Throughout her employment at DPI, Root worked primarily in the rework area, where she sanded down parts that needed painting. R.18-2/Root Decl.¶6/PageID#112; R.21/Root Dep./PageID#533; R.22/Ankney Dep./PageID#714-15,727,729, Ex.5 PageID#793-820; R.23/Fuller Dep./PageID#842-45. In the rework area, she did not paint parts, nor did she handle or work with freshly painted parts. *Id.* Root sometimes spent up to two hours per day working in other areas of the facility—including, rarely, in the D-line area. R.21/Root Dep./PageID#533; R.22/Ankney Dep. Ex.5/PageID#793-820. Nonetheless, she was able to manage her COPD and asthma symptoms successfully because her overall interaction with paint fumes was limited. R.18-2/Root Decl.¶7/PageID#112; R.25/Hagerman Dep./PageID#1112, Ex.37 PageID#1177-78; R.23/Fuller Dep./PageID#873.

Root took FMLA leave for a knee-replacement surgery in February 2020. R.18-2/Root Decl.¶9/PageID#112; R.23/Fuller Dep./PageID#853. While she was out on leave, DPI imposed a layoff and reinstatement process of its staff due to COVID-19. R.23/Fuller Dep./PageID#855,858, Ex.14 PageID#972-80. No record evidence indicates that Root's asthma or

COPD worsened while Root was on leave. DPI ultimately reinstated Root as a production associate in July 2020 and assigned her to the D-line area. R.23/Fuller Dep./PageID#868; R.18-2/Root Decl.¶10/PageID#112. DPI did not fill Root's position in her absence. *See* R.23/Fuller Dep./PageID#858-59.

On her first day back, Root worked a ten-hour shift in the D-line area, which involved prolonged exposure to heavy paint fumes. R.18-2/Root Decl.¶10/PageID#112; R.23/Fuller Dep./PageID#868; R.22/Ankney Dep. Ex.5/PageID#819. She quickly started experiencing breathing problems, including shortness of breath. R.18-2/Root Decl.¶10/PageID#112; R.25/Hagerman Dep. Ex.37/PageID#1181. As a result, as soon has her shift ended at 1:00 pm, she scheduled a telehealth visit with her doctor, Dr. Hagerman, for that same day. R.18-2/Root Decl.¶11/PageID#112.

Dr. Hagerman's records from the visit noted that Root was presented with a "different job at work," that the "fumes are flaring her asthma—can do any other job—just not that one," and that Root had "increased sob [shortness of breath] with paint fumes." R.25/Hagerman Dep. Ex.37/ PageID#1181-82. During this visit, Root requested an accommodation letter for DPI explaining that she could not work in the D-line area but that she

could work in her old position concentrated in the rework area. R.25/Hagerman Dep. Ex.37/PageID#1181-82, PageID#1116-17; R.18-2/Root Decl.¶14/PageID#113. Dr. Hagerman testified that, due to Root's COPD and asthma and recent flare-up in the new position, she authorized "a note saying that [Root] couldn't work in the environment—the job that she had, and she needed something saying that she needed just to go back to her other job." R.25/Hagerman Dep./PageID#1120; *see also id.* at PageID#1182 (Under "Plan," Dr. Hagerman wrote "note for work-change jobs to avoid fumes"). Based on Dr. Hagerman's authorization, a front-desk staff member drafted the following note for Root:

> This will certify that Tina Root has been under my care and seen in my office on 07/21/2020. Tina Root has an underlying condition—COPD & ASTHMA that makes it hard to breath[e] when around paint fumes and should not be working around it. Please feel free to call our office with any questions or concerns.

R.22/Ankney Dep. Ex.6/PageID#821; R.25/Hagerman Dep./ PageID#1119-20.

At some point the following morning, Root told Chris Ankney, a production and paint supervisor, that she could not breathe in her new D-line role. She gave Ankney Dr. Hagerman's note, who in turn gave it to

Sara Fuller, DPI's HR representative. R.18-2/Root Decl.¶13/PageID#113; R.21/Root Dep./Page ID#534,536; R.23/Fuller Dep./PageID#869. Fuller reviewed the note and pulled Root into a meeting later that morning, along with production manager Richard Roberts. R.23/Fuller Dep./PageID#868-71; R.24/Roberts Dep./PageID#996.

Roberts testified that he recognized that Root, by giving them a note from her physician regarding paint fumes and her asthma and COPD, was requesting an accommodation. R.24/Roberts Dep./PageID#998. Roberts and Fuller also both admitted that they did not understand the extent of Dr. Hagerman's recommendation and thus required more information from Root and Dr. Hagerman to fully understand Root's needs. R.24/Roberts Dep./PageID#998-99; R.23/Fuller Dep./PageID#845,873-74.

DPI's disability-accommodation practices require completion of a medical certification form by the employee's physician, a survey for potential accommodations, and discussion with the employee about the condition and request. R.23/Fuller Dep./PageID#830-834,839-841,845,848, 876,880. Nonetheless, neither Fuller nor Roberts sought any clarification from Root about her condition, Dr. Hagerman's note, or her accommodation request. R.18-2/Root Decl.¶15/PageID#113; R.24/Roberts

Dep./PageID#998-99; R.23/Fuller Dep./PageID#873-74; R.21/Root Dep./PageID#555. Nor did Fuller provide Root with the medical certification form that she routinely gives employees seeking an ADA accommodation. R.23/Fuller Dep./PageID#831,833,848, 874,876,880. Further, Root testified that she was not given a chance to clarify what she needed. R.21/Root Dep./PageID#556.

Instead, Fuller and Roberts immediately informed Root that she was a "liability" to DPI, that she would be unable to work anywhere within the DPI facility, and that she would have to return home for safety reasons. R.18-2/Root Decl.¶15/PageID#113; R.24/Roberts Dep./PageID#997; R.23/Fuller Dep./PageID#870-73,876,878. Root testified that Roberts and Fuller terminated her during this meeting. R.21/Root Dep./PageID#547, 555-56; R.18-2/Root Decl.¶15/PageID#113. DPI's internal records, too, reveal that Root's "term date" was the date of the meeting. R.23/Fuller Dep. Ex.16/PageID#982. Root stated that she was so upset about losing her job that she attempted, unsuccessfully, to remove her doctor's note from consideration by Fuller and Roberts. R.2/Root Dep./Page ID#555. Root left and, with the understanding that she had been fired, did not return to work. R.18-2/Root Decl.¶15/PageID#113.

DPI maintains that Root's employment ended because she voluntarily did not return to work. R.23/Fuller Dep./PageID#874-75. After the second day of absence, without any further correspondence with Root or Dr. Hagerman, DPI removed Root from its payroll, retroactively marking the two absent days as "unexcused." *Id.*; R.22/Ankney Dep. Ex.5/PageID#819-20.

DPI's delayed marking of Root as unexcused was contrary to its routine practice of contemporaneously marking employees as no-shows when they fail to show up to work. Fuller testified that, in practice, the lead would notify her "immediately" of a no-show. R.23/Fuller Dep./PageID#837; *see also id.* at PageID#838 ("A no call, no show, I would get it from the supervisor as soon as they send the e-mail out . . . soon as they could get to their computer, they would send it"); R.22/Ankney Dep./PageID#723 (same). She testified that supervisors were expected to report no-shows in a timely way because it was "important." R.23/Fuller Dep./PageID#838; *see also id.* (stating that it "was important … to know what the schedule was going to be for that day and if we had the employees to meet that need"). DPI did not follow this practice in Root's

case. *See id.* at PageID#878 (recalling no documentation regarding Root's purported "no-show" status); R.24/Roberts Dep./PageID#1000 (same).

Root filed suit in federal district court. R.1/Compl. In relevant part, she alleged that DPI violated the ADA[2] by failing to accommodate her disabilities and terminating her on the basis of her disabilities. R.1/Compl./PageID#6-9.

B. District Court's Decision

The district court found that, although summary judgment was unwarranted on the issue of whether Root's COPD and asthma constituted a disability under the ADA, both of Root's ADA claims ultimately failed because she was not qualified for her position, with or without reasonable accommodation. R.34/Dist. Ct. Op./PageID#1606-10.

After citing 42 U.S.C. § 12111(8), which states that an individual is "qualified" under the ADA if she can perform the "essential functions" of the job with or without reasonable accommodation, the court first analyzed whether "exposure to paint fumes" was an essential function of Root's

[2] Root also brought disability claims under the Ohio Revised Code, which are interpreted in tandem with the ADA. *Hostettler v. Coll. of Wooster*, 895 F.3d 844, 848 n.1 (6th Cir. 2018).

position. R.34/Dist. Ct. Op./PageID#1608-10. The court determined that it was, citing to Root's job description as a production associate, which calls for "exposure to general plant conditions," as well as Root's deposition testimony, in which she explained that her prior role was not contained to *only* the rework area and entailed up to two hours of work per day in non-rework areas. *Id.*

The court next analyzed whether Root could perform this essential function with or without accommodation. In doing so, it characterized Root's desired accommodation as one that called for "zero exposure to paint fumes"—a "change in duties" that would allow her "to work only in the rework division." *Id.* at PageID#1608,1610. Requiring zero exposure to paint fumes, it found, left Root unqualified for her job because DPI had no position that included zero exposure to paint fumes; "employers 'are not required to create new jobs as an accommodation' and 'removing an "essential function" from the position … is *per se* unreasonable.'" *Id.* at PageID#1609-10 (citation omitted). It further held that, because Root was terminated due to her inability to perform an essential function of her job (being exposed to paint fumes), she was not terminated on account of her disability. *Id.* at PageID#1610.

ARGUMENT

The district court made three fundamental errors in its analysis of Root's ADA claims. As a threshold matter, it erred in holding Root was not qualified for her job based on its mistaken conclusion that management of her asthma and COPD required "zero" exposure to paint fumes. A reasonable jury could find that Root neither needed nor asked for *zero* exposure to paint fumes. Rather, she simply sought a transfer back to her former rework-centered role, which entailed *limited* exposure to paint fumes, and which Root had performed without incident for years while managing her asthma and COPD.

The court's initial error in finding Root unqualified led directly to its unwarranted rejection of Root's failure-to-accommodate and disability-discrimination claims. Summary judgment was inappropriate as to Root's failure-to-accommodate claim because a jury could find both that Root was qualified for her position and that DPI could reasonably have accommodated her by transferring her back to her former, still-vacant position. Because DPI refused to engage in the ADA's mandatory interactive process in good faith and because accommodation was possible, a trier of fact could find DPI liable for its failure to accommodate Root. As

to Root's disability-discrimination claim, summary judgment was erroneous because Root adduced sufficient evidence to support a reasonable jury finding that she was qualified for her position and that she was terminated on the basis of her disability.

I. A reasonable jury could find that Root was qualified for her position with the reasonable accommodation of a transfer back to her rework-centered role.

To overcome summary judgment on an ADA failure-to-accommodate or disability-discrimination claim, a plaintiff must prove that she was otherwise qualified for her position, with or without reasonable accommodation. *Brumley v. United Parcel Serv., Inc.*, 909 F.3d 834, 839 (6th Cir. 2018); *Ferrari v. Ford Motor Co.*, 826 F.3d 885, 891 (6th Cir. 2016), *abrogated on other grounds by Babb v. Maryville Anesthesiologists P.C.*, 942 F.3d 308 (6th Cir. 2019). Whether Root is qualified for her position raises two distinct questions. *King v. Steward Trumbull Mem'l Hosp., Inc.*, 30 F.4th 551, 560 (6th Cir. 2022). The first is whether Root could perform the "essential" functions of her job, with or without an accommodation. *Id.*; *see also* 42 U.S.C. § 12111(8). A job function is "essential" if removing the function would "fundamentally alter[]" the job. *EEOC v. Ford Motor Co.*, 782 F.3d 753, 762 (6th Cir. 2015) (en banc) (quoting 29 C.F.R. § 1630.2(n)(1); 29 C.F.R.

pt. 1630, app. § 1630.2(n)). The second question is, if Root needed an accommodation to perform essential functions, whether the accommodation was reasonable. *King*, 30 F.4th at 560.

A trier of fact could find in Root's favor as to both questions. First, assuming the district court correctly deemed "exposure to paint fumes" an essential function of all jobs at DPI, R.34, Dist. Ct. Op., PageID#1610, a factfinder could determine that Root could perform this essential function with the accommodation of a transfer back to her former rework-centered position. Contrary to the district court's finding, Root neither requested nor required "zero" exposure to paint fumes—rather, the accommodation at issue was a position with *limited* exposure to paint fumes, like the role that she had managed successfully before. *See supra* p.6. Indeed, Root testified in both her declaration and her deposition that she wished to be moved "off D-line and back to rework." R.18-2/Root Decl.¶14/PageID#113; R.21/Root Dep./PageID#534 ("I told Chris Ankney that I could not work on D line because it hurt my breathing and I gave him documentation from the doctor"), PageID#536 ("I told [Chris] I couldn't breathe"). Dr. Hagerman corroborates that Root was seeking simply to be moved back to her old rework-centered position. *See* R.25/Hagerman Dep./PageID#1116-

17 ("She said she was working there and she was doing fine until they moved her to a different department the night before, and she just wanted to go back to her old department so she didn't have that exposure.… She said that the smell of paint fumes was worse in the new environment with the new job.").

Second, a jury could find that such a transfer would be reasonable. The ADA contemplates that a reasonable accommodation may include "job restructuring" or a "reassignment to a vacant position." 42 U.S.C. § 12111(9)(B); 29 C.F.R. pt. 1630, app. § 1630.2(o); *see also Burns v. Coca-Cola Enters., Inc.*, 222 F.3d 247, 257 (6th Cir. 2000) (holding that an employer has a duty under the ADA to consider transferring a disabled employee who cannot perform his job even with accommodation to a different position within the company for which that employee is otherwise qualified). An employer need only reassign a disabled employee to a vacant position and is not required to create new jobs or displace existing employees from their positions. *Burns*, 222 F.3d at 257.

A jury could find that a position meeting Root's needs and experience both existed and was vacant: the same rework-centered production associate position Root had performed without incident for

three and a half years prior to her FMLA leave. Neither DPI nor the district court pointed to any evidence that Root's prior position had been discontinued or backfilled during her absence, whereas Root adduced uncontested evidence that it had not. *See* R.23/Fuller Dep./Page ID#858-59. Thus, Root's proposed accommodation of a transfer back to her old role is squarely in line with the scope of reasonable accommodations under the ADA. *See* 42 U.S.C. § 12111(9)(B); 29 C.F.R. pt. 1630, app. § 1630.2(o); *Burns,* 222 F.3d at 257; *see also Fisher v. Nissan N. Am., Inc.*, 951 F.3d 409, 419-22 (6th Cir. 2020) (noting that a transfer to a vacant position could serve as a reasonable accommodation).

Further, a jury could find that Root's history of work in her prior position, in which she had no disciplinary issues, renders her qualified for that position. *See Holiday v. City of Chattanooga*, 206 F.3d 637, 646 (6th Cir. 2000) (finding that plaintiff's "successful performance of police jobs" was evidence supporting his assertion that he was qualified for a police role); *Shefferly v. Health All. Plan of Mich.*, 94 F. App'x 275, 282 (6th Cir. 2004) ("Because she received satisfactory performance ratings, Shefferly was qualified for the management position she held at that time."). The district

court thus erred in holding that Root was unqualified for the production-associate position.

II. A trier of fact could find that DPI failed to reasonably accommodate Root's disability when it did not engage in the ADA's mandatory interactive process and denied her a reasonable accommodation despite its availability.

The ADA's prohibition against discrimination based on disability includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee." 42 U.S.C. § 12112(b)(5)(A). To overcome summary judgment on a failure-to-accommodate claim, a plaintiff must prove "that (1) she was disabled within the meaning of the ADA; (2) she was otherwise qualified for her position, with or without reasonable accommodation; (3) [the defendant] knew or had reason to know about her disability; (4) she requested an accommodation; and (5) [the defendant] failed to provide the necessary accommodation." *Brumley*, 909 F.3d at 839.[3]

[3] If the plaintiff proves these elements, the burden shifts to the defendant to prove the ADA's affirmative defense of undue hardship. *See Brumley*, 909 F.3d at 839 (citing *Kleiber v. Honda of Am. Mfg., Inc.*, 485 F.3d 862, 868-69 (6th Cir. 2007)). The Court should not treat this defense as alternative grounds for affirmance here. First, DPI argued undue hardship only as to the purported zero-exposure accommodation, not as to Root's actual requested transfer. R.27/Def. SJ Opp./PageID#1484-85 ("Root requested … to

As discussed above, the district court determined, viewing the facts in the light most favorable to Root, that a jury could find she had a disability (COPD/asthma). *See supra* p.10. Further, the parties do not dispute that Root provided DPI with a note from Dr. Hagerman stating that she had asthma and COPD. And, for the reasons explained in Section I above, a jury could find that Root was qualified for her position with the reasonable accommodation of a transfer back to her rework-centered position. As to the remaining two elements, a jury could find both that Root requested an accommodation and that DPI failed to provide one.

Although the parties do not dispute that Root gave Dr. Hagerman's note to her supervisor and to DPI's HR department, a genuine dispute exists over what Root's request to DPI entailed and whether DPI made any attempts to clarify Root's request and disability. Because a reasonable jury

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eliminate paint fumes from the paint facility … This is absurd."). *See Keith v. Cnty. of Oakland*, 703 F.3d 918, 929 (6th Cir. 2013) ("[B]ecause Oakland County has not argued, much less conclusively shown, that providing the accommodation would impose an undue hardship on the operation of its business, summary judgment was inappropriate."). Second, the district court did not address undue hardship. *See Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970) ("When attention has been focused on other issues, or when the court from which a case comes has expressed no views on a controlling question, it may be appropriate to remand the case rather than deal with the merits of that question in this Court.").

could find that DPI failed to engage in the interactive process, and that this failure led directly to its failure to provide Root with the reasonable accommodation of a transfer back to her rework-centered position, summary judgment on this claim was unwarranted.

"[A]n employee's initial [accommodation] request does not need to identify the perfect accommodation from the start." *King*, 30 F.4th at 564 (internal citations and quotation marks omitted). Once an employee requests an accommodation, an employer must engage in an "informal, interactive process" with the employee. *Kleiber*, 485 F.3d at 871 (quoting 29 C.F.R. § 1630.2(o)(3)). The purpose of the interactive process is to "identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." *Id.* (quoting 29 C.F.R. § 1630.2(o)(3)). It functions to "ensure that employers do not disqualify … employees based on 'stereotypes and generalizations about a disability.'" *Rorrer v. City of Stow*, 743 F.3d 1025, 1040 (6th Cir. 2014) (quoting *Keith v. Cnty. of Oakland*, 703 F.3d 918, 923 (6th Cir. 2013)).

"If this process fails to lead to reasonable accommodation of the disabled employee's limitations, responsibility will lie with the party that caused the breakdown." *Id.* (citation omitted). Employers "who fail to

engage in the interactive process in good faith[ ] face liability [under the ADA] if a reasonable accommodation would have been possible." *Lafata v. Church of Christ Home for the Aged*, 325 F. App'x 416, 422 (6th Cir. 2009) (internal quotation marks and citations omitted) (alterations in original). Thus, summary judgment is precluded where there is a genuine dispute of fact as to whether the employer "participated in good faith." *Rorrer*, 743 F.3d at 1045.

By submitting Dr. Hagerman's note to DPI, Root triggered DPI's duty to engage in an interactive process to determine whether it could reasonably accommodate Root's asthma and COPD. *See King*, 30 F.4th at 565-66 (finding that calling in sick and mentioning a need for medical leave, coupled with the supervisor's knowledge that the employee was missing work to manage her asthma flare-ups, triggered the employer's duty to engage in an interactive process with the employee); *Fisher*, 951 F.3d at 419 ("[I]f an employee requests assistance in identifying vacant positions—even a request as generic as 'I want to keep working for you—do you have any suggestions?'—then 'the employer has a duty under the ADA to ascertain whether he has some job that the employee might be able to fill." (quoting *Burns*, 222 F.3d at 257)).

A factfinder could conclude that DPI failed in its duty to engage in the interactive process in good faith. Roberts and Fuller admit that, despite being confused by Dr. Hagerman's note, they did not clarify Root's request. R.24/Roberts Dep./PageID#998-99; R.23/Fuller Dep./PageID#845,873-74. Instead, they called Root a "liability," and told her that they "could not have her out in the floor … because it was nothing but paint fumes everywhere." R.23/Fuller Dep./PageID#871; R.24/Roberts Dep./PageID#997-99. And rather than attempt to help Root find an accommodation, DPI immediately denied her request. R.27/Def. SJ Opp./PageID#1480. In fact, DPI *admits* that Fuller and Roberts simply "accepted the note as true at the time it was presented and fulfilled its requirement," explaining to Root that "they did not know how DPI could accommodate the request." *Id.*

These acts fit squarely within what this Court has described as an absence of good faith—or even as bad faith. *See King*, 30 F.4th at 566 (finding bad faith where defendant told plaintiff that "she was ineligible for FMLA leave and refused to allow her to actually make a request"); *Blanchet v. Charter Commc'ns, LLC*, 27 F.4th 1221, 1231 (6th Cir. 2022) (finding a lack of good-faith participation where "no one in HR leadership

… contacted Blanchet to indicate that her request for an extended leave was unreasonable[,] … to request medical records[,] or to inquire for further information about her current condition"); *Mosby-Meachem v. Memphis Light, Gas & Water Div.*, 883 F.3d 595, 606 (6th Cir. 2018) (finding failure to engage in the interactive process if it "determine[s] what accommodation it [is] willing to offer before ever speaking with" the employee); *Rorrer*, 743 F.3d at 1040-41, 1045-46 (holding that employer's failure to discuss the employee's request may demonstrate a lack of good faith, and failing to assist an employee in seeking an accommodation may suggest bad faith).

As additional evidence of a lack of good faith, DPI fired Root immediately after her request, without any attempt to follow up with her. R.21/Root Dep./PageID#547,555-56; R.18-2/Root Decl.¶15/PageID#113. *See King*, 30 F.4th at 567 (finding lack of good faith when defendant "prematurely halted the interactive process by terminating [plaintiff] while her leave request was still outstanding."); *Blanchet*, 27 F.4th at 1232 (finding failure to engage in the interactive process when defendant fired plaintiff before even telling her that the accommodation was unreasonable).

That Roberts and Fuller relied on Dr. Hagerman's note for their decision not to accommodate Root does not change the analysis. *See Rorrer*, 743 F.3d at 1045 (holding that the "City's immediate conclusion that Rorrer was unfit to serve as a firefighter," based on one doctor's perfunctory recommendation, "suggests bad faith and falls short of its obligation under the ADA to assist an employee seeking an accommodation"). Moreover, as this Court has explained, DPI's violation of its own policies with regard to Root's accommodation request is further evidence of a lack of good-faith participation. *See King*, 30 F.4th at 566.

Responsibility thus lies with DPI, the party that caused the breakdown, *Rorrer*, 743 F.3d at 1040, and DPI cannot now use this failure to retroactively define and cabin Root's requested accommodation as *per se* unreasonable. *See Blanchet*, 27 F.4th at 1232 (rejecting attempt to style plaintiff's request as *per se* unreasonable where defendant failed to engage with plaintiff: "Charter cannot now use its failure to engage in the interactive process to argue that Blanchet's proposed accommodation was unreasonable.… Charter cannot shield itself from liability through failing to interact with Blanchet"). A reasonable jury could find that, had DPI gone through the interactive process, per its own policies, it would have been

immediately clear that Root simply required a transfer to her previous role, which would have allowed her to manage her COPD and asthma. *See Keith*, 703 F.3d at 929 (denying summary judgment to employer where plaintiff argued that, had an interactive process occurred, he would have been able to respond to the employer's concerns, and clarify the details of his disability and the accommodation that he required). Thus, summary judgment on Root's failure-to-accommodate claim was inappropriate.

DPI argued below that Root's belated attempt to remove her doctor's note from consideration "released DPI from its interactive process obligation." R.27/Def. SJ Opp./PageID#1483. If DPI raises that argument on appeal, this Court should reject it. Here, the record reflects that Root tried to withdraw her doctor's note only *after* she was told that she could not be accommodated, that she was a liability, and that she was going to be fired. R.21/Root Dep./PageID#555 ("I did say that. Because if you're going to fire me because of a disease, COPD, asthma, take it back."). Thus, a jury could find, DPI had already failed to meet its ADA-mandated obligations prior to Root's purported withdrawal of her request. *Arndt v. Ford Motor Company*, 716 F. App'x 519 (6th Cir. 2017), on which DPI relied below, is therefore inapposite. *See Arndt*, 716 F. App'x at 528-29 (finding that the

plaintiff terminated the interactive process because he resigned from his position while the process was ongoing). Root should not be obligated to keep her request on the table when it had already been rejected out-of-hand. *Cf. MX Grp., Inc. v. City of Covington*, 293 F.3d 326, 344 (6th Cir. 2002) (stating that "[t]he law requires no one to perform a useless act," and excusing plaintiff from proposing a reasonable modification where defendants had made clear that they would not approve one); *see also Sivio v. Vill. Care Max*, 436 F. Supp. 3d 778, 796 (S.D.N.Y. 2020) (finding that plaintiff's accommodation claims survived summary judgment where a reasonable jury could conclude that employee "abandoned" the interactive process only after the defendant had improperly denied her a reasonable accommodation).

III. A reasonable jury could find that DPI discriminated against Root because of her disability by terminating her immediately upon receiving her accommodation request.

The ADA forbids "discriminat[ion] against a qualified individual on the basis of disability" as it applies to, inter alia, hiring and firing. 42 U.S.C. § 12112(a). A plaintiff may prove a violation under the ADA by using either "direct" or "indirect" evidence. *Fisher*, 951 F.3d at 416. As this Court has explained, direct evidence does not require the factfinder to draw any

inferences to reach the conclusion that unlawful discrimination was at least a motivating factor, *id.*, whereas indirect evidence does require such an inference, *Chandler v. Specialty Tires of Am. (Tenn.), Inc.*, 134 F. App'x 921, 927 (6th Cir. 2005). This Court has described the distinction between the two types of evidence as "vital" because the use of direct evidence renders unnecessary the burden-shifting approach of *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973), which is designed to show the employer's intent. *Fisher*, 951 F.3d at 416. Here, this Court should find that Root survives summary judgment under either the direct- or indirect-evidence test.

Beginning with direct evidence, Root provided evidence that, as soon as she told DPI of her disability and requested an accommodation, Fuller and Roberts called her a "liability," stated that she could not work at DPI because of her COPD and asthma, failed to provide her with an accommodation, and fired her. *See supra* p.7-8. This fits this Court's definition of direct evidence of disability discrimination. *See EEOC v. Dolgencorp, LLC*, 899 F.3d 428, 435 (6th Cir. 2018) (holding that, for a discriminatory discharge claim, "failing to provide a protected employee a reasonable accommodation constitutes direct evidence of discrimination");

McLeod v. Parsons Corp., 73 F. App'x 846, 857 (6th Cir. 2003) (holding that defendant's characterization of plaintiff's cancer as a "liability" constituted direct evidence of disability discrimination); *Ferrari*, 826 F.3d at 891 (holding that direct evidence of discrimination includes evidence that the defendant relied on the plaintiff's disability in making its employment decision). DPI's treatment of Root requires no further inference to support a reasonable jury finding that it fired her because of her asthma and COPD. *See Dolgencorp*, 899 F.3d at 435 ("[F]ailure to consider the possibility of reasonable accommodation for known disabilities, if it leads to discharge for performance inadequacies resulting from the disabilities, amounts to a discharge solely because of the disabilities." (quoting *McPherson v. Mich. High Sch. Athletic Ass'n, Inc.*, 119 F.3d 453, 460 (6th Cir. 1997) (en banc))).

Root also survives summary judgment under the indirect-evidence test, which requires her to make a prima facie showing that "(1) she is disabled; (2) she was otherwise qualified for the position, with or without reasonable accommodation; (3) she suffered an adverse action; (4) the employer knew or had reason to know of her disability; and (5) she was replaced or the job remained open." *Rosebrough v. Buckeye Valley High Sch.*, 690 F.3d 427, 431 (6th Cir. 2012); *see generally Babb*, 942 F.3d at 320 n.8

(explaining that a "context-specific understanding of prima facie evidence is not surprising, as the Supreme Court has long recognized that 'the prima facie proof required from [a plaintiff] is not necessarily applicable in every respect to differing factual situations.'" (quoting *McDonnell Douglas*, 411 U.S. at 802 n.13) (alteration in original)). Once Root establishes her prima facie case, the burden shifts to DPI to articulate a legitimate, nondiscriminatory reason for terminating her. *Morrissey v. Laurel Health Care Co.*, 946 F.3d 292, 298 (6th Cir. 2019); *Jones v. Potter*, 488 F.3d 397, 404 (6th Cir. 2007). If DPI does so, the burden returns to Root to demonstrate a genuine dispute of material fact that DPI's proffered reasons were, in fact, a pretext designed to mask unlawful discrimination. *Morrissey*, 946 F.3d at 298; *Potter*, 488 F.3d at 404.

The only remaining issue as to Root's prima facie case—whether she was replaced or the job remained open—is easily addressed because DPI admits in its interrogatory responses that "plaintiff was not replaced" following her termination. R.18-8/Def. Interrog. Response ¶16/PageID#409. The burden thus shifts to DPI, which argues Root's employment ended because of her unexcused absences after she did not show up to work for two days. R.19/Def. MSJ/PageID#422. A jury could

find that this was a legitimate, non-discriminatory reason for termination. *See Wallace v. Edward W. Sparrow Hosp. Ass'n*, 782 F. App'x 395, 403-05 (6th Cir. 2019) (characterizing unexcused absences as legitimate, nondiscriminatory reason for plaintiff's termination under FMLA and ADA).

Root, in response, has raised a genuine dispute of material fact that this reason is pretextual. Viewing the evidence in Root's favor, as required on summary judgment, the timing of her termination alone would support a finding that DPI's "unexcused absence" justification was a pretext for disability discrimination. A jury could credit DPI's internal record, which stated that Root's "term date" was the date of the meeting, as well as Root's deposition testimony that Roberts and Fuller fired her during the meeting—immediately after she made her request for accommodation, and before she accumulated any absences. If DPI had already fired her and sent her home, it was impossible for Root to have accrued absences of any kind.

Alternatively, even taking DPI at its word that Root's employment ended two days later, a jury could still find that Root was terminated due to her accommodation request and not because of "unexcused" absences. As explained above, Root adduced evidence that she was simply following

instructions from Roberts and Fuller to go home and not return to work. *See* R.18-2/Root Decl.¶15/PageID#113; R.24/Roberts Dep./PageID#997; R.23/Fuller Dep./PageID#870-73,876,878. Thus, a jury could find, DPI's proffered reason has "no basis in fact." *Briggs v. Univ. of Cincinnati*, 11 F.4th 498, 515 (6th Cir. 2021).

DPI's failure to follow its own practice of documenting unexcused absences contemporaneously—as a matter of "important" routine—further undercuts its reliance on Root's purportedly unexcused absences to support her firing. *See supra* p.9-10. A jury could find that, had DPI truly believed Root's absences unexcused, it would have followed its regular practice, and therefore its failure to do so suggests otherwise. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000) (holding that a trier of fact is permitted "to infer the ultimate fact of discrimination from the falsity of the employer's explanation … Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive.").

Although "an employer's failure to follow self-imposed regulations or procedures is generally insufficient to support a finding of pretext[,]"

Miles v. S. Cent. Hum. Res. Agency, Inc., 946 F.3d 883, 896 (6th Cir. 2020) (citation omitted), a court may still consider such evidence as *part* of the pretext analysis. In *Reeves*, the Supreme Court made clear that a finding of discrimination "will depend on a number of factors[,]" including the "probative value of the proof that the employer's explanation is false." 530 U.S. 133, 148-49.

Thus, in accordance with *Reeves*, on summary judgment courts may put evidence that an employer's proffered explanation is false—including evidence that the employer failed to follow its own practice in a material way—on the evidentiary scales for a trier of fact to weigh. In this case, DPI's failure to follow its unexcused-absence procedure is one piece of evidence supporting Root's contention that DPI's justification is pretextual. *See also supra* p.8, 29-30 (discussing Root's testimony that Fuller and Roberts told her at the meeting to go home and not return to work).

Because there is, at a minimum, a genuine dispute of material fact over whether Root was fired because of her disability, this Court should reverse the district court's grant of summary judgment to DPI on Root's disability-discrimination claim.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be vacated and the case remanded for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 6197 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 6th Cir. R. 32(b)(1).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 365 in Book Antiqua 14 point.

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CERTIFICATE OF SERVICE

I certify that on July 10, 2023, I electronically filed the foregoing brief in PDF format with the Clerk of Court via the appellate CM/ECF system. I certify that all counsel of record are registered CM/ECF users, and service will be accomplished via the appellate CM/ECF system.

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Addendum

Designation of Relevant District Court Documents

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19	Defendant's Motion for Summary Judgment	411-422
21	Deposition of Tina Root	521-708
22	Deposition of Chris Ankney, including exhibits 1, 5, 6	709-821
23	Deposition of Sara Fuller, including exhibits 14, 16	822-982
24	Deposition of Richard Roberts	983-1100
25	Deposition of Kimberly Hagerman, including exhibit 37	1101-1215
27	Defendant's Opposition to Plaintiff's Motion for Partial Summary Judgment	1464-1490
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