

No. 25-1451

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,

v.

A & A APPLIANCE, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of Colorado
Case No. 1:23-cv-02456-DDD-CYC
Hon. Daniel D. Domenico, U.S. District Judge

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INTRODUCTION

In its Opening Brief, the EEOC urged this Court to vacate the district court's award of summary judgment to Appliance Factory. The EEOC argued that a jury could find Javan zad notified Appliance Factory of her disability by identifying her physical impairments and the limitations they caused in breathing, speaking, and digesting. The EEOC also argued that a jury could find Javan zad adequately requested a reasonable accommodation by persistently asking to take a small amount of leave beyond her FMLA leave for treatment and recovery.

In its Responsive Brief, Appliance Factory challenges Javan zad's credibility and presents all contested facts in the light most favorable to itself, contrary to the summary judgment standard. Disavowing its responsibility under the ADA to participate in an interactive process, Appliance Factory says it had no obligation to follow up when Javan zad repeatedly disclosed ongoing health problems and asked for leave to address them. It insists the district court did not require a diagnosis, despite the opinion's language holding otherwise. And it repeatedly – and incorrectly – suggests that case law requires such specificity. The EEOC asks this Court to reject Appliance Factory's arguments.

ARGUMENT

I. A reasonable jury could reject Appliance Factory's interpretation of the facts.

At summary judgment, courts must not weigh the evidence, cannot make credibility determinations, and must make "all justifiable inferences" in the nonmovant's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Appliance Factory essentially invites the Court to contravene this well-established principle.

A. Appliance Factory ignores important evidence.

Rather than acknowledging evidence that favors the EEOC, Appliance Factory simply tells the story as if that evidence does not exist. The company omits Javanзад's testimony about her symptoms' severity and duration. It also selectively describes Javanзад's communications, ignoring evidence that she described ongoing and recurring weakness, stomach problems, and breathing and speaking difficulties.

1. Severity of Javanзад's symptoms

Appliance Factory emphasizes that Javanзад did not experience constant stomach pain. *See* Appx.175. The EEOC acknowledged as much in its Opening Brief. Opening.Br.5 (citing Appx.168-69). However, a jury could find that Appliance Factory overstates Javanзад's periods of

wellness. Appliance Factory ignores Javan zad’s testimony that she went to the emergency room four times because she could not breathe, Appx.151, was “really ill,” Appx.165, was “sick the whole time, on and off,” Appx.168, and could not work because she was “very sick,” Appx.169.

2. Javan zad’s communications with Appliance Factory

Appliance Factory points to Javan zad’s email of April 13 stating that she felt “much better,” Appx.175, but neglects to mention that only three days later, she reported renewed symptoms. *See* Appx.276; Resp.Br.4. She told Appliance Factory on April 16 that her “body got weak again” and that her doctor told her this was normal as she was “still recovering from this illness.” Appx.276. Similarly, Appliance Factory misrepresents Javan zad’s May 12 email, stating that Javan zad said “my stomach has a problem” but omitting the rest of what she said: “Every day I wake up thinking that I will get back to normal but I am still not well. My stomach has a problem after I encountered the virus.” Appx.189; Resp.Br.5-6.

3. Javan zad’s June 2 phone call with Coudayre

Appliance Factory does not acknowledge the information Javan zad provided in a phone call with Coudayre on June 2. Resp.Br.7. It notes (as did the EEOC) that Coudayre did not recall speaking with Javan zad by

phone on June 2, *see* Resp.Br.7; Opening.Br.11, but is silent about phone records indicating that Coudayre and Javanзад spoke for five minutes that day, *see* Appx.209; Resp.Br.7. It does not mention that in the June 10 termination letter, Coudayre wrote, “[o]n or about June 1, 2020, you and I spoke about your FMLA.” Appx.212 (emphasis added), Resp.Br.7. Nor does it acknowledge its own position statement to the EEOC asserting that Coudayre and Javanзад “connected on the phone” *after* June 1. Appx.258; Resp.Br.7.

4. What the evidence actually shows

Appliance Factory’s timeline of Javanзад’s communications is incomplete. *See* Resp.Br.23-24. The following timeline is more accurate:

- March 30: Javanзад informed Appliance Factory that she had gone to the emergency room four times because she could not breathe, that she was “still suffering,” and that she felt like dying. Appx.151.
- March 31: Javanзад provided a note from her primary care provider stating, “Mrs. Javanзад has symptoms consistent with infection from COVID-19. It is my medical opinion that Ms. Javanзад should remain out of participation until 10 days from onset of symptoms, or 72 hours after fever, shortness of breath and deep cough have resolved.” Appx.154.
- April 13: Javanзад wrote that she was feeling “much better” and was ready to return to Appliance Factory. Appx.175.

- April 16: Javan zad emailed Coudayre that her “body got weak again” and that her doctor had told her this was normal as she was “still recovering from this illness.” Appx.276.
- April 17: Javan zad sent a note from her primary care physician releasing her to work with no restrictions. Appx.177.
- April 19: Javan zad emailed Coudayre to say, “I have some bad news. I think I have to stay on FMLA a few more weeks because I can’t find daycare due to school closures.” Appx.178.
- April 21: Javan zad emailed Coudayre saying she could return to work on May 11 because her husband would be able to watch the children. Appx.188. Coudayre responded, “I have informed the necessary managers that you will be out until May 21st and returning May 22nd.” *Id.*
- May 12: Javan zad emailed Coudayre, “I’m still not feeling well. My stomach has a problem after I encountered the virus. My doctor scheduled an endoscopy next week, maybe they can figure out what’s causing the pain.” Appx.189. She asked, “I also want to know how long more do I have on the FMLA and if I used the whole 12 weeks can I extend it?” *Id.* Coudayre replied, “You still have time remaining from the 12 weeks, so let’s see what happens with your doctor before we discuss any other steps.” *Id.*
- June 1: Coudayre and Javan zad played “phone tag.” Appx.202. Additionally, Javan zad emailed that, due to her inability to obtain a negative COVID test prior to her endoscopy, her gastroenterologist had rescheduled the procedure to June 9. *Id.* She attached a note from her primary care provider stating, “It is my medical opinion that Karima Javan zad should remain out of work until her symptoms have improved and she has the results of her planned procedures.” Appx.191, 203. Javan zad

asked, “if the FMLA is over and I needed more time, what’s my options?” Appx.202.

- June 2: Coudayre texted at 7:41 a.m., “I saw your email but need to speak with you on the phone. Please call me today, thanks!” Appx.204. Coudayre and Javan zad then had a five-minute phone conversation at 12:03 p.m. Appx.209. Javan zad told Coudayre that she wanted to return to work but was still too ill. Appx.232-34. She explained, “I’m not feeling good. I can’t breathe. I have difficulty speaking. That’s why I’m not able to speak.” Appx.230. She added that she would need a few days of leave before the endoscopy and possibly “a few weeks” afterwards to obtain results. Appx.163, 228, 233, 239. She needed the results for treatment and recovery before going back to work. *Id.* Javan zad asked Coudayre, “Can you please give me an answer ... I want extra time.” Appx.230. Coudayre responded, “Let me talk to my boss.” Appx.231, 254.¹
- June 3 – June 4: Javan zad and Coudayre played “phone tag.” Appx.224.
- June 5: Javan zad emailed, “I saw your missed call and I wasn’t able to respond because I have difficulty speaking. It happened yesterday and again today. Please email me and let me know what my options are.” Appx.217. Coudayre did not email back. Appx.269-70.
- June 8: Javan zad emailed, “I haven’t heard from you regarding my options after FMLA ended.” For the third time in six days, she explained, “I’m sorry I couldn’t speak to you over the phone because some days I have difficulty speaking. I did, however, send an email.” She added, “I was also wondering if I

¹ Part III, *infra*, addresses Appliance Factory’s argument that EEOC cannot rely on evidence concerning this phone call due to what it claims is a judicial admission.

can go on leave of absence since today is the last day for the FMLA. What's the company's policy on that?" Appx.210.

- June 9: Coudayre emailed Javan zad, "You were expected to return to work yesterday Monday 6/8, and we have your Product Specialist position still open for you. If you are unable to return, I understand if you need to resign at this time. If you choose to resign, you are welcome to give me a call when you are able to return to work and we can discuss having you rejoin our team! It's easier to discuss things over the phone if possible." Appx.210.
- June 10: Appliance Factory emailed a termination letter. Appx.207. The letter stated that if Javan zad had requested additional leave for COVID-related reasons, Appliance Factory would have given her an additional four weeks. Appx.212. Because she was requesting leave "for a gastrointestinal disorder unrelated to COVID-19," the letter said, Appliance Factory "could not offer you additional FMLA leave time for your gastrointestinal disorder." *Id.* Coudayre testified that she never considered Appliance Factory's obligations under the ADA and never engaged in the interactive process to consider a reasonable accommodation. Appx.225, 270.

B. Appliance Factory resolves disputed facts in its own favor.

In addition to neglecting important parts of the record, Appliance Factory claims as settled fact matters that very much remain in dispute.

1. Difficulty speaking

Appliance Factory says that June 5 "was the first time Javan zad raised the subject of alleged difficulty speaking and the alleged difficulty speaking was raised in isolation and not connected to any alleged

underlying condition, impairment, or anything else.” Resp.Br.8. But Javan zad testified that she told Coudayre during the June 2 phone call, “I’m not feeling good. I can’t breathe. I have difficulty speaking. That’s why I’m not able to speak.”² Appx.230.

1. Severity of Javan zad’s symptoms

Appliance Factory emphasizes that Javan zad did not experience constant stomach pain. *See* Appx.175. The EEOC acknowledged as much in its Opening Brief. Opening.Br.5 (citing Appx.168-69). However, a jury could find that Appliance Factory overstates Javan zad’s periods of wellness. Appliance Factory ignores Javan zad’s testimony that she went to the emergency room four times because she could not breathe, Appx.151, was “really ill,” Appx.165, was “sick the whole time, on and off,” Appx.168, and could not work because she was “very sick,” Appx.169.

² Appliance Factory contends that this Court may not consider this testimony because the EEOC did not highlight it to the district court. Resp.Br.27. But the EEOC cited the very paragraph in which Javan zad also testified about the rest of their phone conversation. Appx.89 ¶ 14 (citing Appx.230).

2. Javan zad's phone calls to Coudayre

Appliance Factory states as fact that Javan zad "did not return HR's calls or respond via text message" on June 4 and June 5. Resp.Br.7.

However, Coudayre testified that she and Javan zad played "phone tag," which, Coudayre acknowledged, meant that Javan zad "also call[ed] me back." Appx.224. Appliance Factory also points to phone records allegedly showing that Javan zad made other calls on June 4 and June 5, and states that she was simply "avoiding calls from HR." Resp.Br.34. But Javan zad testified that her husband also used her phone, and that he might have been the one to make those calls. Appx.174. She added, "If I was feeling good, of course I would call [Coudayre] back." Appx.174.

3. Javan zad's request for email communication

Appliance Factory acknowledges that Javan zad emailed Coudayre about her difficulty speaking on June 5, but it misquotes a sentence from that message, omitting (without an ellipsis) Javan zad's specific request that Coudayre respond to her via email. *Compare* Appx.217 ("Please *email me* and let me know what I need to do and what my options are." (emphasis added)) *with* Resp.Br.8 ("Please let me know what I need to do and what my options are.").

Appliance Factory does not deny that it insisted on phone communication even after Javan zad explained she had difficulty speaking, and even though it would have been possible to email instead. *See* Resp.Br.8.; Appx.208, 223, 265. Rather, Appliance Factory points to testimony that it would have been impossible to put *all* of the company's questions into *one* email. Resp.Br.7. A jury may appropriately consider this explanation as it weighs the evidence, but a court on summary judgment may not. *Krueger v. Phillips*, 154 F.4th 1164, 1195 (10th Cir. 2025). A jury could also interpret Appliance Factory's refusal to email Javan zad as being a deliberate attempt to avoid a written record and to avoid engaging in the interactive process with someone who had already expressed difficulty speaking.

4. Alleged lack of communication

Appliance Factory states as fact that it fired Javan zad due in part to her "lack of communication," and criticizes her for not contacting Coudayre as frequently as requested. Resp.Br. at 8, 15. But the record does not support this depiction. To the contrary, Appliance Factory's position statement to the EEOC stated, "From the start of her FMLA leave in March to about the end of May, [Appliance Factory] and Mrs. Javan zad kept in

constant communication in the form of text messages, emails, and phone conversations.” Appx.256. Rather than mentioning communication, the sole reason the letter gave for termination was Javanzad’s “gastrointestinal disorder.” Appx.212.

5. Possibility of Javanzad retaining her job

Appliance Factory argues that it might not have terminated Javanzad if she had responded to Coudayre’s June 9 email offering to “talk through things.” Resp.Br.8 (citing Supp.Appx.63). A jury could readily find that the June 9 email invited no such discussion. That communication said, “You were expected to return to work yesterday Monday 6/8, and we have your Product Specialist position still open for you. If you are unable to return, I understand if you need to resign at this time. If you choose to resign, you are welcome to give me a call when you are able to return to work, and we can discuss having you rejoin our team!” Appx.210. Nothing in that email suggested that Javanzad could have taken more leave without being terminated.

6. Childcare

A reasonable jury could disagree with Appliance Factory’s contention that Javanzad “remain[ed] on leave through May due solely to

childcare needs.” Resp.Br.3. While Javan zad expressed childcare concerns at times throughout her leave, she also repeatedly stated that she was unwell. Appx.151, 189, 276, 232-34. Javan zad might well have needed leave for childcare *and* for addressing her medical situation. As the Supreme Court has explained, “Often, events have multiple but-for causes.” *Bostock v. Clayton Cnty.*, 590 U.S. 644, 656 (2020). Appliance Factory’s categorical statements about Javan zad’s reasons for leave are merely improper attempts to undermine her credibility at summary judgment.

II. A reasonable jury could find that Javan zad had a disability or disabilities, gave Appliance Factory sufficient notice of her health conditions and their limitations, and tied her request for additional leave to those conditions and limitations.

A. A reasonable jury could find that Javan zad had a disability or disabilities.

Appliance Factory argues that the district court should decide in the first instance whether the EEOC has raised a fact issue regarding the existence of one or more disabilities. Resp.Br.46. Remand is an option, but on this issue, it is unnecessary. *See* Opening.Br.30. Putting aside questions of credibility, as required, the summary judgment record – reviewed de novo on appeal – contains sufficient evidence from which a jury could find that Javan zad had one or more disabilities.

As a preliminary matter, Appliance Factory insists that it “is *still* unclear what disability the EEOC is asserting.” Resp.Br.14 (emphasis added). But as Appliance Factory well knows, the EEOC contends that Javan zad’s impairments (chronic gastritis, acid reflux, vocal paralysis, shortness of breath) can each constitute a disability either alone or together. Opening.Br.30, 39. Although not necessary, the EEOC has also introduced evidence tying the impairments to one another. *See* Appx.196, 201, 219 (gastritis and acid reflux could cause difficulty speaking if the reflux reached her vocal cords).

Appliance Factory criticizes the EEOC for improperly “mixing and matching [Javan zad’s] alleged impairments or limitations,” Resp.Br.16, but in fact, the record simply reflects that Javan zad had a number of simultaneous conditions and symptoms. That is neither unusual nor inconsistent. And this is simply another way in which Appliance Factory is acknowledging there are disputed facts, which is the province of the jury to sort out. Moreover, taking an inclusive approach to assessing disability is consistent with Congress’s stated intention that coverage under the ADA be construed broadly. *See* 42 U.S.C. § 12102(4)(A) (“The definition of disability... shall be construed in favor of broad coverage of

individuals...to the maximum extent permitted by the terms of this chapter.”); *see also Russell v. Phillips 66 Co.*, 687 F. App’x 748, 753 (10th Cir. 2017) (“Russell identified depression and panic disorder as his impairment We will use the term ‘depression’ to refer to the *full scope* of his impairment.” (emphasis added)).

Appliance Factory offers no basis for focusing myopically on each different term used to describe Javan zad’s symptoms as if they must be analyzed separately. With or without a unifying diagnosis, a reasonable jury could believe that Javan zad had at least one impairment that substantially limited at least one major life activity.

B. A reasonable jury could find that Javan zad gave Appliance Factory enough information for the company to understand that she had one or more disabilities.

A reasonable jury could find that Javan zad’s communications throughout her FMLA leave were sufficient to provide notice that she had one or more impairments that caused a substantial limitation on a major life activity – i.e., a disability.³ In March, Javan zad told Coudayre that she

³ Appliance Factory is incorrect that “the EEOC’s disparate treatment and retaliation claims ... are not raised on appeal.” Resp.Br.47. The district court held that all three of the EEOC’s claims “fail for the same reasons” – i.e., that Javan zad did not convey enough information about her

had gone to the emergency room four times because she could not breathe and felt like dying. Appx.151. On April 16, she told Coudayre that her “body got weak *again*,” and that Dr. Ochs said she was “*still recovering* from this illness.” Appx.276 (emphases added). On May 12, she wrote, “I’m *still* not feeling well. Every day I wake up thinking that I will get back to normal but I am *still* not well. My stomach has a problem *after I encountered the virus*.” Appx.189 (emphases added). She added that her doctor had scheduled an endoscopy because she was in pain, and she sent a note from Dr. Ochs recommending that she “remain out of work until her symptoms have improved.” Appx.203. On June 2, Javanзад told Coudayre that she wanted to return to work but was too ill to do so and was having trouble speaking. Appx.230. Finally, as Appliance Factory acknowledged in its termination letter, Javanзад told Coudayre during a phone call “on or about June 1” that she had a “gastrointestinal disorder.” Appx.212.

impairments to communicate that she had a disability. Appx.143. Accordingly, the EEOC’s argument applies to the court’s entire order. Opening.Br.21-22, 48 (describing all claims and stating, “the judgment of the district court should be vacated”).

Appliance Factory emphasizes that the EEOC's Opening Brief does not mention "Long COVID." Resp.Br.26-27. But the ADA does not require a specific diagnosis, only substantially limiting impairments. Whether her impairments were ultimately attributable to "Long COVID" or one or more other disorders, a jury could find that Javan zad's repeated references to being ill "still" or "again" were enough for Appliance Factory to recognize that her situation was different from that of otherwise healthy people saying on occasion that they are not feeling well.

Like the district court, Appliance Factory places undue emphasis on the lack of a formal diagnosis as relevant to notice. *Compare* Resp.Br.18 ("the EEOC once again fail[s] to identify exactly what disability Appliance Factory should have known Javan zad had") *with* Appx.144-45 (district court referencing "the lack of a formal diagnosis"). Appliance Factory downplays the district court's reference to the lack of a diagnosis, asserting that the court mentioned this only because "an employer is not charged with greater knowledge or insight than the employee or her doctors." Resp.Br.38, 40.

But the district court's opinion states, "Given the lack of a formal diagnosis until after she was terminated (June 17 – gastritis) and Ms.

Javanzad's inconsistent representations regarding her ability to return to work, Defendant cannot be found to have been on notice of a disability that required accommodation under the ADA." Appx.141 (citations omitted). In other words, the court found the lack of a formal diagnosis to be of critical importance. The EEOC explained in its Opening Brief why this was error. Opening.Br.31-33. A diagnosis is unnecessary because if an employer is aware that an individual has health problems that cause significant limitations, "it is not essential that [they know] the specific name of [the employee's] condition." *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 314 (3d Cir. 1999).

The EEOC cited *Yarberry v. Gregg Appliances, Inc.*, 625 F. App'x 729 (6th Cir. 2015), in its Opening Brief for the proposition that "[i]t is reasonable to conclude ... an employer is on notice of a disability if an employee's symptoms are 'severe enough to alert' it, giving it either knowledge or 'some generalized notion of the disability.'" Opening.Br.32-33 (quoting *Yarberry*, 625 F. App'x at 737). In *Yarberry*, the employee had not yet been diagnosed with bipolar disorder, but the employer knew that the employee "had engaged in strange behavior," had passed a drug test, and had been involuntarily placed in a psychiatric hospital. *Id.* at 736, 738. From

this, the Sixth Circuit held, a jury could find that the employer “had reason to know that [the employee] was suffering from a mental illness rather than the effects of alcohol or drugs and that his prior, sudden, and bizarre behavior was attributable to that illness.” *Id.* at 738.

Appliance Factory calls *Yarberry* “entirely inapplicable” because it involved mental illness, Resp.Br.19, but the Sixth Circuit did not limit its discussion to psychiatric disabilities. Indeed, as support for the quoted proposition, it cited two cases involving physical disabilities. 625 F. App’x at 737 (citing *Nilles v. Givaudan Flavors Corp*, 521 F. App’x 364, 369 (6th Cir. 2013) (multiple sclerosis), and *Hedberg v. Ind. Bell Tel. Co., Inc.*, 47 F.3d 928, 934 (7th Cir. 1995) (primary amyloidosis)).

The EEOC also relied on *Hrdlicka v. General Motors, LLC*, 63 F.4th 555, 568 (6th Cir. 2023), which states that “a diagnosis is not necessary for an ADA claim to succeed.” See Opening.Br.32. Appliance Factory dismisses *Hrdlicka* as another “mental health case,” Resp.Br.21, but, like *Yarberry*, the case was not limited to the mental-health context – likely because the plaintiff had an undiagnosed brain tumor. 63 F.4th at 561.

The *Hrdlicka* plaintiff did not sufficiently alert her employer that she had a disability, the court said, in part because she herself was unaware

that she had a brain tumor and depressive disorder, and she “never even sought medical help for any symptoms or conditions from which she was suffering while employed.” *Id.* at 567. She was frequently absent from work, but the texts she sent her employer often did not refer to her health, and those that did referenced only vague symptoms. *Id.*

Unlike the plaintiff in *Hrdlicka*, Javan zad informed her employer that her doctor had imposed work restrictions. Appx.203; *see Hrdlicka*, 63 F.4th at 567 (non-exclusive list of factors relevant to notice includes “a diagnosis, a treatment plan, apparent severe symptoms, and physician-imposed work restrictions”). Additionally, a jury could find that, unlike *Hrdlicka*, Javan zad clearly linked her need for leave to her ongoing health problems. *See* Appx.163, 228, 233, 239 (explaining that she needed leave for treatment and recovery before going back to work). For these reasons, the EEOC has raised a genuine issue of material fact regarding notice of Javan zad’s disability.

C. Even if Appliance Factory doubted the existence of a disability, it had an obligation to seek more information through the interactive process.

Appliance Factory is wrong that the EEOC must show Javan zad communicated enough information to prove definitively that she met the

definition of a “disability” within the meaning of the ADA. *See* Resp.Br.18. The EEOC’s burden is only to show that Javanzad communicated enough information to trigger the ADA’s interactive process, which is not the same thing. *See Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1172 (10th Cir. 1999) (en banc) (“The obligation to engage in an interactive process is inherent in the statutory obligation to offer a reasonable accommodation to an otherwise qualified disabled employee.”).

All that an individual must say to initiate the interactive process is that she “needs an adjustment or change at work for a reason related to a medical condition.” EEOC Enforcement Guidance, *Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, 2002 WL 31994335, at *4 (Oct. 17, 2002); *see also EEOC v. C.R. England, Inc.*, 644 F.3d 1028, 1049 (10th Cir. 2011) (citing earlier version of this Guidance).

An employer, of course, “need not take the employee’s word for it that the employee has an illness that may require special accommodation.” *Kennedy v. Superior Printing Co.*, 215 F.3d 650, 656 (6th Cir. 2000). “In some instances, before addressing the merits of the accommodation request, the employer needs to determine if the individual’s medical condition meets the ADA definition of ‘disability[.]’” Enforcement Guidance, 2002 WL

31994335, at *5; see *EEOC v. Sears, Roebuck & Co.*, 417 F.3d 789, 804 (7th Cir. 2005) (“Where notice is ambiguous as to the precise nature of the disability or desired accommodation, but is sufficient to notify the employer that the employee *may* have a disability that requires accommodation, the employer must ask for clarification.” (emphasis added)).

Accordingly, EEOC regulations allow employers “to make inquiries or require medical examinations necessary to the reasonable accommodation process.” EEOC Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. pt. 1630, App. § 1630.14(c) (discussing 29 C.F.R. § 1630.14(c)). Doing so allows an employer to “confirm or disprove the employee’s statement.” *Kennedy*, 215 F.3d at 656; see also *Kelly v. Town of Abington*, 90 F.4th 158, 166 (4th Cir. 2024) (“When a valid request leaves the precise nature of the disability or desired accommodation ambiguous, the employer should seek clarification.” (citation modified)).

Appliance Factory insists that it has no ADA obligations “if the decisionmaker is unaware of the *specifics* of an employee’s disabilities or restrictions, even if the decisionmaker has a general knowledge that a disability exists.” Resp.Br.21 (quoting *Tennial v. United Parcel Serv., Inc.*, 840

F.3d 292, 306 (6th Cir. 2016)). The *Tennial* court wrote this, however, in addressing the plaintiff's claim that he had been demoted because of his disability; the court addressed his failure-to-accommodate claim elsewhere. *Id.* The record showed that the plaintiff's supervisors were altogether "unaware" of his stress-related disability. *Id.* Thus, the court held, the plaintiff could not establish a standard disparate treatment claim — supervisors who were unaware of his disability could not have demoted him because of it. *Id.* *Tennial's* disparate treatment analysis has no bearing on an employer's responsibilities to engage in the interactive process in the reasonable-accommodation context. See *Exby-Stolley v. Bd. of Cnty. Comm'rs*, 979 F.3d 784, 797 (10th Cir. 2020) (en banc) (describing "distinction between disparate-treatment claims and failure-to-accommodate claims").

Thus, if Appliance Factory questioned whether Javan zad had a disability, the answer was not to fire her and insist that she had not disclosed enough information. The answer was to request that she provide more. See *Albert v. Smith's Food & Drug Ctrs., Inc.*, 356 F.3d 1242, 1253 (10th Cir. 2004) ("Neither party may create or destroy liability by causing a breakdown of the interactive process.").

D. A jury could find that Javan zad adequately tied her request for additional leave to impairments stemming from her disability or disabilities.

A reasonable jury could find that Javan zad sufficiently tied her request for additional leave to her disability or disabilities because she requested the leave to obtain treatment, get a diagnosis, and become well. Appx.163, 228, 233, 239. This case is therefore unlike others where the plaintiff inadequately linked an accommodation request to a disability.

In the reasonable-accommodation portion of the *Tennial* opinion discussed above, for instance, the plaintiff vaguely mentioned “my ADA deal” to a supervisor and later characterized this as a request for reasonable accommodation. *Id.* at 306-07. The court said, “Although there is no bright-line test for determining when an employee like Tennial has made such a request, at a minimum he must make it clear from the context that the request is being made in order to conform with existing medical restrictions.” *Id.* at 307 (citation modified). Tennial’s supervisors did not know he had a stress-related disability, and he never conveyed that his request was related to medical restrictions. *Id.* at 307. Thus, he never said enough to trigger the interactive process. *Id.*

Similarly, in *EEOC v. C.R. England, Inc.*, 644 F.3d 1028 (10th Cir. 2011), this Court held that the plaintiff's request for leave did not trigger the interactive process because the plaintiff said he needed leave for "family time" rather than for his illness. *Id.* at 1050; *see* Opening.Br.42, 44. Likewise, in *Dinse v. Carlisle Foodservice Products Inc.*, 541 F. App'x 885 (10th Cir. 2013), this Court held that the interactive process was not triggered when the plaintiff requested a laptop for working from home because the plaintiff made clear that the request was unrelated to his disability. *Id.* at 892; *see* Opening.Br.45.

Javanzad's communications with Appliance Factory, in contrast, made the necessary connection. *See* Appx.163, 228, 233, 239 (explaining that she needed leave for treatment and recovery before going back to work).

Curiously, Appliance Factory characterizes Javanzad's leave requests as "simply ask[ing] about her options for leave without actually requesting additional time, stating how much she needed, or indicating it was because of a disability." Resp.Br.30. Yet Appliance Factory's own termination letter stated that Javanzad "requested [leave] for a gastrointestinal disorder." Appx.212 (termination letter). That was all she needed to say to trigger the interactive process. *See* Enforcement Guidance, 2002 WL 31994335, at *4

(statements sufficient to trigger the interactive process include “I’m having trouble getting to work at my scheduled starting time because of medical treatments I’m undergoing,” or “I need six weeks off to get treatment for a back problem”).

Although an open-ended request for leave would not have qualified as a reasonable accommodation, a few weeks of leave for purposes of treatment and recovery might. *See Herrmann v. Salt Lake City Corp.*, 21 F.4th 666, 676 (10th Cir. 2021) (“Reasonable accommodation refers to those accommodations which presently, or in the *near future*, enable the employee to perform the essential functions of his job.” (citation modified)); *Smith v. Diffie Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955, 967 (10th Cir. 2002) (“[L]imited leave for medical treatment may qualify as reasonable accommodation under the ADA.”). Appliance Factory correctly notes that this Court generally requires an individual seeking leave as a reasonable accommodation to provide the expected end date of the impairment, not of the leave request. Resp.Br.36 (citing *Herrmann*, 21 F.4th at 676). However, this Court has clarified that “we do not construe the duration requirement so narrowly” as to require an exact end date, “and

certainly would not do so in chronic impairment cases.” *Herrmann*, 21 F.4th at 677.

Indeed, Appliance Factory was prepared to give Javan zad four more weeks of leave if she had said it was because of COVID. Appx.212. Had Javan zad’s doctors discovered a serious condition requiring more time off, *see* Resp.Br.36, Javan zad would have had to make a new request based on new circumstances, which Appliance Factory would evaluate at that time.

III. Because the complaint does not expressly concede that the June 2 phone call never occurred, the judicial admissions doctrine does not bar the EEOC from showing that it did.

Appliance Factory criticizes the EEOC for relying on Javan zad’s communications during the June 2 phone call, asserting that the statement of facts in the operative complaint constitutes a judicial admission that the call never took place. Resp.Br.27-28. Appliance Factory is mistaken.

In *United States v. Gallegos*, 111 F.4th 1068 (10th Cir. 2024), this Court instructed that “the standard for making a judicial admission is demanding: to determine that a statement qualifies, a court must find that it is an express waiver made by the party or his attorney conceding for the purposes of trial the truth of some alleged fact.” *Id.* at 1077 (citation modified). This Court has emphasized that a judicial admission must be a

“formal, deliberate declaration[.]” *Asarco, LLC v. Noranda Mining, Inc.*, 844 F.3d 1201, 1212 n.3 (10th Cir. 2017) (citation omitted); *see also Wells Fargo Bank, N.A. v. Mesh Suture, Inc.*, 31 F.4th 1300, 1313 (10th Cir. 2022) (“Judicial admissions include ‘formal concessions in the pleadings[.]’” (citation omitted)); *United States v. E.F.*, 920 F.3d 682, 688 (10th Cir. 2019) (judicial admissions are “formal, deliberate declarations” (citation omitted)).

The first amended complaint does not satisfy this demanding standard. The complaint says, “On June 1, 2020, HR Specialist [Coudayre] sent Javan zad a text message and asked Javan zad to call about her FMLA leave.” Appx.33 ¶ 43. It then describes a June 2 email in which Javan zad asked Coudayre about her options for extending leave after her FMLA leave had expired. *Id.* ¶¶ 46-47. Immediately thereafter, the complaint states, “After [Coudayre] and Javan zad were unable to connect via telephone, Javan zad sent an email to [Coudayre] on June 5, 2020. In the email, Javan zad explained that she was having difficulty speaking and could not talk on the telephone.” *Id.* ¶ 48.

Appliance Factory insists that the complaint “did not simply omit any mention of a call [on June 2], but affirmatively represented no call took place.” Resp.Br.27-28. This is incorrect. The complaint affirmatively states

that Javanzad emailed Coudayre on June 5 because they were unable to connect by phone, but it is silent about the time frame during which they were unable to connect. Appx. 33 ¶ 48. Appliance Factory's reading is plausible, but it is also plausible that paragraph 48 refers only to an inability to connect by phone on June 5. The statement is not unambiguous, and is therefore not a "formal, deliberate declaration" that there was no phone call on June 2. *Asarco*, 844 F.3d at 1212 n.3 (citation omitted). *See also Atlas Glass & Mirror, Inc. v. Tri-North Builders, Inc.*, 997 F.3d 367, 373 (1st Cir. 2021) (judicial admissions must be made "clearly and unambiguously" (citation omitted)).

Appliance Factory contends that even if the complaint does not constitute a judicial admission that there was no June 2 phone call, "[t]he EEOC was content to let the First Amended Complaint stand until it needed to argue a call occurred to survive summary judgment."

Resp.Br.28-29. The EEOC's reference at summary judgment to the June 2 call, Appliance Factory says, was a tacit request to amend the complaint that the district court silently denied. *Id.* at 29. But the EEOC did not need to amend the complaint. The June 2 call was not an "issue raised for the first time in ... response to a motion for summary judgment." *Id.* (citation

modified). Rather, it was further evidence supporting Javan zad's consistent representation that she spoke with Coudayre on the phone in "late May or early June." Appx.228, 250-51. The EEOC confirmed that the conversation occurred on June 2 when it obtained Coudayre's cell phone records in discovery. Appx.209.

Litigants routinely obtain new information in discovery without amending their complaints to add new facts. There is no legal barrier to the EEOC's reliance on the June 2 phone call now.

IV. The EEOC's appendix complies with Circuit rules, and even if the EEOC is mistaken, the Supplemental Appendix cures any omissions.

This Court mandates that an appellant "must electronically file an appendix sufficient for considering and deciding the issues on appeal." 10th Cir. R. 30.1(B)(1). Here, the issue on appeal is whether a jury could find that Javan zad's communications with Appliance Factory were sufficient under the ADA. The EEOC's appendix contains all evidence necessary to resolve this question. Appliance Factory's evidence calling Javan zad's credibility into question is irrelevant because, for purposes of appeal, this Court must deem Javan zad credible and make all reasonable

inferences in the EEOC's favor.⁴ See *Tufaro v. Okla. ex rel. Bd. of Regents of the Univ. of Okla.*, 107 F.4th 1121, 1131 (10th Cir. 2024).

Lincoln v. BNSF Railway Co., 900 F.3d 1166 (10th Cir. 2018), is not to the contrary. There, an issue on appeal was whether the plaintiffs were qualified for positions that BNSF had denied them. *Id.* at 1176-77. The appellants neglected to include evidence such as job postings that listed qualifications and the hiring manager's testimony about qualifications. *Id.* at 1190. Accordingly, it was impossible for this Court to fairly review the district court's decision regarding that issue. *Id.* at 1191. Unsurprisingly, this Court explained that "[w]hen an appellant contends the district court's findings and conclusions were contrary to the evidence presented, the appellant must include in the record a transcript of all evidence relevant to that finding or conclusion." *Id.* at 1189 (citation modified). This is entirely different from the EEOC's omission of evidence that, as Appliance Factory indicates, primarily would impugn Javanзад's credibility. See Resp.Br.10 n.4.

⁴ Appliance Factory concedes that much of the evidence it seeks to bring to this Court's attention is irrelevant. Resp.Br.15 n.5.

The EEOC acknowledges that the record here contains evidence from which a jury could find in favor of Appliance Factory. The EEOC never intended to hide this evidence and is surprised at Appliance Factory's implication of bad faith. *See* Resp.Br.10 n.4. Appliance Factory discussed the excluded evidence in its motion for summary judgment, which is included in the appendix. Although the EEOC believes that evidence favorable to Appliance Factory is irrelevant to whether the EEOC's evidence would be sufficient to support a verdict in its favor, it has never doubted that this Court would look at all parts of the record it deems important.

To the extent the EEOC misunderstood this Court's requirements, the Supplemental Appendix – expressly contemplated by 10th Circuit Rules 11.1(B) and 30.2(A)(1) – includes everything that Appliance Factory believes should have been included originally. That cures any harm. *See Ezell v. BNSF Ry. Co.*, 949 F.3d 1274, 1278 (10th Cir. 2020) (absence of evidence in appellant's appendix "easily resolved" by appellee's filing a supplemental appendix). The EEOC respectfully asks this Court to excuse any inadvertent mistake on its part.

CONCLUSION

For the foregoing reasons and those in our Opening Brief, the district court's judgment should be vacated and the case remanded for further proceedings.

Respectfully submitted,

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,458 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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I certify that on this 8th day of July, 2026, 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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