No. 16-5063

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STEVEN W. RUSSELL,

Plaintiff-Appellant,

v.

PHILLIPS 66 CO.,

***Defendant-Appellee*.**

On Appeal from the United States District Court
for the Northern District of Oklahoma – Tulsa
Civ. No. 4:15-CV-00087-CVE-PJC
(Hon. Chief Judge Claire V. Eagan)

BRIEF FOR AARP AND AARP FOUNDATION AS AMICI CURIAE SUPPORTING PLAINTIFF-APPELLANT

DARA S. SMITH*
DANIEL B. KOHRMAN
AARP FOUNDATION LITIGATION
601 E Street, NW
Washington, DC 20049
Tel. (202) 434-6280
dsmith@aarp.org
Attorneys for Amici Curiae

Counsel of Record

CORPORATE DISCLOSURE STATEMENT

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(4) of the Internal Revenue Code and is exempt from income tax. The Internal Revenue Service has determined that AARP Foundation is organized and operated exclusively for charitable purposes pursuant to Section 501(c)(3) of the Internal Revenue Code and is exempt from income tax. AARP and AARP Foundation are also organized and operated as nonprofit corporations under the District of Columbia Nonprofit Corporation Act.

Other legal entities related to AARP and AARP Foundation include AARP Services, Inc., and Legal Counsel for the Elderly. Neither AARP nor AARP Foundation has a parent corporation, nor has either issued shares or securities.

Dated: September 30, 2016

/s/ *Dara S. Smith*
Dara S. Smith

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES, LEGISLATION AND ADMINISTRATIVE REGULATIONS

MISCELLANEOUS

STATEMENT OF RELATED CASES

There are no known related cases pending in this Court.

STATEMENT OF INTEREST OF AMICI CURIAE[1]

AARP is a nonprofit, nonpartisan organization dedicated to fulfilling the needs and representing the interests of people age fifty and older. AARP fights to protect older people's financial security, health, and well-being. AARP's charitable affiliate, AARP Foundation, creates and advances effective solutions that help low-income individuals fifty and older secure the essentials. Among other things, AARP and AARP Foundation combat age and disability-based employment discrimination against older workers, including through participation as amici curiae in state and federal courts. *E.g.*, *Flynn v. Distinctive Home Care, Inc.*, 812 F.3d 422 (5th Cir. 2016); *Adams v. Rice*, 531 F.3d 936 (D.C. Cir. 2008); *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002).

AARP and AARP Foundation submit this brief because the district court decision failed to appreciate the nature and effects of major depressive disorder ("MDD"), which the agency responsible for enforcing the Americans With Disabilities Act ("ADA") has determined will "virtually always be found to impose a substantial limitation on a major life activity," and therefore constitute a covered "disability." 29 C.F.R. § 1630.2(j)(3)(ii)-(iii). Depression occurs more often and with greater severity as individuals age. Indeed, individuals age 40-59 have the

[1] In accordance with Fed. R. App. P. 29(c)(5), amici hereby state that no party's counsel authored this brief either in whole or in part, and further, that no party or party's counsel, or any person or entity other than amici, their members and counsel, contributed money intended to fund preparing or submitting this brief.

highest rates of reported depression in the United States. QuickStats: Prevalence of Current Depression Among Persons Aged ≥12 Years, by Age Group and Sex — United States, National Health and Nutrition Examination Survey, 2007–2010, (January 6, 2012), http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6051a7.htm. Thus, amici are especially concerned about decisions that exclude older workers with MDD, like Steven Russell, from the law's protections.

Moreover, the district court conducted a fatally flawed analysis of Russell's claim that Phillips 66 did not reasonably accommodate him by reassigning him to an appropriate vacant position within the company. Amici are dedicated to ensuring that individuals with disabilities, including mental health conditions, have the equal work opportunities that federal law, including the ADA strives to create.

INTRODUCTION

When Congress amended the ADA in 2008, it reversed a series of decisions that had restricted the law's coverage by adopting ever narrower constructions of what was a covered "disability" under the statute. ADA Amendments Act of 2008 ("ADAAA"), Pub. L. 110-325, 122 Stat. 3553, Sec 2. The ADAAA expressly superseded two major Supreme Court cases that construed this definition "strictly" and created a "demanding standard for qualifying as disabled," and Congress urged courts to construe the statute in favor of broad coverage. *Id.* In this way, Congress sought "to convey [its intent that] that the primary object of attention in cases

brought under the ADA should be *whether entities covered under the ADA have complied with their obligations*, and to convey that the question of *whether an individual's impairment is a disability under the ADA should not demand extensive analysis*." Pub. L. 110-325, 122 Stat. 3553, Sec 2(b)(5) (emphasis added). In this case, the district court contravened Congress' stated intent in enacting the ADAAA: despite the wealth of contrary evidence in the record, it found that Russell had not proved a substantial limitation on any major life activity, and it failed to hold Phillips 66 to its statutory obligations to reasonably accommodate Russell when he requested reassignment within the company.

SUMMARY OF THE ARGUMENT

The district court's "disability" analysis failed to appreciate basic facts about MDD's nature and effects, and, therefore, it rejected Russell's allegations that MDD substantially limited his ability to sleep and think. Consistent with the Equal Employment Opportunity Commission's ("EEOC's") regulations, the scientific consensus conclusively establishes that MDD virtually always substantially limits multiple major life activities. Research reflects that MDD is almost always associated with sleep disturbances, especially insomnia. Likewise, studies consistently show that cognitive dysfunction – including difficulty concentrating, remembering, and preventing intrusive, negative thoughts – is a defining hallmark of MDD. Studies further show that insomnia as well as concentration and memory

problems are more prevalent in older individuals with MDD, like Russell. Russell submitted both an affidavit describing his own disruptions in sleep and cognition associated with MDD, along with a wealth of corroborating medical evidence. The district court ignored this evidence to reach the conclusion that, nonetheless, Russell's MDD did not substantially limit any major life activity. The Court should correct this error.

Furthermore, the district court applied an entirely improper analysis to Russell's claim that Phillips 66 failed to accommodate him when he requested reassignment to another position within the company, consistent with his doctor's advice. The district court applied the wrong framework to the accommodation analysis because it did not recognize that failure to accommodate is, itself, intentional disability discrimination under the ADA. The court improperly focused on Phillip 66's subjective intent rather than examining whether the company's refusal to transfer Russell was unreasonable under the circumstances. The district court also defied both Supreme Court precedent and this Court's precedent in concluding that the company met its accommodation obligation simply by allowing Russell to compete equally for open positions with other applicants. This Court has made clear that the ADA requires more. The Court should reverse and remand to direct the district court to apply the correct legal standards, taking into

account the Supreme Court's admonition that the ADA is a statute that sometimes requires preference to afford equal opportunity for individuals with disabilities.

ARGUMENT

I. The District Court's Conclusion that Russell is Not Disabled Is Inconsistent with the Scientific Consensus about Major Depressive Disorder and the Record Evidence.

The EEOC's post-ADAAA regulations specifically identify MDD as an impairment that will "virtually always be found to impose a substantial limitation on a major life activity," so that "the necessary individualized assessment should be particularly simple and straightforward." 29 C.F.R. § 1630.2(j)(3)(ii)-(iii) (2011) ("it should be easily concluded that . . . major depressive disorder . . . substantially limit[s] brain function"); *see also* Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act as Amended, 76 Fed. Reg. 58, 17012 (Mar. 25, 2011) (codified at 29 C.F.R. § 1630) ("major depressive disorder may substantially limit major life activities such as thinking, concentrating, sleeping"). But the district court's analysis of Russell's MDD reflects a fundamental misunderstanding – or lack of understanding – about MDD's nature and effects, particularly in older individuals like Russell. The court ignored significant record evidence consistent with the scientific consensus about MDD and emphasized irrelevant evidence. Contrary to the court's conclusion,

based on the evidence presented, a reasonable fact-finder could readily conclude that Russell's MDD substantially limited his ability to sleep and think.

A. Major Depressive Disorder Causes Significant Sleep Disruptions and Cognitive Impairments That Frequently Worsen with Age.

In general, MDD is characterized by one or more major depressive episodes. AM. PSYCH. ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS TEXT REVISED FOURTH EDITION, 369, 345 (2000) [hereinafter DSM-IV]. A major depressive episode includes: a depressed mood or loss of interest or pleasure for more than two weeks, a change from an individual's baseline mood, impaired social occupational or educational functioning, and at least five of nine specifically enumerated symptoms present nearly every day. *Id.* at 356. These symptoms include: depressed mood or irritability, decreased interest or pleasure, significant weight change or change in appetite, change in sleep, change in activity, fatigue or loss of energy, feelings of guilt or worthlessness, diminished ability to think or concentrate, and suicidality. *Id*. MDD may last multiple months or may reoccur in clusters of episodes. *Id.* at 354. MDD may be diagnosed as mild, moderate, or severe. *Id.* at 416.

1. Major depressive disorder is almost always associated with significant sleep disruption.

Researchers estimate that around 90% of individuals with MDD also have sleep disturbances. Fred W. Turek, *Insomnia and Depression: If it Looks and*

Walks Like a Duck…, 28 SLEEP 1362, 1362 (2005) (citing Thase ME. Antidepressant treatment of the depressed patient with insomnia. J Clin. Psychiatry, 1999;60 (Suppl 17): 28-31). The most common sleep disturbance for individuals with MDD is insomnia. DSM-IV at 350. In fact, depression is the most common cause of long-term insomnia. Linda Wasmer Andrews, ENCYCLOPEDIA OF DEPRESSION 464 (2010). Insomnia also worsens depression's effects, increasing the likelihood of relapse and poor responses to psychotherapy. *Id.* Furthermore, the prevalence of insomnia increases with age in individuals with MDD. Amy Fiske et. al., *Depression in Older Adults*, 5 Ann. Rev. Clin Psychol. 4, 10 (2009). As discussed below, this research is consistent with Russell's reported symptoms. *See infra* Part I.B.1.

2. Major depressive disorder significantly disrupts thinking processes.

Cognitive dysfunction is a classic hallmark of MDD. Asa Hammar & Gurdo Ardal, *Cognitive Functioning in Major Depression – A Summary*, 3 Frontiers in Human Neuroscience 1, 1 (2009).[2] Individuals with MDD frequently experience distortions in their thinking. These individuals pay a disproportionate amount of

[2] For further information about cognitive dysfunction and MDD, *see* Beatrice Bortolato et. al., *Cognitive Dysfunction in Major Depressive Disorder: A State-of-the-Art Clinical Review*, 13 CNS & Neurological Disorders – Drug Targets 1804, 1804 (2014); Nat'l Acads. of Scis., Eng'g, & Med., *Enabling Discovery, Development, and Translation of Treatments For Cognitive Dysfunction in Depression: Workshop Summary*, 1, 2 (2015) [hereinafter National Academies].

attention to negative events and focus more on negative thoughts. *See* Claire A. Hales et al., *Modelling Cognitive Affective Biases in Major Depressive Disorder Using Rodents*, 171 Brit. J. Pharmacol. 4524, 4526 (2014); Ian H. Gotlib and Jutta Joormann, *Cognition and Depression: Current Status and Future Directions*, 6 Ann. Rev. Clin. Psychol. 1, 11-12 (2010). These individuals have problems with "rumination" – experiencing "persistent, cyclical, depressive thinking." Costas Papageorgiou and Adrian Wells, NATURE, FUNCTIONS, AND BELIEFS ABOUT DEPRESSIVE RUMINATION IN DEPRESSIVE RUMINATION: NATURE, THEORY AND TREATMENT, 3 (Costas Papageorgiou and Adrian Wells eds., 2004); *see also* DSM-IV at 352 (detailing how many individuals with MDD ruminate and excessively worry about their physical health).

In addition to these distortions in thinking, individuals with MDD typically experience cognitive deficits. *See* Bortolato et. al., *supra* note 2, at 1804, 1807. In other words, "many individuals [with MDD] report impaired ability to think, concentrate, and make decisions," and "they may . . . complain of memory difficulties." DSM-IV at 350. Researchers have linked MDD to deficits in the ability to plan, problem-solve, and strategize. J.K. Trivedi, *Cognitive Deficits in Psychiatric Disorders: Current Status*, 48 Indian J. Psychiatry 10, 11-12 (2006). Individuals with MDD also often have diminished ability to form and control working memory. *See* Bortolato et. al, *supra* at 1806*; see also* Hammar and Ardal,

supra at 2; National Academies, *supra* note 2, at 10. Researchers have also observed deficits in effortful attention. *See* Hammar and Ardal, *supra* at 2.[3] In particular, older adults with MDD have been found to have greater problems with concentration, memory and psychomotor skills. *Id.* at 4. This research, like the research concerning insomnia, is consistent with Russell's reported symptoms. *See infra*, Part II.B.2, as well as the EEOC regulations stating that MDD will "virtually always" substantially limit brain function, 29 C.F.R. § 1630.2(j)(3)(ii)-(iii).

B. The District Court Ignored Russell's Ample Evidence, Consistent with the Scientific Consensus, that Major Depressive Disorder Substantially Limits His Major Life Activities, Including Sleeping and Cognition.

In ruling that Russell had provided no evidence to support his claim that he was substantially limited in a major life activity, the lower court failed to apply the correct summary judgment standard to the ample evidence of Russell's sleep disturbances and cognitive disruptions. In an ADA case, to survive summary judgment, the plaintiff must point to *some* evidence showing that her impairment

[3] In addition, anxiety disorders are extremely common in people with MDD, like Russell. Laura Andrade et al., *The Epidemiology of Major Depressive Episodes: Results from the International Consortium of Psychiatric Epidemiology (ICPE) Surveys*, 12 Int. J. Methods Psychiatric Research 3, 11-14 (2003). Anxiety that occurs with MDD may also contribute to worse performance on cognitive tasks. Natalie Castriotta and Michelle G. Craske, *Depression and Comorbidity with Panic Disorder* in *The Oxford Handbook of Depression and Comorbidity* 1, 5-6 (C. Steven Richards and Michael W. O'Hara, eds.) (2014).

limits a major life activity. *Sanchez v. Vilsack*, 695 F.3d 1174, 1178 (10th Cir. 2012) (emphasis added). This burden is not onerous. *Id.* at 1179.

Sanchez v. Vilsack illustrates the appropriate "disability" analysis to be undertaken at the summary judgment stage. *Id.* at 1178. In *Sanchez*, an employee requested reassignment after suffering a brain injury that caused her to lose half of her total visual field in each eye. *Id.* at 1176. The plaintiff pleaded that her vision was substantially limited due to this impairment. *Id.* at 1179. The district court disagreed, holding that her vision was not substantially limited because she "drives," "reads with some difficulty," "'is able to care for herself,'" and "'walks and bicycles on a regular basis.'" *Id.* at 1180.

On appeal, this Court found that summary judgment was inappropriate because Sanchez' affidavit describing the limits in her field of vision, along with medical experts' confirmation that this vision loss was permanent, sufficiently supported Sanchez' allegations about her limitations. *Id*. The Court explained that the district court's reasoning "misses the mark" because it should have focused on whether the impairment substantially limited the plaintiff in the terms of her own experience, not "whether [she could] do many of the same activities a person who is not [impaired] takes for granted." *Id*.

As detailed below, the district court in this case similarly "misse[d] the mark" because Russell's evidence plainly meets – and in many ways exceeds – the *Sanchez* standard.[4]

1. Russell's medical treatment notes and affidavit show that major depressive disorder substantially limited his ability to sleep.

The court below found that no rational trier of fact could find that Russell was substantially limited in the major life activity of sleeping based on the evidence presented. *Russell v. Phillips 66 Co.*, No. 4:15-cv-00087, 2016 U.S. Dist. LEXIS 54694, at *17 (N.D. Okla. Apr. 25, 2016). However, as the record amply reflects, the district court failed to draw all reasonable factual inferences in Russell's favor on this issue, selectively discussing evidence that supported the defendant's position and ignoring significant evidence of sleeping disturbances.

The record is saturated with references to Russell's insomnia and medications for insomnia. For example, Russell's affidavit directly states, "one of the side effects of the medication I take to treat my depression is insomnia." Pl.'s Resp. in Opp'n to Def.'s Mot. for Summ. J. Ex. 29, Russell Aff. at 1 (¶ 4) (Mar. 8, 2016). In addition to the affidavit, the medical treatment notes corroborate Russell's reported insomnia. The medical treatment notes contain at least fourteen

[4] While the district court also ruled that Russell had not provided sufficient evidence of substantial impairments to his breathing or working, amici will not address those issues.

references to Russell's insomnia. Pl.'s Resp. in Opp'n to Def.'s Mot. for Summ. J. Ex. 8, at 1, 5, 6, 7, 8, 10, 12, 14, 16, 18, 20. These references make clear that Russell has experienced a significant, disruptive sleeping disorder. Russell's treating physician, Dr. McClure, unequivocally states that Russell "has insomnia one or two nights a week," and that while he is on medication, "he will have 2-3 nights per week where he will wake up in the middle of sleep and has difficulty falling back asleep." *Id.* at 1, 6. The treatment notes also reflect that he was on several insomnia medications (Ambien and Temazepam) throughout the time period and that he was consistently taking these medications for the duration of the treatment. *See, e.g.*, *id*. at 18 ("taking ambien 5 mg at bed time").

The district court discounted this robust record evidence of insomnia by reasoning that because in February 2013 "plaintiff reported that he was sleeping well when he was taking Ambien" and his "treatment records for the following months do not contain any complaints concerning lack of sleep . . . there is no basis to find that plaintiff was substantially limited in his ability to sleep." *Russell*, 2016 U.S. Dist. LEXIS 54694, at *17. In addition to plain legal error,[5] the court's reading of the record was selective.

[5] As discussed in Russell's Opening Brief, since the ADAAA, an ADA complainant's alleged disability is to be assessed in its untreated state – *i.e.*, without taken into account the beneficial impact of "mitigating measures" such as medication. *See* 42 U.S.C. § 12102(4)(E)(i) (2012); Pl. Opening Br. at 14. The

Russell's February 2013 session with Dr. McClure represents only one of eleven he undertook over 18 months, yet his full medical treatment notes show he made numerous complaints of problems sleeping and contain repeated references to his insomnia over a period of years. Pl.'s Resp. in Opp'n to Def.'s Mot. for Summ. J. Ex. 8. While Dr. McClure's notes stop referencing sleeping problems after the February 2013 meeting, every note thereafter indicates that he was prescribing Russell medication "for insomnia." *See, e.g., id*., at 16 ("Tue, 19 Nov 2013 . . . Medications . . . Ambien . . . 10 mg . . . by mouth at bedtime as needed for insomnia").

Russell's evidence of insomnia is entirely consistent with the scientific consensus that depression and insomnia are linked, especially for older adults. *See supra*, Pt. I.A.1. A reasonable fact-finder should have readily recognized that Russell's evidence supported his claim of actual disability under the ADA. But the district court instead disregarded that evidence and the ADA itself, relying on isolated statements in the treatment notes that it believed to be inconsistent with Russell's reported symptoms. Neither the law nor the facts can support this reasoning, and the Court should not allow it to stand.

---

district court's consideration of Russell's sleep disturbances while mitigated by medication clearly contradicted this provision.

2. Russell's medical treatment notes and affidavit show that major depressive disorder substantially limited his thinking processes.

The district court concluded that "there is also no evidence that depression limited plaintiff's ability to think" because on two select days of treatment, Dr. McClure's notes describe him as "coherent," "appropriately conversant," "awake," and "alert." *Russell*, 2016 U.S. Dist. LEXIS 54694, at *18. This conclusion cannot be squared with either Russell's evidence or the reality of MDD's effects.

As with his evidence of sleep disruption, Russell presented ample evidence of his disrupted thought processes. Russell's affidavit states that he "suffer[s] from panic attacks, lapses of memory . . . and trouble concentrating, thinking and focusing." Pl.'s Resp. in Opp'n to Def.'s Mot. for Summ. J. Ex. 29 at 1. As with Russell's statements about insomnia, the record strongly corroborates his affidavit. The record is replete with documentation of Russell's cognitive disruptions. *Id*. at Ex. 8 at 1, 2, 3, 5, 6, 10, 12. For instance, treatment notes for November 15, 2012 state that Russell's "ruminating gets out of control." *Id*. at 3 ("The spikes in anxiety are rarely out of the blue, more if he goes somewhere in public or work related, occasionally when his ruminating gets out of control"). The treatment notes also reference two occasions when Russell was exhibiting avoidant behaviors. *See id*. at 3, 6. The record also directly mentions problems in Russell's

thinking when Dr. McClure's notes refer to Russell's report that his thinking was "foggy" preceding the May 30, 2013 treatment session. *Id*. at 10.

In addition, the record supplies evidence of deficits in Russell's mental processing. Russell had a diminished ability to control both his mood and anxiety. *See, e.g.*, *id.* at 2 ("he struggles more with his mood"), 3, 5. In fact, he had to take anxiety medication before even talking to the doctor about work. *Id*. at 6. Most significantly, Dr. McClure's note to the company warned that if Russell were to return to his job, he would suffer a mental "decomposition." *Id*. at Ex. 14.

However, the district court discussed none of this evidence, instead focusing on treatment notes describing Russell as "coherent," "appropriately conversant," "awake," and "alert." *Russell*, 2016 U.S. Dist. LEXIS 54694, at *18.

In addition to defying the summary judgment standard, this conclusion completely misconstrues the evidence. The "coherent," "appropriately conversant," "awake," and "alert" language comes from a section in the medical treatment notes devoted to Russell's Mental Status Examination (MSE) and the Mini Mental Status Examination (MMSE). Pl.'s Resp. in Opp'n to Def.'s Mot. for Summ. J. Ex. 8 at 6. The MSE is a general test used by clinicians designed to capture potential symptoms of a wide range of mental health conditions. Am. Psychiatric Ass'n, *Practice Guideline for the Psychiatric Evaluation of Adults Second Edition* 23 (2006) [hereinafter Guidelines]. Thus, many of its observations

– including those the court noted – are entirely irrelevant to MDD. In fact, no psychological literature describes any relationship between the attributes that the court found to be persuasive ("alertness," "awakeness," "coherency," and being "conversant") and MDD.

Additionally, even if this evidence could somehow be considered relevant to MDD, the MSE is a test that assesses the mental health status of the individual only at the moment of examination. *Id.; see also* HAROLD I. KAPLAN ET AL., KAPLAN & SADOCK'S COMPREHENSIVE TEXTBOOK OF PSYCHIATRY (Benjamin James Sadock, M.D. et al. eds., 9th ed. 2009). This means that the test presents only a fleeting snapshot of the patient's mental health. For example, Russell visited Dr. McClure on December 27, 2012. Pl.'s Resp. in Opp'n to Def.'s Mot. for Summ. J. Ex. 8 at 5. His next visit to the doctor was February 4, 2013. *Id.* at 6. Any mental stress or disruptions that occurred between those treatment sessions are not reflected in the MSE, because they were evidently not present at the exact moment the test was administered.[6]

Nonetheless, the district court assumed that because some attributes on the MSE were performing normally on two isolated occasions, MDD did not substantially limit Russell's ability to think at all. The court overlooked the

[6] As discussed in Russell's Opening Brief, this analysis also violates the ADA, as amended, which provides that "An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active." 42 U.S.C. § 12102(4)(D); Pl. Opening Br. at 20.

evidence throughout the record of cognitive dysfunctions that *are* associated with depression – insomnia, ruminations and more – while making its decision based on mental attributes that have *not* been shown to be affected by MDD. Again, the court's decision is inconsistent with both the law and the facts. Had the court abided by the summary judgment standard, read the record in its entirety, or understood the mental impairment it was assessing, it would not have reached this conclusion. This Court should correct that error.

II. The Trial Court Committed Serious Legal Errors in Analyzing Russell's Failure-to-Accommodate Claim.

In addition to erring in its assessment of Russell's disability, the district court went astray in critical ways in its analysis of Russell's failure-to-accommodate claim. The court applied the wrong framework and the wrong substantive standard for determining whether Phillips 66 met its burden on this issue, contravening both Supreme Court precedent and this Court's well-established standards.

A. The District Court Applied the Wrong Analytical Framework to Russell's Accommodation Claim.

The district court pledged to assess Russell's disability discrimination claim by faithfully navigating "the *McDonnell/Douglas* burden shifting analysis," 2016 U.S. Dist. LEXIS 54694, at *13, but the court went far off course. After discussing whether Russell had a disability and finding none, *see id.* at *16-21, the court

concluded that Russell did not satisfy the first step of *McDonnell Douglas*, *id.* at 13-14, 19. But then, the court purported to assess his ADA challenge in the alternative, "even [assuming he] *could* establish a prima facie case of disability discrimination." *Id.* at *21 (emphasis added); *accord id.*at *24. The district court assumed that Russell had a disability but misapplied both the second and third steps of the *McDonnell Douglas* framework by overlooking the crucial components of a failure-to-accommodate claim's analysis.

1. Reasonable accommodation claims are proved differently under *McDonnell Douglas* than termination claims.

While this Court has not decided whether assertions of "wrongful termination and failure to accommodate . . . under the ADA are separate causes of action," it has recognized that these assertions warrant different formulations of the prima facie case and, consequently, the *McDonnell Douglas* burden-shifting analysis. *Allen v. Southcrest Hospital*, 455 F. App'x 827, 830 (10th Cir. 2011); *see also Spielman v. Blue Cross & Blue Shield of Kan.*, 33 F. App'x 439, 443 (10th Cir. 2002) (also stating prima facie case elements tailored to review of ADA accommodation claim). Specifically, in an accommodation-via-reassignment[7] case, after showing that he or she is a qualified individual with a disability, an

[7] *See* 42 U.S.C. § 12112(b)(5)(A) (disability discrimination includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability unless such . . . accommodation would impose an undue hardship") § 12111(9)(B) (reasonable accommodation "may include . . . reassignment to a vacant position").

employee establishes a prima facie case by showing that "an employer [did not] take reasonable steps to reassign a qualified individual to a vacant position or a position the employer reasonably anticipates with become vacant in the future," *Bartee v. Michelin N. Am.*, 374 F.3d 906, 912 (10th Cir. 2004) (citing *Albert v. Smith's Food & Drug Centers, Inc.*, 356 F.3d 1242, 1252 (10th Cir. 2004)); *accord Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1178 (10th Cir. 1999). That is entirely different from a discriminatory termination case, in which the employee must create an inference of subjective intent to discriminate on the basis of disability to make out a prima facie case. *See Bartee*, 374 F.3d at 912 n.4 (describing the difference between the two frameworks).

As this Court explained long ago, getting the analytical framework right in an accommodation case matters, because

> Congress has already determined that a failure to offer a reasonable accommodation to an otherwise qualified disabled employee *is* unlawful discrimination . . . Thus, we use the burden-shifting mechanism, *not to probe the subjective intent of the employer,* but rather simply to provide a useful structure by which the district court . . . can determine whether the various parties have advanced sufficient evidence to meet their respective traditional burdens *to prove or disprove the reasonableness of the accommodations* offered or not offered.

Smith, 180 F.3d at 1178 n.12. (emphasis added).

2. The district court improperly analyzed Russell's accommodation claim the same way as his termination claim.

While the district court plainly understood Russell to assert that Phillips 66 discriminated against him by refusing to reasonably accommodate his alleged disability,[8] the court did not apply the separate failure-to-accommodate framework this Court's precedent requires. Instead, the district court improperly focused on the company's intent, asking whether the "[d]efendant has met its burden to state a legitimate, non-discriminatory reason for terminating plaintiff's employment;" and whether the plaintiff has met his burden "to show that defendant's explanation for terminating [his] employment is pretextual." 2016 U.S. Dist. LEXIS 54694, at *22. While this approach was entirely appropriate for assessing the discriminatory termination allegations, it was wholly inapposite to the failure-to-accommodate allegations. In conflating the two, the court neglected to address the nature and extent of Phillips 66's duty to accommodate Russell's disability, and, thus, to properly assess the legitimacy of Phillips 66's reasons for denying Russell accommodation in the form of reassignment.

The court's error in this regard caused it to ask the wrong questions and omit the right ones. The court did not ask or assess whether Phillips 66 fulfilled its duty

[8] *See Russell*, 2016 U.S. Dist. LEXIS 54694, at *12 (""Plaintiff responds that . . . defendant failed to accommodate the plaintiff's disability by granting his request for a transfer outside the finance department"); *id.* at *23 ("Plaintiff argues that defendant . . . refused to accommodate him by finding another job for him").

to accommodate Russell when it "allowed [him]to look for another job" and "gave him additional time" to do so. *Id.* at *23-24. In particular, the district court did not assess multiple relevant decisions of this Court, as well as *US Airways v. Barnett*, 535 U.S. 391 (2002) (discussed further below), to determine whether Phillips 66 had an obligation to facilitate Russell's possible transfer from the finance department. Similarly, the district court noted that Russell had failed to show that Phillips 66 officials declined to hire Russell for other jobs on account of his disability. 2016 U.S. Dist. LEXIS 54694 at *24. Yet the court did not consider whether Phillips 66 had a more robust duty, under the ADA, than to simply leave hiring decisions up to managers "[un]aware that [Russell] claimed to have a disability." *Id.*

In this case, the district court manifestly gave no consideration to the sufficiency of the parties' evidence regarding, nor the parties' satisfaction of their "traditional burdens" of proof concerning "the reasonableness of the accommodations offered [and] not offered." *Smith*, 180 F.3d at 1178 n.12. Rather, the court concluded that Russell's discrimination claim, including his contentions that Phillips 66 failed to adequately accommodate him, "could be characterized" solely "as a challenge to defendant's business judgment." *Russell*, 2016 U.S. Dist. LEXIS 54694, at *24. Thus, "the role of the Court" was only "to remedy

intentional discrimination." *Id.* Under the Court's ADA reassignment decisions, these premises constituted reversible error. [9]

B. The District Court Ignored Supreme Court and Tenth Circuit Precedent Strongly Indicating that Phillips 66 Failed to Reasonably Accommodate Russell.

The district court concluded that Phillips 66 met its ADA obligations by allowing Russell to compete for open positions on equal footing with other applicants. 2016 U.S. Dist. LEXIS 54694 at *23-24. That conclusion fails to take into account the standards laid out in Supreme Court and Circuit precedent, which make clear that employers must give employees preference in assigning them to appropriate vacant positions as an accommodation. Indeed, this Court has recognized time and again that "the employer must do more than consider the disabled employee alongside other applicants." *Duvall v. Georgia-Pacific Consumer Products, L.P.*, 607 F.3d 1255, 1260 (10th Cir. 2010).

[9] In addition, the district court erred in its *McDonnell Douglas* analysis even with respect to the termination allegations when it approved Phillips 66's supposedly legitimate, non-discriminatory reason for terminating Russell: the very fact that Russell did not succeed in gaining another position within the company. *See Russell*, 2016 U.S. Dist. LEXIS 54694, at *22. As discussed below, the company appears to have failed to satisfy its duty to take steps needed to reasonably accommodate Russell – as required by this Court's precedents. Because "a failure to . . . reasonabl[y] accommodat[e] *is* unlawful discrimination," *Smith*, 180 F.3d at 1178 n.12, this failure was neither "legitimate" nor "non-discriminatory."

1. The Supreme Court has rejected the district court's approach to reassignment cases.

In *US Airways v. Barnett*, for the first time, the Supreme Court expressly discussed the ADA's inclusion of "reassignment" as a potential reasonable accommodation. 535 U.S. 391, 398-99 (2002). In particular, the Court considered and rejected the argument that reassignment was inherently unreasonable because it could require a "preference" for employees with disabilities. *Id.* at 398. The Court explained that "preferences will sometimes prove necessary to achieve the Act's basic equal opportunity goal" because "by definition any special 'accommodation' requires the employer to treat an employee with a disability differently, *i.e.*, preferentially." *Id.* at 397. Furthermore, *Barnett* made clear that the mere fact that "the difference in treatment violates an employer's disability-neutral rule cannot by itself place the accommodation beyond the Act's potential reach." 535 U.S. at 397. Accordingly, past court of appeals cases rejecting preferential reassignment as inherently unreasonable are no longer good law. *See, e.g.*, *EEOC v. United Airlines, Inc.*, 693 F.3d 760, 764 (7th Cir. 2012) (overruling *EEOC v. Humiston–Keeling*, 227 F.3d 1024 (7th Cir.2000) and explaining that *Barnett*'s reasoning invalidated another case holding that the ADA's reassignment obligation could never require an employer to deviate from a "best-qualified selection policy").

2. This Court has consistently held that allowing an employee with a disability to compete for an open position does not fulfill the employee's duty to reasonably accommodate that employee via reassignment.

Even before *Barnett*, the en banc Tenth Circuit held in *Smith v. Midland Brake* that under the ADA, an employer's "reassignment obligation must mean something more than merely allowing a disabled person to compete equally with the rest of the world for a vacant position." 180 F.3d at 1165. This Court has repeatedly reaffirmed this holding. *Davoll v. Webb*, 194 F.3d 1116, 1131 (10th Cir. 1999) (quoting *Smith*); *Duvall*, 607 F.3d at 1261; *Foster v. Mt. Coal Co., LLC*, No. 12-cv-03341-LTB-MJW, 2014 U.S. Dist. LEXIS 176050, at *28 (D. Colo. Dec. 22, 2014) (citing *Smith* to same effect, despite finding proposed transfer position not "vacant"), *rev'd on other grounds*, 2016 U.S. App. LEXIS 13564 (10th Cir. 2016). Indeed, this Court has gone into further detail than *Barnett* in delineating the boundaries of an employer's ADA reassignment obligations.

Unpacking the ADA's text, the *Smith* Court observed that Congress "define[d] the term 'reasonable accommodation' to include 'reassignment to a vacant position.' The statute does not say 'consideration of a reassignment to a vacant position.'" *Smith*, 180 F.3d at 1164. And, following another full federal appeals court, the Court explained,

> The word "reassign" must mean more than allowing an employee to apply for a job on the same basis as anyone else. An employee who on his own initiative applies for

> and obtains a job elsewhere would not be described as having been "reassigned"; the core word "assign" implies some active effort on the part of the employer.

Smith, 180 F.3d at 1164 (quoting *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1304 (D.C. Cir. 1998) (en banc)). Hence, "[a]lthough the right to reassignment is not absolute,"

> It may very well be determined that reassignment is a reasonable accommodation under all the circumstances [and] [i]f it is so determined, then the disabled employee *has a right in fact to the reassignment, and not just to the consideration process* leading up to the potential reassignment.

Davoll, 194 F.3d at 1131-32 (emphasis added).

Of course, this duty is not without its limitations. *Id.* at 1132. *Smith* stressed "the overarching principle" that all accommodations must demonstrate "reasonableness" and also outlined "specific situations in which reassignment would be unreasonable." 180 F.3d at 1177-78. In *Duvall v. Georgia-Pacific Consumer Products*, this Court explained that employees unable to do their current job due to disability are not entitled to reassignment as a reasonable accommodation if the proposed transfer is to a job to be created for that purpose, to a job affording a promotion, to a job not truly vacant, or if the proposed transfer would violate "important fundamental policies underlying legitimate business

interests."[10] 607 F.3d at 1261; *see also Smith*, 180 F.3d at 1177-778 (employees must be qualified for reassignments, employers may choose among potential new postings for which an employee is qualified, and reassignment must not cause "undue hardship"). But, notwithstanding these carefully crafted exceptions and considerations, the Court's precedent clearly requires that a company *both* consider reassignment *and* offer an alternate position to an employee with a disability where appropriate. *Smith*, 180 F.3d at 1165.

Here, however, the district court did not even attempt to follow this rubric. The court implicitly found that Phillips 66 had satisfied its ADA obligations by taking extremely limited efforts to accommodate Russell's request for accommodation via reassignment from the finance department. The court concluded that "allow[ing him] to look for another job within the company and [giving] him additional time [to do so] when he could not find a new position after seven weeks," 2016 U.S. Dist. LEXIS 54694 at *23-24, was enough.

In fact, the only meaningful affirmative step the company took to fulfill Russell's reassignment request was to "review[]" possible "vacant positions"

[10] The last of these "specific situations" is a small category. This Court has "recognize[d] that the ADA may sometimes require an employer to abrogate policies that apply to all employees equally in order to accommodate a disabled employee, under the rubric of reasonableness. Thus, in Midland Brake . . . an employer who maintained a blanket no-transfer policy that applied to all employees equally w[as] required to reassign a disabled employee to a vacant position as a reasonable accommodation under the ADA. 180 F.3d at 1176." *Duvall*, 607 F.3d at 1262 n.3.

limited to the finance department – not "open position[s] within the company" overall – for jobs within that subset of open positions company-wide "that did not require moderate math or accounting skills."[11] *Id.* at 8. Although Phillips 66 admits that Russell was qualified for at least two of the positions to which he did apply, the company does not appear to have done anything more than consider him alongside other applicants.[12] *See* Def.'s Mot. for Summ. J. and Br. in Supp. at 7-8 (¶¶37, 39) (stating that the company hired applicants for "Senior Freight Analyst" and "Advisor, Recruiting" positions that it considered more qualified).

These steps are precisely the ones that *Smith* and its progeny have repeatedly and expressly rejected as insufficient to satisfy a company's duty under the ADA. *Duvall*, 607 F.3d at 1261 (employers must "do more than [merely] consider the

[11] The company also provided Russell with a company laptop to assist his job search. *Russell*, 2016 U.S. Dist. LEXIS 54694, at *9. The value of this aid to Russell is unclear.

[12] That the company evidently failed to identify these positions as potentially appropriate for Russell's transfer is yet another indication that it did not do nearly enough to meet its ADA obligations. The company appears to have wholly failed to engage in an "interactive process" with Russell regarding possible reassignment elsewhere in the company. *See Albert*, 356 F.3d at 1252 (quoting *Smith*, 180 F.3d at 1171-72) (describing the interactive process under the ADA). This Court has repeatedly recognized that while an employee may be aware of appropriate vacant positions, for the benefit of both parties, "in larger companies . . . it might be reasonable to require the employer to identify jobs that the employer reasonable concludes are appropriate for reassignment consideration." *Smith*, 180 F.3d at 1173 (quoting *Woodman v. Runyon*, 132 F.3d 12130, 1343 (10th Cir. 1997) ("The employer has far greater access to information than the typical plaintiff, both about its own organization, and equally importantly, about the practices and structure of the industry as a whole.")).

disabled employee alongside other applicants"). Simply failing to discriminate in hiring was not enough.

The Court should reverse and remand for the district court to assess the company's actions under the standard required by this Court and the Supreme Court.

CONCLUSION

For these reasons, the Court should reverse the district court's decision.

Dated: September 30, 2016

Respectfully Submitted,

/s/ *Dara S. Smith*
Dara S. Smith*
Daniel B. Kohrman
AARP Foundation Litigation
601 E Street, NW
Washington, DC 20049
Tel. (202) 434-6280
dsmith@aarp.org
Attorneys for Amici Curiae

**Counsel of Record*

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,479 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point font.

Dated: September 30, 2016

/s/ Dara S. Smith
Dara S. Smith*
Attorney for Amici Curiae

**Counsel of Record*

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program,

Symantec Endpoint Protection, Version 12.1.6, last updated September 30, 2016 at 8:58 am and, according to the program are free of viruses.

/s/ Dara S. Smith
Dara S. Smith*
Attorney for Amici Curiae

**Counsel of Record*

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of September 2016, I electronically filed the foregoing Brief for Amici Curiae AARP and AARP Foundation Supporting Plaintiff-Appellant with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ *Dara S. Smith*
Dara S. Smith*
Daniel B. Kohrman
AARP Foundation Litigation
601 E Street, NW
Washington, DC 20049
Tel. (202) 434-6280
dsmith@aarp.org
Attorneys for Amici Curiae

**Counsel of Record*