No. 16-1412

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LAURIE EXBY-STOLLEY,

Plaintiff-Appellant

v.

BOARD OF COUNTY COMMISSIONERS, WELD COUNTY, COLORADO,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
THE HONORABLE WILEY Y. DANIEL, No. 1:13-cv-01395-WYD-NYW

EN BANC BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFF-APPELLANT

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INTEREST OF THE UNITED STATES

This case presents an important question regarding the elements required to prove a failure-to-accommodate claim under Title I of the Americans with Disabilities Act (ADA), 42 U.S.C. 12112(a) and (b)(5). The Department of Justice and the Equal Employment Opportunity Commission (EEOC) share enforcement responsibility under Title I, see 42 U.S.C. 12117(a), and the EEOC has Title I

rulemaking authority, see 42 U.S.C. 12116. Accordingly, the United States has a substantial interest in the proper resolution of the question raised in this appeal.

The United States files this brief under Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUE

Title I of the ADA, 42 U.S.C. 12112, prohibits discrimination on the basis of disability in regard to the "terms, conditions, and privileges of employment" and defines discrimination, in relevant part, as the failure to reasonably accommodate the known limitations of qualified individuals with disabilities. This brief addresses the following issue:

Whether the district court erred in instructing the jury that to prevail on a failure-to-accommodate claim under Title I of the ADA, the plaintiff had to prove that she suffered an "adverse employment action," which the court defined as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[1]

[1] The United States takes no position on any other issue presented in this appeal.

STATEMENT OF THE CASE

1. Statutory Framework

a. Congress enacted the ADA to establish a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). "To effectuate its sweeping purpose, the ADA forbids discrimination against disabled individuals in major areas of public life, among them employment (Title I of the Act), public services (Title II), and public accommodations (Title III)." *PGA Tour, Inc.* v. *Martin*, 532 U.S. 661, 675 (2001). This case concerns the prohibitions against employment discrimination under Title I of the ADA. 42 U.S.C. 12111-12117.

Title I's prohibitions on disability-based employment discrimination are set out at 42 U.S.C. 12112. Section 12112(a) provides a "[g]eneral rule" that

> [n]o covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. 12112(a).[2] A "qualified individual" is "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. 12111(8).

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[2] The Act defines "disability" to mean "a physical or mental impairment that substantially limits one or more major life activities * * *[;] a record of such (continued…)

Section 12112(b), entitled "[c]onstruction," provides a list of specified actions that are included in the term "discriminate against a qualified individual on the basis of disability." 42 U.S.C. 12112(b)(1)-12112(b)(7). At issue in this case is Section 12112(b)(5), which provides that "discriminat[ion] against a qualified individual on the basis of disability" includes:

> (A) 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, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or
>
> (B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant[.]

42 U.S.C. 12112(b)(5).

The term "reasonable accommodation" is further defined in the statute and in its implementing regulations. 42 U.S.C. 12111; 29 C.F.R. 1630.2(o). Title I's definitional provision states that the term "reasonable accommodation" "may include":

(…continued)
an impairment; or being regarded as having such an impairment." 42 U.S.C. 12102(1)(A)-(C).

> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
>
> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C. 12111(9). The EEOC's implementing regulations further provide that the term "reasonable accommodation" means:

> (i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or
>
> (ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position; or
>
> (iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

29 C.F.R. 1630.2(o)(1)(i)-(iii); see also 29 C.F.R. 1630.9(a) ("It is unlawful for a covered entity not to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified [individual] with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business."); *US Airways, Inc*. v. *Barnett*, 535 U.S. 391, 399, 401, 403-404 (2002) (relying on EEOC regulations in applying Title

I's provisions and, in a failure-to-accommodate case, construing the standard for reasonableness as whether the accommodation is reasonable on its face in the ordinary run of cases).[3]

2. Procedural History

a. Plaintiff-Appellant Laurie Exby-Stolley worked as a health inspector for Weld County, Colorado (the County) and alleged that she suffered an injury that left her without full use of her right arm. *Exby-Stolley* v. *Board of Cty. Comm'rs*, 906 F.3d 900, 902 (10th Cir. 2018). After this injury, Exby-Stolley's work performance began to suffer as her inspections took longer, and she could not complete the number of inspections that her position required. *Id.* at 903. Exby-Stolley was given a temporary part-time assignment while she and the County discussed longer-term accommodations. *Ibid.* Exby-Stolley ultimately resigned from her employment with the County and filed suit in 2013. *Id.* at 903-905. At trial, Exby-Stolley asserted that after numerous meetings with the County to discuss her injury and attempts to find a long-term accommodation, her supervisor told her to resign. *Id.* at 903. For its part, the County asserted that Exby-Stolley had voluntarily resigned mid-way through its process for determining what permanent accommodations could be made for her. *Id.* at 904-905.

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[3] Congress expressly authorized the EEOC to issue regulations to implement Title I of the ADA. See 42 U.S.C. 12116.

The sole claim on which the district court instructed the jury was Exby-Stolley's failure-to-accommodate claim under Title I of the ADA. The district court instructed the jury that Exby-Stolley had to demonstrate that she "was discharged from employment or suffered another adverse employment action." Aplt. App. Vol. II, at 440.[4] The court further instructed the jury that "[a]n adverse employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Aplt. App. Vol. II, at 449. The district court then provided the jury with a seven-question special interrogatory verdict form for this claim. At Question 3, the jury found that Exby-Stolley had not "proven by a preponderance of the evidence that she was [discharged from employment][not promoted][or other adverse action] by [the County]." Doc. 200, at 2 (brackets in original). This finding against Exby-Stolley meant that the jury "found for the Defendant" as to Exby-Stolley's failure-to-accommodate claim. Doc. 200, at 2.

b. On appeal, Exby-Stolley asserted that the district court erred by "instructing the jury that she had to prove she had suffered an adverse employment

[4] "Aplt. App. Vol. __, at __" refers to the Plaintiff-Appellant's Appendix filed before the original panel hearing in this case. "Doc. __, at __" refers to the docket entry number and relevant pages of the district court filings below in *Exby-Stolley* v. *Board of Cty. Comm'rs*, No. 13-cv-1395 (D. Colo.).

action" to prevail on her Title I failure-to-accommodate claim. *Exby-Stolley*, 906 F.3d at 905. A divided panel of this Court rejected her argument. The majority (Hartz and Kelly, JJ.) held that an "adverse employment action—that is, a materially adverse decision regarding 'application procedures, hiring, advancement, discharge, compensation, training, or other terms, conditions, and privileges of employment'—is an element of all discrimination claims under the ADA." *Id*. at 902 (alteration, ellipses, and citation omitted). The majority then affirmed the jury's verdict, explaining that, when the County denied Exby-Stolley's request for a reasonable accommodation, "it did not fire her or make any other changes in her employment status." *Id.* at 918.

The dissent (Holmes, J.) would have held that "an adverse-employment-action element" is not among the "requisite elements of a failure-to-accommodate claim" under the ADA, and that such a requirement only applies to disparate-treatment claims under the ADA. *Exby-Stolley*, 906 F.3d at 924.

c. On December 18, this Court granted rehearing en banc. *Exby-Stolley* v. *Board of Cty. Comm'rs*, 910 F.3d 1129 (10th Cir. 2018).

SUMMARY OF THE ARGUMENT

The district court erred in instructing the jury that to prevail on her Title I failure-to-accommodate claim, Exby-Stolley had to prove an "adverse employment action," which it defined as "a significant change in employment status, such as

hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Aplt. App. Vol. II, at 449. That standard appears nowhere in the text of Title I. To be sure, unlawful discrimination under Title I must pertain to "job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, *and other terms, conditions, and privileges of employment*." 42 U.S.C. 12112(a) (emphasis added). But the "adverse employment action" standard, as defined by the district court, is inconsistent with that plain text. Congress did not limit the statutory phrase "terms, conditions, and privileges of employment" to economic harm or significant changes in employment status. On the contrary, the ordinary meaning of the phrase encompasses a broad spectrum of employment-related arrangements, including but not limited to work schedules, job assignments, worksite locations, training opportunities, and access to workplace facilities and equipment. The district court's standard not only conflicts with the statutory text, but also undermines the purpose of Title I's reasonable accommodation requirement, which is to further the full and equal integration of persons with disabilities into the workforce.

The type of discrimination that the plaintiff has alleged here—the failure to make a reasonable accommodation that would enable her to "*perform the essential functions of her job*" (Aplt. App. Vol. I, at 209) (emphasis added)—necessarily

relates to the terms, conditions, or privileges of her employment. If she demonstrates that such discrimination occurred, she need not also prove that she suffered an "adverse employment action" to prevail on her Title I claim.

Accordingly, this Court should reject the district court's standard and reverse its judgment.

ARGUMENT

THE DISTRICT COURT'S JURY INSTRUCTIONS ON PLAINTIFF'S FAILURE-TO-ACCOMMODATE CLAIM CANNOT BE RECONCILED WITH THE PLAIN TEXT AND PURPOSE OF TITLE I OF THE ADA

The proper starting point, as always, is the statutory text. *BedRoc Ltd., LLC* v. *United States*, 541 U.S. 176, 183 (2004). Title I of the ADA prohibits discrimination on the basis of disability in regard to the "terms, conditions, and privileges of employment" and defines discrimination as the failure to reasonably accommodate the known limitations of qualified individuals with disabilities. 42 U.S.C. 12112(a) and (b)(5). To prevail on a failure-to-accommodate claim under Title I, therefore, a plaintiff must prove that she was discriminated against because her employer failed to provide a reasonable accommodation that relates to the terms, conditions, or privileges of her employment. Rather than adhere to the statutory language, the district court instructed the jury in this case that to prevail on her claim, Exby-Stolley had to prove that she suffered an "adverse employment action," which it defined as "a significant change in employment status, such as

hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Aplt. App. Vol. II, at 449. As explained below, that standard not only is inconsistent with Title I's text, but also undermines the purpose of its reasonable accommodation requirement.

A. Title I's Prohibition Of Discrimination Imposes An Affirmative Obligation On Employers To Make Reasonable Accommodations

Prohibited "discrimination" under Title I includes, among other things, "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability." 42 U.S.C. 12112(b)(5)(A). Through its reasonable accommodation requirement, Title I compels employers to modify their work conditions or application requirements to enable qualified individuals with disabilities to have the same opportunities as those without disabilities. The affirmative obligations that Title I imposes on employers also stem from the statute's definition of a "qualified individual" as "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. 12111(8); see also *US Airways, Inc.* v. *Barnett*, 535 U.S. 391, 393 (2002) (Title I "prohibits an employer from discriminating against an 'individual with a disability' who, with 'reasonable accommodation,' can perform the essential functions of the job.") (citations omitted).

Title I thus "requires preferences in the form of 'reasonable accommodations' that are needed for those with disabilities to obtain the *same* workplace opportunities that those without disabilities automatically enjoy." *US Airways*, 535 U.S. at 397. "[T]he very purpose of reasonable accommodation laws is to *require* employers to treat disabled individuals differently in some circumstances" such as when "different treatment would allow a disabled individual to perform the essential functions of his position by accommodating his disability without posing an undue hardship on the employer." *Holly* v. *Clairson Indus., LLC*, 492 F.3d 1247, 1262-1263 (11th Cir. 2007). Indeed, Title I expressly provides that a "reasonable accommodation" may include "making existing facilities used by employees readily accessible * * * and usable" as well as "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations." 42 U.S.C. 12111(9)(A) and (B); see also *US Airways, Inc.*, 535 U.S. at 397-398 (contemplating failure-to-accommodate claims as to job location, worktime break policy, or office furniture).

The purpose of Title I's reasonable-accommodation requirement, therefore, is to ensure equal employment opportunities for individuals with disabilities by

leveling the playing field so that they may participate fully in the workplace. See *Cleveland* v. *Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 801 (1999) ("The ADA seeks to eliminate unwarranted discrimination against disabled individuals in order both to guarantee those individuals equal opportunity and to provide the Nation with the benefit of their consequently increased productivity."); *Smith* v. *Midland Brake*, 180 F.3d 1154, 1168 (10th Cir. 1999) (en banc) ("[B]y defining discrimination * * * to include the failure to offer reasonable accommodations, one of Congress' objectives was to facilitate economic independence for otherwise qualified disabled individuals.").

Title I's reasonable-accommodation requirement has a defined scope. For example, "an employer only has to provide an accommodation that is reasonable, not an accommodation the employee prefers." *Faidley* v. *United Parcel Serv. of Am., Inc.*, 889 F.3d 933, 942-943 (8th Cir. 2018) (en banc) (citation and internal quotation marks omitted); accord *Credeur* v. *Louisiana*, 860 F.3d 785, 797 (5th Cir. 2017); *Selenke* v. *Medical Imaging of Colo.*, 248 F.3d 1249, 1263 (10th Cir. 2001). Moreover, Title I does not require accommodations desired for mere employee convenience. 29 C.F.R. 1630, App. 420 (Title I does not require "an employer * * * to provide as an accommodation any amenity or convenience that is not job-related * * * or * * * that is not provided to employees without disabilities."). Employers also have an affirmative defense under Title I if they can

demonstrate that the requested accommodation would impose an "undue hardship." 42 U.S.C. 12112(b)(5)(A).

B. Under Title I, Discrimination Is Unlawful If It Pertains To "The Terms, Conditions, And Privileges Of Employment"

Like a number of other federal employment discrimination statutes, Title I of the ADA prohibits discrimination in regard to the "terms, conditions, and privileges of employment." 42 U.S.C. 12112(a); see also 42 U.S.C. 2000e-2(a)(1) (Title VII of the Civil Rights Act); 29 U.S.C. 623(a)(1) (Age Discrimination in Employment Act). Thus, to prevail on a failure-to-accommodate claim under Title I, a qualified individual must show that a denied accommodation pertains to her terms, conditions, or privileges of employment.

The statutory phrase "terms, conditions, and privileges of employment" is broad and evinces Congress's intent to strike at disability discrimination in the entire range of employment practices. Cf. *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57, 64 (1986). While "terms, conditions, and privileges of employment" plainly encompass rates of pay and compensation, as well as hiring, firing, and promotion decisions, 29 C.F.R. 1630.4(a)(1)(ii) and (iii), the phrase is not limited to actions that cause "economic" or "tangible" harm. Cf. *Meritor Sav. Bank*, 477 U.S. at 64. On the contrary, "terms, conditions, and privileges of employment" under the ADA may also include job assignments; work schedules; fringe benefits made available because of employment; selection and financial support for

training, including professional meetings and conferences; and employer-sponsored programs and activities. See, *e.g.*, 29 C.F.R. 1630.4(a)(1)(i)-(ix).

Title I's reasonable accommodation provision also makes clear that discrimination may relate to the "terms, conditions, and privileges of employment" where it affects an employee's working conditions, even if those conditions do not result in a significant change of employment status. The Act defines "reasonable accommodation" to include "making existing facilities used by employees readily accessible to and usable" as well as "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations." 42 U.S.C. 12111(9)(A) and (B). "Work schedules," the "[]structuring" of job responsibilities, and the availability of office "equipment or devices" can affect an employee's conditions of employment or his ability to perform a job, even when they do not result in a significant change of employment status. 42 U.S.C. 12111(9)(B).

C. The District Court's "Adverse Employment Action" Instruction Is Inconsistent With Title I's Text And Undermines The Purpose Of The Reasonable Accommodation Requirement

The district court's "adverse employment action" instruction in this case too narrowly construed Title I's text and undermined its purpose. Under the district

court's framework, there is no violation of Title I unless a failure to provide a reasonable accommodation results in "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Aplt. App. Vol. II, at 449; see also *Exby-Stolley*, 906 F.3d at 917-918 (majority opinion explaining that an adverse employment action may not include a lateral transfer or a shift change, and pointing out that in this case, Exby-Stolley was not fired and did not suffer a change in her employment status).

As already explained, however, Title I prohibits discrimination in regard to the "terms, conditions, and privileges of employment," and discrimination based on a failure to accommodate may satisfy that standard without resulting in an employee's termination or other tangible change in employment status. Thus, for example, the Sixth Circuit has upheld a jury verdict finding that an employer violated Title I when it refused to allow a cashier with diabetes to keep orange juice at her register to manage her blood sugar. See *EEOC* v. *Dolgencorp, LLC*, 899 F.3d 428, 431 (6th Cir. 2018). Although the employee in that case brought a separate claim for discriminatory discharge, the failure-to-accommodate claim was upheld on its own; the court did not require a showing of discharge or other change in employment status in connection with the employer's denial of the requested accommodation. See *id*. at 436. Similarly, an employee who requests to work a

different shift so that he may receive chemotherapy treatments on a particular day may have an actionable Title I claim if such request is denied, because an employee's work shift is plainly a term or condition of employment. And an employee who has a medical condition that causes "great pain" when "he stands for prolonged periods" may succeed on a failure-to-accommodate claim when his employer denies his request for a chair. See *Gleed* v. *AT&T Mobility Servs., LLC*, 613 F. App'x 535, 536 (6th Cir. 2015) (unpublished); see also *Hill* v. *Association for Renewal in Educ.*, 897 F.3d 232, 239 (D.C. Cir. 2018) ("A reasonable jury could conclude that forcing [plaintiff] to work with pain when that pain could be alleviated by his requested accommodation violates the ADA."). By contrast, a "failure to accommodate a wheelchair-bound employee by moving her office a few feet closer to the entrance * * * if requiring the employee to travel the extra distance is a mere inconvenience," *Exby-Stolley*, 906 F.3d at 917, would not violate Title I. See 29 C.F.R. 1630.2(o)(1)(i)-(iii); 29 C.F.R. 1630, App.

The panel majority suggested that the term "adverse employment action" can be read as mere "judicial shorthand" for the statutory phrase "terms, conditions, and privileges of employment." *Exby-Stolley*, 906 F.3d at 906 (citation omitted). This could be accurate if courts truly treated "adverse employment action" as synonymous with the statutory language. However, many courts, including the district court here, construe "adverse employment action" far more

narrowly than actions that pertain to the "terms, conditions, and privileges of employment." Indeed, as noted in the panel majority's opinion, some panels of this Court have held that lateral transfers and shift changes are not adverse employment actions, even though such actions can relate to the terms, conditions and privileges of employment. See *Exby-Stolley*, 906 F.3d at 909 (citing *Sanchez* v. *Denver Pub. Sch. Dist*., 164 F.3d 527, 531 (1998); *Daniels* v. *United Parcel Serv., Inc.*, 701 F.3d 620, 636 (2012); *Haynes* v. *Level 3 Commc'ns, LLC*, 456 F.3d 1215, 1224-1225 (2006)).[5]

Such a narrow interpretation of "terms, conditions, and privileges of employment" not only conflicts with Title I's text, but it also defeats its purpose. Indeed, as already discussed, Title I's reasonable accommodation requirement is designed to reduce employment barriers and promote the integration of individuals with disabilities in the workplace. See p. 12-13, *supra*. The reasonable

[5] In a number of Title VII cases, other courts similarly have strayed from the statutory text and defined "adverse employment action" more narrowly than actions that relate to one's terms, conditions, and privileges of employment. See, *e.g.*, *Miller* v. *American Family Mut. Ins. Co.*, 203 F.3d 997, 1006 (7th Cir. 2000) (denial of a discretionary monetary bonus is not a "materially adverse job action"); *Bowman* v. *Shawnee State Univ.*, 220 F.3d 456, 461-462 (6th Cir. 2000) (non-permanent job reassignment without economic loss is not a materially adverse action); *Ledergerber* v. *Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997) (only "ultimate employment decision[s]" are "intended to be actionable under Title VII").

accommodation provision, which is critical to achieving the Act's equal opportunity goal, thus requires employers to make certain modifications and adjustments to the work environment so that employees with disabilities can fully participate in the workforce. *US Airways, Inc.*, 535 U.S. at 397-398. It would defeat the ADA's purpose of furthering "integration of persons with disabilities into the economic and social mainstream," *Helen L.* v. *DiDario*, 46 F.3d 325, 331 (3d Cir. 1995) (citation and emphasis omitted), to require that disabled employees suffer an "adverse employment action,"—*i.e.*, termination or other significant change in employment status—before they could enforce Title I's requirement that employers reasonably accommodate their known disabilities. A number of circuit courts thus properly omit any discussion of an adverse employment action requirement when discussing the elements of Title I failure-to-accommodate claims.[6]

On appeal before this Court, the County argues (Appellee's Supp. Br. 4) that the district court's instruction is supported by the Supreme Court's decision in

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[6] *E.g.*, *Freadman* v. *Metropolitan Prop. & Cas. Ins. Co.*, 484 F.3d 91, 102 (1st Cir. 2007); *McMillan* v. *City of N.Y.*, 711 F.3d 120, 126 (2d Cir. 2013); *Haberle* v. *Troxell*, 885 F.3d 170, 180 (3d Cir. 2018); *EEOC* v. *LHC Grp., Inc.*, 773 F.3d 688, 703 (5th Cir. 2014); *Brumley* v. *United Parcel Serv., Inc.*, 909 F.3d 834, 839 (6th Cir. 2018); *Feldman* v. *Olin Corp.*, 692 F.3d 748, 753 (7th Cir. 2012); *Holly* v. *Clairson Indus., LLC*, 492 F.3d 1247, 1261-1262 (11th Cir. 2007); *Hill*, 897 F.3d at 237.

Burlington Northern & Santa Fe Ry. Co. v. *White*, 548 U.S. 53 (2006). Not so. In *Burlington Northern*, the Supreme Court ruled that Title VII's anti-retaliation provision, 42 U.S.C. 2000e-3, provides broader protection to employees than its anti-discrimination provision, 42 U.S.C. 2000e-2, because the anti-retaliation provision is not limited to discriminatory actions that affect the terms and conditions of employment. *Burlington Northern*, 548 U.S. at 64, 68. In discussing the scope of Title VII's "terms, conditions, or privileges of employment" language in its substantive anti-discrimination provision, 42 U.S.C. 2000e-2(a), the Court explained that the phrase refers to "actions that affect employment or alter the conditions of the workplace." *Burlington Northern*, 548 U.S. at 62. The instruction that the district court gave here (Aplt. App. Vol. II, at 449) was much narrower than the Supreme Court's construction of Title VII's nearly identical language.

The district court erred, therefore, in instructing the jury that a qualified individual with a disability who was denied a reasonable accommodation would have no right to relief under Title I if she did not also suffer "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Aplt. App. Vol. II, at 449. While a district court has considerable discretion in instructing a jury, see, *e.g.*, *Liberty Mut. Fire Ins. Co.* v. *Woolman*,

913 F.3d 977, 992 (10th Cir. 2019), the error at issue in this appeal could have been avoided had the district court accepted Exby-Stolley's proposed instruction that she could prevail under Title I if she proved that she was denied a "reasonable accommodation so that she could perform the essential functions of her job." Aplt. App. Vol. I, at 209. That is so because the denial of an accommodation that is reasonable and enables an employee to perform the essential functions of the job necessarily pertains to her terms, conditions, and privileges of employment, as required by the statute. 42 U.S.C. 12112(a).

CONCLUSION

This Court should reverse the district court's judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(g):

(1) This brief complies with Federal Rule of Appellate Procedure 29 and with Federal Rule of Appellate Procedure 32(a)(7)(B) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), it contains 4477 words according to the word processing program used to prepare the brief.

(2) This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016, in 14-point Times New Roman font.

s/ Anna M. Baldwin
ANNA M. BALDWIN
Attorney

Date: March 1, 2019

CERTIFICATE OF DIGITAL COMPLIANCE

I certify that the electronic version of this brief complies with all required privacy redactions required under Federal Rule of Appellate Procedure 25(a)(5) and Tenth Circuit Rule 25.5; is exactly the same as the hard copies of this brief submitted to the clerk's office; has been scanned for virus with the most recent version of Symantec Endpoint Protection (version 14) and is virus-free according to that program; and complies with the applicable type-volume limit in Federal Rule of Appellate Procedure 32(f), in that it contains 4477 words according to the word processing program used to prepare the brief.

s/ Anna M. Baldwin__
ANNA M. BALDWIN
Attorney

Date: March 1, 2019

CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2019, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT with the United States Court of Appeals for the Tenth Circuit by using the CM/ECF system. For participants in this case who are registered CM/ECF users, service will be accomplished by the appellate CM/ECF system. Service by mail will be provided to Bruce G. Smith, Darling Milligan, 1331 17th Street, Suite 800, Denver, CO 80202.

I further certify that sixteen paper copies of the foregoing brief will be sent to the Clerk of the Court by Federal Express.

s/ Anna M. Baldwin
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Attorney