IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Docket No. 23-2955

KAREN SHIELDS

Plaintiff - Appellant

vs.

CREDIT ONE BANK, N.A., CREDIT ONE FINANCIAL, a Nevada Corporation; SHERMAN FINANCIAL GROUP, LLC, a Delaware Limited Liability Company

Defendants - Appellees

On Appeal From an Order of the

United States District Court

for the District of Nevada

BRIEF OF APPELLANT

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I.

STATEMENT OF JURISDICTION

A. The Basis for the District Court's Jurisdiction.

The basis for the district court's jurisdiction is the Americans With Disabilities Act of 1990, *42 USC*, §12101, et seq. ("ADA") as the complaint involves a claim by Plaintiff and Appellant Karen Shields ("Shields") for disability discrimination and failure to accommodate her disability in the workplace which is governed by the ADA. Jurisdiction was predicated upon these code sections as well as *28 USC*, §1331 as the action involved a federal question.

B. The Basis for the Court of Appeals Jurisdiction.

The basis for the court of appeals jurisdiction is that the district court entered a final decision in the case. The circuit courts of appeals have jurisdiction over appeals from all final judgments of the district courts. *28 USC*, §1291.

C. Filing Date of the Appeal.

On October 4, 2023 the district court filed its order granting Defendant and Appellee Credit One Bank, N.A.'s ("Credit One") motion to for summary judgment[1]. [Excerpt of Record (hereinafter "ER") pgs. 33-55, Docket #94.] On the same day, October 4, 2023, the clerk of the district court filed its judgment in a civil case entering judgment in favor of Credit One, et al. and closing the case. [ER pg. 56, Docket #95.] On October 19, 2023 Shields' filed her notice of appeal to the district court's order granting Credit One, et al's motion for summary judgment. [ER pgs. 121-122, Docket #100.]

D. Assertion that the Appeal is from a Final Order or Judgment that Disposes of all of Shields' Claims.

The district court entered its final judgment that disposed of all of Shields'

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[1] And denied Shields' motion for summary judgment.

claims on October 4, 2023. [ER pg. 56, Docket #95.] A final judgment that disposes of all a party's claims is an appealable judgment. *Catlin v. United States*, 324 U.S. 229, 233 (1945).

II.

ISSUES PRESENTED

1. Is there an issue of fact for a jury to decide as to whether Shields was disabled under the ADA as a result of her bone biopsy surgery and recovery? Was Shields substantially limited in a major life activity including her ability to perform her job?

2. Did the district court err in concluding that as a matter of law there is *not* an issue of material fact for a jury to decide as to whether Credit One failed to provide continued accommodations for Shields' disability under the ADA and instead terminated Shields because of this disability in violation of the ADA? On the evidence presented is it reasonable for a jury to decide for Shields on these issues?

III.

STATEMENT OF CASE

Shields filed her complaint for damages and other relief against Credit One, et al. on June 2, 2019. [ER pgs. 4-11, Docket #1.]

On June 25, 2019 Credit One filed their first motion to dismiss Shields' complaint. [ER pg. 125, Docket #5.]

On July 29, 2019 the district court granted Credit One's first motion to dismiss Shields' complaint with leave to amend. [ER pg. 125, Docket #10.]

Shields filed her first amended complaint for damages and other relief against Credit One, et al. on August 8, 2019. [ER pgs. 12-32, Docket #16.]

On August 22, 2019 Credit One filed their second motion to dismiss Shields' complaint. [ER pg. 126, Docket #20.]

On January 10, 2020 the magistrate judge for the district court filed a report and recommendation recommending that Credit One's second motion to dismiss be granted and that Shields' first amended complaint be dismissed without leave to amend. [ER pg. 128, Docket #43.]

On March 17, 2020 the district court adopted the report and recommendation from the magistrate judge granting Credit One's second motion to dismiss Shields' first amended complaint without leave to amend. [ER pg. 129, Docket #49.]

On March 18, 2020 judgment was entered for Credit One, et al. based on the district court granting Credit One's motion to dismiss. [ER pg. 129, Docket #50.]

On April 12, 2020 Shields filed her notice of appeal, appealing the judgment that was entered for Credit One, et al. on March 18, 2020 based on their motion to dismiss. [ER pg. 129, Docket #54.]

On May 6, 2022 the ninth circuit court of appeals issued is opinion reversing and remanding the judgment of the district court based on the district court granting Credit One's motion to dismiss. [ER pg. 129, Docket #56.]

On June 1, 2022 the ninth circuit court of appeals issued mandate to the district court on its opinion reversing and remanding the judgment of the district court. [ER pg. 129, Docket #57.]

On May 18, 2023 Shields filed her motion for summary judgment. [ER pg. 131, Docket #75.]

On May 23, 2023 Credit One filed their motion for summary judgment. [ER pg. 131, Docket #76.]

On October 4, 2023 the district court filed its order denying Shields' motion for summary judgment and granting Credit One's motion for summary judgment. [ER 33-55, Docket #94, Docket #94.]

Also on October 4, 2023, the clerk of the district court filed its judgment in a civil case entering judgment in favor of Credit One, et al. based on the district

court granting Credit One's motion for summary judgment. [ER pg. 56, Docket #95.]

On October 19, 2023 Shields filed her notice of appeal to the district court's order granting summary judgment and entering judgment for Credit One, et al. [ER pgs. 121-122, Docket #100.]

IV.

STATEMENT OF FACTS

Shields was hired as an exempt salaried Human Resources Generalist I with CREDIT ONE BANK, N.A. on November 13, 2017 due to her 20+ years of Human Resources experience as well as Plaintiff's expertise in ADP HRIS. [ER pgs. 57-58, Shields Aff., ¶2.]

At the end of January 2018 it was suspected that Shields had bone cancer in her right arm and shoulder that had metastasized from somewhere else which resulted in a bone biopsy surgery being performed on April 20, 2018 in which a 10 centimeter skin incision created a window into the bone measuring one centimeter in width by two centimeters in length for the purpose of harvesting tissue from her shoulder and arm. [ER pg. 58, Shields Aff., ¶3.]

Plaintiff was thereafter discharged from the hospital on April 23, 2018. [ER pg. 58, Shields Aff., ¶4.]

During that time, Shields was required to use vacation time for partial days off for medical leave of absences (doctor appointments, bone scans, blood work, surgery pre-op appointments, etc.). At one point Plaintiff's pay statement was actually reverted to an hourly wage and she was docked wages. [ER pg. 58, Shields Aff., ¶5.]

Thereafter on April 27, 2018 Shields' Orthopedic Oncology Surgeon/Doctor, Ronald Hillock, MD, ("Dr. Hillock"), completed an ADA Employee Accommodation Medical Certification Form which was provided to

Plaintiff by Credit One. [ER pgs. 58, 63-65, Shields Aff., ¶6, Ex. 1.]

In the Form, Dr. Hillock indicated that Shields was substantially limited by a medical condition or accompanying treatment in the major life activities of sleeping, lifting, writing, pushing, pulling and manual tasks. [ER pg. 58, Shields Aff., ¶7.]

Plaintiff was unable to fully use her right shoulder, arm and hand which included, among other things, lifting, pushing and pulling things with her shoulder, arm and hand, typing on a computer keyboard or otherwise, handwrite, or even tie her shoes or lift a hair dryer to dry Shields' hair. [ER pg. 58, Shields Aff., ¶8.]

The job description for the Human Resources Generalist I position lists physical requirements of frequently being required to use hands to finger, handle, feel and reach with hands and arms. Further the job description states that the employee must occasionally lift and/or move up to 2 pounds. [ER pgs. 58-59, 66-68, Shields Aff., ¶9, Ex. 2.]

Due to the surgery and recovery, Dr. Hillock indicated in the ADA Medical Certification Form that Plaintiff was unable to perform the essential job functions of her job as Human Resources Generalist I with or without accommodations and Dr. Hillock initially stated that Shields would not be able to return to work until 8 weeks after the surgery. [ER pg. 59, Shields Aff., ¶10.]

This was further memorialized by Work Summary Forms dated April 13, 2018 and May 11, 2018. The April 13, 2018 Work Summary Form said that Plaintiff was unable to work from 4/20/2018 to 5/20/2018 and the May 11, 2018 Work Summary Form said Shields may return to work full duty on 6/20/2018. Both of these forms were signed by Dr. Hillock. [ER pgs. 59, 69-72, Shields Aff., ¶11, Exs. 3 and 4.]

These forms were forwarded to Defendant and Plaintiff was approved for an unpaid medical leave of absence as an accommodation under the ADA because she

did not qualify for Family Medical Leave. [ER pg. 59, Shields Aff., ¶12.]

On May 3, 2018, Shields received the results of the bone biopsy which found everything was benign. [ER pg. 59, Shields Aff., ¶13.]

After Plaintiff's medical leave of absence started, she received multiple texts, calls and emails from various Credit One employees stating how much she was missed and that they could not wait for her to return. Shields even received a flower arrangement from the HR department after her bone biopsy was completed. [ER pg. 59, Shields Aff., ¶14; ER pgs. 76, 111-113, Balaban Aff., ¶8, Ex. 6; ER pgs. 76, 114-117, Balaban Aff., ¶9, Ex. 7; ER pgs. 76, 118-120, Balaban Aff., ¶10, Ex. 8.]

During this time Plaintiff was never contacted nor given information or costs regarding paying the employee portion of her monthly healthcare premium during the time Shields was on an unpaid leave of absence. Plaintiff had to contact Christyne Riggs ("Riggs") at Credit One to coordinate the payment of her portion of the monthly healthcare premiums out of fear of losing her healthcare coverage which had become past due. [ER pg. 59, Shields Aff., ¶15.]

Also during this time Shields qualified for Short Term Disability but was denied Long Term Disability because she believes Credit One told the Long Term Disability carrier that she did not have a job to go back to. [ER pgs. 59-60, Shields Aff., ¶16.]

On June 18, 2018, Dr. Hillock extended Plaintiff's return to work date until July 12, 2018 saying Shields was unable to work from 6/21/2018 to 7/12/2018 and Plaintiff informed Defendant of this extension of her leave of absence. See the Work Summary Form dated June 18, 2018 which says, "Patient has an appointment on 7/10 at which point a return to work date will be discussed. Unable to work until appointment." This Work Summary Form was also signed by Dr. Hillock. [ER pgs. 60, 73-74, Shields Aff., ¶17, Ex. 5.]

During the extension of Shields' leave of absence, she still was unable to fully use her right shoulder, arm and hand as set forth above. [ER pg. 60, Shields Aff., ¶18.]

Then on June 21, 2018 Plaintiff had a missed call from Credit One and a text from Vera Yanez-Tourigny ("Yanez-Tourigny" or "Vera") saying, "Hey Karen, hope all is going well. Are you able to come in tomorrow at 8:30 or 9:00 a.m. to pay your insurance premiums and catch up. Please let me know. Thanks!" [ER pg. 60, Shields Aff., ¶19.]

In response to the text, Shields called Vera about an hour later and explained that she had already mailed the check that morning. She said that she still wanted Plaintiff to come in to Credit One so we could "catch up on things". Shields asked if she was being let go and she replied, "No. I just want to catch up". Plaintiff asked if this was something that they could do over the phone and she said "No. I want to do it in person. I know it's kind of early, but we are really swamped." Shields told her she would be there at 9:00 a.m. [ER pg. 60, Shields Aff., ¶20.]

Plaintiff arrived at Credit One Bank offices at 9:00 a.m. on June 22, 2018, parked in the visitor parking, came in through the main lobby and was issued a visitor badge (per previous instructions to all employees not scheduled to work but are in the building). Shields waited approximately 10 minutes for Vera. Vera and Megan Lago ("Lago"), Human Resources Director, entered the "Termination" HR Huddle room from the HR department entrance and Plaintiff was escorted by Vera from the main lobby into the room. [ER pg. 60, Shields Aff., ¶21.]

Vera asked how Plaintiff was doing and Megan came over to give Shields a hug and said Plaintiff looked great. After Shields explained how she was doing. [ER pgs. 60-61, Shields Aff., ¶22; ER pg. 94, Lago Depo. 31:10-14.]

Vera then announced that they were in fact letting Plaintiff go and she

wanted to do it in person rather than a letter or phone call. Vera said she "was trying to be respectful". She stated, "Since you have been off, your duties and responsibilities were re-distributed to other HR staff members. Someone had to do the monthly benefit billing. We couldn't just not do them while you were out. So we have eliminated the Human Resources Generalist position as we feel it is no longer necessary to have that position since other staff members have taken over all your responsibilities. We will not be filling the Human Resources Generalist position at the Bank thanks you for all your hard work". [ER pg. 61, Shields Aff., ¶23; ER pg. 94, Lago Depo. 31:15-21.]

Megan then stated that even though Shields had not been with Credit One Bank for a year, Credit One wanted to offer Plaintiff one week's salary ($1,192.31) as "severance". She stated that Shields had twenty (20) days to sign and return the "Separation and General Release Agreement" and then another ten (10) days to change her mind after that and then the "severance check" would be sent out. Plaintiff told her that she would review it later. [ER pg. 61, Shields Aff., ¶24.]

Thereafter Shields decided she would not sign the "Separation and General Release Agreement". [ER pg. 61, Shields Aff., ¶25.]

On June 30, 3018, Plaintiff's healthcare coverage was terminated so Shields had to discontinue her physical therapy sessions and had to cancel her last follow-up session on September 6, 2018 with Dr. Hillock. [ER pg. 61, Shields Aff., ¶26.]

V.

SUMMARY OF ARGUMENT

The ADA Amendment Act of 2008 ("ADAAA") which became law on January 1, 2009 significantly broadens the ADA in several respects, particularly in connection with what constitutes a "disability" and what "substantially limits" means under the ADA.

Under the ADAAA a physical impairment must be looked at individually to determine if it qualifies as a disability under the ADA. And whether an individual is disabled under the ADA is not subjected to the strict demanding standard as before. In fact the main emphasis under the ADAAA is whether the ADA has been complied with, not on whether the individual is disabled within the meaning of the ADA, which now does not demand an extensive analysis.

Here Shields had a physical impairment from the bone biopsy surgery which left her unable to fully use her right shoulder, arm and hand while the incision from the surgery healed, even though the bone biopsy found everything to be benign.

Further this physical impairment at a minimum substantially limited Shields' in the major life activity of working at Credit One because her physician/surgeon initially put her on medical leave of absence until June 20, 2018 and later extended her return to work date until July 12, 2018.

Thus Shields was clearly disabled under the ADA as was previous found by the Court of Appeals when they reversed the same district court's order dismissing the case earlier in this action.

Further the ADA provides that an employer must provide reasonable accommodations for a qualified employee with a disability and although Credit One did initially provide a leave of absence for Shields to recovery from her bone biopsy, she was then abruptly terminated on June 22, 2018 four days after Shields informed Credit One that her doctor had extended her leave of absence.

Credit One claims that the termination was because they were reorganizing their human resources department and had nothing to do with her disability.

But the evidence tells a different story. Yanez-Tourigny, the Credit One employee who informed Shields that she was being terminated and later told the Employment Security Division about her termination as part of Shields unemployment claim, explained that Shields daily responsibilities were divided

and assumed by other employees in the HR Department and thus she was no longer needed.

Although Credit One and its attorneys have tried to spin this as a reorganization which had nothing to do with her disability, this is ridiculous. "But for" Shields becoming disabled and needing time off to recover, which led to her duties being redistributed and assigned to other employees, she would not have been terminated.

On appeal it should be clear that the district court didn't follow the law on summary judgment. It didn't credit any of Shields' evidence by making reasonable inferences in her favor and instead weighed the evidence and came to conclusions on genuine issues of material fact itself instead of leaving those issues for a jury like the law instructs.

Thus the district court clearly erred when it granted Credit One's motion for summary judgment. This being the case, it is incumbent on the Court of Appeals to overturn the district court's order granting Credit One's motion for summary judgment with orders to proceed to trial of the matter.

VI.

STANDARD OF REVIEW

A. Legal Standard Applicable to a Motion for Summary Judgment.

Under *Rule 56(c)*, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

"As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v.*

Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "More important….summary judgment will not lie if the dispute about a material fact is "genuine, that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

"[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.* at 249.

"[T]rial courts should act....with caution in granting summary judgment...." *Id.* at 255." Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.*

Recently the Supreme Court reiterated the long standing standard a judge is supposed to use in deciding whether to grant summary judgment. In the case of *Tolan v. Cotton*, 572 U.S. 650, 134 S.Ct. 1861, 1866 (2014), the Supreme Court reversed the lower court's grant of summary judgment, holding the lower court failed to credit the opposing party's evidence and the reasonable inferences therefrom, which contradicted the evidence of the moving party. *Id.* at 1866-1868.

In the decision the Supreme Court held that, "[A] 'judge's function' at summary judgment is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial'." (Citation omitted). "Summary judgment is appropriate only if 'the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law'." (Citation omitted). In making that determination, a court must view the evidence 'in the light most favorable to the opposing party'." (Citation omitted)." *Id.* at 1866.

B. Standard of Review for a Motion for Summary Judgment.

The Ninth Circuit applies the de novo standard of review when reviewing a district court decision granting a motion for summary judgment. *Lovell v. Chandler*, 303 F.3d 1039, 1052 (9th Cir. 2002).

In conducting a de novo review, the appellate court does not defer to the lower court's ruling, but independently considers the matter anew, as if no decision had been rendered on the matter below. *Voigt v. Savell*, 70 F3d 1552, 1564 (9th Cir. 1995).

The reviewing court must determine whether when viewing the evidence in the light most favorable to the nonmoving party there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Valdez v. Rosenbaum*, 302 F3d 1039, 1043 (9th Cir. 2002).

VII.

ARGUMENT

A. Introduction.

On summary judgment a judge is supposed to look at the evidence for the non-moving party and make all reasonable inferences for the non-moving party. The judge is *not* a fact finder, that is why we have juries. If the judge likes the moving party's version of the facts better, that is *not* reason to grant summary judgment. It is only proper to grant summary judgment, if when looking at all the evidence in the non-moving party's favor and making reasonable inferences on that evidence for the non-moving party, *no* reasonable jury could rule for the non-moving party.

The undisputed evidence shows that Shields and her doctor, Dr. Hillock say she was unable to go back to work on June 18, 2019 and physical therapist, Arnel Marthin M. Sulit, P.T. ("Sulit"), was never asked by Dr. Hillock or anyone else whether Shields was able to go back to work on June 18, 2019 or any other time

during the period he was performing physical therapy services for Shields.

Further Sulit did not question Dr. Hillock's judgment on extending Plaintiff's leave of absence past June 18, 2019 or for that matter any other leave period he granted Shields.

Thus the evidence show that Shields was disabled at least until July 12, 2018.

Second even though Shields followed all the proper procedures by first having her Dr. Hillock first fill out an ADA Medical Certification Form and then the Work Summary Forms to extend her leave of absence, Shields was abruptly terminated on June 22, 2018 four days after her doctor extended her return to work date on June 18, 2018 from June 20, 2018 to July 12, 2018.

Credit One claims this was because they had redistributed Shields job duties and thus were able to eliminate her position.

First this reason is in direct violation of the ADA and an employer's obligation to accommodate an employee under the ADA. If an employer was able to redistribute and eliminate an employee's position once they were put on a medical leave of absence they would do this as a matter of course in every case to get around their obligation to accommodate an employee with a leave of absence in the first place. Employers would also do this instead of making accommodations for an employee who needed accommodations to perform their job by saying we got someone who can do the job without accommodations so we don't need you anymore.

Further if Credit One was able to redistribute Shields' job duties, they could have eliminated her position right when she was forced to go on her medical leave of absence *not* four days after Shields told them she needed an extension to her leave of absence. Thus it is clear that "but for" Shields informing Credit One that her return to work date had been extended by her doctor, she would not have been

terminated (or for that matter "but for" Shields becoming disabled and needing to go on leave in the first place, she would not have been terminated).

Finally the employee that took over the majority of Shields' job duties, Riggs, had no real job duties when she started besides what she took over for Shields since she had just been hired about when Shields became disabled and went on leave. Thus this employee was in essence given Shields' job duties and eventually was retained instead of Shields because of Shields' disability and her need for a leave of absence.

So in addition to there being undisputed evidence that Shields was disabled for purposes of the ADA, there is clear evidence that Credit One violated the ADA by terminating Plaintiff's employment instead of giving her a short extension to her leave of absence that was approved by her doctor.

But even if Defendant was given the benefit of the doubt on the evidence (which again on summary judgment is supposed to go to the non-moving party), there is absolutely "no way" under the law that it can be said that there is undisputed evidence for Credit One and that it would *not* be reasonable for a jury to conclude that Shields was disabled for purposes of the ADA and that she was terminated in violation of the ADA.

As is clear throughout the district court's opinion, instead of deciding whether there is an issue of material fact for trial, the district court impermissively weighed and analyzed the evidence like a trier of fact would do, failed to credit evidence for Shields and decided the genuine issues of material fact itself instead of leaving that for a jury to decide at trial.

Thus if the rule of law on summary judgment is followed in this case, there is absolutely "no way" that summary judgment should have been granted for Credit One on the evidence presented.

This being the case, the district court's grant of summary judgment should

be reversed and the case should be remanded back to the district court with instructions to proceed to a trial on the merits.

B. The Evidence is Undisputed that Shields was Disabled under the ADA as Amended by the ADAAA.

To state a prima facie claim of discrimination under the ADA, a Plaintiff must sufficiently allege: (1) she was disabled within the meaning of the ADA; (2) she was otherwise qualified to perform the essential functions of the job with or without accommodations; and (3) she suffered an adverse employment action based on her disability. *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1246 (9th Cir. 1999).

Under the ADA "disability" means, with respect to an individual: (a) a physical or mental impairment that substantially limits one or more major life activities; (b) a record of such an impairment; or (c) regarded as having such an impairment. *42 USC* §12102(2); *29 CFR* §1630.2(g); EEOC Compliance Manual §902.1.

To establish a "disability" under the first alternative, Shields has to establish that she had "[1] a physical or mental impairment [2] that substantially limits [3] one or more major life activities." 42 U.S.C. § 12102(1)(A).

At issue here is whether Shields bone biopsy surgery and recovery substantially limited Shields ability to work at Credit One during the time her doctor put her out of work on a leave of absence.

The undisputed evidence shows that Shields's impairment "substantially limit[ed]" her ability to perform these major life activities. As amended by the ADAAA, the ADA expressly provides that the "determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures," such as medication, medical supplies, or other aids. 42 U.S.C. § 12102(4)(E)(i) (emphasis added). The ADA

further states that an impairment need only substantially limit one major life activity in order to give rise to a covered disability. *Id.* § 12102(4)(C). The statute also provides that, as a general matter, the definition of "disability" is to be "construed in favor of broad coverage of individuals" under the ADA, "to the maximum extent permitted by the terms" of the Act. *Id.* § 12102(4)(A).

The definition of "substantially limits," in particular, is to "be interpreted consistently with the findings and purposes" of the ADAAA, *id.* § 12102(4)(B), which includes the admonition that "the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis," see ADAAA, § 2(b)(5), 122 Stat. at 3554. *See also* 29 C.F.R. § 1630.2(j)(1)(i) ("Substantially limits' is not meant to be a demanding standard.").

While the district court appears to concede in its order granting summary judgment for Credit One that Shields was substantially limited in a major life activity including her ability to perform her job for the period in which Dr. Hillock extended her leave of absence from June 21, 2018 to July 12, 2018[234], Credit One

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[2] District Court's Order ("Order"), 5:11-7:2.

[3] This appears to be based on the district court accepting the conclusion reached by the court of appeals in is published decision, *Shields v. Credit One Bank, N.A.*, 32 F.4th 1218 (9th Cir. 2022).

[4] When the appellate court decides a legal issue (which happen here when the court of appeals decided the standard to be used in deciding whether Plaintiff was disabled for purposes of the ADA), whether explicitly or by necessary implication, that decision generally is *not open to relitigation* in subsequent proceedings in the same case. *See Chevron v. USA, Inc. v. Bronster*, 363 F.3d 846, 849 (9th Cir. 2004); *United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1186-1187 (9th Cir. 2001). Thus, a Ninth Circuit decision on a legal issue becomes the "law of the case" and is binding upon the district court on remand, as well as upon any subsequent Ninth Circuit panel hearing a new appeal in the matter. *Jeffries v. Wood*, 114 F.3d 1484, 1489 (9th Cir. 1997)(en banc).

attempts to contest whether or not Shields was substantially limited during this period by arguing on summary judgment that Shields' physical therapist Sulit disagreed with this assessment and that Dr. Hillock never examined Shields before he extended her leave of absence to July 12, 2018 and that when he did examine her on July 10, 2018 he speculated that he would have told her to go back to work on that date even though see had been terminated 18 days earlier.

Thus Credit One wants this Court to attach a demanding standard to the definition of substantially limited which as just mentioned is one of the things the ADAAA was meant to eliminate.

First any testimony that Sulit gave about Shields' functionality based on his exam of Plaintiff on June 7, 2018 or her treating physician doctor Dr. Hillock gave regarding his examination of Shields on July 10, 2018, is not dispositive on what's at issue here, ie., was Shields able to work from June 21, 2018 to July 12, 2018.

What is dispositive in that Dr. Hillock unequivocally certified that Shields was unable to perform her job through at least July 12, 2018 and in particular was unable to work from June 21, 2018 to July 12, 2018. [ER pgs. 59-60, 69-72, 73-74; Shields Aff., ¶¶11, 17, Exs. 3-5.][5]

Whether Dr. Hillock actually saw and physically examined Shields before making the determination to extend Shields' return to work date on June 18, 2018 is neither here nor there. He is the doctor and if he thought he had to examine Shields before he extended her return to work date to July 12th, he would have seen her.

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[5] Although it was anticipated that Shields would recover from these surgery-related injuries by June 20, 2018, Dr. Hillock concluded on June 18, 2018 that Shields was not able to return to work until at least July 12, 2018. [ER pgs. 60, 73-74, Shields Aff., ¶17, Ex. 5; ECF No. 76-1, Exhibit A-17, Exhibit K to Dr. Hillock's deposition.]

Credit One or their counsel are not doctors and thus what they think is *not* relevant.

Further physical therapist Sulit was *not* asked to perform an assessment of whether Shields was able to perform the duties of her job [ER pg. 98, Sulit Depo. 44:18-21], nor was he asked to provide Shields any type of release to work or out-of-work note. [ER pgs. 98-99, Sulit Depo. 44:22-45:1.]

In addition Sulit had no reason to challenge or question Dr. Hillock judgment in initially saying that Shields was unable to work from April 20, 2018 to May 20, 2018 [ER pgs. 101-102, Sulit Depo. 50:13-51:1], extending the time period until June 20, 2018 [ER pgs. 103-104, Sulit Depo. 52:10-53:13] and finally extending the time period that Plaintiff was unable to work from June 21, 2018 to July 12, 2018 [ER pg. 104, Sulit Depo. 53:14-23.]

Sulit said that pain might have prevented Shields from returning to work sooner and would have recommended light duty or limited or part time hours [ER pgs. 99-100, Sulit Depo. 45:11-46:2], which there is *no* evidence of being offered in this case.

Sulit also indicated that a Functional Capacity Evaluation ("FCE") could have been performed to assess Shields ability to do her job based on the job duties contained in her job description but that was not done in this case. [ER pg. 107, Sulit Depo. 60:1-10.] In fact there in *no* evidence in this case that Credit One ever questioned whether Shields was disabled under the ADA such that she could or could not perform her job duties with her physical impairment(s) until she filed her complaint under the ADA.

Finally as to Dr. Hillock treatment of Shields, Credit One misstates Dr. Hillock's testimony and the record regarding Plaintiff ability to return to work[6].

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[6] Defendant's Opposition to Plaintiff's MSJ, pg. 11, lns. 24-26.

First this testimony relates to an examination performed by Dr. Hillock on July 10, 2018, 18 days after Shields had been terminated by Credit One on June 22, 2018. Second Dr. Hillock answered, "Speculating, I would not have given a restriction based on this. I would have told her to go to work."[7]

Thus whether Shields was able to go back to work at this point was *not* even relevant to the issues in this case because Shields had already been terminated (and Shields had already been put out of work by Dr. Hillock until July 12, 2018 at this point). Further Dr. Hillock was only speculating and this is irrelevant because of what he actually did, ie. he put Shields out of work until July 12, 2018 as set forth above and supplementary extended her being out of work until September 6, 2018.[8]

C. The Evidence is Undisputed that Shields was a Qualified Individual with a Disability under the ADA.

The ADA prohibits discrimination "against a qualified individual with a disability .... in regard to job application procedure, 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); *29 C.F.R.* §§1630.4 and 1630.13.

Title I of the ADA insures full opportunities for people with disabilities in the workplace by requiring reasonable accommodation of employees' disabilities by their employers. *Barnett v. U.S. Air, Inc.,* 228 F.3d 1105, 1110 (9th Cir. 2000). The ADA prohibits employers from discriminating against a disabled employee by "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an

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[7] ECF No. 76-1, Exhibit A-19, Hillock Depo. 40:11-12.

[8] ECF No. 76-1, Exhibit A-21, Exhibit M to Dr. Hillock's deposition.

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." *Barnett,* 228 F.3d at 1111 (quoting *42 U.S.C.* §12112(b)(5)(A)).

To analyze claims of whether an employer provided reasonable accommodations to a disabled employee, a court first must first determine if the individual is "otherwise qualified," to perform the essential functions of the job, and if not, whether the employee could perform these functions with a reasonable accommodations. *42 U.S.C.* §12111(8); *School Board of Nassau County v. Arline,* 480 U.S. 273, 287 n.17 (1987).

Whether an individual is "qualified" is a two-step analysis. The first step is to determine if the individual satisfied the prerequisites for the position, such as possessing the appropriate employment experience, skills, etc. *Bates v. United Parcel Service, Inc.*, 511 F.3d 974, 990 (9th Cir. 2007). The second is to determine whether the individual can perform his job's essential functions 'with or without a reasonably accommodation.' *Id.*

Here as to the first step, Shields had the appropriate employment experience, skill, etc. as when she was hired as a Human Resources Generalist I with Credit One on November 13, 2017, Plaintiff had 20+ years of Human Resources experience as well as expertise in ADP HRIS. [ER pgs. 57-58, Shields Aff., ¶2.]

Further as to step two, had she not been disabled by her bone biopsy surgery, Shields could have performed the essential functions of her job without a reasonable accommodation as she was performing her job satisfactorily prior to the time she found out that she might have bone cancer and needed the operation to confirm whether or not that was the case.

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D. At a Minimum there is an Issue of Material Fact for Trial on Whether Credit One Violated the ADA by Terminating Shields Because of her Disability.

"No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedure, 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); *29 C.F.R.* §§1630.4 and 1630.13.

A leave of absence may be required to reasonable accommodate an employee's disability under the ADA, where it would permit him upon his return to perform the essential functions of his job. *Humphrey v. Memorial Hospitals Assoc.*, 239 F.3d 1128, 1135-1136 (9th Cir. 2001); *Nunes*, 164 F.3d at 1247. Even an extended medical leave, or an extension of an existing leave period, may be a reasonable accommodation if it does not pose an undue hardship on the employer. If an employee's medical leave was a reasonable accommodation, then the employee's inability to work during the leave period would not automatically render the employee unqualified. *Id.*

"Unlike a simple failure to accommodate claim, an unlawful discharge claim requires a showing that the employer terminated the employee because of his disability." *Humphrey*, 239 F.3d at 1139. "Often the two claims, are, from a practical standpoint, the same." *Id.* "For the consequence of the failure to accommodate is....frequently an unlawful termination." *Id.* "For purposes of the ADA, with few exceptions, conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for termination." *Humphrey*, 239 F.3d at 1140. "[Thus], the link between the disability and termination is particularly strong where it is the employer's failure to reasonably accommodate a known disability that leads to discharge." *Id.*

In its order granting summary judgment for Credit One the district court questions (as did Credit One) whether the *Humphrey* analysis set forth above is the correct one to use in this case in deciding whether Credit One violated the ADA by terminating Shields employment instead of extending her leave of absence per her doctor orders.

The fact that Credit One had accommodated Shields with a leave of absence until the time they terminated her employment on June 22, 2018 indicates a *Humphrey* analysis is appropriate, but even if a pretext analysis is used under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), at a minimum issues of material fact exist for trial on whether Credit One terminated Shields because of her disability.

1. The Evidence is Anything but Clear and Undisputed that Shields was Terminated as Part of an Ongoing Restructuring and More Clearly Supports that her Position was Eliminated because her Duties had been Redistributed as a result of her Disability which Ultimately Lead to Shields' Termination.

The district court in it order granting summary concludes that because Credit One says that it terminated Shields as part of its restructuring of its Human Resources department that it is not reasonable under the fact presented to conclude otherwise.

Here while Krutchik might have been hired as the new department head of Human Resources and some employees were hired, fired or transferred after Krutchik was hired, there is *no* undisputed evidence like Credit One claims, and the district court agrees with, that this was part of an ongoing restructuring of the department.

Employees get hired, fired or transferred as a matter of course in businesses all the time. Even if Krutchik was *not* hired as the new department head, there would have been ongoing changes in the Human Resources Department at Credit One.

Further besides Krutchik claiming this to be the case at her deposition, there is *not* one bit of documentary or corroborative evidence to back this up.

Of all the firings, hiring and promotions claimed to be made by Krutchik as part of the supposed restructuring of the Human Resources department, Credit One has offered no documentation, ie, emails, faxes, letters or other correspondence to corroborate that the firings, hiring and promotions were made because of a restructuring of the Human Resources department.

And at her termination contrary to Shields being let go because of a restructuring, even though she was *not* given a written termination stating a reason for termination like most employers do, Shield was told by Yanez-Tourigny when she was terminated that "Since you have been off, your duties and responsibilities were re-distributed to other HR staff members. Someone had to do the monthly benefit billing. We couldn't just not do them while you were out. So we have eliminated the Human Resources Generalist position as we feel it is no longer necessary to have that position since other staff members have taken over all your responsibilities. We will not be filling the Human Resources Generalist position at the Bank thanks you for all your hard work". [ER pg. 61, Shields Aff., ¶23; Lago Depo. 31:15-21.]

This was corroborated by Yanez-Tourigny's February 11, 2019 fax to the Employment Security Division regarding Plaintiff's application for unemployment benefits in which she says in pertinent part:

> "On June 18, 2018 we received additional information from her doctor stating she could not return until July 12, 2018. The doctor stated, 'Patient has an appointment on July 10, at which point a return to work date will be discussed."
>
> "Karen's duties as a Human Resources Generalist had to be addressed on a daily basis; therefore, her daily responsibilities were divided and assumed by other employees in the HR Department. As time passed, the department decided her position was no longer necessary. On June 22, 2018 Karen was notified that her job was discontinued effective immediately." [ER pgs. 76, 109-110, Balaban Aff., ¶7, Ex. 5.]

Krutchik also agreed in her deposition that because of Shields medical issues/disability and her need for a leave of absence, her duties were redistributed to other employees which ultimately led to decision to eliminate her position and terminate her.

> "Q. Okay. But correct me if I'm wrong. Given what you just said, it seems clear that but for her disability and her need for a leave of absence and time off her position would not have been eliminated? Because you said right then, right there, hey, when she was off, we found that maybe we redistributed her activities and we didn't need her anymore. So had she not been disabled, had she not had cancer, had she not had the operation, had she not needed time for recovery, her position would not have been eliminated; correct, because…
>
> MS. SALMONSON: Objection. It misstates prior witness testimony. It calls for a legal conclusion. Misstates facts in this case with respect to whether and to what extent Ms. Shields had cancer.
>
> THE WITNESS: Again, we -- again, she was having medical issues. She went out. She needed to take care of her medical issues. We had no idea until the work, as business kept going on, until the work was being either done or we decided we didn't need that work anymore. We were making lots of changes throughout my time there to make any decision as far as the position. So we could not make that decision when, you know, right when she started her leave.
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> BY MR. BALABAN: Q. Okay. But, again, if she had not been disabled and if she had not had cancer and if she had not needed the time off medically, there was no reason that you would have eliminated her position because you just said that, hey, once she was off and we redistributed her duties, we found that we didn't need her position anymore?
>
> MS. SALMONSON: Objection. Misstates prior witness testimony. It calls for speculation. Asked and answered. You can go ahead and answer. But, Mr. Balaban, I think that the witness has answered your question regardless of how many times you ask it.
>
> THE WITNESS: Again, we cannot -- I don't know, maybe six months or nine months or whatever with changes being done in the department and technology being enhanced and so forth, I don't know that that position would have been needed at that point. **But when we looked at it, once we redistributed the roles and responsibilities, looked at the business needs, we decided that at that point we did not need that position anymore.** What the future was going to hold with that position I can't answer that. It's speculating." [ECF No. 76-9, 17:3-19:4, Krutchik Depo. 52:3-54:4.]

So the evidence more clearly supports that the reason for Shields termination was because her duties and responsibilities were redistributed because of her

disability which ultimately led to her termination, not that her position was eliminated as part of a restructuring having nothing to do with her disability and the need to redistribute her duties.

As set forth in *Humphrey* above, "[F]or purposes of the ADA, with a few exceptions, conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for termination. *Humphrey*, *supra,* 239 F.3d at 1140. Thus just like in *Humphrey* where the employer said they didn't terminate Humphrey because of her disability but rather because of tardiness and absenteeism[9], here Credit One is trying to say that Shields was terminated as part of a reorganization (having nothing to do with her disability), even though in is clear from Yanez-Tourigny's letter, what she told Shields when she was terminated and Krutchik's deposition testimony that Shields was terminated because her duties and responsibilities were redistributed as part of her disability accommodations (ie. leave of absence) which ultimately led to her termination.

2. By Redistributing Shields Duties to Other Employees Once she became Disabled and then Terminating her Because her Position was no Longer Needed, Credit One was in Violation of the ADA.

As the record supports, Riggs took over the majority of Shields job duties when Shields left on disability leave until Riggs left Credit One. [ER pgs. 86, 87, Riggs Depo. 41:12-18; 53:13-23.][10] Further Riggs was new to the organization when Shields went on leave and did not have job duties of her own (although she took on additional projects as necessary). [ER pg. 85, Riggs Depo. 27:21-24.]

Thus it is clear that even if Credit One didn't rehire a Human Resources

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[9] See *Humphrey*, 239 F.3d at 1139

[10] Although Credit One claims differently, according to Lago she didn't pick up any of Shields job duties when she went on a leave of absence. [ER pg. 93, Lago. Depo. 23:16-21.]

Generalist (as they claim) to replace Shields, they did replace the duties Shields was performing by having Riggs (and possible Lago or others) perform the duties instead.

And by doing so and then terminating Shields, Credit One violated the ADA.

It is clear that "but for" Plaintiff becoming disabled and having to initially go on a leave of absence, her daily responsibilities would *not* have been divided and assumed by other employees in the HR Department. Further "but for" Shields' requesting that her return to work date be extended on June 18, 2018 her employment with Credit One would *not* have been terminated.

Thus Credit One's self-serving argument that the elimination of Shields' position was *not* dependent on Shields becoming disabled and having her job duties assumed by other employees, is *not* supported by the evidence.

There would have been *no* reason to eliminate Shields' position if she had *not* become disabled in the first place, needing a leave of absence which precipitated other employees having to assume her daily job duties, and then needing an extension of her leave of absence which led to Credit One eliminating Shields' position.

Further if an employer could terminate an employee by redistributing their duties during a leave of absence and then say we don't need you anymore because your duties and responsibilities are being done by someone else, the ADA would provide no protection for an individual who is unable to work during their leave of absence.

Finally if an employer was able to redistribute an employee's duties and responsibilities and eliminate their position once they were put on a leave of absence to get around their obligations (or continue obligations) to accommodate an employee under the ADA, they would do this in every case.

3. Evidence of Calls, Emails and Text Messages Shields Received from Krutchik, Riggs and Lago does not Support that her Position was going to be Eliminated as Part of a Restructuring of the HR Department.

While Credit One claims that the elimination of Shields' position was part of an on-going restructuring of the department, the calls, emails and text messages Shields received from employees Krutchik, Riggs and Lago make no mention of an impending termination because her position is being eliminated because of a department restructuring.

In addition, after Shields medical leave of absence started, she received multiple texts, calls and emails from various Credit One employees stating how much she was missed and that they could not wait for her to return. Plaintiff even received a flower arrangement from the HR department after her bone biopsy was completed. [ER pg. 59, Shields Aff., ¶14.]

For example on May 3, 2018 Shields emailed and texted Krutchik, "Just got back from the oncologist. ALL benign. NO sign of ANY cancer ANYWHERE!!! Thank you for all your support and prayers. Xoxoxo" to which Krutchik emailed back, "Yay!!! Great news!!! Come back we miss you" [ER pgs. 76, 111-113, Balaban Aff., ¶8, Ex. 6.]

In addition Shields also emailed and texted Riggs a similar message on May 3, 2018 which said "Just got back from the oncologist. ALL benign. NO sign of ANY cancer ANYWHERE!!! Now on to physical therapy. Thank you for all your support and prayers. Xoxoxo", to which Riggs emailed back, "Yay!!! That is amazing news!!! Does that mean that you get to come back next week?!?" And on June 15, 2018 Riggs emailed Shields about her expected return, "Happy Friday!!! This is my last Friday without you, right!?! Hope you're feeling well." [ER pgs. 76, 114-117, Balaban Aff., ¶9, Ex. 7.]

Further Riggs thought that Shields was coming back and Riggs was not told

that her taking over Plaintiff's job duties was not a permanent thing. [ER pgs. 88-89, Riggs Depo. 62:20-63:7.]

Finally on May 3, 2018 Megan Lago texted Shields, "Thanks. Looking forward to you coming back. Christine mentioned she missed you" [ER pgs. 76, 118-120, Balaban Aff., ¶10, Ex. 8.] Further Lago got no indication that Plaintiff wasn't coming back. [ER pg. 93, Lago Depo. 23:3-7.]

None of these messages make any reference to an impending elimination of Shields position or that she was no longer needed. In fact all these messages indicate that Plaintiff is coming back and they want her back!

4. Finally the Temporal Proximity to when Shields Informed Credit One that she Needed an Extension of her Return to Work Date and when she was Terminated Indicates that the Real Reason Shields was Terminated was Because of her Need to Extend her Leave due to her Disability.

Finally the proximity between when Shields informed Credit One that she needed an extension to her return to work date and when she was terminated strongly indicates that Credit One was claiming that they were eliminating Shields position to hide the fact that they were really terminating her because they didn't want to extend her leave of absence.

Without more Shields was an at will employee and could have been terminated at any time for any reason or no reason at all. But the fact that Credit One waited until four days after Shields informed them that she needed to extend her return to work date is telling as to the true motivation on why she was terminated.

After all they could have terminated Shields on any number of occasions after she informed them of the need for a leave of absence.

In fact, since Credit One had the right to redistribute her duties and eliminate her position, they could have done it immediately after Shields informed them of the need for a leave of absence.

This is supported by the district court's specific findings that Krutchik was allegedly implementing changes even before Shields went on leave and before Riggs was brought on, to streamline much of the work that Shields was doing. [11]

So why *not* terminate Shields right after Krutchik came aboard or after Riggs was hired and started doing much of Shields duties. Why give her a leave of absence when Credit One was going to eliminate her position anyway.

Thus it is reasonable to conclude that because Credit One could have terminated Shields much earlier than they did had they wanted to, that the reason they terminated her when they did was *not* because of a restructuring but rather because Credit One was unhappy that her leave of absence kept being extended.

E. The District Court Clearly Erred when it Failed to Credit Shields' Evidence and Make all Reasonable Inferences for Shields as the Non-Moving Party and Instead Improperly Chose to Weight the Evidence and Decided Genuine Material Disputed Facts Itself Instead of Leaving that for a Jury at Trial.

Under Rule 56, summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). A fact is material if it "might affect the outcome of the suit under the governing law," and a dispute of fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

"[I]n ruling on a motion for summary judgment, '[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.'" *Tolan*, 572 U.S. at 651 (per curiam) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 255.

On a motion for summary judgment, courts must not weigh the evidence or assess credibility, but rather must make all reasonable inferences in favor of the

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[11] District Court's Order ("Order"), 17:8-13.

non-moving party. See *Tolan*, 572 U.S. at 655-59 (per curiam) (holding that, in determining whether a dispute about a material fact is "genuine," the trial court must not weigh the evidence and instead must draw all reasonable inference in the nonmoving party's favor).

First and foremost the district court credited the evidence of Credit One, the moving party seeking summary judgment and failed to credit Shields evidence over and over again. See *Tolan*, 572 U.S. at 659.

As set forth above, the district court credited evidence that Shields was terminated as part of a restructuring of its Human Resources department by Krutchik but failed to credit or make reasonable inferences on Shields evidence like a judge is supposed to do on summary judgment.

In furtherance of the district court's finding that Shields was terminated as part of a restructuring or reorganization, it made specific finding that "Krutchik implemented a series of changes to procedures and personnel in the department" by March 2018 including terminating Barber, promoting Lago from a recruiting supervisor to the newly created role director of human resources and hiring Riggs for the new director of benefits. [12] Further the district court found in April of 2018, a human resources representative position was eliminated, and a month later, Lago's former supervisor, Mike Young, was let go.[13]

The district court made these findings despite the fact no documentation, ie, emails, faxes, letters or other correspondence to corroborate that the firings, hiring and promotions were made because of a restructuring of the Human Resources department.

As set forth above, employees get hired, fired or transferred as a matter of

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[12] Order, 14:5-8.

[13] Order, 14:8-10.

course in businesses all the time and even if Krutchik was *not* hired as the new department head, there would have been ongoing changes in the Human Resources Department at Credit One.

Thus the district court made a huge inference for Credit One based mostly on what Krutchik said in her deposition and Credit One and its attorneys' argued in their motion for summary judgment even though there was *not* shred of documentary evidence that directly said that any of the hiring, transfers or firings, including Shields', was because of an restructuring or reorganization of the human resources department.

On summary judgment reasonable inferences are supposed to be credited for the non-moving party not the moving party and here the district court made a key inference on suspect evidence at best.[14]

Once the district court credited Credit One evidence or found that they met their initial burden to proffer a legitimate nondiscriminatory reason for Shields' termination, the district court was required to credit any Shields put forward and accept all the evidence of the non-moving party, ie. Shields, as true, make all reasonable inference for the non-moving party, and not make credibility determination on the evidence or witnesses.

As set forth above and further set forth here, the district court failed miserably in this part of its analysis. In fact the district court failed to credit one piece of evidence presented by Shields finding that none of the evidence was "specific and substantial" enough to create a genuine dispute of material fact as to pretext.

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[14] While the district court made this initial finding under the context of Credit One proffering a legitimate, nondiscriminatory reason for Shields' termination under the *McDonnell Douglas* standard of shifting burdens, the district court's final conclusion was that as a matter of law in is not reasonable on these facts to find that Shields was terminated for a reason other than the restructuring, ie., because of her disability.

First the evidence Shields has presented is specific and substantial, much more so than Credit One's evidence as was discussed above and will further be discussed below. Secondly when evaluating whether the non-moving party has met its burden on the summary judgment to show pretext, "specific and substantial" is not the standard that the court should ultimately look at. Rather as the Supreme Court has said over and over again, most recently in *Tolan* referenced throughout this Brief, a court is supposed look at the evidence in a light most favorable to the nonmoving party and make all reasonable inferences for that party, and then determine whether it is reasonable for a jury to return a verdict for the nonmoving party.

Looking first at the only piece of documentary evidence in this case that gives a reason why Shields was terminated, ie., Yanez-Tourigny's February 11, 2019 fax to the Employment Security Division, the district court says about this evidence, besides the fact that it was sent more than seven months after Shields termination, that "nothing in this fax implies a causal link between her leave extension and discharge", "nor is it inconsistent with Credit One's proffered reason for terminating Shields."[15]

First it is unclear how the district court could come to a finding that nothing in this fax implies a causal link between her leave extension and discharge when the first paragraph of the fax sets forth Shields' request to extend her leave and then the second paragraph talks about her being terminated as result of Credit One dividing and having other employees assume Shields duties to the extent she was no longer needed anymore. So "but for" Shields having to go on a medical leave because of her disability, her duties would not have to be divided up and assumed by other employees which directly gave Credit One a reason to terminate Shields.

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[15] Order, 22:8-10.

How does that *not* provide a causal link between Shields disability, her needing a leave of absence and then an extension of her leave of absence, and then being terminated, especially when all reasonable inferences are supposed to be made in Shields' favor as the non-moving party.

Second the reason given in the fax by Yanez-Tourigny is inconsistent with the reason Credit One proffered for Shields' termination. Credit One said that Shields' termination was because they were restructuring or reorganizing the HR department while the fax and what Yanez-Tourigny told Shields at her termination makes clear that once Shields requested an extension of her leave of absence the decision was made to terminate her employment because her duties were already divided up and assumed by other employees, which only happened because Shields was disabled and had to go on medical leave.

And again as set forth above, it would be in direct violation of the ADA for an employer to divide up and have other employees assume the disabled employees duties as a result of their disability and then say we're letting you go, we've reorganized and we don't need you anymore.

Further this piece of evidence is related to what Krutchik said in her deposition, "[B]ut when we looked at it, once we redistributed the roles and responsibilities, looked at the business needs, we decided that at that point we did not need that position anymore."

Thus a jury could reasonably conclude on these pieces of evidence alone, that the termination was because of Shields' disability, *not* because Credit One independently (without regard to anything dealing with Shields' disability) decided to terminate her because they were restructuring the HR Department. Yet the district court failed to credit this evidence for Shields and find that with this evidence a jury could reasonably find in Shields' favor.

Further the district court failed to credit the fact that Riggs pick up the

majority of Shields duties once she became disabled.

As set forth above, Riggs took over the majority of Shields job duties when Plaintiff left on disability leave until Riggs left Credit One. [ER pgs. 86, 87, Riggs Depo. 41:12-18; 53:13-23.] Further Riggs was new to the organization when Shields went on leave and did not have job duties of her own (although she took on additional projects as necessary). [ER pg. 85, Riggs Depo. 27:21-24.]

First the district court tries to suggest that Riggs didn't take over the majority of Shields job duties but rather they were somewhat equally split between Riggs, Lago and Yanez-Tourney, which the record does not support.[16] As set forth above, according to Lago she didn't pick up any of Shields job duties. [ER pg. 93, Lago Depo. 23:16-21.]

But even if some of Shields duties were picked up by Lago or Yanez-Tourney, that does change the fact that because of Shields disability her job was *not* held open for her to come back to after she recovered from her disability as required by both the ADA and FMLA. The district court fails to credit this fact as it was required to do because when looking at the evidence in the light most favorable to Shields as the non-moving party and making all inferences for her on the evidence, it undermines Credit One's argument that the reason Shields was terminated was because they were reorganizing or restructuring the HR Department.

Next the district court fails to credit Shields evidence that employees including that Krutchik, Riggs and Lago corresponded with Shields by text and email that she was coming back once her doctor released her and all of them wanted and expected her back.

When looking at this evidence in Shields favor, ie., that Shields was coming

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[16] Order, 22:16-21-6.

back once her doctor released and the various employees thought she was coming back and wanted her back, this leads to the reasonable inference that her doctor extending her leave of absence was the reason she was suddenly terminated. If it was because of the reason Credit One relies on, that it was part of a restructuring, this would have been known far in advance, not four days after Shields told them that her leave of absence had been extended.

For example as set forth above, on May 3, 2018 Shields emailed and texted Krutchik, "Just got back from the oncologist. ALL benign. NO sign of ANY cancer ANYWHERE!!! Thank you for all your support and prayers. Xoxoxo" to which Krutchik emailed back, "Yay!!! Great news!!! Come back we miss you" [ER pgs. 76, 111-113, Balaban Aff., ¶8, Ex. 6.]

At that point Shields' job duties had already been divided and assumed by other employees, so why would Krutchik be emailing Shields, "Come back we miss you" if in fact she knew that Shields would be terminated as part of a restructuring. After all, the only thing that changed between this date and June 22, 2018 when Shields was terminated was the fact that Shields doctor extended her leave of absence on June 18, 2018. So a reasonable conclusion would be that the termination happened because of Shields request to have her leave of absence extended per her doctor's orders.

Further Riggs emailed Shields as late as June 15, 2018 (three days before her leave extension request and one week before her termination) about Shields expected return, "Happy Friday!!! This is my last Friday without you, right!?! Hope you're feeling well." [ER pgs. 76, 114-117, Balaban Aff., ¶9, Ex. 7.]

The district court discounts this evidence because Riggs was not part of the decision making process, but because Riggs took over the majority of Shields duties once Shields went on her leave of absence and thought that Shields was coming back and that her taking over Shields' job duties was not a permanent thing

[ER pgs. 88-89, Riggs Depo. 62:20-63:7], you would think that Riggs would have been told much in advance Credit One was reorganizing the department and that Shields was going to be terminated and thus Riggs would be picking up Shields' job duties permanently.

These might not be the only conclusions to make on this evidence, but it was the district court's job to credit evidence to Shields which a jury could reasonable conclude in her favor which was *not* done.

Finally, the fact that Shields was terminated just four days after she gave Credit One notice that her leave of absence had been extended by her doctor leads to the inescapable conclusion that this event is what led to her termination.

Again this isn't the only conclusion that can be come to given the other alleged evidence in the case. But a judge's job on summary judgment is to identify genuine issues of material facts, not to decide the issues of material facts themselves.

While the district court acknowledges the temporal proximity between Shields' leave extension request and her termination, it discounts its significance by finding that Credit One proffered reason for the termination, ie., because of a corporate reorganization, diminishes the significance of the closeness in time.[17]

But by doing so the district court is weighing the evidence. It is a making credibility determination on witnesses and the evidence.

Obviously the district court thinks that Credit One's claim of corporate reorganization and Krutchik's testimony at her deposition in support of the changes she supposedly made in furtherance of the reorganization is credible. This is despite the fact that there is *no* corroborative documentary evidence in support of any of these changes, terminations, etc., being made because of a reorganization

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[17] Order, 17:4-6.

and even though the one document that does give a reason for Shields' termination, ie., Yanez-Tourigny's February 11, 2019 fax to the Employment Security Division, says the reason was because Shields' job duties were divided and assumed by other employees (mostly Riggs), so she wasn't needed anymore[18], thus making it reasonable to conclude that Shields' disability was the cause of her termination.

Lastly as already mentioned above, the fact that Credit One terminated Shields four days after she requested her leave of absence be extended, suggests that was the cause of her termination given the fact that if it was because of a corporate reorganization like Credit One claims, it should have happened a lot earlier.

As the district court finds in its order, the reorganization process began before Shields went on leave and continued in her absence[19]and even before Shields requested her initial leave.[20]

Thus Credit One could have terminated Shields even before she went on her medical leave of absence and there would have been no argument that it was because of her disability since she wasn't even claiming she had a disability or needed a leave of absence for her disability at that point.

Further Credit One could have terminated Shields a short time after she went on her leave of absence after Credit One had her job duties divided and assumed by other employees.

But the fact Credit One terminated Shields four days after she requested her leave of absence be extended reasonably suggests that Credit One was not happy

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[18] Which is what Yanez-Tourigny told Shields when she was terminated her and Krutchik corroborated in her deposition

[19] Order, 17:8-9.

[20] Order, 17:11-12.

about Shields request to extend her leave of absence and wanted to put an end to it once and for all.

As the Supreme Court found in *Tolan* and is the case here, "[b]y failing to credit evidence that contradicted some of its key factual conclusions, the court improperly 'weigh[ed] the evidence' and resolved disputed issues in favor of the moving party." *Tolan*, 572 U.S. at 657.

"Considered together", [the facts in this case as in *Tolan*] "lead to the inescapable conclusion that the court below credited the evidence of the party seeking summary judgment and failed properly to acknowledge key evidence offered by the party opposing that motion." *Tolan*, 572 U.S. at 659.

Finally what the Supreme Court said in closing in *Tolan* is equally applicable in this case, "[T]he witnesses on both sides come to this case with their own perceptions, recollections, and even potential biases. It is in part for that reason that genuine disputes are generally resolved by juries in our adversarial system. By weighing the evidence and reaching factual inferences contrary to Tolan's [here Shield's] competent evidence, the court below neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party." *Tolan*, 572 U.S. at 660.

For this and other reasons stated herein, the district court's grant of summary judgment for Credit One must be overturned so the case can proceed to a trial on the merits of all the genuine issues of material fact outlined above.

VIII.

CONCLUSION

It is clear that the district court had one objective in mind when it decided Credit One's motion for summary judgment and that was to decide the motion in Credit One's favor no matter what the evidence was.

Instead of looking at the evidence objectively and letting the evidence lead it to a decision based on the prevailing law, the district court instead made findings of fact and conclusion of law which led it to the outcome it desired in favor of Credit One.

Here as set forth above, on summary judgment a judge is supposed to look at the evidence for the non-moving party and make all reasonable inferences for the non-moving party. Further the court is supposed to accept all the evidence of the non-moving party as true, make all reasonable inference for the non-moving party, and not make credibility determination on the evidence or witnesses.

In other words it is not the court's function to be a fact finder on the evidence presented but only rule for the moving party if it can conclude that *no* reasonable jury could find for the non-moving party when accepting the evidence as presented by the non-moving party and making all reasonable inferences on that evidence for the non-moving party.

As set forth above, the district court credited the evidence of Credit One, the moving party seeking summary judgment and failed to credit Shields' evidence properly and by doing so was *not* accepting Shields evidence and making all reasonable inferences on that evidence.

The district court choose to accept Credit One's assertion that Shields was terminated because of a department restructuring based almost totally on assertions made by the then department head Krutchik at her deposition but failed to properly credit Shields' evidence to the contrary that at a minimum created a genuine issue of material fact for trial on whether Shields was terminated because of a department restructuring like Credit One says or because of her disability because Credit One did not want to extend Shields' leave of absence per her doctor's order.

And by doing so the district court was impermissively weighing the evidence, making judgment on what evidence was credibly, relevant, compelling,

etc., all of which are the job of the jury *not* the judge.

Finally on the issue of whether Shields was disabled, the district court appeared to concede that Shields was disabled, given the Court of Appeals reported decision on that issue among other things, including that Shields' doctor unequivocally said that she was unable to perform her job at Credit One until at least July 12, 2019.

Thus it is incumbent on the Court of Appeals to overturn the district court's grant of summary judgment for Credit One with instructions that the case to proceed forward to a trial on its merits.

DATED: 02/09/2024

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STATEMENT OF RELATED CASES

Appellant is aware of no related cases pending before this court.

CERTIFICATE OF COMPLIANCE

Pursuant to F.R.A.P. 32(a)(7)(B)(i) and Circuit Rule 32-1, I certify that this Brief of Appellants is proportionately spaced, has a typeface of 14 points and contains 11,982 words.

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Circuit Rule 25-5(f) a true and correct copy of the foregoing document was electronically served via the Appellate ECF system to the following persons:

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