No. 23-1087

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Tonya C. Huber,
Plaintiff-Appellant,

v.

Westar Foods, Inc.,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of Nebraska

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

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STATEMENT OF INTEREST

Congress tasked the Equal Employment Opportunity Commission (EEOC) with interpreting and enforcing the employment provisions of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101 *et seq.* *See* 42 U.S.C. §§ 12116 and 12205a (regulatory authority), 12117(a) (enforcement authority). This case presents important questions concerning whether—and, if so, when—disciplining an employee for a workplace policy violation caused by the employee's disability constitutes discrimination "on the basis of disability." The EEOC has a significant interest in the proper resolution of these questions and thus offers its views. *See* Fed. R. App. P. 29(a)(2).

STATEMENT OF ISSUES[1]

1. Whether disciplining an employee for a workplace policy violation that was caused by the employee's disability, in at least some circumstances, constitutes discrimination "on the basis of disability" under the ADA.

Apposite authority:

[1] The EEOC takes no position on any other issue in this appeal.

- *Gruttemeyer v. Transit Auth.*, 31 F.4th 638 (8th Cir. 2022)
- *Weatherly v. Ford Motor Co.*, 994 F.3d 940 (8th Cir. 2021)
- *EEOC v. Dolgencorp, LLC*, 899 F.3d 428 (6th Cir. 2018)
- *King v. Steward Trumbull Mem'l Hosp., Inc.*, 30 F.4th 551 (6th Cir. 2022)

2. Whether an employer acts "on the basis of disability" when its determination that an employee violated a workplace policy is premised on a belief about the existence, nature, or extent of the employee's disability.

Apposite authority:

- *Sanders v. Union Pac. R.R. Co.*, 108 F.4th 1055 (8th Cir. 2024)
- *Hustvet v. Allina Health Sys.*, 910 F.3d 399 (8th Cir. 2018)
- *Sprenger v. Fed. Home Loan Bank of Des Moines*, 253 F.3d 1106 (8th Cir. 2001)
- *Gillen v. Fallon Ambulance Serv., Inc.*, 283 F.3d 11 (1st Cir. 2002)

STATEMENT OF THE CASE

A. Statement of the Facts.[2]

Westar Foods, Inc. operates a chain of Hardee's restaurants. *Huber v. Westar Foods, Inc.*, 106 F.4th 725, 732 (8th Cir.), *reh'g granted and opinion vacated*, No. 23-1087, 2024 WL 3892871 (8th Cir. Aug. 21, 2024). In December 2018, Westar hired Tonya Huber as a store manager at a Nebraska location. *Id.* There, Huber's duties included ensuring that the store was opened each day, and her shifts began at 5:00 a.m. *Id.* As pertinent here, Westar maintained a "call-in" policy, which provided that if a store manager will be late for work or if they are unable to work, they must call their district manager immediately and at least two hours before the start of their shift "when possible." *Id.* at 733; *see also* App. 60, R. Doc. 39-3 at 2.

Huber has diabetes, which requires her to take insulin, and she occasionally sought help from Westar to ensure that she could take her insulin at work. *Huber*, 106 F.4th at 732. Her managers responded to these requests with disdain or indifference. For example, when Huber asked a

[2] We draw these facts from the panel opinion and present them in the light most favorable to Huber. *See Anderson v. KAR Glob.*, 78 F.4th 1031, 1036 (8th Cir. 2023).

district manager for help finding a room-temperature area to store her insulin (because "[t]he restaurant's kitchen and office ran upwards of ninety degrees"), the manager responded, "That's a [you] problem, not a [me] problem." *Id.* A different district manager, Cindy Kelchen, later suggested that Huber store her insulin in the restaurant's freezer. *Id.* When Huber noted that the freezer was not room temperature, Kelchen responded, "Then I don't know what to tell you." *Id.* When Huber asked Kelchen for help finding time to eat meals during her shifts so she could take her insulin, Kelchen told Huber to get better at time management. *Id.*[3]

In December 2019, Huber suffered an incapacitating diabetic episode. *Id.* Due to a low blood glucose level, Huber experienced symptoms consistent with hypoglycemia, which included severe confusion and disorientation. *Id.* Huber managed to drive to a clinic, where medical staff gave her an IV and sedated her. *Id.* At some point, Huber was able to make calls to her son and boyfriend. *Id.* Huber's son and boyfriend reported that she was incoherent and difficult to comprehend during these calls, and

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[3] For her part, Kelchen testified that these conversations "never existed," and that she was not aware Huber had diabetes before Westar fired Huber. App. 82, R. Doc. 39-12 at 7.

Huber does not remember making them. *Id.* Meanwhile, Kelchen learned that Huber had not come into work and that Hardee's was not open. *Id.* at 733. Kelchen called Huber's emergency contact, her son, who told Kelchen that Huber was at a clinic, that her "levels" were off, and that she would call back. *Id.* That evening, the clinic discharged Huber, but would not allow her to drive given her condition, and Huber remained delirious, disoriented, and ill. *Id.* As a result, Huber did not call Kelchen that day. *Id.*

The next day, Huber was still ill and recovering from the sedatives she had received the day before, and she slept through the 5:00 a.m. start of her shift. *Id.* When Huber awoke, she immediately called Kelchen, explained what had happened, and provided a doctor's note by email. *Id.* In response, Kelchen yelled at Huber and demanded to know why Huber had not followed the call-in policy. *Id.* Although Huber explained that her diabetic episode had made it extremely difficult to call, Kelchen did not believe her. *Id.* Immediately after that call, Westar decided to fire Huber. *Id.*

Days later (and the day after Christmas), while Huber was still on leave, the company sent her a termination letter. *Id.* at 734. Notwithstanding Huber's diabetic episode, the letter explained that Westar believed Huber could have called in to report her absences, stating: "Based

on your explanation to [Kelchen] that you were driving and in contact with your son … you should have been able to provide notification of your absences to the Company…."[4] App. 72, R. Doc. 39-10 at 2. There is no indication in the record that Westar took any action to investigate or verify Huber's assertion that her diabetic episode prevented her from calling in.

B. District Court and Panel Decisions.

Huber filed this action, asserting an ADA disability-based disparate-treatment claim[5] (among other claims). After discovery, the district court granted summary judgment to Westar. App. 750-54, 758, R. Doc. 66 at 6-10, 14.

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[4] The termination letter also noted that Westar had previously disciplined Huber for violating the company's attendance policies. *Huber*, 106 F.4th at 734; App. 71, R. Doc. 39-10 at 1. There appears to be no dispute, however, that Huber's December 2019 absence triggered her termination (i.e., Westar would not have fired Huber but for its determination that she violated the call-in policy in December 2019).

[5] Courts recognize multiple theories of disability discrimination, including disparate treatment, disparate impact, and failure to accommodate. *See generally Nunes v. Mass. Dep't of Corr.*, 766 F.3d 136, 144-45 (1st Cir. 2014). Although the panel, the district court, and the parties referred to Huber's ADA claim simply as a "disability discrimination" claim, Huber appears to proceed exclusively under a disparate-treatment theory rather than failure-to-accommodate or disparate-impact theories.

On appeal, a split panel reversed. *Huber*, 106 F.4th at 744. The panel majority began its analysis by acknowledging that "typically the 'rule in discrimination cases is that if an employer honestly believes that an employee is terminated for misconduct, but it turns out later that the employer was mistaken about whether the employee violated a workplace rule, the employer cannot be liable for discrimination.'" *Id.* at 736 (quoting *Richey v. City of Indep.*, 540 F.3d 779, 784 (8th Cir. 2008)).

Nonetheless, the majority continued, "an employer's argument of good faith will not always preclude a discrimination case from reaching a jury." *Id.* at 737. Instead, the majority held that when an employer asserts a good-faith argument, its reason for firing the employee must be "sufficiently independent" from the plaintiff's disability, and "if the reason for an employer's adverse employment action is 'so inextricably related to' the disability, 'they cannot be considered independently of one another.'" *Id.* (quoting *Gilooly v. Mo. Dep't of Health & Senior Servs.*, 421 F.3d 734, 740 (8th Cir. 2005), and *Womack v. Munson*, 619 F.2d 1292, 1297 (8th Cir. 1980)). "In these situations," the majority explained, "whether the employee's disability caused the conduct that violated company policy and whether the employer acted in good faith are both questions of fact." *Id.* at 738.

Applying this "inextricably related" standard, the panel majority determined that a reasonable jury could find that Huber's "diabetic episode was not independent from her firing." *Id.* Westar fired Huber "because she failed to call in to work on days she was experiencing a diabetic episode." *Id.* And while "Huber argues that her disability precluded her from calling in," Kelchen "did not believe Huber and assumed she was able to abide by the call-in policy on the days of her diabetic episode" and "Westar's decision to terminate Huber was based on this assumption." *Id.* Accordingly, the majority concluded, "a jury must decide whether Westar's termination decision was made in good faith or supports a showing of pretext." *Id.*

Judge Stras dissented from the majority's decision on the ADA claim. *Huber*, 106 F.4th at 744-50 (Stras, J., concurring in part, dissenting in part). The partial dissent rejected the majority's "inextricably related" standard, which it described as "a new intertwinement test." *Id.* at 748. That test, the partial dissent argued, was unsupported by precedent, inconsistent with the ADA's text, and contrary to the caselaw from other courts. *Id.* at 748-50.

This Court thereafter granted en banc review and vacated the panel opinion. *Huber v. Westar Foods, Inc.*, No. 23-1087, 2024 WL 3892871, at *1 (8th Cir. Aug. 21, 2024).

SUMMARY OF ARGUMENT

The district court's grant of summary judgment on Huber's ADA claim should be reversed for two principal reasons.

First, as a baseline proposition, disciplining an employee for workplace policy violations caused by the employee's disability, in at least some circumstances, constitutes discrimination "on the basis of disability." As the examples discussed below demonstrate, this may occur where the employer's failure to provide a reasonable accommodation led to the employee's policy violation or where an employer would excuse similar policy violations resulting from non-disability-related causes. Although these examples differ somewhat from the facts of Huber's case, they establish that an employer's "honest belief" that an employee violated a workplace policy is neither an absolute defense nor a dispositive fact. Instead, the employer's belief must be examined in the light of the surrounding circumstances, which may sometimes undermine—or even

defeat—the employer's reliance on an alleged workplace policy violation as a justification.

Second, applying that context-dependent approach here, an examination of the surrounding circumstances undermines Westar's reliance on Huber's alleged policy violation. That examination reveals that Westar's determination that Huber violated the company's call-in policy hinged entirely on its unfounded assumption that her diabetic episode did not prevent her from calling in, and that Westar made no effort—reasonable or otherwise—to confirm whether that assumption was correct. In other words, Westar would not have fired Huber but for its judgment about whether and how her impairment affected her abilities.

This fact yields a narrow and sensible way to resolve this case: where, as here, an employer's determination that an employee violated a workplace policy is premised on a judgment about the existence, nature, or extent of the employee's disability, then the employer acted "on the basis of" the employee's disability. This narrow approach is consistent with existing caselaw from this Court and other courts of appeals, imposes a minimal and manageable obligation on employers to conduct individualized inquiries when acting on the basis of disability, and

prevents employers from disciplining employees based on unfounded assumptions, myths, or stereotypes about individuals with disabilities.

ARGUMENT

I. Disciplining an employee for a workplace policy violation that was caused by the employee's disability, in at least some circumstances, constitutes discrimination "on the basis of disability" under the ADA.

The ADA prohibits employers from discriminating against qualified individuals "on the basis of disability." 42 U.S.C. § 12112(a). A plaintiff must therefore establish a causal connection between her disability and an adverse action taken by her employer. *Brown v. City of Jacksonville*, 711 F.3d 883, 889 (8th Cir. 2013). The "ultimate question" is whether the plaintiff has presented enough evidence for a reasonable jury to find that her employer acted because of her disability. *Gruttemeyer v. Transit Auth.*, 31 F.4th 638, 648 (8th Cir. 2022) (quoting *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1135 (8th Cir. 1999) (en banc)).[6]

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[6] Here, the district court and the panel evaluated Huber's ADA claim under the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), focusing on the third step. At that step, this Court has held, the plaintiff's "burden to show pretext 'merges with the ultimate burden of persuading the court that [she was] the victim of intentional discrimination.'" *Torgerson v. City of Rochester*, 643 F.3d 1031, 1046 (8th Cir. 2011) (en banc) (quoting *Tex. Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248,

This case concerns whether—and if so, when—disciplining an employee for a workplace policy violation caused by the employee's disability constitutes discrimination "on the basis of disability." This question has pulled courts in different directions.[7] On the one hand, as explained above, a qualified individual with a disability need only show a causal connection between her disability and an adverse action. So, for example, "if a disability caused [an employee's] missed work, and missed work caused termination, it doesn't seem like much of a stretch to conclude that … his disability caused his termination." *Weatherly v. Ford Motor Co.*, 994 F.3d 940, 946 (8th Cir. 2021); *see also Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128, 1139-40 (9th Cir. 2001) ("For purposes of the ADA, with a

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256 (1981)). Thus, "[b]ecause the record has been fully developed with respect to the motion for summary judgment," this Court may dispense with *McDonnell Douglas* and "proceed directly to the 'ultimate question of discrimination *vel non*.'" *Otto v. City of Victoria*, 685 F.3d 755, 758 (8th Cir. 2012) (quoting *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 (1983)).

[7] *See generally* Kelly Cahill Timmons, *Accommodating Misconduct under the Americans with Disabilities Act*, 57 Fla. L. Rev. 187, 205-22 (2005); Adi Goldiner, *Moral Accommodations: Tolerating Impairment-Related Misconduct under the Americans with Disabilities Act*, 54 Colum. Hum. Rts. L. Rev. 171, 199-202 (2022); Michael S. Verdichizzi, Note, *Understanding Terminations for "Disability-Caused Misconduct" As Failures to Provide Reasonable Accommodation*, 97 Notre Dame L. Rev. 1735, 1742-52 (2022).

few exceptions, conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for termination." (footnote omitted)); *Den Hartog v. Wasatch Acad.*, 129 F.3d 1076, 1088 (10th Cir. 1997) (rejecting view that ADA "contemplates a stark dichotomy between 'disability' and 'disability-caused misconduct'").

On the other hand, courts have held that an employee's violation of workplace policies remains a valid reason to impose discipline. This Court has said that "if an employer honestly believes that an employee is terminated for misconduct," then "the employer cannot be liable for discrimination." *Richey v. City of Indep.*, 540 F.3d 779, 784 (8th Cir. 2008). As a result, some courts have stated that the ADA does not require an employer to excuse a workplace policy violation merely because it was caused by a disability. *See, e.g.*, *Miners v. Cargill Commc'ns, Inc.*, 113 F.3d 820, 823-24 & n.6 (8th Cir. 1997) (although alcoholism is a disability, "the ADA does not protect alcoholics or perceived alcoholics from the consequences of alcohol-related misconduct"); *Neal v. E. Carolina Univ.*, 53 F.4th 130, 152 (4th Cir. 2022) ("[M]isconduct—even misconduct related to a disability—is not itself a disability and may be grounds for dismissal." (citation omitted)); *McElwee v. County of Orange*, 700 F.3d 635, 641 (2d Cir.

2012) ("[W]orkplace misconduct is a legitimate and nondiscriminatory reason for terminating employment, even when such misconduct is related to a disability."). The EEOC's technical assistance and enforcement guidance likewise state that an employer may discipline an employee for disability-caused misconduct if "the conduct rule is job-related and consistent with business necessity and other employees are held to the same standard," EEOC, *Applying Performance and Conduct Standards to Employees with Disabilities* § III(B)(9), 2008 WL 4786697, at *9 (Sept. 2008)[8] ("Technical Assistance"),[9] and that "an employer is not required to excuse

[8] Also available at https://www.eeoc.gov/laws/guidance/applying-performance-and-conduct-standards-employees-disabilities.

[9] The EEOC's technical assistance distinguishes between performance standards and conduct rules. *Compare* Technical Assistance § III(A), 2008 WL 4786697, at *3 (discussing performance standards, i.e., "quantitative and qualitative requirements for performance of essential functions"), *with id.* § III(B), 2008 WL 4786697, at *9 (conduct rules, i.e., "violence, threats of violence, stealing, or destruction of property," "insubordination towards supervisors and managers," employee respect for clients and customers, "inappropriate behavior between coworkers," misuse of e-mail or the Internet, "safety and operational rules," and rules "prohibit[ing] drinking or illegal use of drugs in the workplace"); *see also* EEOC, *Diabetes in the Workplace and the ADA* (May 2013), https://www.eeoc.gov/laws/guidance/diabetes-workplace-and-ada (question 13, discussing "performance that does not meet [an employer's] standards" and "violations of conduct rules"). That distinction does not appear to matter here. For purposes of this case, whether Westar's call-in

past misconduct even if it is the result of the individual's disability," EEOC, *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA*, 2002 WL 31994335, at *25 (Oct. 2002) ("Enforcement Guidance").[10]

This case does not require this Court to decide whether disciplining an employee for a disability-caused policy violation, standing alone, is enough to establish the causation element of a disability-based disparate-treatment claim (i.e., whether such discipline *always* constitutes discrimination "on the basis of disability"). Even assuming that an employer need not excuse a policy violation on the sole ground that it resulted from a disability, that would not mean that disciplining an employee for disability-caused violations is always lawful. To the contrary, relevant caselaw reveals circumstances in which an employer could honestly believe that a qualified employee with a disability violated a workplace policy *and* disciplining the employee for that conduct would still violate the ADA (absent an affirmative defense).

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policy was a performance standard or a conduct rule does not alter the analysis.

[10] Also available at https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada.

For example, one such situation occurs when the employee's alleged policy violation results from the employer's failure to provide a reasonable accommodation. The ADA affirmatively obliges an employer to reasonably accommodate an employee's known disability, which can include modifying workplace policies. *See* 42 U.S.C. §§ 12112(b)(5)(A), 12111(9)(B). If an employee asks his employer to modify a workplace policy as an accommodation, the employer "may not illegitimately deny an employee a reasonable accommodation to [that] general policy and use that same policy as a neutral basis for firing him." *EEOC v. Dolgencorp, LLC*, 899 F.3d 428, 435 (6th Cir. 2018); *see also Sanders v. Union Pac. R.R. Co.*, 108 F.4th 1055, 1062-63 (8th Cir. 2024) (employer violated ADA where it refused to modify fitness-for-duty exam and then relied on employee's poor exam results to impose work restrictions). As this Court has recognized, in these types of cases, "accommodation and termination claims are two sides of the same coin." *Weatherly*, 994 F.3d at 946; *see also Holly v. Clairson Indus., L.L.C.*, 492 F.3d 1247, 1263 (11th Cir. 2007) ("Allowing uniformly-applied, disability-neutral policies to trump the ADA requirement of reasonable accommodations would utterly eviscerate that ADA requirement.").

Another situation occurs when the employer treats policy violations caused by a disability differently than similar violations arising from other non-disability-related causes (or treats violations resulting from some disabilities differently than similar violations resulting from other disabilities). *Cf.* Enforcement Guidance, 2002 WL 31994335, at *25 ("An employer may discipline an employee with a disability for engaging in … misconduct if it would impose *the same discipline* on an employee without a disability." (emphasis added)). Indeed, meting out different discipline to employees who engaged in similar conduct is a classic form of disparate treatment. *See Wallin v. Minn. Dep't of Corr.*, 153 F.3d 681, 687 (8th Cir. 1998) ("Employees are similarly situated [for purposes of comparator status] when they 'are involved in or accused of the same or similar conduct and are disciplined in different ways.'" (quoting *Williams v. Ford Motor Co.*, 14 F.3d 1305, 1309 (8th Cir. 1994))).

This type of disparate discipline is readily apparent in the attendance context. Suppose, for example, that an employer has "a policy requiring employees to notify supervisors before 9:00 a.m. if they are unable to report to work." Enforcement Guidance, 2002 WL 31994335, at *20. If the employer "would excuse an employee from complying with this policy

because of emergency hospitalization due to a car accident, then the employer must do the same thing when the emergency hospitalization is due to a disability." *Id.*; *see also King v. Steward Trumbull Mem'l Hosp., Inc.*, 30 F.4th 551, 562-63 (6th Cir. 2022) (excusing disability-caused absences was reasonable accommodation where employer's policies "includ[ed] relaxed notice requirements for emergency leave requests and a five-day look back period for retroactive requests"). The same logic would apply if the employer would excuse a no-notice absence resulting from other sudden or emergency situations, like a death in the family. Notably, the Westar human resources advisor who drafted Huber's termination letter appeared to acknowledge in her deposition that if an employee was involved in a car accident that prevented them from providing advance notice of an absence, failing to call in under those circumstances would not violate Westar's call-in policy. App. 391, R. Doc. 42-5 at 22.

As these examples illustrate, an employer's honest or good faith belief that an employee violated a workplace policy is neither a complete defense nor a dispositive fact. Instead, the employer's belief must be examined in the light of the surrounding circumstances, which may sometimes undermine—or even defeat—the employer's reliance on an

alleged workplace policy violation as a justification. That is, in at least some circumstances, disciplining an employee for a disability-caused policy violation constitutes discrimination "on the basis of disability."

II. An employer acts "on the basis of disability" when its determination that an employee violated a workplace policy is premised on a belief about the existence, nature, or extent of the employee's disability.

Consistent with the scenarios outlined above, the panel opinion similarly concluded that an employer's honest or good faith belief that an employee violated a workplace policy does not necessarily preclude a finding that the employer discriminated "on the basis of disability." It held that "[w]here an employer seeks to assert a good faith argument, the underlying reasons for firing must be sufficiently independent from the protected status or activity." *Huber*, 106 F.4th at 737 (cleaned up). "Thus," the panel majority continued, "if the reason for an employer's adverse employment action is so inextricably related to the disability, they cannot be considered independently of one another." *Id.* (cleaned up). Under this standard, the majority concluded, a reasonable jury could find that Huber's disability "was not independent from her firing" because her diabetic episode caused her to violate the call-in policy, and consequently, Westar was not entitled to summary judgment. *Id.* at 738.

The panel opinion did not spell out what "inextricably related" meant or how to measure whether an employer's stated rationale for disciplining an employee is "sufficiently independent" from an employee's disability itself. The partial dissent opined that "inextricably related" simply meant "some connection." *Id.* at 748-49. If that were correct, then any causal connection between an employee's disability and the policy violation for which she was disciplined would be enough to preclude summary judgment. So understood, the partial dissent explained, that standard would conflict with dicta from the Supreme Court's decision in *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003), the weight of authority from other circuits, and EEOC guidance, all of which the partial dissent read as supporting the proposition that an employer may discipline an employee for a workplace violation even when the violation was caused by a disability. *Id.* (collecting cases); *see also* Technical Assistance § III(B)(9), 2008 WL 4786697, at *9 ("The ADA does not protect employees from the consequences of violating conduct requirements even where the conduct is caused by the disability."); Enforcement Guidance, 2002 WL 31994335, at *25 ("[A]n employer is not required to excuse past misconduct even if it is the result of the individual's disability.").

This Court need not decide whether the majority's "inextricably related" standard or the partial dissent's characterization of that standard is correct. Applying the context-dependent approach set forth above, *supra* Part I, an examination of the surrounding circumstances reveals that Westar's rationale for firing Huber was "related" to her disability in a specific and materially different way than the majority or dissent recognized—that is, the relationship consists of *more* than a simple causal chain from disability to violation to termination. Specifically, viewed in the light most favorable to Huber, the facts show that Westar's determination that Huber violated the call-in policy was premised on its belief about whether and how her impairment affected her abilities.

Westar's call-in policy required employees to provide advance notice of absences "*when possible*." Huber told Westar that her diabetic episode prevented her from providing advance notice when she missed work. In turn, Westar's determination that Huber had violated the call-in policy hinged entirely on its belief that Huber's diabetes did not prevent her from calling in. Indeed, its termination letter explicitly stated: "Based on your explanation to [Kelchen] that you were driving and in contact with your son … *you should have been able to provide notification of your absences* to the

Company…." App. 72, R. Doc. 39-10 at 2 (emphasis added).[11] In other words, Westar would not have fired Huber but for its judgment about whether and how her impairment affected her abilities.

This fact yields a narrow and sensible way to resolve this case: when a reasonable jury could find that the employer's determination that an employee violated a workplace policy is based on a judgment about the existence, nature, or extent of the employee's disability, then the jury could find that the employer acted "on the basis" of the employee's disability.

This approach comports with the fact that the ADA generally calls for an individualized assessment when an employer takes an adverse action based on an employee's disability. *See, e.g.*, *Hustvet v. Allina Health Sys.*, 910 F.3d 399, 411 n.5 (8th Cir. 2018) ("individualized assessment" required to determine whether employee with impairment can perform essential job functions with or without accommodation (quoting *McGregor v. Nat'l R.R. Passenger Corp.*, 187 F.3d 1113, 1116 (9th Cir. 1999))); *Sanders*, 108 F.4th at 1062 ("individualized assessment" required before imposing work

[11] Westar's witnesses, including Kelchen, offered similar testimony. *See* App. 88-89, R. Doc. 39-12 at 13-14; App. 390-91, R. Doc. 42-5 at 21-22.

restrictions based on employee's alleged impairment); *Keith v. Cnty. of Oakland*, 703 F.3d 918, 923 (6th Cir. 2013) (ADA mandates individualized inquiry to determine whether individual with disability is qualified for position).

When an employer forgoes that individualized inquiry and instead acts on its own pre-conceived notions about the employee's disability, it risks liability. *See Gillen v. Fallon Ambulance Serv., Inc.*, 283 F.3d 11, 29 (1st Cir. 2002) ("Even if the employer's belief is honestly held, on particular facts a jury still might conclude that it rested on an unfounded stereotype (and, therefore, constituted discrimination)."). Although a plaintiff is not *required* to show that her employer acted based on "archaic attitudes, erroneous perceptions, [or] myths," *Sanders*, 108 F.4th at 1061 (citation omitted), such a showing should suffice to establish causation.

At a minimum, the honest belief doctrine does not sanction willful ignorance. *Cf. Hogarth v. Thornburgh*, 833 F. Supp. 1077, 1085 (S.D.N.Y. 1993) ("The congressional goal of eliminating … thoughtless discrimination is hardly advanced if an employer is permitted to raise a 'pure heart, empty head' defense, claiming that it was unaware of the relation between the handicap and its manifestations…."); *see also Alexander v. Choate*, 469 U.S.

287, 295 (1985) (disability discrimination under Rehabilitation Act includes acts that result from "thoughtlessness and indifference" or "benign neglect," not only those motivated by "invidious animus").[12] Where, as here, an employer knows an employee has an impairment, makes no attempt to apprise itself about whether or how the employee's impairment affects her abilities, and then takes an adverse action premised on its belief about whether and how the employee's impairment affects her abilities, the employer's "honest belief" defense should not compel summary judgment for the employer.

This narrow approach also avoids the concerns raised by the partial dissent. To start, this approach is entirely consistent with the view that "basing an employment decision on 'workplace misconduct' would [not] violate the [ADA] just because [the conduct] was 'related to [a] disability.'" *Huber*, 106 F.4th at 749 (last alteration in original) (quoting *Raytheon Co.*, 540 U.S. at 54 n.6). It thus presents no conflict with the partial dissent's reading of *Raytheon*'s dicta, authority from other circuits, or EEOC guidance.

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[12] "[D]ecisions interpreting either the ADA or the Rehabilitation Act are applicable and 'interchangeable' to claims under each statute." *Hill v. Walker*, 737 F.3d 1209, 1216 (8th Cir. 2013).

As applied in this case, this approach also makes clear that the causal connection between Huber's disability and Westar's decision to fire her was stronger than the partial dissent suggested. The partial dissent acknowledged that Huber's diabetic episode "led to a violation of the company's attendance policy" and "[t]he attendance-policy violation then led to her termination," but then characterized this "causal chain" as "attenuated." *Id.*

As an initial matter, nothing about that causal link is so remote or indirect as to render it "attenuated." *Cf. FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 383 (2024) (stating, in different context, that a causation requirement "rules out attenuated links" where the challenged action is "far removed from its distant (even if predictable) ripple effects"); *Utah v. Strieff*, 579 U.S. 232, 238-39 (2016) (in Fourth Amendment context, listing factors to consider in determining whether causal link between unlawful stop and evidence seized is "attenuated"). To the contrary, there is no dispute that Westar made the decision to fire Huber the day after learning about her diabetic episode, and this Court has long recognized that the temporal proximity between an adverse action "and the disclosure of a potentially debilitating condition" is enough to suggest a causal link.

Sprenger v. Fed. Home Loan Bank of Des Moines, 253 F.3d 1106, 1113-14 (8th Cir. 2001).

True, as the partial dissent points out, Westar knew Huber had diabetes well before her December 2019 absence. *Huber*, 106 F.4th at 746 n.7. But construing the facts in Huber's favor, Westar learned about the extent or severity of her diabetes only after she suffered a debilitating episode. If the temporal proximity between the disclosure of an impairment and an adverse action is enough to suggest causation, then the temporal proximity between the disclosure of an impairment's severity and an adverse action should have the same effect.[13] Even putting all of that aside, Huber's disability and her termination are related in another way. That is, a reasonable jury could find that Westar's determination that Huber violated the policy (i.e., that she was *capable* of calling in and failed

[13] Relatedly, the ADA expressly covers impairments that are "episodic or in remission" that "would substantially limit a major life activity when active." 42 U.S.C. § 12102(4)(D); *see also Rinehart v. Weitzell*, 964 F.3d 684, 688 (8th Cir. 2020). The fact that an employer tolerates such an impairment when it is inactive or in remission does not give the employer license to fire an employee when the impairment becomes active or when the employee has an episode.

to do so) rested on Westar's judgment about the existence, nature, or extent of her disability. That is enough to establish causation.

This narrow approach is consistent with the decisions from this Court that the partial dissent suggested "would now come out differently" under the majority's ruling. *Huber*, 106 F.4th at 749-50. In *McNary v. Schreiber Foods, Inc.*, 535 F.3d 765, 766-68 (8th Cir. 2008), for example, the employer fired an employee for allegedly sleeping on the job in violation of company policy. Although the employee's Graves' disease arguably caused his fatigue, *id.* at 766 & n.2, nothing in the employer's decision turned on what it believed about the employee's condition. Similarly, in *Bharadwaj v. Mid Dakota Clinic*, 954 F.3d 1130, 1134-35 (8th Cir. 2020), the employer forced a doctor out of his job based on his "interpersonal difficulties" and "inability to get along with others." Even if the employee's mental impairment contributed to those difficulties, as the partial dissent suggests, the employer's determination did not turn on any particular belief about the nature of that impairment.

Finally, the partial dissent warned that the majority's ruling "create[d] a lose-lose situation for employers," forcing them to "think twice about imposing discipline if there is any possibility that the misconduct

lacked 'sufficient[] independen[ce]' from an employee's disability." *Huber*, 106 F.4th at 750 (alterations in original). The narrow approach set forth here, however, would not require an employer to excuse a policy violation on the sole ground that the violation was related to an employee's disability.

To be sure, this approach would require an employer to think more carefully—and to conduct an individualized assessment—before disciplining an employee based on a judgment about the existence, nature, or extent of her disability. But this deliberation-forcing mechanism is a feature, not a bug. It ensures, as Congress intended, that employers do not act based on unfounded assumptions, myths, or stereotypes about individuals with disabilities. *See* Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2(a)(7), 104 Stat. 327 (finding that individuals with disabilities "have been faced with restrictions and limitations" based in part on "stereotypic assumptions not truly indicative of the individual ability of such individuals"); *EEOC v. Wal-Mart Stores, Inc.*, 477 F.3d 561, 571 (8th Cir. 2007) (discussing ADA's goal of "protect[ing] disabled individuals from discrimination based on prejudice, stereotypes, or unfounded fear" (citation omitted)). And in any event, causation alone

does not establish liability: a plaintiff still must show that she is a qualified individual with a disability, and employers have affirmative defenses at their disposal. *See* 42 U.S.C. §§ 12113(a) (business necessity), 12113(b) (direct threat).

CONCLUSION

For these reasons, this Court should reverse the district court's grant of summary judgment on Huber's ADA claim and remand for further appropriate proceedings.

Respectfully submitted,

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This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 5,745 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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I certify that on October 9, 2024, I electronically filed the foregoing brief in PDF format with the Clerk of Court via the appellate CM/ECF system. I certify that all counsel of record are registered CM/ECF users, and service will be accomplished via the appellate CM/ECF system.

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