No. 00-1303

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KEVIN W. WILLIAMS

Plaintiff-Appellant

v.

HERMANSON FAMILY
LIMITED PARTNERSHIP I,

Defendant-Appellee

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

The Honorable Alan B. Johnson, United States District Judge
Civil Action No. 96-WY-2490-AJ

REPLY BRIEF OF APPELLANT KEVIN W. WILLIAMS

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STATEMENT OF FACTS

People who use wheelchairs are unable to enter the Crawford Building because of a single 5½-inch step at its entrance. During trial of this case, Appellant Kevin W. Williams presented specific evidence of a plan to provide wheelchair access to the Crawford Building: Raise the sidewalk from the step to the curb over a length of 23½ feet to cover the rise of 5½ inches. Williams's architectural expert, Noré Winter, described this plan and testified that it would be "relatively easy to accomplish," (App. at 335), that it would not threaten or destroy the historic significance of the building, (id. at 310-11, 328-33, 432-33), and that John Salmen, an expert hired by Appellee Hermanson Family Limited Partnership I ("Hermanson"), had, in fact, suggested this plan in response to a similar suggestion by Winter. (Id. at 334.) (This plan to raise the sidewalk from the step to the curb at the Crawford Building will be referred to herein as the "Winter/Salmen plan.") Winter also testified that implementing this plan would cost approximately $10,750. (See id. at 335-36.) Williams's financial expert demonstrated, based on a number of different metrics, that an amount far higher than this would be very inexpensive in light of Hermanson's resources. (See generally id. at 469-95.) Williams also demonstrated that, prior to this litigation, Hermanson and its predecessor had received three estimates ranging from $2,195 to $2,500 to ramp the Crawford Building. (Id. at 600, 602, 640-42, 749, 751, 752.) There is no evidence in the record to contradict any of this or to suggest that the Winter/Salmen plan was anything but easily accomplishable and able to be carried out without much difficulty or expense.

Hermanson's statement that Winter was only testifying to what was "possible" and "'not how necessarily it would [be] done,'" (Appellee Hermanson Family Limited Partnership I's Answer Brief ("Ans. Br.") at 3-4), is simply wrong. In the passage cited by Hermanson, Winter in fact states: "The first question that was asked of me was did I think it was possible, not how necessarily would it be

done . . . ." (App. at 349 (emphasis added).) Hermanson ignores Winter's specific testimony that the plan -- endorsed by Salmen -- to raise the sidewalk from the step to the curb was "relatively easy to accomplish." (Id. at 335).

Williams originally filed suit as to four different locations owned by Hermanson; all four were tried together and the District Court dismissed the case at the close of Williams's evidence. In its Order Granting Motions for Judgment as a Matter of Law ("Order"), the District Court did not make specific findings of fact or provide record citations for the facts it discussed. (See App. at 189-202.) In holding that Williams had not carried his burden of proof, the District Court focused on three alleged shortcomings of Williams's case: Lack of evidence concerning "engineering requirements for maintaining structural integrity;" lack of evidence concerning the impact of his proposal on adjacent businesses; and the fact that the City of Denver was not a party. (Id. at 198.) The District Court did not specify which of the four locations originally at issue were the subject of each of these objections. Williams will demonstrate below that none of the three is appropriately part of his prima facie case; the first two are also factually irrelevant to the Crawford Building, the only one of the four locations now on appeal.

"[E]ngineering requirements for maintaining structural integrity" are not relevant to a plan to raise the sidewalk outside the structure in question, the Winter/Salmen plan for the Crawford Building. Structural and engineering issues were relevant to other plans at other buildings, where there was a discussion, for example, about whether internal ramps should be supported structurally from above or below. (See, e.g., id. at 324.) Structural issues might have be relevant to a proposal, which Winter made early in the litigation but later abandoned, to cut and tilt the stoop in front of the Crawford Building. Although Winter did not discuss this obsolete proposal in his direct examination,[1] **Hermanson resurrected**

[1] Hermanson states that Winter's proposals included "a ramp involving cutting and bending the cast iron stoop" and cites Winter's direct testimony in

it on cross examination and suggested that it might have had structural implications. However, since this was not the proposal Williams or his expert was advocating at trial, any such structural implications were irrelevant, as are Hermanson's many references in its Answer Brief to cutting or removing the stoop. (See Ans. Br. at 4, 7, 13, 25.)

The second factor on which the District Court apparently relied was that Williams did not "consider the effect of [his] proposed ramping on adjacent businesses." (See App. at 198.) Again, this matter was relevant to other ramps at other locations where, for example, there was a dispute whether the ramps would extend laterally into neighboring store-fronts. (See, e.g., id. at 386-87.) The Winter/Salmen proposal, however, simply involved raising the sidewalk from the step to the curb. There is no evidence in the record that this plan would have had any impact on other businesses.[2]

Hermanson raises in its Answer Brief several other factual issues on which the District Court did not rely; none of them is supported by the record. For example, Hermanson refers several times to an additional step beyond the 5½-inch step at the front of the Crawford Building. (See Ans. Br. at 3 (citing App. at 592, 646) & 29.) There is no such additional step. The testimony Hermanson cites concerns the Crawford building when it was occupied by a Laura Ashley store, prior to the Nine West tenancy and prior to

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support. (Ans. Br. at 4 (citing App. at 333-36).) There is no mention of cutting the stoop on the pages to which Hermanson cites or anywhere else in Winter's direct testimony. (See generally App. at 305-48.)

[2] Hermanson argues that the Winter/Salmen plan "called for running a ramp and handrail perpendicular to and across a busy sidewalk, forcing pedestrians to cross the street, and plainly affecting access to adjacent businesses." (Ans. Br. at 28-29.) As will be demonstrated below, see infra at 14 n.8, when the regulations are applied to the undisputed facts, no handrail was required and no such impact on adjacent businesses would have occurred.

the present litigation. (See App. at 592 (Susan Spencer testifying about a reference to the "Laura Ashley Building" in Exhibit 1A (id. at 755)); id. at 646 (Spencer testifying about a "drawing for Laura Ashley").) Spencer testified, however, that the Crawford building was "gutted" when Nine West moved in. (See id. at 611.) There was no evidence in the record that any additional step or height existed at the building at the time of the litigation, when it was occupied by Nine West. To the contrary, Winter testified that "the shop entry is an increase of five and a half inches above the sidewalk," (id. at 439), and photographs corroborate this testimony. (Id. at 734 & 736).

Finally, Hermanson refers to a range of costs from $7,000 to $18,000. (See Ans. Br. at 5 (citing App. at 410).) The testimony Hermanson cites concerns all of the locations originally at issue. Williams presented evidence specific to the Crawford Building that the cost to provide access would be approximately $10,750, (App. at 335-36), and that Hermanson had received estimates to do this that ranged from $2,195 to $2,500. (Id. at 600, 602, 640-42, 749, 751, 752.) Hermanson does not challenge this; nor does it challenge the conclusion of Williams's financial expert that -- from a cost perspective -- building four ramps at much greater expense would be easily accomplishable and able to be carried out without much difficulty or expense. (Id. at 468.)

ARGUMENT

I. Standard of Review

The District Court in this case entered judgment in favor of Hermanson under Rule 50 of the Federal Rules of Civil Procedure because it held, as a matter of law, that Williams had failed to establish a prima facie case. (See App. at 190-91, 198, 200.) This Court reviews an order pursuant to Rule 50 de novo, construing the evidence and inferences in the light most favorable to the nonmoving party. Greene v. Safeway Stores, Inc., 98 F.3d 554, 557 (10th Cir. 1996).

Because the trial was to the court, the District Court likely should have based its decision on Rule 52(c). Crawford v. Northeastern Oklahoma State Univ., 713 F.2d 586, 587 (10th Cir. 1983) (construing former Rule 41(b), predecessor to Rule 52(c)).[3] **Rule 52(c) requires that the judgment be "supported by findings of fact . . . ." Fed. R. Civ. P. 52(c). Generally, an appellate court reviews findings of fact made pursuant to Rule 52 under a "clearly erroneous" standard, while questions of law are reviewed de novo. Transwestern Publishing Co. LP v. Multimedia Mktg. Assocs., Inc., 133 F.3d 773, 775 (10th Cir. 1998). "Whether the district court failed to consider or accord proper weight or significance to relevant evidence are questions of law we review de novo." Blankenbaker ex rel. Harvey v. United Transp. Union, 878 F.2d 1235, 1244 (10th Cir. 1989) (citations omitted), cert. denied, 493 U.S. 1074 (1990).**

Although the District Court was required to "find the facts specially and state separately its conclusions of law," Fed. R. Civ. P. 52(a), cited in Fed. R. Civ. P. 52(c), it provided no record citations in its Order and, with the exception of a description of the 5½-inch step, made no findings of fact or conclusions of law specific to the Crawford Building. (App. at 192; see generally id. at 189-202.) This is especially egregious here, as the question whether barrier removal is readily achievable "is to be determined on a case-by- case basis." Preamble to Regulation on Nondiscrimination on The Basis of Disability by Public Accommodations And in Commercial Facilities, 28 C.F.R. Part 36, app. B ("Preamble") at 646 (1999). "Broad and general findings, not explicitly tethered to any particular testimony - especially in [a] context which demands penetrating case by case, fact bound analysis - simply do not provide the foundation for proper appellate review." See Sanchez v.

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[3] Hermanson states that "the trial court dismissed the case under Fed. R. Civ. P. 41(a)(2)." (Ans. Br. at 1.) There is no basis in the record for this assertion.

Colorado, 97 F.3d 1303, 1316 (10th Cir. 1996), cert. denied, 520 U.S. 1229 (1997). Under such circumstances, it is appropriate for this Court to "till the same ground." Id.; see also Burger v. New York Inst. of Technology, 94 F.3d 830, 835 (2d Cir. 1996) (holding that where the lower court did not make sufficient factual findings, the appellate court must view evidence in the light most favorable to the appellant). For this reason and because the issues before this Court are the weight to be accorded relevant testimony and whether the evidence presented by Williams established a prima facie case, this Court should review the District Court's ruling de novo.

II. Williams Only Needs to Satisfy His Initial Burden of Production to Shift That Burden to Hermanson.

Williams urges this Court to adopt his view and that of the Department of Justice ("DOJ") that the defendant bears the ultimate burden of proof under 42 U.S.C. § 12182(b)(2)(A)(iv)[4] **on the question whether barrier removal is readily achievable.**[5](See Ans. Br. at 11 (quoting, in part, § 12182(b)(2)(A)(v)).) The

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[4] Unless otherwise noted, statutory citations are to Title 42 of the United States Code.

[5] See Opening Brief of Appellant Kevin W. Williams at 19; Brief for the United States as Amicus Curiae at 12-25. Hermanson's argument that the plaintiff should bear the ultimate burden on this question is based on its attempt to distinguish subsections 12182(b)(2)(A)(i) through (iii), on the one hand, from subsections (iv) and (v) on the other. (See Ans. Br. at 10-11.) Its argument is seriously undermined by the words it elected to leave out when it quoted subsection (v). This subsection is quoted in full below, with the text omitted by Hermanson in italics:

> ***where an entity can demonstrate that the removal of a barrier under clause (iv) is not readily achievable***, a failure to make ***such*** goods, services, [or] facilities, ***privileges, advantages, or accommodations*** available through alternative methods if such methods are readily achievable.

initial clause -- omitted by Hermanson -- is precisely the language upon which Williams and the DOJ rely in support of their argument that the defendant bears the ultimate burden to show that removal of a barrier is not readily achievable. **This Court does not, however, have to reach the question of the ultimate burden of proof to hold in favor of Williams. Because the District Court ruled at the close of Williams's evidence, the only question before this Court is whether Williams presented sufficient evidence to satisfy his burden of production and put Hermanson to its proof.**

Even on questions on which the plaintiff bears the ultimate burden of proof, he is not required, in his case in chief, to anticipate and disprove every potential objection the defendant may raise. Rather, he may make a basic showing -- a prima facie case -- and shift the burden of production to the defendant. A familiar application of this principle is the question whether discrimination has occurred in a case brought under Title VII of the Civil Rights Act of 1964. See § 2000e et seq. Under that statute, the plaintiff bears the ultimate burden of proving discrimination. Reeves v. Sanderson Plumbing Prods, Inc., 530 U.S. 133, 120 S. Ct. 2097, 2106 (2000); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). He can shift the burden of production to the defendant by showing that the challenged employment action took place "under circumstances which give rise to an inference of unlawful discrimination." Burdine, 450 U.S. at 253. The plaintiff does this by establishing his prima facie case, that is, by showing: that he belongs to a protected class; that he applied and was qualified for an open position; that he was rejected; and that, after his rejection, the position remained open. See id. at 253 n.6 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)). The prima facie case raises an inference of discrimination because "we presume these acts, if otherwise unexplained, are

more likely than not" based on discrimination. Id. at 254 (internal quotes and citations omitted).

Once the plaintiff has established a prima facie case, the defendant has the burden of production to show a legitimate, nondiscriminatory reason for its action. Id. That is, once the plaintiff makes a basic showing, the defendant is required to explain why it believes the acts in question do not constitute discrimination. The purpose of shifting the burden of production to the defendant is, among other things, "to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity" to respond to the defendant's objections. Id. at 255-56. Although the Burdine Court used this process "to sharpen the inquiry into the elusive factual question of intentional discrimination" -- and thus focused on the question whether the defendant's proffered reasons were pretexts for intentional discrimination -- it noted that "[t]his evidentiary relationship between the presumption created by a prima facie case and the consequential burden of production placed on the defendant is a traditional feature of the common law." Id. at 255 n.8. Ultimately, "[t]he McDonnell Douglas division of intermediate evidentiary burdens serves to bring the litigants and the court expeditiously and fairly to this ultimate question." Id. at 253.

An analogous procedure to shift the burden of production under § 12182(b)(2)(A)(iv) of Title III of the Americans with Disabilities Act ("ADA") would "bring the litigants and the court expeditiously and fairly to [the] ultimate question" whether barrier removal is readily achievable.[6]

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[6] This Court has acknowledged that the McDonnell Douglas/Burdine burden-shifting framework may be used in cases brought under the ADA where intent is not an issue. See Smith v. Midland Brake, Inc., 180 F.3d 1154, 1178 n.12 (10th Cir. 1999) ("[W]e use the burden-shifting mechanism, not to probe the subjective intent of the employer, but rather simply to provide a useful structure by which the district court, when considering a motion for summary judgment, can determine whether the various parties have advanced sufficient evidence to meet their

Assuming, arguendo, that the plaintiff has the ultimate burden of proof under this provision, it is reasonable to permit him to shift the burden of production to the defendant following a basic showing of facts which, "if otherwise unexplained, . . . more likely than not" show that it is readily achievable to remove a challenged barrier to access. Just as an employment discrimination plaintiff is not required to anticipate and disprove in his case in chief every possible reason the employer may eventually offer for the adverse employment action, a Title III plaintiff should not have to anticipate and disprove every possible objection -- no matter how unlikely or irrelevant -- to readily achievable barrier removal. Instead, placing the burden of production on the defendant after an initial showing by the plaintiff will "frame the issue with sufficient clarity so that the plaintiff will have a full and fair opportunity" to respond to those specific objections to barrier removal as to which the defendant can put on credible evidence. This process will be both expeditious -- in that the court's time will not be wasted while the plaintiff puts on evidence concerning every conceivable objection to barrier removal -- and fair -- in that the plaintiff will be able to respond directly to real objections clearly stated rather than to hypothetical or imaginary ones.

This Court has adopted a procedure to shift the burden of production under the provision of Title I of the ADA requiring reasonable accommodation of employees with disabilities. See § 12112(b)(5)(A). Hermanson takes pains to point out that this Court places the ultimate burden to prove discrimination under that provision on the plaintiff. (Ans. Br. at 11-12 (quoting White v. York Int'l Corp., 45 F.3d 357, 361 (10th Cir. 1995).) In that same case, however, this Court made clear that a plaintiff could shift the

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respective traditional burdens to prove or disprove the reasonableness of the accommodations offered or not offered.")

burden of production to the defendant by "produc[ing] evidence sufficient to make a facial showing that accommodation is possible." White, 45 F.3d at 361.[7]

The present case provides a perfect example of why a plaintiff should be able to make a basic showing that it is readily achievable to provide access and thereby shift the burden of production to the defendant. Williams's expert and lay evidence shows that the Winter/Salmen plan for an entity with Hermanson's resources to ramp a 5½-inch step by raising the sidewalk gradually over 23½ feet, "if otherwise unexplained," is "more likely than not" readily achievable. It is neither expeditious nor fair to require Williams to address in his prima facie case abstract objections that Hermanson may never be able to support with law or fact. For example, Hermanson argues in its Answer Brief that the Winter/Salmen plan required a handrail across the sidewalk. (Ans. Br. at 28-29.) When the applicable regulations are applied to the undisputed facts, however, it is clear that this is not the case.[8] **Similarly,**

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[7] See also Pushkin v. Regents of the University of Colorado, 658 F.2d 1372, 1387 (10th Cir. 1981) (adapting the McDonnell Douglas/Burdine burden-shifting framework for use in the context of Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, which prohibits disability discrimination by recipients of federal funds).

[8] A route is only required to have handrails if it is a "ramp," that is, if it has a slope of greater than 1:20 (or 5%). Standards for Accessible Design, 28 C.F.R. Part 36, Appendix A ("Standards"), §§ 4.3.7 and 4.8.5. The Winter/Salmen plan called for a rise of 5½ inches over a distance of 23½ feet (or 282 inches). That is a slope of 1:51 (or approximately 2%), considerably more gradual than that which would require handrails. Hermanson's claim that Winter "acknowledged" the need for handrails is incorrect. (Ans. Br. at 4, citing App. at 397.) The cited testimony makes clear that Winter understood that a handrail was only required "if it is a ramp," and that the plan proposed by Salmen would not require a handrail. The question whether handrails are required is, in any event, a legal question to be resolved with reference to the implementing regulations, not expert testimony. See, e.g., Nieves-Villanueva v. Soto-Rivera, 133 F.3d 92, 99 (10th Cir. 1997) (holding that expert testimony on issues of law is rarely admissible); Burkhart v.

Williams should not have been expected to put on evidence concerning, for example, structural engineering, the effect on adjacent buildings, possible trip hazards, or the possible reaction of the City of Denver to a hypothetical permit application unless and until Hermanson put on credible evidence that the Winter/Salmen plan would in fact encounter these problems. That is, Hermanson should be forced to "frame the issue with sufficient clarity" so that Williams can address each objection on its merits.

III. Williams Satisfied His Burden of Production to Demonstrate That the Winter/Salmen Proposal Was Readily Achievable.

A. Williams Satisfies His Burden of Production by Suggesting a Method of Barrier Removal and Proffering Evidence as to the Ease and Inexpensiveness of the Proposed Method.

A plan for barrier removal is readily achievable if it is "easily accomplishable and able to be carried out without much difficulty or expense." § 12181(9). From the grammar of the sentence, it appears to divide into three elements: (1) easily accomplishable; (2) able to be carried out without much difficulty; and (3) able to be carried out without much expense. There is little discernable difference between the first and second of these, that is, "accomplishable" is synonymous with "able to be carried out," and "easily" is synonymous with "without much difficulty."[9] **Essentially, something is readily achievable if it is easy and inexpensive to accomplish. Accordingly, the**

Washington Metro. Area Transit Auth., 112 F.3d 1207, 1212-14 (D.C. Cir. 1997) (holding that expert testimony on the application of ADA regulations was inadmissible).

[9] As Justice Scalia has recognized, instances of repetition of synonyms are not unusual in statutory and other legal language. Moskal v. United States, 498 U.S. 103, 120-21 (1990) (Scalia, J., dissenting). Hermanson attempts to divide this definition into four separate elements, but cites no case that supports this approach or that adds any other element to the plaintiff's burden. (See Ans. Br. at 9.)

Pascuiti case held that the plaintiff satisfies his initial burden to show that barrier removal is readily achievable by "proffer[ing] evidence, including expert testimony, as to the ease and inexpensiveness of [his] proposed method of barrier removal." Pascuiti v. New York Yankees, 1999 U.S. Dist. LEXIS 18736, at *12 (emphasis added).[10] The court in Parr v. L & L Drive-Inn Rest. held that a ramp was readily achievable in reliance on expert testimony that it would involve "minimal cost and effort." 96 F. Supp. 2d 1065, 1088 (D. Haw. 2000) (emphasis added).

Decisions construing a plaintiff's burden of production under similar provisions of the ADA support this approach. For example, businesses are required, under § 12182(b)(2)(A)(ii), to make reasonable modifications to policies and procedures unless it would fundamentally alter its goods or services. A plaintiff seeking relief under this section may meet his burden of production by showing that the modification is "reasonable in the general sense, that is, reasonable in the run of cases." Johnson v. Gambrinus/Spoetzl Brewery, 116 F.3d 1052, 1059 (5th Cir. 1997).[11] In addition, as noted above, a

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[10] Although the Pascuiti case placed the ultimate burden of proof under § 12182(b)(2)(A)(iv) on the defendant, it made a separate and distinct holding that the plaintiff "bear[s] the initial burden of suggesting a method of barrier removal and proffering evidence that [his] suggested method meets the statutory definition of 'readily achievable.'" Id. at *3 (emphasis added). This Court does not have to accept Pascuiti's holding concerning the ultimate burden to rely on its enunciation of a plaintiff's initial burden of production.

[11] See also Dahlberg v. Avis Rent A Car Sys., 92 F. Supp. 2d 1091, 1106 (D. Colo. 2000) (quoting Johnson); Olinger v. United States Golf Ass'n, 55 F. Supp. 2d 926, 934 (N.D. Ind. 1999) (quoting Johnson), aff'd, 205 F.3d 1001 (7th Cir. 2000), petition for cert. filed, 69 U.S.L.W. 3235 (U.S. Sep. 20, 2000)(No. 00-434); Martin v. PGA Tour, Inc., 994 F. Supp. 1242, 1248 (D. Or. 1998) (quoting Johnson), aff'd, 204 F.3d 994 (9th Cir. 2000); cert. granted, 69 U.S.L.W. 3223 (U.S. Sep. 26, 2000) (No. 00-24); Bingham v. Oregon Sch. Activities Ass'n, 24 F. Supp. 2d 1110, 1116-17 (D. Or. 1998) (quoting Johnson).

plaintiff requesting a reasonable accommodation under Title I of the ADA can shift the burden of production to the defendant by "produc[ing] evidence sufficient to make a facial showing that accommodation is possible." White, 45 F.3d at 361.

Hermanson attempts to distinguish Johnson and its progeny on the ground that Johnson's "'in the run of cases' analysis is based on an expressly stated affirmative defense." (Ans. Br. at at 17-19.) This is incorrect. The "run of cases" standard in Johnson relates to the reasonableness of the requested accommodation, a matter as to which the plaintiff has the ultimate burden. See Johnson, 116 F.3d at 1059. Thus, even if this Court should place the ultimate burden of proof as to readily achievable barrier removal on the plaintiff, it would still be appropriate to adopt the Johnson standard to measure when a plaintiff has established a prima facie case sufficient to shift the burden of production to the defendant.

Hermanson contends that permitting a plaintiff to shift the burden of production by showing that barrier removal is "generally" readily achievable or readily achievable in the "run of cases" would conflict with DOJ regulations stating that the question whether a measure is readily achievable "is to be determined on a case-by-case basis." (Ans. Br. at 15 n.4 (quoting Preamble at 646).) This is an entirely theoretical question in the present case, as Williams went far beyond the evidence required by Johnson and presented a plan specific to the Crawford Building that demonstrated that it would be readily achievable to create wheelchair access at that location.[12] Even as a theoretical matter, however, the Johnson standard is not inconsistent with a

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[12] Indeed, one of the primary shortcomings of the District Court's Order in this case is that it did not examine the specific evidence Williams had introduced concerning the Crawford Building but instead provided a generalized discussion of various factors that applied only to other buildings then in the litigation.

case-by-case analysis following a full exposition of the proof at trial. A case-by-case analysis does not, however, require that each factor that might conceivably be relevant must be addressed in the plaintiff's case in chief. This approach would be inconsistent with the Burdine burden-shifting paradigm, which is intended to promote efficiency and fairness at trial. See id., 450 U.S. at 253. Once the plaintiff has presented evidence sufficient to raise an inference of discrimination under Burdine, the defendant has the opportunity to present specific objections to rebut this inference. The plaintiff cannot then rest on generalities, but must address these case-specific factors.

Hermanson finally argues that cases applying other sections of the ADA are inapposite because the "readily achievable defense requires a less demanding level of exertion" on the part of a business than the "undue burden" or "undue hardship" defense. (Ans. Br. at 11, 18 (internal quotations omitted).) That is, that a less onerous legal duty owed by a defendant necessarily translates into a heavier burden of proof on plaintiff at trial. Hermanson confuses two distinct and unrelated concepts: the effort that an entity must exert to comply with the law, on the one hand, and the amount of proof a litigant must present to shift the burden of production, on the other. Religious accommodation cases demonstrate that a low level of exertion required of an entity does not (as Hermanson would surmise) translate into a high burden of proof. Under Title VII, employers are required to make reasonable accommodation for an employee's religion unless it would be an "undue hardship" to do so. § 2000e(j). The ADA regulations make clear that this provision requires a far lower "level of exertion" than is required of an employer asked to reasonably accommodate an employee's disability.[13] If

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[13] See Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. Part 1630, app. at 371 (2000) ("To demonstrate undue hardship pursuant to the ADA and this part, an employer must show substantially more difficulty or

Hermanson's equation were accurate, religious discrimination plaintiffs would be required to satisfy a higher burden of proof than disability discrimination plaintiffs when requesting a reasonable accommodation. The opposite is true. In contrast to ADA reasonable accommodation cases, a plaintiff in a religious accommodation case can make out a prima facie case without suggesting an accommodation or showing that it is reasonable. Compare Thomas v. National Ass'n of Letter Carriers, 225 F.3d 1149, 1155 (10th Cir. 2000) (holding that a prima facie case requires informing employer of a bona fide religious belief that conflicts with an employment requirement, and being fired for failure to comply with the conflicting employment requirement), with White, 96 F.3d at 361 (holding that a prima facie case requires "evidence sufficient to make a facial showing that accommodation [of the plaintiff's disability] is possible."). Similarly, the "less demanding level of exertion" required of businesses under the readily achievable defense (in contrast to that under the "undue hardship" or "undue burden" defense) does not require that the plaintiff bear a heavier initial burden of production.

B. Williams Satisfied His Burden of Production.

Williams put on the following evidence at trial: Expert architectural testimony that the step at the Crawford Building was 5½ inches high and abutted a sidewalk that was 23½ feet wide, that it would be "relatively easy to accomplish" to raise the sidewalk from the 5½-inch step to the curb, that Hermanson's expert agreed with -- indeed, had proposed -- this approach, and that this would cost approximately $10,750; documentary evidence that Hermanson and its predecessor had received estimates to ramp the Crawford Building for amounts ranging from $2,195 to $2,500; and expert financial testimony that a far larger amount of money

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expense than would be needed to satisfy the 'de minimis' title VII standard of undue hardship.")

would have been, from a financial perspective, easily accomplishable and able to be carried out without much difficulty or expense.

This certainly constitutes sufficient evidence of "the ease and inexpensiveness of [Williams's] proposed method of barrier removal," see Pascuiti at *12, to shift the burden of production to Hermanson. It is as much or more than that before the judge in L & L Drive Inn, who found a ramp to be readily achievable where:

> First, Plaintiff's expert, Brent Beals, based on his prior experience as a contractor, testified that barrier removal for these barriers would involve minimal cost and effort. (Tr. 11/04/99 at 8-10). Mr. Beals also suggested various reasonable alternatives for the removal of these barriers. (Tr. 11/16/99 at 179-180). Second, [the defendant's] ADA compliance officer Mr. Flores acknowledged that barrier removal is "very inexpensive." (Tr. 11/16/99 at 63). Third, the photographs entered into evidence indicate that it would not be difficult or expensive to remediate the barriers at issue. Fourth, the [defendant] franchisees enjoy average annual revenues of approximately $500,000-$600,000. Id. at 60.

96 F. Supp. 2d at 1088.[14]

A plaintiff may make out a prima facie case under § 12182(b)(2)(A)(ii) -- and thereby shift the burden of production -- by relying on DOJ regulations and commentary suggesting that the modification he requested was

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[14] See also Lieber v. Macy's West, Inc., 80 F. Supp. 2d 1065, 1077 (N.D. Cal. 1999) (holding that, under the readily achievable barrier removal provision, "[p]laintiffs . . . bear the burden of putting forward reasonable modifications.") Although this case used the language of "reasonable modifications," the court was very clear that it was interpreting the "readily achievable" provision. See id. at 1067, 1074, 1077-79. Hermanson is thus incorrect when it asserts that Lieber "involved a different section of the ADA." (Ans. Br. at 19.)

reasonable. Johnson, 116 F.3d at 1060. Under that standard, too, Williams has established a prima facie case: Both the DOJ regulations and the legislative history of the ADA make clear that it will generally be readily achievable to ramp one or two steps. See 28 C.F.R. § 36.304(b)(1); Preamble at 646; H. R. Rep. No. 101-485, Pt. 2, at 110 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 393; S. Rep. No. 101-116, at 66 (1989) (same).[15]

Hermanson would also have this Court ignore Winter's testimony that Hermanson's expert suggested and endorsed the plan to raise the sidewalk outside the Crawford Building from the step to the curb on the grounds that it is not "substantive evidence." (Ans. Br. at 27-28 n.8 (citing H&H Supply Co. v. United States, 194 F.2d 553, 555 (10th Cir. 1952)).) More recent decisions by this Court make it clear, however, that -- far from being ignored -- a statement relied on by an expert is "admitted for the limited purpose of informing the jury of the basis of the expert's opinion and not for proving the truth of the matter asserted." Wilson v. Merrell Dow Pharm. Inc., 893 F.2d 1149, 1153 (10th Cir. 1990). That is the precise role of Salmen's proposal of a plan to provide access to the Crawford Building by raising the sidewalk: It constitutes part of the basis for -- and thereby adds weight to -- Winter's proposal of this same plan and Winter's view that it was "relatively easy to accomplish."

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[15] Hermanson asserts that this Court may not consider the legislative history of the ADA without first finding that that statute is ambiguous. (Ans. Br. 13.) This Court has held that "legislative history is not to be ignored even though we feel that the 'legislative intent is clearly manifested in the language of the statute itself.'" Owen v. Magaw, 122 F.3d 1350, 1354 n.1 (10th Cir. 1997) (citation omitted). In those circumstances, the Court can "consider the light that the legislative history sheds on the question . . . ." Id. See also Midland Brake, 180 F.3d at 1161-62 (relying on legislative history of the ADA for support of the Court's reading of the statute without a finding that the statute is ambiguous).

Hermanson did not object to this testimony at trial and does not deny that its expert recommended providing access to the Crawford Building by raising the sidewalk from the step to the curb. Indeed, its attorneys did not cross-examine Winter on this point. (See generally App. at 348-442.) As Judge Posner has suggested, the statement of an individual retained as an expert by an opposing party is likely admissible under Federal Rule of Evidence 807 as a statement with "equivalent circumstantial guarantees of trustworthiness." Blue Cross & Blue Shield United of Wisc. v. Marshfield Clinic, 152 F.3d 588, 595 (7th Cir. 1998), cert. denied, 525 U.S. 1071 (1999). In any event, the statement is not hearsay, as Williams did not seek to rely on it for the truth of the matter asserted (i.e., that the plan was valid) but rather for the fact that Salmen -- Hermanson's expert -- made it. "[W]hen the mere making of the statement is the relevant fact, i.e., tends to establish a fact of consequence . . . hearsay is not involved." 31 Wright & Miller, Federal Practice & Procedure § 6705 (2d ed. 1997). It is a fact of consequence in this litigation that an individual retained by Hermanson to evaluate access at the Crawford Building had made the suggestion to raise the sidewalk from the step to the curb.

C. The District Court Applied the Incorrect Legal Standard in Requiring Williams to Put on Evidence as to Matters Not Properly Part of His Prima Facie Case.

The District Court made no individualized holdings concerning the four stores originally at issue in the litigation. The paragraph in which it sets forth specific support for its holding that Williams did not carry his burden of proof notes three perceived shortcomings of Williams's case: Failure to consider the effect of his proposals on adjacent businesses; failure to consider "engineering requirements for maintaining the structural integrity of any location;" and failure to join the City of Denver as a party to the case. (App. at 198.) As demonstrated

above, as a factual matter, the effects on adjacent businesses and structural issues both related to locations other than the Crawford Building. See supra at 3-4. There was no evidence in the record that raising the sidewalk outside the Crawford Building from the step to the curb would present either structural challenges or effects on neighboring stores. As explained above, there is no precedent in the discrimination context for requiring a plaintiff in his prima facie case to disprove all possible -- and, here, inapplicable -- objections to his plan.

Williams should not have had to join the City of Denver as a defendant to establish his prima facie case. As demonstrated in greater detail in Williams's Opening Brief, the City of Denver would be required, under Title II of the ADA, to approve a plan to provide access to the Crawford Building.[16] **Further, the only evidence in the record concerning the actions of the City suggests that it would ultimately grant a permit for such a ramp. (App. at 606-08.) Under those circumstances, it is not reasonable to require a plaintiff to assume that city officials will violate the law and join them as defendants -- or call them as witnesses -- in his prima facie case. Rather, once he has made a basic showing that the barrier-removal is readily achievable, it should be up to Hermanson to bear the burden of production to show that city officials would not only violate Title II of the ADA, but would ultimately prevail on this position.**

In any event, is it not reasonable to require Williams to join parties against whom he has no case or controversy. Even if he could apply for a permit to build on another's property, it is entirely speculative that such a permit would be denied. Under similar circumstances, this Court has held that plaintiffs do not have standing. See Phelps v. Hamilton, 122 F.3d 1309, 1327 (10th Cir. 1997) (holding that plaintiffs did not have standing to

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[16] See Title II of The Americans with Disabilities Act: Technical Assistance Manual, § II-3.6100, illus. 1 (1993).

challenge a municipal ordinance where there was no evidence that they intended to engage in prohibited activities or faced an imminent threat of prosecution); Bangerter v. Orem City Corp., 46 F.3d 1491, 1499 (10th Cir. 1995) (holding that plaintiff did not have standing to challenge a permitting process that applied to an entity other than himself); cf. City of Los Angeles v. Lyons, 461 U.S. 95, 108 (1983) (holding that a plaintiff did not have standing to challenge illegal chokeholds by police because it was "no more than conjecture to suggest that . . . the police will act unconstitutionally" in each encounter with citizens).

Finally, Williams must address the District Court's assertion that he conceded that "[he] could not meet the burden of proving ready achievability, characterized by [him] as a high burden." (App. at 196.) Hermanson asks this Court to ignore this astonishing statement on the grounds that it is dictum, but it is impossible to tell from the District Court's Order the role this statement played in its decision. It is clear, however, that Williams's counsel made no such concession. Hermanson argues that the District Court must have been referring to an exchange concerning access in the residential context. (Ans. Br. at 24 n.7.) The complete exchange was as follows:

> **THE COURT: Have you ever remodeled a house?**
>
> **MS. ROBERTSON: Yes, we have. And, in fact, we've remodeled extensively to put in ramps and obviously to make our house accessible.**
>
> **THE COURT: I just did that. It's a very lengthy and expensive process.**
>
> **MS. ROBERTSON: It's a lengthy and expensive process, but well worthwhile, I hope you'll agree.**

(App. at 699-700.) This exchange -- concerning an extensive remodeling of the District Judge's and counsel's homes -- cannot be read to constitute a

concession that the burden of proving readily achievable barrier removal under § 12182(b)(2)(A)(iv) is heavy.

CONCLUSION

For the reasons set forth above, Williams respectfully requests that this Court reverse and/or vacate the District Court's Order Granting Motions for Judgment as a Matter of Law and the judgment entered in Hermanson's favor. Because the motions were granted and judgment entered following the close of Williams's case in chief, Williams respectfully requests this Court to order a new trial guided by the proper allocation of burdens of proof and production.

CERTIFICATE REGARDING LENGTH OF BRIEF

As required by Fed. R. App. P. 32(a)(7)(C), undersigned counsel certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i), and that this brief contains 6,861 words. Counsel relied on the word count of Word Perfect 8.0, which was used to prepare this brief.

Respectfully submitted this 29th day of December, 2000.

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Certificate of Service

I hereby certify that on December 29, 2000, a copy of the foregoing Reply Brief of Appellant Kevin W. Williams was served by first class mail, postage prepaid, on:

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