ORAL ARGUMENT – 9-8-04
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LITTLE V. TEXAS DEPT. OF CRIMINAL JUSTICE

BRISTER: Are you aware of any case that's ever held an amputee is not disabled under the Act?

GRIFFIN: I'm not aware of any. Especially a case where a person is missing the greater portion of an entire leg. The state has cases where a heel is made 2-3 inches longer, or people have various difficulties. But Evelyn Little has one leg. She's got a prosthesis that's laced up above the knee that she has to put on everyday before she can take one, single step.

O'NEILL: I read in the briefing that there was some testimony she needed to swing her leg out to walk. I know in the Tauk(?) case, the focus seemed to be that it was pretty unnoticeable, the disability. That her walking ability was pretty good. In this case there was some indication that Ms. Little had to swing her leg out and it was very obvious. Is that in the summary judgment record?

GRIFFIN: It is. It's in the affidavit of Evelyn Little, at the bottom of the first page and the top of the second page. She says, When I walk my leg remains stiff, and with each step I have to swing it out away from my body just to clear the floor.

O'NEILL: And that was part of the summary judgment record?

GRIFFIN: Yes. And even some of the evidence from the state's depositions were that you would have to be blind not to see her limp. Obviously there's conflicting stories about what people noticed and what they processed when they saw it. But the fact is she has to swing her leg way out, and that's in the summary judgment record.

HECHT: I'm not clear whether you think this is a fact issue for the jury or a legal issue for the court to decide?

GRIFFIN: On this record it has to be a fact issue given the nature of a traditional motion for summary judgment, which is recited on page 3 of their motion, that it is a traditional motion.

HECHT: But the facts don't seem to be in dispute except the ultimate fact, which is, is this a disability or not. But none of the other facts that you would use to make that decision seem to be disputed.

GRIFFIN: I think when we talk about substantial on the life of the individual, which J. O'Conner teaches us in Sutton, whether a limitation is substantial or merely trivial oftentimes the trier of fact has to review all of the evidence in the record to determine the limitations that are placed on the life of the individual.

HECHT: Well if this case were tried on this evidence and a jury found that she was not disabled using that definition, would it withstand appeal?

GRIFFIN: I would say it would be against the great weight and preponderance of the evidence on this record.

HECHT: But there would be some evidence to support the finding that it was not a disability or not?

GRIFFIN: I think it's a fact issue. I don't think on this record given the fact that she can function some, that the SC tells us that just because the obstacles to a disability are not insurmountable, that one can still be disabled under the American Disabilities Act. But see, what the state has done is taken a series of cases - the Tauk(?) case where somebody moves their heel a couple of inches and that's not a disability. Just because you have a heel that compensates fully. And they've got all these cases with one thing that's not enough. But here we have a record that's pretty full.

WAINWRIGHT: Do you view Sutton as modifying Tauk? Tauk talked about a moderate difficulty experience while walking, and then Sutton talks about a substantial limitation on their ability to walk. Do you view Sutton as having modified Tauk, or do you see them as both being in the same vein?

GRIFFIN: I take it modifying may be too strong a word. But we have to view Tauk through the prism of Sutton at least insofar - if this court accepts the Sutton premise that we consider mitigating measures - prosthesis, insulin, treatment for epilepsy, if we consider all those things as Sutton has, then I think we have to view Tauk through the prism of Sutton.

WAINWRIGHT: When you say view Tauk through the prism of Sutton, do you think Sutton lightened the burden on your client to prove a disability, or do you think as some commentators that Tauk would be a little bit more difficult still carries the day?

GRIFFIN: No. I think Sutton helps.

WAINWRIGHT: So Sutton lowered the bar just a little do you think?

GRIFFIN: In our case it did lower the bar because J. O'Connor responding to the dissent, she has a quote that says "the dissent fears that even people without legs won't be protected under this statute." And she makes the quote verbatim "that just because a person has the prosthesis or a wheelchair, they are still going to be limited in the major life activities of walking and running." And so I don't know that - I think it does lighten the load. It makes it absolutely clear, at least that the US SC did not want to provide people who are missing legs, from the protection of the Americans with Disabilities Act and the Texas statute should do no less than that. And the amici here have made a very persuasive argument that under Texas precedent in our history of our Texas

Commission on Human Rights Act, and our decisional law we've not considered mitigating measures.

But on this record regardless of the standard, whether it's the Sutton standard or the pre-Sutton standard, this is a fact issue whether or not Evelyn Little who has to harness a prosthesis, put it on, walks with a limp, walks slower than everybody else, she can't run at all, it's an obvious limp, all of these things she's got to do to take one step. She's got to lace it up, put it on, get out and go, and even then she is substantially impaired.

Basically the state's argument is to go right around Braggan(?) v. Abbott and says unless you're utterly unable to conduct an activity that you're not protected. But that's just not the law.

HECHT: When would you be disabled as a matter of law without any fact question being involved?

GRIFFIN: Under Sutton, no one is disabled as a matter of law any longer.

HECHT: That's hard for me to understand.

GRIFFIN: It's hard for me to understand as well. Because a person in a wheelchair ought to be disabled as a matter of law. There is no denying. It is absolutely. That is the flaw in the reasoning of Sutton, because we all know that a person in a wheelchair is going to be substantially limited in activities. To J. O'Connor's credit, I think she drops in a footnote and says, well a person in a wheelchair we agree ordinarily will be disabled. Our view is that it's alright to say ordinarily, but when you get in the situation that Ms. Little is in where she doesn't want to view herself as a disabled person.

JEFFERSON: Is it possible that we could construe our statute differently than the ADA and conclude that there are circumstances where it is possible to prove a disability as a matter of law?

GRIFFIN: Absolutely. That's the position of the coalition of amici, the American Diabetes Ass'n, AARP. That's the position they've advanced in the amicus brief before you that our statute is stronger than the ADA.

JEFFERSON: And what distinction between the two statutes would support that thesis?

GRIFFIN: In the amicus brief you will see the legislative history, the decisional history, the changes in the wording in the statute. We have some provisions in our statute that are not in the federal law, such as disability means an impairment which does not interfere with the person's ability to do a job. And those are cataloged quite well in the very lengthy and scholarly brief that's been filed by Brian East on behalf of the organizations.

But for Evelyn Little it doesn't matter whether it's Sutton. It doesn't matter whether it's pre-Sutton. Because the use of that prosthesis while it helps her to get some mobility doesn't replace her leg. She's still is limited in the life activities of walking and running. And that's undisputed on this record.

JEFFERSON: Is it true that Ms. Little has to prove that there was an adverse employment decision made because of her disability?

GRIFFIN: No. She didn't have to prove anything on this record in the court below, because it was a traditional motion for summary judgment, so denominated and so responded to. Even if it had been denominated as a no evidence motion, which it was not, Rule 166(a)(i) requires the movant to specify each element of each cause of action for which there is no evidence to support it. Here, she had no burden at all. The state had the burden of negating at least one element of each cause of action. And as the court now is aware there are three different definitions of disability, both in our statute and the ADA: actual disability; perceived disability; and a record of a disability that is used in a context such as this.

So the state in its motion, it is a very broad motion, but it clearly on page 3 denominates itself as a traditional motion: requiring them, obligating the movant to disprove at least one element of each cause of action. They don't even mention record of disability anywhere in the motion. And arguably attacks actual disability and arguably attacks perceived disability, but just arguing it in a traditional motion under this court's jurisprudence is simply not enough. The DC's can't be playing dodgeball and find the balloon in the air when it comes to deciding issues on summary judgment. The movant has the obligation to inform the DC and the respondent what are the issues that we're moving for summary judgment on? And so, in answer to your question, she had no burden of putting on any evidence of anything except to the extent to respond to or create an issue of fact on evidence that the state put in their motion.

JEFFERSON: And has she done that on the adverse employment decision?

GRIFFIN: Absolutely. On Page 16 of the principal brief of the petitioner, are numerous examples of the evidence that was cataloged in the court below. For example: people expressing doubts of a person with one leg to do the job of a food service manager; they needed able bodied people, they were worried that she wouldn't be able to run from a threat. These are all cataloged on pages 16 through 20 of the principal brief.

And it's import to know when we talk about adverse employment action, we have to look at the whole picture here. The state's witnesses gave differing stories on why they did what they did, and who was most qualified. And under this court's decision in _____ Chemical v. Tennies(?), those become evidence for the fact finder to address and review who is telling the truth here. Is that the real reason why she wasn't given this job? Or were they really concerned. And we see some of that in the respondent's brief at this court. There's a footnote they drop on the second or third page of their brief where they question why a woman with one leg would want to have the

demanding position of food service manager at many of the state's maximum security prisons. It's footnote 2. And that therein lies the problem when you have a can do person who is overcoming disabilities to be argued in a footnote: It's questionable whether she ought to be applying for such a physically demanding job. It's almost paternalistic in the way that it's approached. People ought to be judged on their ability to do the job, not on the diagnosis of their disease or the impediment that they face.

And so that's why on this record, the state's obligated to negate elements of the plaintiff's cause of action didn't address some of them. In those they did address they were not entitled to a decision as a matter of law.

SMITH: Your first issue is about whether she was disabled. And that's what the CA's opinion was about. That was their dispositive issue of law. Your second issue is whether she submitted a scintilla of evidence regarding whether her limitations were a motivating factor. And basically the state didn't respond to your second issue, and said that wasn't within the scope of review. What's your view as to what we should do - say if we go with your view and say Ms. Little was disabled. Do we reverse the CA's judgment and send it back for further consideration of the issues in the CA's, or do you want us to send it back to the TC for a new trial, or do you want us to try to resolve this issue without briefing from the state?

GRIFFIN: We think the case ought to be remanded to the DC. The court will see the motion. The motion is what it is. It should not have been granted. Under clear rules of traditional motions for summary judgment it never should have been granted. And the main issue that the CA saw was the issue of disability. The CA felt compelled because of this Sutton conundrum because she's been so successful, and because my worthy brother opposing counsel got her to say, Yes. I look good when I walk. She had a positive view of her paralysis, much like the woman with one arm in the Gillian v. _____ case. And that is the problem that needs to be addressed and that's why we are here.

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RESPONDENT

YOUNG: I want to address a couple of points that were raised by the court and by counsel before I go into my primary argument here today. No one in the Texas Dept. of Criminal Justice nor did I ever suggest in any footnote that she was not welcomed to apply for these jobs, or that she could not do any of these jobs. It's never been the TDJC's position or perception that she was unable to do any job that she applied for.

BRISTER: How about the interviewer that said that she wouldn't be able to fight and run?

YOUNG: You have to look at the context in which that testimony at deposition was presented. He was being asked by plaintiff's counsel: Well if you got into a situation where there was a riot in the kitchen, would you be disadvantaged in that predicament if you were unable to run?

And his response was to the effect that well you could be if you needed to run. But if you read on in that deposition, you will see that this person, that this deponent also stated that as far as he was concerned if she was physically able to handle herself in the kitchen, then she would satisfy the requirements of the job. And he saw no reason why she wouldn't be able to do the job from what he knew about the case. So that's one of those statements and there are several like that in the plaintiff's brief where a deponent's testimony is really taken out of context.

BRISTER: Was your motion in the TC that there is no evidence of discrimination or no evidence of disability?

YOUNG: Both.

BRISTER: Point out the language from the motion that says no evidence of discrimination. Was it a traditional motion?

YOUNG: Yes.

BRISTER: And what was your evidence that there was no discrimination as a matter of law?

YOUNG: We provided really voluminous evidence, and along with the voluminous evidence or the extensive evidence of her answers to the technical questions that are asked at all 14 of the boards that we had a record of her applying for. We provided all of that down to the very questions and the very answers that she gave along with an analysis, an in-depth analysis of a person by the name of Kathy Cook. That is in the record at pages 62-68, a synopsis by Kathy Cook who is a human resources specialist for the department, which goes into each one of these decisions and explains in really excruciating detail what the basis for the decision was, why the questions were not answered correctly by Ms. Little and so forth.

OWEN: But that goes to discriminatory intent. I think J. Brister asked you what evidence did you put on that says as a matter of law she was not disabled?

YOUNG: Perhaps I misunderstood your question. Her testimony at deposition, and that testimony is that she walks well, albeit with a limp. And we recognized her limitations. We also recognized the fact that she has done very well in her life to get her walking up to a standard which quite frankly in our view under the case law would not permit her to claim a walking disability, because she does walk well.

She walks with a limp. No question about that. And I would suggest that the record does really in substance disclose what J. Hecht suggested earlier, that there are no material fact issues in this case that are genuine.

HECHT: So then is the ultimate issue one of law or one of fact in your view?

YOUNG: In my opinion it is one of law. We know what the facts are. She walks with a limp. She does have to swing her leg out to the side in order to walk. But by her own testimony, and she should know what her limitations are, and or not better than anyone.

HECHT: And don't you think that on this record there aren't any real predicate facts in dispute other than a couple of adjectives like severe and slight, but that otherwise everyone seems to agree that it is what it is.

YOUNG: It is what it is. And she either has a walking disability it seems to me as a matter of law, or she doesn't.

OWEN: What about J. O'Connor's opinion in Sutton. She did pretty clearly say that if you're disabled even with a prosthesis and are unable to run, that you would be disabled. How do you square that?

YOUNG: I don't see the - that is quite frankly I think passing dicta by J. O'Connor and I don't see any substantial body of cases that holds that a major life activity is running. That would include so many of the population of this country. And I find it hard to believe that congress would have intended that...

BRISTER: Is there any case that's ever held that losing half of your leg you are not disabled?

YOUNG: Of course not. And if she were in a uncorrected state...

BRISTER: Losing half your leg with prosthesis or without?

YOUNG: I don't think there is any cases that say one way or the other.

BRISTER: Surely the ADA was intended for amputees.

YOUNG: I would agree with that if the amputee had no corrective device that allowed them to walk.

BRISTER: So the ADA was not intended for amputees if they make the mistake of getting a prosthesis?

YOUNG: I don't think that is a mistake. But I think you have to look at whether they are substantially limited at present time in a major life activity. That's the way the law is set up. It certainly is a significant impairment, but is it a disability...

BRISTER: And there's a difference between glasses as a prosthetic help, and an artificial leg isn't it?

YOUNG: Agree.

BRISTER: So how is this prosthesis the same as glasses, which I understood to be the argument in your brief?

YOUNG: With glasses the issue is whether after Sutton, and in many jurisdictions before Sutton, including the 5th circuit, the issue is when you consider the corrective measure the person has a substantial limitation on a major life activity, such as see. As in Sutton, once you put the glasses on - right now I am disabled. If the law were that you don't consider the corrective measure at all, such as some courts held before Sutton, but now that I put my glasses on it's a permanent and a readily accessible measure that I can take to alleviate my impairment.

SMITH: In your view, if we say she's disabled should we consider the second issue, or should we remand to the CA for further actions consistent with our opinion, or should we just send it back to the TC?

YOUNG: If you find that she's disabled, then I think it should be sent back to the CA, so that the second issue can be addressed at all. Because they didn't address it at all when they considered in the first instance.

SMITH: A lot of our discussion has been about that second issue.

YOUNG: I understand. I did brief that, although the brief is a little thin on that point. But I did brief that under the regarded as portion of my brief. And it certainly was briefed in the motion. If you will look at the affidavit of Ms. Cook, you will see that what we have produced there is more than competent and substantial evidence going to each of the selection boards and proving conclusively that each of those decisions was based on a legitimate non-discriminatory reason. And in my view that proves the lack of discrimination. But in any event, she has no evidence of discrimination. And I did treat that under the regarded as section.

SMITH: Technically or otherwise, regarded as is a part of the equation for whether she's disabled or not. That's one of the criteria for that. But there's issues in the CA like whether she filed within 180 days. On their side there's an issue about whether or not Ms. Cook's affidavit was based on personal knowledge. Those type of things aren't briefed in this court. Again, very interesting questions.

YOUNG: Yes. You did not grant the petition on those points and they were not briefed. And certainly those issues should be addressed at the CA level if you find that she is disabled.

WAINWRIGHT: It sounds like you're - well you did specifically acknowledge that Ms. Little has limitations. You agree that she has impairments?

YOUNG: Yes.

WAINWRIGHT: Would you agree that she has disability but assert that it's not a substantial disability. Is that your position?

YOUNG: No. Because in my view unless she has a substantial limit on her ability to walk, which is all that was pled by the way in this case. There was no pleading made that she had an inability to run. And if you look at your petition for review, as well as your brief on the merits, the only allegation that she's ever made up until the amicus brief being filed was that there was a disability in walking. But she has to be substantially limited in that ability, otherwise she's just not disabled. It's our position that because of the corrected measure that she has taken - and quite candidly because of her own good character or logical features where she has herself - I mean she's a very proud and honest woman, and where she has made the best out of a bad situation really - now I don't seek to hold that against her, but at the same time I think we must recognize that either she has a walking disability under the case law, or she doesn't. And of course if this court wants to depart from Sutton and Tauk(?) and the other cases, you are free to do so. But we suggest that those cases are good law.

O'NEILL: It sounds like a focus of your argument then is the ability of the corrective device to fully correct the disability.

YOUNG: Absolutely.

O'NEILL: So for example in your eye glass example. If you put your glasses on it didn't correct you to 20/20, but something much less than that or a degree less than that, I think that's the problem that J. Hecht is having and I share it is, if we're talking about matters of degree it's very difficult to determine something as a matter of law. If the prosthetic leg got her completely indiscernible disability as Tauk seem to be more along that scale, it may be as a matter of law. But when you've got testimony that she had to swing her leg out to walk that was very noticeable. At what point does the matter of degree become a fact issue or question of law?

YOUNG: I would suggest that this is the basis of that problem. And I recognize the problem that you've just identified in interpreting the disability act. It's in the language of what substantially limits? And the EEO guideline which seeks to help clarify that says, Well you look at whether the person is significantly restricted vis a vis their impairment relative to an average person in the population. Well those terms are just broad and somewhat vague and there is nothing we can do about that. That's just the way the law is written. So there is a measuring rod that has to be applied to these cases. All the department is suggesting is that after Sutton and Tauk and some of the other cases that we've cited, where the federal courts have held that even if you have to use a cane and you're walking with an absolutely noticeable limp, you are using a cane, you cannot walk for long periods of time, the courts have held that if you walk fairly well notwithstanding those limitations, you are not going to be held to have a walking disability.

O'NEILL: But fairly well as a matter of degree. And it strikes me as just inherently difficult to settle on a summary judgment record. Back to my example about the glasses. Let's say

that your vision was not corrected 20/20 and you were unable to read as well. You are a slow reader. Would you be disabled even though you read fairly well you can't read as fast as you need to for a particular job?

YOUNG: No. I think moderate difficulty, and the cases are pretty clear on this, moderate difficulty in reading, seeing, walking or any of the other major life activities is just not going to qualify you as disabled under present case law. You have to have - I'm not going to say it's not anything like...

O'NEILL: And you would say that Ms. Little does not have moderate difficulty as a matter of law?

YOUNG: I think that she has moderate difficulty, but she has to have more than that to be disabled.

WAINWRIGHT: She has to have substantial difficulty.

YOUNG: She has to have substantial if not severe difficulty under the case law. Now severe is a hard term. Severe is a severe term, but I've seen 5th circuit cases use it.

HECHT: Does she have severe difficulty running in your view?

YOUNG: I'm willing to assume - it's not in the record. But I'm willing to assume for purposes of this argument that she cannot run. But I don't think that's a major life activity. The EEOC regulations and interpreted commentaries have never even recognized running as a major life activity.

SMITH: There's a continuum between walking and running and that would be moving quickly. So what do we do? In this scenario there was some discussion about if there is an inmate fight and maybe she needs to get out of there. She needs to move quickly. Faster than walking. Slower than running. What do we do about that kind of question? It's still not black and white.

YOUNG: But the disability law is such that even if you are prevented by some impairment from a specific class of jobs, and I suggest to you that running from a riot would not only be a specific class of a job, it would be a specific task or activity within a particular job, clearly that's not going to make a person disabled under _____ case law.

If you simply cannot do something well that doesn't make you disabled. It's only if have more than moderate difficulty doing it under the prevailing case law at this time. As an advocate for my client's position, I'm going to naturally look at that case law, and defend the case on that basis.

If it's not severe - if to be disabled is something less than severe, I would

suggest to the court it's something more than moderate. It's not anything like Mr. Griffin mentioned a moment ago, where she has to - it's our position that she has to be utterly unable to walk to be disabled. That's not our position at all. Clearly if she did not have her prosthetic or if even with her prosthetic she was unable to walk at all, or able to walk only with great difficulty, then she would be disabled. But she has said she can walk well. We recognize that she has a limp. She has not anywhere in her affidavit which followed the deposition, her counsel seeks to establish that well it contradicts her deposition testimony, therefore, it creates a fact issue. I think that's a suspicious argument for various reasons. But even if you look at the affidavit closely, you see that nowhere does she say - I mean she's being honest here. Nowhere did she say I have to walk only with great difficulty. What she says is, what she describes is the mechanism by which she does have to swing her leg out to the side somewhat to walk. And that causes her to walk with a limp. It's a noticeable limp if you are paying attention to her.

JEFFERSON: How do you determine whether that is to be regarded as a disability and a substantial disability?

YOUNG: There would have to be evidence to suggest that the agency in fact did regard her as being disabled. And the footnote that Mr. Griffin talks about, he attributes to us the position that, Well she really can't do this job. We questioned whether she could do this job because of her impairment. We don't question that at all. The point of the footnote was simply to point out that neither the department nor Ms. Little ever even suggested the need for an accommodation to do the job of food service manager. So it's clear. She didn't suggest that she needed an accommodation at anytime and she applied over a period of 4 years. We didn't suggest that she needed one either and didn't think that she needed one.

SMITH: When does an applicant breach the subject of accommodation in this type situation? It would seem awkward to me to come into an interview and say, I'm applying for this job, but I need 1, 2 and 3 to be able to do the job. Now is that the way it's actually done? I've understood maybe that you got hired and then you discuss accommodation.

YOUNG: It can go either way though. It's really up to the applicant. And the TDCJ is very liberal, very progressive and liberal under their polices, such that even if you don't have a disability, even if you would not be deemed disabled as a matter of law, they will make an accommodation for every employee that feels like they need an accommodation as long as it doesn't eviscerate the requirements of the job as it were.

SMITH: It seems that you want to hold this against her that there's been no discussion of accommodation even though that would seem to be normally reserved for after an offer is made.

YOUNG: That's not my point. I don't seek to hold that against her at all. I seek only to show that - we have never regarded her as being disabled. She does not even regard herself as that.

O'NEILL: The regarded piece means that she is not disabled, but that you mistakenly regarded her as disabled. And isn't there some evidence in this record that interviewers mistakenly regarded her as disabled by saying she couldn't move, that they were concerned her ability to move.

YOUNG: Not at all. Again, if you will look at that specific deposition testimony and look at it in context, they were being asked questions by opposing counsel, Well if she were in a riot, if she had to run, if she had to be fully mobile, could it create a security problem for her? The deponent at that point has to be honest and answer the question. Well it could. But that doesn't disqualify her. That doesn't mean we regard her as being disabled. It doesn't disqualify her for the job. It could present a problem that would be similar to any number of employee's problems.

If I'm in a riot and again my glasses if they get knocked off, I'm at a disadvantaged, but nobody in that agency would suggest that I could not be a food service manager because I wear glasses. But if you ask them, Well if you got your glasses knocked off would that create a potential security problem for you? Well the answer would of course be yes, because it would. But that doesn't make me regarded as disabled.

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REBUTTAL

GRIFFIN: Well the colloquia with the court on what substantial verses moderate verses trivial verses severe demonstrate the unique fact intensive inquiry that the ADA and the Texas Human Rights Act compelled.

WAINWRIGHT: A large proportion of the time when facts are undisputed, application of a statute to those facts is a question of law. Why is this case different?

GRIFFIN: This case is different because the motion for summary judgment from which all this arose, that 4 or 5 page motion, everything that's identified in that motion has to be complied with rule 166(a). And in reflecting on J. Hecht's question, the reason why it's inappropriate for legal resolution at this court is because the record is not developed, because the motion for summary judgment doesn't properly identify either the causes of action, or the elements of the cause of action for the DC and the respondent to respond to. Had the issues been joined about substantial limitation in the life activities of running, or working, or walking, the parties could have developed that evidence. There could have been evidence by hip replacements of people with one leg. There could have been evidence about stub blisters. But those issues were not joined because in this traditional motion they were not raised. They were not proved. Therefore, it is inappropriate in our view at this court to resolve the issue as a question of law other than the issue that is before the court, Was the summary judgment appropriately granted on this record or not?

WAINWRIGHT: I understood your prior statement to be a bit broader, that determining whether there's a substantial disability was a fact question. Period. Are you saying now that it could be a question of law in particular cases? It just depends.

GRIFFIN: Sure. If the record is developed adequately. For example, there is undisputed portions of the testimony that either showed the extent of the limitation, or the lack of the limitation, I would think in certain cases it could be appropriate. But when you've got a motion like this one, those issues were not properly developed at the DC. They were not properly identified under rule 166(a), and they were not appropriate for summary judgment resolution as a matter of law. Now the question about remand. The reason why we suggest that a remand to the CA would not be appropriate here is because the record before this court in the brief on the merits, pages 16-20, it's not going to take the court very long to see that evidence. And of course Mr. Young's going to say it's out of context. That's what fact issues are. That's what they are going to claim. But our position is, it is a big fat fact issue on those things, and they are identified in the record before this court. That's why the relief we seek is a remand to the DC.

HECHT: You think running is a major life activity?

GRIFFIN: Sure. I take more confidence in J. O'Connor's use of the term in her opinion at the US SC than my brother does. I think she wouldn't have put it in the opinion unless it were important.

HECHT: Although perhaps in the amicus brief there's a suggestion that maybe not running for exercise purposes.

GRIFFIN: I agree. There are cases that say that. If the plaintiff says my major life activity that I'm limited is jogging for recreation, jogging for recreation is not a major life activity under the case law.

HECHT: But lots of people cannot run for lots of reasons: weak knees; overweight. Would all those people be disabled?

GRIFFIN: I don't know the answer to that question. All I can tell you on this record there's a lot more than running. I think one of the justices raised the point: this is an ability to move from place to another. And whether you walk real fast, or can walk a 12-minutes mile, or run a 9 minute mile, the fact in this case and it is in the record, her statement that she cannot run and she can't walk fast either. And when we talk about major life activities, the ability to move around when you need to be able to move, whether it's to keep a child from getting run over, or whether it's to get out of the rain, or whether it's to get out of a building like 911, we take for granted people's ability to do that. Ms. Little can't even walk one step until she puts the prosthesis on, and that's what they ignore - the limitations of the prosthesis itself. You've got to lace it up. You've got to put it on. You've got to then swing it out. You've got all these limitations.

BRISTER: And under the statute it's got to be an impairment that makes you unable to do a major life activity. So if you're just out of shape, and that's why you can't run, that would be covered by the impairment.

GRIFFIN: Would not do any good. And the glasses example, J. O'Connor kind of threw a dig at the plaintiff's lawyers and says, Y'all didn't argue you were regarded in the major life activity of seeing. You only argued working. And so the guy that's not corrected with glasses and still is substantially limited would clearly be still protected under the ADA.

OWEN: You lost in the TC, and you lost in the CA. It seems to me the only issue you can raise in any court now are what's in front of us. So some of the issues that were briefed in the CA are gone by the boards. Isn't that correct?

GRIFFIN: I don't think so in this sense. The motion for summary judgment dismissed the entire case. Our position in this court is that traditional motion didn't adequately raise any defense to any of the causes of action. So any of the pleadings that are supported at the court below ought properly to be in front of the court below since they were not adequately addressed in the motion for summary judgment. And what we say here today is that summary judgment was inappropriately granted, and it has to be sent back to the DC. And I don't think we should tie the DC's hands.

OWEN: I'm saying in terms of what we're looking at or another appellate court. We are limited to what you have now raised here.

GRIFFIN: That's right: disability and the fact that our view is the summary judgment ought to be reversed and the case sent back.

SMITH: You had in the TC and in the CA a substantial argument that Cook's affidavit was invalid for various reasons. And do you consider that argument waived or do you consider that before the court?

GRIFFIN: I guess the point is, is that regardless of that issue the case has to be sent back because there are facts issues. I don't know the answer as whether it's officially been waived as to the admissibility of the affidavit. I think it's carried forward in the arguments that have been made, and I believe that's in the principal brief as well. Regardless of how that question is resolved, the issue should be one of fact and we think it has to be sent back.

SMITH: Do you understand that Ms. Little is seeking to prove but for the discrimination she would have been hired in seeking a job, or is she just seeking to prove that it was a motivating factor and limit her relief to the declaratory judgment and injunction and fees?

GRIFFIN: No.

SMITH: Because the argument here is simply motivating factor. It doesn't have any argument about a but for.

GRIFFIN: I think there are two avenues that she takes. One is direct evidence. We've

got direct evidence of the employer's remarks about the persons own physical situation. That's on page 16-20 of the brief. But also the issue of pretext. They floated out a whole bunch of reasons why they had all these other people that they hired instead of Ms. Little. She proved that she was more qualified, had more experience, got some of their deponents to admit that she was more qualified. All that then becomes an issue of pretext, but it all gets to the same point B, which is an issue for the trier of fact.