CASE NO. 04-1397

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOHN COUTURE,

Plaintiff-Appellant,

v.

BONFILS MEMORIAL BLOOD CENTER,

Defendant-Appellee.

MOTION OF TRAINING AND ADVOCACY SUPPORT CENTER, NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, COLORADO CROSS-DISABILITY COALITION, CENTER'S LEGAL INITIATIVES PROJECT, AND AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES, FOR LEAVE TO FILE A BIREF AS *AMICI CURIAE* IN SUPPORT OF APPELLANT, URGING REVERSAL

On Appeal from the United States District Court for the District of Colorado
Honorable Robert E. Blackburn, District Court Judge
District Court Civil Action No. 02-RB-2319 (OES)

The Training and Advocacy Support Center, National Employment Lawyers Association, Colorado Cross-Disability Coalition, Center's Legal Initiatives Project,

and American Association of People With Disabilities (hereinafter, "*amici curiae*"), by and through their undersigned attorney, hereby move this Court, pursuant to Rule §29(b) of the Federal Rules of Appellate Procedure, for leave to file the accompanying brief of *amicus curiae* in support of the Plaintiff-Appellant John Couture (hereinafter, "Couture"). This *amicus* brief urges reversal of the decision below that Couture did not suffer an "adverse employment action" and therefore had no actionable claims of employment discrimination under the Americans With Disabilities Act (ADA) and a related state anti-discrimination statute.

Argument

Amici curiae are all non-profit organizations that represent people who are protected from discrimination under the ADA and related federal, state, and/or local anti-discrimination statutes. *Amici curiae* are committed to enforcing Title I of the ADA, the relevant federal statute at issue in this litigation, which prohibits disability discrimination in employment. 42 U.S.C. § 12101 et seq. In the underlying litigation, the District Court held that Couture did not suffer an "adverse employment action," and thus did not have an actionable ADA claim and related state employment discrimination statute claim. Because *Amici curiae* investigate and litigate cases under Title I of the ADA, and engage in other forms of public advocacy concerning disability employment discrimination, they are interested in

ensuring that the ADA is properly interpreted and enforced. Their *amicus* brief would be desirable because it presents the views of organizations whose day-to-day work would be at risk should the decision of the court below be upheld.

I. Interest of *Amici Curiae.*

The American Association of People with Disabilities (AAPD) is a national membership organization working to increase the political and economic power of children and adults with disabilities in the United States. Founded on the fifth anniversary of the ADA, AAPD has a strong interest in effective enforcement and implementation of the ADA and other disability rights laws.

The Center's Legal Initiatives Project (CLIP) is a program of The Gay, Lesbian, Bisexual and Transgender Community Center of Colorado, Inc. CLIP is a *pro bono* legal services program that opposes discrimination based on sexual orientation, gender identity, and HIV/AIDS. CLIP advocates for equal opportunity and fair employment practices in the State of Colorado.

Colorado Cross-Disability Coalition (CCDC) is a Colorado non-profit corporation whose members are persons with disabilities and their non-disabled allies. CCDC's mission is to work for systemic change that promotes independence, self-reliance, and full inclusion for people with disabilities in the entire community.

The National Employment Lawyers Association (NELA) is a voluntary membership organization of over 3,000 lawyers who regularly represent employees in labor, employment, and civil rights disputes. NELA is one of the largest organizations in the United States whose members litigate and counsel individuals, employees, and applicants on claims arising out of the workplace. As part of its advocacy efforts, NELA has filed numerous *amicus curiae* briefs before this Court regarding the proper interpretation and application of employment discrimination laws.

The Training and Advocacy Support Center (TASC) of the National Association of Protection and Advocacy Systems (NAPAS) is part of the membership association for protection and advocacy (P&A) agencies. P&As were established in each state by the Protection and Advocacy for Individual Rights statute, located at 29 U.S.C. § 794e, and related federal statutes, to protect the legal and human rights of individuals with disabilities. TASC provides P&As with training and technical assistance, coordinates their activities, and represents their interests before the federal government. TASC has substantial expertise regarding the interpretation and application of the ADA.

II. An *Amicus* Brief Would Be Desirable in this Case and the Matters Asserted Therein Are Relevant to the Disposition of this Case.

Amici curiae and their members represent numerous individuals throughout the country who are victims of unlawful employment discrimination. In presenting their brief, *Amici curiae* seek to protect the rights of people with disabilities, by ensuring that the goal of the ADA and other civil rights laws to eradicate disability discrimination in employment is fully realized. This goal cannot happen when the victims of unlawful disability discrimination are left without remedy despite the ramifications such unlawful conduct may have on their employment status.

Amici curiae submit this brief because of the importance of the issues at bar to furthering this goal. The brief supports the position of Plaintiff-Appellant Couture, urging reversal of the district court's decision on the issue of whether he suffered an adverse employment action.

This case involves complex legal issues regarding the employment rights of people with disabilities. *Amici curiae* are familiar with and have expertise concerning the rights of person with disabilities, and specifically their rights to be employed without being subjected to invidious discrimination based upon unreasonable fears and prejudices concerning their disabled status.

The matters asserted in the attached brief are directly relevant to the disposition of the issue presented for review in Appellant's Brief, whether the District Court erred in holding that Couture did not suffer an "adverse employment action." The *amicus* brief addresses that question and the question of whether the District Court's interpretation of the term "adverse employment action" may have an undesirable impact on public policy.

III. Disclosure of Opponent's Position

Defendant-Appellee Belle Bonfils Memorial Blood Center does not support the present motion.

Conclusion

For the reasons set forth above, *Amici curiae* respectfully request that this Court grant them leave to file the attached brief as *amici curiae*.

Respectfully submitted this 7th day of January, 2005.

s/ John C. Hummel

JOHN C. HUMMEL
Legal Director
Center's Legal Initiatives Project (CLIP)
1050 Broadway
Denver, Colorado 80203
(303) 733-7743
jhummel@coloradoglbt.org

Counsel for *Amici Curiae*

Certificate of Service

I hereby certify that on 7th day of January, 2005, I served a true and correct copy of the foregoing Motion, including two paper copies and in digital form on compact disc, via hand delivery, on the following:

Andrea E. Faley
Eric H. Maxfield
The Legal Center for People with
Disabilities and Older People
455 Sherman Street, Suite 130
Denver, CO 80203

Counsel for Plaintiff-Appellant John Couture

Matthew J. Rita
Sven C. Collins
Holme Roberts & Owen LLP
1700 Lincoln, Suite 4100
Denver, CO 80203-4541

Counsel for Defendant-Appellee Bonfils Memorial Blood Center

s/ John C. Hummel

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BRIEF OF *AMICI CURIAE* TRAINING AND ADVOCACY SUPPORT CENTER, NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, COLORADO CROSS-DISABILITY COALITION, CENTER'S LEGAL INITIATIVES PROJECT, AND AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES, IN SUPPORT OF PLAINTIFF-APPELLANT COUTURE

On Appeal from the United States District Court for the District of Colorado
Honorable Robert E. Blackburn, District Court Judge
District Court Civil Action No. 02-RB-2319 (OES)

SUPPORTING REVERSAL

JOHN C. HUMMEL
Legal Director
Center's Legal Initiatives Project (CLIP)
1050 Broadway
Denver, Colorado 80203
(303) 733-7743
Counsel for *Amici Curiae*

ALL ATTACHMENTS SUBMITTED IN DIGITAL AND WRITTEN FORM

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DISCLOSURE STATEMENT REQUIRED BY FED. R. APP. P. 26.1

Amici curiae are non-profit corporations that have no parent corporations and do not issue stock. No publicly held company owns 10% or more of these organizations' stock.

Dated this 7th day of January 2005.

s/ John C. Hummel

John C. Hummel
Counsel for *Amici Curiae*

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae are all non-profit organizations that are composed of and/or represent people under the Americans with Disabilities Act and related federal, state, and/or local anti-discrimination statutes. A description of each *amicus* organization is contained in Appendix A, *infra*.

Amici curiae and their members represent victims of unlawful employment discrimination throughout the country. The interest of *amici curiae* in this case is to ensure that the goal of the Americans with Disabilities Act and other civil rights laws to eradicate disability discrimination in employment is fully realized. This goal cannot happen when the victims of unlawful disability discrimination are left without remedy despite the ramifications such unlawful conduct may have on their employment status.

Amici curiae submit this brief because of the importance of the issues at bar to furthering this goal. The brief supports the position of Plaintiff-Appellant Couture, urging reversal of the district court's decision and an order for entry of summary judgment in his favor on the issue of whether he suffered an adverse employment action.

Plaintiff-Appellant Couture has consented to the filing of this brief; Defendant-Appellee Bonfils Memorial Blood Center (Bonfils) has not. Consequently, authority to file this brief must be provided by the Court's grant of

the Motion for Leave to File Brief of *Amici Curiae*, submitted contemporaneously with this brief.

INTRODUCTION

Defendant-Appellee Bonfils hired Plaintiff-Appellant Couture to work as a donor technician, which required him to perform phlebotomy. (Aplt. App. at 250 - 251.) When Couture revealed to Bonfils that he has human immunodeficiency virus (HIV), Bonfils involuntarily removed him from the donor technician position due to its fears of public perception and alleged beliefs regarding the risk of transmission of HIV to its donors. (Aplt. App. at 11, 159, 189, 194, 196.)

Bonfils then told Couture that he could apply for another job in the company, which he did. (*Id.* at 196, 333.) After successfully interviewing for the position of product management technician, Couture was offered the job and agreed to try it. (*Id.* at 336, 357.) However, he soon resigned as the new job did not have the same attributes as the donor technician position. (*Id.* at 220-21.)

Eventually, he brought suit, raising claims of disability discrimination in violation of Title I the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101, *et seq.*, and the Colorado Anti-Discrimination Act (CADA), Colo. Rev. Stat. § 24-34-402. The district court dismissed Couture's disability discrimination claims on cross-motions for summary judgment based upon an erroneous determination that Couture did not suffer an adverse employment action. (Aplt.

App. at 146.) *Amici Curiae* urge the Court to reverse the decision of the district court and order entry of summary judgment in favor of Plaintiff-Appellant Couture on the issue of whether he suffered an adverse employment action in this case.

ARGUMENT

I. BASED UPON THIS COURT'S PRIOR DECISIONS REGARDING THE NATURE OF AN ADVERSE EMPLOYMENT ACTION, THE EMPLOYMENT ACTION AT ISSUE IN A CASE SUCH AS THIS IS ADVERSE.

Title I of the ADA and the CADA prohibit disability discrimination in employment. *See* 42 U.S.C. § 12101, *et seq.*; Colo. Rev. Stat. § 24-34-402. To prevail on an employment discrimination claim under the ADA or CADA, the employee must demonstrate, among other things, that the employer took an adverse employment action against the employee due to disability. *See Mathews v. Denver Post*, 263 F.3d 1164, 1167 (10th Cir. 2001); *Lawley v. Department of Higher Education*, 36 P.3d 1239, 1247 (Colo. 2001).

What constitutes an adverse employment action is to be "liberally construed" in every type of employment discrimination case. *See Hillig v. Rumsfeld*, 381 F.3d 1028, 1031 (10th Cir. 2004) (mandating that determination of whether an employment action is adverse be done on a case-by-case basis, "examining the unique factors relevant to the situation at hand" in Title VII retaliation case) (internal quotations omitted); *see also Stinnett v. Safeway, Inc.*, 337 F.3d 1213, 1217 (10th Cir. 2003) (same standard for Title VII and CADA hostile work

environment claims); *Garcia v. Pueblo Country Club*, 299 F.3d 1233, 1241-42 (10th Cir. 2002) (same standard for ADEA and § 1981 race/national origin claims); *Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1178 (10th Cir. 1999) (same standard for ADA retaliation case).

Hence, while the law cannot give effect to a mere "chip-on-the-shoulder" complaint, *Sanchez v. Denver Public Schools*, 164 F.3d 527, 533 (10th Cir. 1998), if "the unique factors relevant to the situation at hand," demonstrate that the employer's action has caused more than a *de minimis* harm to a plaintiff's current employment status or potential future employment prospects, an adverse employment action exists. *See Hillig*, 381 F.3d at 1033 (concluding negative job reference constituted adverse employment action though plaintiff could not demonstrate that reference precluded a particular employment prospect); *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986 (10th Cir. 1996) (filing of false criminal charges against employee is adverse where act caused "significant risk of humiliation, damage to reputation, and a concomitant harm to future employment prospects.")

As a matter of course, loss of a particular job constitutes an adverse employment action. *See Wells v. Colorado Dept. of Transp.*, 325 F.3d 1205, 1216 (10th Cir. 2003); *Pacheco v. Whiting Farms, Inc.*, 365 F.3d 1199, 1207 (10th Cir. 2004) Employment actions that give rise to pecuniary losses also constitute

adverse employment actions. *See Hooks v. Diamond Crystal Specialty Foods, Inc.*, 997 F.2d 793, 799 (10th Cir. 1993) (noting that a reassignment may be an adverse employment action when the employee "receives less pay, has less responsibility, or is required to utilize a lesser degree of skill than his previous assignment"), *overruled on other grounds by Buchanan v. Sherrill*, 51 F.3d 227, 229 (10th Cir. 1995).

However, an adverse employment action also includes a variety of other actions. *See Hillig*, 381 F.3d at 1032-33 (concluding that adverse employment actions are *not* limited to "tangible employment actions" *e.g.*, those causing "'a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits,'") (quoting *Burlington Indus. v. Ellerth*, 524 U.S. 742, 761, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998)). An adverse employment action is also *not* limited to one causing "monetary losses in the form of wages or benefits." *Sanchez*, 164 F.3d at 532; *Stinnett*, 337 at 1217. An adverse employment action may even include a reassignment that is undesired but results in no loss of pay or responsibility. *See Ellerth*, 524 U.S. at 765 (noting tangible employment action also exists when employer causes a "discharge, demotion, or undesired reassignment"); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1128 (10th Cir. 1993)

("Plaintiff demonstrated that she was reassigned against her wishes, satisfying the requirement that an adverse action be taken against her.")

The parties to this action dispute whether Couture's removal from the donor technician position and subsequent placement in the product management technician was an involuntary termination and new hire or a reassignment. (Aplt App. at 122-123, 137-138.) The district court determined that Couture did not suffer an adverse employment action because it mistakenly concluded that he "was transferred to another position within the organization at the same rate of pay." (*Id.* at 147.) In the face of undisputed facts to the contrary, the court found that "[t]he evidence shows only that plaintiff was reassigned to a job that, while providing the same rate of pay, did not suit him." (*Id.* at 146 n.2.) The district court therefore concluded erroneously that "Plaintiff's mere dissatisfaction with the alternative job is not sufficient to transform the transfer into an adverse employment action." (*Id.* at 147.)

However, the district court was in error. In examining the "unique factors" relevant to the situation at hand," as required under *Hillig*, it is clear that regardless of whether the employment action at issue here is viewed as an involuntary termination or a reassignment, it qualifies as an adverse employment action. First, though the district court failed to consider it, Couture had presented evidence establishing that the two positions were completely dissimilar because they

involved entirely different duties. (Aplt. App. at 188, 123.) A comparison of the two job descriptions reveals that a donor technician was required to "register, interview, screen and select potential [blood] donors; perform sample and whole blood collections [*i.e.*, phlebotomy]; provide donor care; and conduct equipment quality control while delivering excellent customer service and adhering to company standards." (*Id.* at 253.) As noted by Couture's vocational expert, the donor technician "work[ed] with a variety of patients, worked a varied schedule, and travel[ed] to local blood drives." (*Id.* at 292.)

In contrast, the product management technician "receives and prepares blood components, performs distribution duties, maintains supplies and labels blood products[; and p]rovides assistance in quarantine, washing, deglycing, aliquoting and irradiation of blood products." (*Id.* at 394.) This job, unlike the donor technician position, "essentially involved shipping of blood and blood products and related supplies and maintaining product production and inventory." (*Id.* at 293.) As conceded by Bonfils' vocational expert, the product management technician job required far less interaction with the public than the donor technician position, required a static work environment as opposed to the varied work environment for the donor technician, and offered no opportunities for travel in the product management job, in contrast to the frequent travel involved in the donor technician position. (*Id.* at 305.) Therefore, even if the move from the donor technician

position to the product management technician job is characterized as a transfer, it is undeniably a "reassignment with significantly different responsibilities" and is, therefore, an adverse employment action under the well-established precedents of this Court. *See Hillig*, 381 F.3d at 1032-33; *Sanchez*, 164 F.3d 532 (both quoting *Ellerth*, 524 U.S. at 761.); *see also Stinnett*, 337 F.3d at 1217 (concluding evidence sufficient to present triable issue of fact as to adverse employment action where reassignment may have resulted in a de facto reduction in responsibility and required a lesser degree of skill, though employee maintained her wage level, seniority, and title.)

Contrary to the district court's finding, *amici curiae* observe that the product management technician job also offered less compensation than the donor technician position. While the two jobs provided the same base hourly wage because Bonfils had increased the regular hourly wage of the product management technician position exclusively for Couture, (Aplt. App. at 354), the product management job still did not offer the additional $1.25 per hour "shift differential" or the $2.50 per hour for community blood drives that was paid to donor technicians. (*Id.* at 251, 355.) Therefore, Couture would not have earned as much as a product management technician as he would have had he remained in the donor technician position. Such a loss in employment compensation constitutes an adverse employment action in this Circuit. *See Ellerth*, 524 U.S. at 761; *Hillig*, 381

F.3d at 1032-33; *Sanchez*, 164 F.3d at 532; *Stinnett*, 337 F.3d at 1217; *Hooks*, 997 F.2d at 799.

Finally, it is undisputed by the parties that the "reassignment," if characterized as such, was undesired. Couture made it abundantly clear to Bonfils that he objected to being removed from the donor technician position. (Aplt. App. at 194.) This is sufficient to make the "reassignment" to the product management job an adverse employment action in this Circuit. *See Hillig*, 381 F.3d 1032-33 (concluding that tangible employment actions are adverse); *Ellerth*, 524 U.S. at 765 (determining that "undesired reassignment" is tangible employment action); *Sauers*, 1 F.3d at 1128 (concluding that employee's objection to reassignment was all that was needed to demonstrate adverse employment action even though she was transferred to same secretarial position at another office at the same rate of pay.)

Each of these factors—the significant differences between the jobs, the loss in compensation, and the objection to the so-called "re-assignment"—is alone more than sufficient to submit the issue of whether Couture suffered an adverse employment action to a jury. Taken together, however, they provide overwhelming evidence of the existence of an adverse employment action, such that *amici curiae* urge this Court to reverse the district court's decision and order entry of summary judgment on behalf of Couture on this issue.

II. THE PLAIN LANGUAGE AND UNDERLYING PURPOSES OF THE ADA AND CADA DICTATE THAT AN ADVERSE EMPLOYMENT ACTION EXISTS WHEN AN EMPLOYER INVOLUNTARILY REASSIGNS AN EMPLOYEE TO ANOTHER POSITION DUE TO DISABILITY WHEN NO REASONABLE ACCOMMODATION HAS BEEN REQUESTED OR IS NECESSARY.

The ADA's purpose is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). To implement this remedial purpose, the ADA prohibits employers from discriminating against individuals with disabilities in any of the "terms, conditions, and privileges of employment." 42 U.S.C. §12112(a). Similarly, the CADA prohibits an "employer [from] refus[ing] to hire, to discharge, to promote or demote, to harass during the course of employment, or to discriminate in matters of compensation against any person otherwise qualified because of disability." Colo. Rev. Stat. § 24-34-402(1)(a). "Qualified individual with a disability means an individual with a disability who satisfies the . . . job-related requirements of the employment position such individual holds or desires."[1] 29 C.F.R. § 1630.2(m).[2]

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[1] *Amici curiae* are aware that Bonfils has raised a direct threat defense, contending that Couture posed a significant risk to blood donors in the donor technician position, (Aplt. App. at 108-114); however, this issue is addressed in Couture's opening brief and in the briefs of other *amici curiae*. Consequently, it is not considered here.

[2] Because the portion of the CADA "concerning . . . disability is substantially equivalent to Federal law, as set forth in the Americans with Disabilities Act of 1990," the interpretation of the CADA "concerning disability shall follow the interpretations established Federal regulations

An employer is prohibited from "limit[ing], segregat[ing], or classify[ing] a job applicant or employee in a way that adversely affects his or her employment opportunities or status on the basis of disability." 29 C.F.R. § 1630.5. In its interpretative guidance to its regulations, the EEOC explained further that it "would be a violation for an employer to assign or reassign (as a reasonable accommodation) employees with disabilities to one particular office or installation" or "to deny an applicant with a disability based on generalized fears about the safety of an individual with such a disability..." 29 C.F.R. Pt. 1630, App. § 1630.5.

Consistent with these laws, "an employer may not compel a qualified individual with a disability to accept an accommodation, where that accommodation is neither requested nor needed by the individual." 29 C.F.R. Pt. 1630, App. § 1630.9(d); *see* H.R. Rep. No. 485(II) at 63, 1990 U.S.C.C.A.N. at 345 ("Efforts should be made . . . to accommodate an employee in the position that he or she was hired to fill before reassignment is considered.") "The preferred option is always an accommodation that keeps the employee in his or her existing job if that can reasonably be accomplished." *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1170-71 (10th Cir. 1999); *see EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, 2 EEOC Compl. Man. (BNA), filed after Section 902 ("Reassignment is the

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adopted to implement the Americans with Disabilities, [sic] Act . . . ." Colo. Civil Rights Comm'n Rule 60.1, 3 Colo. Code Regs. § 708-1.

reasonable accommodation of last resort.")[3] To do otherwise, runs the risk that reassignment will "be used to limit, segregate, or otherwise discriminate against employees with disabilities by forcing reassignments to undesirable positions," though this is prohibited. 29 C.F.R. Pt. 1630, App. § 1630.2(o).

Consequently, in cases where an employer forces an unrequested and unnecessary transfer upon an employee because of disability, that employer violates applicable disability discrimination statutes. In one of the earliest of such cases, the Ninth Circuit granted a preliminary injunction reinstating a teacher with AIDS who had alleged a violation of the Rehabilitation Act, finding the teacher had presented sufficient evidence of irreparable injury by showing that the administrative job to which he had been involuntarily transferred was "distasteful" to him, involved no student contact, and did "not utilize his skills, training or experience." *Chalk v. United States District Court*, 840 F.2d 701, 709 (9th Cir. 1988) The ADA's legislative history cites *Chalk* in H.R. Rep. No. 485(II) at 63, 1990 U.S.C.C.A.N. at 345, as support for the proposition that "in the absence of a request, it would be inappropriate to provide an accommodation, especially where it could impact adversely on the individual."

[3] "As administrative interpretations of the ADA, . . .these guidances are not controlling upon the courts by reason of their authority, but they do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Midland Brake*, 180 F.3d at 1165 n.5.

In a similar case, the Seventh Circuit determined than an employee had raised "a clear claim of forced reassignment or of an unreasonable accommodation" in violation of the ADA, based upon allegations that he had been involuntarily transferred from one custodial job to another in which he no longer had contact with other custodians and was ordered not to talk with others because his employer regarded him as having a mental illness. *Duda v. Board of Educ. of Franklin Park Public School Dist. No. 84*, 133 F.3d 1054, 1059 (7th Cir. 1998.)

In yet another such decision, a woman with a hearing impairment who transported children in a van presented sufficient evidence that she had suffered an adverse employment action by showing that she was transferred from her job as van driver (in which she had contact with children) to a job as a cook (where she primarily worked in the back of the building), was required to work a split shift and had her work hours reduced. *See Rizzo v. Children's World Learning Centers, Inc.*, 84 F.3d 758, 764-65 (5th Cir. 1996), *affirmed on remand*, 173 F.3d 254 (1999), *affirmed en banc*, 213 F.3d 209 (2000).

Here, assuming *arguendo*, that Couture was "reassigned" from the donor technician position to the product management technician job as Bonfils has alleged, Couture did not seek or need a reasonable accommodation from Bonfils and objected to it as violating the ADA. (Aplt. App. at 308, 310-311.) As for Bonfils, it never asserted that it offered the purported "reassignment" as a

reasonable accommodation to Mr. Couture's disability. Rather, when Couture asked how Bonfils could do such a thing to him in light of the ADA, the Bonfils' manager who is responsible for ensuring ADA compliance at Bonfils stated that she did not see how the ADA applied to Couture's situation. (*Id.* at 308, 310-311.) She admitted she did not know whether the ADA required Bonfils to make an individualized inquiry as to a person's disability and acknowledged that Bonfils did not ask Couture anything about his particular medical condition before removing him from the donor technician position. (*Id.* at 188-189.) Further, though Couture had never sought, nor been offered, the alleged "transfer" as a reasonable accommodation to his disability, he was nevertheless involuntarily "reassigned" to a position that he did not desire which took him out of direct contact with the public, solely because he is HIV-positive. (*Id.* at 168, 189, 196, 293.) Consequently, under the foregoing statutes, regulations, policy, and case law, the "reassignment" of Couture constitutes an adverse employment action.

III. IF ALLOWED TO STAND, THE REPURCUSSIONS OF THE DISTRICT COURT'S DECISION HAVE THE POTENTIAL TO UNDERMINE THE REMEDIAL PURPOSES OF EMPLOYMENT DISCRIMINATION STATUTES IN ADDITION TO THE ADA AND CADA.

As a final note, *amici curiae* observe that it is impossible to reconcile the district court's summary judgment decision in this case with the remedial purposes of not only the ADA, but *all* employment discrimination laws. Employers should

not be encouraged to engage in acts of invidious discrimination; nevertheless, the district court's decision suggests that employers may, without fear of liability under applicable employment discrimination laws, take action to remove or reassign employees from certain jobs solely due to the very characteristics that are supposed to protect them under the law. That is, the district court's decision suggests that an employer may freely discriminate against an employee in a protected class simply by reassigning the employee to another position at the same rate of pay, regardless of the obviousness of the discriminatory motive behind it. (Aplt. App. at 145.)

With such free rein to engage in intentional discrimination, it is not difficult to envision that an employer may wish to "reassign" certain workers, so as to prevent them from interacting with the public, solely on the basis of that person's protected class or characteristic. For example, a retailer who fears that a person of color working as a sales associate would be less attractive to its customers could simply transfer any such worker to work behind the scenes in its stock room, provided that the employer made sure that the employee's rate of pay and other terms of compensation were equivalent. The same principle could apply to people in wheelchairs, women, older people, or members of religious communities who display religious emblems, in fact, to anyone whose protected characteristic is visible or whom the employer fears may be disclosed to the public, essentially

eradicating a long line of cases that have prohibited precisely this kind of discrimination. *See, e.g. Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971) (prohibiting under Title VII employment decisions based solely upon customer preferences for one gender of employee over another where such preferences do not make an employer unable to perform its primary function); *Gerdom v. Continental Airlines, Inc.*, 692 F.2d 602, 609 (9th Cir. 1982) (same with regard to employer's weight requirement for female employees).

Therefore, this Court should reverse the district court's ruling on the existence of an adverse employment action in this case, not just because its application to Couture was erroneous under this Circuit's prior decisions and the remedial purposes of the ADA and CADA, but also because it undermines the basic principals of all anti-discrimination remedial statutes, and thereby opens employees to abusive employment practices. *Amici curiae* request that the Court affirm the principle that segregating, reassigning, or otherwise adversely impacting the employment status of an employee solely on the basis of a protected characteristic is *never* allowable under employment discrimination laws.

IV. CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that the Court reverse the district court's decision, and order entry of summary judgment in favor

of Plaintiff-Appellant Couture on the issue of whether he suffered an adverse employment action as a matter of law.

Dated this 7th day of January 2005.

s/ John C. Hummel

John C. Hummel
Legal Director
Center's Legal Initiatives Project (CLIP)
1050 Broadway
Denver, Colorado 80203
(303) 733-7743
jhummel@coloradoglbt.org

Counsel for *Amici Curiae*

V. CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(c) & (d) and Fed. R. App. P. 32(a)(7)(C)(i), the undersigned certifies that this brief is proportionally spaced and contains 3,638 words. In making this statement, the undersigned relied on the word count of Microsoft Word 2002, the word processing program used to prepare this brief, excluding the Table of Contents, Table of Authorities, and certifications of counsel.

s/ John C. Hummel

John C. Hummel
Counsel for *Amici Curiae*

VI. CERTIFICATE OF DIGITAL SUBMISSION

Pursuant to the October 20, 2004 Emergency General Order of the United States Court of Appeals for the Tenth Circuit regarding Electronic Submission of Selected Documents, the undersigned certifies that:

(1) all required privacy redactions have been made and, with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk, and

(2) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program (Symantec Antivirus Vers. 1/5/05, rev. 9) and, according to the program, are free of viruses.

s/ John C. Hummel

John C. Hummel
Counsel for *Amici Curiae*

CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2005, the foregoing Brief of *Amici Curiae* Training and Advocacy Support Center, National Employment Lawyers Association, Colorado Cross-Disability Coalition, Center's Legal Initiatives Project, and American Association of People with Disabilities, in Support of Plaintiff-Appellant Couture was served in two paper copies and in digital form on compact disc via hand delivery, to the following:

Andrea E. Faley
Eric H. Maxfield
The Legal Center for People with
Disabilities and Older People
455 Sherman Street, Suite 130
Denver, CO 80203

Counsel for Plaintiff-Appellant John Couture

Matthew J. Rita
Sven C. Collins
Holme Roberts & Owen LLP
1700 Lincoln, Suite 4100
Denver, CO 80203-4541

Counsel for Defendant-Appellee Bonfils Memorial Blood Center

s/ John C. Hummel

APPENDIX A

DESCRIPTION OF *AMICI CURIAE*

The Training and Advocacy Support Center (TASC) provides training and technical assistance to the nationwide network of protection and advocacy (P&A) agencies. Located in all 50 states, the District of Columbia, Puerto Rico, and the federal territories, P&As are mandated under various federal statutes to provide legal representation and related advocacy services on behalf of all persons with disabilities in a variety of settings. The P&A system comprises the nation's largest provider of legally based advocacy services for persons with disabilities. TASC is housed at the National Association of Protection and Advocacy Systems (NAPAS). This case is of particular interest to TASC because P&As frequently represent employees with disabilities in discrimination cases.

The National Employment Lawyers Association (NELA) is a voluntary membership organization of over 3,000 lawyers who regularly represent employees in labor, employment, and civil rights disputes. NELA is one of the largest organizations in the United States whose members litigate and counsel individuals, employees, and applicants on claims arising out of the workplace. As part of its advocacy efforts, NELA has filed numerous *amicus curiae* briefs before this Court regarding the proper interpretation and application of employment discrimination laws.

Colorado Cross-Disability Coalition (CCDC) is a Colorado non-profit corporation whose members are persons with disabilities and their non-disabled allies. CCDC's mission is to work for systemic change that promotes independence, self-reliance, and full inclusion for people with disabilities in the entire community.

The Center's Legal Initiatives Project (CLIP) is a program of The Gay, Lesbian, Bisexual and Transgender Community Center of Colorado, Inc. CLIP is a *pro bono* legal services program that opposes discrimination based on sexual orientation, gender identity, and HIV/AIDS. CLIP advocates for equal opportunity and fair employment practices in the State of Colorado.

The American Association of People with Disabilities (AAPD) is a national membership organization working to increase the political and economic power of children and adults with disabilities in the United States. Founded on the fifth anniversary of the ADA, AAPD has a strong interest in effective enforcement and implementation of the ADA and other disability rights laws.