No. 24-1207

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SHARISE PARKER,
Plaintiff-Appellant,

v.

CHILDREN'S NATIONAL MEDICAL CENTER, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of Maryland
Hon. Julie R. Rubin, United States District Judge

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Rules & Regulations

Other Authorities

STATEMENT OF INTEREST

Congress charged the Equal Employment Opportunity Commission ("EEOC") with interpreting, administering, and enforcing federal prohibitions on employment discrimination, including the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 et seq. ("ADA"), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. ("Title VII"). Here, the district court rejected the plaintiff's ADA claims on the grounds that (1) her pregnancy-related medical condition was not a covered disability and (2) her request to work fewer hours due to her medical condition was neither a request for reasonable accommodation nor subject to the ADA's antiretaliation provision. And in analyzing the plaintiff's Title VII sex-discrimination claim, the court rejected her evidence that the circumstances of her termination suggested discrimination because that evidence came from her own testimony.

In so ruling, the district court relied on inapposite and incorrect legal standards under the ADA and Title VII. Because of the importance of these issues to the effective administration and enforcement of both statutes, the EEOC respectfully offers its views to the Court. As a federal agency, the

EEOC is authorized to participate as amicus curiae in the courts of appeals. Fed. R. App. P. 29(a)(2).

STATEMENT OF THE ISSUES

1. Whether the plaintiff presented sufficient evidence to support a jury finding that she was a qualified individual with a disability under the ADA and that she requested a reasonable accommodation.
2. Whether a reasonable jury could find that the plaintiff's request for reasonable accommodation constituted protected activity for purposes of her ADA retaliation claim.
3. Whether the plaintiff's deposition testimony is valid evidence of causation as to her Title VII discrimination claim.

STATEMENT OF THE CASE

A. Statement of the Facts

Starting in September 2018, Plaintiff-Appellant Sharise Parker was employed by Defendant Children's National Medical Center, Inc., ("CNMC"), as a Training Specialist. JA90, JA121. Parker's job duties included facilitating education, orientation, and training for new hires and existing employees. JA121-122. Parker was a salaried employee with a regular work shift from 8:30 a.m. to 5 p.m. five days a week, but she

testified in her deposition that CNMC routinely expected her to, and she did, work longer hours, up to ten to twelve hours per day depending on the day. JA126, JA500-501.

That November, Parker learned she was pregnant, with an estimated due date of July 8, 2019. JA370. Around Thanksgiving, Parker informed her supervisor, Itina Viaud, of her pregnancy. JA362. Parker's healthcare providers advised her that her pregnancy was considered "high risk" because of her age and history of uterine fibroids. JA362; *see also* JA444-445. Parker did not start having fibroid problems until after her first pregnancy. JA444. She underwent three or four surgeries to remove them, but they grew back, and continued to grow, with the pregnancy at issue here. JA444-445.

On Sunday, December 2, Parker experienced substantial vaginal bleeding due to one of her uterine fibroids having burst. JA442. She described the experience in her deposition as, "I had a massive … it almost felt as though like I had urinated on myself, and it was blood." JA442. Parker then went to the emergency room (ER), fearing a miscarriage. JA363. The ER doctor thought she was having a miscarriage, but the staff were unable to make a determinative diagnosis and they ultimately

referred her to her own physician. JA363, JA442. The ER staff also restricted Parker to bed rest for the following three days, through Wednesday, December 5, and provided her with documentation indicating she could return to work thereafter. JA363. At around 7:30 a.m. on Monday—the next day after her ER visit—Parker notified Viaud by phone that she feared she was having a miscarriage, that she had been seen at the ER, and that she would be out from work for three days. JA363. Parker also provided Viaud documentation from the hospital. JA363. The parties did not dispute that Parker did not suffer a miscarriage, and she returned to work after this period of bed rest. *See* district court docket no. ("R.") 63 at 16-33; R.82 at 10-29.

On January 16, 2019, Parker's doctor expressed concern that working long hours could be harmful to her pregnancy. JA363. The doctor recommended that she restrict her hours of work to eight hours per day for the duration of the pregnancy, and gave her documentation to that effect. JA363. Parker further testified that the return of the uterine fibroids with this pregnancy caused her to experience a lot of lower-abdomen pressure, which necessitated her wearing a brace around her stomach. JA445.

About a week later, after Parker had already worked a full day, Viaud asked her to complete several additional tasks. JA364. Parker called Viaud and informed her that she needed to limit her work to eight hours per day due to her pregnancy and that she had a doctor's note. JA364. According to Parker, Viaud responded that "it didn't matter if [she] was pregnant because she was still a salaried employee and her pregnancy was 'no excuse.'" JA364.

On January 29, Viaud contacted CNMC human resources, seeking guidance on how to proceed with terminating Parker's employment.[1] JA545-546. On February 22, Parker submitted a reasonable accommodation request to CNMC through its third-party insurer, seeking an eight-hour limit to her workdays. JA526; JA601-602; JA608, JA618-619. On February 28, CNMC terminated Parker's employment. JA666.

Parker ultimately filed suit, alleging in relevant part that CNMC violated Title VII and the ADA by discriminating against her based on sex and disability and retaliating against her for engaging in protected activity.

[1] On summary judgment, the parties disputed whether Parker's job performance had been satisfactory up to this point. *See* R.82 at 24; R.63-1 at 6-12.

JA89, JA94-96. CNMC moved for summary judgment on all of Parker's Title VII and ADA claims. *See* R.63-1 at 3-4.

B. District Court's Decision

The district court granted summary judgment to CNMC on all of Parker's claims. JA790. First, analyzing her Title VII pregnancy discrimination claim under the evidentiary framework described in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the court concluded that Parker failed to establish a prima facie case because, while she was not required to present comparator evidence as to her termination, she had not otherwise "present[ed] evidence that reasonably creates an inference of an unlawfully discriminatory motive." JA810. Noting that Parker "alleges that Viaud treated her differently, subjected her to heightened scrutiny, and made statements demonstrating pregnancy-based animus," she "fail[ed] to produce evidence in support of these allegations" "outside of her own testimony." JA812.

Turning to Parker's ADA failure-to-accommodate claim, the court concluded that the evidence did not show that her pregnancy-related medical condition rose to the level of an actual disability for statutory coverage purposes. The court recognized that a pregnancy-related

impairment that substantially limits a major life activity qualifies as an actual disability under the ADA. JA815-816. But, the court stated, even assuming Parker's pregnancy complications constituted a qualifying impairment, she had failed to produce sufficient evidence that those complications substantially limited a major life activity. JA821. Assuming the major life activities at issue were reproductive function and working, the court ruled that the evidence was insufficient to support a finding of substantial limitation as to either one. JA821. In a footnote, the court added that even if it were to conclude that Parker was disabled, she failed to present evidence that she could perform her job with a reasonable accommodation. JA823 n.9. The court also stated that CNMC had in fact accommodated Parker. JA823 n.9.

As for Parker's ADA retaliation claim, the court focused on her late January statement to Viaud that her doctor had instructed her to limit her workday to eight hours due to her pregnancy, and concluded that Parker's evidence was insufficient to show that she had "made clear that the workday limit was a request for accommodation." JA827-828; JA833-834. The court cited *Kelly v. Town of Abingdon*, 90 F.4th 158, 167 (4th Cir. 2024), for the proposition that "[t]o properly invoke the ADA, the communication

must be sufficiently direct and specific, providing notice that the employee needs a special accommodation for a medical condition." JA834. The court noted that it was "not entirely clear whether Plaintiff merely informed Viaud that she had a doctor's note or whether Plaintiff informed Viaud that she required an accommodation and 'require[d] an adjustment or change at work for a reason related to a medical condition.'" JA834 (quoting in part *Kelly*, 90 F.4th at 167). The court continued that, even if Parker had established a prima facie case, CNMC had articulated a legitimate, nondiscriminatory reason for terminating Parker—her job performance deficiencies—and Parker failed to present evidence showing CNMC's explanation was pretextual. JA836-841.

ARGUMENT

I. Parker presented sufficient evidence to support a jury finding that she was a qualified individual with a disability under the ADA and that she requested a reasonable accommodation.

A. A reasonable jury could find that Parker's uterine fibroid condition was a physical impairment that substantially limited her in the major life activity of reproductive function.

The ADA prohibits covered employers from discriminating against qualified individuals on the basis of disability. 42 U.S.C. § 12112(a); *see also Summers v. Altarum Inst., Corp.*, 740 F.3d 325, 328 (4th Cir. 2014) (same). In

2008, Congress amended the ADA to broaden the coverage provided by the statute's definition of "disability." ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008) ("ADAAA") (excerpts attached at Addendum A1-A4); *see also*, *e.g.*, *Summers*, 740 F.3d at 330 (recognizing same).

Post-amendment, the ADA continues to define "disability" to include "a physical or mental impairment that substantially limits one or more major life activities of such individual." 42 U.S.C. § 12102(1)(A) (attached at Addendum A5). However, with the ADAAA, Congress substantially relaxed the standards for determining whether a plaintiff has met that definition. *See* 42 U.S.C. § 12102(4)(A) (providing that the definition of disability "shall be construed in favor of broad coverage of individuals") (attached at Addendum A5-A6); *see also* 29 C.F.R. § 1630.2(i)(2) (new ADA coverage standards are "not … demanding") (attached at Addendum A7); *Summers*, 740 F.3d at 330. The ADAAA also redefined several key statutory terms, including "substantial limitation" and "major life activity." *See* ADAAA § 4 (attached at Addendum A2-A3); 42 U.S.C. § 12102(2)(A)-(B), (4) (attached at Addendum A5-A6); *Jacobs v. N.C. Admin. Off. of the Cts.*, 780 F.3d 562, 573 (4th Cir. 2015) (recognizing broader definitions of "major life

activity" and "substantial limitation" post-ADAAA). As a result, "[i]n enacting the ADAAA, Congress abrogated earlier inconsistent caselaw." *Jacobs*, 780 F.3d at 572 (*citing Summers*, 740 F.3d at 331).

In concluding that Parker failed to show that her uterine fibroids constituted an actual disability, the district court relied primarily on authority that itself was based on disability-coverage standards the ADAAA displaced. Measured under the correct, post-ADAAA coverage standards, the evidence of Parker's pregnancy-related medical condition is sufficient to support a reasonable jury finding that her condition was an actual disability under § 12102(1)(A).

First, Parker's pregnancy-related medical condition satisfies the ADA's "impairment" requirement.[2] As relevant here, a qualifying physical impairment is defined as "[a]ny physiological disorder or condition … affecting one or more body systems, such as … reproductive." 29 C.F.R. § 1630.2(h)(1) (attached at Addendum A7). Pregnancy itself generally is not a disability under the ADA. *See* 29 C.F.R. pt. 1630, app. § 1630.2(h)

[2] On summary judgment CNMC did not dispute that Parker's pregnancy-related medical condition met the requirements for a qualifying impairment. *See* R.63-1 at 16-20; R.86 at 1-2.

(observing that "conditions, such as pregnancy, that are not the result of a physiological disorder are … not impairments.") (attached at Addendum A11). "However, a pregnancy-related impairment that substantially limits a major life activity is a disability under the first prong of the definition." *Id.*; *see also Young v. United Parcel Serv., Inc.*, 784 F.3d 192, 198-200 (4th Cir. 2015) (analyzing whether the plaintiff's pregnancy-related lifting restriction constituted an ADA disability), *vacated on other grounds*, 575 U.S. 206 (2015); *Owens v. Governor's Off. of Student Achievement*, 52 F.4th 1327, 1336 (11th Cir. 2022) (recognizing that "a pregnancy- or childbirth-related impairment may qualify as a disability … if that impairment substantially limits a major life activity").

Along the same lines, the EEOC's policy guidance on pregnancy discrimination provides that "[a]lthough pregnancy itself is not an impairment," "some pregnant workers may have impairments related to their pregnancies that qualify as disabilities." Enforcement Guidance on Pregnancy Discrimination and Related Issues, No. 915.003, at II.A (June 25, 2015), https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues. "[U]nder the amended ADA, it is likely that a number of pregnancy-related impairments that

impose work-related restrictions will be substantially limiting, even though they are only temporary." *Id.* This includes impairments of the reproductive system, such as "[d]isorders of the uterus and cervix," that "make a pregnancy more difficult and thus necessitate certain physical restrictions to enable a full term pregnancy." *Id.*

Measuring the record evidence against these standards, a reasonable jury could readily find that Parker's pregnancy-related medical condition constituted a physiological condition or disorder affecting her reproductive system. *See supra* pp. 3-4 (discussing the evidence of her condition). While this Court has not addressed the question of pregnancy-related disabilities since Congress amended the ADA in 2008, such a finding would be consistent with how other courts of appeals have treated similar pregnancy-related medical conditions as qualifying impairments under the ADA. *See Munoz v. Selig Enters., Inc.*, 981 F.3d 1265, 1273 (11th Cir. 2020) (recognizing in ADA suit that "[b]y definition" the plaintiff's uterine fibroids constituted an impairment of her reproductive system); *Serednyi v. Beverly Healthcare, LLC*, 656 F.3d 540, 553-54 (7th Cir. 2011) (holding that the plaintiff who experienced vaginal bleeding (spotting) among other conditions, and whose physician prescribed medication and bed rest, had

presented evidence that "may support the inference that these complications were not the result of a normal pregnancy, and were, in fact, physiological disorders of the reproductive system" sufficient to qualify as an impairment under the ADA), *abrogated on other grounds by Young v. United Parcel Serv., Inc.*, 575 U.S. 206 (2015).

Second, Parker's evidence is sufficient to support a reasonable jury's conclusion that her condition substantially limited her in the major life activity of reproductive function. The amended statute explicitly provides that "a major life activity … includes the operation of a major bodily function, including … reproductive functions." 42 U.S.C. § 12102(2)(B) (attached at Addendum A5). The revised regulations also define "major bodily function[s]" to include reproductive functions. 29 C.F.R. § 1630.2(i)(1)(ii) (attached at Addendum A7). *See also Bragdon v. Abbott*, 524 U.S. 624, 639 (1998) (pre-ADAAA, recognizing reproduction as a major life activity).

The amended ADA also relaxed the standards for establishing whether an impairment constitutes a substantial limitation. *See Summers*, 740 F.3d at 329 (observing that "Congress instructed that the term 'substantially limits' be interpreted consistently with the liberalized

purposes of the ADAAA," quoting 42 U.S.C. § 12102(4)(B), and noting EEOC regulations clarifying that "'[t]he term "substantially limits" shall be construed broadly in favor of expansive coverage'" and is "'not meant to be a demanding standard,'" quoting 29 C.F.R. § 1630.2(j)(1)(i) (attached at Addendum A7)); *Miller v. Md. Dep't of Nat. Res.*, 813 F. App'x 869, 875 (4th Cir. 2020) (recognizing that, "[i]mportantly, this standard is much more lenient than the previous ADA standard" for substantial limitation). After the ADAAA, the correct substantial-limitation inquiry is whether the plaintiff's impairment "substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population." *Jacobs*, 780 F.3d at 573 (quoting 29 C.F.R. § 1630.2(j)(1)(ii) (attached at Addendum A7)). To satisfy that standard, "[a]n impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity." *Id.* (quoting 29 C.F.R. § 1630.2(j)(1)(ii) (attached at Addendum A7)).

While this inquiry requires an individualized assessment, "in making this assessment, the term 'substantially limits' shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for 'substantially limits' applied prior to the ADAAA." 29 C.F.R.

§ 1630.2(j)(1)(iv) (attached at Addendum A8). The inquiry "should not demand extensive analysis," ADAAA § 2(b)(5) (attached at Addendum A2), and the comparison of an individual's performance of a major life activity to most people in the general population "usually will not require scientific, medical, or statistical analysis," *Miller*, 813 F. App'x at 875 (quoting 29 C.F.R. § 1630.2(j)(1)(v) (attached at Addendum A8)).

In addition, "[u]nder the ADAAA and its implementing regulations, an impairment is not categorically excluded from being a disability simply because it is temporary," *Summers*, 740 F.3d at 333, so long as it is "sufficiently severe," *id.* at 330 (citing 29 C.F.R. pt. 1630, app. § 1630.2(j)(1)(ix) (attached at Addendum A12)). "[W]hile the ADAAA imposes a six-month requirement with respect to 'regarded-as' disabilities, it imposes no such durational requirement for 'actual' disabilities, thus suggesting that no such requirement was intended." *Id.* at 332 (citing *Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006), for the proposition that "a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute"). Accordingly, the relevant regulation "expressly provide[s] that 'effects of an impairment *lasting or expected to last fewer than six months* can

be substantially limiting' for purposes of proving an actual disability."[3] *Id.* at 329 (citing 29 C.F.R. § 1630.2(j)(1)(ix)) (attached at Addendum A8) (emphasis added by court of appeals).

This Court has endorsed this interpretation of the ADA, holding that "[t]he EEOC's decision to define disability to include severe temporary impairments entirely accords with the purpose of the amended Act." *Id*. at 332. Moreover, the Court observed, this interpretation of the ADA "advances" the Congressional intent underpinning the ADAAA by

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[3] As to the duration of Parker's condition, the non-sealed evidence on summary judgment identifies the onset of the adverse effects of her uterine fibroids but not when the condition abated. As multiple courts of appeal, including this Court, have observed, "[i]n an ADA case, the relevant time for assessing the existence of a [cognizable] disability is the time of the adverse employment action." *Anderson v. Discovery Comm'ns, LLC*, 517 F. App'x 190, 196 (4th Cir. 2013) (quoting *EEOC v. Chevron Phillips Chem. Co.*, 570 F.3d 606, 618 (5th Cir. 2009)) (cleaned up); *Chevron Phillips*, 570 F.3d at 618 (collecting cases). Thus, as of the relevant time—i.e., when CNMC terminated Parker—the record evidence would support a jury finding that her condition substantially limited her reproductive function. In any event, given the record evidence that Parker's uterine fibroids both were recurrent and worsened as her pregnancy progressed, *see supra* pp. 3-4, and the absence of evidence that the condition abated before the end of her pregnancy, this Court should infer on summary judgment that her condition substantially limited her reproductive function at least until the end of her pregnancy. *See, e.g.*, *Tolan v. Cotton*, 572 U.S. 650, 660 (2014) ("[A]t the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party.").

"expand[ing] the scope of protection available under the [ADA] as broadly as the text permits." *Id.*

In this case, the record evidence is sufficient to support a reasonable jury's finding that, at the relevant time, Parker's uterine-fibroid condition substantially limited her in the major life activity of reproduction and therefore establishes actual-disability coverage. As explained *supra* pp. 3-4, Parker's "high risk" pregnancy involved "massive" bleeding due to a ruptured fibroid, treatment in the ER, three days' bed rest, and sufficient abdominal pressure to require her to wear a stomach brace. JA362-363, JA442, JA444-445. These issues caused Parker's physician sufficient concern to restrict her to eight hours of work per day. JA363.

Moreover, even insofar as Parker's impairment may have been temporary or more limiting during pregnancy, a jury could still find it sufficient to qualify as a substantial limitation. *See supra* pp. 15-17; 29 C.F.R. § 1630.2(j)(1)(vii) ("An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.") (attached at Addendum A8). For all these reasons, the district court erred when it determined that Parker had not presented evidence that she was

substantially limited in her reproductive functions while working at CNMC. *See* JA821.

While the district court did not fully explain the reasoning behind its assessment of the evidence, its conclusion relied on outdated legal authority. For example, the court stated (JA816) that it took "guidance" from *Wonasue v. University of Maryland Alumni Association*, 984 F. Supp. 2d 480 (D. Md. 2013), but *Wonasue* itself relied on pre-ADAAA authority, including this Court's decision in *Brockman v. Snow*, 217 F. App'x 201 (4th Cir. 2007), to reject the plaintiff's claim. *See Wonasue*, 984 F. Supp. 2d at 487-89. *Brockman* is an unpublished, nonprecedential, pre-ADAAA decision holding that the plaintiff failed to show substantial limitation because, although she had presented evidence that she experienced "acute pregnancy complications, including bleeding and threatened abortion" and was put on bed rest for an indeterminate time, she nevertheless "offer[ed] no evidence of the duration of her impairment, nor of its severity." 217 F. App'x at 204, 208-09.

The district court's reliance on *Munoz* was similarly inapposite. *See* JA819-20. In *Munoz*, the Eleventh Circuit rejected the plaintiff's claim because she "introduced no evidence that she was substantially limited in

her ability to procreate … during the time she worked" for the defendant. 981 F.3d at 1273. Instead, the plaintiff's substantial-limitation evidence was based on her condition as it existed "[three and a half] years after she was terminated." *Id.* Here, as explained above (*see supra* p. 16 n.3), Parker adduced evidence that her uterine fibroids were substantially limiting as of the relevant time: her employment with and termination by CNMC.

B. A reasonable jury could find that Parker requested a reasonable accommodation from CNMC.

As this Court has recognized, the process for requesting an ADA accommodation "is not difficult," and the "burden of requesting an accommodation is light." *Kelly*, 90 F.4th at 166, 167. To satisfy this minimal burden and thereby "trigger an employer's duty to accommodate," in her "initial request" to the employer the employee need only "'communicate [her] disability and desire for an accommodation.'" *Id.* at 166 (quoting *Jacobs*, 780 F.3d at 581 (cleaned up)). The employee's initial request "need not specify 'the precise limitations resulting from the disability'" or "'identify a specific, reasonable accommodation'"; the employee simply needs to make clear that she "'wants assistance for … her disability.'" *Id.* at 166-67 (citations omitted).

This Court emphasizes substance over form in evaluating an employee's accommodation request. *Id.* at 168. The request must present "a logical bridge connecting the employee's disability to the workplace changes [s]he requests." *Id.* This connection need not be explicit; a request is sufficient if it "permit[s] the employer to infer that the request relates to the employee's disability." *Id.* And if the employee's initial request "leaves the precise nature of the disability or desired accommodation ambiguous," this does not render the accommodation request invalid. *Id.* (cleaned up). Instead, the employer should seek clarification through the interactive process "to ascertain the extent of [the employee's] disabilities and the range of accommodations that might address them." *Id.* (citing *Wilson v. Dollar Gen. Corp.*, 717 F.3d 337, 346 (4th Cir. 2013) (quoting 29 C.F.R. § 1630.2(o)(3))). This Court's interpretation of the ADA on this issue "is consistent with [EEOC] guidance on the ADA's accommodation provisions." *Id.* at 167 (citing EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, 2002 WL 31994335, at *4 (Oct. 17, 2002)).

Based on these standards and viewing the evidence on summary judgment in the light most favorable to Parker, a reasonable factfinder

could determine that her mid-January 2019 request to Viaud not to work extra hours, per her doctor's orders, constituted a request for reasonable accommodation. Parker presented evidence that on January 16 her doctor expressed concern that working long hours could be harmful to her pregnancy and recommended that she restrict her hours of work to eight hours per day for the duration of the pregnancy. JA363. About a week later, in response to Viaud's request that she complete several additional tasks after she had already worked a full day, Parker called Viaud and informed her that she had a doctor's note specifying that she needed to limit her work to eight hours per day as a result of her pregnancy. JA364. In response, Viaud told Parker that "it didn't matter if [she] was pregnant because she was still a salaried employee and her pregnancy was 'no excuse.'" JA364.

A reasonable jury could determine from this evidence that Parker had met her "not difficult" and "light" burden to show that she requested a reasonable accommodation from CNMC via Viaud. *Kelly*, 90 F.4th at 166, 167. Per *Kelly*, Parker's burden was simply to make clear to CNMC that she "want[ed] assistance for … her disability," *id.* at 167. Parker proffered evidence that she informed CNMC of her medical condition and its

adverse effects as early as December 3, when she experienced her ruptured fibroid event. And in her late-January communication with Viaud requesting maximum eight-hour days, Parker explicitly referenced her pregnancy as the basis for her request not to work more than eight hours a day and specified that she had supporting documentation from her doctor. JA363-364. This is more than sufficient evidence to permit a reasonable jury to find that Parker informed CNMC that she "wants assistance for … her disability." *Kelly*, 90 F.4th at 167. And to the extent CNMC had any further questions about Parker's accommodation needs, it was CNMC's burden to ask those questions as part of the ADA's mandatory interactive process, and not just deny her request without following up. *Id.* at 166 ("[W]hen a valid request leaves the precise nature of the disability or desired accommodation ambiguous, the employer should seek clarification.") (cleaned up).

II. A reasonable jury could find that Parker's request for reasonable accommodation constituted protected activity for purposes of her ADA retaliation claim.

The ADA's anti-retaliation provision states that "[n]o person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such

individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter." 42 U.S.C. § 12203(a). To establish a prima facie case of retaliation, a plaintiff must establish that she engaged in ADA-protected activity; she suffered a materially adverse employment action; and there is a causal link between the protected activity and the employment action. *Laird v. Fairfax Cnty.*, 978 F.3d 887, 892 n.4, 893 (4th Cir. 2020) (citations omitted).

This Court has long recognized that an employee's request for reasonable accommodation is ADA-protected activity. *Kelly*, 90 F.4th at 166; *see also Haulbrook v. Michelin N. Am., Inc.*, 252 F.3d 696, 706 (4th Cir. 2001). EEOC policy guidance similarly recognizes that requests for reasonable accommodation of a disability constitute protected opposition conduct under the ADA's antiretaliation provision. EEOC Enforcement Guidance on Retaliation and Related Issues, No. 915.004, at II.A.2.e (Aug. 25, 2016) ("Retaliation Guidance"), https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues.

To secure the statute's protection against retaliation, an employee "is not required to prove the conduct [s]he opposed was actually an ADA violation." *Reynolds v. Am. Nat'l Red Cross*, 701 F.3d 143, 154 (4th Cir. 2012).

"Rather, [s]he must show [s]he had a 'good faith belief' the conduct violated the ADA." *Id.* (citation omitted); *see also* Retaliation Guidance at II.A.2.c ("For statements or actions to be protected opposition … they must be based on a reasonable good faith belief that the conduct opposed violates the EEO laws…."). Accordingly, a plaintiff may establish protected activity with evidence that she "had a reasonable, good faith belief that she was entitled to request the reasonable accommodation she requested." *Williams v. Phila. Hous. Auth. Police Dep't*, 380 F.3d 751, 759 n.2 (3d Cir. 2004); *see also Sulima v. Tobyhanna Army Depot*, 602 F.3d 177, 188 (3d Cir. 2010) (same).

Parker's retaliation claim is based, in relevant part, on her late-January request for reasonable accommodation. For the reasons described in section I.B above, *see supra* pp. 19-22, a reasonable jury could find that her late-January interaction with Viaud constituted a request for accommodation under the ADA. A fortiori, then, a reasonable jury could further conclude that Parker's accommodation request was protected activity under the ADA because she had *more* than a reasonable, good-faith belief that she was entitled to request that CNMC limit her daily work

hours as a reasonable accommodation: she was *in fact* entitled to make that request.

The district court erred in holding otherwise. Although the court relied on *Kelly* in faulting Parker for not engaging in sufficiently "direct and specific" communication with CNMC about her disability, JA834 (citing *Kelly*, 90 F.4th at 167), it offered no explanation of why Parker's request did not meet the "not difficult" and "light" burden *Kelly* described. *See generally* JA829-835; *Kelly*, 90 F.4th at 166-68. Instead, it simply determined that even assuming Parker provided Viaud with the doctor's note, this was still insufficient to constitute a request for reasonable accommodation. JA833-835. But on this evidentiary record, that determination cannot be reconciled with *Kelly*.

We note one additional issue regarding the district court's analysis of Parker's retaliation claim. In discussing whether Parker had shown that CNMC's explanation for her termination was a pretext for unlawful retaliation, the court stated that Parker had both failed to show that CNMC's explanation was false and, additionally, that she failed to "connect [CNMC's] decision to terminate [Parker] to the alleged discriminatory reasons." JA841, JA843. To the extent the district court

implied that Parker was required to make an additional evidentiary showing of discriminatory or retaliatory motive at the pretext stage, the Supreme Court and this Court have long rejected that approach.

Prior to the Supreme Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), this Court and some others applied a "pretext-plus" standard to the *McDonnell Douglas* framework. Pretext-plus required, "as a matter of law, that an employee introduce *new* evidence, separate from her prima facie case, that *not only* undercut the employer's justification *but also* showed a specific and discriminatory motive." *Westmoreland v. TWC Admin. LLC*, 924 F.3d 718, 727 (4th Cir. 2019) (citing *Reeves*, 530 U.S. at 140-41). But, as this Court recognized in *Westmoreland*, "[i]n 2000, the Supreme Court in *Reeves* … abrogated this court's pretext-plus standard." *Id.*; *see also, e.g., Leake v. Ryan's Family Steakhouse*, 5 F. App'x 228, 232 (4th Cir. 2001) (same in Title VII retaliation case).

It is unclear whether the district court's mention of a lack of causation evidence at the pretext stage was in reference to its conclusion that Parker had failed to establish a prima facie case, or if it was suggesting an additional evidentiary burden for her to satisfy at the pretext stage. Nevertheless, under *Reeves* and this Court's case law construing it, the

evidence presented in this case indicating that CNMC's explanation was false, in addition to the evidence establishing Parker's prima facie case, would permit a jury to find pretext without any additional evidence of a discriminatory or retaliatory motive. *See* 530 U.S. at 147-48.

III. Parker's deposition testimony is valid evidence of causation as to her Title VII discrimination claim.

In addressing Parker's Title VII discrimination claim—specifically, the fourth prima facie element of that claim, that her termination occurred under circumstances giving rise to an inference of unlawful discrimination—the court noted Parker's allegation that after Viaud learned of her pregnancy, "Viaud treated her differently, subjected her to heightened scrutiny, and made statements demonstrating pregnancy-based animus." JA812. The court ruled, however, that Parker had "fail[ed] to produce evidence in support of these allegations" because the only evidence she adduced was "her own testimony." JA812. The court offered no explanation for why the fact that Parker's evidence was her own testimony rendered it infirm. *See* JA812. The court did claim support from two of this Court's decisions—*King v. Rumsfeld*, 328 F.3d 145, 149 (4th Cir. 2003), and *Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 280 (4th Cir. 2000)—but

offered no explanation for the relevance of those decisions to its dismissive treatment of Parker's testimonial evidence. JA812.

Insofar as the court rejected Parker's evidentiary proffer because it was her own testimony, that ruling was erroneous. This Court has long rejected the notion that evidence of an employer's discriminatory conduct is devoid of probative value simply because it was offered in the form of the plaintiff's own testimony. For example, in *Cowgill v. First Data Technologies, Inc.*, this Court addressed the employer's assertion that one aspect of the plaintiff's pretext argument was unpersuasive because she "offer[ed] no evidence outside of her own self-serving testimony." 41 F.4th 370, 383 & n.8 (4th Cir. 2022). Rejecting that argument, the Court observed that "[i]t is of no moment that [the plaintiff]'s fact testimony is 'self-serving.'" *Id.* And in *Lovett v. Cracker Barrel Old Country Store, Inc.*, this Court observed that "courts have 'long ago buried—or at least tried to bury—the misconception that uncorroborated testimony from the non-movant cannot prevent summary judgment because it is "self-serving."'" 700 F. App'x 209, 212 (4th Cir. 2017) (quoting *Berry v. Chi. Transit Auth.*, 618 F.3d 688, 691 (7th Cir. 2010)).

Nor do the cases the district court cited support its approach. Neither *King* nor *Hawkins* addressed the weight to afford a plaintiff's own testimony regarding discriminatory treatment she experienced—a disputed question about which Parker's "personal knowledge or firsthand experience" was more than sufficient to qualify as evidence. *Lovett*, 700 F. App'x at 212. In contrast, *King* and *Hawkins* addressed a different question: the value of a plaintiff's testimony on fact questions regarding *the employer's* own beliefs or perceptions. *See King*, 328 F.3d at 149 (stating that the plaintiff's testimonial evidence was not sufficient to show whether the employer believed the plaintiff's job performance had been meeting the employer's expectations); *Hawkins*, 203 F.3d at 280 (recognizing that the plaintiff's self-perception of her own job performance was not relevant to her discrimination claim, as "we have repeatedly held that in a wrongful discharge action, [i]t is the perception of the decision maker which is relevant [regarding job performance], not the self-assessment of the plaintiff") (cleaned up).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be vacated and the case remanded for further proceedings.

Respectfully submitted,

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June 24, 2024

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 5,748 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I certify that on June 24, 2024, I electronically filed the foregoing brief in PDF format with the Clerk of Court via the appellate CM/ECF system. I certify that all counsel of record are registered CM/ECF users, and service will be accomplished via the appellate CM/ECF system.

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Addendum

PL 110–325, 122 Stat 3553

September 25, 2008

ADA AMENDMENTS ACT OF 2008

An Act To restore the intent and protections of the Americans with Disabilities Act of 1990.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

<< 42 USCA § 12101 NOTE >>

SECTION 1. SHORT TITLE.

This Act may be cited as the "ADA Amendments Act of 2008".

<< 42 USCA § 12101 NOTE >>

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.—Congress finds that—

(1) in enacting the Americans with Disabilities Act of 1990 (ADA), Congress intended that the Act "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and provide broad coverage;

(2) in enacting the ADA, Congress recognized that physical and mental disabilities in no way diminish a person's right to fully participate in all aspects of society, but that people with physical or mental disabilities are frequently precluded from doing so because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers;

(3) while Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation has not been fulfilled;

(4) the holdings of the Supreme Court in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect;

(5) the holding of the Supreme Court in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) further narrowed the broad scope of protection intended to be afforded by the ADA;

(6) as a result of these Supreme Court cases, lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities;

(7) in particular, the Supreme Court, in the case of Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002), interpreted the term "substantially limits" to require a greater degree of limitation than was intended by Congress; and

(8) Congress finds that the current Equal Employment Opportunity Commission ADA regulations

defining the term "substantially limits" as "significantly restricted" are inconsistent with congressional intent, by expressing too high a standard.

(b) PURPOSES.—The purposes of this Act are—

(1) to carry out the ADA's objectives of providing "a clear and comprehensive national mandate for the elimination of discrimination" and "clear, strong, consistent, enforceable standards addressing discrimination" by reinstating a broad scope of protection to be available under the ADA;

(2) to reject the requirement enunciated by the Supreme Court in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures;

(3) to reject the Supreme Court's reasoning in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) with regard to coverage under the third prong of the definition of disability and to reinstate the reasoning of the Supreme Court in School Board of Nassau County v. Arline, 480 U.S. 273 (1987) which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973;

(4) to reject the standards enunciated by the Supreme Court in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002), that the terms "substantially" and "major" in the definition of disability under the ADA "need to be interpreted strictly to create a demanding standard for qualifying as disabled," and that to be substantially limited in performing a major life activity under the ADA "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives";

(5) to convey congressional intent that the standard created by the Supreme Court in the case of Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) for "substantially limits", and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis; and

(6) to express Congress' expectation that the Equal Employment Opportunity Commission will revise that portion of its current regulations that defines the term "substantially limits" as "significantly restricted" to be consistent with this Act, including the amendments made by this Act.

. . . .

SEC. 4. DISABILITY DEFINED AND RULES OF CONSTRUCTION.

<< 42 USCA § 12102 >>

(a) DEFINITION OF DISABILITY.—Section 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102) is amended to read as follows:

"SEC. 3. DEFINITION OF DISABILITY.

"As used in this Act:

"(1) DISABILITY.—The term 'disability' means, with respect to an individual—

"(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

"(B) a record of such an impairment; or

"(C) being regarded as having such an impairment (as described in paragraph (3)).

"(2) MAJOR LIFE ACTIVITIES.—

"(A) IN GENERAL.—For purposes of paragraph (1), major life activities include, but are not limited

to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

"(B) MAJOR BODILY FUNCTIONS.—For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

"(3) REGARDED AS HAVING SUCH AN IMPAIRMENT.—For purposes of paragraph (1)(C):

"(A) An individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

"(B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

"(4) RULES OF CONSTRUCTION REGARDING THE DEFINITION OF DISABILITY.—The definition of 'disability' in paragraph (1) shall be construed in accordance with the following:

"(A) The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.

"(B) The term 'substantially limits' shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.

"(C) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

"(D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

"(E)(i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as—

"(I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;

"(II) use of assistive technology;

"(III) reasonable accommodations or auxiliary aids or services; or

"(IV) learned behavioral or adaptive neurological modifications.

"(ii) The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

"(iii) As used in this subparagraph—

"(I) the term 'ordinary eyeglasses or contact lenses' means lenses that are intended to fully correct visual acuity or eliminate refractive error; and

"(II) the term 'low-vision devices' means devices that magnify, enhance, or otherwise augment a visual image.".

<< 42 USCA § 12103 >>

(b) CONFORMING AMENDMENT.—The Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.) is further amended by adding after section 3 the following:

"SEC. 4. ADDITIONAL DEFINITIONS.

"As used in this Act:

"(1) AUXILIARY AIDS AND SERVICES.—The term 'auxiliary aids and services' includes—

"(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

"(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

"(C) acquisition or modification of equipment or devices; and

"(D) other similar services and actions.

"(2) STATE.—The term 'State' means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands of the United States, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.".

(c) AMENDMENT TO THE TABLE OF CONTENTS.—The table of contents contained in section 1(b) of the Americans with Disabilities Act of 1990 is amended by striking the item relating to section 3 and inserting the following items:

"Sec. 3. Definition of disability.

"Sec. 4. Additional definitions.".

. . . .

42 U.S.C.A. § 12102

§ 12102. Definition of disability

Effective: January 1, 2009

As used in this chapter:

(1) Disability

The term "disability" means, with respect to an individual--

(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment (as described in paragraph (3)).

(2) Major life activities

(A) In general

For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

(B) Major bodily functions

For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

(3) Regarded as having such an impairment

For purposes of paragraph (1)(C):

(A) An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

(B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

(4) Rules of construction regarding the definition of disability

The definition of "disability" in paragraph (1) shall be construed in accordance with the following:

(A) The definition of disability in this chapter shall be construed in favor of broad coverage of

individuals under this chapter, to the maximum extent permitted by the terms of this chapter.

(B) The term "substantially limits" shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.

(C) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

(D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(E)(i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as--

(I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;

(II) use of assistive technology;

(III) reasonable accommodations or auxiliary aids or services; or

(IV) learned behavioral or adaptive neurological modifications.

(ii) The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

(iii) As used in this subparagraph--

(I) the term "ordinary eyeglasses or contact lenses" means lenses that are intended to fully correct visual acuity or eliminate refractive error; and

(II) the term "low-vision devices" means devices that magnify, enhance, or otherwise augment a visual image.

29 C.F.R. § 1630.2

Definitions.

. . . .

(h) Physical or mental impairment means—

(1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as an intellectual disability (formerly termed "mental retardation"), organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(i) Major life activities—

(1) In general. Major life activities include, but are not limited to:

(i) Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working; and

(ii) The operation of a major bodily function, including functions of the immune system, special sense organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. The operation of a major bodily function includes the operation of an individual organ within a body system.

(2) In determining other examples of major life activities, the term "major" shall not be interpreted strictly to create a demanding standard for disability. ADAAA section 2(b)(4) (Findings and Purposes). Whether an activity is a "major life activity" is not determined by reference to whether it is of "central importance to daily life."

(j) Substantially limits—

(1) Rules of construction. The following rules of construction apply when determining whether an impairment substantially limits an individual in a major life activity:

(i) The term "substantially limits" shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. "Substantially limits" is not meant to be a demanding standard.

(ii) An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a disability within the meaning of this section.

(iii) The primary object of attention in cases brought under the ADA should be whether covered

entities have complied with their obligations and whether discrimination has occurred, not whether an individual's impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment "substantially limits" a major life activity should not demand extensive analysis.

(iv) The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term "substantially limits" shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for "substantially limits" applied prior to the ADAAA.

(v) The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis. Nothing in this paragraph is intended, however, to prohibit the presentation of scientific, medical, or statistical evidence to make such a comparison where appropriate.

(vi) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures. However, the ameliorative effects of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

(vii) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(viii) An impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment.

(ix) The six-month "transitory" part of the "transitory and minor" exception to "regarded as" coverage in § 1630.15(f) does not apply to the definition of "disability" under paragraphs (g)(1)(i) (the "actual disability" prong) or (g)(1)(ii) (the "record of" prong) of this section. The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section.

(2) Non-applicability to the "regarded as" prong. Whether an individual's impairment "substantially limits" a major life activity is not relevant to coverage under paragraph (g)(1)(iii) (the "regarded as" prong) of this section.

(3) Predictable assessments—

(i) The principles set forth in paragraphs (j)(1)(i) through (ix) of this section are intended to provide for more generous coverage and application of the ADA's prohibition on discrimination through a framework that is predictable, consistent, and workable for all individuals and entities with rights and responsibilities under the ADA as amended.

(ii) Applying the principles set forth in paragraphs (j)(1)(i) through (ix) of this section, the individualized assessment of some types of impairments will, in virtually all cases, result in a determination of coverage under paragraphs (g)(1)(i) (the "actual disability" prong) or (g)(1)(ii) (the "record of" prong) of this section. Given their inherent nature, these types of impairments will, as a factual matter, virtually always be found to impose a substantial limitation on a major life activity. Therefore, with respect to these types of impairments, the necessary individualized assessment should be particularly simple and straightforward.

(iii) For example, applying the principles set forth in paragraphs (j)(1)(i) through (ix) of this section, it should easily be concluded that the following types of impairments will, at a minimum, substantially limit the major life activities indicated: Deafness substantially limits hearing; blindness substantially limits seeing; an intellectual disability (formerly termed mental retardation) substantially limits brain function; partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function; autism substantially limits brain function; cancer substantially limits normal cell growth; cerebral palsy substantially limits brain function; diabetes substantially limits endocrine function; epilepsy substantially limits neurological function; Human Immunodeficiency Virus (HIV) infection substantially limits immune function; multiple sclerosis substantially limits neurological function; muscular dystrophy substantially limits neurological function; and major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia substantially limit brain function. The types of impairments described in this section may substantially limit additional major life activities not explicitly listed above.

(4) Condition, manner, or duration—

(i) At all times taking into account the principles in paragraphs (j)(1)(i) through (ix) of this section, in determining whether an individual is substantially limited in a major life activity, it may be useful in appropriate cases to consider, as compared to most people in the general population, the condition under which the individual performs the major life activity; the manner in which the individual performs the major life activity; and/or the duration of time it takes the individual to perform the major life activity, or for which the individual can perform the major life activity.

(ii) Consideration of facts such as condition, manner, or duration may include, among other things, consideration of the difficulty, effort, or time required to perform a major life activity; pain experienced when performing a major life activity; the length of time a major life activity can be performed; and/or the way an impairment affects the operation of a major bodily function. In addition, the non-ameliorative effects of mitigating measures, such as negative side effects of medication or burdens associated with following a particular treatment regimen, may be considered when determining whether an individual's impairment substantially limits a major life activity.

(iii) In determining whether an individual has a disability under the "actual disability" or "record of" prongs of the definition of disability, the focus is on how a major life activity is substantially limited, and not on what outcomes an individual can achieve. For example, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in the major life activity of learning because of the additional time or effort he or she must spend to read, write, or learn compared to most people in the general population.

(iv) Given the rules of construction set forth in paragraphs (j)(1)(i) through (ix) of this section, it may often be unnecessary to conduct an analysis involving most or all of these types of facts. This is particularly true with respect to impairments such as those described in paragraph (j)(3)(iii) of this section, which by their inherent nature should be easily found to impose a substantial limitation on a major life activity, and for which the individualized assessment should be particularly simple and straightforward.

(5) Examples of mitigating measures—Mitigating measures include, but are not limited to:

(i) Medication, medical supplies, equipment, or appliances, low-vision devices (defined as devices that magnify, enhance, or otherwise augment a visual image, but not including ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aid(s) and cochlear implant(s) or

other implantable hearing devices, mobility devices, and oxygen therapy equipment and supplies;

(ii) Use of assistive technology;

(iii) Reasonable accommodations or "auxiliary aids or services" (as defined by 42 U.S.C. 12103(1));

(iv) Learned behavioral or adaptive neurological modifications; or

(v) Psychotherapy, behavioral therapy, or physical therapy.

(6) Ordinary eyeglasses or contact lenses—defined. Ordinary eyeglasses or contact lenses are lenses that are intended to fully correct visual acuity or to eliminate refractive error

. . . .

29 C.F.R. Pt. 1630, App.

APPENDIX TO PART 1630—INTERPRETIVE GUIDANCE ON TITLE I OF THE AMERICANS WITH DISABILITIES ACT

. . . .

Section 1630.2(h) Physical or Mental Impairment

Neither the original ADA nor the ADAAA provides a definition for the terms "physical or mental impairment." However, the legislative history of the Amendments Act notes that Congress "expect[s] that the current regulatory definition of these terms, as promulgated by agencies such as the U.S. Equal Employment Opportunity Commission (EEOC), the Department of Justice (DOJ) and the Department of Education Office of Civil Rights (DOE OCR) will not change." 2008 Senate Statement of Managers at 6. The definition of "physical or mental impairment" in the EEOC's regulations remains based on the definition of the term "physical or mental impairment" found in the regulations implementing section 504 of the Rehabilitation Act at 34 CFR part 104. However, the definition in EEOC's regulations adds additional body systems to those provided in the section 504 regulations and makes clear that the list is non-exhaustive.

It is important to distinguish between conditions that are impairments and physical, psychological, environmental, cultural, and economic characteristics that are not impairments. The definition of the term "impairment" does not include physical characteristics such as eye color, hair color, left-handedness, or height, weight, or muscle tone that are within "normal" range and are not the result of a physiological disorder. The definition, likewise, does not include characteristic predisposition to illness or disease. Other conditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments. However, a pregnancy-related impairment that substantially limits a major life activity is a disability under the first prong of the definition. Alternatively, a pregnancy-related impairment may constitute a "record of" a substantially limiting impairment," or may be covered under the "regarded as" prong if it is the basis for a prohibited employment action and is not "transitory and minor."

The definition of an impairment also does not include common personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or psychological disorder. Environmental, cultural, or economic disadvantages such as poverty, lack of education, or a prison record are not impairments. Advanced age, in and of itself, is also not an impairment. However, various medical conditions commonly associated with age, such as hearing loss, osteoporosis, or arthritis would constitute impairments within the meaning of this part. See 1989 Senate Report at 22–23; 1990 House Labor Report at 51–52; 1990 House Judiciary Report at 28–29.

. . . .

Section 1630.2(j)(1)(ix) Effects of an Impairment Lasting Fewer Than Six Months Can Be Substantially Limiting

Section 1630.2(j)(1)(ix) states: "The six-month 'transitory' part of the 'transitory and minor' exception to 'regarded as' coverage in § 1630.2(l) does not apply to the definition of 'disability' under § 1630.2(g)(1)(i) or § 1630.2(g)(1)(ii). The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section."

The regulations include a clear statement that the definition of an impairment as transitory, that is, "lasting or expected to last for six months or less," only applies to the "regarded as" (third) prong of the definition of "disability" as part of the "transitory and minor" defense to "regarded as" coverage. It does not apply to the first or second prong of the definition of disability. See Joint Hoyer–Sensenbrenner Statement at 3 ("[T]here is no need for the transitory and minor exception under the first two prongs because it is clear from the statute and the legislative history that a person can only bring a claim if the impairment substantially limits one or more major life activities or the individual has a record of an impairment that substantially limits one or more major life activities.").

Therefore, an impairment does not have to last for more than six months in order to be considered substantially limiting under the first or the second prong of the definition of disability. For example, as noted above, if an individual has a back impairment that results in a 20–pound lifting restriction that lasts for several months, he is substantially limited in the major life activity of lifting, and therefore covered under the first prong of the definition of disability. At the same time, "[t]he duration of an impairment is one factor that is relevant in determining whether the impairment substantially limits a major life activity. Impairments that last only for a short period of time are typically not covered, although they may be covered if sufficiently severe." Joint Hoyer–Sensenbrenner Statement at 5.

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