No. 24-1431

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JESSE SUTHERLAND,
Plaintiff-Appellant,

v.

PETERSON'S OIL SERVICE, INC.,
Defendant-Appellee.

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

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

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STATEMENT OF INTEREST

Congress charged the Equal Employment Opportunity Commission ("EEOC") with interpreting, administering, and enforcing federal laws prohibiting workplace discrimination, including the employment provisions of the Americans with Disabilities Act of 1990 ("ADA") and the ADA Amendments Act of 2008 ("ADAAA"), 42 U.S.C. §§ 12101 *et seq*. This appeal raises important questions about establishing disability under the ADA, the parties' respective responsibilities during the interactive process as contemplated in the statute, and the application of the ADA's antiretaliation provision. Because the EEOC has a strong interest in the effective enforcement of the ADA, it offers its views to the Court. *See* Fed. R. App. P. 29(a)(2).

STATEMENT OF THE ISSUES[1]

1. Did the district court err when it applied a pre-ADAAA standard in concluding that plaintiff Jesse Sutherland could not establish he was disabled within the meaning of the ADA?

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

2. Did the district court err when it concluded that Sutherland could not perform the essential duties of his job even with a reasonable accommodation, based on its determination, without record evidence, that the accommodations at issue were not "reasonable" for someone in his position?

3. Did the district court err in concluding that Sutherland failed to produce sufficient evidence showing he "expressly made" an accommodation request that was "link[ed]" to a disability?

4. Did the district court err when it dismissed Sutherland's retaliation claims as identical to his failure-to-accommodate claims, when a reasonable jury could have found that the two claims are not duplicative?

STATEMENT OF THE CASE

A. Statement of the Facts

Defendant Peterson's Oil Service, Inc. ("Peterson's") provides heating oil, cooling, and energy services to families and businesses. Appx.936.[2] Peterson's hired Sutherland as a service technician in August 2019. *Id.*

[2] Citations to the Joint Appendix are in the form "Appx.[page number]."

Service technicians maintain and repair heating and air conditioning systems at customers' homes. Appx.79; 170. At the time of his interview, Sutherland negotiated with Peterson's not to perform water heater installations and not to take "on-call" shifts. Appx.416-18; 356; 170. Peterson's mostly honored these requests, though Sutherland estimated that he had to install four or five water heaters during his tenure. Appx.416-18.

Sutherland injured his knee on October 8, 2019, and thereafter informed his dispatcher when knee swelling and inflammation interfered with his work. The injury "prevented [him] from bending [his] knee, which severely limited [his] ability to walk." Appx.68. He testified that the knee pain was "downright excruciating at some points," making his eyes tear, and his knee "felt like [it] was literally on fire" if he bent it. Appx.519-20. At the end of the workday, he testified, he "was begging basically, please, no more. I can't do anymore." Appx.431. He would end his workday when he could no longer bend his knee and had to ice his leg for an hour afterwards. Appx.435, 441.

Sutherland's contemporaneous texts to his dispatcher support these claims about the extent of his impairment. He told her that the swelling

kept him from bending his knee and hurt so much that he wanted his leg ripped off. Appx.718, 734, 738, 740, 811. In these messages, he also referred to needing surgery because the knee injury had "affected [his] ability to work and live." Appx.821.

After seeing his doctor and a surgeon in November, Sutherland informed Peterson's that he had torn the meniscus in his right knee, had similar problems with his left knee, and wanted to "cut back on hrs to 40 per week" to deal with his "excruciating pain[.]" Appx.989-90; 763. He also offered to provide any necessary medical documentation to support the request. Appx.990. He contends, however, that Peterson's still required him to work beyond that limit. Appx.68, 441, 505-06. Kristine Peterson Halus, Peterson's vice president and head of human resources, testified that she told the dispatchers and Sutherland's supervisor to "do their best" to minimize the hours assigned to Sutherland beyond the requested limit, but said it was "very difficult to put a hard stop on someone's day." Appx.99-100. Sutherland, for his part, contends that many of his customer calls were short, allowing for scheduling flexibility to ensure he did not exceed his limitations. Appx.68-70.

He then had an MRI, which revealed a torn meniscus, arthritis, and damage to his ACL, necessitating surgery. Appx.820-21. In mid-December, Sutherland gave Peterson's a letter from his doctor stating that he was unable to work more than six hours per day or five days per week. Appx.991-92; 178; 820-21; 825-26. He claims that Peterson's again ignored this limitation. Appx.68; 385, 419, 501, 520. Sutherland subsequently provided Peterson's with documentation from his surgeon stating that he would have knee surgery on January 27 and would be unable to work for eight weeks. Appx.172-76.

The surgery and rehabilitation were successful. Appx.384. Sutherland's doctor cleared him to return to work without restrictions as of April 20, 2020. Appx.1011. In preparation for his return, Sutherland attempted to contact Halus on April 8. *Id.* Several days later, after Sutherland had sent her three texts, Halus responded that she would "reach out later" that day. Appx.1011; Appx.110-11. She did not do so, however, despite several follow-up texts from Sutherland. Appx.111. Instead, Halus sent him a letter dated May 26, 2020, informing him that his employment had been terminated "effective April 20, 2020"—the day he told her he would be ready to return to work. Appx.993.

B. District Court's Decision

Sutherland filed suit alleging disability discrimination and retaliation under the ADA and Massachusetts state law.[3] The district court granted Peterson's summary judgment motion on all claims.

Regarding Sutherland's disability discrimination claims, the court concluded that he failed to show that he was "disabled within the meaning of the law." Appx.17. Sutherland's only evidence of impairment, the court said, was "his own complaints of pain and discomfort to fellow employees" along with "a single note from his doctor" that he provided in conjunction with a request for leave to have surgery. *Id.* And because Sutherland "admitted that his injury was temporary" and that he was able to work without restrictions following his recovery from surgery, the court concluded that he had not shown that he met the definition of "disability" under any of the ADA's three definitions. Appx.17-18.

Even if Sutherland had a covered disability, the court continued, he "failed to proffer sufficient evidence that he could perform his duties with

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[3] Courts analyze ADA and analogous Massachusetts state-law claims under the same framework. *Jones v. Nationwide Life Ins. Co.*, 696 F.3d 78, 86 (1st Cir. 2012); *Jones v. Walgreen Co.*, 679 F.3d 9, 13-14 (1st Cir. 2012).

or without" a reasonable accommodation because, in its view, working fewer hours and refraining from being on-call or performing installations "do not constitute 'reasonable' accommodations for a service technician in his industry" as a matter of law. Appx.18 (citing *EEOC v. Amego, Inc.*, 110 F.3d 135, 148-49 (1st Cir. 1997)). The court also concluded that Sutherland failed to produce evidence showing he "expressly made" a request for an accommodation and linked that requested accommodation to his disability. *Id.* Addressing Sutherland's argument that Peterson's failed to engage in the interactive process, the court stated that "Peterson's did reduce Mr. Sutherland's workload on an informal basis to the extent it was possible in a given workday." *Id.* at 18 n.5. The court dismissed Sutherland's retaliation claims, concluding that they were "identical to his failure to accommodate claims." Appx.20.

ARGUMENT

I. The district court erred in analyzing Sutherland's disparate treatment claims.

Under the ADA, a covered employer may not "discriminate against a qualified individual on the basis of disability." 42 U.S.C. § 12112(a); *Lang v. Wal-Mart Stores E., L.P.*, 813 F.3d 447, 454 (1st Cir. 2016). The statute

defines a "qualified individual" as someone "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). "Disability" means "a physical or mental impairment that substantially limits one or more major life activities of such individual," "a record of such an impairment," or "being regarded as having such an impairment." 42 U.S.C. § 12102(1)(A)-(C).

Pursuant to the ADAAA, which Congress enacted in 2008, courts interpreting the statute must construe disability "in favor of broad coverage of individuals … to the maximum extent permitted" by its terms. 42 U.S.C. § 12102(4)(A); *Mancini v. City of Providence*, 909 F.3d 32, 40 (1st Cir. 2018). Indeed, emphasizing this breadth of coverage was one of the central ideas animating the ADAAA's enactment. *See* ADAAA, Pub. L. No. 110-325, § 2(b)(1), 122 Stat. 3553, 3554 (noting that the purposes of the ADAAA include "reinstating a broad scope of protection to be available under the ADA"); *Mancini*, 909 F.3d at 40 (explaining that the ADAAA amendments "underscore the broad applicability of the statute").

To prove a disparate treatment claim under the ADA, "a plaintiff must show … that he (1) has a disability within the meaning of the ADA;

(2) is qualified to perform the essential functions of the job, with or without reasonable accommodations; and (3) was subject to an adverse employment action based in whole or in part on his disability." *Ramos-Echevarría v. Pichis, Inc.*, 659 F.3d 182, 186 (1st Cir. 2011). The district court rejected Sutherland's disparate treatment claim because it determined that he failed to produce evidence showing either that he had a disability or that he could perform the essential functions of his job with or without a reasonable accommodation. Appx.17-18. Both conclusions were erroneous.

A. The district court erred in determining that Sutherland could not establish he was disabled.

A preliminary question in both the disparate treatment and reasonable accommodation analyses is whether Sutherland was disabled within the meaning of the statute. Interpreting all evidence in the light most favorable to Sutherland, *see Mancini*, 909 F.3d at 38, a reasonable jury could find that Sutherland had a disability under all three subparts of the ADA's disjunctive definition: he produced evidence showing he had a physical impairment that substantially limited one or more major life activities, he had a record of such an impairment, and Peterson's regarded

him as having such an impairment. 42 U.S.C. § 12102(1)(A)-(C). The district court erred in determining otherwise.

1. Substantially limiting impairment

To establish a disability under the first part of the statutory definition, sometimes referred to as the "actual disability" prong, *see, e.g.*, 29 C.F.R. § 1630.2(g)(2), Sutherland needed to show that he suffered from a substantially limiting physical impairment. 42 U.S.C. § 12102(4); *Mancini*, 909 F.3d at 40-41. Summarizing Sutherland's evidence as "a single note from his doctor, which he gave to Peterson's in December of 2019 when he requested leave to have surgery," along with contemporaneous "complaints of pain and discomfort to fellow employees," the district court concluded that this evidence failed to meet the statutory standard. Appx.17. The court found further support for its conclusion in the fact that Sutherland's impairment was temporary and corrected via surgery. *Id.* The court's limited analysis disregarded relevant evidence and applied an incorrect legal standard to the subset of evidence it considered.

As an initial matter, this Court has explained that there is no per se rule about the type or amount of evidence needed to establish the existence of an ADA-covered impairment. *Mancini*, 909 F.3d at 39; *Katz v. City Metal*

Co., 87 F.3d 26, 32 (1st Cir. 1996). Different types of impairments require different amounts of corroborating evidence: "[s]ome long-term impairments would be obvious to a lay jury (e.g., a missing arm)," *Mancini*, 909 F.3d at 39, while other conditions might be unfamiliar to a lay jury and require expert diagnosis, *id.* at 41. Along this continuum, "some conditions plainly fall within the universe of impairments that a lay jury can fathom without expert guidance," and such conditions "do not require medical evidence in an ADA case." *Id.* at 42; *see also Marinelli v. City of Erie*, 216 F.3d 354, 361 (3d Cir. 2000) (explaining that "ailments that are the least technical in nature" are the most understandable by a lay jury and do not require additional medical documentation). Importantly, this Court has held that "a knee injury"—such as Sutherland's—"falls within that universe" of readily understood impairments that do not require additional medical documentation. *Mancini*, 909 F.3d at 42.

Turning to the substantial limitations at issue, one of Congress's chief purposes in passing the ADAAA was to reject the overly strict standard the Supreme Court previously applied to determine which impairments were "substantially limit[ing]" enough to qualify as disabilities under the ADA. 42 U.S.C. § 12101 note (b)(4); *see also id.* note (a)(7) (explaining the Supreme

Court "interpreted the term 'substantially limits' to require a greater degree of limitation than was intended by Congress"); 42 U.S.C. § 12102(4)(B) ("The term 'substantially limits' shall be interpreted consistently with the findings and purposes of the [ADAAA]."). Congress explicitly vested the EEOC with "the authority to issue regulations implementing the definitions of disability" in accordance with the ADAAA. 42 U.S.C. § 12205a; *see also* 42 U.S.C. § 12101 note (b)(6) (explaining that Congress expected the EEOC to "revise that portion of its current regulations that defines the term 'substantially limits' … to be consistent with this Act, including the amendments made by this Act"); *cf. Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2263 (2024) (explaining that Congress may "expressly delegate to an agency the authority to give meaning to a particular statutory term" (quotation marks omitted)); *id.* at 2263 n.5 (giving statutory examples).

Accordingly, the EEOC's ADAAA-implementing regulations explain that in assessing whether an impairment substantially limits a "major life activity," "the term 'major' shall not be interpreted strictly to create a demanding standard for disability," and need not be "of central importance to daily life." 29 C.F.R. § 1630.2(i)(2) (citing 42 U.S.C. § 12101

note (b)(4)). Types of covered "major life activities" can include "walking, standing, lifting, [and] bending." 42 U.S.C. § 12102(2)(A). With respect to the necessary degree of limitation, the regulations explain that the term "'substantially limits' shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA"—it "is not meant to be a demanding standard." 29 C.F.R. § 1630.2(j)(1)(i). In making this determination, the court should assess whether the impairment limits the plaintiff's ability "to perform a major life activity" when compared with "most people in the general population." *Id.* § 1630.2(j)(1)(ii). This issue "should not demand extensive analysis." 42 U.S.C. § 12101 note (b)(5); *see also* 29 C.F.R. § 1630.2(j)(1)(v) (noting that the issue "usually will not require scientific, medical, or statistical analysis").

In addition, although the Supreme Court initially interpreted the ADA to require covered impairments to be "permanent or long term," *see Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 198 (2002), the ADAAA "defenestrated this requirement," *Mancini*, 909 F.3d at 40 (citing 42 U.S.C. § 12102(4)(D)). Instead, "a cognizable impairment may last fewer than six months … as long as it is 'sufficiently severe.'" *Id.* (citing 29 C.F.R.

§ 1630.2(j)(1)(ix)); *see also* 29 C.F.R. pt. 1630, app. § 1630.2(j)(1)(ix) ("[A]n impairment does not have to last for more than six months in order to be considered substantially limiting under the [impairment or record of such impairment] prong of the definition of disability.").

Applying these principles, the record evidence was sufficient for a reasonable jury to find that Sutherland's knee injury substantially limited one or more of his major life activities. In a case involving an analogous knee injury, this Court explained,

> We cannot conceive that a lay jury would have difficulty grasping the connection between a knee injury and problems in conducting major life activities such as standing, walking, and bending. It is a common-sense proposition that [plaintiff's] knee injury … limited to some degree activities to which [plaintiff's] use of his leg was integral.

Mancini, 909 F.3d at 43.

The record clearly established the connection between Sutherland's impairment and the substantial limitations on his major life activities. His affidavit stated that after his knee injury first surfaced in October 2019, it "prevented [him] from bending [his] knee, which severely limited [his] ability to walk." Appx.68. In his deposition, Sutherland expanded on these limitations at length, describing significant swelling that prevented

bending; the need to wear a brace; intense pain that burned, "felt like [his] knee was literally on fire," and brought him to tears; an inability to squat, lean, or kneel at work; and needing to take breaks or stop work entirely to ice his knee. Appx.519-20; *see also* 431, 435, 441.

Sutherland's contemporaneous statements to his dispatcher, Dianna Costigan, provide further support. In text exchanges with Costigan, Sutherland repeatedly complained of excruciating knee pain, swelling, and an inability to bend his knee. *See, e.g.*, Appx.718 ("My right knee is fully swollen I can't bend it rite. … [I don't know] why its swelling like it is but its scaring me."). He explained that his doctor scheduled surgical repair quickly because of the injury's effect on his "ability to work and live." Appx.821.

Contrary to the district court's conclusion, *see* Appx.17, Sutherland needed no additional medical documentation at the summary judgment stage to establish his disability under the ADA. *See Mancini*, 909 F.3d at 43-44 ("A plaintiff's detailed description of his limitations, standing alone, often will be sufficient to overcome the relatively low bar created by the substantially-limits and summary-judgment standards." (cleaned up)).

The district court also misapprehended the relevant law when it emphasized that Sutherland's "injury was temporary and … he was ready and able to work in his full capacity following his surgery with no limitations." Appx.17. Again, the touchstone of the inquiry is whether the impairment is substantially limiting, not whether it was "temporary." 29 C.F.R. § 1630.2(j)(1)(ii); *Mancini*, 909 F.3d at 40-41. Impairment duration is only one relevant factor, and although "[i]mpairments that last only for a short period of time are typically not covered, … they may be covered if sufficiently severe." 29 C.F.R. pt. 1630, app. § 1630.2(j)(1)(ix) (quotation omitted); *see also Mancini*, 909 F.3d at 40 (noting that "a cognizable impairment may last fewer than six months" if serious enough). Thus, the court erred as a matter of law in relying on the impairment's "temporary" nature to reject it as insufficiently substantially limiting.[4] Applying the correct standard, a reasonable jury could find, based on the record evidence, that Sutherland's impairment met the substantial limitation standard, and thus that he had an actual disability.

[4] In addition, the court's characterization of Sutherland's injury was factually incorrect. He first injured his knee on October 8, 2019, and was not fully recovered from the surgery and rehabilitation until April 20, 2020—more than six months later. Appx.68, 1011.

2. Record of such an impairment

A reasonable jury could also find that Sutherland met the requirement for having a "record of such an impairment" under the statute. 42 U.S.C. § 12102(1)(B). That subparagraph applies to any individual who "has a history of … a mental or physical impairment that substantially limits one or more major life activities." 29 C.F.R. § 1630.2(k)(1). As with the "actual disability" prong of the statute, the "record of" provision is to "be construed broadly to the maximum extent permitted by the ADA and should not demand extensive analysis." *Id.* § 1630.2(k)(2).

Sutherland testified that he felt "98 percent" healed after his surgery and rehabilitation, Appx.384, which could suggest that he "had a disability in the past (even though he no longer suffered from that disability when the allegedly discriminatory action took place)." *Mancini*, 909 F.3d at 40. The "record-of" provision applies to individuals like Sutherland who no longer exhibited the impairment at issue at the time the discrimination took place, so long as that record of impairment gave rise to the discriminatory action. *Mancini*, 909 F.3d at 40; *Ramos-Echevarría*, 659 F.3d at 190. Here, interpreting all evidence in the light most favorable to Sutherland, a

reasonable jury could conclude that his prior knee injury, necessitating a modification of his hours and time off for surgery and recovery, constituted a record of impairment sufficient to bring Sutherland within the statute's protection.

3. Regarded as having such an impairment

A reasonable jury could find that Sutherland met the "regarded-as" prong for disability as well. *See* 42 U.S.C. § 12102(3)(A); 29 C.F.R. § 1630.2(*l*)(1). In order to establish disability under the regarded-as prong, an individual must show that he was subjected to a prohibited action "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." 42 U.S.C. § 12102(3)(A).

The district court relied on pre-ADAAA case law to assert that a regarded-as claim requires showing that the employer regards the plaintiff "as having an impairment that does substantially limit major life activities." Appx.17. Based on this formulation, the court held that "the record evidence does not support [a regarded-as] claim." Appx.17-18. But under the ADAAA, to establish a prima facie claim of disability under the regarded-as prong, an individual must produce evidence showing only

that the employer took the prohibited action because of the employee's "actual or perceived impairment." *Mancini*, 909 F.3d at 46. Unlike under the "actual disability" prong, "[i]t is not necessary for the plaintiff to prove that the impairment limits or is perceived to limit a major life activity." *Id.* at 45; *see also Mercado v. Puerto Rico*, 814 F.3d 581, 588 (1st Cir. 2016) (Title II case).

Given Sutherland's history of knee impairment during his employment with Peterson's, a reasonable jury could have found that Peterson's considered him impaired at the time of termination, and terminated him because of it, rendering him "disabled" under 42 U.S.C. § 12102(1)(C). The district court's reliance on pre-ADAAA case law to hold that "the record evidence does not support [a regarded-as] claim," Appx.17-18, was therefore erroneous.

B. The district court erred in holding that no reasonable jury could find that Sutherland was able to perform the essential functions of his job, with or without a reasonable accommodation.

Under the ADA, in addition to establishing a disability, a plaintiff must demonstrate that he is qualified—i.e., that he "possesses the requisite skill, experience, education and other job-related requirements" for the

position, and that he is "able to perform the essential functions of the position with or without reasonable accommodation." *Sarkisian v. Austin Preparatory Sch.*, 85 F.4th 670, 675 (1st Cir. 2023) (cleaned up). Thus, the reasonable-accommodation analysis is relevant not only to the failure-to-accommodate claim, but also to the disparate-treatment claims. In determining whether the plaintiff has made this "qualified" showing, courts must make an individualized, fact-based assessment, rather than applying per se rules about which functions are essential or what accommodations are or are not reasonable. *García-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 650 (1st Cir. 2000) ("These are difficult, fact intensive, case-by-case analyses, ill-served by per se rules or stereotypes.").

The district court held that Sutherland did not provide sufficient evidence that he could perform the essential functions of his job with or without reasonable accommodation, and further held that the accommodations he sought "do not constitute 'reasonable' accommodations for a service technician in his industry." Appx.18. On this record, however, a reasonable jury could find in Sutherland's favor on both issues.

"Essential functions" are "fundamental job duties of the employment position" at issue. 29 C.F.R. § 1630.2(n)(1). To determine which functions are essential, rather than marginal, relevant factors include "the employer's judgment" and the work experience of those in the same or similar positions. *Nationwide Life Ins.*, 696 F.3d at 88 (citing *Mulloy v. Acushnet Co.*, 460 F.3d 141, 147 (1st Cir. 2006); 29 C.F.R. § 1630.2(n)(3)). Courts give "a 'significant degree' of deference to an employer's business judgment about the necessities of a job." *Id.* (quoting *Walgreen*, 679 F.3d at 14).

The plaintiff has the burden of identifying a reasonable accommodation that would allow him to perform the essential functions of his job. *García-Ayala*, 212 F.3d at 646 n.10. He must also show that, "at least on the face of things, [the plaintiff's proposed accommodation] is feasible for the employer under the circumstances." *Enica v. Principi*, 544 F.3d 328, 338 (1st Cir. 2008). A part-time or modified work schedule is one example of a reasonable accommodation specifically enumerated in the ADA. 42 U.S.C. § 12111(9)(B).

If the employer challenges the feasibility of a proposed accommodation that seems reasonable on its face, the employer bears the burden of proving that the proposed accommodation would constitute an

undue hardship. *US Airways, Inc. v. Barnett*, 535 U.S. 391, 401-02 (2002); *García-Ayala*, 212 F.3d at 649. To do so, the employer must "produce at least some modicum of evidence" of such hardship, "financial or otherwise." *Calero-Cerezo v. U.S. Dep't of Just.*, 355 F.3d 6, 23 (1st Cir. 2004) (internal quotation marks omitted).

The district court determined, without any reference to evidence in the record, that Sutherland could not perform the essential functions of his job even with a reasonable accommodation because he was limited before his surgery in the number of hours he could work, he was not placed on on-call duty, and he did not perform heater installations. Appx.18. The court also held, again without any reference to record evidence, that a shorter workweek and dispensation not to perform certain tasks "do not constitute 'reasonable' accommodations for a service technician in his industry." *Id.* But these conclusions misapplied the law, neglected to take all relevant record evidence into account, and failed to view that evidence in the light most favorable to Sutherland, as required at the summary judgment stage. *Trahan v. Wayfair Me., LLC*, 957 F.3d 54, 60 (1st Cir. 2020).

A reasonable jury could find that Peterson's did not consider working on-call duty or performing installations to be essential functions

of the job because it agreed during Sutherland's interview process—before his first day of work (and before his knee injury)—that he would not have to do them. Sutherland submitted communications from Peterson's confirming this agreement, in addition to his own testimony. *See* Appx.416-18; 355-56 (email summary of negotiations); 170 (job offer letter). Because employers receive deference in their assessment of which functions are essential, *see Nationwide Life Ins.*, 696 F.3d at 88, a reasonable jury could rely on the evidence that Peterson's agreed not to require Sutherland to perform on-call duties or installations before he started the position to find that Peterson's did not consider these tasks essential to Sutherland's position.[5]

To the extent Peterson's argues that allowing Sutherland not to work on-call shifts or perform installations would have constituted an undue hardship on its business, it had the burden of proof on that issue. *Calero-Cerezo*, 355 F.3d at 23. Again, it would have difficulty making this

[5] Halus testified in her declaration that "[i]nstallations and on-call work were both essential functions of a Service Technician position." Appx.939. Given that Peterson's hired Sutherland to perform his job with the express understanding that he would not perform either task, however, a reasonable factfinder could well conclude otherwise.

argument in light of its agreement to these conditions before hiring Sutherland. Peterson's provided no evidence that it reconsidered that issue during the course of Sutherland's employment.

With respect to the shorter workweek, such an accommodation is presumptively reasonable "on the face of things." *Enica*, 544 F.3d at 338. Indeed, the ADA itself mentions "part-time or modified work schedules" along with "job restructuring" as potential types of "reasonable accommodations." 42 U.S.C. § 12111(9)(B); *see also* 29 C.F.R. § 1630.2(o)(2)(ii) (same). Peterson's argued that it could not limit Sutherland's hours because "[i]t was an essential function of the Service Technician job for Mr. Sutherland to complete an entire service call and, wherever possible, complete the entire repair in one visit," and Peterson's "could not guarantee how long any given call, and consequently any shift, would take." Appx.937. Sutherland disputed this, submitting evidence that Peterson's was in fact capable of estimating how long calls would take (with most repair jobs taking less than an hour and most routine maintenance jobs taking between one and one-and-a-half hours). Appx.68-69; 119. Sutherland also argued that Peterson's failed to accommodate his scheduling needs even when it reasonably could have done so, routinely

sending him on new calls after he had already worked the full shift recommended by his doctors. In support of this claim, he submitted evidence that he agreed to go on another call even after telling his dispatcher that his "knee is all swelled and [he] can hardly bend it," Appx.811; that even after informing Peterson's of his hours restriction, he was "still working beyond six hours a day and … was still being pushed to work more," Appx.501; and that he "never truly worked a six-hour day, because it was always more," Appx.385. The court interpreted the evidence in Peterson's favor, stating that "Peterson's did reduce Mr. Sutherland's workload on an informal basis to the extent it was possible in a given workday." Appx.18-19 n.5. This was error: such a disputed factual issue should have gone to a jury. *See Trahan*, 957 F.3d at 60.

In deciding that the modifications Sutherland sought "do not constitute 'reasonable' accommodations for a service technician in his industry," Appx.18, the district court erroneously applied per se rules rather than making an individualized assessment of the facts based on the evidentiary record. *See Gelabert-Ladenheim v. Am. Airlines, Inc.*, 252 F.3d 54, 62 (1st Cir. 2001); *García-Ayala*, 212 F.3d at 650. The court cited *EEOC v.*

Amego, Inc., 110 F.3d 135 (1st Cir. 1997), to support its conclusion, but *Amego* is inapposite. That case involved a woman with depression and a history of attempting suicide via an overdose of medications whose job involved providing medications to her disabled clients. *Id.* at 138. The court relied on the record evidence to conclude that the plaintiff could not safely perform the essential job function of dispensing medications, and that no reasonable accommodation was available that would not constitute an undue hardship on her employer. *Id.* at 148-49. *Amego* has no bearing on whether the hour reduction and limited duties at issue here could have constituted a reasonable accommodation.

II. For purposes of Sutherland's reasonable accommodation claim, a jury could have found Sutherland sufficiently requested a reasonable accommodation.

The district court further erred in addressing Sutherland's request for a reasonable accommodation when it faulted Sutherland for not "expressly" requesting accommodation or sufficiently linking the desired accommodation with his disability. Appx.18. Again, this conclusion misapprehended the parties' responsibilities under the ADA.

The employer's duty is to make reasonable accommodations for the "known physical or mental limitations" of otherwise qualified employees.

42 U.S.C. § 12112(b)(5)(A). To this end, an employee seeking an accommodation must make a request that is "sufficiently direct and specific so as to put the employer on notice of the need for an accommodation." *Enica*, 544 F.3d at 338; *see also Nationwide Life Ins.*, 696 F.3d at 89. However, the request need not be in writing or specifically reference "magic words" like "reasonable accommodation." *Ballard v. Rubin*, 284 F.3d 957, 962 (8th Cir. 2002); *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 313 (3d Cir. 1999). In addition, the employee need not make such a request if the employer already knows that a reasonable accommodation is needed. *Nationwide Life Ins.*, 696 F.3d at 89; *Freadman v. Metro. Prop. & Cas. Ins. Co.*, 484 F.3d 91, 102 n.11 (1st Cir. 2007).

An employee's request for a reasonable accommodation may trigger an employer's duty to engage in an interactive process,[6] which this Court has defined as "engage[ment] in a meaningful dialogue, in good faith, for

[6] The EEOC has explained that the process is not always required, because "[i]n many instances, both the disability and the type of accommodation required will be obvious, and thus there may be little or no need to engage in any discussion." EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, No. 915.002, 2002 WL 31994335 (Oct. 17, 2002).

the purpose of discussing alternative reasonable accommodations" for the employee's disability. *Ortiz-Martínez v. Fresenius Health Partners, PR, LLC*, 853 F.3d 599, 605 (1st Cir. 2017); *see also Enica*, 544 F.3d at 338-39. This dialogue should be "informal," and should "identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." 29 C.F.R. § 1630.2(o)(3). The employer has the duty to engage in this interactive process as soon as it becomes aware of the employee's disability. *Tobin v. Liberty Mut. Ins. Co.*, 433 F.3d 100, 108 (1st Cir. 2005). The process "requires a great deal of communication." *Calero-Cerezo*, 355 F.3d at 24 (quoting *García-Ayala*, 212 F.3d at 648 n.12).

Here, Sutherland first informed Peterson's of his knee injury and the need to accommodate it by reducing his hours to 40 per week beginning in November 2019. He explained that he was "ask[ing] for a bit of mercy" because the meniscus in his right knee was "torn pretty bad," his left knee was "almost the same," and he was "going thr[ough] excruciating pain." Appx.989-90. He also volunteered that he could "get you doctor documentation if you see it [necessary]." *Id.* After subsequently meeting with a surgeon and undergoing an MRI, Sutherland sent Peterson's his

surgeon's note stating that he should reduce his work to "six hours/day, 5 days/week starting on 12/18/19 until further notice." Appx.991-92.

Thus, Sutherland twice made an accommodation request to Peterson's that was "sufficiently direct and specific so as to put the employer on notice of the need for an accommodation." *Enica*, 544 F.3d at 338; *see also Nationwide Life Ins.*, 696 F.3d at 89. At a minimum, that was enough to begin the interactive process. To the extent Peterson's, in good faith, believed that it needed additional information to identify the specific limitations and potential accommodations at issue, *see* 29 C.F.R. § 1630.2(o)(3), it was required to request that additional information from Sutherland. *See Taylor*, 184 F.3d at 315 ("Once the employer knows of the disability and the employee's desire for accommodations, it makes sense to place the burden on the employer to request additional information that the employer believes it needs."). Indeed, Sutherland offered to provide any documentation from his doctor that Peterson's deemed necessary, Appx.989-90; the record contains no indication that Peterson's pursued this option.

In light of these facts, the district court erred in determining that Sutherland failed to "expressly ma[k]e" a request for accommodation, and

that any such request was not sufficiently linked to his disability. Appx.18. Sutherland clearly requested an accommodation on multiple occasions and tied those requests directly to his disability. The court also erred in stating that "an employer's participation in the interactive process" is not required under the ADA. Appx.18 n.5. While such participation is not necessary in every instance—for example, when the need for an accommodation is obvious, *see Nationwide Life Ins.*, 696 F.3d at 89; *Freadman*, 484 F.3d at 102 n.11—participation in the interactive process is indeed necessary to the extent either party is unclear about the nature of the limitations at issue or the accommodation options available to the employer. *See* 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. § 1630.2(o)(3); *Ortiz-Martínez*, 853 F.3d at 605.

III. The district court erred in dismissing Sutherland's retaliation claim as duplicative of his failure-to-accommodate claim.

Under the ADA's anti-retaliation provision, "No 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). For purposes of this provision, both requesting and availing

oneself of an accommodation constitute protected activity. *Kelley v. Corr. Med. Servs., Inc.*, 707 F.3d 108, 115 (1st Cir. 2013); *Freadman*, 484 F.3d at 106; *Soileau v. Guilford of Me., Inc.*, 105 F.3d 12, 16 (1st Cir. 1997). When a plaintiff brings both a disability discrimination claim and a retaliation claim, he "need not succeed on a disability claim to assert a claim for retaliation." *Wright v. CompUSA, Inc.*, 352 F.3d 472, 477 (1st Cir. 2003).

The *McDonnell Douglas* burden-shifting framework applies to retaliation claims under the ADA. *Carreras v. Sajo, García & Partners*, 596 F.3d 25, 36 (1st Cir. 2010) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973)). Under that framework, the plaintiff must first show that "he was engaged in protected conduct, that he was discharged, and that there was a causal connection between the discharge and the conduct." *Soileau*, 105 F.3d at 16. Once the plaintiff makes this prima facie showing, the burden shifts to the employer "to articulate a legitimate, nondiscriminatory reason for its employment decision." *Wright*, 352 F.3d at 478 (quotation marks omitted). If it does so, the burden returns to the plaintiff "to show that the employer's proffered reason is pretext masking retaliation." *Id.*

Here, Sutherland premised his retaliation claim on his having requested a reasonable accommodation and taken a leave of absence for his knee surgery—both protected activities under the statute. It is undisputed that Peterson's terminated Sutherland effective April 20, 2020, the date he was cleared to return to work after his surgery. A reasonable jury could find this temporal proximity sufficient to create an inference of causation. *Valle-Arce v. P.R. Ports Auth.*, 651 F.3d 190, 199 (1st Cir. 2011); *Calero-Cerezo*, 355 F.3d at 25. As to the issue of pretext, the parties disputed Peterson's reasons for terminating Sutherland, with Peterson's claiming it needed to reduce its staff due to lack of work during the Covid-19 pandemic and Sutherland pointing to evidence calling that explanation into question. The unresolved factual question should have gone to the jury.

The district court dismissed Sutherland's retaliation claims "to the extent they are based on his requesting a disability-related accommodation" because, in its estimation, the claims "are identical to his failure to accommodate claims." Appx.20. But the claims are not necessarily duplicative. A reasonable jury could certainly have found that Peterson's was willing to accommodate Sutherland's requests for reduced hours and medical leave initially, but subsequently terminated him in

retaliation for having availed himself of those accommodations. *Cf. Soileau*, 105 F.3d at 16. The accommodation requests may have been a factual predicate for the retaliation, but the two claims are not coterminous. And success on the retaliation claim is not dependent on prevailing on the failure-to-accommodate claim. *See, e.g.*, *Walgreen*, 679 F.3d at 20 (holding that success on a disability discrimination claim is not a prerequisite to bringing a retaliation claim). The evidence on this score, while not conclusive, was sufficient to go to a jury.

CONCLUSION

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

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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 6,462 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief also complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 365 in Book Antiqua 14 point.

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CERTIFICATE OF SERVICE

I certify that on this 29th day of July, 2024, I electronically filed the foregoing amicus curiae brief in PDF format with the Clerk of Court via the appellate CM/ECF system, and I will submit hard copies of the brief upon the Court's instruction. I certify that all counsel of record have consented to electronic service by virtue of First Circuit Rule 25.0(c)(1), and service will be accomplished via the Court's appellate CM/ECF system.

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