No. 24-20269

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Alisha Strife,
Plaintiff-Appellant,

v.

Aldine Independent School District,
Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Texas

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

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STATEMENT OF INTEREST

This appeal raises important questions about the scope of an employer's obligations under Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12111 *et seq.*, to provide reasonable accommodations and to refrain from interfering with individuals in the exercise or enjoyment of their rights under the ADA. *See* 42 U.S.C. §§ 12112(b)(5)(A), 12203(b). The Department of Justice and the Equal Employment Opportunity Commission (EEOC) share enforcement responsibilities under Title I and the ADA's anti-interference provision, 42 U.S.C. §§ 12117(a), 12203(c), and the EEOC has Title I rulemaking authority, 42 U.S.C. § 12116. The EEOC and the Attorney General file this brief under Federal Rule of Appellate Procedure 29(a).

STATEMENT OF ISSUES[1]

1. Whether the district court erred in dismissing Alisha Strife's ADA failure-to-accommodate claim, which is premised on her employer's alleged undue delay in providing a reasonable accommodation.

[1] The EEOC and the Attorney General take no position on any other issue in this appeal.

2. Whether the district court misstated the elements of an ADA interference claim.

STATEMENT OF THE CASE

A. Statement of Facts.[2]

Alisha Strife is an Army veteran who served in Iraq during Operation Iraqi Freedom. ROA.686-89 (¶¶ 1, 7-8). While she was deployed there in 2004, Strife suffered significant injuries that caused long-term physical and psychological impairments, including Post-Traumatic Stress Disorder (PTSD), a traumatic brain injury that affects her balance, osteopenia (low bone density), depression, and anxiety. ROA.689-91, 696-97 (¶¶ 9-13, 17, 19, 48, 50). Because of these conditions, Strife is prone to falling and has repeatedly suffered bone fractures from falls. ROA.690-91, 696-97 (¶¶ 15-18, 48, 50). In 2017, the U.S. Department of Veterans Affairs (VA) determined that Strife is totally disabled from PTSD and partially disabled

[2] Because the main issue we address here arises from a dismissal for failure to state a claim, we draw these facts from Strife's operative complaint and present them in the light most favorable to her. *See Hester v. Bell-Textron, Inc.*, 11 F.4th 301, 304 (5th Cir. 2021). We note that because the district court dismissed Strife's failure-to-accommodate claim after discovery—and granted summary judgment on other claims in the same order—its summation of the facts goes beyond the allegations in the complaint.

from other injuries. ROA.691 (¶¶ 20-21). Since 2012, Strife has worked for Aldine Independent School District in different roles, most recently as a Performance Management Project Analyst. ROA.695 (¶¶ 39, 41).

In June 2022, Strife obtained a specially trained service dog to help her cope with PTSD and other psychological and physical disabilities. ROA.694 (¶¶ 35-37). In August 2022, Strife asked the School District (through a third-party administrator) to accommodate her disabilities by allowing her to bring her service dog to work. ROA.695 (¶ 44). In September 2022, Strife told the School District that she thought the third-party administrator was "stonewalling" her, and she renewed her accommodation request. ROA.696 (¶ 46). That month, Strife provided the School District with letters from her treating VA doctor of pharmacy and VA psychiatrist, which both confirmed Strife's conditions and stated that her service dog was "invaluable to her mental and physical health recovery." ROA.696-97 (¶¶ 47-51). Despite this information, the School District did not grant Strife's request, but instead requested additional information. ROA.697 (¶ 52).

In November 2022, Strife's treating VA psychiatrist completed a Job Accommodation Questionnaire, using a form provided by the School

District, which again confirmed that Strife required a service dog at work as a reasonable accommodation for her disabilities. ROA.697 (¶¶ 53-54). Strife then gave the questionnaire to the School District. ROA.697 (¶ 55). Once again, the School District did not grant Strife's request, but instead demanded that she submit to an independent medical examination by a doctor retained by the School District. ROA.698 (¶ 57). The doctor whom the School District retained was not a psychiatrist or psychologist and had no other expertise in diagnosing or treating PTSD, depression, or anxiety. ROA.701 (¶ 67).

In the months that followed, Strife's counsel repeatedly requested that the School District withdraw its demand for an independent medical examination, arguing that the demand was unlawful. ROA.699-702 (¶¶ 60, 63, 65, 70). The School District repeatedly refused and continued to insist that Strife undergo an independent medical examination. ROA.699-701 (¶¶ 61-62, 64, 66).

In January 2023, Strife filed a charge of discrimination with the EEOC and the Texas Workforce Commission's Civil Rights Division. ROA.702 (¶ 71). That same month, Strife underwent a comprehensive physical examination by a VA doctor of physical therapy. ROA.702 (¶ 72). The

examination confirmed that Strife had "chronically impaired standing balance and gait, with history of multiple falls and injuries including fractures requiring multiple leg surgeries," and that her "condition is appropriate for use of a mobility dog." ROA.702 (¶ 73) (brackets omitted). Based on those findings, another VA physician concluded that a "certified service mobility dog is appropriate for Ms. Strife and should be utilized in all settings (including place of employment) to avoid further balance related injuries." ROA.703 (¶ 74). Although Strife's counsel submitted these findings to the School District and again asked the School District to withdraw its demand for an independent medical examination, the School District again refused to do so. ROA.703-04 (¶¶ 75-78).

In February 2023, Strife filed this action. ROA.705 (¶ 82).[3] Later that month, the School District conditionally approved Strife's request to bring her service dog to work. ROA.705 (¶ 86).

[3] Strife filed a state court action in January 2023, which she nonsuited before filing her federal action. ROA.1843.

B. District Court's Decision.

Strife's operative complaint asserted failure-to-accommodate, interference, and other claims under the ADA. ROA.716-17 (¶ 119).[4] Strife generally alleged that the School District violated the ADA by unreasonably delaying her accommodation request, and by unreasonably demanding an independent medical examination. ROA.686-88 (¶ 1). After discovery, the district court dismissed some of Strife's claims under Federal Rule of Civil Procedure 12(b)(6) and granted summary judgment to the School District on the remaining claims.

[4] Strife's complaint asserts hostile-work-environment, disparate-treatment, and retaliation claims under the ADA, and claims under the Rehabilitation Act and state law. ROA.707-09, 716-18 (¶¶ 93, 95, 119-21). We take no position on these claims. We note, however, that in resolving Strife's disparate-treatment claim (discussed in the opinion below as a "disability discrimination" claim, ROA.1849-51), the court did not cite or apply the Supreme Court's recent decision in *Muldrow v. City of St. Louis*, 601 U.S. 346 (2024). Other courts of appeals recently have remanded disparate-treatment claims in similar circumstances to allow district courts to apply *Muldrow* in the first instance. *See, e.g.*, *Peifer v. Bd. of Prob. & Parole*, 106 F.4th 270, 277 (3d Cir. 2024) (remanding for district court to consider in first instance whether plaintiff satisfied *Muldrow*); *West v. Butler Cnty. Bd. of Educ.*, No. 23-10186, 2024 WL 2697987, at *2 (11th Cir. May 24, 2024) (same); *Peccia v. Cal. Dep't of Corr. & Rehab.*, No. 21-16962, 2024 WL 1985817, at *1 (9th Cir. May 1, 2024) (same).

As relevant here, the district court dismissed Strife's failure-to-accommodate claim premised on undue delay. ROA.1845-46. The court reasoned that although an "undue delay in granting [an] accommodation may constitute an ADA violation" in some circumstances, the School District's delay was not unreasonable because Strife was able to continue working without accommodation and faced only "possible physical and psychological danger because she did not have her service dog." ROA.1845-46. "During the six months that [the School District] evaluated her accommodation request," the court stated, Strife "simply worked under the same conditions that she had previously until [the School District] ultimately granted the exact accommodation [Strife] requested." ROA.1846.

In the same order, the district court granted summary judgment to the School District on Strife's interference claim. ROA.1855-56. In doing so, the district court stated that "an element of an interference claim is that the defendant 'interfered on account of the plaintiff's protected activity.'" ROA.1855 (brackets omitted) (quoting *Huber v. Blue Cross & Blue Shield of Fla., Inc.*, No. 20-cv-03059, 2022 WL 1528564, at *5 (E.D. La. May 13, 2022)).

This appeal followed. ROA.1858-59.

SUMMARY OF ARGUMENT

Contrary to the district court's ruling, Strife alleged facts sufficient to state a failure-to-accommodate claim under the ADA. As other circuits have recognized, an employer's unreasonable delay in providing an accommodation can amount to a failure to accommodate in some circumstances. Here, Strife plausibly alleged that the School District's delay in granting her accommodation request was unreasonable under the circumstances, and that the School District was responsible for the delay. Furthermore, the fact that Strife could continue working without accommodation and suffered no workplace injuries while her request was pending is not dispositive because an accommodation may be reasonable—and thus required—where, as here, it enables an employee with a disability to perform her job less painfully or more safely. Accordingly, the district court's dismissal of Strife's failure-to-accommodate claim should be reversed.

The district court also misstated the elements of a claim under the ADA's anti-interference provision, 42 U.S.C. § 12203(b). Contrary to the district court's understanding, the relevant statutory text does not require a plaintiff asserting an interference claim to show either that she engaged in

protected activity or that her employer took an adverse action against her "on account of" any protected activity. Instead, the text encompasses employer actions that prevent or deter an employee from exercising or enjoying her ADA rights, including conduct that frustrates an employee's attainment of a reasonable accommodation. We take no position on the ultimate disposition of Strife's interference claim.

ARGUMENT

I. The district court erred in dismissing Strife's failure-to-accommodate claim, which was premised on her employer's undue delay in providing a reasonable accommodation.

A. An unreasonable delay in providing a reasonable accommodation can amount to a failure to accommodate under some circumstances.

Title I of the ADA prohibits a covered entity from "discriminat[ing] against a qualified individual on the basis of disability" in employment. 42 U.S.C. § 12112(a). The statute defines unlawful discrimination to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability." *Id.* § 12112(b)(5)(A). A covered entity violates this requirement when it fails to reasonably accommodate a qualified individual's known disability unless it can prove that doing so would impose an undue hardship. *Riel v. Elec.*

Data Sys. Corp., 99 F.3d 678, 681-82 (5th Cir. 1996). With respect to Strife's failure-to-accommodate claim, this appeal presents two related questions: Can an unreasonable delay in providing an accommodation, by itself, amount to a failure to accommodate? If so, what constitutes an unreasonable delay?

The answer to the first question is a straightforward yes: Every circuit that has confronted the issue has recognized that "[a]n unreasonable delay in providing an accommodation for an employee's known disability can amount to a failure to accommodate his disability." *McCray v. Wilkie*, 966 F.3d 616, 621 (7th Cir. 2020) (Rehabilitation Act case);[5] *see also Valle-Arce v. P.R. Ports Auth.*, 651 F.3d 190, 200 (1st Cir. 2011) ("[An] unreasonable delay may amount to a failure to provide reasonable accommodations."); *Mogenhan v. Napolitano*, 613 F.3d 1162, 1168 (D.C. Cir. 2010) ("[T]here are certainly circumstances in which a long-delayed accommodation could be considered unreasonable and hence actionable under the ADA." (quotation marks omitted)); *Selenke v. Med. Imaging of Colo.*, 248 F.3d 1249, 1262 (10th

[5] "[T]he ADA and Rehabilitation Act are interpreted *in pari materia*," and "[c]ases interpreting the applicable standards under one of the statutes are thus applicable to both." *Luke v. Texas*, 46 F.4th 301, 306 n.3 (5th Cir. 2022).

Cir. 2001) ("[A] few courts have concluded that an employer's delay in providing reasonable accommodation may violate the ADA.").[6]

Consistent with these authorities, the EEOC's enforcement guidance explains that "[u]nnecessary delays can result in a violation of the ADA." EEOC, *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA*, No. 915.002, 2002 WL 31994335, at *10 (Oct. 17, 2002) ("Enforcement Guidance").[7] The district court here likewise recognized that an "undue delay in granting [an] accommodation may constitute an ADA violation" under some circumstances. ROA.1845.

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[6] *See also Farquhar v. McCarthy*, 814 F. App'x 786, 788 (4th Cir. 2020) (although an employer need not "move with 'maximum speed' in addressing a request for accommodations," an "unreasonable delay in providing an accommodation for an employee's known disability can amount to a failure to accommodate his disability that violates the Rehabilitation Act" (quotation marks and citations omitted)); *Perkins v. City of New York*, No. 22-196, 2023 WL 370906, at *3 (2d Cir. Jan. 24, 2023) (under Rehabilitation Act, "a refusal of a request for a reasonable accommodation can be both actual or constructive, as an indeterminate delay has the same effect as an outright denial" (quotation marks and citation omitted)); *Cheatham v. Postmaster Gen. of U.S.*, No. 20-4091, 2022 WL 1073818, at *8 n.4 (6th Cir. Apr. 11, 2022) (White, J., concurring in part, dissenting in part) ("[A]n unreasonable delay in providing an accommodation may constitute a discriminatory act.").

[7] Also available at https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada.

Although this Court has not squarely decided the issue, it too has suggested in dicta that unreasonably delayed accommodations could violate the ADA. *See Loulseged v. Akzo Nobel Inc.*, 178 F.3d 731, 737 n.6 (5th Cir. 1999); *see also Schilling v. La. Dep't of Transp. & Dev.*, 662 F. App'x 243, 246 (5th Cir. 2016) (stating that "[t]his Court has discussed only in dicta whether delay alone may constitute an ADA violation," and declining to resolve the issue). To be sure, this Court has said that the ADA requires an employer to engage in an interactive process with an employee who requests a reasonable accommodation, and the statute does not require an employer to "move with maximum speed to complete this process." *Loulseged*, 178 F.3d at 737. Instead, "the employer is entitled to move at whatever pace he chooses as long as the ultimate problem—the employee's performance of her duties—is not truly imminent." *Id.* (employer not required to immediately provide accommodation where discrete task requiring accommodation was not regular part of plaintiff's job). But where, as here, "the employee continues working in a capacity arguably needing accommodation while the interactive process is ongoing," and a delay "could force the employee to work under suboptimal conditions,"

the "employer's delaying of the process … might create liability." *Id.* at 737 n.6.[8]

The next question is what constitutes an *unreasonable* delay in providing an accommodation. The answer is that "[w]hether a particular delay qualifies as unreasonable necessarily turns on the totality of the circumstances." *McCray*, 966 F.3d at 621. Relevant circumstances include "the employer's good faith in attempting to accommodate the disability, the length of the delay, the reasons for the delay, the nature, complexity, and burden of the accommodation requested, and whether the employer offered alternative accommodations." *Id.* at 621; *see also Selenke*, 248 F.3d at 1262-63 (listing factors); Enforcement Guidance, 2002 WL 31994335, at *10 n.38 (articulating similar factors).[9]

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[8] Although the example discussed in *Loulseged* contemplated a situation in which the delayed accommodation led to the employee's termination, 178 F.3d at 737 n.6, a plaintiff need not show that her employer's failure to provide a reasonable accommodation resulted in a *separate* adverse action (like termination). *Infra* at 21-22 & n.11. *Loulseged* does not suggest otherwise.

[9] As with other totality-of-the-circumstances tests, these factors are best viewed as illustrative, not exhaustive, and no single factor controls. *Cf.*, *e.g.*, *Ganpat v. E. Pac. Shipping PTE, Ltd.*, 100 F.4th 584, 590 (5th Cir. 2024); *Pizza Hut L.L.C. v. Pandya*, 79 F.4th 535, 544 (5th Cir. 2023); *Rollerson v. Brazos*

This context-driven inquiry does not lend itself to bright-line rules because it is not possible "to say that a delay of any particular duration will invariably be reasonable regardless of the surrounding circumstances." *McCray*, 966 F.3d at 622. As the EEOC's enforcement guidance explains, shorter delays might be unreasonable for simple accommodations (for example, if an employee asks for an accessible parking space), whereas longer delays could be reasonable for more complex accommodations (for example, if the employer must order adaptive equipment that will take several months to acquire). Enforcement Guidance, 2002 WL 31994335, at *10.

In short, an unreasonable delay in providing an accommodation can amount to a failure to accommodate, and whether a delay was unreasonable turns on the totality of the circumstances.

B. Strife plausibly alleged that the School District unreasonably delayed providing her with a reasonable accommodation.

Here, Strife plausibly alleged that the School District's delay in providing the accommodation she requested was unreasonable under the

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River Harbor Navigation Dist., 6 F.4th 633, 640 (5th Cir. 2021); *United States v. Jon-T Chems., Inc.*, 768 F.2d 686, 694 n.8 (5th Cir. 1985).

circumstances. Indeed, the factors outlined above favor Strife. *See McCray*, 966 F.3d at 621; *Selenke*, 248 F.3d at 1262-63; Enforcement Guidance, 2002 WL 31994335, at *10 n.38.

There was a six-month delay between the time Strife first requested the accommodation (in August 2022), and when the School District conditionally approved the request (in February 2023). ROA.695, 705 (¶¶ 44, 86, 88). The accommodation was not especially complex: Strife asked only that the School District "allow[] her to have and use [her] service dog while at work." ROA.695 (¶ 44). Strife did not ask the School District to procure the service dog (or any other devices) for her, and there is no indication that the School District had to take any other action to effectuate that accommodation (such as modifying existing facilities). *Cf.* Enforcement Guidance, 2002 WL 31994335, at *10 (longer delays might be reasonable when necessary to acquire adaptive equipment). Nor is there any indication in the complaint that the School District offered Strife an alternative accommodation while it considered her request. And the delay forced Strife to "work under suboptimal conditions." *Loulseged*, 178 F.3d at 737 n.6.

Perhaps most importantly, Strife's allegations suggest that the School District bore responsibility for the delay. According to Strife's complaint, the main source of the delay was the School District's demands for—and Strife's refusal to submit to—an independent medical examination. Of course, there may be circumstances in which requesting an independent medical exam would be reasonable. The EEOC's enforcement guidance recognizes as much, stating: "[t]he ADA does not prevent an employer from requiring an individual to go to an appropriate health professional of the employer's choice if the individual provides *insufficient information* from his/her treating physician (or other health care professional) to substantiate that s/he has an ADA disability and needs a reasonable accommodation." Enforcement Guidance, 2002 WL 31994335, at *8 (emphasis added). The guidance further clarifies that "[d]ocumentation is insufficient if it does not specify the existence of an ADA disability and explain the need for reasonable accommodation." *Id.* Thus, whether an employee's documentation was insufficient—and, in turn, whether requiring an independent medical exam was reasonable—also turns on the circumstances.

In Strife's telling, however, she promptly and repeatedly submitted supporting information confirming both the existence of her impairments and her need for accommodation. ROA.696-97, 703 (¶¶ 47, 49, 55, 76). At every turn, the School District nonetheless refused to grant her request and instead insisted that Strife undergo an examination by a physician of its choosing. ROA.696-704 (¶¶ 45, 52, 56-57, 62, 64, 66, 77, 81).

Notably, the School District does not argue that Strife's documentation failed to specify the existence of a disability or explain her need for accommodation. Nor has it suggested that the accommodation Strife requested—allowing her to bring her service dog to work—would have imposed an undue hardship. Instead, it appears to have insisted on an independent medical examination for the sole purpose of identifying potential alternative accommodations. ROA.1841-43, 1852-54.

But the School District does not explain why it needed more medical information to formulate possible alternative accommodations or how another examination would aid that process. A reasonable factfinder might disbelieve any such explanation based on the fact that the School District relented shortly after Strife filed suit—apparently without having received any additional medical information. *See McCray*, 966 F.3d at 622 (noting

that employer "finally provide[d]" requested accommodation "[o]nly when [plaintiff] threatened to file a charge with the EEOC"). There is also little indication that the School District tried to identify alternative accommodations based on the information Strife had already provided before demanding an independent medical examination. *See Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 320 (3d Cir. 1999) (employer could be liable for failure to accommodate where it "made no effort to help [plaintiff] find accommodations"); *see also* 29 C.F.R. pt. 1630, app. § 1630.9 ("Once an individual with a disability has requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation.").

Taken together, Strife's allegations support an inference that here, the School District's demands for an independent medical examination were unreasonable. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007))). Under these circumstances, the School District's six-month delay in granting Strife's accommodation request could well qualify as

unreasonable. *See McCray*, 966 F.3d at 622 ("On these alleged facts, we cannot rule out the possibility that the factfinder might conclude the 11-month delay in accommodating McCray's disability was unreasonable."); *Krocka v. Riegler*, 958 F. Supp. 1333, 1342 (N.D. Ill. 1997) ("The court cannot say that the eight-month delay was, under the circumstances of this case, a reasonable delay as a matter of law.").

C. The district court did not apply the correct standard.

In reaching a contrary result, the district court did not assess the totality of the circumstances. Instead, it held that the School District's delay was not unreasonable as a matter of law because Strife was able to continue working without accommodation and faced only "possible physical and psychological danger." ROA.1846. The court did not explain, nor is it apparent, why either of these reasons would defeat a failure-to-accommodate claim premised on an undue delay.

To the extent the court assumed a plaintiff must show that her employer's failure to accommodate prevented her from performing essential job functions, that assumption is incorrect. This Court has rejected the notion that "an accommodation must facilitate the essential functions of one's position." *Feist v. La. Dep't of Just., Off. of the Atty. Gen.*, 730 F.3d 450,

453 (5th Cir. 2013); *see also Stokes v. Nielsen*, 751 F. App'x 451, 454 (5th Cir. 2018) ("[O]ur circuit has explicitly rejected the requirement that requested modifications must be necessary to perform essential job functions to constitute a reasonable accommodation."). *But see Stringer v. N. Bolivar Consol. Sch. Dist.*, 727 F. App'x 793, 801-02 (5th Cir. 2018) (employer's two-month delay in granting accommodation request did not violate ADA where plaintiff "was still capable of performing her duties").

As other circuits have recognized, even when an employee can perform her essential job functions without accommodation, she may still be entitled to accommodations that enable her to perform her job less painfully or more safely. *See, e.g.*, *Hill v. Assocs. for Renewal in Educ., Inc.*, 897 F.3d 232, 239 (D.C. Cir. 2018) ("A reasonable jury could conclude that forcing [an employee] to work with pain when that pain could be alleviated by his requested accommodation violates the ADA."); *Burnett v. Ocean Props., Ltd.*, 987 F.3d 57, 69 (1st Cir. 2021) (employee entitled to accommodation that reduced "risk of bodily injury"); *Gleed v. AT & T Mobility Servs., LLC*, 613 F. App'x 535, 539 (6th Cir. 2015) (plaintiff entitled to accommodation that allowed him "to work—as other employees do—without great pain and a heightened risk of infection"); *see also Beasley v.*

O'Reilly Auto Parts, 69 F.4th 744, 755 (11th Cir. 2023) ("Safety is self-evidently a condition of employment….").[10]

Likewise, the fact that an employee managed to avoid actual physical or psychological injury while awaiting an accommodation does not render a delay reasonable as a matter of law. If that were so, virtually no amount of delay would violate the ADA unless and until the employee suffered a workplace injury. Moreover, a failure-to-accommodate claim does not require proof of a separate adverse action. *EEOC v. LHC Grp., Inc.*, 773 F.3d 688, 703 n.6 (5th Cir. 2014) ("A failure-to-accommodate claim provides a mechanism to combat workplace discrimination even when the employee in question *has not* suffered adverse employment action."); *Dillard v. City of Austin*, 837 F.3d 557, 562 (5th Cir. 2016) ("Apart from any claim that an

[10] *See also, e.g.*, *Bell v. O'Reilly Auto Enters., LLC*, 972 F.3d 21, 24 (1st Cir. 2020) ("An employee who can, with some difficulty, perform the essential functions of his job without accommodation remains eligible to request and receive a reasonable accommodation."); *EEOC v. Charter Commc'ns, LLC*, 75 F.4th 729, 739 (7th Cir. 2023) ("Our [precedent] should not be read as holding that the ADA imposes no duty to offer reasonable accommodations that affect safety or pain that an employee may be motivated to overcome."); *Schroeder v. AT&T Mobility Servs., LLC*, 568 F. Supp. 3d 889, 893 (M.D. Tenn. 2021) (fact that plaintiff was "physically capable of performing his job absent accommodation" did not render service-dog request "automatically unreasonable").

adverse employment action was motivated by the employee's disability, an employer's failure to reasonably accommodate a disabled employee may constitute a distinct violation of the [ADA].").[11]

Here, Strife's allegations make clear that the accommodation she requested—permission to bring her service dog to work—would have enabled her to perform her job less painfully and more safely. Accordingly, the alleged fact that Strife was able to continue working without accommodation and did not suffer any work-related injuries while her accommodation request was pending does not defeat her failure-to-accommodate claim. *See Loulseged*, 178 F.3d at 737 n.6 (unreasonable delay in granting accommodation "might create liability" where it "could force the employee to work under suboptimal conditions").

For these reasons, the district court's dismissal of Strife's failure-to-accommodate claim should be reversed.

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[11] *See also Bridges v. Dep't of Soc. Servs.*, 254 F.3d 71, at *1 (5th Cir. 2001) (unpub.) ("Although Bridges has suffered no adverse employment action, she may still raise a claim of discrimination based on the alleged failure reasonably to accommodate her disability.").

II. The district court misstated the elements of an ADA interference claim.

In assessing Strife's interference allegations, the district court stated that "an element of an interference claim is that the defendant 'interfered on account of the plaintiff's protected activity.'" ROA.1855 (brackets omitted) (citation omitted). Contrary to the district court's understanding, the relevant statutory text reveals that protected activity is not an element of an ADA interference claim.

The ADA's anti-interference provision makes it "unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter." 42 U.S.C. § 12203(b). The statutory text thus requires a showing that the employer (1) coerced, intimidated, threatened, or interfered with any individual (2) (a) in the exercise or enjoyment of, or (b) on account of his or her having exercised or enjoyed, or (c) on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, (3) any right granted or protected by this chapter.

By its plain language, the anti-interference provision encompasses some conduct that prevents or deters an employee from exercising or enjoying her ADA rights, including conduct that frustrates an employee's attainment of a reasonable accommodation. *See, e.g.*, *Brown v. City of Tucson*, 336 F.3d 1181, 1193 (9th Cir. 2003) ("[T]he plain language of [§ 12203(b)] clearly prohibits a supervisor from threatening an individual with transfer, demotion, or forced retirement unless the individual foregoes a statutorily protected accommodation."); *see also* EEOC, *Enforcement Guidance on Retaliation and Related Issues* § III, No. 915.004, 2016 WL 4688886, at *25-28 (Aug. 25, 2016)[12] (examples of interference include coercing an individual to relinquish or forego an accommodation to which he or she is otherwise entitled). As a result, the statutory text does not require a plaintiff asserting an interference claim to show either that she engaged in protected activity or that her employer took an adverse action against her "on account of" any protected activity.

A few examples demonstrate the point. Suppose, for instance, that an employer insists that its employees submit accommodation requests by

[12] Also available at https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues.

using a particular form, but then refuses to make the form available. Or suppose an employer sets up a drop box for accommodation requests, but then keeps the box in a locked office. Or suppose the drop box in that scenario is accessible, but the employer simply never checks it—or, perhaps, does not check it until six months after an employee dropped off a request. In each hypothetical, the employer plainly interfered with its employees' "exercise or enjoyment of" their statutory right to reasonable accommodation. In none, however, did the employer take an adverse action "on account of" an employee's protected activity.

An undue delay in providing an accommodation could similarly qualify as interference with an employee's "exercise or enjoyment of" the right to reasonable accommodation afforded by the ADA. This is not to suggest that any action taken by an employer that delays the provision of a reasonable accommodation counts as interference. *See Menoken v. Dhillon*, 975 F.3d 1, 11 (D.C. Cir. 2020) ("Our disposition of this case should not be read to suggest that allegations of a delay or a proposed settlement offer during the reasonable accommodation process necessarily amount to unlawful interference."). But where, as here, the delay allegedly results from an employer's unreasonable or unlawful insistence on an

independent medical examination, the delay may constitute interference. *Cf. Enforcement Guidance on Retaliation and Related Issues*, 2016 WL 4688886, at *26 (interference includes "threatening an employee with loss of employment or other adverse treatment if he does not 'voluntarily' submit to a medical examination or inquiry that is otherwise prohibited under the statute").

CONCLUSION

For the foregoing reasons, the district court's dismissal of Strife's failure-to-accommodate claim should be reversed, and the case should be remanded for further appropriate proceedings. Furthermore, this Court should make clear that protected activity is not an element of an ADA interference claim, as set forth above.

Respectfully submitted,

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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), and Fifth Circuit Rules 29.2, 29.3, and 32.2, because it contains 5,080 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Fifth Circuit Rule 32.2.

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CERTIFICATE OF SERVICE

I certify that on September 3, 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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