No. 23-5700

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHRISTIE ANDREWS,
Plaintiff-Appellant,

v.

TRI STAR SPORTS AND ENTERTAINMENT GROUP, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
for the Middle District of Tennessee
No. 3:21-cv-00526

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE IN SUPPORT OF PANEL REHEARING OR REHEARING EN BANC

KARLA GILBRIDE
General Counsel

JENNIFER S. GOLDSTEIN
Associate General Counsel

ANNE NOEL OCCHIALINO
Assistant General Counsel

CHELSEA C. SHARON
Attorney

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M St. N.E., 5th Floor
Washington, D.C. 20507
(202) 921-2889
chelsea.sharon@eeoc.gov

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STATEMENT IN SUPPORT OF REHEARING

The Equal Employment Opportunity Commission (EEOC) urges this Court to grant panel rehearing or rehearing en banc because the panel majority's holding that Plaintiff's asthma did not qualify as an actual or regarded-as disability relied on standards abrogated by the Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008) ("ADAAA") and rejected by this Court and other circuits. The majority's errors undermine the uniformity of this Court's decisions, *see Morrissey v. Laurel Health Care Co.*, 946 F.3d 292 (6th Cir. 2019); *Babb v. Maryville Anesthesiologists P.C.*, 942 F.3d 308 (6th Cir. 2019); *Hostettler v. Coll. of Wooster*, 895 F.3d 844 (6th Cir. 2018); *EEOC v. J.H. Routh Packing Co.*, 246 F.3d 850 (6th Cir. 2001); *Harrison v. Soave Enters.*, 826 F. App'x 517 (6th Cir. 2020); *Barlia v. MWI Veterinary Supply, Inc.*, 721 F. App'x 439 (6th Cir. 2018), and conflict with decisions of other circuits, *see Mueck v. La Grange Acquisitions*, 75 F.4th 469 (5th Cir. 2023); *Shields v. Credit One Bank*, 32 F.4th 1218 (9th Cir. 2022); *Summers v. Altarum Inst.*, 740 F.3d 325 (4th Cir. 2014); *Gogos v. AMS Mech. Sys.*, 737 F.3d 1170 (7th Cir. 2013), implicating questions of exceptional importance and requiring correction. Fed.R.App.P.35(b)(1), 40(a)(2).

STATEMENT OF INTEREST

Congress charged EEOC with administering and enforcing the Americans with Disabilities Act, as amended, 42 U.S.C. §§ 12101 *et seq.* ("ADA"). The panel majority's holding that Plaintiff's asthma was not a disability contravened the amended ADA. Because EEOC has a strong interest in the proper application of the laws it enforces, EEOC files this brief. Fed.R.App.P.29(b)(2).

STATEMENT OF THE CASE

A. Factual Background[1]

Andrews, who has asthma, worked for Tri Star. Andrews-Dep./R.49-1/PageID#697-700. Wind, cold, humidity, stress, and strong smells trigger her asthma. *Id.*/PageID#736; Def.-Resp.-to-Pl.'s-Facts/R.62/PageID#1021, ¶54. She takes three medications daily to manage her asthma and regularly uses a rescue inhaler. Def.-Resp.-to-Pl.'s-Facts/R.62/PageID#1019,¶50; Andrews-Dep./R.49-1/PageID#743-47. Still, Andrews suffers asthma attacks, which sometimes cause bronchitis or pneumonia. Andrews-Dep./R.49-1/PageID#742-43, 751. During attacks, Andrews coughs,

[1] EEOC presents these facts in the light most favorable to Andrews. *Latits v. Phillips*, 878 F.3d 541, 547 (6th Cir. 2017).

experiences chest tightness, and begins "wheezing and breathing … with [her] stomach." *Id.*/PageID#742. Attacks require using a rescue inhaler, which opens her bronchial tubes so she can breathe but does not relieve symptoms like coughing that can last for days. *Id.*/PageID#741. Andrews once had to visit the emergency room to take albuterol, which makes her vomit, when her rescue inhaler could not control an attack. *Id.*/PageID#744. She explained, "when your [inhaler] isn't working and you can't breathe and you're desperate, that's what you have to do." *Id.*

In March 2020, at the outset of the COVID-19 pandemic, Andrews suffered an asthma attack when her co-workers sprayed Lysol to clean their workspaces. *Id.*/PageID#753. She asked to telework, providing a note from her nurse practitioner stating she had asthma and would benefit from teleworking. Def.-Resp.-to-Pl.'s-Facts/R.62/PageID#1012,¶20. On March 20, Tri Star terminated Andrews. Taylor-Dep./R.40-2/PageID#395. It maintains it laid off all "non-essential" employees requesting to telework. *Id.*/PageID#381.

Andrews sued. At summary judgment, she argued she had an actual disability due to substantial limitations in her breathing and immune function, *see* 42 U.S.C. §§ 12102(1)(A), 12102(2)(A), (B), and that Tri Star

regarded her as disabled, *id.* § 12102(3)(A). The district court granted summary judgment to Tri Star, holding Andrews had no disability. Mem.Op./R.76/PageID#1181-1202.

B. Panel Decision

A divided panel affirmed. The majority held that Andrews's asthma did not substantially limit her breathing. Op. at 6-9. Apparently relying on pre-ADAAA regulatory definitions, the majority stated that "[a] major life activity is 'substantially limited' when an individual cannot perform that activity" as an average person could or "faces significant restrictions" in performing that activity. *Id.* at 7 (citing 29 C.F.R. § 1630.2(j)(1)(i)-(ii)). This standard was unmet because Andrews's asthma caused only "transient" or "isolated" breathing problems and did not preclude activities like gymnastics, CrossFit, travel, metal detecting, or spending time with her dog. *Id.* at 8-9.

The majority held that Andrews forfeited any argument that her asthma substantially limited her immune function because she did not plead that major life activity. *Id.* at 4-5. Andrews thus could not argue "that her asthma substantially limited, or was perceived as substantially limiting,

her immune function" for either her actual or regarded-as disability claims. *Id.* at 5, 10.

Judge Clay dissented. He said the majority committed two main errors. First, it ignored the ADAAA "by holding that Andrews' 'transient' and 'isolated' asthma does not qualify as a disability." *Id.* at 18. Calling this analysis "outdated," he explained that whether "a disability occurs only in response to stimuli or can be controlled with mitigation measures is no longer relevant." *Id.* Second, the majority erred by considering Andrews's ability to engage in physical activities with her inhaler, a mitigating measure the amended ADA instructs courts to disregard. *Id.* at 19. Under the correct legal standards, he concluded, a jury could find Andrews's asthma substantially limited her breathing. *Id.* at 20.

ARGUMENT

In enacting the ADAAA, Congress sought to "respond to years of court decisions narrowly defining who qualifies as an individual with disabilities, which left the ADA too compromised to achieve its purpose." *Morrissey*, 946 F.3d at 299 (cleaned up); *see* 42 U.S.C. § 12102(4)(A) (disability "shall be construed in favor of broad coverage"). The majority,

however, rejected Andrews's disability claim based on outdated standards that the ADAAA expressly abrogated and that this Court has rejected.

I. The majority's actual-disability holding relied on standards abrogated by the ADAAA and rejected by this Court and other circuits.

A. The majority relied on a definition of "substantially limited" that the ADAAA expressly abrogated.

The majority said that "[a] major life activity is 'substantially limited' when an individual *cannot* perform that activity as an average person in the general population could perform it, or if she faces *significant* restrictions in the condition, manner, or duration under which she can perform the activity." Op. at 7 (emphasis added). And, the majority said, Andrews's asthma was not substantially limiting because it did not "prevent[] her from breathing as an average person" or "pose[] significant restrictions to her breathing." *Id.* at 8.

The majority cited 29 C.F.R. § 1630.2(j)(1)(i)-(ii) for this prevent-or-significantly-restrict standard, Op. at 7, but that standard appears in the old, pre-ADAAA version of those regulations. 29 C.F.R. § 1630.2(j)(1)(i)-(ii) (1991) ("substantially limits" means "[u]nable to perform" or "[s]ignificantly restricted" in performing a major life activity). The ADAAA rejected that standard, "convey[ing] congressional intent" that the prior

standard "created an inappropriately high level of limitation" and mandating that EEOC "revise" its "regulations that define the term 'substantially limits' as 'significantly restricted' to be consistent with this Act." Pub. L. No. 110-325 at § 2(b)(5)-(6). EEOC's revised regulations state that "[a]n impairment *need not prevent, or significantly or severely restrict*, the individual from performing a major life activity in order to be considered substantially limiting," 29 C.F.R. § 1630.2(j)(1)(ii) (emphasis added), as this Court has recognized, *Morrissey*, 946 F.3d at 299; *Hostettler*, 895 F.3d at 853-54.

B. Transient or episodic impairments can be disabling.

The majority emphasized that Andrews's asthma limits her breathing only in "transient" or "isolated" circumstances. Op. at 8. But the amended ADA states that an "episodic" impairment is disabling "if it would substantially limit a major life activity when active," 42 U.S.C. § 12102(4)(D), even if the periods of activity are "brief or occur infrequently," 29 C.F.R. pt. 1630, app. 1630.2(j)(1)(vii); *id.* (asthma is episodic impairment).

This Court has held as much. *E.g.*, *Hostettler*, 895 F.3d at 854 (that panic attacks "were episodic makes no difference under the ADA"); *Barlia*,

721 F. App'x at 446 (hypothyroidism that caused substantial limitation "when it flared up" could be disability). So, too, have other circuits. *E.g.*, *Mueck*, 75 F.4th at 479-80; *Gogos*, 737 F.3d at 1172-73. Here, a jury could find that Andrews's asthma, when active, substantially limited her breathing by causing wheezing, chest tightness, and days-long coughing episodes—symptoms most people do not experience when attempting to breathe. *Supra* pp. 2-3.

C. An impairment need not limit multiple major life activities.

Under the amended ADA, "[a]n impairment that substantially limits one major life activity need *not* limit other major life activities" to be disabling. 42 U.S.C. § 12102(4)(C) (emphasis added). Thus, "an individual whose impairment substantially limits a major life activity need not additionally demonstrate a resulting limitation in the ability to perform [other daily] activities," as pre-ADAAA cases held. 29 C.F.R. pt. 1630, app. 1630.2(j)(1)(viii); *see Shields*, 32 F.4th at 1223 (ADAAA rejects notion that impairment must restrict daily activities).

The ADAAA added "breathing" as a major life activity. 42 U.S.C. § 12102(2)(A). Thus, Andrews needed only to show a substantial limitation in her *breathing as such*, not her ability to perform *other daily activities*

involving breathing. *See* 29 C.F.R. pt. 1630, app. 1630.2(j)(1)(viii) (individual whose vision is substantially limited "need not also show" inability to "perform [daily] activities … that require seeing").

The majority contravened this mandate, reasoning that because Andrews could perform activities like exercise, travel, metal detecting, and spending time with her dog, her breathing was not substantially limited. Op. at 8-9. This reasoning, as the dissent explained, "wrongfully assumes that those who are 'truly' disabled cannot find ways to participate in everyday activities." *Id.* at 11. Under the correct analysis, a jury could find that Andrews's *breathing as such* was substantially limited. *Supra* p. 8.

D. The ameliorative effects of mitigating measures should not factor into the substantially-limiting determination.

Under the amended ADA, "whether an impairment substantially limits a major life activity shall be [determined] without regard to the ameliorative effects of mitigating measures such as … medication." 42 U.S.C. § 12102(4)(E)(i)(I). An individual can still be disabled if "because of the use of a mitigating measure, [she] has experienced no limitations, or only minor limitations." 29 C.F.R. pt. 1630, app. 1630.2(j)(1)(vi). The relevant inquiry is whether the impairment would be substantially limiting

"absen[t] … an effective mitigating measure." *Id.*; *see Barlia*, 721 F. App'x at 446 (considering impact of plaintiff's hypothyroidism without medication); *Summers*, 740 F.3d at 330 n.3 (courts must evaluate impairment "as it would manifest without … medication"); *Gogos*, 737 F.3d at 1173 (ameliorative effects of medication "not relevant").

The majority, however, considered only Andrews's limitations in their *mitigated state*. And the record contained ample evidence that Andrews could only control her asthma (and thereby participate in the activities the majority found significant) by relying on mitigating measures.[2] Tri Star did not dispute that "Andrews deals with her asthma every day to keep it well-controlled," taking three medications daily and regularly using her rescue inhaler "before exercising so that her asthma is kept under control." Def.-Resp.-to-Pl.'s-Facts/R.62/PageID#1019,¶50.

The majority acknowledged Andrews's argument that she could "maintain a very active lifestyle" only "through use of 'mitigating measures'" but refused to consider this argument because the district court had not. Op. at 9 n.4. But, as the dissent noted, the district court "*did*

[2] Even with mitigating measures, Andrews still suffered attacks that impaired her breathing. *Supra* pp. 2-3.

consider" it, "conclud[ing] that 'Plaintiff's reliance on [her inhaler] to reduce the effects of her asthma is not sufficient to support her assertion that her asthma is a disability.'" Op. at 19 n.4 (quoting Mem.Op./R.76/PageID#1195 n.13). In any event, the majority had a "duty to apply the correct legal standards" irrespective of any forfeiture. *Trs. of Sheet Metal Workers v. Pro Servs.*, 65 F.4th 841, 848 n.3 (6th Cir. 2023).

II. The majority's forfeiture rulings contravened the amended ADA and circuit precedent.

A. Plaintiffs need not plead a specific major life activity.

The majority held that Andrews forfeited any argument that her asthma substantially limited her immune function by failing to plead it. Op. at 4-5. But decisions from this Court and others recognize that plaintiffs need not plead specific major life activities. In *EEOC v. J.H. Routh Packing Co.*, 246 F.3d 850 (6th Cir. 2001), this Court held that "so long as the complaint notifies the defendant of the claimed impairment, the substantially limited major life activity need not be specifically identified in the pleading." *Id.* at 854. Courts continue to rely on *Routh* after *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662

(2009). *E.g.*, *Fowler v. UPMC Shadyside*, 578 F.3d 203, 213-14 (3d Cir. 2009) (Rehabilitation Act).

The majority found *Routh* distinguishable because it "involved a denial of a Rule 12(c) motion for judgment on the pleadings—not an order on summary judgment." Op. at 6 n.2. But it is unclear why this distinction is meaningful. It is true that the required evidentiary support differs between the motion-on-pleadings and summary-judgment stages. *See Fowler*, 578 F.3d at 214 (plaintiff "must ultimately prove" substantial limitation of a major life activity but need not at pleading stage). The majority's objection, however, was not that Andrews *failed to support* her immune-function allegations at summary judgment but that she could not *rely on that major life activity at all* because she failed to plead it. Yet, because (as *Routh* holds) specific major life activities need not be pled, failure to do so could not result in forfeiture at summary judgment. *See Allen v. SouthCrest Hosp.*, 455 F. App'x 827, 832 n.5 (10th Cir. 2011) (because plaintiff need not plead specific major life activity, failure to do so did not preclude reliance on that activity at summary judgment).

To be sure, as the majority noted, plaintiffs must amend their complaints to raise *new legal claims*. Op. at 4 (citing *Tucker v. Union of*

Needletrades, Indus., & Textile Emps., 407 F.3d 784, 788 (6th Cir. 2005) (plaintiff could not assert promissory-estoppel claim for first time at summary-judgment stage without amending complaint)). But Andrews was not seeking to raise a new legal *claim* but instead to flesh out the complaint's disability-discrimination claim and its allegations about "the physical limitations and/or restrictions" arising from her asthma. Complaint/R.1/PageID#9,¶58.

Nor did any failure to plead immune-function allegations deprive Tri Star of "fair notice." Op. at 6 n.2 (quoting *Routh*, 246 F.3d at 854). To the contrary, *Routh* held that identifying a "particular impairment" provided "sufficient notice," even without "specifically identif[ying]" a major life activity. 246 F.3d at 854. Because Andrews's complaint identified her impairment, she provided sufficient notice.

B. Regarded-as claims require no actual or perceived substantial limitation of a major life activity.

The majority concluded that Andrews's failure to plead that "Tri Star regarded her immune system as substantially limited" defeated her regarded-as claim. Op. at 10. But, as this Court has recognized, post-ADAAA, a regarded-as plaintiff need only show the employer took

adverse action based on an actual or perceived impairment; it is irrelevant "whether or not the impairment limits or is perceived to limit a major life activity." 42 U.S.C. § 12102(3)(A); *see Babb*, 942 F.3d at 319 (for regarded-as claim, "employee need only show that their employer believed they had a 'physical or mental impairment'"); *Harrison*, 826 F. App'x at 525-26 (similar).

Thus, Andrews needed to show that Tri Star regarded her as having *the impairment of asthma*, not that Tri Star regarded her asthma as *substantially limiting her immune function* (or another major life activity). Andrews argued that Tri Star did regard her as having asthma, citing evidence that she disclosed this impairment to Tri Star. Dkt.No.17 at 36-38. The majority, however, never considered this issue—or whether Tri Star terminated Andrews because it regarded her as having asthma—due to its erroneous view of the governing legal standards.

CONCLUSION

We urge this Court to grant panel rehearing or rehearing en banc.

Respectfully submitted,

KARLA GILBRIDE
General Counsel

JENNIFER S. GOLDSTEIN
Associate General Counsel

ANNE NOEL OCCHIALINO
Assistant General Counsel

/s/Chelsea C. Sharon
CHELSEA C. SHARON
Attorney
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M St. N.E., 5th Floor
Washington, D.C. 20507
(202) 921-2889
chelsea.sharon@eeoc.gov

September 30, 2024

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because it contains 2,600 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 6th Cir. R. 32(b)(1).

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 was prepared in a proportionally spaced typeface using Microsoft Word in 14-point Book Antiqua font.

/s/Chelsea C. Sharon
CHELSEA C. SHARON
Attorney
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M St. N.E., 5th Floor
Washington, D.C. 20507
(202) 921-2889
chelsea.sharon@eeoc.gov

September 30, 2024

CERTIFICATE OF SERVICE

I certify that on September 30, 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.

/s/Chelsea C. Sharon
CHELSEA C. SHARON
Attorney

September 30, 2024

ADDENDUM

Designation of Relevant District Court Documents

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