23-665

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ANGEL TUDOR,

Plaintiff-Appellant

v.

WHITEHALL CENTRAL SCHOOL DISTRICT,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT ON THE ISSUE ADDRESSED HEREIN

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INTEREST OF THE UNITED STATES

The United States has a direct and substantial interest in this appeal, which presents an important question regarding the scope of an employer's obligation to provide reasonable accommodations under Title I of the Americans with Disabilities Act (ADA), 42 U.S.C. 12112(b)(5)(A). The Attorney General and the Equal Employment Opportunity Commission (EEOC) share responsibility for enforcing Title I. *See* 42 U.S.C. 12117(a). In addition, Congress charged the EEOC with issuing implementing regulations. *See* 42 U.S.C. 12116.

The United States files this brief under Federal Rule of Appellate Procedure 29(a)(2).

STATEMENT OF THE ISSUE

Whether an employee's ability to perform the essential functions of her job, without a reasonable accommodation, is fatal to her failure-to-accommodate claim under Title I of the ADA, 42 U.S.C. 12112(b)(5)(A), where the requested accommodation is necessary to minimize disability-related pain and suffering in performing essential job functions.[1]

[1] The United States takes no position on any other issue in this appeal, including the ultimate merits of the plaintiff's failure-to-accommodate claim.

STATEMENT OF THE CASE

A. Statutory And Regulatory Background

Congress enacted the ADA to create a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). "To effectuate its sweeping purpose, the ADA forbids discrimination against disabled individuals in major areas of public life, among them employment (Title I of the Act), public services (Title II), and public accommodations (Title III)." *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675 (2001) (citations omitted).

Title I's prohibitions on employment-based disability discrimination are set out at 42 U.S.C. 12112. Section 12112(a) provides a "[g]eneral rule" that "[n]o covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. 12112(a). Section 12112(b) makes clear that prohibited discrimination includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee," unless the employer can demonstrate that doing so would impose an "undue hardship" on the employer. 42 U.S.C. 12112(b)(5)(A).

Title I also provides two relevant definitions. First, the statute defines a "qualified individual" as "an individual 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). Second, the statute provides that "[t]he term 'reasonable accommodation' may include[] (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities." 42 U.S.C. 12111(9).

The EEOC's implementing regulations further explain that "reasonable accommodation means":

> (i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or
>
> (ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position; or
>
> (iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

29 C.F.R. 1630.2(o)(1).

Such modifications or adjustments ensure that, when not unduly burdensome, employers remove workplace barriers that impede the ADA's purpose of ensuring "equality of opportunity" to qualified individuals with disabilities. *See* 42 U.S.C. 12101(a)(7). "These barriers may be physical obstacles (such as inaccessible facilities or equipment), or they may be procedures or rules (such as rules concerning when work is performed, when breaks are taken, or how essential or marginal functions are performed)." EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, No. 915.002, 2002 WL 31994335, at *2 (Oct. 17, 2002).

B. Factual Background

Plaintiff Angel Tudor is employed as a full-time teacher by defendant Whitehall Central School District. SPA-2.[2] Tudor developed Post-Traumatic Stress Disorder (PTSD) after experiencing "severe workplace sexual harassment" and alleged assault at work by her supervisor in a prior job. A-428; *see also* A-1388-1389.

[2] Citations to "SPA- __" are to pages of the Special Appendix and citations to "A-__" are to pages of the Appendix. "Doc. ___, at ___" refers to the docket entry and page number of documents filed on the district court's docket. "C.A. Doc. __" refers to documents filed in this Court.

As an accommodation for her PTSD, Tudor requested the ability to take two 15-minute breaks, in addition to her lunch break, so that she could leave school grounds. *See* SPA-2. Tudor explained that "[her] PTSD symptoms [were] at their worst when [she] encounter[ed] environments or situations similar to the environment where [she] developed [her] PTSD," so the "two 15-minute breaks that . . . allowed [her] to leave this confined setting . . . [were] . . . essential for [her] to have in order to perform the essential functions of [her] job without further harm to [her]self." A-390. When she tried to work without this accommodation in the past, "[she] had to take a medical leave because . . . she was unable to teach and had to attend a 5 day a week intensive outpatient program . . . to get her PTSD symptoms and anxiety under control." A-13.

For the 2019-2020 school year, the District permitted Tudor to take a break so that she could leave school grounds every morning, but the parties dispute whether the District provided the same opportunity to leave school grounds every afternoon. *See* SPA-3. For the afternoon breaks, the District claims that it assigned Tudor to an "unpopulated study hall." *Ibid.* The parties dispute whether the study hall was actually unpopulated and whether Tudor was allowed to leave the school grounds even if there were no students. *Ibid.* Although Tudor left the building during many of these afternoon study halls, she believed she lacked permission to do so. *See* A-550. She "wonder[ed] every day is somebody going to

assign a student to me, is somebody going to change my schedule, is somebody going to find out, am I going to get in trouble, am I going to get written up. Every single day I had to worry about that." A-552.

In discovery, Tudor admitted that she has thus far been able to "perform the essential functions of her job even though she was not granted her accommodation request," but she stated that she has done so "under great duress and harm." A-116-117; *see also id.* at 111; SPA-4. In a deposition, she similarly stated: "I was able to perform my duties, but it was at an extreme cost emotionally and physically." Doc. 22-4, at 35.

C. Procedural Background

After filing a charge of discrimination and receiving a notice of a right to sue (SPA-4), Tudor filed a complaint in the Northern District of New York (Doc. 1). In addition to state law claims that were later voluntarily dismissed, Tudor alleged that the District had failed to reasonably accommodate her disability in violation of the ADA. A-7-22 (Am. Compl.); Doc. 16 (Stip. Dismissal); *see also* SPA-1 & n.1.

The District moved for summary judgment. Doc. 22. The District primarily argued (1) that Tudor failed to gather admissible medical evidence to establish her disability, and (2) that the District had reasonably accommodated Tudor's disability by assigning her to the afternoon study hall. Doc. 22-2, at 11-21. On the second point, the District argued that, while Tudor may not have received the exact

accommodation that she desired, she received an alternative accommodation that allowed her to perform the essential job duties. *Id.* at 17. The District acknowledged Tudor's assertion that "she was able to perform her job, . . . under 'great duress and harm'" but stressed that Tudor "does not claim that this alleged 'duress' or 'harm' that she experienced caused her to be unable to report to work and perform the essential functions of her job." *Id.* at 17-18 (citation omitted).

The district court granted the District's motion for summary judgment, focusing solely on Tudor's conceded ability to perform the essential functions of the job. SPA-7. The court summarized that, "[t]o make a prima facie showing of an employer's failure to accommodate, a plaintiff must establish:"

> (1) [She] is a person with a disability under the meaning of the statute in question; (2) an employer covered by the statute had notice of h[er] disability; (3) with reasonable accommodation, plaintiff could perform the essential functions of the job at issue; and (4) the employer has refused to make such accommodations.

Id. at 6 (citation omitted). The court assumed without deciding that "Tudor is disabled under the ADA, and that the scheduling arrangement in place regarding her afternoon study hall constituted a denial of Tudor's requested accommodation." *Id.* at 7. Nevertheless, the court stated that the District "points to uncontroverted evidence, including Tudor's own admissions, that, regardless of the alleged denial of her accommodation, she was able to perform the essential functions of her job." *Ibid.* (citations omitted). "[T]herefore," the court concluded,

"no fact finder could determine she has established the third element of her failure to accommodate claim." *Ibid.* (citing *Anderson v. National Grid, PLC*, 93 F. Supp. 3d 120, 139 (E.D.N.Y. 2015); *Harvin v. Manhattan & Bronx Surface Transit Operating Auth.*, No. 14-cv-5125, 2018 WL 1603872, at *5 (E.D.N.Y. Mar. 30, 2018)).

The court entered judgment against Tudor. SPA-9. Tudor filed a timely notice of appeal and originally proceeded pro se. A-1439. This Court granted Tudor's motion for the appointment of counsel and instructed counsel to "brief, among any other issues, whether Appellant's ability to perform the essential functions of her job, without a reasonable accommodation, was fatal to her failure-to-accommodate claim under the Americans with Disabilities Act. *See Hopman v. Union Pac. R.R.*, 68 F.4th 394, 402 (8th Cir. 2023); *Bell v. O'Reilly Auto Enters., LLC*, 972 F.3d 21, 24 (1st Cir. 2020); *Feist v. La., Dep't of Just., Off. of the Att'y Gen.*, 730 F.3d 450, 453 (5th Cir. 2013)." C.A. Doc. 78 (Dec. 14, 2023).

SUMMARY OF ARGUMENT

This Court should hold that a plaintiff's ability to perform the essential functions of her job by enduring disability-related pain and suffering is not fatal to her failure-to-accommodate claim under Title I of the ADA.

1. Title I of the ADA requires an employer to provide a reasonable accommodation to a qualified individual with a disability, unless doing so would

cause an undue hardship. 42 U.S.C. 12112(b)(5)(A). There is no basis in the statutory text or in the EEOC's implementing regulations to hold that an employer need not provide a reasonable accommodation if the qualified individual is able to perform the essential functions of the job without one. Title I's broad prohibition of discrimination in the "terms, conditions, and privileges of employment" and the EEOC's implementing regulations require employers to make reasonable accommodations even if unrelated to the performance of essential job functions.

2. The issue in this case, however, is about reasonable accommodations that arguably *are* related to the performance of essential job functions. Employers must, absent undue hardship, provide reasonable accommodations that enable a qualified individual to perform the essential functions of the job with less disability-related pain or suffering. And the district court erred when it failed to consider the extent to which Tudor needed a reasonable accommodation for that purpose.

a. Title I's text and the EEOC's implementing regulations make clear that employers must provide qualified individuals with reasonable accommodations to minimize disability-related pain and suffering in the performance of their essential job functions. And several other courts have already recognized that employees who can perform the essential functions of their job with disability-related pain or suffering may still be entitled to reasonable accommodations.

b. The district court here held as a matter of law that Tudor could not maintain a failure-to-accommodate claim because she could technically perform the essential functions of the job, despite Tudor's assertion that she could only do so "under great duress and harm." In so holding, the district court erred in failing to consider the extent to which Tudor needed an accommodation to enable her to perform the essential functions of her job with less disability-related pain and suffering.

c. Recognizing that Title I requires employers to provide reasonable accommodations to qualified individuals with disabilities who can perform the essential functions of the job by enduring pain and suffering will not open the door to meritless claims. The statute provides other important limitations on an employer's obligation to provide reasonable accommodations. In particular, the requested accommodation must still be reasonable, effective, and not unduly burdensome.

ARGUMENT

A PLAINTIFF'S ABILITY TO PERFORM THE ESSENTIAL FUNCTIONS OF THEIR JOB WITH DISABILITY-RELATED PAIN AND SUFFERING IS NOT FATAL TO THEIR FAILURE-TO-ACCOMMODATE CLAIM

Title I's broad prohibition of discrimination in the workplace requires employers to make reasonable accommodations to the known physical and mental limitations of qualified individuals with disabilities unless doing so would impose

an undue hardship. 42 U.S.C. 12112(b)(5)(A). This obligation extends to reasonable accommodations that are unrelated to a qualified individual's ability to perform their essential job functions. But the issue in this case is whether Tudor needed a reasonable accommodation in order to perform the essential functions of her job with less disability-related pain and suffering.

A. An employer's obligation under Title I to provide reasonable accommodations extends to those unrelated to the performance of essential job functions.

Title I of the ADA prohibits covered employers from "discriminat[ing] against a qualified individual on the basis of disability in regard to . . . terms, conditions, and privileges of employment." 42 U.S.C. 12112(a). To "discriminate against a qualified individual on the basis of disability" is defined to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee," unless doing so would impose an undue hardship. 42 U.S.C. 12112(b)(5)(A). Taken together, this means that, absent an undue hardship, an employer must reasonably accommodate the "known physical or mental limitations" of a "qualified individual" with a disability if the failure to do so would affect the "terms, conditions, and privileges of employment."

This obligation extends beyond reasonable accommodations that are related to the performance of essential job functions. Indeed, a "qualified individual" is

defined as "an individual who, *with or without reasonable accommodation*, can perform the essential functions of the employment position." 42 U.S.C. 12111(8) (emphasis added). And the language "terms, conditions, and privileges of employment" goes beyond the essential functions of the job, *see Beasley v. O'Reilly Auto Parts*, 69 F.4th 744, 757 (11th Cir. 2023), to capture "a wide range of employment-related conduct," *Exby-Stolley v. Board of Cnty. Comm'rs*, 979 F.3d 784, 817 (10th Cir. 2020) (en banc) (emphasis omitted).

The EEOC's implementing regulations confirm Title I's broad reach. They explain that "reasonable accommodation" means (i) "[m]odifications or adjustments to a job application process," (ii) "[m]odifications or adjustments . . . that enable an individual with a disability who is qualified to perform the essential functions of that position"; and (iii) "[m]odifications or adjustments that enable [an] employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities." 29 C.F.R. 1630.2(o)(1). Enabling an employee to perform the essential functions of the job is therefore one, but not the only, basis for a reasonable accommodation. *See Noll v. International Bus. Mach. Corp.*, 787 F.3d 89, 94 (2d Cir. 2015) (considering an argument that an accommodation was necessary to enjoy equal benefits and privileges of employment separate from the essential functions of the job).

Thus, a failure-to-accommodate claim does not require a "nexus between the requested accommodation and the essential functions of [the plaintiff]'s position." *Feist v. Louisiana, Dep't of Just., Off. of the Atty. Gen.*, 730 F.3d 450, 454 (5th Cir. 2013); *see also Stokes v. Nielsen*, 751 F. App'x 451, 454 (5th Cir. 2018) (per curiam). For example, even if they are able to perform the essential functions of the job, an employee with limited mobility might be entitled to a modification that would allow them to use an otherwise inaccessible restroom, *see, e.g.*, *Scalera v. Electrograph Sys., Inc.*, 848 F. Supp. 2d 352, 357-358, 363-366 (E.D.N.Y. 2012), or access an otherwise inaccessible employee lounge, *see, e.g.*, *Hopman v. Union Pacific R.R.*, 68 F.4th 394, 396 (8th Cir. 2023) (recognizing "strong indications" that Congress intended to bar discrimination in employer-sponsored benefits and privileges even if unrelated to essential job functions), *cert. denied*, 2024 WL 674724 (Feb. 20, 2024).

In reaching a contrary conclusion, the district court here, and the district court decisions that it cited, seem to have misunderstood the elements of a prima facie case for a failure-to-accommodate claim. *See* SPA-7 (citing *Anderson v. National Grid, PLC*, 93 F. Supp. 3d 120, 139 (E.D.N.Y. 2015); *Harvin v. Manhattan & Bronx Surface Transit Operating Auth.*, No. 14-cv-5125, 2018 WL 1603872, at *5 (E.D.N.Y. Mar. 30, 2018)). *But see Scalera*, 848 F. Supp. 2d at

366 (reasoning that "the requested accommodations did not necessarily have to go to essential functions of the job").

The standard often cited in this Court requires a plaintiff to show that "(1) [she] is a person with a disability under the meaning of the ADA; (2) an employer covered by the statute had notice of [her] disability; (3) with reasonable accommodation, plaintiff could perform the essential functions of the job at issue; and (4) the employer has refused to make such accommodations." *McBride v. BIC Cons. Prods. Mfg. Co.*, 583 F.3d 92, 96-97 (2d Cir. 2009) (citation omitted). The third element is meant to capture the statutory requirement that the employee be a "qualified individual," which, as explained above, is defined as an individual who can perform the essential functions of the job "with or without reasonable accommodation." 42 U.S.C. 12111(8). Indeed, in a case in which the plaintiff sought a reasonable accommodation to get to work, even though she could "perform[] her job duties successfully," this Court more precisely articulated this element of the prima facie case as requiring "that, with or without reasonable accommodation, she could perform the essential functions of the job." *Lyons v. Legal Aid Soc'y*, 68 F.3d 1512, 1513, 1515 (2d Cir. 1995).

Because the relevant inquiry in the run-of-the-mill case is whether an individual needs an accommodation to do the job at all, it appears that courts have sometimes shortened the third element to refer only to the ability to perform the

essential functions of the job "with reasonable accommodation." After all, if a plaintiff cannot perform the essential functions of the position, even with a reasonable accommodation, then they are not a qualified individual. But the district court misread this element as requiring the opposite showing. In short, requiring a plaintiff to show that they are *able* to perform the essential functions of the job *with* a reasonable accommodation does not compel the inverse, *i.e.*, requiring a plaintiff to show that they are *unable* to perform the essential functions of the job *without* a reasonable accommodation.

B. At issue in this case is an employer's obligation to provide reasonable accommodations to enable a qualified individual to perform their essential job functions with less disability-related pain and suffering.

Although Title I does not limit the obligation to provide reasonable accommodations to those related to the performance of essential job functions, this appeal is about reasonable accommodations that arguably *are* related to the performance of essential job functions. Title I's text, the EEOC's implementing regulations, and case law from this and other circuits all make clear that, absent undue hardship, employers must provide reasonable accommodations to enable qualified individuals to perform their essential job functions by minimizing disability-related pain and suffering. The district court therefore erred when it failed to consider the extent to which Tudor needed a reasonable accommodation for this purpose. Confirming that Title I requires accommodations to minimize

pain and suffering in the performance of essential job functions would not impose excessive burdens on employers given the statute's independent requirements that any accommodation be "reasonable" and not impose an "undue hardship."

1. Title I requires employers to provide reasonable accommodations that enable a qualified individual with a disability to perform the essential functions of their job with less disability-related pain or suffering.

As explained above, Title I expressly requires employers to reasonably accommodate the "known physical or mental limitations" of a "qualified individual" with a disability if the failure to do so would affect the "terms, conditions, and privileges of employment." 42 U.S.C. 12112(a) and (b)(5)(A). A qualified individual's ability to perform the essential functions of their position by enduring disability-related pain and suffering does not deprive them of this statutory right to a reasonable accommodation. Forcing an employee to work with disability-related pain and suffering clearly affects the "terms" and "conditions" of their employment.

The EEOC's implementing regulations provide further support. Specifically, the second category of accommodations set forth in the regulations include "[m]odifications or adjustments to the work environment, or to the manner or circumstances under which the position held . . . is customarily performed, that *enable* an individual with a disability who is qualified *to perform the essential functions of that position*." 29 C.F.R. 1630.2(o)(1)(ii) (emphases added).

Mitigating disability-related pain and suffering that an employee bears in order to perform the essential functions of the position "enable[s]" them to perform such work. To "enable" means "to make possible, practical, or easy." *Enable*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/enable (last visited Mar. 21, 2024). Minimizing pain and suffering in the performance of essential job functions is necessarily part and parcel of making it "possible, practical, or easy" for an employee to perform them. As a result, an employer must provide a reasonable accommodation to a qualified individual, not only when they need a reasonable accommodation to perform the essential functions at all, but also when they need a reasonable accommodation to perform the essential functions with less disability-related pain or suffering.

In other words, impossibility is not the standard. Considering a physical-accessibility issue under Title II of the ADA, a district court explained that "Title II of the ADA does not leave a person with disabilities who manages to crawl up a courthouse's steps with no remedy for the courthouse's inaccessibility." *Thill v. Olmstead Cnty.*, No. 08-cv-4612, 2010 WL 3385234, at *3 (D. Minn. Aug. 24, 2010). Similarly, Title I of the ADA does not deprive an employee with disabilities of a reasonable accommodation because they manage to perform the essential functions of the job despite disability-related pain and suffering.

Three other circuits have already recognized that employees who can perform the essential functions of their job with disability-related pain or suffering may be entitled to reasonable accommodations. The First Circuit has held that "[a]n employee who can, with some difficulty, perform the essential functions of his job without accommodation remains eligible to request and receive a reasonable accommodation." *Bell v. O'Reilly Auto Enters., LLC*, 972 F.3d 21, 24 (1st Cir. 2020). The D.C. Circuit has rejected a defendant's argument that an accommodation was not necessary because the plaintiff "could perform the essential functions of his job without accommodation, 'but not without pain.'" *Hill v. Associates for Renewal in Educ., Inc.*, 897 F.3d 232, 239 (D.C. Cir. 2018) (citation omitted). And, albeit in an unpublished opinion, the Sixth Circuit has similarly rejected a defendant's argument that, if the plaintiff "was physically capable of doing his job—no matter the pain or risk to his health—then it had no obligation to provide him with any accommodation, reasonable or not." *Gleed v. AT&T Mobility Servs., LLC*, 613 F. App'x 535, 538-539 (6th Cir. 2015).[3]

[3] Even the Seventh Circuit, whose precedent has "some tension" as to whether a reasonable accommodation is required if unrelated to the essential functions of the job, has distinguished "accommodations that may be needed for an employee with a disability to perform essential job functions more safely or less painfully." *EEOC v. Charter Commc'ns, LLC*, 75 F.4th 729, 739, 743 n.2 (7th Cir. 2023) (citing, in its discussion, *Hill*, 897 F.3d at 234, 239). In such a case, the Seventh Circuit clarified that its precedent "should not be read as holding that the

The Eighth Circuit's decision in *Hopman*, *supra*, does not hold otherwise. There, the plaintiff sought to bring his service dog with him aboard trains in his role as an engineer to ameliorate the effects of PTSD and migraine headaches, but, "[f]rom the outset of the litigation, [he] . . . conceded that he is able to perform the essential functions of his work on Union Pacific trains with or without the service dog accommodation he seeks." 68 F.4th at 395-396.

The Eighth Circuit rejected the plaintiff's failure-to-accommodate claim solely on the basis that it did not fit within the third subsection of the EEOC's regulation concerning the equal benefits and privileges of employment, 29 C.F.R. 1630.2(o)(1)(iii). That subsection, according to the court, is limited to employer-sponsored programs or non-work facilities provided or maintained by the employer that are made equally available to non-disabled employees. *See Hopman*, 68 F.4th at 400-401. For the plaintiff's case, the Eighth Circuit concluded, "mitigating pain is not an employer sponsored program or service." *Id.* at 401.[4] Critically, the Eighth Circuit did not decide whether the case would have been different had the

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ADA imposes no duty to offer reasonable accommodations that affect safety or pain that an employee may be motivated to overcome." *Id.* at 739.

[4] In so holding, the Eighth Circuit split with the Sixth Circuit, which had applied the third subsection to a plaintiff's claim that "he needed a chair to work—as other employees do—without great pain and a heightened risk of infection." *See Gleed*, 613 F. App'x at 539.

plaintiff simply relied on the second category of the EEOC's regulation related to enabling employees to perform the essential functions of their job. *See id.* at 399 (stating that "[Hopman] explicitly limited his failure-to-accommodate claim" to the third subsection of the EEOC's regulation); *see also id.* at 398 (reiterating that "Hopman did not claim denial of a job performance accommodation" under the second subsection of the EEOC's regulation).

Although this Court has not specifically addressed the issue of disability-related pain and suffering, it has taken a broad view of when accommodations are related to an employee's ability to perform the essential functions of the job. In *Lyons*, for example, the plaintiff was able to "perform[] her job duties successfully" when she returned to work following an accident, but struggled to walk long distances in her commute and asked her employer to accommodate her disability by paying for a parking space near the office and courts where she worked. 68 F.3d at 1513. This Court held, in part, that it was inappropriate to dismiss the complaint on the argument that the request was "unrelated to the 'essential functions' of her job." *Id.* at 1517. Based on the facts alleged in the complaint, the plaintiff's "ability to reach her office and the courts [was] an essential prerequisite to her work in that position." *Ibid.* Several other circuits have reached similar conclusions concerning accommodations to access the workplace. *See, e.g.*, *EEOC v. Charter Commc'ns, LLC*, 75 F.4th 729, 734 (7th

Cir. 2023); *Burnett v. Ocean Props., Ltd.*, 987 F.3d 57, 69 (1st Cir. 2021); *Colwell v. Rite Aid Corp.*, 602 F.3d 495, 506 (3d Cir. 2010); *see also, e.g.*, *Feist*, 730 F.3d at 454.

2. The district court erred by failing to consider the extent to which Tudor needed an accommodation to minimize disability-related pain and suffering in the performance of her essential job functions.

The district court here held as a matter of law that Tudor could not maintain a failure-to-accommodate claim solely because she conceded that she could perform the essential functions of her job even without her requested accommodation. SPA-7. In so holding, the district court noted Tudor's evidence that she could only do her job without accommodation by enduring "great duress and harm." *See id.* at 4 (citing A-51-52 (Def. SMF ¶¶ 84, 86); A-111 (Doc. 22-13, at 4); A-116-117 (Doc. 22-14, at 3-4); Doc. 22-4, at 35-36 (pp. 127-128 of transcript)). The court erred in failing to consider the import of that evidence under the proper analysis.

The merits of Tudor's claim required a "fact- and context-specific" inquiry, *see Hopman*, 68 F.4th at 402, including a determination of what Tudor meant by "great duress and harm" and whether she needed a reasonable accommodation to minimize disability-related pain and suffering in the performance of her essential job functions. But the district court did not resolve these issues or allow them to reach a jury. This was error. As explained above, a plaintiff's ability to endure

disability-related pain and suffering in the performance of the essential functions of the job is not fatal to a failure-to-accommodate claim.

3. An employer's obligation to provide reasonable accommodations to minimize disability-related pain and suffering in the workplace is not boundless.

Making clear that an employer must provide a reasonable accommodation to minimize disability-related pain and suffering in the workplace would not impose excessive burdens on employers. Although a plaintiff's technical ability to perform the essential functions of the job with pain and suffering is not a bar to a failure-to-accommodate claim, the statute provides other important limitations.

First, employers need only accommodate individuals whose disability-related pain or suffering is tied to an "actual disability" or a "record of" such a disability. *See* 42 U.S.C. 12201(h) (citing 42 U.S.C. 12102(1)); *see also* 29 C.F.R. 1630.2(o)(4). The accommodation mandate does not extend to those who are solely "regarded as" having a disability. *See ibid.*

Second, the failure to provide a reasonable accommodation must affect the terms, conditions, or privileges of employment. *See* 42 U.S.C. 12112(a). Although expansive, the phrase "terms, conditions, and privileges" of employment is not boundless. *Cf. Threat v. City of Cleveland*, 6 F.4th 672, 678 (6th Cir. 2021). Moreover, employers have no obligation to provide accommodations that are

"primarily for the personal benefit of the individual with a disability." 29 C.F.R. Pt. 1630, App. § 1630.9.

Third, the accommodation request must be reasonable and effective. *See Noll*, 787 F.3d at 95; *see also US Airways, Inc. v. Barnett*, 535 U.S. 391, 400 (2002) (noting "[i]t is the word 'accommodation,' not the word 'reasonable,' that conveys the need for effectiveness" because "[a]n *ineffective* 'modification' or 'adjustment' will not *accommodate* a disabled individual's limitations"). So long as the accommodation is effective at enabling a qualified employee to perform their essential job functions by mitigating pain and suffering, it need not be the "perfect accommodation or the very accommodation most strongly preferred by the employee." *Noll*, 787 F.3d at 95; *see also* 29 C.F.R. Pt. 1630, App. § 1630.9. For example, if an employee sought a particular standing desk to mitigate disability-related pain and suffering from prolonged sitting, the employer could offer a less expensive option or some other alternative workaround if still effective.

Finally, an employer need not grant any accommodation if doing so would impose an "undue hardship." 42 U.S.C. 12112(b)(5)(A); *see also* 42 U.S.C. 12111(10). For example, if the same employee sought to work significantly fewer hours to mitigate disability-related pain and suffering from prolonged sitting, the employer could argue that such a request was unreasonable or imposed an undue hardship on their business.

The text of Title I thus adequately assures that accommodations to address disability-related pain and suffering within the workplace remain within reasonable bounds.

CONCLUSION

For the foregoing reasons, the district court erred in its analysis of Tudor's failure-to-accommodate claim.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT ON THE ISSUE ADDRESSED HEREIN:

(1) complies with the type-volume limit of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B)(i) because it contains 5,329 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it was prepared in Times New Roman 14-point font using Microsoft Word for Microsoft 365.

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Date: March 21, 2024

CERTIFICATE OF SERVICE

I certify that on March 21, 2024, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT ON THE ISSUE ADDRESSED HEREIN with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

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