Record No. 13-1645

In the

United States Court of Appeals

For the Fourth Circuit

CARL R. SUMMERS,

Plaintiff-Appellant,

v.

ALTARUM INSTITUTE, CORPORATION

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA AT ALEXANDRIA

BRIEF OF AMICI CURIAE AARP AND NATIONAL EMPLOYMENT LAWYERS ASSOCIATION SUPPORTING PLAINTIFF APPELLANT

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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Counsel for: Amici AARP and NELA

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I certify that on 7-16-2013 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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No. 13-1645 Caption: Carl R. Summers v. Altarum Institute, Corporation

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

AARP is a nonpartisan, nonprofit organization with a membership that helps people turn their dreams into real possibilities, strengthens communities and fights for issues that matter most to families, such as employment, healthcare, income security, retirement planning, affordable utilities and protection from financial abuse. AARP is dedicated to addressing the needs and interests of older workers, and strives through legal and legislative advocacy to preserve the means to enforce their rights. Approximately half of AARP members work or are seeking work, and thus, are protected by laws such as the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 to 12213. AARP is committed to vigorous enforcement of the ADA, including provisions of the ADA Amendments Act of 2008 (ADAAA), Pub. L. 110-325 (Sept. 25, 2008), and regulations authorized by the ADAAA and issued by the Equal Employment Opportunity Commission (EEOC).

The National Employment Lawyers Association (NELA) is the largest professional membership organization in the country comprised of lawyers who represent workers in employment, civil rights and labor disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for

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[1] Pursuant to Fed. R. App. P. 29(c)(5), Amici Curiae certify: that no party or party's counsel authored this brief in whole or in part; that no party or party's counsel contributed money that was intended to fund the brief's preparation or submission; and that no person, other than Amici Curiae, their members, staff or their counsel, contributed money intended to prepare or submit this brief.

equality and justice in the American workplace. NELA and its 68 circuit, state and local affiliates have a membership of over 3,000 attorneys committed to assisting those who have been illegally treated in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports litigation affecting the rights of individuals in the workplace.

SUMMARY OF ARGUMENT

Amici address several aspects of ADA law not analyzed with clarity or precision by the district court. First, the district court's analysis of Appellant Carl Summers' claim that he had an ADA–covered "disability" was flawed in at least three respects. The district court erred in concluding that Summers' claim of disability was foreclosed because his alleged impairments were not permanent and were expected to heal within a year. J.A. at 74–79. In doing so, the district court failed to apply ADAAA standards contained in the ADAAA itself, as well as in EEOC regulations and guidance, with regard to Summers' limitations, and also failed to look at them without regard to "mitigating measures" undertaken by Summers. These standards differ greatly from those in force prior to 2009. The district court also erroneously considered Summers' alleged impairments largely in terms of their limitation of Summers in the major life activity of "working," J.A.

at 77, rather than walking, which was the focus of Summers' Complaint, and the focus of his briefing and oral argument opposing the motion to dismiss.

Second, Amici address the alternative grounds invoked to dismiss Summers' reasonable accommodation claim. The district court suggested this claim rested solely on the failure of Appellee Altarum Institute, Corp. (Altarum) "to engage in [the] interactive process." J.A. at 80. This misreads Summers' Complaint allegations, briefing and argument that Altarum failed to grant his requests for accommodation. The district court also ignored settled law that an employer's failure to respond to accommodation requests is unjustified unless it is shown that no accommodation is possible. Further, it was error to rule that Summers' return-to-work plan was "unreasonable" on its face on grounds that he asked "to be allowed to work from home indefinitely." *Id.* Under this Court's rulings, Summers' plan included a "finite" end of twelve months to his need for accommodation. Thus, he adequately pled Altarum's "failure" to accommodate.

Finally, Amici submit that the legal hurdles erected by the district court are improper at this early stage of an ADA case and clash with Congressional intent recited in the ADA. The questions the court resolved to grant dismissal—whether Summers is "substantially limited" in a "major life activity," and whether Altarum "failed" to "reasonably" accommodate his injuries—are non-ripe fact issues that should be decided on a full evidentiary record at summary judgment or trial.

SUMMARY OF APPELLANT'S FACT ALLEGATIONS

The district court granted Appellee Altarum's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Hence, allegations in the Complaint dated December 27, 2012, J.A. at 37–49, must be treated as true and correct.

Appellant Summers worked for Altarum from mid-July to December 1, 2011 as a researcher and statistician. J.A. at 38, 41. Altarum performed services for private firms as well as federal agencies such as the Defense Centers of Excellence (DCoE), in Silver Spring, Maryland. *Id*. at 38–39. Summers "frequently commuted to" DCoE's offices to work there for Altarum. *Id.* Summers had no "performance problems." *Id.* at 39

In mid-October 2011, Summers sustained what the district court described as a "very serious injury." J.A. at 75 (transcript of April 26, 2013 District Court Motions Hearing). While commuting to DCoE, he suffered a broken left leg "requiring surgery to fit a metal plate, screws, and donated bone," "a torn meniscus cartilage in his left knee," a broken right ankle, and right knee damage requiring surgery to "refasten the tendons to the knee." *Id*. at 39–40 (Complaint, ¶14).

Summers' doctors estimated that "even with ... mitigating measures," his recovery would take "seven months to a year." J.A. 75 (summarizing Complaint, ¶39, J.A. 44). For a few months, "Summers could not even walk very short

distances without pain," and as of the filing of the Complaint, fourteen months after his injuries, he still could not "walk short distances without pain." *Id.*

Summers alleged that shortly after his accident he spoke to an Altarum human resources (HR) employee about "working from home." J.A. at 40. A week later, he e-mailed "supervisors and colleagues, updating them about his recovery and expressing his hope to return to work quickly." *Id*. at 40–41. In the next "few weeks," Summers allegedly "sent two or three other e-mails to his supervisors at Altarum and DCoE" seeking "advice as to the best way" to return to work, asking "about working remotely full- or part-time," and proposing "a plan" to take short-term disability for a few weeks, then start working remotely part-time, and then increase his hours gradually until he was full-time again." *Id.* at 41.

After the accident, Altarum's HR representative allegedly "agreed to talk about accommodations that would allow Summers to return to work." *Id*. at 40. A few weeks later Summers' boss at Altarum called, but did not discuss his proposals. *Id.* at 41. He next heard from Altarum on November 30. He learned he would be terminated the next day, assertedly because Altarum's client DCoE asked that he be replaced and Altarum had no other assignment for him. Summers disputes this rationale, and asserts that Altarum never considered or explored with DCoE giving him a reasonable accommodation to let him keep his job. *Id*. at 41–42.

ARGUMENT

I. THE DISTRICT COURT'S ANALYSIS OF WHETHER SUMMERS HAS A "DISABILITY" CLASHES WITH THE ADAAA, AND WITH THE EEOC RULES AND GUIDANCE ISSUED TO INTERPRET IT.

A. The ADAAA's Text and History, As Well As EEOC Regulations and Regulatory Guidance, Clearly Envision Actual Impairments Lasting Less Than A Year, as in This Case, Constituting Actual "Disabilities."

Under the ADA as amended in 2008, a "very serious injury" such as the one here, likely to last seven to twelve months taking into account "mitigating measures," clearly is a covered "disability."

This is an "actual disability" case brought under the first prong of the ADA's disability definition, 42 U.S.C. § 12102(1)(A). Significantly, although duration is an explicit statutory factor in cases of a "regarded as" disability under prong *three*, 42 U.S.C. § 12102(3)(B),[2] Congress included no such limitation in the revised definition of an "actual disability." Accordingly, EEOC regulations issued pursuant to express authorization by Congress[3] state in no uncertain terms:

> The six-month 'transitory" part of the "transitory and minor" exception to "regarded as" coverage in [29 C.F.R.] § 1630.15(f) does not apply to the definition of "disability under paragraph[] [1630.2](g)(1)(i) (the "actual disability" prong) ... of this section. *The effects of an impairment lasting or expected to last*

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[2] That provision states that "regarded as having [a disabling] impairment" does not apply to "impairments that are transitory and minor," and defines a transitory impairment as one "with an actual or expected duration of 6 months or less."

[3] *See* 42 U.S.C. § 12205a.

> *fewer than six months can be substantially limiting within the meaning of this section.*

29 C.F.R. § 1630.2(j)(1)(ix) (ninth of nine "Rules of construction" for the term "Substantially limits") (emphasis supplied).

It follows that the district court was incorrect in ruling that Summers had no actual disability because at the time of his discharge, his impairment was "temporary" and "he was expected to recover within a year." J.A. at 75 (Summers alleged his doctors "estimated [his] recovery require[d] … even with mitigation ... seven months to a year"); *id.* at 76 ("these are not facts that suggest a disability"); *id.* 77 ("a temporary condition, even up to a year, does not fall within the purview of the act"). In this regard, the district court simply reaffirmed its prior erroneous order, dismissing Summers' initial complaint "because his injuries were not permanent and were expected to heal within a year." *Id.* at 74.

In the Appendix to 29 C.F.R. Part 1630 ("Interpretative Guidance on Title I of the Americans with Disabilities Act"), EEOC elaborated on its regulation declaring that the limited duration of an actual impairment is not dispositive. Rather, duration is only "one factor that is relevant in determining whether the impairment substantially limits a major life activity." 29 C.F.R. Part 1630 App. § 1630.2(j)(1)(ix).[4] Consistent with this interpretation of the ADAAA, EEOC

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[4] In support the EEOC cites a formal statement by the two chief sponsors in the House of Representatives of legislation that became the ADAAA. *Id.*

reaffirmed that even actual disabilities lasting "only for a short period of time," i.e., fewer than six months, though "typically not covered ... may be covered if sufficiently severe." *Id.* *See also id.* § 1630.2(j)(1)(viii) (a "restriction that lasts or is expected to last for several months [may be] substantially limit[ing]").

Decisions rendered in recent years recognize the need for flexible and generous application of the revised ADAAA definition of "disability" in assessing "temporary" impairments. *See, e.g.*, *Cohen v. CHLN, Inc.*, 2011 U.S. Dist. LEXIS 75404, at *21 (E.D. Pa. July 13, 2011) ("As discussed above, the ADAAA mandates no strict durational requirement for plaintiffs alleging an actual disability."); *Feldman v. Law Enforcement Assocs. Corp.*, 779 F. Supp. 2d 472, 484–85 (E.D.N.C. 2011) ("The ADAAA does not explicitly overturn the finding in *Toyota Motor* that temporary disabilities do not qualify for ADA protection. However, as previously noted, the ADAAA states that the definition of disability is to be construed 'in favor of broad coverage ... .' Accordingly, even if Feldman's [condition] 'only temporarily limited his ability to work, the stringent requirements of *Toyota Motor* may be rejected by the amended statute in favor of a more inclusive standard.'") (citations omitted). *See also Duggins v. Appoquinimink Sch. Dist.*, 2013 U.S. Dist. LEXIS 15297, at *8 (D. Del. Feb. 5, 2013) (ruling that six months of severe depression, which prevented work for a month, "inevitably" qualifies as an actual "disability"); *Nayak v. St. Vincent Hosp. & Health Care Ctr.*,

Inc., 2013 WL 121838, at *3 (S.D. Ind. Jan. 9, 2013) (finding sufficient to plead actual "disability" pregnancy-related complications lasting eight months); *Dentice v. Farmers Ins. Exch.*, 2012 U.S. Dist. LEXIS 89609, at *31–34 (E.D. Wis. June 28, 2012) (finding nine months treatment for anxiety, depression and carpal tunnel syndrome, during leave that continued on return to work, to be sufficient evidence of substantially limiting actual impairment).

B. The District Court's Embrace of A Strict Durational Requirement for Alleging An Actual "Disability" Is Premised on Pre-ADAAA Authorities that Are No Longer Good Law.

An inevitable consequence of legislation such as the ADAAA, which Congress enacted expressly to modify the impact of certain Supreme Court rulings and related lower court decisions, is the need to avoid precedents not expressly "overturned," but whose reasoning is expressly premised on the vacated decisions. The district court gave inadequate attention to this task and erred as a result.

The linchpin of the district court's decision on the issue of duration of an actual impairment is *Pollard v. High's of Baltimore, Inc.*, 281 F.3d 462 (4th Cir. 2002), which, the court declared "is, I think, still good law." J.A. at 78. Not so.

In particular, the district court gleaned from *Pollard* that

> in evaluating whether or not the plaintiff here was disabled [,] *I have to consider* the nature and severity of the impairment, of *whether [an impairment] was permanent or [had] long-term impact*, and [an] impairment simply cannot be a substantial limitation of a major life activity if it is ... expected to improve in a relatively short period of time … [t]his doctor's estimate,

> seven months up to 12 months, is insufficient to state a claim of disability.

Id. at 77–78 (emphasis supplied). Plainly, the district court was referencing a passage in *Pollard*, 281 F.3d at 467–68, discussing, *inter alia,* a former EEOC regulation, 29 C.F.R. § 1630.2(j)(2) (2002), which enumerated factors "courts *may* [not 'have to'] consider" in deciding if an impairment is "substantially limiting" including the "permanent or long-term impact of the impairment." The same passage in *Pollard* cites EEOC guidance as indicating that temporary impairments "such as recuperation from surgery, will generally not qualify as a disability under the ADA." 281 F.3d at 468. Yet the EEOC revoked this regulatory and interpretative language after enactment of the ADAAA and replaced it with the far more generous approach described above.[5] In addition, *Pollard* supported its

[5] Thus, neither 29 C.F.R. § 1630.2(j)(2), nor any other subsection of the EEOC's ADA regulations now contains the "permanent or long-term" language relied on by the Supreme Court in *Toyota Motor*, 122 S. Ct. at 691, and cited by *Pollard*, 281 F.3d at 468. (Nor is it so, as Altarum states, that it "was a legislative decision," i.e., Congress' choice in 2008, that a disability "had to be permanent [or] long-term in order to be protected." J.A. at 54. Altarum cites no ADAAA text or legislative history to that effect as there is none.) The corresponding text of the new ADA regulations, addressing "Condition, manner, or duration" of an impairment, 29 C.F.R. § 1630.2(j)(4), stresses that consideration of such factors, including duration, must "[a]t all times [take] into account the principles in paragraphs (j)(1)(i) through (ix) of this section," the last of which reaffirms that "an impairment lasting or expected to last fewer than six months can be substantially limiting." Moreover, current § 1630.2(j)(4)(i) reflects a wholesale change in EEOC's approach, consistent with the less onerous definition of disability in the ADAAA. The new subsection does not mention at all consideration of the duration of an impairment, but rather, "the duration of time it takes the individual

stingy view of ADA coverage of "temporary impairments" by quoting strict definitional language from *Toyota Motor* regarding "substantially limits" and the ruling in *Sutton v. United Air Lines* mandating consideration of mitigating measures in determining "disability." *Id.* This is precisely the approach Congress repudiated in the ADAAA.

While *Pollard* purported to approve a "case-by-case evaluation" of temporary impairments, in reality it focused almost exclusively on whether an impairment was permanent, or conversely, whether an impairment can "properly be characterized as temporary." 281 F.3d at 468–69.[6] Thus, where the standard is whether the plaintiff "had a permanent impairment or . . . was not likely to make a full recovery"—apparently *ever*—it is unsurprising that the *Pollard* court declared a nine-month injury could not be an ADA "disability." *Id.* at 469; *accord id.* at 471 n.4 (equating "temporary" with a condition that "was improving," i.e., not permanent, but rather, likely to resolve).

Both *Pollard* and this Court's prior ruling in *Halperin v. Abacus Tech. Corp.*, 128 F.3d 191 (4th Cir. 1997), denied ADA coverage for a broad swath of

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to perform the major life activity, or for which the individual can perform the major life activity."

[6] This passage of *Pollard* also points up yet another error in the district court's decision. Adoption of a *per se* rule limiting actual disabilities to those involving impairments unlikely to heal within a year violates the fundamental precept that "whether a person has a disability under the ADA is an individualized inquiry." *Sutton* v. *United Air Lines, Inc.,* 527 U.S. 471, 483 (1999).

non-permanent impairments that Congress demonstrated in 2008 it plainly intends the ADA to address. Both decisions rely on the prospect—condemned in *Toyota Motor* and *Sutton*, but embraced in the ADAAA—that a generous definition of "disability," such as one "applying the protections of the ADA to temporary impairments, such as Pollard's, would dramatically expand the scope of the Act." *Id.* at 471–72 (citing similar language in *Halperin*, 128 F.3d at 200). Such reasoning no longer justifies categorically excluding ADA protections "to individuals with broken bones . . . infectious diseases, or other ailments that temporarily limit" them. *Halperin*, 128 F.3d at 200.[7] *See id.* at 199 (relying on withdrawn provisions of 29 C.F.R. § 1630.2(j) issued prior to ADAAA).

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[7] The extreme example of this outdated reasoning is *Bateman v. American Airlines, Inc.*, 614 F. Supp. 2d 660 (E.D. Va. 2009), in which the district court held that neck and back injuries from which plaintiff took 28 months to recover were insufficient to demonstrate an actual disability—based on *Pollard, Halperin, Toyota*, and now-withdrawn EEOC rules, and because the condition was still improving and thus was "temporary," not "permanent." 614 F. Supp. 2d at 670-71. (Further, *Bateman*'s convoluted "disability" analysis likely was wholly unnecessary, as the case might have been decided on a straight-forward "qualified" analysis, rather than its now—and possibly then—unsustainable view of "disability.") The other authorities cited by the district court purporting to establish strict limits on recognition of non-permanent impairments as actual disabilities are likewise inapt. The injuries sustained by the plaintiffs in *Rankin v. Loews Annapolis Hotel Corp.*, 2012 U.S. Dist LEXIS 67553 (D. Md. May 14, 2013), and *Zick v. Waterfront Comm'n*, 2012 U.S. Dist. LEXIS 144920 (S.D. N.Y. Oct. 4, 2012), were insignificant compared to Summers.' Rankin's "daily activities were unimpeded and ... he was able to work and exercise normally," 2012 U.S. Dist. LEXIS 67553 at *9, and Zick's broken leg was expected to resolve in 8–10 *weeks*, 2012 U.S. Dist. LEXIS 67553 at *5. Zick's employer allowed her

C. The Ruling Below Also Ignores the Duty to Consider Alleged Disabilities Not Taking into Account Mitigating Measures.

The district court recognized that Summers alleged an impairment his doctors expected to last between seven and twelve months "even with mitigation," J.A. at 75, but the court then bypassed a critical step required by the ADAAA: "the determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures." 42 U.S.C. § 12102(4)(E)(i). One of the mitigating measures Summers claims to have used, "medication" (for pain), J.A. at 40 (Complaint, ¶16), is specifically listed as such in the ADA, as amended. *See* 42 U.S.C. § 12102(4)(E)(i)(I). Another, "physical therapy," which Summers alleged in December 2012 was "continuing to this day," J.A. at 40 (Complaint, ¶16), is specified as a mitigating measure in post-ADAAA EEOC regulations. *See* 29 C.F.R. § 1630.2(j)(5)(v). Still another, "surgery," J.A. at 40, should—according to the EEOC—be "assessed on a case-by-case basis." 76 Fed. Reg. 16978, 16983 (Mar. 25, 2011) (preamble, "Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act Amendments Act").[8] Most pre-

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to work from home; she resigned when faced with evidence she had abused the arrangement. *Id.* at *5-6

[8] EEOC explained that its draft rule included as an example of mitigating measures "surgical interventions, except for those that permanently eliminate an impairment"—i.e., the kind of surgery Summers apparently had. *Id.* EEOC

ADAAA decisions held that "mitigating measures" include surgical interventions. *See, e.g.*, *Cutrera v. Bd. of Supervisors of Louisiana State Univ.*, 429 F.3d 108, 111-12 (5th Cir. 2005); *Stephenson v. United Airlines, Inc.*, 9 F. App'x 760, 763-64 (9th Cir. 2001) (unpublished).

Given the relevance of at least some, and possibly all of the mitigating measures identified by Summers, the district court erred in dismissing the Complaint for failure to allege an ADA "disability" without considering the likely severity and duration of Summers' impairments absent these measures.[9]

D. It Was Error to Assess Summers' Alleged Disability Solely by How It Limited the Major Life Activity of "Working" When Summers Stressed How It Limited the Major Life Activity of Walking.

Another reason for the improper dismissal of Summers' case was confusion regarding the "major life activity" that Summers highlighted in demonstrating that his Complaint sufficiently stated a claim of actual "disability." Summers alleged that he was substantially limited in no less than six major life activities: "the

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struck this language due to "confusion evidenced in the comments about how [it] would apply." *Id*. The district court should address this issue on remand.

[9] ADA text, 42 U.S.C. § 12102(4)(E)(i) ("such as"), and EEOC rules ("Mitigating measures include, but are not limited to"), 29 C.F.R. § 1630.2(j)(5)(v), make clear that "the list of examples ... in the ADA and the regulations is non-exhaustive." 29 C.F.R. Part 1630 App. § 1630.2(j)(1)(vi). Further, "[t]he absence of any particular mitigating measure from the list in the regulations should not convey a negative implication as to whether the measure is a mitigating measure under the ADA." *Id.* (citing legislative history to this effect).

functioning of his musculoskeletal system"[10] and "his … ability to walk, run, drive, climb stairs, and work." J.A. at 44 (Complaint, ¶38). Unsurprisingly, in response to a Rule 12(b)(6) motion, Summers stressed just one—as he had to adequately allege just one—the major life activity of walking. Remarkably, however, the district court became sidetracked by, in effect, a *non sequitur*—repeated questions regarding Summers' evidence that he was substantially limited in "working."

Ironically, the district court powerfully articulated, yet still resisted Summers' walking argument. The court acknowledged over and over that plaintiff likely needed a wheelchair for mobility, as he could not walk. *See* J.A. at 56, 57, 65–66, 68, 77. But the court could not separate the issue of walking from the issue of working. *Id*. at 77 ("that suggests to me that he was capable of working from a computer at home in a wheelchair"), 68 ("at some point within that year he would be able to use crutches or wheelchair [and] come back to work"), 66 ("why is it he could not work in a wheelchair on a computer at the office in October 2011"). Yet in the end, the court could not fathom what its own comments show: "someone in a wheelchair is disabled, even if they can get to the office." *Id*. at 62.[11]

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[10] This allegation reflects another change wrought by the ADAAA: including in the non-exhaustive list of "major life activities" various "major bodily functions." 42 U.S.C. §§ 12102(2)(A), (B). The EEOC added the "musculoskeletal" function to the list of specific covered major bodily functions. 29 C.F.R. § 1630.2(i)(1)(ii).

[11] Moreover, the district court's focus on "working" despite clear evidence on "walking" ignores the ADA rule, reaffirmed in 2008, that "An impairment that

II. SUMMERS' REASONABLE ACCOMMODATION CLAIM IS SUFFICIENT AS A MATTER OF LAW TO SATISFY RULE 12(b)(6).

The district court concluded incorrectly both that Summers' reasonable accommodation claim rested solely on a contention that Altarum "fail[ed] to engage in [the] interactive process," J.A. at 80, and further, that Summers' accommodation requests were "unreasonable" on their face, because they amounted to a demand that he "be allowed to work from home indefinitely." *Id.*

The first of these rulings is contrary to the Complaint, reasonable inferences to be drawn from it, and the argument record. In the first place, the Complaint separately and specifically alleges that "Altarum failed to grant Summers' reasonable accommodation request to work remotely part-time" and to "transition[] back to a full-time, on-site role as his recovery progressed." J.A. at 46 (Complaint, ¶¶49-50). And while it seemingly bothered the district court that Summers did not propose still other options or make additional requests when he heard nothing back from Altarum, *id.* at 72, this ignores the plausible contention that Altarum's assurances that it would consider his proposals lulled Summers into waiting to make further demands and suggestions, *id.* at 40 (Complaint, ¶17: Altarum's HR representative "agreed to talk about accommodations that would allow Summers to return to work" then "suggested [he] take short-term disability and focus on getting

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substantially limits one major life activity need not limit other major life activities in order to be considered a disability." 42 U.S.C. § 12102(4)(C).

well again."). *Accord id.* at 69–70 ("Mr. Scher: ... HR said 'that's a possibility. I'll call you back and we'll discuss what your options are.'"). *See id.* at 69 (Summers "would have proposed a number of accommodations given the opportunity.").

Summers satisfied this Court's requirement that "the employee must make an adequate request [for accommodation], thereby putting the employer on notice." *Wilson v. Dollar General Corp.*, ___ F.3d ___, 2013 U.S. App. LEXIS 9929, at *24 (4th Cir. May 17, 2013) (quoting *EEOC v. C.R. England, Inc.*, 644 F.3d 1028, 1049 (10th Cir. 2011)). Such a request must inform the employer "of both the disability and desire for an accommodation." *Id.* (quoting *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 313 (3d Cir. 1999)). This "generally trigger[s]" an employer's "duty to engage in an interactive process to identify a reasonable accommodation." *Id.* at *23–24. An employee is not required to request the specific accommodation that he or she ultimately seeks. *EEOC v. Chevron Phillips Chem. Co., LP*, 570 F.3d 606, 621–22 (5th Cir. 2009) (declaring that the plaintiff-employee "was not required to come up with the solution … on her own"; rather, both employee and employer are "required to engage … so that *together* they can determine what … accommodations might be available") (emphasis in original). *Accord EEOC v. Convergys Customer Mgmt. Grp., Inc.*, 491 F.3d 790, 795–96 (8th Cir. 2007) (discussing "shared responsibility between employers and

employees to resolve accommodation requests"); *Armstrong v. Burdette Tomlin Mem'l Hosp.*, 438 F.3d 245, 247 (3d Cir. 2006) ("[trial] court incorrectly placed the entire burden to request a specific reasonable accommodation on [plaintiff]"). Nor is it fatal that an employee initially requested an accommodation that the employer could not provide. *Taylor,* 184 F.3d at 315.

To be sure, "an employer who fails to engage in the interactive process will not [necessarily] be held liable"; but this occurs "if the employee cannot identify a reasonable accommodation that would have been possible." *Wilson*, 2013 U.S. App. LEXIS 9929, at *25. *Accord Barber ex rel. Barber v. Colorado Dep't of Revenue*, 562 F.3d 1222, 1231 (10th Cir. 2009); *Jones v. Nationwide Life Ins. Co.*, 696 F.3d 78, 91 (1st Cir. 2012). *See also Dargis v. Sheahan*, 526 F.3d 981, 988 (7th Cir. 2008) ("The [employer] being able to make the required showing that no reasonable accommodation was possible, there was no further interactive process necessary."). The *Wilson* court affirmed a summary judgment based on a "clear ... record that no reasonable accommodation could have enabled Wilson to perform the essential functions of his position." 2013 U.S. App. LEXIS 9929, at *26. By contrast, the meager record here suggests that discovery would reveal many options. *See, e.g.,* J.A. at 46 (Complaint, ¶48, identifying possibility of on-site "part-time or light duty" and "use of a wheelchair or scooter at work").

This Court's rulings also make clear the inaccuracy of characterizing Summers' proposals to telecommute, part-time, for up to a year, as an inherently "unreasonable" bid for "indefinite" leave. In *Halpern v. Wake Forest Univ. Health Sciences*, 669 F.3d 454 (4th Cir. 2012), this Court rejected a proposed ADA accommodation as "unreasonable on its face" because of its "indefinite duration and uncertain likelihood of success": neither the plaintiff-employee "nor his expert could specify a time at which his treatment would be complete." *Halpern*, 669 F.3d at 465–66. By contrast, Summers' plan to transition back to full-time work on-site in one year or less has a well-defined maximum duration and was accompanied by expert medical assurances of success. Similarly, in *Myers v. Hose*, 50 F.3d 278 (4th Cir. 1995), this Court held unreasonable, as a matter of law, a proposed accommodation that obliged an employer "to wait indefinitely for [plaintiff's] medical conditions to be corrected, especially in light of the uncertainty of cure." *Myers*, 50 F.3d at 283. Both *Myers* and *Halpern* affirmed dismissals reached on a full evidentiary record under Rule 56. Given the starkly different record and procedural posture here, a reversal and remand is warranted.

To the extent the district court concluded that Summers asked to work at home "indefinitely" because he did not state the precise date of his anticipated return to work full-time, on-site, this too was error. It is sufficiently definite, in order to justify leave as an accommodation, to "provide the employer an estimated

date when [the employee] can resume her essential duties." *Robert v. Bd. of Cnty. Comm'rs*, 691 F.3d 1211, 1218 (10th Cir. 2012). That Summers has done, providing a medical estimate of 7 to 12 months, or one year at most. *See Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 648 (1st Cir. 2000) ("[s]ome employees, by the nature of their disability, are unable to provide an absolutely assured time for their return to employment, but that does not necessarily make a request for leave to a particular date indefinite"). To the extent the district court worried that Summers did not propose to return to work full-time (or full-time, on-site) sooner, that is an issue that should not have been resolved, on a Rule 12(b)(6) motion, absent record evidence of Altarum's need for Summers to return to work full-time (or full-time, on-site). This also argues for a reversal and remand.

Finally, the district court effectively declared telecommuting to be *per se* "unreasonable" as an accommodation as it would "eliminate a significant function of the job which is namely attendance to work." J.A. at 79. Plainly this is incorrect, as the "complex question of what constitutes an essential job function involve[s] fact-sensitive considerations and must be determined on a case-by-case basis." *Willinghan v. Town of Stonington*, 847 F. Supp. 2d 164, 188 (D. Maine 2012) (finding "summary judgment on the reasonableness of Mr. Willinghan's work-from-home proposal is inappropriate," citing *Gillen v. Fallon Ambulance Serv., Inc.*, 283 F.3d 11, 25 (1st Cir. 2002)). *See McMillan v. City of New York,*

711 F.3d 120, 126, 128 n.4 (2d Cir. 2013) (rejecting undue reliance on "assumption that physical presence is 'an essential requirement of virtually all employment'" and remanding ADA claim for more "penetrating factual analysis"; citing decisions "impl[ying that] permitting unsupervised work," such as "work from home," may "in some cases, constitute a reasonable accommodation"); *Dahlman v. Tenenbaum*, 2011 U.S. Dist. LEXIS 88220, at *36–38 (D. Md. Aug. 9, 2011) (denying, in ADA case, summary judgment for employer that "has not offered overwhelming evidence that the requested accommodation [of part-time telework] was unreasonable or would present an undue burden," and collecting cases approving part-time telework as a possible reasonable accommodation).

The Complaint says Altarum allowed employees "to work remotely so long as the client approved," and that DCoE "generally preferred" employees to work on-site, but in some instances "permit[ted] contractors to bring their computers home and work remotely." J.A. at 39 (Complaint ¶¶10–11). It also alleges that Altarum was not being truthful when it told Summers that the DCoE wanted to replace him. *Id.* at 41–42 (Complaint, ¶ 26). This is not a record establishing as a matter of law, as the district court suggested, that on-site attendance is an essential job function for Summers' former position at DCoE.

III. THIS CASE IS NOT RIPE FOR DISMISSAL UNDER RULE 12(b)(6).

In Section I, Amici demonstrate that Summers more than satisfied his duty to adequately allege that he was substantially limited in the major life activity of walking. Further analysis of Summers' contentions regarding limitations his injuries caused in this and other major life activities (with or without "mitigating measures") should await discovery. Likewise, in Section II, Amici demonstrate that Summers sufficiently plead a facially "reasonable" proposal that his employer afford him an accommodation. The adequacy of Altarum's response, the need for Summers' proposed accommodation, and the availability of other options are fact issues, not matters of law, for resolution via Rule 56, not Rule 12, or at trial.

The district court's dismissal of this case defies Congress' clear command in the ADAAA "that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations," and further, "that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." Pub. L. 110-325, § 2(b)(5). This case poses exactly the same kind of problems Congress sought to correct in the ADAAA, when legislators explicitly vitiated unduly strict court interpretations of ADA text so as to avoid improper barriers to the merits of disability employment discrimination claims. *See* 29 C.F.R. Part 1630 App. Introduction ("As a result, in too many cases, courts would never reach the

question whether discrimination had occurred.")(quoting *Senate Statement of the Managers to Accompany S.3406*, *Americans with Disabilities Act Amendments Act of 2008*, 154 Cong. Rec. 15,816, 15,817 (2008)).

CONCLUSION

For the reasons set forth above, Amici Curiae urge this Court to reverse the decision of the district court and remand this case for further factual development.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, there are no known related cases in this Court.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because:

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Dated: July 16, 2013

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that on July 16, 2013, the foregoing Brief of Amici Curiae AARP and National Employment Lawyers Association was electronically filed with the Clerk of the Court for the United States Court of Appeals of the Fourth Circuit using the appellate CM/ECF system which will send notice of such filing to the following registered CM/ECF users:

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