No. 23-1747

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ANDREW MORGAN,
Plaintiff-Appellant,

v.

ALLISON CRANE & RIGGING LLC,
Defendant-Appellee.

On Appeal from the United States District Court
for the Middle District of Pennsylvania

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

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STATEMENT OF INTEREST

Congress charged the Equal Employment Opportunity Commission (EEOC) with interpreting the definition of "disability" under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12205a, and with interpreting, administering, and enforcing Title I of the statute, *id*. §§ 12116, 12117(a). This appeal presents important questions about the definition of disability, and thus the scope of persons protected under the statute, 42 U.S.C. § 12102. Because the EEOC has a substantial interest in the proper interpretation of the ADA, it files this brief pursuant to Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUES[1]

1. Whether a reasonable jury could find the plaintiff's back pain was substantially limiting and thus constituted an actual disability under the ADA.

2. Whether a reasonable jury could find the defendant regarded the plaintiff as disabled under the ADA.

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[1] We take no position on any other issue in this appeal, including plaintiff's claims under the Pennsylvania Human Rights Act and his common law wrongful discharge claim.

STATEMENT OF THE CASE

A. Statement of the Facts

Plaintiff Andrew Morgan had been working in the millwright department of Defendant Allison Crane & Rigging LLC (Allison Crane) for a year and a half when, on September 29, 2020, he injured his back on the job. Appx.46 (17:4-9); Appx.49 (26:22-27:17). Morgan first assumed the injury, which caused him "severe pain," was a muscle strain. Appx.49 (29:14-19). But when the pain persisted, he sought treatment from a chiropractor. Appx.50 (30:18-32:12). The chiropractor diagnosed him with a "bulged disk or a herniated disk" in his lower back and restricted Morgan from bending and from lifting anything over fifteen pounds until November 5. Appx.50 (23:20-23); Appx.79-83. Morgan's chiropractor then eased the lifting restriction to thirty pounds and continued to advise that Morgan refrain from bending. Appx.85. Morgan reported his injury to his foreman the day he was hurt and provided Allison Crane with his chiropractor notes, which memorialized Morgan's bending and lifting restrictions, as he received them. Appx. 49-50 (29:20-30:1); Appx.51-52 (37:17-38:1); Appx.79-85.

On November 16, while Morgan was still under a bending prohibition and a thirty-pound lifting restriction, an Allison Crane dispatcher assigned Morgan to drive on November 17 to the New York-Canadian border and escort a crane back to Williamsport, Pennsylvania, a roughly twelve-hour trip. Appx.52 (40:10-25). Morgan declined the job, both because he felt the long drive would inflame his injury and because he had an afternoon appointment that day. Appx.52-53 (41:12-43:3); Appx.87. He offered to continue to perform his light duties instead. Appx.52-53 (39:12-43:15). The next day, Allison Crane terminated Morgan because he "failed to show for work" on the 17th. Appx.212; Appx.53 (43:16-44:10). Morgan's chiropractor released him from restrictions on November 25. Appx.60 (70:3-6).

B. District Court's Decision

Morgan sued Allison Crane, alleging that it violated the ADA when it failed to reasonably accommodate him and then terminated him because of his disability. The district court granted summary judgment to Allison Crane, holding that no reasonable jury could find that Morgan had an actual disability, nor that Allison Crane regarded him as disabled.

The court began by concluding that Morgan "failed to demonstrate the existence of a purported bulged or herniated disk in his back" because the only evidence he proffered to that end was his own testimony that his chiropractor gave him that diagnosis. App.14-15. In the court's view, such testimony was "hearsay" and thus would be inadmissible at trial. *Id*. at 15. The court further held that the diagnosis of a bulged or herniated disk is beyond the comprehension of a lay jury and therefore requires substantiation through medical evidence, which Morgan did not produce. *Id*. at 16-17.

The court held, however, that Morgan's "alleged generalized back pain," to which Morgan testified, required no medical substantiation. *Id*. at 17. And back pain accompanied by bending and lifting restrictions, as Morgan's was, could constitute an actual disability. *Id*. But, the court said, as a matter of law it did not in this case because Morgan's impairment was too short in duration. *Id*. at 18-19.

The court then held that no reasonable jury could find that Allison Crane regarded Morgan as disabled because his back pain was both transitory and minor. *Id*. at 20-21.

ARGUMENT

Based on the summary judgment record, a reasonable jury could find both that Morgan had an actual disability and that Allison Crane regarded him as disabled. In holding to the contrary, the court relied on the wrong legal standard to reach an incorrect result. We first set forth general principles governing what it means to be "disabled" under the ADA, then turn to their application to the case at hand.

The ADA prohibits employers from discriminating against qualified individuals "on the basis of disability." 42 U.S.C. § 12112(a). To establish an ADA discrimination claim, an aggrieved employee must show that he is disabled within the meaning of the ADA, he is "otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations," and he "suffered an otherwise adverse employment decision as a result of discrimination." *Eshleman v. Patrick Indus., Inc.*, 961 F.3d 242, 245 (3d Cir. 2020). The statute protects employees (1) with an actual disability, defined as a physical or mental "impairment that substantially limits one or more major life activities"; (2) with a record of such an impairment; and (3) who are regarded as having "such an

impairment." 42 U.S.C. § 12102(1)(A)-(C). The "actual disability" and "regarded-as" definitions are at issue here.

The ADA, enacted in 1990, was amended by the ADA Amendments Act (ADAAA) in 2008 "to clarify that the definition of 'disability' should be construed 'in favor of broad coverage of individuals . . . to the maximum extent permitted.'" *Matthews v. Pa. Dep't of Corrs.*, 613 F. App'x 163, 167 (3d Cir. 2015) (quoting 42 U.S.C. § 12102(4)(A)). It thus rejected the former interpretation of the ADA limiting actual disabilities to "'permanent or long term' impairments." *See id.* (citing *Toyota Motor Mfg. v. Williams*, 534 U.S. 184, 198 (2002)).

After the ADAAA, an impairment is an actual disability "if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population." 29 C.F.R. § 1630.2(j)(1)(ii).

By contrast, a successful "regarded-as" claim requires proof that the employer took a prohibited action "because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." 42 U.S.C. § 12102(3)(A). The statute excepts from "regarded-as" coverage impairments that are transitory and

minor. *Id*. § 12102(3)(B); *Eshleman*, 961 F.3d at 248. Transitory is defined as an impairment lasting or expected to last "six months or less." 42 U.S.C. § 12102(3)(B). The ADA does not define the term "minor."

I. A reasonable jury could find that Morgan had an actual disability.

Lifting and bending are both major life activities under the ADA. *See* 29 C.F.R. § 1630.2(i)(1)(i) (defining major life activities to include "lifting, bending"). Sitting and walking are, too. *Id*. The district court thus correctly acknowledged that Morgan's impairment, which restricted his ability to lift, bend, sit, and walk, affected major life activities. Appx.17. But the court erred when it failed to account for the ADAAA's expansion of coverage and held that Morgan's back pain was not an actual disability because it was a "temporary non-chronic impairment of short duration." Appx.18-19 (quoting *Macfarlan v. Ivy Hill SNF, LLC*, 675 F.3d 266, 274 (3d Cir. 2012)). If left to stand, the district court's ruling could impose an arbitrary forty-eight-day durational floor for actual disability claims.

The Supreme Court originally interpreted the ADA to cover only impairments that are "permanent or long term." *Toyota Motor Mfg.*, 534 U.S. at 198. But "[t]he ADAAA . . . changed the ground rules and defenestrated this requirement." *Mancini v. City of Providence*, 909 F.3d 32,

40 (1st Cir. 2018); *see also* ADAAA, Pub. L. No. 110-325, 122 Stat. 3553 § 2(b)(5) (2008) (rejecting *Toyota* as creating an "inappropriately high level of limitation necessary to obtain coverage"). Under the amended ADA, there is no categorical temporal threshold before an impairment may be considered substantially limiting. *See Shields v. Credit One Bank, N.A.*, 32 F.4th 1218, 1224-25 (9th Cir. 2022); *see also Hamilton v. Westchester Cnty.*, 3 F.4th 86, 94 (2d Cir. 2021) ("The statute does not suggest that there is any duration that is too short[.]"). The EEOC's regulations provide that "[t]he effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section." 29 C.F.R. § 1630.2(j)(1)(ix). Likewise, the EEOC's interpretive guidance says "impairments that last only for a short period of time . . . may be covered if sufficiently severe." 29 C.F.R. pt. 1630, app. § 1630.2(j)(1)(ix) (quoting Statement of Representatives Hoyer and Sensenbrenner at 5, 154 Cong. Rec. H8294–96 (daily ed. Sept. 17, 2008)).

Accordingly, multiple circuits, including this Court, have held that temporary conditions may qualify as actual disabilities under the amended ADA. *See, e.g.*, *Matthews*, 613 F. App'x at 167-68; *see also Mueck v. La Grange Acquisition, L.P.*, 75 F.4th 469, 481 (5th Cir. 2023); *Shields*, 32 F.4th at 1224-25;

Hamilton, 3 F.4th at 92-93; *Mancini*, 909 F.3d at 40-41; *Summers v. Altarum Inst., Corp.*, 740 F.3d 325, 332 (4th Cir. 2014); *Gogos v. AMS Mech. Sys., Inc.*, 737 F.3d 1170, 1172-73 (7th Cir. 2013) (per curiam); *see also Skerce v. Torgeson Elec. Co.*, 852 F. App'x 357, 362 (10th Cir. 2021).

The record shows that Morgan's back pain limited his ability to lift and bend for forty-eight days. From September 29 until November 5, Morgan could not lift anything over fifteen pounds. Appx.79-83. From November 5 until November 25, he could not lift more than thirty pounds. Appx.85. Throughout that time, his chiropractor wrote notes that Morgan gave to Allison Crane advising that Morgan refrain entirely from bending. Appx.79-85. Morgan also testified that "it hurt to sit, hurt to walk," and it hurt to "turn[] left or right." Appx.50 (33:16-18). A reasonable jury could find that Morgan's back pain, while temporary, nonetheless constituted an actual disability because it substantially limited his ability to bend, lift, sit, and/or walk "as compared to most people in the general population." 29 C.F.R. § 1630.2(j)(1)(ii); *see also id*. ("impairment need not prevent, or significantly or severely restrict" to be substantially limiting); *id*. § 1630.2(j)(1)(i), (iii) (substantial limitation question "should not demand extensive analysis" because the term "substantially limits" should be

"construed broadly in favor of expansive coverage"). Put another way, a jury could reasonably conclude that the general population can walk, sit, bend, and lift up to thirty pounds without the type of pain Morgan experienced. *Cf. Shields*, 32 F.4th at 1226-27 (inability to fully use right shoulder, arm and hand for over two months qualified as actual disability); *Harrison v. Soave Enters. L.L.C.*, 826 F. App'x 517, 525 (6th Cir. 2020) (plaintiff unable to kneel due to torn ACL raised triable issue of fact regarding disability because "a reasonable juror could determine that the majority of the general population can kneel and does not share [plaintiff's] physical limitation").

The interpretive guidance to EEOC's regulations supports this conclusion. It provides that "if an individual has a back impairment that results in a 20–pound lifting restriction that lasts for several months, he is substantially limited in the major life activity of lifting, and therefore" has an actual disability. 29 C.F.R. pt. 1630, app. § 1630.2(j)(1)(ix). Although Morgan's impairment is not identical to this example because it was shorter in duration, a jury could find it was more severe. For a time, Morgan was restricted to lifting no more than fifteen pounds. And throughout his forty-eight-day impairment, he not only struggled to lift,

but he was also unable to bend and experienced pain walking, sitting, and turning from side to side.

In holding otherwise, the district court grafted onto the statute a durational requirement that the text does not reflect. Appx.18-19. The court primarily relied on *Macfarlan v. Ivy Hill SNF*, a case that is inapposite for two reasons. First, *Macfarlan* applied the pre-2008 ADA, not the amended ADA, because the events at issue took place before the amendments' January 2009 effective date. 675 F.3d at 270 (reciting that Macfarlan was terminated in 2008). Second, *Macfarlan* dealt not with a claim of actual disability, but with an allegation that the plaintiff's employer regarded the plaintiff as disabled, which, as discussed above, is subject to a different standard. *Id*. at 274 (noting "Macfarlan's claims . . . rise or fall on the question of whether Ivy Hill regarded him as having a qualifying disability"). In that different analytical context, the court held that Macfarlan's "temporary non-chronic impairment of short duration [was] not a disability." *Id*. (quotation marks omitted). *Macfarlan* in turn relied on this Court's definition of actual disability articulated in *Rinehimer v. Cemcolift, Inc.*, 292 F.3d 375, 380 (3d Cir. 2002), a case that also pre-dates the

ADAAA and thus does not account for its more relaxed standard.[2] *See Morrissey v. Laurel Health Care Co.*, 946 F.3d 292, 299 (6th Cir. 2019) (cases relying on pre-ADAAA standards no longer "good law in . . . determining whether a plaintiff was disabled"); *see also Britting v. Sec'y, Dep't of Veterans Affs.*, 409 F. App'x 566, 570 (3d Cir. 2011) (pre-ADAAA disability standard "more demanding"). Because *Macfarlan* is a "regarded-as" case and because it relied on pre-ADAAA case law, it is inapposite to analysis of whether Morgan had an actual disability.

The district court also cited *Bangura v. Pennsylvania*, 793 F. App'x 142 (3d Cir. 2019). *See* Appx.18 n.75. *Bangura* is an unpublished case that noted

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[2] *Rinehimer* relied on *McDonald v. Pennsylvania Department of Public Welfare*, 62 F.3d 92, 96 (3d Cir. 1995), which in turn relied on the EEOC's pre-ADAAA regulation requiring consideration of an impairment's "permanent or long term impact" and on the EEOC's interpretive guidance excluding "temporary, non-chronic impairments" from the definition of actual disability, *id*. at 95. Congress expressly criticized the EEOC's regulations, to which that interpretive guidance was appended, when it enacted the ADAAA's relaxed standard. *See* ADA Amendments Act of 2008, PL 110–325 § 2(a)(8), 122 Stat 3553 (2008). And the EEOC subsequently rescinded its regulations and removed reference to "actual or expected permanent or long-term impact," as well as a reference to "duration or expected duration of the impairment," as factors informing the ADA's "substantial limitation" analysis. *See* 76 Fed. Reg. 16978, 17013 (Mar. 25, 2011); *see also* 29 C.F.R. § 1630.2(j)(1)(ix) ("The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section.").

in a footnote that the plaintiff's anxiety attack did not substantially limit any major life activity because it was a "temporary non-chronic impairment of short duration," quoting *Macfarlan*. 793 F. App'x at 145 n.3 (quoting 675 F.3d at 274). That case is not binding, *Chehazeh v. Att'y Gen.*, 666 F.3d 118, 127 n.12 (3d Cir. 2012); relies on *Macfarlan* in the same problematic way that the district court did; and similarly fails to account for the ADAAA.

Because the district court applied the wrong legal standard to conclude that no reasonable jury could find that Morgan's back pain was an actual disability, this court's judgment should be vacated. Moreover, because other district courts have relied on *Macfarlan*, as well as *Rinehimer*, to incorrectly hold "actual disability" plaintiffs to a durational requirement, the Court should take this opportunity to reaffirm the governing post-ADAAA standard. *See, e.g.*, *Mitchell v. Cont'l Airlines, Inc.*, No. 11-4118 (KM), 2014 WL 1155438, at *7 (D.N.J. Mar. 21, 2014) (quoting *Macfarlan* and *Rinehimer* and holding that plaintiff's condition was not a disability in part because it was not "a chronic diagnosis requiring long term treatment"); *Forestieri v. Wendover*, Inc., No. 18-1171 (MN), 2020 WL 489574, at *3 (D.

Del. Jan. 30, 2020) (quoting *Macfarlan* and *Rinehimer* and holding that injury lasting four months could not qualify as a disability).

II. A reasonable jury could find that Allison Crane regarded Morgan as disabled.

Turning to Morgan's claim that Allison Crane regarded him as disabled, the district court held the claim could not proceed because Morgan's injury was both transitory and minor, and because Allison Crane "did not think Morgan's injury was anything other than transitory and minor." Appx.21. Here again the court got part of its analysis right, correctly noting that an injury lasting fewer than six months is transitory under the ADA. Appx.20. But, contrary to the court's conclusion, a jury could find Morgan's injury was objectively not minor, and therefore was a disability under the ADA's "regarded-as" prong.

As discussed above, the ADA's definition of disability encompasses individuals who are "regarded as" having an impairment. 42 U.S.C. § 12102(1)(C). The "regarded-as" definition prohibits employers from discriminating against employees based on their "actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." *Id*. § 12102(3)(A). It excludes actual

or perceived impairments that are both "transitory and minor." *Id.* § 12102(3)(B).

An impairment lasting fewer than six months is transitory, but may not be minor, and therefore may still qualify as a disability under the "regarded-as" prong. *Eshleman*, 961 F.3d at 247-48 (only impairments that are *both* transitory *and* minor are excluded from coverage). The statute does not define the term "minor." But, like the definition of actual disability, "[c]overage under the 'regarded as' prong . . . should not be difficult to establish." 29 C.F.R. pt. 1630, app. § 1630.2(l); *id.* (transitory and minor "limitation on coverage should be construed narrowly"); *see also* 42 U.S.C. § 12102(4)(A) ("The definition of disability in this chapter shall be construed in favor of broad coverage[.]"); *and see Eshleman*, 961 F.3d at 248 ("Congress did not expect or intend that this would be a difficult standard to meet.") (quoting H.R. Rep. No. 110-730, pt. 2, at 17 (2008)). The ADAAA's legislative history "explains that the 'transitory and minor' exception was intended to weed out 'claims at the lowest end of the spectrum of severity,' such as 'common ailments like the cold or flu.'" *Eshleman*, 961 F.3d at 248 (quoting H.R. Rep. No. 110-730, pt. 2, at 18). This Court has said that whether an impairment is "minor" is a case-by-case

assessment that should take into account "such factors as the symptoms and severity of the impairment, the type of treatment required, the risk involved, and whether any kind of surgical intervention is anticipated or necessary—as well as the nature and scope of any post-operative care." *Id*. at 249.

Importantly, "[a] covered entity may not defeat 'regarded as' coverage of an individual simply by demonstrating that it subjectively believed the impairment was transitory and minor; rather, the covered entity must demonstrate that the impairment is (in the case of an actual impairment) or would be (in the case of a perceived impairment) both transitory and minor." 29 C.F.R. § 1630.15(f); *see also* 29 C.F.R. pt. 1630, app. § 1630.2(l) ("The relevant inquiry is whether the actual or perceived impairment on which the employer's action was based is objectively 'transitory and minor,' not whether the employer claims it subjectively believed the impairment was transitory and minor.").

As set forth above, a reasonable jury could find that Morgan's back pain was substantially limiting because of its severity and thus constituted an actual disability. *Cf. Mancini*, 909 F.3d at 46 (describing the "regarded-as" prima facie case as "less demanding" than the "actual disability" prima

facie case); *Adair v. City of Muskogee*, 823 F.3d 1297, 1306 (10th Cir. 2016) (a "regarded-as" plaintiff need not establish an impairment that "substantially limited one or more major life activities"). It follows that a jury could also reasonably conclude that an injury that is substantially limiting because of its severity is not minor because, as this Court has recognized, minor is meant to exclude only impairments "at the lowest end of the spectrum of severity," such as "common ailments like the cold or flu." *Eshleman*, 961 F.3d at 248. A jury could therefore conclude that Morgan was disabled under the "regarded-as" prong because, although transitory, his impairment was not minor.

This Court's precedent in *Budhun v. Reading Hospital & Medical Center*, 765 F.3d 245 (3d Cir. 2014), which the district court cited at Appx.21 n.94, is not to the contrary. In *Budhun*, this Court held that the plaintiff's broken fifth metacarpal, which kept the plaintiff out of work for two weeks but would not have precluded her from performing her job's primary function (albeit more slowly) after that period, was transitory and minor. 765 F.3d at 259-60. As this Court has recognized, in that case "the temporary nature of a broken pinky finger served as a proxy for the lack of severity" of the

injury. *See Eshleman*, 961 F.3d at 249.[3] But Morgan's impairment precluded him from returning to full duty for longer, meaning *Budhun* is not controlling.

To the extent the district court relied on evidence that "Morgan's supervisors directly stated that they felt his impairment was not severe" in concluding that Allison Crane did not regard Morgan as disabled, that was error. Appx.21. Regardless of what Morgan's supervisors "felt," they knew from Morgan's chiropractor notes that his impairment precluded bending and limited lifting for forty-eight days, relegating Morgan to light duty. That is objectively more serious than "the lowest end of the spectrum" of common ailments. Morgan's supervisors' subjective opinion regarding severity is immaterial. *See* 29 C.F.R. § 1630.15(f) ("A covered entity may not defeat 'regarded as' coverage of an individual simply by demonstrating that it subjectively believed the impairment was transitory and minor[.]");

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[3] *Budhun* could be read to define all impairments lasting fewer than six months as both transitory and minor. *See id*. at 259 ("The statute curtails an individual's ability to state a regarded as claim if the impairment is transitory and minor, which means it has an actual or expected duration of six months or less." (quotation marks omitted)). But, as *Eshleman* later appropriately held, the transitory and minor exception is conjunctive, meaning a transitory injury may suffice if it is non-minor. 961 F.3d at 247-48.

see also 29 C.F.R. pt. 1630, app. § 1630.2(l) ("The relevant inquiry is whether the actual or perceived impairment on which the employer's action was based is objectively 'transitory and minor,' not whether the employer claims it subjectively believed the impairment was transitory and minor."); *see also Budhun*, 765 F.3d at 259 (noting objective standard).

Finally, although it is not material to resolving Morgan's appeal, we raise for the Court's consideration an issue regarding burdens of proof under the transitory and minor exception to ADA coverage. The EEOC and four courts of appeals consider the "transitory and minor" limitation an affirmative defense, meaning that it is waivable and that the burden rests with the party invoking it to establish that it applies. *See* 29 C.F.R. § 1630.15(f); *Babb v. Maryville Anesthesiologists P.C.*, 942 F.3d 308, 319 (6th Cir. 2019); *Nunies v. HIE Holdings, Inc.*, 908 F.3d 428, 435 (9th Cir. 2018); *Mancini*, 909 F.3d at 45 n.7; *Silk v. Bd. of Trs.*, 795 F.3d 698, 706 (7th Cir. 2015).

This Court initially characterized the limitation as an affirmative defense, *see Budhun*, 765 F.3d at 259, but later explained its view in *Eshleman* that describing it so was "imperfect shorthand, since the statutory text demands a non-transitory or non-minor perceived impairment for

regarded-as claims." 961 F.3d at 246 n.25; *see also id.* ("[A] regarded-as plaintiff alleging a transitory and minor impairment has failed to state a legally sufficient claim, even if the employer does not include a transitory and minor defense in its Answer.").

We reiterate our view, embodied in 29 C.F.R. § 1630.15(f), that 42 U.S.C. § 12102(3)(B)'s specification that ADA coverage "shall not apply" to "transitory and minor" impairments creates an affirmative defense. This view is in accord with principles of statutory interpretation holding that the burden to establish a statutory exception to liability typically rests with the party invoking the exception. For instance, this Court in *S.R.P. ex rel. Abunabba v. United States*, 676 F.3d 329 (3d Cir. 2012), held that a statutory exception to Federal Tort Claims Act coverage that used the same "shall not apply language" as the transitory and minor exception to ADA coverage is analogous to an affirmative defense and burdens the defendant with proving it applies. *Id*. at 332, 333 n.2; *see also, e.g.*, *Meacham v. Knolls Atomic Power Lab'y*, 554 U.S. 84, 92-93 (2008). For these reasons, we encourage this Court to clarify in an appropriate case that it is the employer's burden to raise and prove the argument that the employee's impairment is transitory and minor and thus not covered under the ADA.

CONCLUSION

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

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 4,156 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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September 25, 2023

CERTIFICATE OF SERVICE

I certify that on September 25, 2023, I electronically filed the foregoing brief in PDF format with the Clerk of Court via the appellate CM/ECF system. I certify that all counsel of record are registered CM/ECF users, and service will be accomplished via the appellate CM/ECF system.

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