No. 23-14199

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CHRISTOPHER MATTHEW BATTEN,
Plaintiff-Appellant,

v.

K-VA-T FOOD STORES, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Georgia
No. 22-cv-00179

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

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1, I hereby certify that, to the best of my knowledge, Plaintiff-Appellant's Certificate of Interested Persons, filed with his brief on February 27, 2024, is a complete list of the persons and entities who may have an interest in the outcome of this case except for the following individuals omitted from that list:

Equal Employment Opportunity Commission (EEOC) (amicus curiae)

Gilbride, Karla (General Counsel, EEOC)

Goldstein, Jennifer S. (Associate General Counsel, EEOC)

Occhialino, Anne Noel (Assistant General Counsel, EEOC)

Sharon, Chelsea C. (Attorney, EEOC)

EEOC is not aware of any publicly traded corporations or companies that have an interest in the outcome of this case or appeal. Pursuant to Federal Rule of Appellate Procedure 26.1, EEOC, as a government agency, is not required to file a corporate disclosure statement.

s/ Chelsea C. Sharon
CHELSEA C. SHARON

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STATEMENT OF INTEREST

Congress charged the Equal Employment Opportunity Commission (EEOC) with implementing, administering, and enforcing Title I of the Americans with Disabilities Act, as amended. 42 U.S.C. §§ 12101 *et seq.* ("ADA"); *id.* §§ 12116, 12117(a). This case presents important questions about whether the ADA requires reasonable accommodations, absent undue hardship, that allow disabled employees to perform their jobs safely and without pain. EEOC has a strong interest in these issues and offers its views to the court. *See* Fed. R. App. P. 29(a).

STATEMENT OF ISSUES[1]

1. Whether disabled individuals who endure pain and risk their safety to perform their essential job functions retain their statutory right to reasonable accommodation?

2. Whether Plaintiff was responsible for the breakdown of the interactive process where the employer rejected Plaintiff's reasonable and effective accommodation and proposed only a single ineffective alternative?

[1] EEOC addresses no other issues.

PERTINENT STATUTORY PROVISIONS

Pertinent statutory provisions appear in the addendum.

STATEMENT OF THE CASE

A. Statutory and Regulatory Framework

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," including "employment." *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675 (2001).

Title I of the ADA addresses employment discrimination. Section 12112(a) provides in relevant part: "[n]o covered entity shall discriminate against a qualified individual on the basis of disability in regard to … terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). Section 12112(b) defines "discriminat[ion]" to include, *inter alia*, "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability," absent undue hardship. *Id.* § 12112(b)(5)(A). A "qualified individual" is one "who, with or without reasonable accommodation, can perform the essential

functions of the employment position." *Id.* § 12111(8). And "reasonable accommodation" includes "making existing facilities used by employees readily accessible," and other accommodations such as "job restructuring, … reassignment … , acquisition or modification of equipment or devices, [and] … the provision of qualified readers or interpreters." *Id.* § 12111(9).

EEOC's implementing regulations provide 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)(i)-(iii).[2]

[2] Congress authorized EEOC to issue these regulations. 42 U.S.C. § 12116.

B. Statement of the Facts[3]

A motorcycle crash left Plaintiff Christopher Matthew Batten with an amputated right arm, a titanium femur, and dozens of screws in his right side. R.29-1 at 22.[4] He suffers from Complex Regional Pain Syndrome, walks with an altered gait, can only stand for short periods, and frequently falls. R.29-1 at 22, 70; R.42-1 at 2, ¶¶13-14. Batten also has PTSD and experiences panic attacks. R.29-1 at 70-71; R.42-1 at 2, ¶8.

Batten worked as a fuel clerk at various K-VA-T Food Stores ("Food City") locations, performing duties like ringing up customers, cleaning fuel pumps, and stocking items. R.29-2 at 6. He was stationed in a fuel kiosk, where he could sit, but had to stand to perform certain tasks. R.29-1 at 36-37. Batten's job "[p]erformance was good," R.29-3 at 25, but performing it was difficult and painful. R.50 at 2-3, ¶¶7-8. Cleaning fuel pumps, for example, was "[n]ot easy … with one hand," nor was "pulling the hose around from one side to the other. I have stumbled, and I can say without

[3] Because this case was decided on summary judgment, EEOC recites the facts in the light most favorable to Batten. *Hardigree v. Lofton*, 992 F.3d 1216, 1223 (11th Cir. 2021).

[4] Record citations take the form R.[docket number] at [CM/ECF-assigned page number].

question one of the scariest things … is falling and watching the ground come [up] ….” R.29-1 at 33. Batten’s supervisor reprimanded him for cleaning the pumps too slowly. R.29-1 at 34-35. Batten also struggled when “stuck standing up” attending to many customers. R.29-1 at 36-37.

In the summer of 2021, Food City granted Batten leave to attend a training camp to receive a service dog. R.29-1 at 59-60. Batten’s service dog, Mellow Joy, aided with his physical instability and anxiety. She was trained to prevent falls by allowing Batten to lean into her to provide counterweight or by keeping her leash taut while walking ahead to provide stabilization. R.29-1 at 86. And, if Batten did fall, she would allow him “to use her to push onto to gain … leverage … to be able to get back to [his] feet.” R.29-1 at 86. She also eased anxiety by providing companionship and detecting and assisting with panic attacks. R.29-4 at 71; R.42-1 at 2, ¶8.

Batten believed Food City understood he “was always coming back [to work] with the dog,” as his managers completed paperwork for the service-dog company and approved his leave. R.29-1 at 61-63. After returning from training, Batten attended his July 23 shift with his service dog. R.29-3 at 33. Store Manager Gary Richards allowed this while awaiting guidance from HR Specialist David Ellison about Batten’s request

to work with his dog. R.29-3 at 28-30. Richards was unaware of any issues that arose during the week or so Batten worked with his dog. R.29-3 at 38.

On August 6, Richards and Ellison met with Batten to discuss his "request for an accommodation for [his] service dog to be present with him" during work. R.29-6 at 65. Ellison's notes recount that Batten said "he needed the service animal to help him in his battle of anxiety, panic attacks, and feeling of isolation" and that "he has fallen about 5 times and the dog helps him steady on his feet." *Id.*

Vice President of Human Resources, Donnie Meadows, denied Batten's request. R.29-9 at 41. Meadows's decision was not based on any determination that the service dog would impose undue hardship or "constitute any type of burden" on Food City. R.29-9 at 45-46. He stated he simply wanted to engage in "informal discussion and exchange" to "explore alternatives." R.29-9 at 45.

On August 12, Richards and Ellison again met with Batten. R.29-4 at 72. Ellison said "the request for the service animal has been denied." *Id.* Ellison suggested Batten be reassigned to USCAN cashier, a standing-only position helping customers with self-checkout. *Id.*; R.29-3 at 55-56. Ellison's notes recount that Batten explained that his Complex Regional Pain

Syndrome prevented him from working a position that required prolonged standing and that he could only work if the service dog remained with him. R.29-6 at 67. Food City offered no modifications to the USCAN position or other accommodations. R.42-6 at 8-9. Batten responded by saying "I guess, at this time, I have to wait for whatever you guys come up with." R.42-1 at 2, ¶16.

After the meeting, Ellison told Meadows that Batten turned down the USCAN position because he could not stand for "prolonged periods of time." R.29-5 at 48. Ellison and Meadows, however, never discussed offering any modifications to the USCAN position, like a chair or stool. R.29-5 at 48-49.

On August 18, Ellison met again with Batten. R.29-6 at 69. Ellison confirmed the denial of Batten's service-dog request and reiterated the USCAN position offer. *Id.* Batten again "stat[ed] he could not perform that duty" due to his disability. *Id.* Once again, Food City failed to suggest any modifications to the USCAN position or other accommodations. R.42-6 at 8-9. Instead, Ellison offered Batten personal leave or FMLA leave. R.29-6 at 69. Batten responded that "he had a vested interest in this company after working for the past two years and he was not quitting." *Id.*

Batten never requested leave. R.29-1 at 80. He believed FMLA leave inappropriate because he did not "have a medical condition" he could "get better from" and turned down personal leave because he needed to work. R.29-1 at 78-79. Food City nonetheless placed him on personal leave. R.29-5 at 62. On August 23, Batten called Richards asking if he "would allow him" to "come to work with his service animal." R.29-4 at 74. Richards asked what Ellison decided, and Batten replied that Ellison denied the request. *Id.* Richards "told [him] that he already had his answer." *Id.* Batten never heard from Food City again and was terminated effective February 14, 2022, for failing to return from leave. R.29-1 at 80-81; R.50 at 21, ¶75.

C. Lower Court Decisions

Batten alleged that Food City failed to accommodate him in violation of the ADA by rejecting his request to continue bringing his service dog to work. The magistrate judge recommended summary judgment be granted to Food City on two grounds. First, Food City was "under no obligation" to accommodate Batten because he could purportedly "perform the essential functions of his job without reasonable accommodation," even though "doing so caused him constant daily pain" and "put [him] at risk for falling and injuring himself." R.53 at 4, 28. The judge believed "long-standing

Eleventh Circuit precedent" compelled this conclusion but simultaneously acknowledged that *Beasley v. O'Reilly Auto Parts*, 69 F.4th 744 (11th Cir. 2023), considered the relevant language from this prior precedent "mere dicta." R.53 at 20, 23. Believing *Beasley* was "incorrect," the judge applied that prior precedent's "rule of law" that "Food City was under no obligation to make an accommodation" because Batten "did not require [one] to perform his essential job functions." R.53 at 27-28.

The magistrate judge next concluded that even if Food City was obligated to accommodate Batten, the company could not be liable because Batten obstructed the interactive process by insisting on his service dog. R.53 at 30-32. In the judge's view, Batten presented an "ultimatum" that "precluded" Food City from offering accommodations beyond the USCAN position. R.53 at 30-31.

The district court accepted the magistrate judge's recommendation and granted summary judgment. The court acknowledged the magistrate judge's first ground was "in tension" with *Beasley*, "which casts doubt on the … line of cases" holding employers need not accommodate employees who can already perform essential job functions. R.57 at 9-10. But the court noted that *Beasley*, which reached no holding on the issue, did "not provide

substantial guidance." R.57 at 10. The court did not decide if accommodation was necessary because it agreed that Batten obstructed the interactive process by insisting on his service dog, an accommodation Food City "did not find acceptable." R.57 at 10-11. In doing so, the court said, Batten "foreclosed" Food City from proposing alternatives beyond the USCAN position. R.57 at 13.

SUMMARY OF ARGUMENT

Batten, an amputee who lives in daily pain and is prone to falls, asked to bring his service dog to work as a reasonable accommodation. Despite having no objection to this request and agreeing that it would not impose undue hardship, Food City refused Batten's request, proposed a single alternative that Batten explained was ineffective, and ultimately fired him. In recommending that summary judgment nonetheless be granted to Food City, the magistrate judge made two erroneous conclusions: that Batten's ability to struggle through pain and danger to perform his essential job functions deprived him of the right to reasonable accommodation, and that he obstructed the interactive process. The district court adopted only the second conclusion, faulting Batten for the breakdown of the interactive process.

This Court should reject the proposition that the ADA requires only those accommodations strictly necessary for performance of essential job functions. That conclusion is not compelled by this Court's precedent and contravenes the ADA's text, implementing regulations, and precedent from other circuits, all of which indicate that no nexus between a requested accommodation and essential job functions is required. And, even if such a nexus is required, it would necessarily be satisfied by reasonable accommodations—like this one—that allow disabled employees to perform their jobs more safely and less painfully. This Court should also reject the interactive-process ruling because a reasonable jury could find Food City obstructed the interactive process by summarily denying Batten's reasonable and unobjectionable accommodation request, proposing only reassignment to a position he could not perform, and disengaging from meaningful discussion.

ARGUMENT

I. Batten's ability to perform his essential job functions by enduring pain and risking his safety did not deprive him of the right to reasonable accommodation.

A. This Court's precedent does not limit ADA accommodations to those strictly necessary for performance of essential job functions.

The magistrate judge was incorrect that this Court's decisions establish a "rule of law" that employees who can perform their jobs without accommodation are ineligible to receive one. R.53 at 28 (relying on *Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249 (11th Cir. 2001); *LaChance v. Duffy's Draft House, Inc.*, 146 F.3d 832 (11th Cir. 1998); *D'Onofrio v. Costco Wholesale Corp.*, 964 F.3d 1014 (11th Cir. 2020); and *Willis v. Conopco, Inc.*, 108 F.3d 282 (11th Cir. 1997) (per curiam)).

This Court's recent ruling in *Beasley* explained that these decisions' "statements about essential job functions" were "necessarily tethered to the facts of those cases." 69 F.4th at 757. *Beasley* first addressed statements from *Lucas*, *LaChance*, and *Willis* that an accommodation is required "only if it enables the employee to perform the essential functions of the job." *Id.* at 756-57 (citations and emphasis omitted). This language, *Beasley* explained, came in the context of holding that the plaintiffs were ineligible for

accommodation not because they could already perform their essential job functions without accommodation but instead because they were unable to perform those functions even *with* accommodation. *Id.* at 758-59 & n.10. These decisions thus stand for the unremarkable proposition that if an "individual is unable to perform an essential function of his job, even with an accommodation, he is, by definition, not a 'qualified individual' and, therefore, not covered under the ADA." *Holly v. Clairson Indus., L.L.C.*, 492 F.3d 1247, 1256 (11th Cir. 2007) (citation omitted) (discussing *Lucas* and *LaChance*); *see Bell v. O'Reilly Auto Enters., LLC*, 972 F.3d 21, 24-25 (1st Cir. 2020) (reading jury instruction stating that employee must show that "accommodation would enable him to perform the essential functions of the job" to "express[] only the well-settled rule that a proposed accommodation must be 'effective,' leaving an employee able to perform the [job's] essential functions") (citation omitted). Because Batten "could do his job with reasonable accommodations," these decisions do not control. *Beasley*, 69 F.4th at 758 n.10.

Beasley also characterized as dicta *D'Onofrio*'s statement that an employer has "no obligation to make an accommodation" if "an employee does not require [one] to perform her essential job functions." *D'Onofrio*,

964 F.3d at 1022. *Beasley* explained that because the *D'Onofrio* employer provided all necessary accommodations, the court "had no reason to delve into the essential job functions question" there. 69 F.4th at 760. Batten, in contrast, "pointed to specific instances in which he needed a reasonable accommodation but was denied one," making *D'Onofrio* inapposite. *Id.*

The magistrate judge thus erred by concluding that *D'Onofrio*, *Lucas*, *LaChance*, and *Willis* established a "rule of law" that controlled Batten's case. R.53 at 28. Moreover, this flawed conclusion rested not on a misunderstanding of *Beasley* but instead on the judge's own determination that *Beasley* was incorrectly decided. The judge recognized that *Beasley* "rejected as dicta" the relevant language from these decisions but believed "the *Beasley* panel's decision" to do so was "incorrect." R.53 at 27. But the magistrate judge was not free to disregard binding precedent. To be sure, as the district court noted, *Beasley* did not *resolve* the question of whether the ADA requires accommodations beyond those needed for essential job functions. R.57 at 10. However, *Beasley* did make clear the question was an open one. 69 F.4th at 757. The magistrate judge erred by concluding otherwise.

B. The ADA's accommodation requirement extends beyond performance of essential job functions.

While *Beasley* left open the question of whether the ADA requires only accommodations necessary for performance of essential job functions, it did highlight "tension" between "an essential function requirement" and "the text of the statute," EEOC regulations, and precedent from other circuits. *Id.* at 757 & n.9. All three militate against any essential-job-function requirement.

First, the ADA's text does not suggest that an accommodation denial is actionable only where that denial precludes performance of essential job functions. Instead, the statute prohibits "discriminat[ion] against a qualified individual on the basis of disability in regard to … terms, conditions, and privileges of employment," 42 U.S.C. § 12112(a), and defines discrimination to include "not making reasonable accommodations to the known physical or mental limitations" of a disabled individual, absent undue hardship, *id.* § 12112(b)(5)(A). The ADA thus makes it unlawful to deny an accommodation when that denial negatively impacts the disabled individual's terms, conditions, or privileges of employment. And, as *Beasley* recognized, "[t]he terms, conditions, and privileges of

employment are more than just the essential functions of a job." 69 F.4th at 757. There is no textual basis for concluding that the ADA's anti-discrimination proscription extends only to accommodation denials that preclude performance of essential job functions.

Moreover, the ADA's definition of reasonable accommodation "gives no indication that an accommodation must facilitate the essential functions of one's position." *Feist v. La., Dep't of Just.*, 730 F.3d 450, 453 (5th Cir. 2013). The statute provides several examples of "reasonable accommodation[s]" but nowhere limits the definition to accommodations required for performance of essential job functions. 42 U.S.C. § 12111(9). And while the ADA contemplates accommodations that allow individuals to "perform [a position's] essential functions," *id.* § 12111(8), its concerns extend more broadly to other goals, like making the workplace "readily accessible" to disabled employees, *id.* § 12111(9)(A), and ensuring equal opportunity in the workplace, *id.* § 12101(a)(5) (expressing concern that disabled individuals "continually encounter … relegation to lesser services, programs, activities, benefits, jobs, or other opportunities").

In addition, the statutory definition of a "qualified individual" includes those who can perform essential job functions "*without* reasonable

accommodation." *Id.* § 12111(8) (emphasis added). That the statute allows such "qualified individual[s]" to bring failure-to-accommodate claims indicates that the requested accommodation need not be critical to performance of essential job functions. *See Bell*, 972 F.3d at 24 (definition of "qualified individual" means that "[a]n employee who can … perform the essential functions of his job without accommodation remains eligible" to receive one).

A contrary conclusion would also, as *Beasley* acknowledged, be "in tension with … EEOC regulations." 69 F.4th at 757. These ADA regulations make clear that while a "reasonable accommodation" *can* be one that enables an employee to perform essential job functions, it can *also* be one that enables an individual to "be considered for [a] position" or to "enjoy equal benefits and privileges of employment as are enjoyed by … other similarly situated employees without disabilities." 29 C.F.R. § 1630.2(*o*)(1)(i)-(iii). An accommodation "that enables an individual to perform the essential functions of a position is only one … categor[y] of reasonable accommodation" the regulations contemplate. *Feist*, 730 F.3d at 453; *see Sanchez v. Vilsack*, 695 F.3d 1174, 1181 (10th Cir. 2012) (EEOC

regulations contemplate accommodations unrelated to essential functions) (Rehabilitation Act).[5]

Further, as *Beasley* noted, "[o]ther circuits … have held that the statutory text and its implementing regulations do not require a plaintiff to show a connection between a reasonable accommodation and the essential functions of his job." 69 F.4th at 757 n.9 (citing *Hill v. Assocs. for Renewal in Educ., Inc.*, 897 F.3d 232, 239 (D.C. Cir. 2018); *Feist*, 730 F.3d at 452-54; and *Sanchez*, 695 F.3d at 1182); *see also Bell*, 972 F.3d at 24 (rejecting essential-job-function requirement); *Buckingham v. United States*, 998 F.2d 735, 740 (9th Cir. 1993) (same) (Rehabilitation Act). Thus, the ADA's text, implementing regulations, and a large body of case law all indicate that the statute requires accommodations that allow not just performance of essential job functions but also equality in the terms, conditions, and privileges of employment.

Here, a jury could find that forcing Batten to endure "constant daily pain" and danger to perform his job, R.53 at 4, negatively impacted the

[5] This Court reviews Rehabilitation Act and ADA claims under the same standards. *Ellis v. England*, 432 F.3d 1321, 1326 (11th Cir. 2005).

"terms, conditions, and privileges of [his] employment" under 42 U.S.C. § 12112(a). *E.g.*, *Beasley*, 69 F.4th at 755 (jury could find that accommodation denial that prevented plaintiff from understanding important safety information "adversely affect[ed] the terms, conditions, and privileges of his employment" because "[s]afety is self-evidently a condition of employment in a warehouse"); *Wedow v. City of Kansas City*, 442 F.3d 661, 671-72 (8th Cir. 2006) (female firefighter's lack of adequate protective clothing impacts "the terms and conditions" of her employment under Title VII by "jeopardiz[ing] her ability to perform the core functions of her job in a safe and efficient manner"); *see Exby-Stolley v. Bd. of Cnty. Comm'rs*, 979 F.3d 784, 817-18 (10th Cir. 2020) (en banc) (ADA's "terms, conditions, and privileges" language "reaches 'the *entire spectrum*' of employment-based disability discrimination" (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986))).

C. Even if the ADA requires a nexus to essential job functions, accommodations that allow disabled employees to work more safely or less painfully can satisfy this nexus.

In the alternative, if this Court requires that accommodations "enable" performance of essential job functions, *e.g.*, *Lucas*, 257 F.3d at 1259-60; 29 C.F.R. § 1630.2(*o*)(1)(ii), it should find that accommodations that allow

disabled employees to overcome workplace pain and danger satisfy this requirement. One definition of "enable" is "to make possible, practical, or easy." Merriam Webster's Collegiate Dictionary 380 (10th ed. 1995); *see Owens v. Governor's Off. of Student Achievement*, 52 F.4th 1327, 1335 (11th Cir. 2022) (accommodation must "alleviate the workplace challenges" a disability poses) (Rehabilitation Act). Accommodations that allow disabled employees to perform their jobs more safely or less painfully necessarily alleviate workplace challenges and make it easier and more practical to perform the job.

Indeed, courts have repeatedly held that the ADA requires accommodations needed to allow disabled employees to perform their jobs safely or without pain. *See EEOC v. Charter Commc'ns, LLC*, 75 F.4th 729, 739 (7th Cir. 2023) (Seventh Circuit precedent "should not be read as holding that the ADA imposes no duty to offer reasonable accommodations that affect safety or pain that an employee may be motivated to overcome"); *Burnett v. Ocean Props., Ltd.*, 987 F.3d 57, 69 (1st Cir. 2021) (rejecting argument that paraplegic employee's ability to enter workplace made him ineligible for accommodation, given that he could do so only at "risk of bodily injury"); *Bell*, 972 F.3d at 24 (where plaintiff requested

accommodation to mitigate mental-health symptoms, explaining that employees "who can, with some difficulty" perform their jobs without accommodation "remain[] eligible" for accommodation); *Hill*, 897 F.3d at 239 ("A reasonable jury could conclude that forcing [plaintiff] to work with pain when that pain could be alleviated by his requested accommodation violates the ADA."); *Gleed v. AT & T Mobility Servs., LLC*, 613 F. App'x 535, 538 (6th Cir. 2015) (rejecting employer's argument that "if Gleed was physically capable of doing his job—no matter the pain or risk to his health—then it had no obligation" to accommodate him); *Schroeder v. AT&T Mobility Servs., LLC*, 568 F. Supp. 3d 889, 893 (M.D. Tenn. 2021) (fact that plaintiff was "physically capable of performing his job absent accommodation" did not render service-dog request "automatically unreasonable").[6]

[6] The Commission disagrees with *Hopman v. Union Pacific Railroad*, 68 F.4th 394 (8th Cir. 2023), *cert. denied*, No. 23-362, 2024 WL 674724 (S. Ct. Feb. 20, 2024), which rejected a service-dog accommodation aimed at mitigating disability-related workplace pain. *Hopman* concluded that 29 C.F.R. § 1630.2(*o*)(1)(iii) is limited to *employer-sponsored* benefits and privileges, relying on the regulatory requirement that a benefit or privilege be equally "enjoyed by [the employer's] other similarly situated employees without disabilities." *Id.* at 400 (quoting regulation). But that language does not mean *the employer must provide* that benefit or privilege; instead, the ability to work free from disability-related impediments is a privilege similarly

A jury could find that Batten's service dog would have enabled performance of his job functions by allowing him to conduct those functions more safely and less painfully. Batten's service dog was trained to help him prevent and recover from falls, R.29-1 at 86, and to ease his anxiety by detecting and assisting with panic attacks, R.42-1 at 2, ¶8. And Batten's dog, a jury could find, would have further enabled performance of his work by providing physical stability and thus allowing him to carry out his duties more quickly and efficiently.

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situated employees "automatically enjoy," *US Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002), simply by virtue of lacking a disability. *See Gleed*, 613 F. App'x at 539 (allowing plaintiff to use chair would enable him "to work—as other employees do—without great pain" and thus "to 'enjoy equal benefits and privileges as are enjoyed by … similarly situated employees without disabilities'") (alteration in original) (quoting regulation). Nor, contrary to *Hopman*'s conclusion, 68 F.4th at 400-01, does EEOC's guidance discussing accommodations for employer-sponsored services and programs suggest those are the *only* benefits or privileges requiring accommodation. *See* 29 C.F.R. pt. 1630, app. 1630.9 (framing accommodation requirement in terms of "barriers to … equal employment opportunity" more generally). In any event, because the *Hopman* plaintiff, unlike Batten, relied solely on the benefits-and-privileges regulation subsection, *Hopman* did not consider whether accommodations to mitigate pain could "enable" performance of essential job functions under 29 C.F.R. § 1630.2(*o*)(1)(ii) or whether their denial implicates "terms, conditions, and privileges of employment" under 42 U.S.C. § 12112(a). *See* 68 F.4th at 398.

Of course, holding that reasonable accommodations may be required to alleviate disability-related pain or danger in the workplace would not mean that employers must grant all such requests. The ADA contains important limitations on failure-to-accommodate claims that would be unaffected by adopting such a holding. First, employers need only accommodate individuals whose pain or danger is tied to an "actual disability" or a "record of" such a disability. 42 U.S.C. § 12201(h). Second, an employee bears the burden to show that a requested accommodation is reasonable. *See US Airways, Inc. v. Barnett*, 535 U.S. 391, 401-02 (2002). Third, employers have no obligation to provide accommodations that are "primarily for the personal benefit of the individual." 29 C.F.R. pt. 1630, app. 1630.9. Fourth, employers retain "discretion to choose between effective accommodations." *Id.* Finally, employers need not grant any accommodation that imposes "undue hardship." 42 U.S.C. § 12112(b)(5)(A).

This Court should reject the notion that disabled employees can *never* receive an accommodation if it remains possible for them to perform their job duties without one, even at the expense of "constant daily pain" and risk of injury. R.53 at 4, 28. "[I]mpossibility" is a "disturbing standard,"

Sturz v. Wis. Dep't of Corrs., 642 F. Supp. 2d 886, 888 (W.D. Wis. 2009), that the ADA's core objective of ensuring "equality of opportunity" in the workplace does not countenance, 42 U.S.C. § 12101(a)(7). We urge this Court to clarify as much.

II. The district court erred by granting summary judgment on the ground that Batten obstructed the interactive process.

Food City never claimed that Batten's service-dog accommodation was unreasonable, objectionable, or would pose undue hardship, and yet it refused without explanation to grant his request. Instead of providing an effective alternative accommodation, it terminated him. The district court erred by blaming Batten for a purported breakdown of the interactive process in the face of Food City's straightforward violation of the ADA.

The purpose of the interactive process is to "identify … potential reasonable accommodations that could overcome [disability-related] limitations." 29 C.F.R. § 1630.2(*o*)(3). The interactive process is necessary where "neither the individual requesting the accommodation nor the employer can readily identify the appropriate accommodation." 29 C.F.R. pt. 1630, app. 1630.9. In such cases, a breakdown in the interactive process may well preclude identification of an appropriate accommodation, and

"courts should attempt to isolate the cause of the breakdown and then assign responsibility." *Beck v. Univ. of Wis. Bd. of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996).

In other cases, like Batten's, "an appropriate reasonable accommodation" can be "requested, identified, and provided without either the employee or employer … engag[ing] in any sort of 'reasonable accommodation process.'" 29 C.F.R. pt. 1630, app. 1630.9. Here, Batten identified a reasonable accommodation at the outset: use of his service dog. Food City did not dispute that this accommodation would have helped with Batten's anxiety, isolation, and physical stability. R.50 at 18, ¶67; *see Branson v. West*, No. 97-C-3538, 1999 WL 311717, at *11 (N.D. Ill. May 11, 1999) (service-dog accommodation reasonable where dog would benefit performance of work activities and plaintiff purchased and trained dog) (Rehabilitation Act). Nor did Food City claim that Batten's service dog "would constitute *any* burden on [the company], undue or otherwise," or that the dog was objectionable in any way. R.50 at 14, ¶¶51-52. Richards was unaware of any issues that arose when Batten brought his service dog to work and agreed he could not think of any reason why it would be a problem for Batten to have his dog in the kiosk. R.29-3 at 30-31, 38. And

Meadows testified he had "[a]bsolutely no[]" problem with Batten's requested accommodation. R.29-9 at 45-46. When pressed as to why Food City did not grant Batten's request at the outset, Meadows stated—confusingly, since he claimed to have no objection to the service dog—that he simply wanted to engage in "informal discussion and exchange" to "explore alternatives." R.29-9 at 45. But the interactive process is not an end in itself; its purpose is to "identify" an accommodation "that is mutually agreeable to the parties." *Owens*, 52 F.4th at 1335. Any purported failure by Batten to continue the interactive process did not prevent identification of a mutually agreeable accommodation because Batten already proposed one at the outset. The record thus contradicts the district court's conclusion that Batten limited the universe of potential accommodations to one "Defendant did not find acceptable." R.57 at 11.

To be sure, an employer is entitled to explore potential alternatives to an employee's requested accommodation and "may choose among reasonable accommodations." EEOC, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, 2002 WL 31994335, *9 (2002). But an employer can do so only "as long as the chosen accommodation *is effective*." *Id.* (emphasis added); *see Stewart v.*

Happy Herman's Cheshire Bridge, Inc., 117 F.3d 1278, 1286 (11th Cir. 1997) (employee is not owed "accommodation of her choice" but *is* owed a "reasonable accommodation") (citation omitted). Because Batten proposed a reasonable accommodation that imposed no undue hardship, Food City was obligated to provide either that accommodation or an effective alternative. 29 C.F.R. pt. 1630, app. 1630.9. Food City did neither. Instead, it summarily rejected Batten's request and offered only the USCAN position which, Food City's 30(b)(6) deponent agreed, was a standing-only position that "would not address Mr. Batten's stability concerns." R.42-6 at 9.

And even after Batten—as Food City concedes—"made it abundantly clear that he had a physical condition that would prevent him from standing for long periods of time in the USCAN … position," R.50 at 11, ¶41, Food City simply reiterated its take-it-or-leave-it offer of the unmodified USCAN position, R.29-6 at 69. This falls far short of satisfying Food City's ADA obligations. *E.g.*, *EEOC v. Sears, Roebuck & Co.*, 417 F.3d 789, 806 (7th Cir. 2005) ("An employer cannot sit behind a closed door and reject the employee's requests for accommodation without explaining why the requests have been rejected or offering alternatives."); *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128, 1139 (9th Cir. 2001) (employer violates

ADA "where it rejects the employee's proposed accommodations" and "offers no practical alternatives"); *Branson*, 1999 WL 311717, at *15 (employer violated ADA where it "never explained its objection(s), if any, to the service dog, never suggested any alternative accommodations, and never claimed 'undue hardship,'" yet denied plaintiff's requests).

The district court concluded that Batten's insistence that he needed his service dog "foreclosed" the company from offering effective alternatives. R.57 at 13. But a jury could disagree. Instead, the record supports a finding that Food City did not want to allow the service dog, offered one alternative it knew was ineffective, and then disengaged from discussion for reasons unrelated to Batten's purported "ultimatum."

First, *before* Batten's supposed "ultimatum," Food City pre-emptively denied his request for the service dog without explanation. While Meadows claimed he had no objection to the service dog and simply wanted to explore alternatives, R.29-9 at 45-46, Food City did not begin the August 12 meeting by eliciting dialogue. Instead, it summarily announced that Batten's request was denied. R.29-4 at 72.

Second, again *before* Batten's supposed "ultimatum," Food City offered an alternative that, a jury could find, the company already knew

would be ineffective. Batten explained his stability concerns during the August 6 meeting, but Food City then inexplicably offered the standing-only USCAN position that would have exacerbated rather than ameliorated these concerns. R.29-6 at 65, 67. Indeed, Richards agreed he could not "think of any way[] that the USCAN position would have accommodated Mr. Batten's stability issues."[7] R.29-3 at 57. This does not reflect the sort of "reasonable effort[] to … provide accommodations based on [available] information" that a good-faith interactive process entails. *Stewart*, 117 F.3d at 1287; *see Sears*, 417 F.3d at 808 (employer did not "meaningful[ly] participat[e] in the interactive process" where it denied accommodation requests, offered alternative it "knew would do nothing" to address plaintiff's limitations, and "disengaged from the process"); *Bartee v. Michelin N. Am., Inc.*, 374 F.3d 906, 916 (10th Cir. 2004) (jury could find employer obstructed interactive process by rejecting requested

[7] Food City may argue the USCAN position was effective because it addressed Batten's isolation. But Food City's 30(b)(6) deponent acknowledged that any accommodation would also need to address Batten's instability and anxiety, and that the USCAN position would address neither. R.42-6 at 5-6, 9.

accommodation and offering alternative plaintiff already explained was ineffective).

Third, while Food City claims it did not propose other alternatives because it believed Batten's "ultimatum" made such efforts futile, a jury could disagree. Food City's own statement of undisputed facts represents that it was instead "as a result of" Batten's decision to turn down the ineffective USCAN position that Food City "did not continue the discussion" regarding further accommodations. R.30 at 6, ¶27. Indeed, at the August 18 meeting, Food City did not tell Batten that further discussion would be futile because of his insistence on the service dog but instead doubled down on the USCAN position he already "made … abundantly clear" he could not perform. R.50 at 11, ¶41; R.29-6 at 69. A jury could find that Food City's refusal to budge from the USCAN position—not Batten's refusal to budge from the service-dog accommodation—caused or equally contributed to the breakdown of the interactive process. *See Cooke v. Carpenter Tech. Corp.*, No. 20-14604, 2022 WL 17730393, at *2 (11th Cir. Dec. 16, 2022) (per curiam) (jury could find employer obstructed interactive process where it "refused to consider any accommodation beyond" single ineffective alternative it proposed).

In any event, Batten did not "foreclose[]" Food City from offering further accommodations. *Cf.* R.57 at 13. He did not, for example, storm out of meetings, quit, or refuse to engage in further discussions. Instead, during the August 12 meeting, Batten signaled his willingness to continue discussions, telling Ellison "I guess … I have to wait for whatever you guys come up with." R.42-1 at 2, ¶16. And when Food City at the August 18 meeting again offered only the ineffective USCAN position, Batten responded by saying "he had a vested interest in this company after working for the past two years and he was not quitting." R.29-6 at 69. Even after Food City placed Batten on leave, he called to inquire about returning to work, but the company effectively hung up on him. R.29-4 at 74. Batten's actions, a jury could find, are not those of an employee who had unilaterally withdrawn from the interactive process. *Cf. Hudson v. Tyson Farms, Inc.*, 769 F. App'x 911, 919 (11th Cir. 2019) (per curiam) (employee obstructed interactive process by "abruptly quitting" before employer could respond to accommodation request).

Nor were Batten's actions those of an obstinate employee intent on pursuing an agenda unrelated to his own disability-related limitations. *Cf. Stewart*, 117 F.3d at 1281, 1286-87 (employee obstructed interactive process

where she demanded accommodation in "highly confrontational" manner, telling supervisors they could "kiss [her] ass"; rejected without explanation five different accommodations employer offered; and admitted she was advocating for a "policy goal" for all employees). Batten was continually polite, explained in detail why he could not accept the sole accommodation Food City offered, and sought only to address his own disability-related limitations. R.29-6 at 67, 69.

While Food City suggests that, absent Batten's ultimatum, it might have offered modifications to the USCAN position or other accommodations, no record evidence supports this speculative assertion. Instead, when asked whether Food City intended to offer Batten a modification to the USCAN position, Ellison said he could not "speculate" and admitted he did not discuss this possibility with anyone at Food City. R.29-5 at 47-49. Such "[s]peculation does not create a genuine issue of fact" sufficient even to defeat summary judgment, *Cordoba v. Dillard's, Inc.*, 419 F.3d 1169, 1181 (11th Cir. 2005) (emphasis omitted), much less to require summary judgment in a party's favor.

Moreover, a jury could find that Batten's service dog was the *only* effective accommodation to address his limitations. Batten explained that

his dog was trained to address his physical instability by providing counterweight to prevent falls and leverage to recover from them. R.29-1 at 86. The speculative chair/stool modification would have provided Batten a seated "home base" but given *no* physical support when standing or walking—much less the tailored and highly trained support his service dog could offer—leaving him with the same problem he confronted in the fuel-clerk position. And Food City has never hinted at any other accommodation that could have provided the requisite physical support. Moreover, Batten's dog was trained to "detect when [he was] beginning to have a 'lock down panic attack'" and assist with those attacks, R.42-1 at 2, ¶8, a function a chair or stool could not fulfill. Indeed, it is hard to imagine any other accommodation that would have provided this sort of support with both physical instability and anxiety.

CONCLUSION

For the foregoing reasons, summary judgment should be reversed.

Respectfully submitted,

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Dated: March 5, 2024

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 6,499 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Eleventh Circuit Rule 32-4.

This brief complies with the typeface requirements and type style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because it was prepared in a proportionally spaced typeface using Microsoft Word in size 14, Book Antiqua font.

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

March 5, 2024

CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2024, a copy of the foregoing brief was electronically filed using the Court's CM/ECF system, which will result in service on all counsel of record. I further certify that I caused four (4) paper copies of the foregoing brief to be mailed to the Clerk of Court by Federal Express (FedEx), ground delivery, postage pre-paid.

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

March 5, 2024

ADDENDUM

ADDENDUM: TABLE OF CONTENTS

42 U.S.C. § 12101 - Findings and purpose

(a) FINDINGS

The Congress finds that –

…

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

…

(7) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals;

…

(b) PURPOSE

It is the purpose of this chapter –

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

…

42 U.S.C. § 12111 - Definitions

…

(8) QUALIFIED INDIVIDUAL

The term "qualified individual" means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. …

(9) REASONABLE ACCOMMODATION

The 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. § 12112 - Discrimination

(a) GENERAL RULE

No 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.

(b) CONSTRUCTION

As used in subsection (a), the term "discriminate against a qualified individual on the basis of disability" includes –

…

(5)

(A) 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 such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; …

29 C.F.R. § 1630.2 - Definitions.

(*o*) *Reasonable accommodation.*

(1) The term *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.

…