QUESTION PRESENTED

Congress amended the American's with Disability Act in 2008 for the stated purpose of expanding the scope of protection. To achieve this goal, Congress redefined the definition of disability by adding rules of construction rather than changing the terms within the act. Per the amendment, a disability is still defined as an impairment that substantially limits a major life activity. Post amendment, "The term 'major' shall not be interpreted strictly to create a demanding standard for disability". 29 C.F.R. 1630.2(h)(2). "Substantially limits is not meant to be a demanding standard". 29 C.F.R. 1630 (j)(i). "An impairment need not prevent or significantly or severely restrict the individual from performing a life activity in order to be considered substantially limiting". 29 C.F.R. 1630.2(j)(ii).

In light of the amendment, the question presented is:

Whether the 2008 Amendment to the Americans Disability Act extends the definition of disability to permanent work restrictions precluding manual tasks.

PARTIES TO THE PROCEEDING

Petitioner is the Plaintiff below, Michael Adam Booth. Respondent is Nissan North America, Inc., the Defendant below.

RULE 29.6 STATEMENT

Mr. Booth is an individual and is not a business entity, government entity, has no parent corporations, nor does he hold any publicly held corporation or own any stock.

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PETITION FOR WRIT OF CERTIORARI

Mr. Booth respectfully petitions this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The disposition and court of appeals opinion (App. A) entitled *Michael Adam Booth Plaintiff-Appellant vs. Nissan North America Inc.*, Defendant-Appellee, is reported at 927 F.3d 387. The district court's opinion and order granting respondent's motion for summary judgment (App. C) is reported at 2018 U.S. Dist. LEXIS 139882.

JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered on June 7, 2019. A Petition for rehearing and hearing *en banc* was denied on July 3, 2019. (App. B) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

ADA Amendments Act of 2008.

42 U.S.C.S. § 12102(2) Definition of Disability.

(1) Disability

The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment (as described in paragraph (3)).

(2) Major life activities

(A) In general

For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

(B) Major bodily functions

For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

(2) Regarded as having such an impairment
For purposes of paragraph (1)(C):

(A) An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this chapter 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.

(B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

(4) Rules of construction regarding the definition of disability. The definition of "disability" in paragraph (1) shall be construed in accordance with the following:

(A) The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.

(B) The term "substantially limits" shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.

(C) An impairment that substantially limits one major life activity need not limit other

major life activities in order to be considered a disability.

(D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(Pub. L. 101–336, § 3, July 26, 1990, 104 Stat. 329; Pub. L. 110–325, § 4(a), Sept. 25, 2008, 122 Stat. 3555.)

29 C.F.R. 1630

"The term "major" shall not be interpreted strictly to create a demanding standard for disability." 29 C.F.R. 1630.2(h)(2).

"Substantially limits is not meant to be a demanding standard". 29 C.F.R. 1630 (j)(i).

"An impairment need not prevent or significantly or severely restrict the individual from performing a life activity in order to be considered substantially limiting". 29 C.F.R. 1630.2(j)(ii).

"The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual's impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment "substantially limits a major life activity should not demand extensive analysis". 29 C.F.R. 1630.2(j)(iii).

STATEMENT OF THE CASE

A. UNDERLYING EVENTS

Mr. Booth builds cars for Nissan North America. He sustained a work-related injury in 2004 resulting in a protruding disk in his neck. On December 22, 2005, his doctor assigned permanent work restrictions precluding repetitive neck flexion and extension more than 33 percent of the time, working more than 66 percent of the work day above the shoulder, and working overhead more than sixty six percent of the time. (Appendix D, pgs. A 35-37; Appendix hereafter App.)

In 2014, Nissan accommodated Mr. Booth in a two-job rotation in Zone 29 of left side regulator and right side rear water shield because those positions were within his restrictions. (App. E, pgs. A 38-39) Mr. Booth mitigated his disability by accepting the two-job rotation. Nissan approved the mitigation on April 2, 2014 and December 9, 2015 and Mr. Booth was able to continue working with these ameliorative affects for thirteen years.(App. E, pgs. A 38-39)

Nissan management denied Mr. Booth promotion to material handler because of his work restrictions. Then they revoked the two-job rotation, i.e., ameliorative effects of the accommodation. Nissan told Booth his doctor must remove the permanent work restrictions, or he would have no job. ("We need to discuss some deadlines that he has to meet as he is continuing to drag out his requirement to meet with the Dr. We have continued to let him work in his current pod, but we can't continue to do

that if he doesn't get his Perm Restrictions modified to clear him for duty". (App. F, pgs. A 40)[1] Mr. Booth's doctor removed his restrictions thirteen years after assigning them, on or about January 2018, so he wouldn't be fired. Because Mr. Booth succumbed to the discrimination, he did not lose his job.

Mr. Booth filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging disability discrimination when Nissan forced him to remove work restrictions as a condition of employment. A right to sue letter was issued on May 31, 2017. Mr. Booth filed his complaint alleging a violation of the ADAAA for failure to promote because of a disability in the form of work restrictions and failure to accommodate a disability in the form of work restrictions.

B. DISTRICT COURT PROCEEDINGS

On April 27, 2017, Mr. Booth filed a Complaint for damages in the Middle District of Tennessee alleging a violation of the ADAAA. Specifically, the Complaint alleged Nissan failed to accommodate his disability when they conditioned his job on its removal and failed to promote him because of his disability. Nissan filed a Motion for Summary Judgment alleging *inter alia* Mr. Booth was not disabled, even though it was

[1]Nissan required a condition of employment that is discriminatory akin to a no headwear policy condition. Both policies are discriminatory. *EEOC v. Abercrombie & Fitch Stores, Inc.,* 135 S. Ct. 2028, 192 L. Ed. 2d 35 (2015)

Nissan who said he could not work any job in the plant with the restrictions. The Motion for Summary Judgment was granted on August 17, 2018 because the promotion was lateral, and Nissan's demand to remove a disability was not a discrimination. (App. C, pgs. 22-34) In effect, if the discrimination is successful, and one arbitrarily pretends they don't have a disability all is well.[2] The District Court did not address disability as an issue.

Turning to the Appellate Court, Mr. Booth timely appealed the dismissal on September 14, 2018. Whether or not there was a disability, seemed of little consequence when the District Court failed to address the issue.

C. THE APPELLATE PROCEEDINGS.

On appeal Nissan argued no disability based solely on pre-amendment ADA cases. On June 7, 2019, a unanimous per curium panel of the Sixth Circuit affirmed the District Court's dismissal of all claims because Mr. Booth was not *disabled*. (App. A, pgs. A2-20) The panel states, "Several of our published decisions support Nissan's position. We have held that simply having a work restriction does not automatically render one disabled". (App. A, pg. A 14)They source pre-amendment cases of *McKay v.*

[2] If claimant had agreed to reject her religion and forego the hajib, she too would have been offered employment. *EEOC v. Abercrombie & Fitch Stores, Inc.,* 135 S. Ct. 2028, 192 L. Ed. 2d 35 (2015).

Toyota Motor Mfg., U.S.A., Inc., 110 F.3d 369, 373 (6th Cir. 1997); *Mahon v. Crowell*, 295 F.3d 585, 591 (6th Cir. 2002); and *Ferrari v. Ford Motor Co.*, 826 F.3d 885, 893 (6th Cir. 2016) in holding, "Because Booth has advanced no evidence of his disability beyond his work restrictions, he cannot show that he is disabled and has therefore failed to carry his burden at summary judgment. We affirm the district court's grant of summary judgment on that claim." (App. A, page A 17).

Booth petitioned the Sixth Circuit for a rehearing *en banc* arguing all precedent was no longer good law under the *American with Disability Act, Amendments Act of 2008*. He also pointed out that the EEOC interpretation of the Amendment included work restrictions in multiple examples. The Petition for rehearing was denied on July 3, 2019. (App. B, page A 21)

D. UPDATE

Thirty-one days (31) days after the Sixth Circuit eliminated work restrictions from ADA protection, Nissan re-evaluated Mr. Booth's work restrictions sua sponte, called Mr. Booth into the office, and revoked the accommodation.[3]

[3] The rehearing was denied on July 3, 2019, Mr. Booth was taken off the schedule on August 12, 2019.

REASON FOR GRANTING THE PETITION

Introduction

With a stroke of the pen, the Appellate Court eliminated millions of disabled employees from the Americans with Disability Act protection. (hereafter ADA) They did so in conflict with a bipartisan mandate from Congress to expand coverage. Removing workers from the workforce based upon what they can't do, rather than what they can do creates an animus that costs Americans billions of dollars. Enter, the American Disability Act Amendments Act of 2008.(Hereafter, ADAAA).

Per Congressman George Miller, S. 3406 or the ADA Amendments Act of 2008, "reestablishes the scope of protection of the American's with Disabilities Act to be generous and inclusive. The Bill restores the proper focus on whether discrimination occurred rather than on whether or not an individual's impairment qualifies as a disability."154 Cong. Rec. 19432 (2008.) Per the Congressman:

> Workers like Carey McClure, an electrician with muscular dystrophy who testified before our committee in January, have not been hired or passed over for promotion by an employer regarding them as too disabled to do the job. Yet when these workers seek justice for this discrimination, the courts rule that they are not disabled enough to be protected by the American's with Disabilities Act. This is a terrible catch-

> 22 that Congress will change with the passage of this bill today. *Id.*

The Supreme Court has not resolved the definition of disability following the Amendment. This issue demands the attention of the High Court, because the Act has gone unnoticed by the Circuits who continuously breathe life into cases Congress rejected name in the Amendment.[4] A published judicial precedence that removes work restrictions from ADAAA protection excuses Nissan and thousands of other employers from accommodating these restrictions; an excuse already ceased upon by Nissan directly following the denial of the *En Banc* hearing. Indeed, Mr. Booth was immediately terminated once the Sixth Circuit denied protection in this very case. This creates a class of dependent, non-productive adults just after a herculean effort by both parties of Congress to expand the definition of disability. Mr. Booth requests this Court issue a writ of certiorari to correct and restore the broad protection intended by the elected officials of both parties of Congress.

> In passing the ADA, Congress recognized that 'discrimination against individuals with disabilities continues to be a serious and pervasive social problem' and that the 'continuing

[4] As recently as this year, the Middle District of Tennessee continues to cite *Toyota*. *Roan v. UPS*, 2019 U.S. Dist. LEXIS 64253, 2019 WL 1596736.

> existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity. EEOC introduction to Appendix; *See also* 42 U.S.C. 132101(a)(2), (8).

Mr. Booth supports his Petition for Writ of Certiorari as follows: (1) Congress used rules of construction to expand the definition of disability and remove the demanding and stringent standards; (2) Congress rejected the standards in *Toyota* thus including work restrictions; (3) Disability coverage must be made based upon the non-mitigated state of the condition; (4) All precedent relied upon by the Appellate Court rests squarely on the incorrect standards outlined in *Sutton* and *Toyota,* and (5) The major life activity of "working" is not immune from the new rules of construction.[5]

/ / / /

/ / / /

[5] Full citations: *Toyota Motor Mfg., Ky. v. Williams*, 534 U.S. 184, 122 S. Ct. 681, 151 L. Ed. 2d 615 (2002); *Sutton v. United Air Lines*, 527 U.S. 471, 119 S. Ct. 2139, 144 L. Ed. 2d 450 (1999).

I. Congress used rules of construction to remove demanding standards and expand the definition of disability.

Everything was supposed to get better when the ADAAA protection became effective on January 1, 2009. At its core, this is a case of statutory construction. Congress accomplished a reformation of *disability* by amending the relevant provisions of the ADA, clarifying details, providing rules of construction, and providing examples that underscore the broad applicability of the statute. "The purpose of this legislation is to resolve the intent of Congress to cover a broad group of individuals with disabilities under the ADA and to eliminate the problem of courts focusing too heavily on whether individuals are covered by the law rather than on whether discrimination occurred." 154 Cong. Rec. 19430 (2008)(Statement of Representatives Nadler) The amendment was passed because court decisions, "have created a catch-22" where an individual can be fired from a job or otherwise face discrimination on the basis of an impairment, "and yet not be considered sufficiently disabled to be protected by the ADA. Congress never intended such an absurd result." 154 Cong. Rec. 19433 (2008). Here, Nissan denied employment because of a work restriction, "and yet (Booth) is not considered sufficiently disabled to be protected by the ADA". This is an *absurd result*.

Per the Congressman Nadler:

> The Court's rulings currently exclude millions of disabled Americans from the

> ADA's protection—the very citizens that Congress expressly sought to include within the scope of the Act in 1990. The impact of these decisions is such that disabled Americans can be discriminated against by their employer because of their conditions but are not considered disabled enough by our Federal Courts to invoke the protections of the ADA. This is unacceptable. Today's vote will enable disabled American's utilizing the ADA to focus on discrimination that they have experienced rather than having to first prove that they fall within the ADA's protection. 154 Cong. Rec. 19433 (2008).

Per the Congressional Record, the intent of the amendment was to restore the lower standard of the Rehabilitation Act; i.e.

> In most of these cases,[Rehabilitation Act cases] defendants and the courts simply accepted that a plaintiff was a member of the protected class and moved on to the merits of the case. Congress expected and intended the same thing when it passed the ADA in 1990, and we are again attempting to make this crystal clear. As stated in S. 3406, the focus should be on whether discrimination has occurred and 'the question of whether an individual's

> impairment is a disability under the ADA should not demand extensive analysis'. Under the lower standard for qualifying as disabled, for example, an individual who is disqualified from his or her job of choice because of an impairment should be considered substantially limited in the major life activity of working. *Id.*

Per Congressmen Nadler, "Our Nation simply cannot afford to squander the talents and contributions of our people based on antiquated misconceptions about people with disabilities". *Id.* at 19434. The ink wasn't even dry on the Sixth Circuit opinion, before Nissan sent this model employee home without a paycheck. When manager LaCroix needs restrictions lifted, because he can't keep accommodating Booth in the two-job rotation, the discrimination question is *why not*. (App. F, pg. A 40) Did Congress create a *work restriction* exception to the mandate. The answer is no. This exception is not supported by Congress. Instead, the ADAAA limits the inquiry, "It is our sincere hope that, with less battling over who is or is not disabled, we will finally be able to focus on the important questions—is an individual qualified? And might a reasonable accommodation afford that person the same opportunities that his or her neighbors enjoy?" *Id.*

In the Congressional Record, many examples were provided to interpret the statute. A diabetic is

accommodated with a special lunch break to control his blood sugar. He is healthy and productive.

> So, the man gets a new supervisor. The new supervisor comes in and doesn't understand that need, doesn't permit the lunch break, and the man's unable to do his work. So, he files suit under the ADA, and the court says he doesn't win the case because he is not disabled. Diabetes is not enough of a disability to remedy this person's concern. Now that's just wrong." 154 Cong. Rec. 19434 (2008) (Statement by Congressman Andrews).

Congressman Sensenbrenner states, "[T]he impact of these decisions (court rulings) is such that disabled Americans can be discriminated against by their employer because their conditions are not considered disabled enough, by our Federal Courts to invoke the protections of the ADA. This is unacceptable." *Id* at 19434.

The EEOC prepared an Appendix at the direction of Congress after studying and incorporating the Congressional Record. Within the 38 pages, examples regularly identify work restrictions as a covered disability. The ADA Amendments Act of 2008 (ADAAA), Pub. L. No 110-324, 122 Stat. 355342 U.S.C. 12102 and Appendix. Per this Appendix, "This legislation is the product of extensive bipartisan efforts, and the culmination of collaboration and coordination between legislators

and stakeholders". EEOC Appendix *citing* Statement of Representatives Hoyer and Sensenbrenner, 154 Cong. Rec. H8294-96 (daily ed. Sept. 17, 2008)(Hoyer-Sensenbrenner Congressional Record Statement). Despite all this effort to remove demanding standards, Mr. Booth finds his case rejected because a permanent work restriction is not disabling enough.

Both pre-amendment and post-amendment statutes define disability as a physical or mental impairment that substantially limits one or more major life activities of such individual. Congress changed the rules of construction on the words, "substantially" and "major". Congress extensively deliberated over whether a new term other than "substantially limits" should be adopted to denote the appropriate functional limitation necessary. Ultimately, Congress opted to retain these terms in the Amendments Act, rather than replace them. It concluded that "adopting a new, undefined term that is subject to widely disparate meanings is not the best way to achieve the goal of ensuring consistent and appropriately broad coverage under this Act." 29 C.F.R. 1630(2)(j)(i), App. Instead, Congress determined "a better way to express its disapproval of *Sutton* and *Toyota* is to retain the words 'substantially limits,' but clarify that is not meant to be a demanding standard. To achieve that goal, Congress set forth detailed findings and purposes and "rules of construction to govern the interpretation and application of this concept going forward." 29 C.F.R. 1630.2(j)(1) App.

Likewise, the EEOC similarly considered whether to provide a new definition of "substantially

limits" but concluded a new definition would "inexorably lead to greater focus and intensity of attention on the threshold issue of coverage than intended by Congress". (1630.2(j)(1). App.

> Unmistakably,
>
> The term "major" shall not be interpreted strictly to create a demanding standard for disability. 29 C.F.R. 1630.2(h)(2).

And

> Substantially limits is not meant to be a demanding standard. 29 C.F.R. 1630 (j)(i).

But the most important unambiguous instruction is,

> An impairment need not prevent or significantly or severely restrict the individual from performing a life activity in order to be considered substantially limiting. 29 C.F.R. 1630.2(j)(ii).

Naturally, a *work restriction* is a disability under this broadened definition. "Congress did not intend for the threshold question of disability to be used as a means of excluding individuals from coverage." (Legislative history regarding the basis of the American with Disabilities Act, As Amended 2009; House Judiciary Committee Report at 5. 1630, App. Appendix to Part 1630—Interpretive Guidance on Title I of the Americans With Disabilities Act. Link to

an amendment published at 81 FR 31140, May 17, 2016, hereafter App.) Per Congress, "The question of whether an individual has a disability under this part, 'should not demand extensive analysis.'" (ADAAA) section 2(b)(5). 29 C.F.R. 1630.1(c), App. *See also*, House Education and Labor Committee Report at 9 ("The Committee intends that the establishment of coverage under the ADA should not be overly complex nor difficult. * * *"). The legislative history of the ADAAA is replete with references emphasizing this principle. *See* Joint Hoyer-Sensenbrenner Statement at 2 (warning that "the definition of disability should not be unduly used as a tool for excluding individuals from the ADA's protections"); *id*. (this principle "sends a clear signal of our intent that the courts must interpret the definition of disability broadly rather than stringently"); 2008 House Judiciary Committee Report at 5.

Per Congressman Hoyer,

> [W]hat so many courageous people with a disability has shown us all, that a disability is not disabling. It may rob us of a single or maybe even multiple ways that some people do things, but not all things…One of the places we haven't made the progress we wanted to was employment. So many people want to work, want to be self-sufficient, want to be enterprising, want to have the self-respect of earning their own way but have been shut out. And the Supreme Court didn't help us. That's what this bill is about." 154 Cong. Rec. 19437

> (2008)(Statement of Congressman Hoyer).

Here, Mr. Booth was forced to lie about his disability, have it artificially removed so that he too wouldn't be "shut out". This is the essence of discrimination.

With little to no post amendment precedence, the Appellate Court relied on pre-amendment cases that were jettisoned by Congress. Specifically, the reliance on *Ferrari v. Ford Motor Co*., 826 F.3d 885 (6th Cir. 2016) breathes life into *Sutton* and *Toyota* by relying upon cases that can be traced directly back to them and their pre-amendment standards.

II. Congress rejected the demanding standards in *Toyota* thus including work restrictions.

In *Toyota Motor Mfg., Ky. v. Williams*, 534 U.S. 184, 122 S. Ct. 681, 151 L. Ed. 2d 615 (2002), Ms. Williams's physician placed her on permanent work restrictions that precluded her from lifting more than 20 pounds, frequently lifting or carrying objects weighing up to 10 pounds, engaging in constant repetitive flexion or extension of [her] wrists or elbows, performing overhead work, or using vibratory or pneumatic tools. *Toyota,* 534 U.S. 188. The District Court granted Toyota summary judgment because Ms. William's claim that she was substantially limited in performing manual tasks was "irretrievably contradicted by [William's] continual insistence that she could perform certain tasks in assembly [paint] and paint [second] inspection

without difficulty. *Id* at 191.[6] The Appellate Court reversed the District Court's finding on disability because her ailments "prevented her from doing the tasks associated with certain types of manual assembly line jobs, manual product handling jobs and manual building trade jobs (painting, plumbing, roofing, etc.) that require the gripping of tools and repetitive work with hands and arms extended at or above shoulder levels for extended periods of time." *Ibid.*

The Supreme Court overturned the Appellate Court claiming, "repetitive work with hands and arms extended at or above shoulder levels for extended periods of time …is not an important part of most people's daily lives" and therefore not a disability. "The court, therefore, should not have considered respondent's inability to do such manual work in her specialized assembly line job as sufficient proof that she was substantially limited in performing manual tasks." *Id* at 202. The Supreme Court held the terms "substantially" and "major" in the definition of disability "need to be interpreted strictly to create a demanding standard for qualifying as disabled under the ADA", and that to be substantially limited in performing a major life activity under the ADA, "an individual must have an impairment that prevents or severely restricts the individual from doing activities

[6] Compare to amendment where "for example, an individual who is disqualified from his job of choice … should be considered substantially limited in the major life activity of working"; directing the EEOC to rewrite, 'the inability to perform a single particular job is a "substantial enough limitation". 154 Cong. Rec. 19433

that are of central importance to most people's daily lives."

Congress rejected the stringent *Toyota* requirement in the ADAAA.

> "[A]s a result of these Supreme Court decisions, lower courts ruled in numerous cases that individuals with a range of substantially limiting impairments were not individuals with disabilities, and thus not protected by the ADA. After the Court's decisions in *Sutton* that impairments must be considered in their mitigated state and in *Toyota* that there must be a demanding standard for qualifying as disabled, lower courts more often found that an individual's impairment did not constitute a disability. As a result, in too many cases, courts would never reach the question whether discrimination had occurred. " 29 C.F.R. 1630 Introduction , App.

Consequently, Congress amended the ADA with the Americans with Disabilities Act Amendments Act of 2008 with their intent on their sleeve. The express purposes of the ADAAA are, among other things….

> (4) To reject the standards enunciated by the Supreme Court in *Toyota* that the terms "substantially" and "major" in the definition of disability of the ADA, 'need

> to be interpreted strictly to create a demanding standard for qualifying as disabled,' and that to be substantially limited in performing a major life activity under the ADA 'an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives';

And,

> 5) To convey congressional intent that the standard created by the Supreme Court in *Toyota* for "substantially limits," and applied by lower courts in numerous decisions has created an inappropriately high level of limitation necessary to obtain coverage under the ADA:

Following the rejection of the *Toyota* standard, the EEOC repeatedly uses work restrictions as examples of disability under the new law within in the four corners of 29 C.F.R 1630 *et seq*.

> Thus, for example, lifting is a major life activity regardless of whether an individual who claims to be substantially limited in lifting actually performs activities of central importance to daily life that require lifting. Similarly, the Commission anticipates that the major life activity of performing manual tasks (which was at issue in

> Toyota) could have many different manifestations, such as performing tasks involving fine motor coordination, or performing tasks involving grasping, hand strength, or pressure. Such tasks need not constitute activities of central importance to most people's daily lives, nor must an individual show he or she is substantially limited in performing all manual tasks. 29 C.F.R. 1630.2(i), App.

In viewing direct quotations from 29 C.F.R. 1630, the legal standard placed upon Mr. Booth by the Appellate Court contradicts plain statements made within the act. Per the ADAAA;

> "The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual's impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment "substantially limits a major life activity should not demand extensive analysis". 29 C.F.R. 1630.2(j)(iii).

Like Ms. Williams, Mr. Booth's work restrictions limited manual tasks of reaching, overhead work, and neck flexion or extension. Thus, post ADAAA he is disabled.

III. Disability coverage must be made based upon the non-mitigated state of the condition.

The ADAAA commands protection of a disability even if not disabling because of ameliorative affects to include the effects of accommodations. In *Sutton v. United Air Lines*, 527 U.S. 471, 482 119 S. Ct. 2139, 144 L. Ed. 2d 450 (1999) the Supreme Court held, severely myopic individuals were not disabled when corrective lenses allowed them to function identically to people without similar impairment. The Court reasoned, if a person is taking measures to correct or mitigate a physical or mental impairment, the effects of those measures must be considered when judging whether that person is "substantially limited" in a major life activity. Congress rejected this holding:

> To reject the requirement enunciated in *Sutton* and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures.154 Cong. Rec. 19438-19440.

The rational is clear,

> [A]n Individual with an impairment that substantially limits a major life activity should not be penalized when seeking protection under the ADA simply because he or she managed their own adaptive strategies

> or received informal or undocumented accommodations that have the effect of lessening the deleterious impacts on their disability. 154 Cong. Rec 19435 (2008)(Statement by Congressman Stark).

Per the ADAAA §1630.2(j)(6), "[T]he determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures."

Per the EEOC, "[A]n individual who, because of the use of a mitigating measure, has experienced no limitations, or only minor limitations, related to the impairment may still be an individual with a disability where there is evidence that in the absence of the effective mitigating measure the individual's impairment would be substantially limiting."

The Booth Court misapplied this standard because he worked for ten years in assembly, even though said feat was only accomplished with a mitigating factor. (Booth mitigating factor is accommodation; Sutton mitigating factor; vision correction). The Booth Court claims Mr. Booth was not disabled, because he always worked. App. A, pg. A 15.[7] (An argument akin to the Toyota decision that Ms. Williams was not disabled because she qualified for some of the assembly jobs). Per the Booth opinion,

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[7] The Court writes, "To the Contrary, Booth concedes that he has worked without interruption on the assembly line since injuring his neck in 2004—and has continued to work there since this litigation began." (App. A, pg. 15)

> [t]he disability must prohibit a broad range of jobs such as … assembly line jobs. Id. Booth has not made that showing. To the contrary, Booth concedes that the has worked without interruption on the assembly line since injuring his neck in 2004--- and has continued to work since this litigation began. (Appendix A, page 17)

This contradicts the plain fact that Mr. Booth only worked uninterrupted because of a rotation accommodation, just like the Sutton Plaintiff's worked with eye correction. The Court erred, when failing to analyze the disability prior to mitigating effects of accommodation thus accepting *Sutton*. Moreover, the ruling contradicts congressional intent behind the statute. Per Congressman Williams;

> Tony Coelho takes medicine for his epilepsy and so he functions. And if you saw him, you would say he's functioning fine. But if I said, but I won't hire you, Tony, because you have epilepsy, the Court said that was okay. Nobody on this floor believed that was the case. If he was discriminated against because he had a disability, but could do the job, we said that's wrong. The Court did not agree with us [Congress speaking about the High Court, but it applies to the Booth Court quote above as well] and we're now changing that and making sure that our intent will be lived out. We

> never expected that the people with disabilities who work to mitigate their conditions would have their efforts held against them, but the courts did exactly that.[8]

Accommodation is an accepted ameliorating factor. Per the EEOC, "[F]or example, the fact that mitigating measures include 'reasonable accommodations'". Quoting House Judiciary Committee Report at 20; 2008 House Educ. & Labor Rep. at 15.

The ability to perform his job misses the gravamen of Booth's disability complaint; i.e. Nissan wanted to revoke an ongoing, mitigating work accommodation as a condition of continued employment. Per this record, an email from management, states, "Mr. Booth's restrictions preclude him from running ***any rotation in the plant***. (Appendix F, pg. A 40). Nissan's claim that most jobs in the plant require repetitive neck movement. (Appendix G, pg. A 41; "Primarily, the overwhelming majority of jobs in the manufacturing facility simply require frequent neck flexion/extension")

The Court applied a demanding standard on Mr. Booth while also evaluating him with the mitigating standard, both basis for reversal.

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[8] Anthony Lee Coelho ("Tony") served in the United States House of Representatives with epilepsy; was the primary sponsor of the Americans with Disabilities Act; and is a former chairman of the Epilepsy Foundation.

IV. All precedent relied upon by the Appellate Court relies on the incorrect standards outlined in *Sutton* and *Toyota*.

The Booth Court required a demanding standard based upon pre-amendment cases that were jettisoned by Congress. "We have held that simply having a work restriction does not automatically render one disabled, *McKay v. Toyota Motor Mfg., U.S.A., Inc.,* 110 F.3d 369, 373 (6th Cir. 1997), nor does being unable to perform a discrete task or a specific job. Id.; *see also Mahon v. Crowell*, 295 F.3d 585, 591 (6th Cir. 2002)" What the Court "has held" prior to the amendment is without consequence and now without legal support. Said "past holdings" sparked the ADAAA.

The Booth Court relied upon *McKay v. Toyota Motor Mfg., U.S.A., Inc.*, 110 F.3d 369, 373 (6th Cir. 1997). Ms. McKay was denied ADA protection because, "McKay must prove that she is 'significantly' restricted in ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person with comparable training, skills, and abilities." The ADAAA modified the meaning of "significantly restricted". Pre-amendment, Pamela McKay was not ***significantly limited*** under the ADA, just because she was precluded from certain jobs". *McKay* at 371. *Emphasis added.* Now, she would be covered under the ADAAA because now, "An impairment need not prevent **or *significantly*** or severely ***restri***ct the individual from performing a life activity in order to be considered substantially limiting". 29 C.F.R. 1630.2(j)(ii). *Emphasis added.* Per EEOC notes, this expands to

a condition as benign as "hand strength" or "hand pressure" in McKay.(29 C.F.R. 1630.2(i) App.) It follows that Booth's disability from reaching, repetitive neck movement, and working overhead would likewise be protected.

The Booth Court again revives *Sutton* and *Toyota* via a citation to *Mahon v. Crowell*, 295 F.3d 585, 591 (6th Cir. 2002).

The Mahon court relies on Toyota by name:

> "[I]n *Williams* (Referred to as Toyota in the ADAAA) the Supreme Court directly addressed only the question of when a claimant is substantially limited in the major life activity of performing manual tasks, its decision makes clear that any impairment that only moderately or intermittently prevents an individual from performing major life activities is not a substantial limitation under the Act. See 122 S. Ct. at 691. [Toyota]

Specifically, in Mahon, "The Supreme Court emphasized that these terms need to be interpreted strictly to create a ***demanding standard*** for qualifying as disabled." *Mahon* at 590, *citing Toyota,* 122 S. Ct. at 691. *Emphasis added*. Now, "Substantially limits is not meant to be a demanding standard". 29 C.F.R. 1630 (j)(i). Mahon's major life activities of "sitting, standing, bending, stooping, walking, climbing, lifting" bring within the ADAAA.

Per the Legislative history a lifting restriction is protected whether or not lifting is central:

> Thus, for example, lifting is a major life activity regardless of whether an individual who claims to be substantially limited in lifting actually performs activities of central importance to daily life that require lifting. Similarly, the Commission anticipates that the major life activity of performing manual tasks (which was at issue in Toyota) could have many different manifestations, such as performing tasks involving fine motor coordination, or performing tasks involving grasping, hand strength, or pressure. Such tasks need not constitute activities of central importance to most people's daily lives, nor must an individual show he or she is substantially limited in performing all manual tasks. 29 C.F.R. 1630.2(i), App.

Finally, the Booth Appellate Court follows *Ferrari v. Ford Motor Co*., 826 F.3d 885 (6th Cir. 2016) simply because the opinion was entered after the Act. But timing isn't everything and here it means nothing. *Ferrari* continues to rely on pre-ADAAA standards. A direct quote from Ferrari:

> [T]he statutory phrase "substantially limits" takes on special meaning . . . and imposes a ***stringent standard***, requiring proof that the employer

> regarded the employee as significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. *Ferrari* at 893.

There is no legal basis in the ADAAA or Congressional intent to impose a stringent standard ***EVER*** on the definition of disability. Ferrari got there relying on *Sutton* and *Toyota* thereby breathing life into precedent specifically overturned by Statute. *Ferrari* relies upon *Daugherty v. Sajar Plastics, Inc.*, 544 F.3d 696 (Sixth Cir. 2008). *Daugherty* relies upon the rejected *Sutton* standard specifically overturned. *Sutton* is quoted in *Daugherty*, "[S]uch evidence does not suffice to establish a prima facie regarded-as-disabled discrimination claim under the ADA and OCRA that implicates the major life activity of working. *Daugherty* at 706, *citing*, *Sutton*, 527 U.S. at 492." The Booth panel continues the domino effect relying on *Ferrari*, relying on *Daughtry*, relying on *Sutton*. There is no sign this pattern will stop unless the Supreme Court steps in and upholds the intention of Congress. Meanwhile, millions of disabled workers will become a burden on society.

V. The major life activity of "working" is not immune from the new rules of construction.

A. <u>Congress intended a less demanding standard on the "broad range of jobs" requirement cited by the Booth Appellate Court</u>.

Per the Booth Court, one major life activity remained unchanged within the amendment. They state:

> Even so, Congress did not modify the definition of the major life activity of working, and a plaintiff who alleges a work-related disability "is still required to show that her impairment limits her ability to 'perform a class of jobs or broad range of jobs.'" *Tinsley v. Caterpillar Fin. Servs., Corp*., No. 18-5303, 2019 WL 1302189, at *5 (6th Cir. Mar. 20, 2019) (*quoting* 29 C.F.R. § 1630, App. (2016)); *accord Mancini v. City of Providence*, 909 F.3d 32, 42 n.6 (1st Cir. 2018); *Carothers v. County of Cook,* 808 F.3d 1140, 1147 (7th Cir. 2015); *Allen v. SouthCrest* Hosp., 455 F. App'x 827, 835 (10th Cir. 2011).

This position cannot co-exist with the Congressional mandate where, "An impairment need not prevent or significantly or severely restrict the individual from performing a life activity in order to be considered substantially limiting". 29 C.F.R. 1630.2(j)(ii)

Because the reformation was achieved by redefining the meanings, *a broad range of* jobs has been redefined to a be a lesser standard. The ADAAA retained "broad range" just like it retained "substantial" and "major". Based upon this retention, the Booth Court determined there was no change and said major life activity still required a stringent

standard. Here is the catch-22 prohibited by the ADAAA where you can't do the job but are not disabled. Per Congressman Nadler;

> Under the lower standard for qualifying as disabled, for example, an individual who is disqualified from his or her job of choice because of an impairment should be considered substantially limited in the major life activity of working. Previously in providing guidance on what the term "substantially limits" means with respect to the major life activity of working, the EEOC indicated that 'the inability to perform a single particular job" was not a "substantial" (i.e. 'significant" enough limitation. S. 3406 states that interpreting "substantial" to require a "significant limitations sets too high a standard and that we expect the EEOC to redefine this portion of its regulations. Naturally, this change will require reconsideration of the meaning of "substantial" limitation in the major life activity of working as well as other major life activities.

A demanding standard for major life activity is contrary to the whole purpose of the amendment to promote independence and productivity. Thus, there is sufficient evidence that the "working" threshold was adjusted by the rules of construction. The more likely interpretation is that like "substantial",

"major", and "broad range of jobs" standards are all subject to rules of construction.

The Booth Court has no support in the Amendments Act to apply a demanding standard in any element. Any attempt to do so is simply contrary to purpose and spirit of the Amendment. Congress couldn't have been clearer, and the difficulty lies when the Courts remain entrenched in a pre-amendment ideal.

Also troublesome, is a "broad class of jobs" requirement when all failure to promote cases involve one job. The next catch-22 and absurd result is one can be discriminated in a failure to promote but is not sufficiently disabled to qualify for ADAAA protection. One area of the Act cannot require the claimant to identify a specific job for a promotion claim, while the other requires a disability from a broad range of jobs. Booth was denied a promotion because of his work restrictions. The Court denied *disability* protection, because he was not precluded from a "broad class of jobs". If followed, no worker who files a failure to promote claim will be sufficiently "disabled"; *again, an absurd result.*

B. Mr. Booth's major life activity was not "working" but manual tasks thus mooting an analysis of the "broad range of jobs".

Mr. Booth's major life activity was manual tasks. Reaching the major life activity of working is rare post amendment. Per the EEOC,

In most instances, an individual with a disability will be able to establish coverage by showing substantial limitation of a major life activity other than working; impairments that substantially limit a person's ability to work usually substantially limit one or more other major life activities. This will be particularly true in light of the changes made by the ADA Amendments Act. *See, e.g.*, *Corley v. Dep't of Veterans Affairs ex rel Principi*, 218 F. App'x. 727, 738 (10th Cir. 2007) (employee with seizure disorder was not substantially limited in working because he was not foreclosed from jobs involving driving, operating machinery, childcare, military service, and other jobs; ***employee would now be substantially limited in neurological function***); *Olds v. United Parcel Serv., Inc.*,127 F. App'x. 779, 782 (6th Cir. 2005) (employee with bone marrow cancer was not substantially limited in working due to lifting restrictions caused by his cancer; ***employee would now be substantially limited in normal cell growth***); *Williams v. Philadelphia Hous. Auth. Police Dep't*,380 F.3d 751, 763-64 (3d Cir. 2004) (issue of material fact concerning whether police officer's major depression substantially limited him in performing a class of jobs due to restrictions on his ability to carry a firearm; ***officer would now be***

substantially limited in brain function). 29 C.F.R. 1630.2(j), App.

Mr. Booth was permanently restricted from certain manual tasks. 29 C.F.R. 1630.1 covers any physiological condition. In this case the condition is a neck injury that resulted in a bulging disk and sequalae. The statute identifies examples of major life activities to include "performing manual tasks" and "reaching", but these examples are not an all-encompassing list. 29 C.F.R. 1630.2(i)(i), App. Mr. Booth was medically and permanently restricted from repetitive movements of his neck, working at shoulder level, i.e. reaching, and overhead work, i.e. reaching. These are his major life activities that bring him under the Statute. Now, Mr. Booth turns to the third mistake in the "major life activity" analysis.

C. Even if the major life activity of working a broad class of jobs is required, this record contains ample evidence for a reasonable juror to find in Booth's favor.

As an aside from statutory construction, even if the major life activity was a disability from "working", Mr. Booth proved an impairment from a broad range of jobs. Remembering this matter was dismissed at the summary judgment stage, this record does suggest any reasonable juror would reject could find a broad class of assembly jobs requirement. The email, stating Mr. Booth's restrictions preclude him from running any rotation in the plant should suffice. (App. F, pg. A 40). Nissan's letter to the EEOC claims he was prevented from most of the jobs because they require repetitive neck movement, should

suffice. (App. G, pg. A 41 where, "Primarily, the overwhelming majority of jobs in the manufacturing facility simply require frequent neck flexion/extension").

Conclusion

Mr. Booth requests the Supreme Court issue a writ of certiorari to the Appellate Court to address the definition of disability under the Americans with Disability Act, Amendment Act of 2008

Respectfully submitted

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Constance Mann
The Law Offices of Constance Mann
1107 Battlewood Street
Franklin, TN 37069
(615) 724-1800
cmannlaw@msn.com
Attorney for Petitioner

APPENDIX TABLE OF CONTENTS

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)
File Name: 19a0119p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL ADAM BOOTH, Plaintiff-Appellant	)
v.	)
NISSAN NORTH AMERICA INC., Defendant-Appellee.	)

Appeal from the United States District Court for the Middle District of Tennessee at Nashville.
No. 3:17-cv-00755—William Lynn Campbell, Jr., District Judge.

Argued: April 30, 2019

Decided and Filed: June 7, 2019

Before: GUY, SUTTON, and NALBANDIAN, Circuit Judges.

COUNSEL

ARGUED: Constance Mann, THE LAW OFFICES OF CONSTANCE MANN, Franklin, Tennessee, for Appellant. Stanley E. Graham, WALLER LANSDEN DORTCH & DAVIS, LLP, Nashville, Tennessee, for Appellee. ON BRIEF: Constance Mann, THE LAW OFFICES OF CONSTANCE MANN, Franklin, Tennessee, for Appellant. Stanley E. Graham, Brittany Stancombe Hopper, WALLER LANSDEN DORTCH & DAVIS, LLP, Nashville, Tennessee, for Appellee.

OPINION

NALBANDIAN, Circuit Judge. After Michael Booth started working at a Nissan factory in Tennessee, he injured his neck and sought medical treatment. Booth's physician recommended several work restrictions, including that he not reach above his head or flex his neck too much, but the restrictions did not sideline Booth. Indeed, he continued to work on the assembly line for about a decade without incident. But in 2015, the work restrictions became relevant again. Booth requested a transfer to a different position in the factory, which Nissan denied because that position's duties conflicted with Booth's work restrictions. Booth contends that Nissan's denial was disability discrimination that violated the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 et seq.

Soon after Booth requested the transfer, Nissan announced plans to restructure the assembly line. While Booth and his co-workers on the line had performed two discrete jobs, Nissan wanted to modify the line so that workers would perform four jobs. Booth alleges that the two additional jobs Nissan assigned to him would have violated his work restrictions—and that when he informed Nissan about this conflict, Nissan told him to see a physician to assess whether he still needed the restrictions. Booth followed that request, and his physician modified the restrictions, clearing him to work all four jobs. Although Booth remains a

Nissan employee, he claims that Nissan failed to accommodate him—a separate violation of the ADA—by pressuring him to remove his work restrictions.

Of course, to sue under the ADA, the plaintiff must be disabled. And just because a plaintiff has work restrictions does not mean that he is disabled. Because Booth has not advanced evidence that he is disabled under the ADA (among other reasons), his claims fail. We AFFIRM the district court's decision granting summary judgment to Nissan.

I.

After Booth had begun working at Nissan, he injured his neck in October 2004. Booth visited his physician, who issued a report recommending several permanent work restrictions, including that (1) Booth work overhead or above his shoulders no more than 33% of the time; and (2) Booth flex or extend his neck no more than 66% of the time. Those restrictions did not affect Booth's day-to-day job duties: Booth explained that "[f]rom 2004 through 2015, [he]worked within his original 2005 restrictions." (R. 32, Pl.'s Resp. to Statement of Material Facts t ¶ 9.)

In April 2014, Nissan transferred Booth to a different part of the assembly line, the "door line," but Booth's work restrictions did not interfere with his work there, either.

This appeal concerns two events that occurred about a decade after Booth's physician recommended the work restrictions: (1) Booth's requested transfer to a material handling position; and (2) Booth's transition on the door line from a two-job position to a four-job position. We consider each event below.

Material Handling Transfer. Sometime in September or October 2015, Booth requested a transfer to a material handling position. If Nissan had granted the transfer, Booth would not have seen any changes to his pay or benefits. But Booth alleges that the material handling position was less stressful and thus more desirable than his position on the line. Nissan refers internally to the material handling role as a "preferred" position that it awards to applicants based on seniority and their ability to perform the position's essential functions.

Nissan denied Booth's transfer request. In November 2015, Nissan human resources representative Darron Keith informed Booth that although he had enough seniority to apply for the material handling position, his work restrictions conflicted with the position's requirements. Booth, however, insisted that he could perform the role without violating his restrictions, and asked to speak about Nissan's decision with other supervisors. The next month, Booth met with Debbie Nelson, a manager in Nissan's medical department, to discuss why Nissan had denied his transfer request. Once again, Booth heard that his work restrictions conflicted with the duties of the material handling

role. Not satisfied with that explanation, Booth continued to pursue the matter with his supervisors; in October 2016, Booth met with Randy Knight, a Nissan senior manager, to discuss why Nissan denied his transfer application. Knight promised to get back to Booth, but in the interim, Booth remained in his position on the line.

Door Line Transition. When Booth arrived at the door line in 2014, workers there had to perform two discrete jobs. For Booth, that meant installing the right-side water shield and the left-side regulator. But around the time Booth requested the transfer, Nissan announced plans to overhaul its assembly lines, including the door line. Rather than perform two discrete installation jobs, door line workers would have to install four components of a car. In Booth's case, Nissan wanted him to start installing the left-side door glass and left-side door panel along with the two jobs he was already performing. When Booth met with Darron Keith in November 2015 to discuss the material handling position, he told Keith that the two new installation jobs Nissan wanted him to perform would violate his work restrictions and again requested to transfer to the material handling position, which Booth described as "an easier and simpler job." (R. 25–2, Booth Dep. at 36:7–13.)

In September 2016, Nissan started implementing the announced changes to its assembly lines. So once more, Booth warned Nissan management—including his direct supervisor Randy Wiseman—that his work restrictions might prevent him from performing all four jobs on the

door line. In response, Nissan inquired with its insurer whether Booth could perform any of the jobs on the door line. Nissan soon learned that no such jobs existed, so Nissan kept Booth in his two-job position for the time being.

Later that fall, Nissan supervisors began to express concern that Booth's restrictions would interfere with his ability to remain on the door line—even in his two-job position. According to Booth, Randy Knight suggested that the two jobs Booth was already performing— installing the right-side rear water shield and the left-side regulator—conflicted with his work restrictions. Later, Knight warned Booth that Nissan was "not going to have a job for [him]" unless he changed the work restrictions. (R. 31–6, Booth Dep. at 98:20–25.) To prevent that from happening, several Nissan employees—including Knight and Wiseman—encouraged Booth to see a physician to determine whether his restrictions were still medically necessary. Email correspondence between Nissan supervisors reflects the same concern. In November 2016, Nissan senior manager Mark LaCroix emailed a colleague to explain that Booth's restrictions do not "clea[r] him to run any jobs in the plant" and that Nissan advised Booth "of the steps he would need to take in order to possibly improve his current standings in regards to his restrictions." (R. 31–5, Email.) LaCroix followed up on his email in January 2017, noting that Nissan "continued to let [Booth] work in his current pod, but we can't continue to do that if he doesn't get his Perm Restrictions modified to clear him for duty." (Id.) And Nissan human resources manager Bill Slagle

responded that while Booth had scheduled several medical appointments to reevaluate his restrictions, he "needs to be refreshed on the urgency and need for the medical clinic to assess the findings of the doctor and make a determination regarding his current restrictions." (Id.)

Booth ultimately met with a physician, who performed a functional capacity test and issued a report modifying Booth's work restrictions. Under Booth's 2005 work restrictions, he could not flex his neck more than 66% of the time, but the physician removed that restriction entirely. The physician maintained the restrictions that limited Booth's overhead activity and reaching to no more than 33% of the time. But while Booth's 2005 restrictions applied to both his right and left side, the physician limited the restrictions only to activity on Booth's left side. Booth testified that he has no disagreement with his physician's revisions to his work restrictions.

After Booth informed his supervisors about the revised work restrictions, Nissan determined that he could work the full, four-job position without violating his work restrictions. In February 2017, Nissan cleared Booth to work on the assembly line, and Booth's counsel stated at oral argument that Booth continues to work there.

This litigation dates to November 2016, when Booth filed an intake questionnaire with the Equal Employment Opportunity Commission in which he alleged disability discrimination. Booth then filed a formal charge with the Tennessee

Human Rights Commission in December 2016, alleging disability discrimination and retaliation. The EEOC dismissed Booth's charge after concluding that Booth had not supplied sufficient information to establish an ADA violation. So, Booth filed this lawsuit in the Middle District of Tennessee, alleging failure-to- accommodate and disability discrimination, both in violation of the ADA, and a state law workers' compensation retaliation claim. Nissan moved for summary judgment, which the district court granted. Booth appeals the district court's dismissal of his ADA claims.[1]

Booth did not appeal the district court's dismissal of his workers' compensation retaliation claim so we do not address that issue.

II.

We review a district court's summary judgment decision de novo. *Auburn Sales, Inc. v. Cypros Trading & Shipping, Inc.*, 898 F.3d 710, 715 (6th Cir. 2018). In doing so, we must view the evidence and draw all inferences in the light most favorable to Booth, the nonmoving party, to determine whether there is a genuine issue of material fact. *Henschel v. Clare Cty. Rd.* Comm'n, 737 F.3d 1017, 1022 (6th Cir. 2013). If there is, summary judgment is improper. Id.

A.

[1] Booth did not appeal the district court's dismissal of his workers' compensation retaliation claim so we do not address that issue.

Booth's first claim is that Nissan engaged in disability discrimination when it denied his requested transfer to the material handling role. But before we can consider the merits of that claim, we first address Nissan's argument that the claim is untimely. Booth's claim arises under the ADA, which imposes several procedural requirements before plaintiffs may turn to federal court for relief. *Bullington v. Bedford Cty.*, 905 F.3d 467, 469 (6th Cir. 2018). One such requirement relates to timeliness: the plaintiff must first file a charge describing the alleged discrimination, either with the EEOC or with an equivalent state agency, before he can litigate the claim in court. *Cox v. City of Memphis*, 230 F.3d 199, 202 n.2 (6th Cir. 2000). If the plaintiff files his charge directly with the EEOC, he must do so within 180 days of the alleged discrimination; if he chooses instead to file the charge with an equivalent state agency, he has 300 days from the alleged discrimination. See 42 U.S.C. § 12117; 42 U.S.C. § 2000e-5; *Block v. Meharry Med. Coll.*, 723 F. App'x 273, 277 (6th Cir. 2018).

Booth filed his charge with the Tennessee Human Rights Commission on December 9, 2016, so for his claim to be timely, the alleged discrimination must have occurred sometime within 300 days of December 9, 2016. Thus, our task is to determine when the alleged discrimination occurred. According to Nissan, the 300-day deadline for Booth to file his charge began sometime in November 2015, when Nissan supervisor Darron Keith informed Booth that Nissan had rejected his transfer request. If Nissan is correct, then Booth's

claim is untimely even if Keith told Booth about the decision on November 30, 2015, Booth still waited more than 300 days before filing his charge. Booth, however, argues that Nissan did not make a final decision about his transfer request until sometime in October or November 2016—and that his charge is therefore timely.

We find Nissan's argument persuasive. Booth has advanced no evidence to suggest that Nissan's denial of his transfer request in November 2015 was anything but a final decision. rue, Booth requested to speak with other supervisors after learning that Nissan had denied his transfer, and Nissan granted that request. But Nissan's decision was no less final, simply because Nissan supervisors explained the company's decision to Booth several times in 2015 and 2016. Those discussions did not reset the 300-day deadline to file the charge.

We considered a similar issue in *Hall v. The Scotts Co.*, in which the plaintiff sued his employer under the ADA after his employer refused to purchase special respirator equipment that would have allowed him to operate a forklift. 211 F. App'x 361 (6th Cir. 2006). The employer announced its decision to not purchase the equipment in August 2003, citing safety concerns. Id. at 362. In November, the plaintiff offered to purchase the equipment himself if it meant that he could operate the forklift, but the employer declined that offer in December. Id.

The plaintiff then filed a charge in October 2004 and later filed a complaint in federal court. We held that the claim was untimely because the allegedly discriminatory act occurred in August 2003, when the employer first denied the plaintiff's requested accommodation, and we described the plaintiff's later request as "simply an impotent attempt to renew his earlier request" rather than the "culmination of an interactive process to accommodate his disability." Id. at 363 (internal quotation marks omitted). Our reasoning in Hall applies with equal force here. Booth had 300 days to file a charge from November 2015, when Keith informed him that Nissan denied his transfer request. Even if we assume that Keith notified Booth on the last day of November, Booth's charge would still be late. Thus, Booth cannot pursue his disability discrimination claim in federal court.

If Booth had satisfied the ADA's procedural requirements, his disability discrimination claim would still fail because Booth has not supplied evidence to suggest that he is disabled.

The ADA forbids employers from discriminating "against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). So, to establish a prima facie claim for disability discrimination, the plaintiff must show that:

1) he or she is disabled; 2) otherwise qualified for the position, with or without

reasonable accommodation; 3) suffered an adverse employment decision; 4) the employer knew or had reason to know of the plaintiff's disability, and 5) the position remained open while the employer sought other applicants or the disabled individual was replaced. *Whitfield v. Tennessee*, 639 F.3d 253, 259 (6th Cir. 2011) (internal quotation marks and citations omitted; emphasis added). And to prove that he is disabled, Booth must show that he has (1) "a physical or mental impairment that substantially limits one or more major life activities," (2) "a record of such an impairment," or (3) "[is] regarded as having such an impairment[.]" 42 U.S.C. § 12102(1); *see also*, *Talley v. Family Dollar Stores of Ohio,* Inc., 542 F.3d 1099, 1105 (6th Cir. 2008). Finally, "working" is an example of a major life activity. 42 U.S.C. § 12102(2)(A).

Booth seems to assume that because he has work restrictions and because Nissan denied his transfer request because of those restrictions, he is disabled under the ADA. And he states that Nissan "do[es] not dispute [his] disability or need for accommodation." (Appellant Br. 13.)In fact, the record suggests that Nissan has vigorously disputed the issue: Nissan argued in its summary judgment motion before the district court that Booth is not disabled under the ADA, and Nissan raised that argument again in its brief to this court.[2]

[2] The district court did not address Nissan's argument that Booth is not disabled and instead dismissed Booth's claims on other grounds.

Indeed, Nissan argues that Booth is not disabled under the ADA and that his disability discrimination claim therefore fails.

Several of our published decisions support Nissan's position. We have held that simply having a work restriction does not automatically render one disabled, *McKay v. Toyota Motor Mfg., U.S.A., Inc.,* 110 F.3d 369, 373 (6th Cir. 1997), nor does being unable to perform a discrete task or a specific job. Id.; *see also Mahon v. Crowell*, 295 F.3d 585, 591 (6th Cir. 2002). But as Booth's counsel noted at oral argument, those cases predate Congress's 2008 amendments to the ADA, which reflected a direct response to the Supreme Court's "narrow interpretation of what constitutes a disability." *Robbins v. Saturn Corp.*, 532 F. App'x 623, 628 (6th Cir. 2013). In amending the statute, Congress instructed courts that the "definition of disability . . . shall be construed in favor of broad coverage of individuals," 42 U.S.C. § 12102(4)(A), and the statute now underscores that an impairment that "substantially limits one major life activity need not limit other major life activities in order to be considered a disability." Id. § 12102(4)(C). Even so, Congress did not modify the definition of the major life activity of working, and a plaintiff who alleges a work-related disability "is still required to show that her impairment limits her ability to 'perform a class of jobs or broad range of jobs.'" *Tinsley v. Caterpillar Fin. Servs., Corp., No.* 18-5303, 2019 WL 1302189, at *5 (6th Cir. Mar. 20, 2019) (*quoting* 29 C.F.R. § 1630, App. (2016)); *accord Mancini v. City of Providence,* 909 F.3d 32, 42 n.6 (1st Cir. 2018); *Carothers v. County of Cook*, 808 F.3d 1140, 1147 (7th Cir. 2015); *Allen v.*

SouthCrest Hosp., 455 F. App'x 827, 835 (10th Cir. 2011). EEOC regulations explain that a plaintiff cannot claim a disability by simply "[d]emonstrating a substantial limitation in performing the unique aspects of a single specific job." 29 C.F.R. § 1630, App. (2016). That Booth's neck injury and related work restrictions kept him from working in the material handling role does not resolve whether Booth is disabled under the ADA. Rather than point to one job that he cannot perform, a plaintiff alleging a work-related disability must show that his condition precludes him from working in a class or broad range of jobs, "such as . . . assembly line jobs." Id. Booth has not made that showing. To the contrary, Booth concedes that he has worked without interruption on the assembly line since injuring his neck in 2004—and has continued to work there since this litigation began.

Moreover, Booth does not argue that Nissan denied his transfer request because it regarded him as disabled. Nor could he. Under the ADA, an employee: meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this chapter 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). In other words, a plaintiff may seek relief under the ADA if his employer mistakenly believes that he is substantially limited from performing a major life activity, such as work. *Ferrari v. Ford Motor Co.*, 826 F.3d 885, 893 (6th Cir. 2016). In *Ferrari*, a

decision following Congress's 2008 amendments to the ADA, we considered whether the plaintiff's employer regarded him as disabled. Id. at 892–93. The plaintiff in that case worked on a Ford assembly line and became eligible for a transfer to a skilled trade apprenticeship, provided he passed a medical examination to ensure that he could perform the role. Id. at 889. That proved to be a problem: the plaintiff had injured his neck and treated the injury with prescription opioids, yet the apprenticeship would have required him to work regularly overhead and climb 50-foot ladders. Id. Ford concluded that the plaintiff's opioid use precluded him from holding the apprenticeship position and placed him instead in a machining position that met his restrictions. Id. at 890–91. We rejected the plaintiff's argument that Ford regarded him as disabled, noting that Ford had placed the plaintiff in "both clerical and assembly positions" and that Ford had "only barred [the plaintiff] from a single, particular job—the [ ]apprenticeship." Id. at 893. Thus, we concluded that the evidence did not show that Ford regarded the plaintiff's restrictions "as a substantial impairment on the major life activity of working." Id. at 894. For these same reasons, Booth has not shown that Nissan regarded him as disabled when it denied his transfer request (while employing him on the assembly line all along).

At summary judgment, we must draw all inferences and view all evidence in the light most favorable to Booth, the nonmoving party. *Henschel,* 737 F.3d at 1022. But if the moving party shows the lack of a genuine issue of material fact on an element of the nonmoving party's case, the nonmoving party

must set forth specific facts showing a triable issue. *Hedrick v. Western Reserve Care Sys.*, 355 F.3d 444, 451–52 (6th Cir. 2004). Because Booth has advanced no evidence of his disability beyond his work restrictions, he cannot show that he is disabled and has therefore failed to carry his burden at summary judgment. We affirm the district court's grant of summary judgment on that claim.

B.

Booth brings a separate claim under the ADA, alleging that Nissan failed to accommodate his disability after it modified its assembly lines. The thrust of Booth's argument is that Nissan pressured him to remove his work restrictions—and, indeed, warned that there would be no jobs for him at the factory—rather than accommodate his limitations.

Unlike his disability discrimination claim, Booth's failure-to-accommodate claim is timely because the alleged conduct underlying this claim continued even after Booth filed his charge with the Tennessee Human Rights Commission. Thus, we consider the merits of Booth's claim. Generally, there are two ways to prove disability discrimination—either directly or indirectly. *Hostettler v. College of Wooster*, 895 F.3d 844, 852 (6th Cir. 2018) (*citing Ferrari*, 826 F.3d at 891). The type of evidence (direct or indirect) that the plaintiff must provide—and the test that governs the plaintiff's claim—depends on the nature of the claim. Here, failure-to- accommodate claims "necessarily involve direct evidence (the failure to accommodate) of discrimination." *Kleiber v. Honda of*

Am. Mfg., Inc., 485 F.3d 862, 869 (6th Cir. 2007) (*citing Bultemeyer v. Fort Wayne Cmty. Sch.,* 100 F.3d 1281, 1283 (7th Cir. 1996)); *see also* E.*E.O.C. v. Dolgencorp, LLC*, 899 F.3d 428, 435 (6th Cir. 2018) ("And failing to provide a protected employee a reasonable accommodation constitutes direct evidence of discrimination.") So, to bring a claim for failure-to-accommodate, the plaintiff must provide direct evidence that he suffered an adverse employment action because of his disability. *Ferrari,* 826 F.3d at 891.

Under the direct method of proof, the plaintiff must prove that (1) he is disabled under the ADA; and (2) he is otherwise qualified for the position, despite his disability, "(a) without accommodation from the employer; (b) with an alleged 'essential' job requirement eliminated; or (c) with a proposed reasonable accommodation." *Ferrari*, 826 F.3d at 891 (citation omitted). If the plaintiff proves those elements, his employer must then show that "a challenged job criterion is essential . . . or that a proposed accommodation will impose an undue hardship." Id. (citation omitted).

Like his disability discrimination claim, Booth's failure-to-accommodate claim fails out of the gate because he has not advanced an argument, supported by evidence, that he is disabled under the ADA.[3]

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[3] We note that this issue would have been closer, had Booth argued that Nissan regarded him as disabled when it warned Booth that he would be jobless unless he changed his work restrictions. But Booth does not make this argument in his

But even setting the disability element aside, Booth's failure-to-accommodate claim fails for a separate reason: Nissan never failed to accommodate Booth. Nissan allowed Booth to remain in the two-job position after he alerted his supervisors that the two new tasks Nissan wanted him to perform conflicted with his work restrictions. And Booth remained in that role while he sought medical advice about his work restrictions. Nissan did not move Booth from the two-job position until it reviewed his doctor's report and determined that his work restrictions did not conflict with the modified positions on the assembly line. Nor does Booth suggest that he misreported his symptoms or otherwise encouraged his doctor to modify the restrictions in order to preserve his job. To the contrary, Booth testified that he does not disagree with his doctor's revisions to his work restrictions. So, Booth's claim also fails because he has offered no evidence that Nissan failed to accommodate him.

III.

For these reasons, we AFFIRM the district court's summary judgment decision.

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brief, and in any event, his failure-to-accommodate claim fails for separate reasons.

No. 18-5985

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL ADAM BOOTH, Plaintiff-Appellant,	)	
v.	)	Order
NISSAN NORTH AMERICA, INC., Defendant-Appellee.	)	

Before: GUY, SUTTON, and NALBANDIAN, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Middle District of Tennessee at Nashville.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the district court's grant of summary judgment to Nissan North America, Inc. is AFFIRMED.

Entered by Order of the Court,

S/Deborah H. Hunt
Deborah H. Hunt, Clerk

No. 18-5985

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL ADAM BOOTH, Plaintiff-Appellant,	)	
v.	)	Order
NISSAN NORTH AMERICA, INC., Defendant-Appellee.	)	

BEFORE: GUY, SUTTON, and NALBANDIAN, Circuit Judges.

The court received a petition for rehearing *en banc*. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

Entered by Order of the Court

S/Deborah H. Hunt
Deborah H. Hunt, Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

MICHAEL ADAM BOOTH, Plaintiff,	)	
	)	No:3:17-cv-0755
v.	)	
	)	JUDGE CAMPBELL
NISSAN NORTH AMERICA, INC., Defendant.	)	MAGISTRATE FRENSLEY

MEMORANDUM

I. Introduction

Pending before the Court is Defendant's Motion for Summary Judgment (Doc. No. 25). For the reasons set forth below, Defendant's Motion for Summary Judgment (Doc. No. 25) is GRANTED, and this action is DISMISSED.

II. Factual and Procedural Background

Plaintiff Michael Adam Booth, an employee of Defendant Nissan North America, Inc. ("Nissan"), has brought this action asserting claims for violations of the Americans With Disabilities Act, 42 U.S.C. §§ 12101, et seq. ("ADA"), and for workers' compensation retaliation under state law. (Doc No. 1). Plaintiff injured his neck at work in 2004, resulting in work restrictions Plaintiff acknowledges were accommodated by Nissan until the events giving rise to this lawsuit. (Id. ¶ 12; Plaintiff's Response to Statement of Material Facts in Support of Defendant's Motion for Summary Judgment ¶¶ 8, 9

(Doc. No. 32) (hereinafter "Plaintiff's Response to Facts")).

In 2014, Plaintiff transferred to a "zone" on the "Door Line," a part of Nissan's vehicle- production process. (Id. ¶ 3). In September or October, 2015, Plaintiff requested a transfer to a vacant position in "Material Handling." (Id. ¶¶ 10-13; Plaintiff's Deposition, at 16-17, 34 (Doc. Case 3:17-cv-00755 Document 40 Filed 08/17/18 Page 1 of 12 Page ID #: 746o. 25-1)). Defendant denied the request in November, 2015, advising Plaintiff the new job was beyond his work restrictions. (Id.).

In September, 2016, Randy Wiseman became the supervisor of the Door Line and began implementing Nissan's transition of the zone where Plaintiff worked from a two-job rotation to a four-job rotation. (Declaration of Randy Wiseman, ¶¶ 2-3 (Doc. No. 28)). When he was told Defendant would be implementing a four-job rotation for his zone, Plaintiff became concerned that the two new jobs Defendant intended to add would be outside his work restrictions. (Plaintiff's Deposition, at 34-35, 136; Plaintiff's Response to Facts ¶ 14). Given Plaintiff's concern, Defendant asked its third-party medical provider, Progressive Health, to analyze the functions of the jobs on the Door Line to see if any four-job rotations would be compatible with Plaintiff's original 2005 work restrictions. (Plaintiff's Response to Facts ¶¶ 17-19). In a September, 2016 report, Progressive Health concluded there were no four-job rotations on the Door Line compatible with Plaintiff's original 2005 restrictions. (Id.; Doc. No. 28-1).

Given the results of the report, Plaintiff's supervisors requested that Plaintiff have a physician determine whether the restrictions imposed 10 years earlier remained applicable. (Plaintiff's Deposition, at 57-58, 99-101). For approximately three-to-four months in late 2016 to early 2017, Plaintiff's supervisors asked him

at various times about the status of his restrictions and whether they had been reviewed by a physician. (Id., at 98, 201-02, 203, 212-15, 220-21, 288). According to Plaintiff, his supervisors repeatedly pressured him to arrange for the removal of his work restrictions in order to keep his job, and this pressure amounted to harassment. (Id., at 125-26). Plaintiff contends the harassment was triggered by his earlier request to transfer to Material Handling, which, according to Plaintiff, would have "bumped out" relatives of Nissan's "managers and HR people." (Id., at 231-24, 245, 313). In January 2017, Plaintiff's physician revised his work restrictions and approved him for a full four-job rotation. (Id., at 136-37; Doc. No. 25-4, at 11; Doc. No. 31-5, at 4). Plaintiff continues to work within his restrictions, currently performing a three-job rotation on the Door Line. (Plaintiff's Response to Facts ¶¶ 1, 2, 25-26; Plaintiff's Deposition, at 128-29, 137).

III. Analysis

A. The Standards Governing Motions For Summary Judgment

Summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The Supreme Court has construed Rule 56 to "mandate[] the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

In considering a motion for summary judgment, a court must draw all reasonable inferences in favor of the nonmoving party. See, e.g., *Matsushita Elec. Indus.*

Co., Ltd. v. Zenith Radio Corp.,475 U.S. 574, 587-88, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Shreve v. Franklin County, Ohio*, 743 F.3d 126, 132 (6th Cir. 2014). The court does not, however, make credibility determinations, weigh the evidence, or determine the truth of the matter. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

In order to defeat the motion, the nonmoving party must provide evidence, beyond the pleadings, upon which a reasonable jury could return a verdict in its favor. *Celotex Corp.*, 477 U.S. at 324; Shreve, 743 F.3d at 132. Ultimately, the court is to determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson,* 477 U.S. at 251-52.

B. Denial of Transfer to Material Handling

Plaintiff claims Defendant violated the ADA when it denied his request to transfer from the Door Line to a job in Material Handling. The ADA prohibits discrimination against "a qualified individual on the basis of disability" with regard to hiring, compensation, discharge, and other terms, conditions, and privileges of employment. 42 U.S.C. § 12112(a). A "qualified individual" is "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). In order to establish a prima facie case of discrimination under the ADA, a plaintiff must show: (1) he is disabled; (2) he is otherwise qualified to perform the essential functions of a position, with or without accommodation; and (3) he suffered an adverse employment action because of his disability. *Demyanovich v. Cadon Plating & Coatings, L.L.C.*, 747 F.3d 419, 433 (6th Cir. 2014); *Perry v.*

American Red Cross Blood Services, 651 Fed. Appx. 317 (6th Cir. 2016).

Defendant argues Plaintiff cannot establish the first and third elements. Regarding the fourth element, Defendant argues denial of Plaintiff's request for the Material Handling job did not constitute an "adverse employment action" because transfer to that job would have been a lateral transfer rather than a promotion. An "adverse employment action" is one that results in "a materially adverse change in the terms and conditions of [a plaintiff's] employment." *Spees v. James Marine, Inc.,* 617 F.3d 380, 391 (6th Cir. 2010). Adverse employment actions "are typically marked by a 'significant change in employment status,' including 'hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing significant change in benefits.'" Id. With regard to denial of requests to transfer, a plaintiff generally must show the transfer he was denied involved a change in wages or salary, a less distinguished title, a material loss of benefits, or significantly diminished material responsibilities. *Momah v. Dominguez*, 230 Fed. Appx. 114, 123 (6th Cir. 2007). "[A] purely lateral transfer or denial of the same, which by definition results in no decrease in title, pay or benefits, is not an adverse employment for discrimination purposes." Id. The plaintiff's "'subjective impressions as to the desirability of one position over another are not relevant' in determining whether the employee suffered an adverse employment action." Id. (quoting *Policastro v. Northwest Airlines, Inc.*, 297 F.3d 535, 539 (6th Cir. 2002)).

Plaintiff admits the Material Handling job had the same rate of pay, but argues it was not a lateral transfer because: (1) job openings in Material Handling are rare and require a level of seniority; and (2) Material Handling jobs, in Plaintiff's opinion, involve less stress

on one's body. (Plaintiff's Response to Facts ¶ 10). The scarcity of job openings, and Plaintiff's subjective impressions about the desirability of the job, however, are insufficient to show a transfer from the Door Line to Material Handling was other than a purely lateral transfer. Plaintiff has not alleged or presented any evidence indicating the Material Handling job involved a change in pay or benefits, or other change usually associated with a promotion.[1] Therefore, Plaintiff has failed to make a showing sufficient to withstand summary judgment as to this essential elemenlaim.[2] Accordingly, Defendant is entitled to summary judgment on Plaintiff's failure to promote claim.

Plaintiff also appears to argue Nissan failed to "accommodate" his disability through a transfer to the Material Handling job. Discrimination, under the ADA, includes the failure to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . . unless . . . the accommodation would impose an undue hardship on the operation of the business of the covered entity." 42 U.S.C. § 12112(b)(5)(A). A "reasonable accommodation" includes "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices . . . [or]other

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[1] Plaintiff cites *Deleon v. Kalamazoo County Road Com'n,* 739 F.3d 914, 919 (6th Cir. 2014)for the proposition that a plaintiff may show a transfer constitutes an "adverse employment action" even in the absence of a demotion or pay decrease if the particular circumstances of the new job rise to some level of "objective intolerability." This proposition does not support Plaintiff's claim, however, because he has not suggested his position on the Door Line was objectively intolerable.

[2] Consequently, the Court need not consider whether Plaintiff meets the first element.

similar accommodations for individuals with disabilities." 42 U.S.C. § 12111(9).

The plaintiff bears the initial burden of proposing an accommodation and showing it is objectively reasonable. *Talley v. Family Dollar Stores of Ohio, Inc.*, 542 F.3d 1099, 1108 (6th Cir. 2008). The employer then bears the burden of persuasion to show the accommodation would impose an undue hardship. Id. An employee "cannot force her employer to provide a specific accommodation if the employer offers another reasonable accommodation." Id. If an employee rejects a reasonable accommodation, "the individual is no longer a 'qualified individual with a disability.'" Id.

Plaintiff admits the position he held at the time he requested transfer was a reasonable accommodation of his work restrictions by Nissan. (Plaintiff's Response to Facts, at ¶ 9;Complaint, at ¶ 12 (Doc. No. 1)). Therefore, Plaintiff cannot show Defendant failed to reasonably accommodate his disability. As the Sixth Circuit has explained, Plaintiff cannot insist on a specific accommodation – a job in Material Handling – when his current job is itself a reasonable accommodation of his disability. *See, e.g., Hedrick v. W. Reserve Care Sys.*, 355 F.3d 444, 457 (6th Cir. 2004) (". . . an employee cannot make his employer provide a specific accommodation if another reasonable accommodation is instead provided."); *Bush v. Compass Grp. USA,* Inc., 683 Fed. Appx. 440, 450 (6th Cir. 2017). Thus, Defendant is entitled to summary judgment on Plaintiff's failure to accommodate claim.

C. Reevaluation of Job Duties

Plaintiff alleges that, for several months, Nissan engaged in a campaign of harassment, creating a hostile work environment, by pressuring him to eliminate his work restrictions in order to keep his job. To establish a

claim of hostile work environment based on disability, a plaintiff must demonstrate: (1) he was disabled; (2) he was subject to unwelcome harassment; (3) the harassment was based on his disability; (4) the harassment unreasonably interfered with his work performance; and (5) the defendant either knew or should have known about the harassment and failed to take corrective measures. *Trepka v. Bd. of Educ.,* 28 Fed. Appx. 455, 461 (6th Cir. 2002). To establish a hostile work environment, the plaintiff "must show conduct that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and [to]create an abusive working environment.'" Id. (quoting *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21, 114 S. Ct. 367, 126 L.Ed.2d 295 (1993)). "The standard has both an objective and a subjective component: the environment must be one 'that a reasonable person would find hostile or abusive,' and the plaintiff must 'subjectively perceive the environment to be abusive.'" *Goller v. Ohio Dep't of Rehab. & Correction*, 285 Fed. Appx. 250, 259 (6th Cir. 2008) (quoting *Harris*, 510 U.S. at 21–22)). Conduct that is "merely offensive" will not suffice to support a hostile work environment claim. Id.

Defendant argues it did not "harass" Plaintiff by requesting he update his 2005 work restrictions to determine whether he could continue performing his current job, which was transitioning from a two-job rotation to a four-job rotation. In that regard, the ADA permits an employer to "make inquiries into the ability of an employee to perform job-related functions." 42 U.S.C. § 12112(d)(4)(B); see also 42 U.S.C. § 12112(d)(4)(A) (an employer "shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity."); *Templeton v. Neodata Services, Inc.*, 162 F.3d 617, 619 (10th Cir. 1998)

(employer's request for updated medical information was reasonable in light of doctor's earlier letter questioning employee's ability to return to work). Indeed, an employer is required to engage in an "interactive process" with an employee to identify the precise limitations resulting from a disability and potential reasonable accommodations that could overcome those limitations. See, e.g., *Rorrer v. City of Stow*, 743 F.3d 1025, 1040 (6th Cir. 2014). If this process fails to lead to a reasonable accommodation of the employee's limitations, responsibility lies with the party that caused the breakdown. Id.

To support his hostile work environment claim, Plaintiff relies on his own testimony that his supervisors "pressured" him to get his work restrictions changed so he would be able to continue working. (Id., at 125-26, 152-53, 160, 183). Plaintiff testified he felt harassed because his supervisors asked him once a week, and sometimes more than once a week, over a three-to- four month period, from October, 2016 to January, 2017, if he had seen a physician to obtain a current assessment of his work restrictions. (Id.) In addition, Plaintiff testified he felt he was being harassed because a temporary supervisor "constantly" watched him perform his work in January 2018. (Plaintiff's Deposition, at 25-27, 224-26)).[3] Plaintiff also cites an exhibit containing four emails exchanged by Senior Manager Marc LaCroix with other employees relating to Plaintiff's work restrictions. (Plaintiff's Exhibit Eight (Doc. No. 31-5, at 9-11)). The emails essentially document conversations with Plaintiff regarding the need to review his current work restrictions to determine whether he would be medically

[3] Plaintiff also testified he was never written up or verbally counseled or disciplined by this supervisor, and understood that watching to see if technicians perform their jobs correctly is part of a supervisor's job. (*Id.*).

cleared to perform his current job or other jobs in the plant.[4] (Id.)

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[4] The first email in the exhibit is dated November 2, 2016, and was sent to Trish Howerton at Premise Health, and Debbie Nelson, Manager of Medical Management at Nissan. In it, Mr. LaCroix states: Adam Booth met with me today and informed me that his prior workman's comp doctor is no longer in practice. Due to his permanent restrictions not clearing him to run any jobs in the plant he was advised of the steps he would need to take in order to possibly improve his current standings in regards to his restrictions. He was advised to visit Medical and speak with a case manager about his medical records and setting up and [sic] appointment with his attending physician. With his original Dr. no longer in practice how do we proceed with getting him set up to be seen by another Dr. and evaluated?
(Doc. No. 31-5, at 11). The second email is Ms. Nelson's response to Mr. LaCroix, sent the same day:
It was my understanding he was informed that he could:
1. See his PCP, under group health, if PCP was willing;
2. Ask Dr. Hazlewood, who is treating him for an open WC case, if he will see him, under his group health plan, to review/address the permanent restrictions. Additionally I understand he was told he should come to medical, sign a waiver/consent form, and request his medical records to take to whatever MD apt. he might schedule.
(*Id.*, at 10).
The next email in the exhibit is from Mr. LaCroix to Debbie Nelson, Gina Baio, Bill Slagle, and Rufus McAdoo, all Nissan employees, and is dated January 27, 2017, over two months later. In the email, Mr. LaCroix states:
See the attached email with the most recent details for Adam's medical review status. We need to discuss some deadlines that he has to meet as he is continuing to drag out his requirement to meet with the Dr. We have continued to let him work in his current pod, but we can't continue to do that if he doesn't get his Perm Restrictions modified to clear him for duty. (Id., at 9). The final email in the exhibit is a response from Mr. Slagle to Mr. LaCroix sent later that day:
Before the Holidays when we met with him it was clear that we were giving him ample time to make an appointment. He

Assuming Plaintiff could prove the other elements required to establish a claim for hostile work environment based on disability, Plaintiff's allegations of harassment fall far short of satisfying the second and fourth elements. The conduct Plaintiff cites to support his claim was not objectively harassing or even unreasonable. Rather, contrary to Plaintiff's characterization of the evidence, the documents show a reasonable attempt by Nissan to ensure Plaintiff would retain his employment after a change in the production process in the zone where he worked.[5] During the three-to-four month period in which Plaintiff's supervisors waited for him to obtain updated restrictions,6 there is no evidence Nissan eliminated his current position, or attempted to move him to a more difficult position. There is also nothing in the emails cited by Plaintiff (assuming their admissibility) suggesting his supervisors harassed him during this period. As for Plaintiff's complaints of being constantly watched by a temporary supervisor at a later time, Plaintiff has not shown the behavior went beyond that reasonably expected of a supervisor. Plaintiff has pointed to no evidence that he was ridiculed, insulted, intimidated, or abused because of

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did that and had an evaluation with Hazelwood on 12/29. This follow-up appointment with Hazelwood on 1/31 in my opinion, is still on track with what we asked him to do. I think he needs to be refreshed on the urgency and need for the medical clinic to assess the findings of the doctor and make a determination regarding his current restrictions. Based on his wife's conflicting appointment on this same day, I think it is appropriate to give him 2 weeks from Monday 1/30 to reschedule the 1/31 appointment with Hazelwood. (Id.)

[5] Plaintiff has cited no authority suggesting Nissan was prohibited by the ADA from changing its production processes. Nor has Plaintiff cited any evidence supporting his suggestion that Nissan's stated intention to change its production process was a ruse to "push out the physically disabled." (Doc. No. 31, at 9).

his disability, or otherwise. Even if the Court were to assume Nissan's conduct was intimidating, however, it does not rise to the level of sufficient severity to have altered Plaintiff's working conditions, as is required to establish a hostile work environment claim. See, e.g., *Trepka*, 28 Fed. Appx. at 461 (supervisor's contentious oral confrontation involving yelling and stern words about plaintiff's ability to walk and expressing skepticism about his condition did not create a hostile work environment); *Goller,* 285 Fed. Appx. at 259 (supervisor's derogatory name calling that did not interfere with her work performance held to be insufficient to establish hostile work environment). Therefore, Plaintiff has failed to make a showing sufficient to withstand summary judgment as to two of the essential elements of his hostile work environment claim. Accordingly, Defendant is entitled to summary judgment on this claim.

D. Workers' Compensation Retaliation

Plaintiff also claims Defendant violated Tennessee law by retaliating against him for filing a workers' compensation claim in 2004. In order to establish a prima facie case for workers' compensation retaliation, a plaintiff must show: (1) he was an employee of the employer at the time of the injury; (2) the employee filed a workers' compensation claim against the employer; (3) the employer terminated the employee; and (4) the workers' compensation claim played a substantial role in the employer's decision to terminate the employee. *Alexander v. Kellogg USA, Inc.*, 674 Fed. Appx. 496, 501 (6th Cir. 2017) (citing *Yardley v. Hosp. Housekeeping Sys.*, LLC, 470 S.W.3d 800, 805 (Tenn. 2015)).

Defendant argues Plaintiff cannot establish the third element – termination. Plaintiff admits he has not been terminated and is working full days at Nissan

within his restrictions. (Plaintiff's Response to Facts ¶ 36). Plaintiff has not cited any authority extending a workers' compensation retaliation claim to conduct short of termination. Accordingly, Defendant is entitled to summary judgment on Plaintiff's workers' compensation retaliation claim.[7]

Conclusion

For the reasons discussed above, the Court grants summary judgment to Defendant on all claims, and this action is dismissed.

It is so ORDERED

s/William L. Campbell, Jr.
WILLIAM L. CAMPBELL, JR.
UNITED STATES DISTRICT JUDGE

[7] Given the Court's conclusion that Plaintiff has failed to make a sufficient showing to withstand summary judgment on his claims, it is unnecessary to consider Defendant's arguments regarding the statute of limitations and other defenses to those claims.

WHOLE HEALTH™ WHOLE HEALTH MANAGEMENT, INC. AND NISSAN NORTH AMERICA, INC.

ATTENDING PHYSICIAN'S REPORT

Date: 12/22/2005 **Time:** 10:30 a.m.

Employee's Name: (Last, First) Booth, Michael "Adam" **EE#** 10305 **DOI:** 10/1/2004
Nissan Medical Contact: Dana Hughes **Phone:** 615-459-1944
Appointment Scheduled By:
Adjuster's name: Traci Pippin **Phone:** 615-220-8033
Case manager: Carolyn E. Lawson, RN **Phone:** 615-355-2780 **SHIFT:** Night
Area Manager/ext #: Allen Vannoy **Claim #:** 4656.540.849067XB
PHYSICIAN: Dr. Bachrach **Location:** Skyline Medical Center

NATURE OF REFERRAL:

- [ ] Evaluation, treatment and follow-up care as needed.
- [XXXX] Recheck.
- [ ] Consultation and recommendation for treatment.
- [ ] Second opinion. May provide treatment._____ May not provide treatment_____

Body Part Left arm; Neck

Current Permanent Restrictions Include:

Body Part _____ Restriction _____
Body Part _____ Restriction _____
Body Part _____ Restriction _____

Physician Office: Please complete the section below. This must be returned to NNA by the employee in order for him/her to return to work. If the employee is not returning to work after the appt., please FAX to 615-355-2219 today. Thank you.

DIAGNOSIS: Time In: _____ Time Out: _____

1. neck strain — Work Related ✓Yes __No — Estimated Duration _____
2. _____ — Work Related __Yes __No — Estimated Duration _____

MEDICATIONS given this visit:

WORK STATUS

- [ ] No Restrictions/Regular Duty
- [ ] Unable to Work
- [ ] RTW w/ Restrictions
- [ ] Temporary
- [✓] Permanent
- [ ] Return to Work at next scheduled shift
- [ ] Other

RESTRICTIONS		NO USE	OCC 1-33% of Work Time	FREQ 34-66% of Work Time	CONSTANT 67-100% of Work Time
Use of injured arm/hand	R L				✓
Working Above Shoulder	R L		✓		
Working with Outstretched arm	R L				✓
Working Overhead	R L		✓		
Use of power/battery tools	R L				✓
Use of foot controls	R L				✓
Climbing (stairsteps)					✓
Crawling					NO LIMITS
Kneeling	R L				NO LIMITS
Crouching/Squatting					NO LIMITS
Flexion/Extension of Neck				✓	
Gripping/Twisting	R L				✓
Twist @ trunk -seated or standing					✓
Push/Pull (up to ____ # of force)					—
Limit bending at waist to ____ degrees					—
Limit standing/walking to ____ hrs/day					—
Limit lifting to ____ lbs.					—

- [ ] **Avoid** (specify use of PPE) or
- [ ] **No** contact with:

- [ ] May not drive powered industrial vehicles
- [ ] No job requiring depth perception
- [ ] May not operate machinery
- [ ] No use of hand as hammer

Recommendations: _____

Follow-up Appointment

- [ ] Yes, Date_____
- [ ] No, discharged from care
- [✓] PRN

Referrals

- Rehab Services
- Diagnostic Study
- Other

Physician Signature [signature] Employee Signature

PLAINTIFF EXHIBIT TWO

Check in Time (illegible)

In Room Time DEC 11 '07 1550

Discharge Time 0225 DH

MEDICAL STATEMENT/PASS

EE NAME	Adam Booth	EE #	10305	SHIFT	N	DATE	12-11-07	TIME	1:55 ☐ A.M. ☐ P.M.
MANAGER NAME	Neal White	EXT.		PAGER		PLANT	Base Trim Zone 6		

WORK STATUS

☐ Work Related Date of Injury 10-1-04

☐ Returned to work - No Restrictions/Regular duty _____ (date). Day 1 2 3 4 5; Night 1 2 3 4 5 *(Please circle correct night.)*

☐ Current permanent restrictions *(please list)* See below

Please note that off work is not a restriction in most circumstances. Please specify restriction for the employee. Nissan has work available for most restrictions included on this form.

☐ Return to work with restrictions: Body Part Neck; Shoulder blade

☐ Temporary (until next appt unless otherwise indicated) _____ as indicated below

☒ Permanent as of 9/19/07 as indicated below

☐ Follow up appointment on: DATE: ___/___/___ TIME: _____ A.M. / P.M.

☐ Chose to treat w/CHS ☐ Chose outside physician ☐ Referred to outside MD per CHS ☐ Personal MD

Additional Comments N4 12/19 after lunch - anytime.

RESTRICTIONS	NO USE	OCCASIONAL 1-33% of Work Time	FREQUENT 34-66% of Work Time	CONSTANT 67-100% of Work Time
Use of injured arm/hand R L				
Working Above Shoulder R L		X permanent		
Working with Outstretched Arm R L				
Working Overhead R L		X permanent		
Use of power/battery tools R L				
Use of foot controls R L				
Climbing *(stairsteps)*				
Crawling				
Kneeling R L				
Crouching/Squatting				
Flexion/Extension of neck			X permanent	
Gripping / Twisting R L				
Twist @ Trunk-seated or standing				
Push/Pull (up to # of force)				
Limit bending at waist to ___ degrees				
Limit standing/walk ___ hours/day				
Limit lifting to ___ lbs				
May not drive powered industrial vehicles				
No job requiring depth perception				
May not operate machinery				
No use of hand as a hammer				
Avoid or no contact with _____				
Specify use of PPE _____				

Medical Personnel to complete

☐ Reviewed with employee that restrictions apply 24 hours a day, seven days a week.

Medical Dept. Sig. Diana Higgins RN Employee Sig. Adam Booth

PLAINTIFF EXHIBIT THREE

Premise Health

ATTENDING PHYSICIAN'S REPORT
PERSONAL

NISSAN
Nissan North America

Date: 1-31-11 Time: 8:20 Form Prepared By: _____

Employee: (last, first) Michael A. Booth EE#: 10305 Shift: D

Body Part(s): Neck left shoulder

DOI: 10-1-04 Recordable?: ☐ NO ☐ YES WHY? _____

PROVIDER: _____

Location: _____

INTERNAL

Plant: _____
Cost Center: _____
Area Mgr: _____
Phone Ext: _____
Case # _____
Claim # _____

Reason For Visit
☐ Evaluation, Treatment, Follow-Up
☐ Second Opinion, May provide Treatment?
☐ Consult and Treatment Recommendations
☐ Vocational Restrictions
☐ YES ☐ NO
☐ Other:
☐ RTW/FFD
☐ NCS/EMG
☐ MRI

Physician Office: Please complete the section below. This must be returned to NNA by the employee for RTW. If the employee is not returning to work today, please FAX to 615-459-1898 today. Thank you.

CASE MANAGEMENT

Adjuster: _____
Phone # _____
Case Mgr: _____
Phone # _____
Rstr Days: _____
ODG 90 _____ _____
PROJECTED DATE:
RTW _____
Full Duty _____
MMI _____

DIAGNOSIS: Personal
☐ Personal ☐ Work Related
☐ Personal ☐ Work Related
☐ Personal ☐ Work Related

☐ Full, Unrestricted Duty ☐ Unable to Work Until: _____ ☐ RTW next scheduled shift
☒ RTW with Restrictions: ☐ Temporary To Next Appt. Or: _____ ☐ Permanent ☐ Other:

RESTRICTIONS: to be followed 24HRS/DAY, 7 DAYS/WK

UPPER EXTREMITY:

OCC = < 34% of time FREQ = <67% of time		NO	OCC	FREQ
Use of injured arm/hand	R L			
Finger/Thumb/Palm Press	R L			
Use of Vibratory Tools	R L			
Hand Palm Impact/Hammering	R L			
Flexion / Extension of Wrist	R L			
Pronation/Supination of Wrist	R L			
Simple Grasping	R L			
Firm Grasping	R L			
Fine Finger Manipulation	R L			
Forward Reaching	R L		✓	✓
Overhead Reaching (breaks 90°)	R L		✓	
Overhead Activity (breaks 90°)	R L		✓	

SPINE/LOWER EXTREMITY:

OCC = < 34% of time FREQ = <67% of time	NO	OCC	FREQ
Above Shoulder Lift ____ LBS			
Push/Pull ____ LBS FORCE			
Lift/Carry ____ LBS			
Neck Flexion			
Neck Extension			
Neck Rotation			
Bending/Stooping (>30º)			
Trunk Rotation, seated/standing			
Squatting/Crouching			
Kneeling/Crawling			
Stair Climbing			
Ladder Climbing			
Sitting			
Standing			
Walking			
Use of Foot Controls			
OTHER (be specific)			

☐ No Driving, Work Related
☐ No Driving, Personal
PPE: ☐ Work ☐ Personal
No Contact With:
Additional restrictions
Comments/Clarifications (please be very specific)

Left only

PERMANENT RESTRICTIONS
Body Part: _____
Restriction: R L N O F

Body Part: _____
Restriction: R L N O F

Additional comments and Instructions:

MEDICATIONS Prescribed: (incl. narcotics, if any)
Narcotic Restriction(s)? ☐ No driving ☐ personal ☐ work ☐ No work around hazardous equipment

ORDERS
Procedures: _____ Rehabilitation:
Diagnostics: _____ other: _____
Testing: _____

FOLLOW-UP:
☒ Discharged/ Released
☐ Referred: _____
☐ Return as Needed
☐ Return Appt for Date & Time: _____

DISPOSITION:
☐ Allow Home ☐ Supervisor Discretion
☐ Advised f/u PMD within ___ days
☐ Paneled Out: _____
☐ Fit to Drive ☐ Unfit to Drive (Transport Arranged)
Other: _____

☐ Additional Instructions
☐ Return to onsite clinic
☐ 90 RESTRICTED DAY RULE
☐ RESTRICTIONS ARE 24 /7

checked item reviewed & expressed as understood by employee signed below

Provider Signature: _____ Employee Signature: _____

Time employee left clinic: 1115 Nurse/Case Mgr. Initials: _____ DATE: _____

* Further abilities per FCE if needed

Revised 2-15-16

NISSAN_BOOTH_00150

PLAINTIFF EXHIBIT FOUR

Job Placement Evaluation Report

FROM: Christina Aquila M.S., ATC/L

DATE: 4/2/2014

DOI: 8/24/2014

RE: Michael Booth EE#: 10305

PLANT: T&C

AREA MANAGER: Michael Hicks COST CENTER: 4815

Body Part: Neck

Temporary Restrictions: **none**

Permanent Restrictions: **Frequent Flexion/extension of neck, Occasional Overhead, Occasional working above shoulder**

Received a request from Dominick Wilkerson, to review jobs for EE in Truck System. Teamed with Truck System Supervisors who identified the following [pod/jobs] for review:

1. **Zone 11- No full job rotation within restrictions**
2. **Zone 12- No full job rotation within restrictions**
3. **Zone 13- No full job rotation within restrictions**
4. **Zone 14- No full job rotation within restrictions**
5. **Zone 15- No full job rotation within restrictions**
6. **Zone 16- No full job rotation within restrictions**
7. **Zone 26- No full job rotation within restrictions**
8. **Zone 29- LS regulator, RS rear Watershield rotation is within restrictions**

Concerns/Recommendations:
Please advise if you would like other zones evaluated.

Christina Aquila M.S., ATC/L
Comprehensive Health Services, Inc
Redacted
(615)355-2211

4/3/2014

NISSAN_BOOTH_00140

PLAINTIFF EXHIBIT FIVE

Job Placement Evaluation Report

FROM: Christina Aquila Joyce M.S., ATC/L

DATE: 12/9/2015

DOI: 8/24/2004

RE: Michael Booth EE#: 10305

PLANT: Truck T&C

AREA MANAGER: Marty Davis COST CENTER: 4829

Body Part: Neck

Permanent Restrictions: **Frequent Flex/Extension of neck, Occasional working overhead, occasional working above shoulder**

Received a request from A/Mgr Nissan Medical Management, to review jobs for EE in home area.

1. LS Door Panel Install: Not within restrictions due to flex/extension of neck (see below)
2. LS Glass: Not within restrictions due to working overhead and above shoulder (see below)
3. RS Check: Within restrictions
4. RS Rear Water Shield: Not within restrictions due to flexion/extension of neck (see below)

Concerns/Recommendations: Technician can perform the option 2 job rotation with lifting the second half of the lift on RS rear water shield approximately 6 inches. **Technician's current rotation is within restrictions**

Please email SmyrnaJPP@phrehab.com with additional jobs to be reviewed for placement.

Christina Aquila Joyce M.S., ATC/L
Progressive Health
Cjoyce@phrehab.com
(615)355-2373

PLAINTIFF EXHIBIT EIGHT

マーク　ラクロイ
Nissan North America, Inc
Senior Manager
T/C Line 1 Final Assembly
marc.lacroix@nissan-usa.com
Phone: +1
Mobile: +1 Redacted

ALLIANCE PRODUCTION WAY

From: Slagle, Bill
Sent: Friday, January 27, 2017 2:54 PM
To: Lacroix, Marc <marc.lacroix@Nissan-Usa.com>
Cc: McAdoo, Rufus <Rufus.McAdoo@Nissan-Usa.com>; Nelson, Debbie <Debbie.Nelson@nissan-usa.com>; Baio, Gina <Gina.Baio@Nissan-Usa.com>
Subject: RE: Adam Booth Status

Marc,
Before the Holidays when we met with him it was clear that we were giving him ample time to make an appointment. He did that and had an evaluation with Hazelwood on 12/29. This follow-up appointment with Hazelwood on 1/31 in my opinion, is still on track with what we asked him to do. I think he needs to be refreshed on the urgency and need for the medical clinic to assess the findings of the doctor and make a determination regarding his current restrictions.

Based on his wife's conflicting appointment on this same day, I think it is appropriate to give him 2 weeks from Monday 1/30 to reschedule the 1/31 appointment with Hazelwood.

From: Lacroix, Marc
Sent: Friday, January 27, 2017 9:09 AM
To: Nelson, Debbie <Debbie.Nelson@nissan-usa.com>; Baio, Gina <Gina.Baio@Nissan-Usa.com>
Cc: Slagle, Bill <Bill.Slagle@Nissan-Usa.com>; McAdoo, Rufus <Rufus.McAdoo@Nissan-Usa.com>
Subject: RE: Adam Booth Status

Gina,

See the attached email with the most recent details for Adam's medical review status. We need to discuss some deadlines that he has to meet as he is continuing to drag out his requirement to meet with the Dr. We have continued to let him work in his current pod, but we can't continue to do that if he doesn't get his Perm Restrictions modified to clear him for duty.

Thanks!

Marc LaCroix
マーク　ラクロイ
Nissan North America, Inc
Senior Manager
T/C Line 1 Final Assembly
marc.lacroix@nissan-usa.com
Phone: +1 615.355.2493
Mobile: +1 Redacted

door panel install pod; Charging Party alerted Mr. Wiseman that he had restrictions that might prevent his being able to train on the full rotation in the planned pod expansion. This ultimately resulted in Nissan engaging Charging Party in an interactive process to determine job placement for him.

Charging Party's restrictions, assigned as the result of an injury in 2004, were: frequent neck flexion, frequent neck extension, occasional working above shoulder, and occasional overhead work. Initially, management determined that Charging Party could likely perform some individual jobs, but that no full rotation/pod existed within the facility that Charging Party could perform, with or without accommodation. Primarily, the overwhelming majority of jobs in the manufacturing facility simply require frequent neck flexion/extension. However, management also realized that, given the injury occurred almost thirteen years ago, Charging Party had continued to work, and Charging Party was requesting job placement, at this point in time they did not have enough current information and did not want to make assumptions about Charging Party's functional limitations to conclude that he could or could not perform a full rotation anywhere in the facility.

Accordingly, several discussions were held between Charging Party, Human Resources Business Partner Bill Slagle, Supervisor Wiseman, and Senior Manager Marc LaCroix regarding his job placement. In the meantime, Charging Party was temporarily accommodated by remaining in the same two job rotation, although this was no longer a full rotation in the zone. In order to determine whether and to what extent Charging Party could be placed and/or whether accommodations were needed, Charging Party was asked by his management and Human Resources to provide current, updated information about his functional limitations, if any. Charging Party was assessed by a physician, related to the 2004 injury only, on January 31, 2017, and he was assigned restrictions of frequent forward reaching, occasional working above shoulder, and occasional overhead activity. This information was provided to Nissan. **(CONFIDENTIAL Exhibit 2, January 31, 2017 Doctor's Note)**[2] Based on this information, management determined that Charging Party was able to perform several full rotations on the door line, with or without reasonable accommodation, and as of February 3, 2017 he is being trained in a full rotation.

RESPONSE TO THE ALLEGATIONS OF DISCRIMINATION

Nissan denies Charging Party's allegations of discrimination and retaliation. For that matter, it is unclear how Charging Party truly believes he has been discriminated and/or retaliated against, as the allegations in the Charge are either unclear or omit critical facts.[3] As noted above, when Charging Party filed the Charge, the Company was in the middle of the interactive process with him – a fact which he omitted. During that time, Charging Party was temporarily accommodated by being allowed to continue working in his former two job rotation, even though the pods in the zone had already changed and expanded. Nissan is committed to providing reasonable accommodations for employees, has fulfilled that commitment here, and has not in any way discriminated against Charging Party.

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[2] Charging Party has not disclosed the nature of his medical condition or any functional limitations in the Charge. Accordingly, to maintain Charging Party's privacy, Nissan has marked this exhibit confidential.

[3] Nissan's response to the Charge should not be construed as a waiver of its argument that the Charge fails to state a viable claim. Further, while Charging Party vaguely alleges that some activity has occurred since 2005, **any claim occurring outside of the 300-day window preceding the Charge is outside the applicable statute of limitations and must be dismissed**.