RECORD NO. _____

IN THE
Supreme Court of the United States

PETER COOKS,

Petitioner,

v.

CONTRA COSTA COUNTY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does 28 U.S.C § 1658 supplying a 4 uniform year statute of limitations apply to claims made under the Rehabilitation Act of 1973, as Amended?

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The opinion of the court of appeals is unpublished. (App. *infra* A1-A4). The order of the district court is unpublished. (App.A5-A1

JURISDICTION

The judgment of the court of appeals was entered on November 18, 2021. A1. Justice Kagan granted an extension of time until April 22, 2022 to file a petition for writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C § 1658 – text is at App. A21

STATEMENT

Peter J. Cooks is a retired United States Navy veteran who rendered twenty-five years of service to his country, including the wars in Afghanistan and Iraq. A16. At the time of his retirement Mr. Cooks was a Chief Petty Officer and his job was Information Technology. Id. Mr. Cooks is also a disabled veteran. Id.

Mr. Cooks hired on with Contra Costa County in or around 2010 as an IT professional. Beginning in July 2015 and re-occurring in November of that same year, Mr. Cooks suffered a series of service-related health setbacks which required hospitalization, specifically he was hospitalized for mental stress and mental health issues [preliminary diagnosis Psychosis with Paranoia]. Id.

Mr. Cooks' diagnosis meant that he had (A) a physical or mental impairment that substantially limits one or more major life activities; (B) a record of such an impairment; or (C) was regarded as having such an impairment. A16 Mr. Cooks shared his hospitalization with his supervisor, Patrick Wilson. Id. After Mr. Cooksshared his diagnosis, Mr. Wilson and others began to treated him less favorably because he had a history of a disability and/or because he was perceived as having a physical or mental impairment that was not transitory and minor. Upon Mr. Cooks' his return to work, Mr. Wilson began to question him about the reason for his hospitalization and what his prognosis going forward. A16. Mr. Cooks declined to provide this information as it is private and not related to his ability to perform his job. [Id.]. Mr. Cooks was able to perform all the duties and responsibilities of his job with or without a reasonable accommodation. However, Mr. Cooks' work history prior to his hospitalization and after made it abundantly clear that he needed an accommodation with regard to his start time and schedule. Mr. Cooks had discussions with Mr. Wilson regarding this need, but the Defendant never engaged in the "interactive process" to ascertain what accommodation would be appropriate. A16-A17.

Beginning in or around April 2016, Mr. Wilson began writing up Mr. Cooks for trivial matters and subjecting his work performance to increased scrutiny. A17 Mr. Cooks' alleged co-workers were not subjected to the level of scrutiny directed towards him. Mr. Wilson also began threatening to terminate Mr. Cooks'

employment. Id. In September 2016, an incident between Mr. Cooks and Mr. Wilson ended with Mr. Cooks' suspension. On October 31, 2016, Mr. Cooks was terminated. A17.

PROCEEDINGS BELOW

On April 18, 2020, Mr. Cooks filed a lawsuit alleging that his employer, Contra Costa County, violated his rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA) and for breach of contract. On June 26, 2020, the County filed a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). The County sought dismissal on the following grounds: (1) Mr. Cooks' USERRA claim fails because the statute does not establish a cause of action for disability discrimination, regardless of whether the plaintiff's claimed disability was sustained or aggravated during a period of uniformed service; (2) even if the USERRA did protect against disability discrimination, the complaint lacks the necessary well-pled factual allegations showing that Plaintiff's employment was terminated based on disability; and, (3) Mr. Cooks' breach of contract time barred. On July 17, 2020, Mr. Cooks filed an opposition to the County's motion to dismiss. On July 23, 2020, the County filed a reply. On August 6, 2020, the district court granted the County's motion to dismiss, but extended Mr. Cooks the opportunity to amend his complaint within 21-days of the date of the order. Mr. Cooks missed the deadline by one-day and filed a Motion to File Amended Complaint One-Day Out of Time, *inter alia*, and attached the Amended

Complaint. The Amended Complaint attached to this motion contained an additional claim under the Rehabilitation Act of 1973. The County filed an opposition to this motion on September 1, 2020. On September 4, 2020, the district court denied Mr. Cooks' motion without prejudice and stated, *inter alia*, "plaintiff's motion for leave to file an amended complaint is DENIED WITHOUT PREJUDICE. Plaintiff shall file a renewed motion for leave to file an amended complaint that addresses the deficiencies raised in this order, including the claim added without court approval,within14 days of the date of this order."

On September 16, 2020, Mr. Cooks filed a Second Motion to Amend his Complaint. In this motion Mr. Cooks sought the district court's leave to add the Rehabilitation Act of 1973 claim. On September 30, 2020, the County filed an opposition to Mr. Cooks' Second Motion to Amend. On October 14, 2020, the district court granted Mr. Cooks' Second Motion to Amend his Complaint. Mr. Cooks filed his Amended Complaint against the County on October 15, 2020. In this Amended Complaint, Mr. Cooks advanced claims under the Rehabilitation Act of 1973 and the Uniformed Services Employment and Reemployment Rights Act. On October 21, 2020, the County filed a Motion to Dismiss Mr. Cooks' First Amended Complaint. Mr. Cooks filed a response in opposition to the County's motion on November 12, 2020. In his response, Mr. Cooks **expressly** adopted by reference all applicable legal arguments made in his prior motion to amend complaint. Specifically, in the referenced motion to amend, Mr. Cooks advanced a detailed argument that the 1992 and 2008 amendments to the ADA created new causes of

action under the Rehabilitation Act of 1973 making those newly created causes of action subject to 28 U.S.C. § 1658's four-year catch-all provision. The County filed a reply on November 17, 2020.

On November 30, 2020, the district court granted the County's motion to dismiss all counts on the grounds that (1) a two-year statute of limitations applied to Mr. Cooks' Rehabilitation Act of 1973 claim, and (2) that he failed to plead facts sufficient to support his USERRA claim. Believing the district court's ruling to be in error, Mr. Cooks filed a notice of appeal to the Ninth Circuit Court of Appeals on December 29, 2020.

REASONS TO GRANT THE WRIT

Recognizing that The Rehabilitation Act of 1973 was too restrictive Congress amended the statute twice in 2002 and 2008. A2-A3.

> "...The Rehab Act initially made no mention of accommodations and its implementing regulations defined "qualified" only in the context of the position in question. *See* 29 C.F.R. § 1613.702(f) (1992). ***371** Thus, the ADA eliminated the Rehab Act's inference that only an employee's current job could be considered in the "reasonable accommodation" calculus. *See* Arlene Mayerson, *Title I—Employment Provisions of the Americans With Disabilities Act,* 64 Temp.L.Rev. 499, 515 (1991)."

Lolos v. Solutia, Inc., 193 F.Supp.2d 364, 370–71 (D.Mass.,2002). The amendments changed that

The ADA Amendment Acts of 2008 widened the scope "being regarded as disabled" claims,

> Nearly a decade later, however, Congress passed the ADAAA. Those 2008 amendments expressly rejected the interpretation of "regarded as having such an impairment" that the Court had set forth in Sutton. Pub. L. No. 110–325, sec. 1, § 2(b)(3). In enacting those amendments, *588 Congress changed the relevant portion of the ADA by adding a new paragraph (3). That new paragraph defined the scope of the term "being regarded as having such an impairment," id. sec. 4, § 3(1)(C), as follows:
>
> 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 Act 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. Id. sec. 4, § 3(3)(A) (emphasis added).[4]

Mercado v. Puerto Rico, 814 F.3d 581, 587–88 (C.A.1 (Puerto Rico),2016).

Mr. Cooks' complaint includes that he was regarded as disabled and that he was not afforded any accommodation in any form as a disabled United States Navy War Veteran. A16 ¶10, A17.

The amendments to the Rehabilitation Act afforded robust changes to the statute, including expanding the obligations for the federally funded employer to make a reasonable accommodation.

The 9th Circuit opinion in this case acknowledges the changes; yet affirms dismissal because Cooks' complaint did not specify reassignment as an accommodation and placed his claim under the more restrictive state statute of limitations. "The federal four-year statute of limitations under 28 U.S.C. § 1658 applies only to federal claims that were "made possible by a post-1990 amendment." *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 382 (2004)." A3. While Mr.

Cooks raised the issue of needing an accommodation, no discussion took place. A16, ¶13. This case was decided on a motion to dismiss, not summary judgment. The broadening of Rehabilitation Act's scope to include reassignment requires viewing termination claims under the 4-year catch all statute of limitations.

The 9th Circuit opinion also explained, "In 2008, Congress amended the Rehabilitation Act's definition of "disability" to align it with the ADA's definition, meaning plaintiffs are no longer required to prove an impairment was perceived to limit a major life activity. See 42 U.S.C. § 12102(3); Pub. L. No. 110-325, 122 Stat. 3553 (2008)" A4. With these significant changes applying shorter inconsistent state statute of limitation for alleged discriminatory conduct by federally funded employers frustrates the implementation of statutory goals. This is not matter of distinguishing between a promotion and a retaliation claim but how one proves a violation.

As one district Court explained the addition of the term "reassignment" to the statute expanded the duty to accommodate.

> More importantly for purposes here, the ADA included "reassignment" in the list of possible accommodations. *See* 42 U.S.C. § 12111(9)(B). The absence of that term in the Rehab Act led a number of courts to conclude, regulatory language to the contrary, that reassignment, though perhaps permitted, was not required. *See, e.g., Carter,* 822 F.2d at 467; *Fields v. Lyng,* 705 F.Supp. 1134, 1137 (D.Md.1988), *aff'd,* 888 F.2d 1385 (4th Cir.1989). In the studied opinion of at least one commentator, this component of the ADA erased at least one element of Rehab Act unfairness, namely, that it allowed disabled federal workers to be terminated from jobs they could no longer do even though there were vacant positions for which they were qualified and able to perform. *See* Jeffrey S. Berenholz, *The*

Development of Reassignment to a Vacant Position in the Americans with Disabilities Act, 15 Hofstra Lab. & Employment L.J. 635, 636 (1998). Many courts have since recognized that the ADA's use of the word "reassignment" did indeed expand the Rehab Act's obligation to accommodate. *See Eckles v. Consolidated Rail Corp.,* 94 F.3d 1041, 1048 (7th Cir.1996); *Shiring,* 90 F.3d at 831; *Emrick v. Libbey–Owens–Ford Co.,* 875 F.Supp. 393, 395–96 (E.D.Tex.1995); *Haysman v. Food Lion, Inc.,* 893 F.Supp. 1092, 1104 (S.D.Ga.1995).

Regardless, in 1992, two years after the ADA's enactment, Congress amended the Rehab Act to incorporate the ADA standards, including the ADA's reference in 42 U.S.C. § 12111(9)(B) to reassignment as a potential accommodation. *See* 29 U.S.C. §§ 791(g), 794(d); *McLean v. Runyon,* 222 F.3d 1150, 1153 (9th Cir.2000). Thereafter, in October of 1992, the regulations were amended to reflect this change. *See* 29 C.F.R. § 1614.203 (2001). As a result, the substantive standards for handicap discrimination are now deemed the same whether suit is filed under the Rehab Act against a federally-funded entity or under the ADA against a private employer. *See Myers v. Hose,* 50 F.3d 278, 281 (4th Cir.1995).

Lolos v. Solutia, Inc., 193 F.Supp.2d 364, 371 (D.Mass.,2002)

Such changes are significant enough to be considered new rights to be covered under the 4 year catch all limitations period.

Regardless of what Congress now says it meant to say, what is controlling is what it actually said. Courts across the country, including the United States Supreme Court, in fulfillment of their constitutional duties under the United States' tripartite system of government, conclusively determined that Congress had not said what it now says it intended. In response, Congress proceeded as it is entitled and changed the law. Irrespective of whether Congress tried to characterize its action as merely clarifying its original intent, the Amendments Act undisputedly changed the law. An employer can generally be expected to comply only with laws as they are at the time of a certain action, not as laws might be at some point in the future. Because Congress did not say otherwise, the Amendments Act applies to only matters occurring after the law's effective date.

Steffen v. Donahoe, 2011 WL 13187022, at *5 (E.D.Wis.; 2011)

The overhaul of the Rehabilitation Act of 1973 requires application of the 28 U.S.C. ¶ 1658 4 year catch all limitations period.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ Roderick T. Cooks

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APPENDIX

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NOV 23 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETER COOKS, Plaintiff-Appellant, v. CONTRA COSTA COUNTY, Defendant-Appellee.	No. 20-17516 D.C. No. 4:20-cv-02695-PJH MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Phyllis J. Hamilton, Senior District Judge, Presiding

Submitted November 18, 2021**
San Francisco, California

Before: THOMAS, Chief Judge, MCKEOWN, Circuit Judge, and MOLLOY,*** District Judge.

Following his termination, Peter Cooks sued his former employer, Contra Costa County (the "County"), for violations of the Rehabilitation Act of 1973 and

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Donald W. Molloy, United States District Judge for the District of Montana, sitting by designation.

the Uniformed Services Employment and Reemployment Rights Act of 1994 ("Uniformed Services Act"). The district court granted the County's second motion to dismiss, concluding that Cooks's Rehabilitation Act was time barred and that he failed to state a claim under the Uniformed Services Act. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

1. Cooks's Rehabilitation Act claim is time barred. The federal four-year statute of limitations under 28 U.S.C. § 1658 applies only to federal claims that were "made possible by a post-1990 amendment." *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 382 (2004). While amendments to the Rehabilitation Act in 1992 and 2008 did create new causes of action, Cooks's alleged facts are insufficient to give rise to a claim based on either amendment.

The 1992 amendment incorporated the Americans with Disabilities Act ("ADA") "reasonable accommodations" standard, *see* 42 U.S.C. § 12112(b)(5)(A), which includes "reassignment to a vacant position," *id.* § 12111(9)(B); Pub. L. No. 102-569, 106 Stat. 4344 (1992). However, Cooks's second amended complaint does not allege that Cooks sought reassignment. While Cooks suggested his request "may have meant being considered for transfer/reassignment" in his motion for leave to amend, courts consider only factual allegations in the complaint that "plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Absent facts pled in support, his claim was not made possible by the 1992 amendment.

In 2008, Congress amended the Rehabilitation Act's definition of "disability" to align it with the ADA's definition, meaning plaintiffs are no longer required to prove an impairment was perceived to limit a major life activity. *See* 42 U.S.C. § 12102(3); Pub. L. No. 110-325, 122 Stat. 3553 (2008). However, Cooks's claims are based on an alleged disability arising out of his psychosis and paranoia, and federal courts adjudicated Rehabilitation Act claims that stemmed from paranoia-related disabilities prior to the enactment of the 2008 amendment, *see, e.g.*, *Fredenberg v. Contra Costa Cnty. Dep't of Health Servs.*, 172 F.3d 1176 (9th Cir. 1999); *Johnston v. Horne*, 875 F.2d 1415 (9th Cir. 1989). The facts alleged by Cooks do not distinguish his case from pre-2008 complaints.

Because Cooks's Rehabilitation Act claim was not made possible by either the 1992 or 2008 amendments, the analogous state statute of limitations applies. *Sharkey v. O'Neal*, 778 F.3d 767, 770 (9th Cir. 2015). Even assuming that California's longer, three-year statute applies, *see id.* at 770–73, Cooks's claims are untimely.

2. Under the Uniformed Services Act, current, former, and prospective members of uniformed services "shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership." 38 U.S.C. § 4311(a). Employers are in violation of the Act if an employee's military service is a "motivating factor"

for any of the aforementioned actions. *Id.* § 4311(c)(1). Cooks fails to state a claim under the Act because he does not allege his military background was a motivating factor behind the alleged discrimination. Simply put, § 4311 does not prohibit discrimination based on a disability, which is what is alleged here. The district court properly dismissed Cooks's claim.

3. The final inquiry is whether Cooks should have been given another opportunity to amend his complaint. Denial of leave to amend is "proper only when amendment would be clearly frivolous, unduly prejudicial, cause undue delay or a finding of bad faith is made." *United Union of Roofers v. Ins. Corp. of Am.*, 919 F.2d 1398, 1402 (9th Cir. 1990). Despite a previous opportunity to amend Cooks failed to include additional facts in support of either his Rehabilitation Act or Uniformed Services Act claims. Moreover, Cooks did not seek further amendment in response to the County's second motion to dismiss. Accordingly, the district court properly dismissed the Amended Complaint with prejudice.

AFFIRMED.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

PETER JAMES COOKS,

Plaintiff,

v.

CONTRA COSTA COUNTY,

Defendant.

Case No. 20-cv-02695-PJH

ORDER GRANTING SECOND MOTION TO DISMISS

Re: Dkt. No. 42

Before the court is defendant Contra Costa County's ("defendant") second motion to dismiss. The matter is fully briefed and suitable for decision without oral argument. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, and good cause appearing, the court hereby GRANTS the motion for the following reasons.

BACKGROUND

On April 18, 2020, plaintiff Peter Cooks ("plaintiff") filed a complaint ("Compl.") alleging a violation of the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), 38 U.S.C. §§ 4301–33, and breach of contract. Dkt. 1. Defendant then filed a motion to dismiss, which the court granted with leave to amend on August 6, 2020. Dkt. 24. On October 15, 2020, plaintiff filed a First Amended Complaint ("FAC") in which he continues to allege a violation of USERRA, adds a claim for violation of the Rehabilitation Act of 1973, 29 U.S.C. § 794 et seq., and abandons his breach of contract claim. Dkt. 41.

Plaintiff is a retired U.S. Navy veteran who was hired by defendant in 2010 to work

as an IT professional. Id. ¶¶ 6–7. In July and November 2015, plaintiff was hospitalized for mental health issues for which he was diagnosed as having psychosis with paranoia. Id. ¶ 9. Plaintiff alleges that his diagnosis means that he has a physical or mental impairment that substantially limits one or more major life activities, a record of such impairment, or was regarded as having such an impairment. Id. ¶ 10.

Plaintiff shared his hospitalization with his supervisor when he returned to work. Id. His supervisor treated plaintiff less favorably because he had a history of disability or was perceived as having a physical or mental impairment. Id. ¶ 11. His supervisor began to question him about the reason for his hospitalization and his prognosis, but plaintiff declined to provide this information. Id. ¶ 12.

Plaintiff states that, prior to his hospitalization, he was able to perform all the duties and responsibilities of his job without a reasonable accommodation but after hospitalization he needed an accommodation with respect to his start time and schedule. Id. ¶ 13. In or around April 2016, plaintiff's supervisor began writing him up for trivial matters and subjecting his work performance to increased scrutiny. Id. ¶ 14. In September 2016, an incident occurred between plaintiff and his supervisor which led to his suspension and, later, termination on October 31, 2016. Id. ¶ 15.

Defendant now moves to dismiss the FAC in its entirety pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. Dkt. 42.

DISCUSSION

A. Legal Standard

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests for the legal sufficiency of the claims alleged in the complaint. Ileto v. Glock Inc., 349 F.3d 1191, 1199–1200 (9th Cir. 2003). Under Federal Rule of Civil Procedure 8, which requires that a complaint include a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), a complaint may be dismissed under Rule 12(b)(6) if the plaintiff fails to state a cognizable legal theory, or has not alleged sufficient facts to support a cognizable legal theory. Somers v. Apple, Inc., 729 F.3d 953, 959 (9th

Cir. 2013).

While the court is to accept as true all the factual allegations in the complaint, legally conclusory statements, not supported by actual factual allegations, need not be accepted. Ashcroft v. Iqbal, 556 U.S. 662, 678–79 (2009). The complaint must proffer sufficient facts to state a claim for relief that is plausible on its face. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 558–59 (2007).

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" Id. at 679 (quoting Fed. R. Civ. P. 8(a)(2)). Where dismissal is warranted, it is generally without prejudice, unless it is clear the complaint cannot be saved by any amendment. In re Daou Sys., Inc., 411 F.3d 1006, 1013 (9th Cir. 2005).

Review is generally limited to the contents of the complaint, although the court can also consider documents "whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the plaintiff's pleading." Knievel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005) (quoting In re Silicon Graphics Inc. Sec. Litig., 183 F.3d 970, 986 (9th Cir. 1999), superseded by statute on other grounds as stated in In re Quality Sys., Inc. Sec. Litig., 865 F.3d 1130 (9th Cir. 2017)); see also Sanders v. Brown, 504 F.3d 903, 910 (9th Cir. 2007) ("[A] court can consider a document on which the complaint relies if the document is central to the plaintiff's claim, and no party questions the authenticity of the document." (citation omitted)). The court may also consider matters that are properly the subject of judicial notice (Lee v. City of Los Angeles, 250 F.3d 668, 688–89 (9th Cir. 2001)), and exhibits attached to the complaint (Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc., 896 F.2d 1542, 1555 n.19 (9th Cir. 1989)).

///

B. Analysis

1. First Claim—Rehabilitation Act

i. Whether 28 U.S.C. § 1658 Applies to Plaintiff's Rehabilitation Act Claim

Plaintiff's first claim alleges a violation of section 504 of the Rehabilitation Act. FAC ¶ 23. Defendant argues that plaintiff's Rehabilitation Act claim is barred by the statute of limitations. Mtn. at 3. Defendant contends that a two-year limitation period applies and further argues that plaintiff incorrectly alleges that a four-year limitations period applies. Id. Because plaintiff's termination occurred in October 2016 and plaintiff did not file this lawsuit until April 2020, he is outside the two-year limitations period. Id.

Both parties agree that this claim turns on whether title 28 U.S.C. § 1658 applies to plaintiff's Rehabilitation Act claim. That statute provides: "Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues." 28 U.S.C. § 1658(a). Section 1658 was originally enacted December 2, 1990, Pub. L. No. 101-659, § 313, 104 Stat. 5114 (1990); therefore, the question presented is whether plaintiff's cause of action arises under legislation enacted after 1990. See Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369, 382 (2004) ("We conclude that a cause of action 'aris[es] under an Act of Congress' enacted after December 2, 1990 . . . if the plaintiff's claim against the defendant was made possible by a post-1990 enactment." (first alteration in original)). If so, then plaintiff's claim is timely.

Plaintiff pleads a violation of section 504 of the Rehabilitation Act of 1973, codified at 29 U.S.C. § 794. FAC ¶ 23. Originally enacted in 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355 (1973), section 504(a) states that: "No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance," 29 U.S.C. § 794(a). To state a section 504 claim, plaintiff must show that "(1) he is an

individual with a disability; (2) he is otherwise qualified to receive the benefit; (3) he was denied the benefits of the program solely by reason of his disability; and (4) the program receives federal financial assistance." Updike v. Multnomah Cty., 870 F.3d 939, 949 (9th Cir. 2017) (citation omitted).

Defendant argues that the Rehabilitation Act has always prohibited disability discrimination and required employers to accommodate disabled employees. Mtn. at 3. Defendant asserts that neither the 1992 nor the 2008 amendments to the Rehabilitation Act have any application to the facts alleged in the FAC. Id. Plaintiff responds by arguing that the 2008 amendments to the Americans with Disabilities Act ("ADA") created new rights of action and corresponding liabilities and these new rights are subject to section 1658's four-year statute of limitations. Opp. at 4. Plaintiff makes no other argument or effort to explain his theory other than baldly stating that the 2008 amendments created a new right of action.

As an initial matter, the court notes that plaintiff's opposition does not assert that the 1992 amendment to the Rehabilitation Act created a new right of action or corresponding liability. Even if he had, the district court in Pimentel v. Orloff, 2008 WL 4963049, at *1 (N.D. Cal. Nov. 19, 2008), persuasively discusses why the 1992 amendment to the Rehabilitation Act did not alter section 504(a)'s application to an individual who has been discriminated against 'solely by reason of his or her disability.'" Id. at *1. The Pimentel court concluded that "if plaintiff has a claim, it was not 'made possible by a post-1990 enactment'" and declined to apply section 1658. Id. (citation omitted). The same reasoning and outcome apply here.

With respect to the 2008 amendments to the ADA, plaintiff fails to articulate how those amendments make his claim possible where it was previously impossible under the Rehabilitation Act. The ADA Amendments Act of 2008 ("ADAAA"), Pub. L. No. 110-325, 122 Stat. 3553, clarified the definition of "disability" with the express purpose of superseding two Supreme Court opinions that interpreted the term narrowly. See Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999); Toyota Motor Mfg., Ky., Inc. v. Williams,

534 U.S. 184 (2002). The ADAAA also extended this definition of disability to the Rehabilitation Act. Pub. L. No. 110-325, § 7, 122 Stat. at 3558. Thus, in order to prevail, plaintiff must allege that he plausibly was a person with disabilities under the ADAAA but was not under the prior definition of the Rehabilitation Act.

Plaintiff alleges that his 2015 diagnosis of psychosis with paranoia means that he has a physical or mental impairment that substantially limits one or more major life activities, a record of such an impairment, or was regarded as having such an impairment. FAC ¶¶ 9–10. Yet, as defendant points out, plaintiff could have pursued a Rehabilitation Act claim for paranoia prior to 2008. See, e.g., Chapa v. Adams, 168 F.3d 1036, 1039 (7th Cir. 1999) (considering Rehabilitation Act claim by plaintiff alleging disability relating to paranoia); Fredenburg v. Contra Costa Cty. Dep't of Health Servs., 172 F.3d 1176, 1178 (9th Cir. 1999) (considering ADA claim by plaintiff alleging disability relating to paranoia). Because plaintiff's cause of action was possible prior to the ADAAA and also possible prior to 1990, the four-year statute of limitations in 28 U.S.C. § 1658 does not apply. See also Salazar v. Regents of Univ. of Cal., 2017 WL 4594455, at *4 (N.D. Cal. Aug. 7, 2017), aff'd, 812 Fed. App'x 410 (9th Cir. 2020) (finding depression and anxiety disabilities actionable under the ADA prior to the 2008 amendments and therefore declining to apply § 1658).

ii. Analogous State Law Statute of Limitations

"The statute of limitations for the Rehabilitation Act Section 504 claim is provided by the analogous state law." Douglas v. Cal. Dep't of Youth Auth., 271 F.3d 812, 823 n.11 (9th Cir.), amended, 271 F.3d 910 (9th Cir. 2001). Defendant argues the analogous state law to be the two-year limitation period found in California's personal injury statute. Mtn. at 3 (citing Kitchen v. Lodi Unified Sch. Dist., 2015 WL 925732, at *5 (E.D. Cal. Feb. 27, 2015). Applying California's personal injury statute to an employment discrimination claim under the Rehabilitation Act is contrary to the approach described in Sharkey v. O'Neal, 778 F.3d 767, 771–72 (9th Cir. 2015). There, the court determined that California Government Code § 11135 was the most analogous state-law claim to a Title II

ADA claim and rejected the contention that the personal injury limitation should provide the limitations period where "state law provides an almost identical counterpart to Title II." Id. at 772. The court then held that California Civil Procedure Code 338, which applies to California causes of action "upon a liability created by statute," applied to section 11135 and, thus, a Title II claim. Id. at 773.

The Ninth Circuit has not expressly determined which statute of limitations period applies to the Rehabilitation Act; however, at least one opinion has indicated that either California's personal injury statute of limitation or the three-year limitation period "upon a liability created by statute" applied to section 504. Alexopulos By & Through Alexopulos v. S.F. Unified Sch. Dist., 817 F.2d 551, 554 (9th Cir. 1987) (quoting Cal. Code Civ. Proc. § 338). Following Sharkey, however, district courts have compared a Rehabilitation Act claim to California's Unruh Act, e.g., Peters v. Bd. of Trs. of Vista Unified Sch. Dist., 2009 WL 4626644, at *2 (S.D. Cal. Dec. 7, 2009), aff'd, 457 Fed. App'x 612 (9th Cir. 2011), and several courts have concluded that the three-year limitation period found in California Civil Procedure Code § 338(a) applies to such claims, see Ahmed v. Regents of Univ. of Cal., 2018 WL 3969699, at *6 (S.D. Cal. Aug. 20, 2018) (collecting cases). Though not binding, two memorandum dispositions from the Ninth Circuit have assumed without deciding that the three-year limitation period applies. See Estate of Stern v. Tuscan Retreat, Inc., 725 Fed. App'x 518, 521 (9th Cir. 2018) ("We need not conclusively determine the statute of limitations period applicable to the Rehabilitation Act, but the longest option is California's three-year provision for '[a]n action upon a liability created by statute.'" (alteration in original) (citations omitted)); Krushwitz v. Univ. of Cal., 599 Fed. App'x 714, 715 (9th Cir. 2015).

Assuming the more liberal three-year limitations period—rather than the two-year personal injury statute—applies to plaintiff's Rehabilitation Act claim, his claim is still time barred. Plaintiff alleges that he was terminated October 31, 2016, (FAC ¶ 15), but he did not file this action until April 18, 2020. The limitation period on plaintiff's claim ran on October 31, 2019 and his claim is barred.

For the foregoing reasons, defendant's motion to dismiss plaintiff's first claim for violation of the Rehabilitation Act is GRANTED. Plaintiff has previously had the opportunity to amend his complaint and failed to allege any new factual allegations in the FAC. Therefore, further amendment would be futile, and the dismissal will be with prejudice.

2. Second Claim—USERRA

Plaintiff's second cause of action is for violation of sections 4311 and 4312 of USERRA for denying plaintiff reasonable accommodation and discriminating against him because of his disability. FAC ¶ 24. "USERRA § 4311 prohibits employers from discriminating against an employee because of that employee's military service." Marino v. Akal Sec. Inc., 377 Fed. App'x 683, 685 (9th Cir. 2010) (citing 38 U.S.C. § 4311). An employer violates USERRA if an employee's membership or obligation for service in the military is a motivating factor in an employer's adverse employment action taken against the employee, unless the employer can prove that the action would have been taken in the absence of such membership or obligation. 38 U.S.C. § 4311(c)(1); Leisek v. Brightwood Corp., 278 F.3d 895, 898 (9th Cir. 2002).

Here, defendant argues that plaintiff's USERRA claim fails for the same reasons as in the court's prior order and the conclusory allegations in the FAC are virtually identical to the allegations in the complaint. Mtn. at 12. In response, plaintiff argues that USERRA is to be liberally construed and that courts have recognized actionable USERRA claims for hostile work environment and constructive discharge. Opp. at 3–4.

The court agrees with defendant. The court's prior order found that plaintiff alleged he was discharged because of his disability and not because of his membership in the uniformed services. Dkt. 24 at 4. The FAC alleges no new factual matter concerning how defendant took any action towards plaintiff stemming from or relating to his status as a former member of the uniformed services and plaintiff's opposition is entirely unresponsive on this point.

For the foregoing reasons, defendant's motion to dismiss plaintiff's second cause

of action for violation of USERRA is GRANTED. Because plaintiff has failed to allege any new factual matter relating to this claim, it is clear that further amendment would be futile. Thus, the dismissal is with prejudice.

CONCLUSION

For the foregoing reasons, defendant's motion to dismiss plaintiff's FAC is GRANTED and the claims are DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

Dated: November 30, 2020

/s/ Phyllis J. Hamilton
PHYLLIS J. HAMILTON
United States District Judge

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

PETER J. COOKS	)	
	)	
Plaintiff,	)	**Case No.: 20-2695-PJH**
	)	
vs.	)	**Amended Complaint**
	)	
CONTRA COSTA COUNTY	)	
	)	
Defendant.	)	
	)	

AMENDED COMPLAINT

Plaintiff, Peter J. Cooks, would state the following causes of action:

I. NATURE OF THIS ACTION

1. This is an action alleging disability discrimination in violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 et seq. (§ 504) and the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. §§ 4301-4333 ("USERRA) to redress the deprivation of Plaintiff's statutory and/or constitutionally protected rights. Mr. Peter J. Cooks is a qualified individual with a disability who has been denied accommodations, equal

opportunities, benefits, and services in his employment. Plaintiff is entitled to injunctive and equitable relief and damages under § 504 and the USERRA.

2. Defendant discriminated against the Plaintiff by denying him an accommodation and terminating his employment in violation § 504 of the Rehabilitation and the USERRA.

3. This action seeks equitable and declaratory relief, prospective injunctive and equitable relief, back pay, as well as nominal and compensatory damages at law and other monetary and non-monetary remedies necessary to the make the Plaintiff whole.

II. JURISDICTION AND VENUE

4. This Court has jurisdiction in accordance with 28 U.S.C. § 1331, 28 U.S.C. § 2201, 2202, and 29 U.S.C. § 794a. Venue is proper in this district under 38 U.S.C. § 4323(c)(2) and 28 U.S.C. § 1391(b) because Defendant, Contra Costa County maintains a place of business and/or residence in this judicial district.

III. CONDITIONS PRECEDENT TO SUIT

5. Section 504 of the Rehabilitation Act and the USERRA do not require the exhaustion of administrative remedies and there are no conditions precedent to the institution of this lawsuit. Plaintiff's claims under Section 504 are subject to the four-year statute of limitations provided by 28 U.S.C. § 1658. Plaintiff's claims under the USERRA have no statute of limitations.

IV. PARTIES

6. The Plaintiff, Peter J. Cooks, is citizen of the United States and resident of the State of California. Mr. Cooks served his country on active duty in the United States Navy for 25 years. He is a disabled veteran.

7. The Defendant, Contra Costa County, was the Plaintiff's employer during the time period pertinent to this lawsuit. The Defendant, Contra Costa County, operates its daily business

in the Northern District of California.

V. FACTUAL AVERMENTS

8. Plaintiff, Peter J. Cooks, is a retired United States Navy veteran who rendered twenty-five years of service to his country, including the wars in Afghanistan and Iraq. At the time of his retirement Mr. Cooks was a Chief Petty Officer and his job was Information Technology. Mr. Cooks is a disabled veteran.

9. Mr. Cooks became an employee of Contra Costa County in or around 2010 as an IT professional. In July and November 2015, Mr. Cooks suffered service-related health setbacks which required hospitalization, specifically he was hospitalized for mental stress and mental health issues [preliminary diagnosis Psychosis with Paranoia].

10. Mr. Cooks' diagnosis means that he has (A) a physical or mental impairment that substantially limits one or more major life activities; (B) a record of such an impairment; or (C) was regarded as having such an impairment. Mr. Cooks shared his hospitalization with his supervisor, Patrick Wilson.

11. Mr. Wilson and others treated Mr. Cooks less favorably because he had a history of a disability and/or because he was perceived as having a physical or mental impairment that was not transitory and minor.

12. Upon his return to work, Mr. Cooks' supervisor began to question him about the reason for his hospitalization and what his prognosis going forward. Mr. Cooks declined to provide this information as it is private and not related to his ability to perform his job.

13. Mr. Cooks was able to perform all the duties and responsibilities of his job with or without a reasonable accommodation; however, Mr. Cooks work history prior to his hospitalization and after made it abundantly clear that he needed an accommodation with regard to his start time and schedule. Mr. Cooks had discussions with his supervisor regarding this

need, but the Defendant never engaged in the "interactive process" to ascertain what accommodation would be appropriate.

14. Beginning in or around April 2016, Mr. Cooks' supervisor began writing him up for trivial matters and subjecting his work performance to increased scrutiny. Upon information and belief, Mr. Cooks' co-workers were not subjected to the level of scrutiny directed towards him. Furthermore, since returning from being hospitalized Mr. Cooks has had several negative encounters with his supervisor wherein his job was threatened.

15. In September 2016, an incident occurred between Mr. Cooks and his supervisor which led to his suspension. On October 31, 2016, Mr. Cooks was terminated from his employment in violation of Section 504 and the USERRA, 38 U.S.C. § 4301.

VI. CAUSES OF ACTION

A. Violation of Section 504 of the Rehabilitation Act of 1973

16. As stated, Plaintiff is a person with a disability, has a history of disability and is perceived as disabled pursuant to Section 504 of the Rehabilitation Act of 1973. Defendant is a public entity in accordance with Section 504 of the Rehabilitation Act of 1973 and it receives federal financial assistance.

17. Despite Plaintiff's disability, with or without reasonable accommodation, he can perform the essential functions of his former position. Plaintiff meets the definition of a "qualified individual with a disability" pursuant to 29 U.S.C. § 794.

18. From the time it learned of his illness up until the time he was terminated, Defendant continuously limited, classified, and segregated Plaintiff in a way that adversely affects his job opportunities because of his disability.

19. Further, Defendant continuously utilized standards or methods of administration that discriminate against Plaintiff based on his disability and have excluded or otherwise denied Plaintiff equal benefits of his employment because of his disability.

20. Defendant, too, has also continuously failed to accommodate Plaintiff, including, but not limited to, refusing to allow accommodate his need for a schedule adjustment. Finally,

21. Accommodating the Plaintiff's need for a schedule adjustment would not have caused substantial or grievous economic injury to the operations of the Defendant.

22. Defendant, by its discriminatory treatment of Plaintiff has intentionally, willfully, with deliberate indifference and without justification deprived Plaintiff of his federal statutory and/or constitutional rights, as described herein.

23. This deprivation violates Plaintiff's rights under the Section 504 of the Rehabilitation Act of 1973.

B. Violation of the Uniformed Services Employment and Reemployment Rights Act

24. The Defendant has violated Sections 4311 and 4312 of USERRA by denying Mr. Cooks a reasonable accommodation and discriminating against him because of his service-related disability.

25. Defendant violated Mr. Cooks' rights under USERRA by their acts and/or omissions set forth herein, including but not limited to failing to engage in the interactive process in good faith with Mr. Cooks to find a reasonable accommodation for his service related disability; failing to provide a reasonable accommodation for Mr. Cooks; discriminating against Mr. Cooks based on his disability and/or military service, disparate treatment between Mr. Cooks and other (non-military) employees; terminating Mr. Cooks from employment without just cause. By way of said conduct and/or authorization or ratification of said conduct, Defendant acted with willful intent to violate Mr. Cooks federally protected rights.

26. As a direct and proximate result of the Defendant's wrongful conduct, the Plaintiff has suffered damages, including, but not limited to, lost past and future wage and benefits, retirement benefits, emotional distress, mental anguish, humiliation, and mental injuries.

VII. PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully prays that this Court assume jurisdiction of this action and after trial:

1. Issue a declaratory judgment that the employment policies, practices, procedures, conditions and customs of the Defendants, including the action taken against Plaintiff by Defendants are violative of Plaintiff's rights as secured by Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 and the USERRA.

2. Grant Plaintiff reinstatement and a permanent injunction enjoining the Defendant, its agents, successors, employees, attorneys and those acting in concert with the Defendant, and at the Defendant's request, from continuing to violate Plaintiff's rights as well as those of others who are similarly-situated pursuant to Section 504 of the Rehabilitation Act of 1973 and the USERRA.

3. Issue an injunction ordering Defendant to reinstate the Plaintiff into the position which he was terminated from or into a similar position.

4. Enter an Order requiring the Defendant to award Plaintiff damages including back pay, front pay, nominal, and compensatory damages, pursuant to Section 504 of the Rehabilitation Act and the USERRA.

5. Award Plaintiff reasonable costs, attorney's fees, and expenses.

6. Award such other relief and benefits as the cause of justice may require.

Respectfully submitted,

/s/ Roderick T. Cooks
Lee Winston
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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing document on all persons listed below via the Court's ECF filing system:

Sean M. Rodriquez
Deputy County Counsel
Tort and Civil Rights Litigation Division
Contra Costa County Counsel's Office
Tel: (925) 335-1880
Fax: (925) 335-1866

Done this the 15th day of October 2020.

s/Roderick T. Cooks
Of Counsel

§ 1658. Time limitations on the commencement of civil actions arising under Acts of Congress

Effective: July 30, 2002

Currentness

(a) Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues.

§ 794. Nondiscrimination under Federal grants and programs, 29 USCA § 794

(d) Standards used in determining violation of section
The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201 to 12204 and 12210), as such sections relate to employment.

SEC. 2. FINDINGS AND PURPOSES.
(a) FINDINGS.—Congress finds that—
(1) in enacting the Americans with Disabilities Act of 1990 (ADA), Congress intended that the Act "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and provide broad coverage;
(2) in enacting the ADA, Congress recognized that physical and mental disabilities in no way diminish a person's right to fully participate in all aspects of society, but that people with physical or mental disabilities are frequently precluded from doing so because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers;
(3) while Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation has not been fulfilled;
(4) the holdings of the Supreme Court in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect;

(5) the holding of the Supreme Court in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) further narrowed the broad scope of protection intended to be afforded by the ADA;
(6) as a result of these Supreme Court cases, lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities;
(7) in particular, the Supreme Court, in the case of Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002), interpreted the term "substantially limits" to require a greater degree of limitation than was intended by Congress; and
(8) Congress finds that the current Equal Employment Opportunity Commission ADA regulations defining the term "substantially limits" as "significantly restricted" are inconsistent with congressional intent, by expressing too high a standard.
(b) PURPOSES.—The purposes of this Act are—
(1) to carry out the ADA's objectives of providing "a clear and comprehensive national mandate for the elimination of discrimination" and "clear, strong, consistent, enforceable standards addressing discrimination" by reinstating a broad scope of protection to be available under the ADA;
(2) to reject the requirement enunciated by the Supreme Court in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) 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;
(3) to reject the Supreme Court's reasoning in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) with regard to coverage under the third prong of the definition of disability and to reinstate the reasoning of the Supreme Court in School Board of Nassau County v. Arline, 480 U.S. 273 (1987) which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973;
(4) to reject the standards enunciated by the Supreme Court in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002), that the terms "substantially" and "major" in the definition of disability under 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";
(5) to convey congressional intent that the standard created by the Supreme Court in the case of Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) 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, to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis; and

(6) to express Congress' expectation that the Equal Employment Opportunity Commission will revise that portion of its current regulations that defines the term "substantially limits" as "significantly restricted" to be consistent with this Act, including the amendments made by this Act.

ADA AMENDMENTS ACT OF 2008, PL 110–325, September 25, 2008, 122 Stat 3553

SEC. 7. CONFORMING AMENDMENTS.

Section 7 of the Rehabilitation Act of 1973 (29 U.S.C. 705) is amended—

<< 29 USCA § 705 >>

(1) in paragraph (9)(B), by striking "a physical" and all that follows through "major life activities", and inserting "the meaning given it in section 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102)"; and

<< 29 USCA § 705 >>

(2) in paragraph (20)(B), by striking "any person who" and all that follows through the period at the end, and inserting "any person who has a disability as defined in section 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102).".

<< 29 USCA § 705 NOTE >>

SEC. 8. EFFECTIVE DATE.

This Act and the amendments made by this Act shall become effective on January 1, 2009.

ADA AMENDMENTS ACT OF 2008, PL 110–325, September 25, 2008, 122 Stat 3553