No. _____

In the

SUPREME COURT OF THE UNITED STATES

Application for an Extension of Time Within Which to File a Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

Perry Hopman,

Applicant,

v.

Union Pacific Railroad,

Respondent.

John W. Griffin, Jr.
MAREK, GRIFFIN & KNAUPP
203 N. Liberty Street
Victoria, Texas 77901
Tel. 361-573-5500
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August 4, 2023

Counsel of Record for Applicant/Petitioner

APPLICATION TO THE HONORABLE JUSTICE BRETT KAVANAUGH AS CIRCUIT JUSTICE

PARTIES TO THE PROCEEDING

Applicant Perry Hopman ("Applicant") was plaintiff-appellant in the proceeding below.

Respondent Union Pacific Railroad ("Respondent") was defendant-appellee in the proceeding below.

APPLICATION FOR EXTENSION OF TIME

Pursuant to this Court's Rule 13.5 and 28 U.S.C. § 2101(c), Applicant hereby requests a 45-day extension of time within which to file a petition for a writ of certiorari, up to and including October 2, 2023.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The judgment for which review is sought is the decision of the United States Court of Appeals for the Eighth Circuit in Hopman v. Union Pacific Railroad., No. 22-1881, a copy of which is attached as Exhibit A.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered judgment on May 19, 2023. This Court's jurisdiction will rest on 28 U.S.C. § 1254. Under Supreme Court Rules 13.1, 13.3, and 30.1, a petition for a writ of certiorari is due to be filed on or before August 17, 2023. In accordance with Rule 13.5, Applicant has filed this

application more than 10 days in advance of that due date.

REASONS JUSTIFYING AN EXTENSION OF TIME

Applicant respectfully requests a 45-day extension of time, up to and including October 2, 2023, to file a petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Eighth Circuit in this case. An extension is warranted because of the importance of the issues presented and the undersigned counsel's need for additional time to prepare a petition that will assist this Court in deciding whether to grant certiorari.

1. This case, tried to a jury, concerns the duty of reasonable accommodation under the Americans with Disabilities Act. 42 U.S.C. 12101 et seq..

2. Applicant brought the instant action in the Eastern District of Arkansas, alleging a violation of the duty of reasonable accommodation under the Americans with Disabilities Act. A jury resolved the case in favor of the Applicant, but, on March 30, 2022, district court granted Respondent's motion for judgment as a matter of law. The Eighth Circuit affirmed.

3. The instant case implicates an entrenched and long-running disagreement among the circuits: whether a worker has a right to reasonable accommodation if the worker can, with difficulty, perform the essential functions of the job without one.

4. Furthermore, the decision of the Eighth Circuit extends a circuit split on the duty of accommodations for workers with disabilities who need the accommodation to

mitigate disability related symptoms rather than facilitate performance of discrete essential functions of the job. Given the importance and complexity of the issues presented, a 45-day extension would allow counsel to analyze the issues and present them in the most effective manner for this Court's consideration.

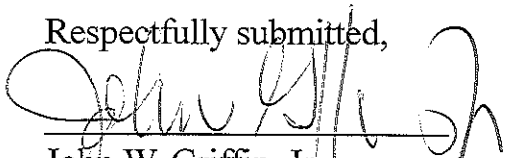
5. Applicant has requested that Professor Eric Schnapper of the University of Washington School of Law assist in the preparation of his petition. Professor Schnapper, however, also has petitions due in other cases on August 7th and September 8th. An extension of time will permit him the time necessary to effectively contribute to the preparation of a comprehensive petition.

6. The need for additional time to coordinate with Professor Schnapper demonstrates good cause for the extension of time.

CONCLUSION

For these reasons, Applicant respectfully requests that this Court grant an extension of 45 days, up to and including October 2, 2023, within which to file a petition for a writ of certiorari in this case.

Respectfully submitted,



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CERTIFICATE OF SERVICE

As required by Rule 29.5, I, John Griffin, a member of the bar of the Supreme Court of the United States, hereby certify that on this 4th day of August, 2023, I served a copy of the Application for Extension of Time to File Petition For Writ of Certiorari on all parties required to be served by email and via first class mail addressed to the following counsel for the defendant-appellee::

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This 4th day of August, 2023.

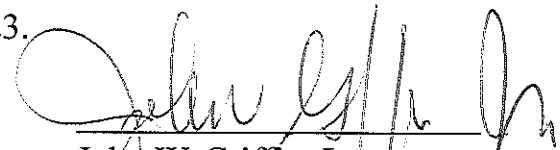

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Exhibit A

68 F.4th 394
United States Court of Appeals, Eighth Circuit.

Perry HOPMAN, Plaintiff - Appellant

v.

UNION PACIFIC RAILROAD,
Defendant - Appellee
Association of American Railroads; The Chamber of Commerce of the United States of America, Amici on Behalf of Appellee

No. 22-1881
|
Submitted: January 10, 2023
|
Filed: May 19, 2023

Synopsis

Background: Railroad employee brought action against his railroad employer, alleging it violated the Americans with Disabilities Act (ADA) when it refused his Rottweiler service dog on board moving freight trains as a reasonable accommodation to ameliorate the effects of his post-traumatic stress disorder (PTSD) and migraine headaches resulting from his prior service in the military. After jury returned verdict for employee, awarding compensatory but not punitive damages, the United States District Court for the Eastern District of Arkansas, Kristine G. Baker, J., 2022 WL 963662, granted employer's renewed motion for judgment as a matter of law. Employee appealed.

[Holding:] The Court of Appeals, Loken, Circuit Judge, held that employer did not violate its duty under the ADA to make reasonable accommodation relating to equal benefits and privileges of employment.

Affirmed.

West Headnotes (8)

[1] **Civil Rights** ⇐ In general; elements of accommodation claims

To prevail on a failure-to-accommodate claim under the ADA, the plaintiff must establish both a prima facie case of discrimination based on disability and a failure to accommodate it. Americans with Disabilities Act of 1990 § 102, 42 U.S.C.A. §§ 12112(a), 12112(b)(5)(A).

[2] **Federal Courts** ⇐ Taking case or question from jury; judgment as a matter of law

Federal Courts ⇐ Taking case or question from jury; judgment as a matter of law

Court of Appeals reviews de novo the grant of a renewed motion for judgment as a matter of law, viewing the evidence in the light most favorable to the verdict.

[3] **Federal Civil Procedure** ⇐ Evidence

Judgment as a matter of law is only appropriate when no reasonable jury could have found for the nonmoving party.

[4] **Federal Civil Procedure** ⇐ Construction of evidence

On a renewed motion for judgment as a matter of law, conflicts in the evidence must be resolved in favor of the verdict.

[5] **Civil Rights** ⇐ Requesting and choosing accommodations; interactive process; cooperation

Railroad employer did not violate its duty under the ADA to make reasonable accommodation relating to equal benefits and privileges of employment as enjoyed by employer's other similarly situated employees without disabilities when it refused employee's request that his Rottweiler service dog be on board moving freight trains on which he worked as a conductor and engineer to ameliorate the effects of post-traumatic stress disorder (PTSD) and migraine headaches that resulted from his prior military service; mitigation of employee's mental or psychological pain was not an employer

sponsored program or service, and providing a service dog at work so that employee would have the same assistance the service dog provided away from work was not a cognizable benefit or privilege of employment. Americans with Disabilities Act of 1990 § 102, 42 U.S.C.A. §§ 12112(a), 12112(b); 29 C.F.R. § 1630.2(o)(1)(iii).

[6] **Administrative Law and Procedure** ⇐ Plain language; plain, ordinary, or common meaning

Unless the court concludes that a regulation is contrary to the commands of the statute it is interpreting, the court must give controlling weight to its plain text.

[7] **Civil Rights** ⇐ In general; elements of accommodation claims

The employer's duty under Equal Employment Opportunity Commission (EEOC) regulation implementing the ADA to make reasonable accommodation relating to equal benefits and privileges of employment as are enjoyed by employer's other similarly situated employees without disabilities is limited by the plain text of the regulation to employer provided or sponsored services and programs. Americans with Disabilities Act of 1990 § 102, 42 U.S.C.A. §§ 12112(a), 12112(b); 29 C.F.R. § 1630.2(o)(1)(iii).

[8] **Civil Rights** ⇐ Handicap, Disability, or Illness

Any interpretation of the Rehabilitation Act must be responsive to two powerful but countervailing considerations -- the need to give effect to the statutory objectives and the desire to keep the Act within manageable bounds. Rehabilitation Act of 1973, § 2 et seq., 29 U.S.C.A. § 701 et seq.

***395** Appeal from United States District Court for the Eastern District of Arkansas - Central

Attorneys and Law Firms

Counsel who presented argument on behalf of the appellant and appeared on the appellant's brief, was John W. Griffin, Jr., of Victoria, TX. The following attorney(s) also appeared on the appellant's brief; Katherine L. Butler, of Houston, TX., Michael Neuerburg, of Cedar Rapids, IA.

Counsel who presented argument on behalf of the appellee and appeared on the appellee's brief, was Stephanie Schuster, of Washington, DC. The following attorney(s) also appeared on the appellee's brief; Amanda Leigh Salz, of Washington, DC., Bryan Michael Killian, of Washington, DC., Linda Cooper Schoonmaker, of Houston, TX.

Counsel who appeared on the amicus brief of The Association of American Railroads, was William A. Brasher, of Saint Louis, MO., Kathryn D. Kirmayer, of Washington, DC., Daniel Saphire, of Washington, DC.

Counsel who appeared on the amicus brief of The Chamber of Commerce of the United States of America was Stephanie A. Maloney, of Washington, DC., Tyler S. Badgley, of Washington, DC., Michael H. McGinley, of Philadelphia, PA., Brian Andrew Kulp, of Philadelphia, PA., Anthony R. Jadick, of Philadelphia, PA.

Before SMITH, Chief Judge, WOLLMAN and LOKEN, Circuit Judges.

Opinion

LOKEN, Circuit Judge.

Perry Hopman, then a conductor now an engineer for Union Pacific Railroad ("Union Pacific"), brought this action under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12117(a), when Union Pacific refused Hopman's requests that he be allowed to bring his Rottweiler service dog on board moving Union Pacific freight trains as a reasonable accommodation to ameliorate the effects of Hopman's undisputed disabilities, post-traumatic stress disorder (PTSD) and migraine headaches resulting from his prior service in the military. At the end of a week-long trial, the district court[1] denied Union Pacific's motion ***396** for judgment as a matter of law. The jury then returned a verdict for Hopman, awarding compensatory but not punitive damages. The district court granted Union Pacific's renewed motion for judgment as a matter of law, concluding there is no legally sufficient evidentiary basis for the jury's verdict. Hopman v.

Union Pac. R.R., No. 4:18-cv-00074-KGB, Order (E.D. Ark. Mar. 30, 2022). Hopman appeals. We affirm.

I. Framing the Regulatory Issue

[1] "The ADA bars private employers from discriminating against a 'qualified individual on the basis of disability.' 42 U.S.C. § 12112(a). Discrimination is defined to include 'not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified [employee] with a disability.' 42 U.S.C. § 12112(b)(5)(A)." Faidley v. United Parcel Service, Inc., 889 F.3d 933, 940 (8th Cir. 2018) (en banc). "To prevail on his failure-to-accommodate claim under the ADA, [Hopman] must establish both a prima facie case of discrimination based on disability and a failure to accommodate it." Moses v. Dassault Falcon Jet-Wilmington Corp., 894 F.3d 911, 923 (8th Cir. 2018) (quotation omitted).

Title I of the ADA is titled "Employment." Its obvious focus is employer discrimination that disadvantages the job opportunities of persons with disabilities. Indeed, the statute defines a "qualified individual" as "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). Thus, most failure-to-accommodate cases involve whether the employer "failed to provide reasonable accommodations ... that would have allowed [the employee] to perform the essential functions of [his] position." Fjellestad v. Pizza Hut of Am., Inc., 188 F.3d 944, 950 (8th Cir. 1999). This case does not. From the outset of the litigation, Hopman has conceded that he is able to perform the essential functions of his work on Union Pacific trains with or without the service dog accommodation he seeks. Indeed, Union Pacific promoted Hopman from conductor to engineer during the litigation.

Employers seeking to hire and retain qualified workers offer attractions not directly related to job performance, including "fringe benefits" such as health and retirement benefits, and privileges such as employee lounges and fitness facilities. The question underlying this appeal, which we have not addressed in prior cases, is whether Congress in the ADA also intended to bar employer discrimination that does not directly affect the ability of an employee who is a qualified individual to perform his job's essential functions. The statute contains strong indications that Congress did intend to bar employer discrimination in providing such benefits and privileges.

The discrimination prohibition in § 12112(a) includes discrimination "in regard to ... other terms, conditions, and *privileges* of employment." The definition of "discriminate" in § 12112(b) includes in subpart (2), subjecting qualified employees with a disability to discrimination by "an organization providing *fringe benefits*" to the employer, and in (4), "excluding or otherwise denying equal jobs *or benefits*." (Emphases added). Subpart (5)(A) defines discrimination as including "not making 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 [employer's] business." The definition of "reasonable accommodation" in § 12111(9)(A) states that it may include "*making* ***397** *existing facilities used by employees readily accessible* to and usable by individuals with disabilities."

The ADA's legislative history confirms that these italicized statutory terms were not inadvertently or carelessly included:

> The phrasing of [42 U.S.C. § 12112(a)] is consistent with regulations implementing section 504 of the Rehabilitation Act of 1973. Consistent with these regulations, the phrase "other terms, conditions, and privileges of employment" includes ... (5) leaves of absence, sick leave, or any other leave; (6) fringe benefits available by virtue of employment, whether or not administered by the [employer] ... and (8) employer-sponsored activities, including social or recreational programs.

S. Rep. No. 101-116, at 25 (1989); see H.R. Rep. No. 485 pt. 2, at 54-55 (1990). Likewise, the EEOC's implementing regulations define the term "reasonable accommodation" as including three distinct requirements:

> (i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or
>
> (ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position; or
>
> (iii) Modifications or adjustments that enable a covered entity's employee with a disability *to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities*.

29 C.F.R. § 1630.2(o)(1) (emphasis added). Hopman's Opening Brief states that he "sought the kind of modification or adjustment of policies envisioned by ... 29 C.F.R. § 1630.2(o)(1)(iii)."

II. Background

Hopman served two military tours as a flight medic -- in Iraq from 2006-2008, where he responded to scenes of catastrophic injury and death from IEDs that wreaked havoc on our troops, and in Kosovo in 2010, a tour that ended when he suffered traumatic brain injury after falling 50 feet out of a helicopter. Hopman testified that these experiences left him with anxiety, depression, sleeplessness, nausea-inducing migraines, flashback triggers from loud noises or certain sights and smells, and difficulties concentrating. Union Pacific concedes he is a qualified individual with a disability, post-traumatic stress disorder.

Hopman started working for Union Pacific as a train conductor in 2008, between his tours of duty. He returned to this job in May 2015, after reconstructive surgery, lengthy treatment for PTSD and traumatic brain injury, and extensive physical and occupational therapy. He successfully passed Union Pacific's fitness re-entrance test but suffered at work from flashbacks and migraine headaches with nausea. Helped by public funding, Hopman purchased a service dog, "Atlas," and secured an experienced service dog trainer. In April 2016, Union Pacific denied Hopman's request to bring Atlas to work. The written denial explained that a service dog would result in a direct threat to the health and safety of employees because "the railroad environment is constantly shifting and changing," "it is unclear how a service dog would adapt to moving box cars, locomotives and oftentimes loud and dangerous conditions," and an unmonitored service dog "may pose a risk to co-workers" when Hopman "is performing his essential duties."

***398** Union Pacific later denied Hopman's renewed request after Atlas was fully trained but offered him alternative accommodations -- take FMLA leave, or accept transfer to a yard position that does not require overnight stays. Hopman temporarily transferred to a yard position "that paid road money." But he returned to his job as a conductor because the yard is "a frenzied environment" that created more frequent flashback triggers. He was subsequently promoted to freight train engineer.

The district court denied Union Pacific's motion for summary judgment. Quoting 29 C.F.R. § 1630.2(o)(1)(iii), the court found "that the ADA permits Mr. Hopman to seek from Union Pacific a reasonable accommodation to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities," despite his being able to perform the essential functions of his job. Hopman v. Union Pacific R.R., 462 F. Supp. 3d 913, 926 (E.D. Ark. 2020) (quotation omitted). The court noted Union Pacific's argument that a "benefit" or "privilege" must be a "tangible service offered by an employer." But viewing the summary judgment record in the light most favorable to Hopman, the non-moving party, the court stated it "is not inclined to grant judgment as a matter of law ... on this point at this stage of the litigation." Id. at 928.

At trial, Hopman ignored the essential terms of the EEOC regulation on which his claim was based even though these terms were incorporated in jury Instruction No. 10 that set forth the elements of his failure-to-accommodate claim:

> Fourth, allowing Mr. Hopman his requested accommodation was (1) reasonable and (2) a modification or adjustment to enable Mr. Hopman with a disability to enjoy equal benefits and privileges of employment as are enjoyed by Union Pacific Railroad's other similarly situated employees without disabilities.

During Hopman's closing arguments, the only mention of benefits and privileges of employment came at the very end of his rebuttal:

> It seems like the only benefit o[r] privilege of employment [Union Pacific] think[s] Mr. Hopman is entitled to is money. They want to be sure to tell you how much money he makes. But you've already heard he works extremely hard. ... Let him do it without the pain and suffering. Let him do it as he can if he's allowed to really flourish and not throw up out of the window every day.

From Hopman's perspective, this is certainly a fair point. But it is a job performance argument, and Hopman did not claim denial of a job performance accommodation under 29 C.F.R. § 1630.2(o)(1)(ii), presumably because he is able to perform the essential functions of his conductor and engineer jobs with or without the requested service dog accommodation.

The district court granted Union Pacific's renewed motion for judgment as a matter of law. The court rejected Hopman's claim "that freedom from mental or psychological pain caused by PTSD is a benefit or privilege of employment that [Congress] envisioned employers being required to

offer employees." At issue is the employer obligation in 29 C.F.R. § 1630.2(o)(1)(iii) to make reasonable accommodation relating to benefits and privileges of employment. This obligation "is applicable to *employer sponsored* placement or counseling services, and to *employer provided* cafeterias, lounges, gymnasiums, auditoriums, transportation and the like." Order at 7 (emphasis in original), citing 29 C.F.R. Pt. 1630 App. § 1630.9. Hopman at trial "did not identify a corresponding ***399** benefit or privilege of employment offered to Union Pacific employees." Id. at 9. The service dog accommodation case on which he relies, Alonzo-Miranda v. Schlumberger Tech. Corp., No. 5:13-cv-1057, 2015 WL 13768973 (W.D. Tex. June 11, 2015), "is an essential function case, not solely a benefit and privilege of employment case." Id. at 15. Evidence and argument that Hopman's job performance will be better if he "not be burdened with the symptoms of PTSD and migraines" during work days support a job performance accommodation claim that Hopman did not assert. Id. at 18-19. Accordingly, the court concluded, "[t]here is no legally sufficient evidentiary basis for a reasonable jury to find that Mr. Hopman has identified a cognizable benefit or privilege of employment that he is entitled to as a reasonable accommodation."[2] Id. at 23.

III. Discussion

[2] **[3]** **[4]** "We review *de novo* the grant of a renewed motion for judgment as a matter of law, viewing the evidence in the light most favorable to the verdict." Monohon v. BNSF Ry. Co., 17 F.4th 773, 780 (8th Cir. 2021). "Judgment as a matter of law is only appropriate when no reasonable jury could have found for the nonmoving party." Mattis v. Carlon Elec. Prods., 295 F.3d 856, 860 (8th Cir. 2002). "[C]onflicts in the evidence must be resolved in favor of the verdict." S. Wine & Spirits of Nevada v. Mountain Valley Spring Co., 646 F.3d 526, 533 (8th Cir. 2011).

[5] Though Hopman restates his job performance arguments on appeal, in the district court he explicitly limited his failure-to-accommodate claim to one of the three subsections of the applicable EEOC regulation: "Modifications or adjustments that enable a [Union Pacific] employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities." 29 C.F.R. § 1630.2(o)(1)(iii). Thus, whether Hopman might have had a job performance accommodation claim is not before us. Ruling on the claim that is before us, the district court concluded that "benefits and privileges of employment" (1) refers only to employer-provided services; (2) must be offered to non-disabled individuals in addition to disabled ones; and (3) does not include freedom from mental or psychological pain. We agree.

The argument section of Hopman's Opening Brief begins by arguing the district court made a slew of procedural errors -- misstating the nature of the accommodation he requested, improper fact-finding, and citing "irrelevant cases." We disagree. The district court recognized that Hopman had limited his failure-to-accommodate claim to the denial of equal benefits and privileges of employment, interpreted what the ADA and the implementing EEOC regulations require to prove that claim, gave Hopman notice of what must therefore be proved in its summary judgment order and in jury Instruction No. 10, and then held that Hopman had failed to introduce the evidence needed to prove that claim. That Hopman chose to ignore the district court's repeated warning of what he needed to prove was hardly procedural error by the court.

***400** **[6]** A. Turning to the merits of the district court's legal conclusions, Hopman argues the district court erred in concluding that a failure-to-accommodate claim under 29 C.F.R. § 1630.2(o)(1)(iii) requires proof of an employer-sponsored or employer-provided benefit or privilege that is provided to workers without disabilities. We first note that the district court's interpretation, as reflected in the above-quoted portion of jury Instruction No. 10, is consistent with the plain text of the regulation, which includes only benefits and privileges "enjoyed by its other similarly situated employees without disabilities." Unless we conclude that a regulation is contrary to the commands of the statute it is interpreting -- which Hopman intimates but does not argue -- "we must give controlling weight" to its plain text. Berndsen v. N. Dakota Univ. Sys., 7 F.4th 782, 789 (8th Cir. 2021).

As we have explained, although "benefits and privileges of employment" is not a term used and defined in the ADA, the statutory meaning of those terms -- fringe benefits, access to recreational programs and facilities, and other employer-provided workplace advantages not directly related to job performance -- can be derived from various provisions of the statute, confirmed by its legislative history. The EEOC has consistently defined the terms in this fashion. Importantly, the agency's Interpretive Guidance on Title I, Appendix to 29 C.F.R. Part 1630, addresses this issue:

> The obligation to make reasonable accommodation is a form of non-discrimination. ... [It] applies to all

> services and programs provided in connection with employment, and to all non-work facilities *provided or maintained by an employer* for use by its employees. Accordingly, the obligation to accommodate is applicable to *employer sponsored* placement or counseling services, and to *employer provided* cafeterias, lounges, gymnasiums, auditoriums, transportation and the like.

Part 1630 App., § 1630.9 (emphasis added). In Morriss v. BNSF Ry. Co., 817 F.3d 1104, 1108-09 (8th Cir. 2016), we relied on another section of this Interpretive Guidance in holding that obesity is not a physical disorder under the ADA unless it occurs as a result of a physiological disorder.

Similarly, an EEOC "Technical Assistance Manual," in addressing the issue of "Accommodations to Ensure Equal Benefits of Employment," stated that "[e]mployees with disabilities must have equal access to lunchrooms, employee lounges, rest rooms, meeting rooms, and other *employer-provided or sponsored* services such as health programs, transportation, and social events." EEOC, Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act § 3.3 (1992).[3]

[7] Hopman argues that the district court's interpretation (and therefore the EEOC regulation) is a "perverse view ... firmly at odds with disability law." But he cites no case, and we have found none, where an employee's failure-to-accommodate claim was based entirely on the benefits and privileges of employment duty in 29 C.F.R. § 1630.2(o)(1)(iii), and the court held that the duty was not limited to employer provided or sponsored services and programs. We agree with the district court that the employer duty to provide "equal benefits and privileges of employment" defined in § 1630.2(o)(1)(iii) is limited by the plain text of the regulation.

***401** B. At trial, counsel argued "that Mr. Hopman should not have to endure 'physical and emotional pain' his episodes bring him at work." Hopman, Order at 17. The district court noted that "Mr. Hopman has not pointed the Court to authority where a court has articulated a right to work without mental or psychological pain." Id. On appeal, without stating this is an issue presented, Hopman asserts the court misstated the nature of the accommodation requested and then argues the merits of whether the ability to work with reduced pain is a benefit or privilege of employment that is part of an employer's duty to provide accommodations under § 1630.2(o)(1)(iii). This will not do. See Fed. R. App. P. 28(a)(5); Fed. Ins. Co. v. Axos Clearing LLC, 982 F.3d 536, 542 n.5 (8th Cir. 2020).

[8] On the merits of this question, mitigating pain is not an employer sponsored program or service. But even putting that formidable obstacle aside, the EEOC's Interpretive Guidance addresses this issue more fundamentally:

> The obligation to make reasonable accommodation ... does not extend to the provision of adjustments or modifications that are primarily for the personal benefit of the individual with a disability. Thus, if an adjustment or modification is job-related, *e.g.*, specifically assists the individual in performing the duties of a particular job, it will be considered a type of reasonable accommodation. On the other hand, if an adjustment or modification assists the individual throughout his or her daily activities, on and off the job, it will be considered a personal item that the employer is not required to provide. Accordingly, an employer would generally not be required to provide an employee with a prosthetic limb, wheelchair, or eyeglasses.
>
> * * * * *
>
> It should be noted that it would not be a violation of this part for an employer to provide any of these personal modifications or adjustments, or to engage in supported employment or similar rehabilitative programs.

29 C.F.R. Part 1630 App., § 1630.9. The district court noted there is strong judicial support for this interpretation of the statute. As a unanimous Supreme Court said in interpreting Section 504 of the Rehabilitation Act of 1973, "[a]ny interpretation of § 504 must therefore be responsive to two powerful but countervailing considerations -- the need to give effect to the statutory objectives and the desire to keep § 504 within manageable bounds." Alexander v. Choate, 469 U.S. 287, 299, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985); see Cannice v. Norwest Bank Iowa N.A., 189 F.3d 723, 728 (8th Cir. 1999) (the obligation to make reasonable accommodation in Title I of the ADA does not "extend[ ] to providing an aggravation-free environment.") Providing a service dog at work so that an employee with a disability has the same assistance the service dog provides away from work is not a cognizable benefit or privilege of employment.

C. For these reasons, we affirm the district court's decision to grant Union Pacific's renewed judgment as a matter of law. We have considered the cases cited by Hopman from outside the circuit and conclude most are distinguishable, as the district court carefully reasoned, and the rest are non-binding and unpersuasive.[4] We ***402** also emphasize that ADA failure-to-accommodate cases are fact- and context-specific, and this opinion should be applied accordingly. Therefore, at

least in the context presented by this case, for reasons we have explained, we reject the alternative argument of Union Pacific and its supporting *amici* that the ADA "requires employers to provide reasonable accommodations only when necessary to enable employees to perform the essential functions of their jobs." There are conflicting views, or at least contrary reasoning, among the many circuit opinions addressing this issue, but it is often possible to reconcile apparent circuit conflicts by careful attention to distinguishing facts and contexts in the various cases.

Another issue is lurking here that we need not resolve in this case. The district court derived jury Instruction No. 10, to which no party objected, from Eighth Circuit Model Civil Jury Instruction 9.42, entitled Elements of Claim: Reasonable Accommodation. The model instruction seems to ignore our holdings in many panel decisions, endorsed by the court en banc in Faidley, that an ADA failure-to-accommodate claim requires proof of a prima facie case of discrimination, which in turn requires proof that the employee "suffered an adverse employment decision because of the disability." Moses, 894 F.3d at 923. Whether a failure-to-accommodate claim requires proof of an adverse employment action has generated sharp controversy elsewhere. See, e.g., the Tenth Circuit's 7-6 en banc decision in Exby-Stolley v. Bd. of Cnty. Comm'rs, 979 F.3d 784 (10th Cir. 2020). We have not applied this principle to a failure-to-accommodate claim under 29 C.F.R. § 1630.2(o)(1)(iii). At first glance, the shoe does not seem to fit if the benefit or privilege of employment at issue is not directly job-related.

The judgment of the district court is affirmed.

All Citations

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Footnotes

1 The Honorable Kristine G. Baker, United States District Judge for the Eastern District of Arkansas.

2 The district court did not rule on Union Pacific's alternative defense that Union Pacific and the American Association of Railroads as *amicus* argue on appeal -- that "allowing Atlas to ride in the tight quarters of a [freight train] cab is prohibited by federal railroad safety regulations." See 49 C.F.R. § 229.119(c). As we are affirming on another ground, we decline to consider this complex question.

3 https://www.eeoc.gov/laws/guidance/technical-assistance-manual-employment-provisions-title-i-americans-disabilities-act.

4 Compare Burnett v. Ocean Props., Ltd., 987 F.3d 57, 68-69 (1st Cir. 2021), Hill v. Assocs. for Renewal in Educ., Inc., 897 F.3d 232, 239 (D.C. Cir. 2018), Gleed v. AT & T Mobility Servs., LLC, 613 F. App'x 535, 538-39 (6th Cir. 2015), and Feist v. Louisiana, Dep't of Just., Off. of the Att'y Gen., 730 F.3d 450, 453 (5th Cir. 2013), with Brumfield v. City of Chicago, 735 F.3d 619 (7th Cir. 2013), and Holly v. Clairson Indus., L.L.C., 492 F.3d 1247 (11th Cir. 2007). See also Nawrot v. CPC Int'l, 259 F. Supp. 2d 716, 726 (N.D. Ill. 2003); Alonzo-Miranda, 2015 WL 13768973 at *2 (W.D. Tex. June 11, 2015).

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