No. _____

In The Supreme Court of the United States

PERRY HOPMAN,

Petitioner,

v.

UNION PACIFIC RAILROAD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

ERIC SCHNAPPER
Counsel of Record
University of Washington
School of Law
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167
schnapp@uw.edu

JOHN W. GRIFFIN, JR.
MAREK, GRIFFIN & KNAUPP
203 North Liberty St.
Victoria, TX 77901
(361) 573-5500

KATHERINE L. BUTLER
BUTLER & HARRIS
1128 Cortlandt St.
Houston, TX 77008
(713) 443-6456

MICHAEL J. NEUERBURG
SIMMONS PERRINE MOYER BERGMAN PLC
115 Third St. SE
Suite 1200
Cedar Rapids, IA 52401
(319) 366-7461

Counsel for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

The Americans with Disabilities Act (ADA) prohibits a covered employer from discriminating in the "terms, conditions, and privileges of employment" against a qualified individual with a disability. The forbidden discrimination includes failing to "mak[e] reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability."

The question presented is:

Is the ADA requirement of reasonable accommodation of employees with disabilities limited to

> —accommodations that enable an employee to perform the essential functions of a position, and
>
> —accommodations that provide equal access to a program or service that is provided or sponsored by the employer and that is not directly job-related?

PARTIES

The plaintiff is Perry Hopman. The defendant is the Union Pacific Railroad.

RELATED PROCEEDINGS

Hopman v. Union Pacific Railroad, No. 4:18-cv-00074-KGB, United States District Court Eastern District of Arkansas, judgment entered March 30, 2022.

Hopman v. Union Pacific Railroad, No. 22-1881, United States Court of Appeals for the Eighth Circuit, judgment entered May 19, 2023.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

STATUTES

TABLE OF AUTHORITIES—Continued

Petitioner Perry Hopman respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on May 19, 2023.

OPINIONS BELOW

The May 19, 2023, opinion of the court of appeals, which is reported at 68 F.4th 394, is set out at pp.1a-18a of the Appendix. The March 30, 2022, Order of the district court, which is unofficially reported at 2022 WL 963662, is set out at pp. 19a-52a of the Appendix. The September 9, 2020, Order of the district court, which is unofficially reported at 2020 WL 5412382, is set out at pp. 53a-65a of the Appendix. The May 26, 2020, order of the district court, which is reported 462 F.Supp.3d 913, is set out at pp. 66a-102a of the Appendix.

JURISDICTION

The decision of the court of appeals was entered on May 19, 2023. On August 14, 2023, Justice Kavanaugh granted an extension of the time to file a petition until October 2, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The district court had jurisdiction under 28 U.S.C. § 1331.

STATUTES AND REGULATIONS INVOLVED

Section 12112(a) of 42 U.S.C. provides:

> No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

Section 12112(b) of 42 U.S.C. provides in pertinent part:

> (b) Construction
>
> As used in subsection (a), the term "discriminate against a qualified individual on the basis of disability" includes—
>
> ***
>
> (5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity....

29 C.F.R. § 1630.2(o)(1) provides:

> (o) Reasonable accommodation.
>
> (1) The term reasonable accommodation means:

(i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or

(ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position; or

(iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

29 C.F.R. § 1630.4(a)(1) provides in pertinent part:

(a) In general—

(1) It is unlawful for a covered entity to discriminate on the basis of disability against a qualified individual in regard to:

***

(vi) Fringe benefits available by virtue of employment, whether or not administered by the covered entity;

(vii) Selection and financial support for training, including: apprenticeships, professional meetings, conferences and other related activities, and selection for leaves of absence to pursue training;

(viii) Activities sponsored by a covered entity, including social and recreational programs; and

(ix) Any other term, condition, or privilege of employment.

29 C.F.R. § 1630.9(a) provides:

(a) It is unlawful for a covered entity not to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business.

29 C.F.R. § 1630.9(e) provides:

(e) A covered entity is required, absent undue hardship, to provide a reasonable accommodation to an otherwise qualified individual who meets the definition of disability under the "actual disability" prong (§ 1630.2(g)(1)(i)), or "record of" prong (§ 1630.2(g)(1)(ii)), but is not required to provide a reasonable accommodation to an individual who meets the definition of disability solely under the "regarded as" prong (§ 1630.2(g)(1)(iii)).

INTRODUCTION

This case concerns a critical, recurring issue regarding the reasonable accommodation requirement of the Americans with Disabilities Act (ADA).

Individuals with disabilities who are already employed often need accommodations to avoid harms related to their disabilities. Accommodations may be necessary to enable an employee to take medication or obtain treatment, to prevent injury or aggravation of symptoms, or to avoid pain. Even when an employee can perform the essential functions of his or her job, an accommodation may be needed to reduce disability-related difficulty in performing essential or non-essential functions.

The EEOC has long interpreted the ADA to require these types of reasonable accommodations. The Commission has issued a series of disability-specific Guidances describing the types of accommodation that are typically needed for a specific problem. And the EEOC has argued in several briefs that the ADA mandates such accommodations.

But in the instant case the Eighth Circuit has adopted an unprecedented legal standard that largely eviscerates the right to this type of reasonable accommodation. Under the decision below, an individual with disabilities who can perform the essential functions of his or her job is only entitled to an accommodation to avoid disability-related harms if that accommodation is a program or service that the employer is already providing to employees who do *not* have disabilities.

Many necessary and reasonable accommodations would not satisfy that extraordinary requirement. Applying that standard, the district court held that a disabled employee who seeks permission to bring his service dog to work is required to show that his employer provides service dogs to employees who did not have disabilities. The Eighth Circuit affirmed.

The Eighth Circuit did not claim that any other circuit has applied this stringent limitation on reasonable accommodation claims. To the contrary, it acknowledged there were at least some contrary decisions, but curtly dismissed them as "unpersuasive." In fact, decisions in eight courts of appeals, as well as in the highest court of one state, adopt a standard for reasonable accommodations that is inconsistent with the Eighth Circuit standard.

The circuit conflict raises vexing practical problems. The outcome of an ADA reasonable accommodation claim can now turn on the circuit in which it is brought. A worker whose job takes him or her to several states can obtain a more favorable outcome by suing in the better circuit; the plaintiff in this case is an engineer for the Union Pacific Railroad, whose work in the past has been on trains traveling between and in the Eighth and Fifth Circuits. Several EEOC district offices must now apply different standards to ADA claims, depending on the state in which a claim arose. The EEOC Guidances are no longer an accurate description of the ADA standards in the Eighth Circuit. The reasonable accommodation requirement imposed by the Rehabilitation Act on recipients of federal funds

is governed by now-divergent ADA standards. When a recipient of federal funds operates in several circuits, the federal agency responsible for enforcing the Rehabilitation Act needs to administer inconsistent legal standards.

Certiorari should be granted to resolve these administrative problems, and to restore the vitality of the ADA reasonable accommodation requirement in the Eighth Circuit.

STATEMENT OF THE CASE

Legal Background

The Americans with Disabilities Act requires employers, under specified circumstances, to provide reasonable accommodations to individuals with disabilities. 42 U.S.C. § 12112(b)(5). That statutory requirement is one of the most consequential laws of modern times, opening the doors of the nation's workplaces to millions of men and women who were previously excluded, permitting them to enjoy remunerative and satisfying jobs and to live independently.

The statutory elements of a reasonable accommodation claim are clear. A claimant must be a person with a disability, he or she must be qualified for the position in question, the employer action sought must accommodate the disability, the accommodation sought must be reasonable, and that accommodation must not impose an undue burden on the employer.

Although disputes do arise in particular cases as to whether one or more of those circumstances is present, the statutory definition of each of these elements is relatively settled. There is an overwhelming consensus among the lower courts that the ADA requires reasonable accommodation not only when a person with a disability needs an accommodation to perform an essential function of a particular position, but also when an employee needs an accommodation for other reasons.

The text of the statute itself does not limit the right to a workplace accommodation to accommodations sought to meet any particular type of need. Disagreement about the scope of the right to reasonable accommodation has arisen because of section 1630.2(o)(1) of the regulations, which defines "reasonable accommodation." That regulatory definition has three subparts. Section 1630.2(o)(1)(i) defines reasonable accommodation to include modifications or adjustments "that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires...." Section 1630.2(o)(1)(ii) applies to modifications or adjustments "that enable an individual with a disability who is qualified to perform the essential functions of th[e] position [in question]." Section 1630.2(o)(1)(iii) adds that reasonable accommodation includes 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."

Section 1630.2(o)(1)(iii) is of particular importance, because it is the part of the regulatory definition that would usually be invoked by employees who are not seeking some other position, but who need an accommodation in the particular job which they already hold. For the most individuals with disabilities who are not applying for a new position, that is the type of accommodation that matters.

The question presented by this case turns in part on the meaning and significance of section 1630.2(o)(1)(iii). The court of appeals below held that section 1630.2(o)(1)(iii) is a limitation, and a severe one, on the circumstances in which a current employee can obtain an accommodation under the ADA. Petitioner maintains, to the contrary, that section 1630.2(o)(1)(iii) does not impose such restrictions, but is a broadly written provision intended to encompass any circumstance in which an accommodation would reduce disadvantages arising from an employee's disability. The difference turns in part on the meaning of the phrase "benefits and privileges of employment." Some circuits, in determining the circumstances in which an employee would be entitled to an accommodations, have not based their standard on section 1620.3(o)(1).

Factual Background

The disabilities at issue in this case derived from the plaintiff's service as an Army flight medic. Hopman first served two years as a flight medic in Iraq, at a

time when our troops were experiencing high rate of casualties because of IEDs. While at the site of an injury or on the helicopter returning to base, Hopman was doctor, surgeon, wound specialist and X-ray technician rolled into one. As a first responder, Hopman repeatedly witnessed horrific scenes of carnage, and assisted gravely wounded and dying service members. Frequently he would return from one tragedy, change out of his bloody clothes, and be sent out on another mission. Those experiences left Hopman with post-traumatic stress syndrome and resulting flashbacks.

After his service in Iraq, Hopman worked for several years as a conductor for Union Pacific Railroad. In 2010 Hopman's Arkansas National Guard unit was called up; Hopman returned to active duty. He was deployed as a flight medic in Kosovo. Near the end of then Staff Sergeant Hopman's tour, a colleague's error caused Hopman to fall 50 feet out of a helicopter. Hopman's fall resulted in traumatic brain injury, as well as nerve damage and injury to his shoulder.

Hopman was sent to Walter Reed for reconstructive surgery and treatment, and then to two other military treatment facilities. He remained in treatment at those facilities for months. After returning to civilian life, Hopman weaned himself off many medications, passed a Union Pacific fitness test, and resumed work for the railroad.

Hopman's symptoms, however, persisted. He continues to have extremely painful, nausea-inducing migraine headaches. When a migraine occurs while

Hopman is at work on a train, he often vomits out the locomotive window. Hopman has been prescribed medicine, the vaso-constrictor rizatriptan, which he can take when he senses the onset of a migraine attack. But the medicine requires some time to take effect; before the medicine is finally effective, Hopman is subject to increasing pain, nausea and light sensitivity. Hopman also continues to experience psychologically painful flashbacks. These continuing medical problems made work exceptionally difficult at times, but Hopman persisted, and eventually was promoted to the position of engineer.

Hopman had been aware since his treatment at Walter Reed that a service dog might well be effective in dealing with his injuries and symptoms. But a service dog trained to deal with those medical problems cost $20,000, and Hopman did not have the funds to obtain one. However, a story about Hopman in National Geographic drew public attention to his plight. An appeal for contributions, highlighting his military service, eventually raised the needed funds. Hopman received the dog, named Atlas, in 2016. The dog, and then the dog together with Hopman, underwent extensive training addressed to Hopman's specific medical problems.

The service dog is quite effective in helping deal with Hopman's symptoms. The dog is able to detect well before Hopman can the onset of a migraine attack, by noting changes in Hopman's scent and by observing changes in Hopman's eyes. The dog is trained to alert Hopman to the imminence of a migraine, which

enables Hopman to take his migraine medicine in time to prevent the onset of symptoms. Similarly, the dog is able to ascertain when Hopman is experiencing flashbacks, and is trained to rub against Hopman in a manner that results in the production of a hormone, oxytocin, which prevents or lessens the flashbacks.[1]

Having found, in the service dog, a means of preventing at work his migraine headaches, vomiting, and flashbacks, Hopman repeatedly asked Union Pacific to accommodate his disability by permitting him to bring the service dog with him in the cab of the locomotive. Hopman described his disability-related symptoms, explained how the service dog was able to assist in avoiding physical and psychological pain, and assured his employer that the dog was trained in a manner that would pose no problems on the job. Company officials denied those repeated accommodation requests.

Proceedings Below

District Court

Hopman sued Union Pacific in federal district court, asserting that its failure to provide him the requested accommodation—permitting Hopman to bring the service dog on the train where he was working—violated the Americans with Disabilities Act. After a period of discovery, the defendant moved for summary judgment.

---

[1] The district court later noted that "[t]he record evidence offers numerous examples of the ways in which Mr. Hopman contends that Atlas helps to alleviate Mr. Hopman's pain and suffering from his PTSD." App. 97a.

As relevant here, Union Pacific advanced two distinct arguments, one statutory and one based on section 1630.2(o)(1). With regard to the statute, the company contended that the reasonable accommodation requirement in section 12112(b)(5) applies only insofar as an employee or applicant needs an accommodation to perform an essential function of the job in question, and thus to be "qualified" under the statute. That issue is important in this case, because the parties agreed that Hopman could perform all the essential functions of his job, without need for any accommodation to do so. The district court rejected Union Pacific's statutory contention. App. 89a-95a.

Union Pacific also argued that the type of accommodation which an employee can obtain is limited by section 1620.2(o)(1). The company argued that section 1630.2(o)(1)(iii) only requires accommodations when they are needed to access some existing program or service that is being provided by the employer to non-disabled employees. App. 96a. Hopman, on the other hand, contended that the ADA and the regulation right to accommodation are not so limited, but more broadly apply where an accommodation is needed to accord a disabled employee the "same right other employees already have—to work without the continual and unrelenting burden and pain" of a disability-related condition. App. 97a. The district court denied the motion for summary judgment. "Even though Mr. Hopman is able to perform the essential functions of his job without accommodation, from the record evidence before it, the Court finds that '[a] reasonable jury could

conclude that forcing [Mr. Hopman] to work with pain when that pain could be alleviated by his requested accommodation violates the ADA.'" App. 97a (quoting *Hill v. Associates for Renewal in Education, Inc.*, 897 F.3d 232, 239 (D.C. Cir.2018)).

Union Pacific moved for reconsideration of the district court's decision. "Union Pacific reiterate[d] its position that the 'benefits and privileges of employment are limited to employee-sponsored services, programs, and facilities....'" App. 61a (quoting 29 C.F.R. § 1630.2(o)(1)(iii)). The company also renewed its statutory argument that the reasonable accommodation requirement applies only to individuals who did need an accommodation to perform an essential function. App. 59a. The district court declined to alter its original decision. App. 63a.

At trial, the jury was asked to answer a series of special verdict questions. One of those questions, phrased in language taken essentially verbatim from section 1630.2(o)(1)(iii), required the jury to determine whether "plaintiff Perry Hopmans' requested accommodation was a modification or adjustment to enable Mr. Hopman with a disability to enjoy equal benefits and privileges as are enjoyed by defendant Union Pacific Railroad's other similarly situated employees without disabilities?"[2] The jury answered "yes." The jury also found that Hopman's requested accommodation was reasonable, that it did not create undue hardship for the defendant, and that it did not require the

[2] Doc. 184, p. 4

company to violate any federal law or regulation.[3] The jury awarded Hopman $250,000 in compensatory damages.

Union Pacific moved for judgment as a matter of law, again contending that under section 1630.2(o)(1)(iii) a disabled employee, able to perform the essential functions of his or her job, is limited to accommodations that are needed to access an employer-provided program or service. This time the district judge agreed with that regulation-based argument.

> According to the regulations, the obligation to make reasonable accommodation 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. 29 C.F.R. § Pt. 1630, App. § 1630.9 "Section 1630.9 Not Making Reasonable Accommodation" ...

App. 28a (emphasis in opinion). Applying that standard, the district court held that Hopman's evidence was insufficient as a matter of law because "Mr. Hopman has not demonstrated that Union Pacific provided service animals as a benefit and privilege of employment for any other similarly situated non-disabled employee." App. 35a; see App. 33a (Hopman failed to prove that

[3] Doc. 184, pp. 4, 6, 7.

"service animals are being provided to other similarly situated non-disabled Union Pacific employees as a benefit and privilege of employment"); see App. 31a. It was thus legally irrelevant whether, as Hopman contended, the requested "accommodation will assist [him] in mitigating the symptoms of a disability." App. 23a.

Hopman also argued that he was entitled to an accommodation because with it "his 'level of performance' will be higher, given that he will not be burdened with the symptoms of PTSD and migraines that otherwise plague him during the days." App. 43a-44a. The district court ruled that the regulation does not require an employer to provide an accommodation that would affect the ability of an employee with a disability to better perform his or her job, except if the employee is unable to perform an essential function of that job without the requested accommodation. Section 1630.2(o)(1)(iii), the court reasoned, does not apply at all to accommodations intended to affect job performance, and section 1630.2(o)(1)(ii) only applies to performance-related accommodations needed to perform essential functions. App. 43a-49a. There is no right, it held, to an accommodation "to assist [an employee] with performing duties above and beyond the core essential functions of his job...." App. 46a.

Court of Appeals

The court of appeals upheld the district court's view that section 1630.2(o)(1) limits the circumstances

in which employees with disabilities can obtain an accommodation for their disabilities. Absent a need for accommodation to perform the essential functions of a job, which would fall within the scope of section 1630.2(o)(ii), the Eighth Circuit reasoned, an employee is only entitled an accommodation when it is needed for equal access to "employer provided or sponsored services and programs." App. 14a. The Eighth Circuit's limitation was based solely on the regulation, not on the text of the statute itself. The phrase "benefits and privileges of employment" in section 1630.2(o)(1)(iii), the court of appeals insisted, "refers only to employer-provided services [that are] offered to non-disabled individuals in addition to disabled ones ... " App. 11a; see App. 12a ("proof of an employer-sponsored or employer-provided benefit or privilege that is provided to workers without disabilities"), App. 13a ("*employer sponsored* placement or counseling services, and ... *employer provided* cafeterias, lounges, gymnasiums, auditoriums, transportation and the like") (emphasis in opinion). The Eighth Circuit further explained that "benefits and privileges of employment" in section 1630.2(o)(1)(iii) "mean][s] ... employer-provided workplace advantages not directly related to job performance...." App. 13a.[4]

---

[4] Even if Union Pacific had provided service dogs to non-disabled employees (as the district court had described as a missing prerequisite to Hopman's claim), the court of appeals insisted that Hopman could not insist that he was entitled to that type of accommodation, because actually providing a service dog would be like providing a worker with eyeglasses, a personal item not a job-related accommodation. App. 15a-16a. Of course, Hopman

The court of appeals acknowledged Hopman's argument that other circuits interpret the ADA and its regulations more broadly. App. 17a n.4 (citing decision in the First, Fifth, Sixth and District of Columbia Circuits). The Eighth Circuit suggested that some of those court of appeals opinions were distinguishable, and commented that "the rest are non-binding [precisely because they are in other circuits] and unpersuasive." App. 16a-17a.

The court of appeals also agreed with the district court that no accommodation could be sought for a disability-related problem that interfered with an employee's ability to do his or her job, unless the problem prevented the employee from performing an essential function of the job. Hopman's counsel had argued to the jury, "Let [Hopman] do [his job] 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." App. 9a. That disability-caused pain, suffering, and vomiting, the Eighth Circuit insisted, were legally irrelevant.

> 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

---

was not asking that Union Pacific provide him with a service dog; Hopman already had one.

> without the requested service dog accommodation. App. 9a.

Under the decisions below, accommodation claims related to job performance are not cognizable under section 1630.2(o)(1)(iii). Such accommodation claims can only be made under section 1630.2(o)(1)(ii),[5] and section 1630.2(o)(1)(ii) in turn is limited to employees who cannot perform an essential function without an accommodation (which is why, as the court of appeals recognized, Hopman did not assert a section 1630.2(o)(1)(ii) claim).

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE EIGHTH CIRCUIT CONFLICTS WITH DECISIONS IN EIGHT CIRCUITS AND IN THE HIGHEST COURT OF ONE STATE

The Eighth Circuit decision conflicts with the legal standard applied in eight other courts of appeals, and in the highest court of one state. The court of appeals below did not contend that any other court (other than the district court in this case) applied a similar standard. The Eighth Circuit acknowledged that at least some other courts ("the rest") rejected its interpretation

[5] See App. 44a (plaintiff's argument that his disability impeded job performance "may be appropriate for an essential functions reasonable accommodation analysis [under section 1630.2(o)(1)(ii)], but it is not appropriate for a benefits and privileges employment reasonable accommodation analysis [under section 1630.2(o)(1)(iii)]").

of the law, and frankly disagreed with them ("unpersuasive"). The court of appeals listed in a footnote several of those decisions in other circuits. App. 17a n.4.

The First Circuit has repeatedly applied to ADA reasonable accommodation claims a legal standard inconsistent with the Eighth Circuit standard. In *Jacques v. Clean-Up Group, Inc.*, 96 F.3d 506 (1st Cir.1996), the First Circuit held that an employee able to perform a job's essential functions could still obtain an accommodation "to pursue therapy or treatment." 96 F.3d at 515 n.9. The controlling standard in *Jacques* is the purpose of the proposed accommodation, not whether it is accorded to others. In *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 253 (1st Cir.1999), the court held that the absence of an accommodation could be actionable if it "affected the terms, conditions, or privileges of the plaintiff's employment," including by "imped[ing] his ability to work comfortably." 194 F.3d at 256, 264. *Bell v. O'Reilly Auto Enterprises, LLC*, 972 F.3d 21 (1st Cir.2020), cert. denied, 141 S.Ct. 2755 (2021), held that an employee could obtain an accommodation because he or she could only do his or her job "with some difficulty." 972 F.3d at 24. *Bell* announced a three-part standard for a reasonable accommodation claim, no element of which turned on whether the plaintiff was seeking access to some existing employer-provided program or on how non-disabled workers were treated.[6] The defendant in *Bell* argued in vain

[6] 972 F.3d at 24:

> [T]o make out a failure to accommodate claim, a plaintiff need only show that: "(1) he is a handicapped

that section 1630.2(o)(1)(iii) should be construed to exclude accommodations that would enable a worker to perform better.[7]

In *Colwell v. Rite Aid Corp.*, 602 F.3d 495 (3d Cir.2010), the Third Circuit upheld the reasonable accommodation claim of a worker with impaired vision who could not drive safely at night, and who asked that the employer accommodate that disability by placing her on a shift that would permit her to get home before dark.[8] "[T]he ADA contemplates that employers may need to make reasonable shift changes in order to accommodate a disabled employee's disability-related difficulties in getting to work." 602 F.3d at 506. The basis of the accommodation—"in order to"—was addressing the difficulties faced by the employee. Such an accommodation, the court held, would provide the employee with "equal benefits and privileges of employment" under section 1630.2(o)(1)(iii). 602 F.3d at 505-06. And this was not, as the district court in

---

person within the meaning of the Act; (2) he is nonetheless qualified to perform the essential functions of the job (with or without reasonable accommodation); and (3) the employer knew of the disability but declined to reasonably accommodate it upon request." *Sepúlveda-Vargas v. Caribbean Rests., LLC*, 888 F.3d 549, 553 (1st Cir.2018). A plaintiff can make out this kind of claim even when an employer has "pronounced itself fully satisfied with [the disabled employee]'s level of performance" before a request. *Calero-Cerezo v. U.S. Dep't of Just.*, 355 F.3d 6, 23 (1st Cir.2004).

[7] Brief of Defendant-Appellee, 30.

[8] The plaintiff could only get home after dark by driving; there was no bus service then, and no taxis. 602. F.3d at 498.

Colwell had argued (and as the Eighth Circuit requires), an accommodation that had "nothing to do with ... the manner and circumstances under which [the plaintiff] performed her work." To the contrary, the Third Circuit emphasized, the time of day when the plaintiff was required to work was "clearly ... a workplace condition." 602 F.3d at 506.

In *Stokes v. Nielsen*, 751 Fed. Appx. 451 (5th Cir.2018), the Fifth Circuit applied section 1630.2(o)(1)(iii)[9] to uphold a claim that clearly would be barred under the Eighth Circuit standard. The plaintiff in that case, an employee with limited vision, could not read written materials at a meeting if they were presented in ordinary format. She asked that the employer accommodate her disability by either giving her the materials in advance, so that she could read the materials with a magnifying glass, or providing the materials at the meeting in a large format. The district court had dismissed the complaint because the employee was able (even without the requested accommodations) to perform the essential functions of her job; the court of appeals reversed, holding that the plaintiff had a viable claim under section 1630.2(o)(1)(iii). It was sufficient that the plaintiff had asserted that she could not "effectively participate in meetings" without one of those accommodations. 751 Fed. Appx. at 454. There was no suggestion in the opinion that

[9] Although the claim in *Stokes* was asserted under the Rehabilitation Act, 29 U.S.C. § 794 the court of appeals applied the ADA regulations because the standards under the two laws are the same. 751 Fed. Appx. at 454.

the defendant provided advance or large format materials to others, and the requested accommodation clearly was directly job-related.

In *Gleed v. AT&T Mobility Services*, 613 Fed. Appx. 535 (6th Cir.2015), the Sixth Circuit, citing section 1630.2(o)(iii), held that an employee's need for an accommodation to avoid pain or injury was sufficient under the ADA to create a right to that accommodation.

> We conclude that Gleed's requested accommodation does seem reasonable, given that (taking the facts in the light most favorable to Gleed) standing causes him great pain and increases his risk of skin infections.... AT & T insists that if Gleed was physically capable of doing his job—no matter the pain or risk to his health—then it had no obligation to provide him with any accommodation, reasonable or not.... [But] the ADA's implementing regulations require employers to provide reasonable accommodations not only to enable an employee to perform his job, but also to allow the employee to "enjoy equal benefits and privileges of employment as are enjoyed by ... similarly situated employees without disabilities." 29 C.F.R. § 1630.2(o)(1)(iii).

613 Fed. Appx. at 538-39. *EEOC v. Dolgencorp, LLC*, 899 F.3d 428 (6th Cir.2018), upheld an ADA accommodation claim under precisely the circumstances which the Eighth Circuit holds bars such claims. The plaintiff, who had diabetes, needed to consume a ready source of sugar if her blood sugar levels were low. If she

failed to do so, she would be at risk of a hypoglycemic episode." 899 F.3d at 432. The plaintiff sought permission to keep orange juice at her workstation, so that she could drink it to avoid a hypoglycemic episode. The employer refused the accommodation on the ground that it had a "store policy" rule against keeping or consuming food at a workstation. 899 F.3d at 432. The plaintiff "asked for ... an exception and got nowhere." 899 F.3d at 434. In the Eighth Circuit, application of such a policy would bar an accommodation claim; the plaintiff was seeking an accommodation that was not provided to non-disabled co-workers. But in the Sixth Circuit, the employer's refusal to depart from its general policy was the gravamen of a successful ADA claim.

The Seventh Circuit decision in *Brumfield v. City of Chicago*, 735 F.3d 619 (7th Cir.2013), was at one time understood to hold that a reasonable accommodation is only required when necessary to perform an essential job function. But the Seventh Circuit recently explained that the ADA reasonable accommodation requirement also applies when an employee can perform those functions, but seeks an accommodation in order to perform those functions more safely or with less pain. *EEOC v. Charter Communications, LLC*, 75 F.4th 729 (7th Cir.2023). *Charter Communications* explained that *Brumfield* does not apply to

> accommodations that may be needed for an employee with a disability to perform essential job functions more safely or less painfully.... Our opinion in *Brumfield* should not

> be read as holding that the ADA imposes no duty to offer reasonable accommodations that affect safety or pain that an employee may be motivated to overcome. In any event, the parties all agree here that attendance at work was an essential job function for[the disabled employee], and evidence would support a finding that the requested accommodation here would have allowed him to meet that requirement more safely.

735 F.3d at 739. This interpretation of the ADA may be narrower than in some other circuits, but is nonetheless broad enough to apply to the claim in this case. Hopman seeks the accommodation at issue here precisely because it will enable him to perform with less pain *all* of his duties as a conductor and engineer.

In *Buckingham v. United States*, 998 F.2d 735 (9th Cir.1993), the Ninth Circuit identified several distinct types of circumstances, other than enabling the performance of an essential function, that would warrant an accommodation. A reasonable accommodation is required if an employee with a disability needs an accommodation to obtain treatment or therapy. "Qualified handicapped employees who can perform all job functions may require reasonable accommodation to allow them to (a) enjoy the privileges and benefits of employment equal to those enjoyed by non-handicapped employees or (b) pursue therapy or treatment for their handicaps." 998 F.2d at 740; see 998 F.3d at 743 (reasonable accommodation claim can be based on need for accommodation "to pursue treatment or therapy for [a] handicap"). Cognizable requests for accommodations

also include "accommodations that facilitate the performance of specific employment tasks" 998 F.3d at 740 n.3 (quoting *McWright v. Alexander*, 982 F.2d 222, 227 (7th Cir.1992)).[10]

Sanchez v. Vilsack, 695 F.3d 1174 (10th Cir.2012), cited both section 1630.2(o)(1)(iii) and decisions from the First, Seventh and Ninth Circuits in holding that reasonable accommodations are not limited to changes needed to perform an essential function. The Tenth Circuit repeatedly explained that the ADA and regulations also mandate reasonable accommodations "for the purpose of medical treatment or therapy." 695 F.3d at 1176; see 695 F.3d at 1181, 1182. The purpose of a requested accommodation is the touchstone of whether it may be legally required. The Tenth Circuit applied that same standard in *Brown v. Austin*, 13 F.4th 1079, 1089, 1090 (10th Cir.2021).[11]

In *Hill v. Associates for Renewal in Education, Inc.*, 897 F.3d 232 (D.C. Cir.2018),[12] the District of Columbia Circuit held that accommodations can be sought under the ADA to address generally "barriers to employment"

---

[10] Although the claim in *Buckingham* arose under the Rehabilitation Act, the Ninth Circuit applies the standard in that decision to ADA claims. *Livingston v. Fred Meyer Stores, Inc.*, 388 Fed. Appx. 738, 740 and n.2 (9th Cir.2010).

[11] Although *Sanchez* and *Brown* were Rehabilitation Act cases, the Tenth Circuit explained in *Brown* that claims under that Act and under the ADA are governed by the same standard. 13 F.4th at 1178 n.2.

[12] Then-Judge Kavanaugh participated in oral argument, but not in the opinion.

caused by an employee's disability, and are not limited to cases in which the accommodation is needed to perform an essential function. 897 F.3d at 238. "Adverse effects of disabilities and adverse side effects from the medical treatment of disabilities arise 'because of disability.'" *Id*. (quoting *Felix v. New York City Transit Auth*., 324 F.3d 102, 107 (2d Cir.2003)). The plaintiff in *Hill* was a classroom teacher who had had a leg amputated, and used a prosthesis; the accommodation he sought was the assistance of a classroom aide whose presence would reduce the amount of time the plaintiff has standing.

> Hill satisfied the [legal] requirements by alleging that he experienced a hazard of pain and bruising on his stump while standing for long periods of time, and by specifically connecting that hazard to supervising his class without assistance.... [A] classroom aide ... could help Hill supervise students in the classroom and during outdoor activities, reducing his need for prolonged standing and mitigating the alleged "hazard of pain and bruising."

897 F.3d at 238.

> [Defendant]'s assertion that Hill did not need the accommodation of a classroom aide because he could perform the essential functions of his job without accommodation, "but not without pain," ... is unavailing. A reasonable jury could conclude that forcing Hill to work with pain when that pain could be alleviated

> by his requested accommodation violates the ADA.

Id. at 239.

In *McDonald v. Department of Environmental Quality*, 351 Mont. 243, 214 P. 3d 749 (2009), the Montana Supreme Court held that a reasonable accommodation is required under the ADA whenever it is needed to remove barriers to equal employment opportunity. The plaintiff in that case, as here, sought permission to bring her service dog to work. Paraphrasing the language of section 1630.2(o)(1)(iii), the court explained:

> [The employee] was entitled to a reasonable accommodation if such accommodation could have assisted her in performing her job duties or alleviated barriers to her ability to enjoy equal benefits, privileges, and opportunities of employment. In this regard, [the defendant] overlooks the fact that when [the employee] was without her service dog, [the employee] had to perform her job duties under limitations to which similarly situated employees were not subjected, such as recurring dissociative episodes, difficulty walking, and the risk of falling without [the dog]'s assistance to get up. The notion that she was required to endure these conditions to the absolute breaking point before she could be deemed to "need" an accommodation is contrary to the purposes of the ... the ADA, and we accordingly reject it.

214 P. 3d 760; see *id*. at 760 (quoting section 1630.2(o)(1)(iii)).

There may be some differences among the standards in the First, Third, Fifth, Sixth, Seventh, Ninth, Tenth and District of Columbia Circuits, and under the Montana Supreme Court decision. But the standards in all of those circuits and in the Montana court, are inconsistent with the Eighth Circuit's crabbed interpretation of the ADA and section 1630.2(o)(1)(iii). And the claim rejected by the Eighth Circuit in the instant case would be upheld in all of those other courts.

II. THE EIGHTH CIRCUIT STANDARD IS INCONSISTENT WITH THE EEOC'S INTERPRETATION OF THE ADA AND REGULATIONS

The Eighth Circuit insisted, as did the district court, that their exceedingly narrow interpretation of the ADA, and of section 1630.2(o)(1)(iii), were supported by the EEOC. App. 28a, 13a-14a. But the EEOC has consistently maintained, to the contrary, that the right to a reasonable accommodation under the ADA arises more broadly whenever that accommodation is needed to avoid disability-related harm to an employee.

In an amicus brief in *Gleed v. AT&T Services, Inc.*, the EEOC repeatedly insisted that an employee is entitled to a reasonable accommodation whenever that accommodation is needed to prevent either disability-related pain or the aggravation of the employee's disability-related symptoms. "An employer must make a reasonable accommodation not only where the

employee is completely unable to do the essential job functions without it, but also where continuing to perform those functions without the accommodation exacerbates the employee's pain or other symptoms of his or her impairment." Brief of the EEOC as Amicus Curiae in Support of Plaintiff/Appellant*, Gleed v. AT&T Mobility Services, Inc.*, 10. "[W]orking *in pain* certainly affects the conditions of one's employment." *Id*., 16 (emphasis in original). "AT&T's obligation to provide reasonable accommodations ... includes accommodations that enable an employee to work without exacerbating his medical condition or increasing his pain...." *Id.*, 20.

In an amicus brief in a more recent Eleventh Circuit case, the EEOC argued that a hearing-impaired employee is entitled to "an interpreter or equivalent accommodation ... if necessary for him to enjoy the benefit and privilege of understanding and participating in workplace meetings, trainings, or social events, even if [the employer] 'pronounced itself fully satisfied' with his 'level of performance' absent such an accommodation." Brief for the EEOC as Amicus Curiae in Support of Plaintiff-Appellant, *Beasley v. O'Reilly Auto Parts*, 69 F.4th 744 (11th Cir.2023) (quoting *Bell v. O'Reilly Auto Enters*., *LLC*, 972 F.3d 21, 24 (1st Cir.2020)).

In two administrative adjudications, the EEOC has endorsed the Ninth Circuit decision in *Buckingham* and the Tenth Circuit decision in *Sanchez*. *Helena A. v. Kijakazi*, 2022 WL 3715444 (E.E.O.C.), at *6 (reasonable accommodation includes transfer for purposes

of medical treatment or therapy); *Reina D. v. Berryhill*, 2017 WL 642230, at *12 (E.E.O.C.) (same).

Equally importantly, as a practical matter, the Eighth Circuit decision is inconsistent with decades of EEOC guidance to employers and employees regarding their obligations and rights under the ADA. The EEOC has issued a series of Guidances, spelling out with regard to particular disabilities the type of accommodations which an employee with that disability is likely to need, and to which—absent undue hardship—an employee might be entitled. The Commission has published, and makes available on its website, separate Guidances regarding the rights under the ADA of employees with diabetes, epilepsy, cancer, mental health conditions, psychiatric disabilities, hearing disabilities, visual disabilities, and intellectual disabilities, and of employees who are pregnant.[13] The touchstones

[13] EEOC, Diabetes in the Workplace and the ADA, "Accommodating Employees with Diabetes"; "An employer must provide a reasonable accommodation that is needed because of the diabetes itself, the effects of medication, or both"; "10. What other types of reasonable accommodations may employees with diabetes need?," available at https://www.eeoc.gov/laws/guidance/diabetes-workplace-and-ada;

EEOC, Epilepsy in the Workplace and the ADA, "Accommodating Employees with Epilepsy"; "What types of reasonable accommodations may employees with epilepsy need?"; "permission to bring a service animal to work," available at https://www.eeoc.gov/laws/guidance/epilepsy-workplace-and-ada;

EEOC, Enforcement Guidance on the ADA and Psychiatric Disabilities, "Selected Types of Reasonable Accommodations," ¶¶ 23-29;

EEOC, Hearing Disabilities in the Workplace and the Americans with Disabilities Act, "9. What types of reasonable accommodations may applicants or employees with hearing difficulties

of whether an employee is entitled to a reasonable accommodation are whether the employee needs an accommodation to avoid disability-related harm, and whether the requested accommodation would impose undue hardship on the employer. None of these Guidances limits the right to a reasonable accommodation

---

need?," available at https://www.eeoc.gov/laws/guidance/hearing-disabilities-workplace-and-americans-disabilites-act;

EEOC, Visual Disabilities in the Workplace and the Americans with Disabilities Act, "10. What are examples of reasonable accommodations that some applicants or employees with visual disabilities may need?," "[a]llowing use of an assistance animal, such as a guide dog, in or to access the workplace," available at https://www.eeoc.gov/laws/guidance/visual-disabilities-workplace-and-americans-disabilites-act;

EEOC, Persons with Intellectual Disabilities in the Workplace and the ADA, "5. What specific types of reasonable accommodations may employees with intellectual disabilities need to do their job or to enjoy the benefits and privileges of employment?";

EEOC, Cancer in the Workplace and the ADA, "accommodating Employees with Cancer"; "10. What other types of reasonable accommodations may employees with cancer need?," available at https://www.eeoc.gov/laws/guidance/cancer-workplace-and-ada;

EEOC, Mental Health Conditions [:] Resources for Job Seekers, Employees, and Employers "If a reasonable accommodation would help you to do your job, your employer must give you one unless the accommodation involves significant difficult or expense," "You can get a reasonable accommodation for any mental health condition that would, if left untreated, ... 'substantial limit' ... and ... 'major life activity,' " available at https://www.eeoc.gov/laws/guidance/depression-ptsd-other-mental-health-conditions-workplace-your-legal-rights;

EEOC, Legal Rights of Pregnant Workers under Federal Law, "3. What if I am having difficult doing my job because of pregnancy or medical condition related to my pregnancy?," available at https://www.eeoc.gov/laws/guidance/legal-right-pregnant-worker-under-federal-law.

to employers who provide the same accommodation to workers without disabilities, or to accommodations that are not directly related to the job at issue. The EEOC has two publications regarding accommodating veterans with disabilities, which address post traumatic stress disorder and traumatic brain injuries.[14]

The Guidance regarding diabetes is typical. EEOC, Diabetes in the Workplace and the ADA.[15] The publication ties the right to accommodation to whether a need for an accommodation arises because of diabetes or diabetes medication.

> The ADA requires employers to provide adjustments or modifications—called reasonable accommodations—to enable ... employees with disabilities to enjoy equal employment opportunities unless doing so would be an undue hardship (that is, a significant difficulty or expense).... An employer must provide a reasonable accommodation that is needed because of the diabetes itself, the effects of medication, or both. For example, an employer may have to accommodate an employee who

---

[14] EEOC, Veterans [:] Understanding Your Employment Rights under the Americans with Disabilities Act (ADA), "What types of reasonable accommodations may I want to request for the application process or on the job?";

EEOC, Veterans and the Americans with Disabilities Act: A Guide for Employers, "8. What types of reasonable accommodations may veterans with disabilities need for the application process or during employment?"

[15] Available at https://www.eeoc.gov/laws/guidance/diabetes-workplace-and-ada.

> is unable to work while learning to manage her diabetes or adjusting to medication.

Id. The Guidance lists a number of accommodations related to medical needs that might be required, such as "[a] private area to test their blood sugar levels or to administer insulin injections," "[b]reaks to eat or drink, take medication, or test blood sugar levels ... ," and "[l]eave for treatment, recuperation, or training on managing diabetes." *Id.* The EEOC also explains that accommodation may be needed because the employee, as a result of diabetes, has difficulty engaging in certain activity. For example, an employer may need to "[a]llow a person with diabetic neuropathy that makes it difficult to stand for long periods of time to use a stool." Or the needed accommodation might be "redistribution of marginal tasks to another employee."[16]

These disability-specific EEOC Guidances are palpably inconsistent with the exceedingly narrow Eighth Circuit standard.

III. IT IS IMPORTANT THAT THE CIRCUIT CONFLICT BE PROMPTLY RESOLVED

There is a clear difference between the Eighth Circuit standard, and the standard in multiple other

---

[16] "**Example** ... : A janitor, who had a leg amputated because of complications from diabetes, can perform all of his essential job functions without accommodation but has difficulty climbing into the attic to occasionally change the building's air filter. The employer likely can reallocate this marginal function to one of the other janitors."

circuits, regarding when an employee who has a disability, but is able to perform the essential functions of his other job, is entitled to a reasonable accommodation under the ADA. In most circuits that employee need only show that—absent a reasonable accommodation—he or she will suffer a disability-related harm or difficulty in connection with his or her employment. The Eighth Circuit requires far more; the particular type of accommodation the employee seeks must be an existing employer-provided benefit that is accorded to workers without disabilities. Many important accommodations by their very nature would not meet the Eighth Circuit test. Under that test, the district court explained, a disabled worker who wants to bring his or her service dog to work would have to prove that his or her employer provides service dogs to workers who are not disabled; but surely employers not provide service dogs to workers who do not need them.

That conflict means that decidedly different legal standards are applied to reasonable accommodation claims depending on the circuit in which they are filed. The claim rejected by the Eighth Circuit in this case would have survived in the First, Third, Fifth, Sixth, Seventh, Ninth, Tenth and District of Columbia Circuits, and in Montana courts. In an economy in which many large employers operate in multiple states, that conflict in the governing standards has peculiar and untoward consequences. Whether a disabled employee is entitled to a reasonable accommodation would depend on where he or she works. If the train Mr. Hopman was driving went from Arkansas (in the

Eighth Circuit) into Texas (in the Fifth Circuit) or Oklahoma (in the Tenth Circuit), he would have a viable claim in the federal courts in those states. And a multi-state employer, ordinarily operating a single human resources system, would be subject to different legal requirements depending on the location of the plant or office where a particular disabled employee worked.

The circuit split imposes significant burdens on the EEOC, because a single EEOC district office could have to apply different legal standards to ADA claims, depending on where the charging party worked. Arkansas, where Hopman was located when he filed his ADA charge, is overseen by the EEOC district office in Memphis, which now must apply a different standard to charges originating in Arkansas than it does to charges originating in Tennessee. The EEOC district office in Chicago applies Seventh Circuit standards to claims from Illinois, but would have to apply the very different Eighth Circuit standard to claims from Minnesota or the Dakotas. The numerous disability-specific Guidances on the EEOC website are no longer an accurate guide to the legal requirements applicable to employers in the Eighth Circuit.

Recipients of federal funds are subject to the reasonable accommodation requirements of the Rehabilitation Act; that statute directs federal agencies providing such funds to use ADA standards. 29 U.S.C. § 794(d). Many recipients of federal funds operate in multiple circuits. It is difficult to understand how a federal agency would enforce the Rehabilitation Act when

the same recipient of federal funds is subject to conflicting federal standards.

The denial of a needed accommodation can obstruct in the most direct way the equal employment opportunity which the ADA was enacted to guarantee. In *EEOC v. Dolgencorp, LLC*, a diabetic worker, denied the accommodation of keeping orange juice at her work station, purchased a bottle of juice from the company store to fend off a hypoglycemic episode, and was then fired for violating a company policy against such purchases. 899 F.3d at 434-35. In *Fults v. Nissan North America, Inc.*, 2020 WL 12862964 (E.D. Tenn. Sept. 16, 2020), an asthmatic employee needed to use an inhaler with Ventolin, a medicine which causes false positive breathalyzer tests. Her employer refused to accommodate that medicine by permitting her to take an alternative alcohol test, and fired her when she repeatedly failed the breathalyzer test. In *Meachem v. Memphis Light, Gas Water Division*, 2017 WL 11681788 (W.D. Tenn. March 29, 2017), a woman with a high-risk pregnancy which required her to stay in bed to avoid a miscarriage was denied the accommodation of being permitted to work from home; when her sick leave ran out, she was unpaid for the rest of her pregnancy. In *Jones v. Lubbock Hospital District*, 834 Fed. Appx. 923 (5th Cir.2020), an employee with severe breathing difficulties was forced to resign when his employer

refused to permit him to wear an over-the-shoulder oxygen tank at work.[17]

The violation of the ADA is as clear, and as serious, when the denial of a reasonable accommodation forces an employee with a disability to work in pain, as it did Mr. Hopman. This Court recognized long ago that Title VII is violated if a woman or man has to endure sexual abuse "in return for the privilege of being allowed to work and make a living...." *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986). An employee with a disability who must endure severe migraine headaches, nausea, and flashbacks of bloody carnage, repeatedly vomiting out the window of his locomotive, assuredly is not "enjoy[ing] equal ... privileges of employment as are enjoyed by ... employees without disabilities." 29 C.F.R. § 1630.2(o)(1)(iii).

IV. THIS CASE IS AN EXCELLENT VEHICLE FOR RESOLVING THE CONFLICT

This case is an ideal vehicle for resolving the circuit conflict. The sole basis on which Hopman's claim

---

[17] See, e.g., *Lett v. Southeastern Pennsylvania Transp. Authority*, 2022 WL 4542093, at *16 (E.D. Pa. Sept. 27, 2022) (employee resigned when denied accommodation needed to obtain dialysis treatment); *Blickle v. Illinois Dept. of Children and Family Services*, 2013 WL 2467651, at *3 (N.D. Ill. June 7, 2013) (employee resigned when denied accommodation needed to obtain treatment for back condition); *Sturz v. Wisconsin Department of Corrections*, 642 F.Supp.2d 881 (W.D. Wis. 2009) (employee retired after one year delay in providing accommodations needed because of degenerative joint disease); *Morales v. Bellsouth Telecommunications*, 2009 WL 1322577, at *12 (employee resigned when denied accommodation needed to alleviate back pain).

was rejected by the lower courts was their narrow interpretation of when the ADA and the applicable regulations require an employer to accommodate the disability of a qualified individual with a disability. There is no dispute in this case that Hopman is disabled, or that he was qualified for the position he held. Union Pacific does not question the extent of the pain that Hopman suffers in the absence of the requested accommodation, or challenge Hopman's evidence that permitting him to bring the service dog with him at work would at least largely end that suffering. Although the defendant argued at trial that the requested accommodation would cause it undue hardship, the jury rejected that factual contention, and the defendant has not challenged the jury's finding.

The facts relevant to the differing proposed legal standards are not in dispute. Under the legal standard announced by the Eighth Circuit, Hopman's claim was necessarily rejected. The court of appeals below held that, absent the need for an accommodation to perform the essential functions of a position, an accommodation is required only if an employee with a disability does not have equal access to a specific employer-provided program or service that is available to non-disabled employees. In this case, the district court explained, that meant that Hopman was required to show that Union Pacific provided service dogs to non-disabled employees. Hopman concedes Union Pacific did not do so. The court of appeals held that an accommodation claim under section 1630.2(o)(1)(iii) is limited to an employer-provided program or service that is *not*

directly job-related. The accommodation at issue in this case is admittedly directly job-related; Hopman wants to bring his service dog with him to work.

Conversely, under the legal standard applied in multiple other circuits, Hopman's claim would be upheld. There is no dispute that Hopman suffers significant disability-related pain and difficulty at work, and that the requested accommodation would largely reduce if not eliminate that pain and difficulty. In those circuits, that would be sufficient to entitle Hopman (absent a showing of undue hardship) to a reasonable accommodation. Which legal standard is the correct one is thus dispositive.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eighth Circuit, and to correct a crabbed statutory interpretation that has prolonged the suffering of a gravely wounded American veteran.

Respectfully submitted,

ERIC SCHNAPPER
Counsel of Record
University of Washington
School of Law
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167
schnapp@uw.edu

JOHN W. GRIFFIN, JR.
MAREK, GRIFFIN & KNAUPP
203 North Liberty St.
Victoria, TX 77901
(361) 573-5500

KATHERINE L. BUTLER
BUTLER & HARRIS
1128 Cortlandt St.
Houston, TX 77008
(713) 443-6456

MICHAEL J. NEUERBURG
SIMMONS PERRINE MOYER
BERGMAN PLC
115 Third St. SE
Suite 1200
Cedar Rapids, IA 52401
(319) 366-7461

Counsel for Petitioner