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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
|
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|
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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 for judgment as a

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

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

"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 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."

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 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.

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[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.

III. Discussion

"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).

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 nondisabled 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.

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]

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.

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

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

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).

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 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

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[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).

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.

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United States District Court, E.D. Arkansas,
Western Division.

Perry HOPMAN, Plaintiff
v.
UNION PACIFIC RAILROAD, Defendant

Case No. 4:18-cv-00074-KGB
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ORDER

Kristine G. Baker, United States District Judge

Before the Court is defendant Union Pacific Railroad's ("Union Pacific") renewed motion for judgment

as a matter of law pursuant Federal Rules of Civil Procedure 50, 39, and 52 (Dkt. No. 193). At trial, Union Pacific timely moved for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50 prior to submission of the case to the jury. Fed. R. Civ. P. 50(a)(1)(2). Plaintiff Perry Hopman responded to the motion for judgment as a matter of law at trial and responded to Union Pacific's renewed motion for judgment as a matter of law (Dkt. No. 196). Mr. Hopman also filed a motion to strike the declaration of Robert Carty and photographs that were attached as an exhibit to Union Pacific's renewed motion for judgment as a matter of law (Dkt. No. 197). Union Pacific replied in support of its renewed motion for judgment as a matter of law and responded to the motion to strike (Dkt. Nos. 205; 206). Mr. Hopman replied in support of his motion to strike (Dkt. No. 207). Also before the Court is Mr. Hopman's motion for equitable relief (Dkt. No. 200). Union Pacific has responded to Mr. Hopman's motion for equitable relief (Dkt. No. 208). Mr. Hopman has replied in support of his motion for equitable relief (Dkt. No. 209).

For the reasons stated below, the Court grants Union Pacific's renewed motion for judgment as a matter of law (Dkt. No. 193). The Court grants Mr. Hopman's motion to strike (Dkt. No. 197). The Court denies Mr. Hopman's motion for equitable relief (Dkt. No. 200).

I. Introduction

Mr. Hopman brings this action against Union Pacific under Section 504 of the Rehabilitation Act of 1973, as amended, ("Rehabilitation Act"), 29 U.S.C. § 794, *et seq.*, and the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq.* (Dkt. No. 4, ¶ 3). Mr. Hopman alleges that he was discriminated against and denied a reasonable accommodation in violation of both the Rehabilitation Act and the ADA (*Id.*, ¶¶ 18-26). Mr. Hopman maintains that he can perform the essential functions of his job (*Id.*, ¶ 9). Mr. Hopman asserts, however, that he needs the requested accommodation of working alongside his service dog, Atlas, in order to enjoy equal benefits and privileges of employment of working without the burden and pain of his post-traumatic stress disorder ("PTSD") (*Id.*, ¶ 12).

Union Pacific moved for summary judgment (Dkt. No. 54). Union Pacific argued that as a matter of law Mr. Hopman was unable to demonstrate that he was entitled to a reasonable accommodation or suffered an adverse employment decision and that Union Pacific should have judgment granted in its favor accordingly (Dkt. No. 54-1, at 17-24). Mr. Hopman responded premising his claims on a benefits and privileges of employment reasonable accommodation analysis and stating that "[a]ll Hopman seeks is the same right other employees already have – to work without the continual and unrelenting burden and pain of PTSD." (Dkt. No. 59, at 17-21). Union Pacific in reply argued that Mr. Hopman failed to identify any "benefit" or "privilege" of employment that Union Pacific offered that he could

not access without an accommodation (Dkt. No. 61, at 1-9).

The Court denied Union Pacific's motion for summary judgment (Dkt. No. 72). The Court determined that Mr. Hopman was able to move forward with his reasonable accommodation claim even though he was able to perform the essential functions of his job (*Id.*, at 19-23). Viewing the limited record evidence available to the Court at that stage of the litigation in the light most favorable to Mr. Hopman, the Court determined on the record before it that "a reasonable juror could conclude that Mr. Hopman has a disability and requested 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" (*Id.*, at 25). Union Pacific filed a motion for reconsideration, or in the alternative, certification under 28 U.S.C. § 1292(b) (Dkt. No. 74). Mr. Hopman opposed the motion (Dkt. No. 78). The Court denied Union Pacific's motion for reconsideration or in the alternative certification under 28 U.S.C. § 1292(b) (Dkt. No. 92).

The case proceeded to a jury trial in July 2021 (Dkt. Nos. 172; 173; 174; 176). Union Pacific filed a timely motion for judgment as a matter of law (Dkt. No. 177). Mr. Hopman orally opposed the motion (Dkt. No. 179). The Court denied Union Pacific' motion for judgment as a matter of law (*Id.*). The case was submitted to the jury on a verdict form that posed ten questions (Dkt. No. 184). The jury returned a verdict in favor of Mr. Hopman (*Id.*).

II. Judgment As A Matter Of Law

A. Background

In its renewed motion for judgment as a matter of law, Union Pacific makes two arguments (Dkt. No. 193). First, Union Pacific argues that it is entitled to judgment as a matter of law because Mr. Hopman failed to identify any cognizable "benefit or privilege of employment" that his requested accommodation would enable him to access (*Id.*, at 6-27). Second, Union Pacific argues that, as an independent matter, the Court should reject the jury's answer to "Question Seven"[1] because "allowing Atlas to ride in the tight quarters of a cab is prohibited by federal railroad safety regulations." (*Id.*, at 27-42).

Mr. Hopman responds to Union Pacific's renewed motion for judgment as a matter of law (Dkt. No. 196). Mr. Hopman argues that Union Pacific gives the Court no basis to ignore the controlling statute and well-established case law which hold that employers owe a duty of accommodation for workers with disabilities "when the accommodation will assist them in mitigating the symptoms of a disability." (*Id.*, at 4). Mr. Hopman contends that the privileges and benefits that workers enjoy do not stem from what the employer chooses to grant as employer-sponsored privileges but from the broad ADA mandate to afford workers with

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[1] "Question Seven" asked the jury: "Do you find from a preponderance of the evidence . . . [t]hat allowing plaintiff Perry Hopman his requested accommodation would be prohibited by a federal law or regulation?" (Dkt. No. 184, at 7).

disabilities the same opportunities as those who do not live with disabilities (*Id.*). As to Union Pacific's second argument, Mr. Hopman contends that Union Pacific did not preserve its challenge to jury "Question Seven" (*Id.*, at 23).

B. Legal Standard

Judgment as a matter of law should be rendered when "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Fed. R. Civ. P. 50(a)(1); *Stults v. American Pop Corn Co.*, 815 F.3d 409, 418 (8th Cir. 2016). "In deciding a motion for judgment as a matter of law, the court shall:

> (1) Resolve direct factual conflicts in favor of the nonmovant, (2) assume as true all facts supporting the nonmovant which the evidence tended to prove, (3) give the nonmovant the benefit of all reasonable inferences, and (4) deny the motion if the evidence so viewed would allow reasonable jurors to differ as to the conclusions that could be drawn.

Stults, 815 F.3d, at 418 (citing *Jones v. Edwards*, 770 F.2d 739, 740 (8th Cir. 1985)).

C. Analysis

1. The Statute And Regulations

The ADA prohibits employers from discriminating against disabled employees "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 or employment." 42 U.S.C. § 12112(a). Under the ADA employers must, among other things, accommodate an employee's known physical or mental limitations. 42 U.S.C. § 12112(b)(5)(A). The ADA does not define "reasonable accommodation." The statute does, however, provide two illustrative examples.

The term "reasonable accommodation" may include—

> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
>
> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C.A. § 12111.

Both examples place the burden on the employer to provide an accommodation, and neither example mentions an accommodation to permit an employee to be free from mental or psychological pain as a benefit or privilege of employment.

In passing the ADA, the Senate defined the phrase "other terms, conditions, and privileges of employment" as follows:

> (1) recruitment, advertising, and the processing of applications for employment; (2) hiring, upgrading, promotion, awarding of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring; (3) rates of pay or any other form of compensation and changes in compensation; (4) job assignment, job classification organizational structures, position descriptions, lines of progression, and seniority lists; (5) leaves of absence, sick leave or any other leave; (6) fringe benefits available by virtue of employment, whether or not administered [sic] by the covered entity; (7) selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training; and (8) employer-sponsored activities, including social or recreational programs.

This legislative history does not support Mr. Hopman's claim that freedom from mental or psychological pain caused by PTSD is a benefit or privilege of employment that legislators envisioned employers being required to offer employees.

The legislative history also makes clear that reasonable accommodation does not extend to adjustments or modifications for the personal benefits of the individual with a disability nor is an adjustment or

modification required to be provided that will assist an individual throughout his or her daily activities on or off the job. For example, an employer would not have to provide as an accommodation "any amenity or convenience that is not job-related . . . " 29 C.F.R. § Pt. 1630, App. § 1630.9 "Section 1630.9 Not Making Reasonable Accommodation" (citing Senate Report at 31; House Labor Report at 62).

The ADA's implementing regulations provide the following three definitions of the term reasonable accommodation:

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

29 C.F.R. § 1630.2(o)(1)(i)-(iii) (emphasis added). Mr. Hopman has consistently argued, and he testified at trial, that he is able to perform the essential functions of his job. Accordingly, the parties agree that this action involves only the reasonable accommodation

definition relating to benefits and privileges of employment.

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" (emphasis added). The Equal Employment Opportunity Commission ("EEOC") has also issued a compliance manual which provides examples of what may constitute benefits and privileges of employment. Each example relates to an employer-sponsored program that the employer offers to its employees. *See* EEOC Compliance Manual § 902 Introduction, "Reasonable Accommodation Related to the Benefits and Privileges of Employment," 2006 WL 4673363 at *9-10 (2006).

2. Cases Interpreting The Statute And Regulations

Mr. Hopman contends that the Eighth Circuit has recognized the broad remedial nature of the accommodation obligation including an opportunity to attain "the same level of performance, benefits, and privileges that is available to similarly situated employees who

are not disabled." (Dkt. No. 196, at 9) (citing *Keil v. Select Artificials, Inc.*, 169 F.3d 1131, 1136 (8th Cir. 1999) (en banc) (emphasis added)). Mr. Hopman also asserts that courts have found that the term benefits and privileges is an expansive rather than restrictive term (*Id.*) (citing *Exby-Stoley v. Bd. of Cnty. Commissioners*, 979 F.3d 784, 818 (10th Cir. 2020) *cert. denied*, No. 20-1357, ___ S.Ct. ___, 2021 WL 2637869 (June 28, 2021), in which the Tenth Circuit Court of Appeals stated that the language "terms, conditions, and privileges of employment" in 42 U.S.C. § 12112(a) "signals that actionable discrimination must 'affect employment or alter the conditions of the workplace,' . . . that the discrimination must relate to some aspect of employment, and also that the ADA's discrimination proscription reaches 'the *entire spectrum*' of employment-based disability discrimination.'" (emphasis in original) (citations omitted)).

The ADA is not, however, without limits. *See Durand v. Fairview Health Servs.*, 902 F.3d 836, 842 (8th Cir. 2018) (determining that, in a case brought under ADA Title III, even though the ADA and Rehabilitation Act are "intentionally broad in scope, . . . they do not require institutions to provide *all* requested auxiliary aids and services.") (quoting *Argenyi v. Creighton Univ.*, 703 F.3d 441, 446 (8th Cir. 2013)); *Michigan Flyer LLC v. Wayne Cty. Airport Auth.*, 860 F.3d 425, 430 (6th Cir. 2017) ("The fact that a statute has a broad remedial structure does not allow us to interpret its text in a way that conflicts with its plain language."); *Noeal v. New York City Taxi & Limousine Comm'n*, 687

F.3d 63, 68-69, 71 (2d Cir. 2012) ("Although the ADA is to be interpreted broadly, 'the scope of Title II is not limitless.' ") (quoting *Reeves v. Queen City Transp., Inc.*, 10 F. Supp. 2d 1181, 1185 (D. Col. 1998)). As the Sixth Circuit has stated, "[t]he ADA is not a weapon that employees can wield to pressure the employers into granting unnecessary accommodations or reconfiguring their business operations. Instead, it protects disabled employees from disability-related mistreatment—no more, no less." *Tchankpa v. Ascena Retail Group, Inc.*, 951 F.3d 805, 809 (6th Cir. 2020).

Union Pacific argues that "benefits and privileges of employment" do not include working without mental or psychological pain (Dkt. No. 193, at 9-15). At the summary judgment stage, Union Pacific argued that Mr. Hopman could prove no set of fact or circumstances to support his claim that Atlas was needed to permit Mr. Hopman to enjoy "equal benefits and privileges of employment as are enjoyed by Union Pacific's other similarly situated employees without disabilities." (Dkt. No. 61). The Court found that Union Pacific did not carry its burden on that point at summary judgment, in part, because there was evidence in the record that Union Pacific had permitted an emotional support animal to accompany an engineer in California on the train in the past, but the record on that point was not developed as to how or why. As a result, the Court found that Union Pacific had not meaningfully distinguished Mr. Hopman's case from other cases in which other courts had permitted claims like Mr. Hopman's to proceed to trial.

At trial, Mr. Hopman pursued the theory that the benefit and privilege of employment that he is seeking is to work without mental and psychological pain caused by his PTSD and traumatic brain injury. Unlike in the cases relied on by Mr. Hopman, at trial Mr. Hopman did not identify a corresponding benefit or privilege of employment offered to Union Pacific employees. There was no evidence presented at trial that Union Pacific offers service animals to its non-disabled employees as a benefit and privilege of employment. Mr. Hopman's case is distinguishable from the cases in other courts relied upon by Mr. Hopman, and Mr. Hopman has not pointed the Court to any cases to support a claimed right to work without mental or psychological pain.

For example, in *Hill v. Assoc. for Renewal in Educ., Inc.*, 897 F.3d 232, 239 (D.C. Cir. 2018), the employer provided classroom aides to all of the teachers but the disabled plaintiff. The D.C. Circuit Court of Appeals stated:

> We conclude Hill sufficiently alleged a connection between his disability and the assistance a classroom aide could provide while Hill supervised his students to present a triable issue of fact as to whether A[ssociation for] R[enewal in] E[ducation]'s denial of an aide violated the ADA. The ADA's purpose in requiring reasonable accommodations is reducing barriers to employment for persons with disabilities. Therefore, to be "reasonable" under the ADA, an accommodation must be related to the disability that creates the employment barrier and must address that barrier; the

> ADA does not make employers responsible for alleviating any and all challenges presented by an employee's disability. *See Nuzum*, 432 F.3d at 848 ("[T]here must be a causal connection between the major life activity that is limited and the accommodation sought."); *Felix v. New York City Transit Auth.*, 324 F.3d 102, 107 (2d Cir. 2003) ("Adverse effects of disabilities and adverse or side effects from the medical treatment of disabilities arise 'because of the disability.' However, other impairments not caused by the disability need not be accommodated."); EEOC's Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. Pt. 1630, App. (2016) ("[A]n employer [does not] have to provide as an accommodation any amenity or convenience that is not job-related" and "that is not provided to employees without disabilities."). Hill satisfied these 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. Construing Hill's *pro se* submissions liberally and with all reasonable inferences drawn in his favor, a reasonable jury could find that if ARE provided Hill a classroom aide as it did for his colleagues, that 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."

Hill, 897 F.3d at 238 (D.C. Cir. 2018).

Mr. Hopman's case is not like *Hill.* Unlike Mr. Hill, who showed at the summary judgment stage that teacher aides – the benefit or privilege being requested

– were being provided to other non-disabled teachers, Mr. Hopman did not show at trial that service animals are being provided to other similarly situated non-disabled Union Pacific employees as a benefit and privilege of employment. Here, the only evidence presented at trial that other Union Pacific employees worked with an animal similar to the one that Mr. Hopman is requesting is that Paul Birchfield, a Union Pacific engineer in California, testified that he brought his emotional support animal ("ESA") to work with him on the train for four years (Plaintiff's Exhibit 42, at 12, 14-16).[2] When Union Pacific received a complaint about Mr. Birchfield's dog, it investigated the matter, discovered that a supervisor had never approved the practice, and notified Mr. Birchfield that he must no longer bring his ESA to work with him (Dkt. No. 189, at 61-62; 115-120).

Even considering Mr. Birchfield's experience at Union Pacific, however, Mr. Hopman's case is not like *Hill*. At trial, Mr. Hopman presented evidence that Mr. Birchfield brought his ESA to work with him at Union Pacific without the permission of his supervisors and was asked to stop bringing the dog as soon as a complaint was lodged with his supervisor and Union Pacific investigated the matter. In *Hill*, ARE provided teacher aides, the accommodation Mr. Hill was

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[2] Union Pacific witness Rodney Doerr disputed this fact and testified that his managers told him that it had only been two to three weeks that Mr. Birchfield brought his dog (Dkt. No. 189, at 119). The Court gives Mr. Hopman the benefit of this disputed evidence.

requesting, to *all* other non-disabled teachers at ARE as a benefit of employment but did not provide a teacher aide to the disabled teacher, Mr. Hill. Additionally, unlike the other non-disabled teachers in *Hill*, Mr. Birchfield appears to have been disabled with anxiety and panic attacks. The facts of *Hill* are not similar to the facts established at the trial of Mr. Hopman's case.

Further, Mr. Hopman's case is distinguishable from *Gleed v. AT&T Mobility Servs., LLC*, 613 Fed. App'x 535, at 539 (6th Cir. 2015). In *Gleed*, the Sixth Circuit Court of Appeals considered and rejected AT&T's argument on summary judgment that, if plaintiff "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." Mr. Gleed requested a chair at work and AT&T admitted that it allowed a pregnant coworker to have a chair at work, which suggested that it could have provided one to Mr. Gleed. The Sixth Circuit Court of Appeals stated, "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). Here, taking the evidence in the light most favorable to Gleed, he needed a chair to work—as other employees do—without great pain and a heightened risk of infection." *Id.* at 539. In *Gleed*, the employer permitted non-disabled workers to work with a chair, the benefit or privilege of employment

that the disabled employee was requesting. Unlike in *Gleed*, 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.

Similarly, in *Sanchez v. Vilsack*, 695 F.3d 1174, 1176 (10th Cir. 2012), an employee sought an accommodation of a hardship transfer to access medical treatment after a brain injury. The employer regularly offered hardship transfers to other non-disabled employees but denied a hardship transfer to the disabled plaintiff. *Id.*, at 1182. Unlike in *Sanchez*, 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.

In *Branson v. West*, Case No. 97 C 3538, 1999 WL 311717 (N.D. Ill. May 11, 1999), the United States District Court for the Northern District of Illinois granted partial summary judgment to a doctor who had been denied the right to bring her service dog to work. *Id.* at *15. Dr. Branson maintained that the service dog could benefit her by "pulling her wheelchair, opening and closing doors and holding doors open, picking up dropped items, retrieving items, and bracing for her when she must lean out of her wheelchair." *Id.* at *11. The court determined that the employer had construed its obligations under the law too narrowly when it stressed that Dr. Branson could "perform all the functions of her job without the accommodation of her service dog." *Id.* at *12. The court determined that no

reasonable jury could conclude that the employer made reasonable efforts to determine an appropriate accommodation, so it denied the employer's motion for summary judgment. *Id.* at *15. In *Branson*, the court did not analyze the requested accommodation as a benefit and privilege of employment under the regulation. The court's analysis largely centered around the essential functions of the job, the assistance the requested accommodation would give Dr. Branson with accessing her employer's facilities, and the interactive process between Dr. Branson and her employer in determining whether a reasonable accommodation existed. The circumstances in *Branson* are not similar to those here where Mr. Hopman steadfastly maintains his ability to perform the essential functions of the job and is specifically seeking solely an accommodation of a benefit and privilege of employment.

After the parties filed their briefs, the Court received correspondence from counsel for Mr. Hopman pointing the Court to the recent decision of *Schroeder v. AT&T Mobility Services, LLC*, ___ F. Supp. 3d ___, 2021 WL 4942870 (M.D. Tenn 2021). Mr. Schroeder, a veteran suffering from PTSD, claimed that AT&T failed to accommodate his mental health condition by refusing to alter his job requirements and company vehicle to permit his service dog to work alongside him. *Id.* at *1. The United States District Court for the Middle District of Tennessee denied AT&T's motion for summary judgment. *Id.* at *2-*4. Among other things, the court rejected AT&T's argument that the accommodation Mr. Schroeder requested was automatically

unreasonable because Mr. Schroeder could perform his job duties without his service animal and noted that accommodation may be required to allow an employee to enjoy equal benefits and privileges of employment as are enjoyed by similarly situated employees without disabilities. *Id.* at *3. The court also found that several questions of fact remained relevant to whether Mr. Schroeder's requested accommodations were reasonable. *Id.* Like this Court, *Schroeder* affirms that a remedy is available for a plaintiff who can establish the need for a reasonable accommodation to enjoy equal benefits and privileges of employment as are enjoyed by similarly situated employees without disabilities, but it goes no further because fact issues remained at the summary judgment stage. *Id.*; *see also Adams v. Crestwood Medical Center*, 504 F. Supp. 3d 1263, 1302 (N.D. Ala. 2020) (citing 29 C.F.R. § 1630.2(o)(1)(iii) and determining that fact issue remained on defendant employer's motion for summary judgment as to whether serving meal trays constituted an essential function of employee's job and whether eliminating meal tray duty was a reasonable accommodation that would have enabled employee to enjoy equal benefits and privileges of employment).

Mr. Hopman points to several cases where courts analyze whether the requested accommodation is reasonable to assist the employee in performing the essential functions of the job. For example, in *Alonzo-Miranda v. Schlumberger Tech. Corp.*, 2015 WL 13768973, *2 (W.D. Tex. 2015), the issue was whether a service dog was a reasonable accommodation for a

disabled employee with PTSD so that he could perform the essential functions of his mechanic job (Dkt. No. 196, at 19). The United States District Court for the Western District of Texas considered Schlumberger's renewed motion for judgment as a matter of law, or alternatively, motion for a new trial. The court found that the jury's verdict in favor of Mr. Alonzo-Miranda was supported by evidence "showing the accommodation would help Alonzo-Miranda avoid and mitigate flashbacks and panic attacks that sometimes prevented him from performing *any* of the essential functions of his job." *Id.* (emphasis in original). The court went on to point out that the employer "misstated Fifth Circuit precedent" when it claimed, "that the ADA requires accommodations only when they are necessary to perform essential functions of the job." It pointed out that in *Feist v. La., Dep't of Justice, Office of the Atty. Gen.*, 730 F.3d 450, 453 (5th Cir. 2013), the Fifth Circuit Court of Appeals held that "an accommodation may enable the employee to 'enjoy equal benefits and privileges of employment' even if it has no effect on the employee's ability to do the job."[3] Finally, the district court remarked, in what appears to be dictum, that

[3] In *Feist*, the Fifth Circuit Court of Appeals remanded the case which involved an on-site parking space, which would have given the employee access to the employer's facilities because the district court overlooked the "benefits and privileges" definition in the regulation. 730 F.3d at 454 (citing the EEOC's interpretive guidance). The employer was granted summary judgment after remand because the employee caused a breakdown in the interactive process. *Feist v. Louisiana Dep't of Justice, Off of Atty. Gen.*, Case Nos. 09-7060, 11-1585, 2014 WL 2979623 (E.D. La. Jul. 1, 2014).

"[s]ubstantial evidence at trial established that a service dog mitigated the effects of Alonzo-Miranda's PTSD by reducing the pain and hardship of his disability while at work." *Alonzo-Miranda* is distinguishable from the instant case. There is no indication that *Alonzo-Miranda* went to the jury solely on the theory that Schlumberger denied Mr. Alonzo-Miranda a benefit and privilege of employment. *Alonzo-Miranda* is an essential function case, not solely a benefit and privilege of employment case. Moreover, dictum from an unreported district court decision from another Circuit is not binding on this Court.

In *Nawrot v. CPC Int'l*, 259 F. Supp. 2d 716, 726 (N.D. Ill. 2003), a diabetic employee, who sometimes became unable to think clearly and care for himself at work, asked his employer for an accommodation of periodic breaks to check his blood-sugar levels, eat certain foods, and administer insulin injections. *Id.*, at 719-720. Unlike Mr. Hopman, Mr. Nawrot claimed that he needed the accommodation to perform the essential functions of his job. *Id.* at 725. The employer moved for summary judgment, but the United States District Court for the Northern District of Illinois denied the motion concluding that there were disputed facts about whether the accommodation would enable Mr. Nawrot to perform the essential functions of his job, and, in the alternative, the court noted that there was a question whether Mr. Nawrot might be entitled to his accommodation even if he could perform his job without it. *Id.* The court quoted the three categories of accommodations and noted that category three "benefits

and privileges" shows that "accommodations are required [for] reasons other than essential job functions." *Id.* at 726. The court went on to suggest "providing additional unpaid leave for necessary treatment" as an example of an accommodation that enables an employee with disabilities to enjoy equal benefits and privileges of employment as are enjoyed by employees without disabilities. *Id.*, at 726 (citing 29 C.F.R. § 1630(o) app.).

Nawrot is not like Mr. Hopman's case. Mr. Nawrot did not claim that he could preform the essential functions of his job, and Mr. Nawrot did not assert solely that he was entitled to a reasonable accommodation of a benefit and privilege of employment to be free from mental or psychological pain. Further, *Nawrot* does not establish, as Mr. Hopman suggests, that a proposed accommodation can be reasonable even if it is not an employer sponsored benefit. In fact, in *Nawrot* the court suggested unpaid leave, which is part of an employer sponsored leave program, might be a reasonable accommodation for Mr. Nawrot.

In *McDonald v. Department of Environmental Quality*, 351 Mont. 243, 246 (2009), the employee used a service dog at work to support her body, help her navigate the office building, and calm her down during "dissociative episodes." Ms. McDonald asked her employer for an accommodation to install nonskid flooring to keep the service animal from loosing traction on slick floors. *Id.* at 247. In *McDonald*, the court assessed the requested accommodation's ability to provide Ms. McDonald access to her employer's facilities and to

allow her to avoid "dissociative episodes" that "impacted her ability to do her job," in contrast to Mr. Hopman who by his own admission can effectively do his job by performing the essential functions and access his employer's facilities without his service animal. *Id.* at 258.

3. Right To Work Free From Mental Or Psychological Pain

At the summary judgment stage, Mr. Hopman asserted that he had a right to work without the "continual and unrelenting burden and pain of PTSD." (Dkt. Nos. 59, at 21). In his trial brief, Mr. Hopman asserted that a jury would consider "whether or not the proposed accommodation would do what Congress intended, to assist a worker with a disability so that worker can be mainstreamed and avoid symptoms and pain not suffered by those without disabilities." (Dkt. No. 145, at 5-6). At trial, Mr. Hopman's counsel argued that Mr. Hopman should not have to endure "physical and emotional pain" his episodes bring him at work (Dkt. No. 192, at 93).

Mr. Hopman has not pointed the Court to authority where a court has articulated a right to work without mental or psychological pain. A number of cases from the Eighth Circuit and others suggest, however, that employees do not have a right to work free from mental or psychological pain. *See e.g. Cannice v. Norwest Bank Iowa N.A.*, 189 F.3d 723, 728 (8th Cir. 1999) (affirming district court's grant of judgment as a

matter of law for the employer who refused to provide unmonitored phone near employee's desk to accommodate his depression stating that "[w]e do not believe, however, that the obligation to make reasonable accommodation extends to providing an aggravation-free environment."); *Gonzagowski v. Widnall*, 115 F.3d 744, 747-48 (10th Cir. 1997) (affirming district court's grant of summary judgment in favor of employer who denied employee with anxiety alterations to his work environment to reduce stress and criticism triggered by his supervisor concluding that "[w]hile specific stressors in a work environment may in some cases be legitimate targets of accommodation, it is unreasonable to require an employer to create a work environment free of stress and criticism."); *Pesterfield v. Tennessee Valley Auth.*, 941 F.2d 437 442 (6th Cir. 1991) (affirming district court judgment for employer because employee with depression and severe anxiety was not capable of performing the essential functions of his job, and "it would be unreasonable to require that TVA place plaintiff in a virtually stress-free environment and immunize him from any criticism in order to accommodate his disability."); *Carozza v. Howard Cty., Md.*, 45 F.3d 425 (4th Cir. 1995) (affirming district court grant of summary judgment against employee with bipolar affective disorder because the undisputed facts "ineluctably lead to the conclusion" that the employee's proposed accommodations "for job restructuring, alleviation of stress, and exemption from normal performance reviews" that would require her employer to change the very essence of her job are unreasonable); *Marino v. U.S. Postal Serv.*, 25 F.3d 1037 (1st Cir. 1994)

(citing *Pesterfield* the First Circuit Court of Appeals upheld district court's grant of summary judgment in favor of employer and dismissed as unreasonable a Vietnam veteran's accommodation request that he be protected from stress-producing situations at work); *Tomlinson v. Wiggins*, Case No. 12-CV-1050, 2013 WL 2151537, at *4 (W.D. Ark. May 16, 2013) (emails employee sent explaining his depression and complaining about his boss's harsh management style were not a reasonable request for an accommodation because "[t]he Eighth Circuit has found that an employer's obligation to make a reasonable accommodation does not extend to 'providing an aggravation-free environment.'") (citing *Schwarzkopf v. Brunswick Corp.*, 833 F. Supp. 2d 1106, 1123 (D. Minn. 2011)) (quoting *Cannice v. Norwest Bank Iowa, N.A.*, 189 F.3d 723, 728 (8th Cir. 1999)). Further, Mr. Hopman has not established that Union Pacific has offered its similarly situated non-disabled employees the benefit and privilege of working without mental or psychological pain.

4. Enhanced Job Performance

Mr. Hopman has asserted throughout the case that he can perform the essential functions of his job. He testified to the same at trial (Dkt. Nos. 190, at 179-180; 191, at 9, 27, 32). Mr. Hopman's character witnesses also expressed confidence in Mr. Hopman's job performance (Dkt. No. 190, at 55, 104-106). In spite of his assertions about the adequacy of his job performance, in his trial brief, Mr. Hopman stated that, if granted his accommodation request, his "performance

will be better when he is able to avoid the symptoms of his disability with an accommodation" and that "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." (Dkt. No. 91, at 6). Mr. Hopman continued this argument at trial, where he asserted that his job performance would be enhanced when he was able to avoid the symptoms of his PTSD and traumatic brain injury (Dkt. Nos. 184, at 1; 196, at 5). In closing argument, his counsel argued that "there is a no-cost solution . . . to allow [Mr. Hopman] to work better, safer and without pain and without flashbacks" (Dkt. No. 192, at 93-94). This argument may be appropriate for an essential functions reasonable accommodation analysis, but it is not appropriate for a benefits and privileges of employment reasonable accommodation analysis.

The EEOC Enforcement Guidance discusses "job performance" as part of the "essential functions" reasonable accommodation analysis when it states, "[a]n accommodation also must be effective in meeting the needs of the individuals. In the context of job performance, this means that a reasonable accommodation enables the individual to perform the essential functions of the position." EEOC Enforcement Guidance at *3. The EEOC's Interpretive Guidance similarly provides that level of performance and benefits and privileges of employment are two separate areas of employment in which a disabled employee may obtain equal employment opportunity. The Interpretive Guidance provides:

> Equal employment opportunity means an opportunity to attain the same level of performance, *or* to enjoy the same level of benefits and privileges of employment as are available to the average similarly situated employee without a disability. Thus, for example, an accommodation made to assist an employee with a disability in the performance of his or her job must be adequate to enable the individual to perform the essential functions of the relevant position.

"Interpretive Guidance on Title I of the Americans With Disabilities Act," 29 C.F.R. Pt. 1630, App. § 1630.9, "Section 1630.9 Not Making Reasonable Accommodation" (emphasis added).

Mr. Hopman points to *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1136 (8th Cir. 1999), to support his position and particularly to the Eighth Circuit Court of Appeals's statement that a reasonable accommodation "should provide the disabled individual an equal employment opportunity, including an opportunity to attain the same *level of performance*, benefits, and privileges that is available to similarly situated employees who are not disabled." *Id.* at 1136-37 (citing 29 C.F.R. § 1620.9 (Appendix (1998)) (emphasis added). In *Kiel*, however, the Eighth Circuit Court of Appeals affirmed the district court's grant of summary judgment in favor of Mr. Kiel's employer denying his requested accommodation in an essential functions case. *Id.* at 1139.

Mr. Kiel was deaf and employed by Select as a billing clerk. Mr. Kiel requested as an accommodation a telecommunications device ("TDD") that would have enabled him to make business and personal telephone calls at work and an interpreter for staff meetings and social gatherings. *Id.* at 1134. Select denied the request for a TDD and chose to have Mr. Kiel's supervisor make minimal client telephone calls required rather than provide the TDD. *Id.* at 1137. Select also found that an interpreter was not required for Mr. Kiel to perform the essential functions of his position, and on one occasion that a training session was relevant to Mr. Kiel's position, Select provided him an interpreter. *Id.* The district court granted summary judgment in favor of Select on Mr. Kiel's failure to accommodate claim. *Id.* The Eighth Circuit Court of Appeals affirmed concluding that the accommodation Select provided "restructuring the billing clerk position" allowed Kiel an equal employment opportunity at Select. *Id.* The Eighth Circuit Court of Appeals did not analyze benefits or privileges of employment.

To the extent that Mr. Hopman seeks an accommodation to assist him with performing duties above and beyond the core essential functions of his job, the Eighth Circuit has held, in the essential functions context, that accommodations are not reasonable unless they help the employee in "performing the duties of her particular job. . . ." *Rask v. Fresenius Med. Care N. Am.*, 509 F.3d 466, 471 (8th Cir. 2007); *see also Hatchett v. Philander Smith Coll.*, 251 F.3d 670, 675 (8th Cir. 2001) ("A reasonable accommodation is one which

enables a[n] individual with a disability to perform the essential functions of the position.") (citing 29 C.F.R. § 1630.2(o)(1)(i)). Similarly, the Sixth Circuit has stated that "[t]he ADA is not a weapon that employees can wield to pressure the employers into granting unnecessary accommodations or reconfiguring their business operations. Instead, it protects disabled employees from disability-related mistreatment—no more, no less." *Tchankpa v. Ascena Retail Group, Inc.*, 951 F.3d 805, 809 (6th Cir. 2020).

In *Arndt v. Ford Motor Co.*, 247 F. Supp. 3d 832, 855-56 (E.D. Mich. 2017), the United States District Court for the Eastern District of Michigan granted summary judgment in favor of an employer and against an Army Veteran with PTSD who worked as a process coach on the factory floor. The evidence in the record on summary judgment indicated that Mr. Arndt had PTSD and wanted to bring his service dog, Cadence, to work with him on the factory floor where he encountered "stressors related to his PTSD." *Id.* at 857. The service dog was trained specifically for the "betterment of Plaintiff's life." *Id.* at 855. The court determined that, while the service dog may have been trained to better Mr. Arndt's life, that was "simply not sufficient to carry Plaintiff's burden to establish, by a preponderance of the evidence, that having Cadence by his side in all aspects of his job as a process coach would have enabled him to perform the essential functions of that high stress supervisory job" on the factory floor. *Id.* In the context of an essential functions case, the United States District Court for the Eastern

District of Michigan determined that Mr. Arndt had not established that his service dog helped him perform the essential functions of his job.

Similarly, to the extent that Mr. Hopman's trainer testified that Atlas was trained to assist Mr. Hopman with getting on a plane, going to an amusement park, going out to dinner, and attending a cheer competition and to the extent that Mr. Hopman testified that Atlas makes him "a better Perry 100 percent of the time," that testimony does not establish a claim to a benefit and privilege of employment that Mr. Hopman has identified (Dkt. No. 190, at 74-76, 139).

Mr. Hopman also cites to two hypotheticals from the EEOC's Enforcement Guidance that both address performance. The first hypothetical involves a cashier who becomes fatigued because of lupus and requests a stool because sitting greatly reduces fatigue and "enables her to perform her job." (Dkt. No. 196, at 14-15). The guidance provides that the "accommodation is reasonable because it is a commonsense solution to remove a workplace barrier—being required to stand—when the job can be effectively performed sitting down. This 'reasonable' accommodation is effective because it addresses the employee's fatigue and enables her to perform her job." (*Id.*, at 15).

The second hypothetical from the EEOC's Enforcement Guidance Mr. Hopman points to involves a crew member for a cleaning company with a psychiatric disability who requests changes to permit him to have fewer alterations in his daily routine by either

staying on one floor permanently, staying on one floor for two months and then rotating, or allowing a transition period to adjust to change in floor assignments (*Id.*, at 15). The guidance provides that "these accommodations are reasonable because they appear to be feasible solutions to this employee's problems dealing with changes to his routine. They also appear to be effective because they would enable him to perform his cleaning duties." (*Id.*)

These hypotheticals address requests for accommodations needed to perform the essential functions of the job. Neither hypothetical provides guidance regarding equal access to employer-sponsored benefits and privileges of employment. Additionally, the hypotheticals do not suggest that freedom from mental and emotional pain constitutes such a benefit or privilege.

D. Conclusion

There 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. Accordingly, the Court grants Union Pacific's renewed motion for judgment as a matter of law (Dkt. No. 193). Having determined that Mr. Hopman does not have a cognizable claim for relief under the Rehabilitation Act or ADA, the Court need not address Union Pacific's second argument on its federal-conflict defense regarding federal safety regulations prohibiting Atlas from being in the cab of a locomotive.

III. Motion For Equitable Relief

Also before the Court is Mr. Hopman's motion for equitable relief (Dkt. No. 200). Because the Court grants Union Pacific's motion for judgment as a matter of law, the Court denies Mr. Hopman's motion for equitable relief (*Id.*)

IV. Motion To Strike

Before the Court is Mr. Hopman's motion to strike the declaration of Robert Carty and attached photographs that are Exhibit 4 to Union Pacific's renewed motion for judgment as a matter of law (Dkt. Nos. 197; 193-4). Mr. Hopman contends that Union Pacific is attempting to introduce into evidence photographs that it neglected to offer into evidence at trial (Dkt. No. 197, at 1). The photographs are of a demonstrative that Union Pacific created on the floor of the courtroom during trial in an effort to show the size of the cab of a locomotive (*Id.*). Mr. Hopman argues that the record is closed, the demonstrative is not part of the record, and Union Pacific provides no authority for reopening the trial record and made no motion to reopen the record (*Id.*, at 2). Union Pacific responds that Mr. Hopman does not challenge the authenticity or accuracy of the photographs attached to Mr. Carty's declaration, and both the jury and the Court had the benefit of the images contained in the photographs during trial (Dkt. No. 206, at 1). Union Pacific contends that appellate courts may take demonstrative exhibits into account when reaching determinations (*Id.*, at 2).

Federal Rule of Civil Procedure 12(f) provides that a court "may strike from a pleading . . . any redundant, immaterial, impertinent, or scandalous matter." An allegation contained in a pleading is immaterial if it "has no essential or important relationship to the claim for relief or the defenses being pleaded." *CitiMortgage, Inc. v. Just Mortgage, Inc.*, Case No. 4:09 CV 1909 DDN, 2013 WL 6538680, at *7 (E.D. Mo. Dec. 13, 2013) (internal quotations omitted). An allegation is impertinent if it "consists of statements that do not pertain, and are not necessary, to the issues in question." *Id.* While Rule 12(f) is understood to provide courts with "liberal discretion," the Eighth Circuit Court of Appeals has stated that "striking a party's pleadings is an extreme measure, and, as a result, we have previously held that '[m]otions to strike under Fed. R. Civ. P. 12(f) are viewed with disfavor and are infrequently granted.'" *Stanbury Law Firm v. I.R.S.*, 221 F.3d 1059, 1063 (8th Cir. 2000) (quoting *Lunsford v. United States*, 570 F.2d 221, 229 (8th Cir. 1977)).

The Court grants the motion to strike the declaration of Robert Carty and attached photographs that is Exhibit 4 to Union Pacific's renewed motion for judgment as a matter of law (Dkt. Nos. 197). Union Pacific did not present the photographs for admission into evidence at trial, and the Court has not considered the declaration or attached photographs in ruling on Union Pacific's renewed motion for judgment as a matter of law.

V. Conclusion

The Court grants Union Pacific's renewed motion for judgment as a matter of law (Dkt. No. 193). The Court will enter judgment for Union Pacific as a matter of law on Mr. Hopman's claims. Mr. Hopman's motion for equitable relief is denied (Dkt. No. 200). The Court grants Mr. Hopman's motion to strike (Dkt. No. 197). The Court orders the Clerk to strike docket number 193-4 from the record.

It is so ordered this 30th day of March, 2022.

2020 WL 5412382
Only the Westlaw citation is currently available.
United States District Court, E.D. Arkansas,
Central Division.

Perry HOPMAN, Plaintiff
v.
UNION PACIFIC RAILROAD, Defendant

Case No. 4:18-cv-00074-KGB
|
Signed 09/09/2020

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ORDER

Kristine G. Baker, United States District Judge

Before the Court is a motion for reconsideration or, in the alternative, certification under 28 U.S.C. § 1292(b) filed by defendant Union Pacific Railroad ("Union Pacific") (Dkt. No. 74). Plaintiff Perry Hopman has filed a response (Dkt. No. 78), and Union Pacific has filed a reply (Dkt. No. 79). Mr. Hopman

supplemented his response to advise the Court of a recent First Circuit case supporting his position, and Union Pacific filed a response to the supplement (Dkt. Nos. 88, 89). For the following reasons, the Court denies Union Pacific's motion for reconsideration or, in the alternative, certification under 28 U.S.C. § 1292(b) (Dkt. No. 74).

I. Background

Mr. Hopman brings this action against Union Pacific under Section 504 of the Rehabilitation Act of 1973, as amended, ("Rehabilitation Act"), 29 U.S.C. § 794, *et seq.*, and the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq.* (Dkt. No. 4, ¶ 3). Mr. Hopman alleges that he was discriminated against and denied a reasonable accommodation in violation of both the Rehabilitation Act and the ADA (*Id.*, ¶¶ 18-26). Mr. Hopman asserts that he needs the requested accommodation of working alongside his service dog in order to enjoy equal benefits and privileges of employment, including the right to work without the burden and pain of his post-traumatic stress disorder ("PTSD") (Dkt. Nos. 4, ¶ 12; 59, at 1, 16-21).

On June 24, 2019, Union Pacific moved for summary judgment in this matter (Dkt. No. 54). Union Pacific argued that as a matter of law Mr. Hopman was unable to demonstrate that he was entitled to a reasonable accommodation or suffered an adverse employment decision and that Union Pacific should have judgment granted in its favor accordingly (Dkt. No.

54-1, at 17-24). Additionally, Union Pacific argued that Mr. Hopman failed to identify any "benefit" or "privilege" of employment that he could not access without an accommodation, further dooming his claims (Dkt. No. 61, at 1-9).

On May 26, 2020, the Court entered an Order denying Union Pacific's motion for summary judgment (Dkt. No. 72). In that Order, the Court considered the text of the Rehabilitation Act, the ADA, and implementing regulations for both; surveyed relevant case law; and reached several conclusions (*Id.*). The Court held that Mr. Hopman was able to bring a reasonable accommodation claim even though he was able to perform the essential functions of his job (*Id.*, at 19-23). The Court also overruled Union Pacific's argument that "Mr. Hopman has not demonstrated that there are any equal benefits or privileges of employment that he is unable to enjoy without an accommodation and that his alleged disability does not prevent him from enjoying anything Union Pacific has to offer" (*Id.*, at 23 (citing Dkt. Nos. 54-1, at 19; 61, at 5-9)). On this point, viewing the record evidence in the light most favorable to Mr. Hopman, the Court concluded that "a reasonable juror could conclude that Mr. Hopman has a disability and requested 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" (*Id.*, at 25). The Court also found that a reasonable juror could conclude that Mr. Hopman's requested accommodation seems reasonable on its face and that there were disputed

genuine issues of material fact regarding whether Mr. Hopman suffered a requisite adverse employment action necessary to maintain his claims (*Id.*, at 27).

On June 17, 2020, Union Pacific filed the instant motion (Dkt. No. 74).

II. Legal Standard

District courts have the inherent power to reconsider an interlocutory order any time prior to the entry of judgment. *See Lovett v. Gen. Motors Corp.*, 975 F.2d 518, 522 (8th Cir. 1992). "When a district court is convinced that it incorrectly decided a legal question in an interlocutory ruling, the district court may correct the decision to avoid later reversal." *Id.* (citing *In re Unioil, Inc.*, 962 F.2d 988, 993 (10th Cir. 1992)). "A 'motion for reconsideration' is not described in the Federal Rules of Civil Procedure, but such a motion is typically construed either as a Rule 59(e) motion to alter or amend the judgment or as a Rule 60(b) motion for relief from judgment." *Peterson v. The Travelers Indem. Co.*, 867 F.3d 992, 997 (8th Cir. 2017) (quoting *Auto Servs. Co. v. KPMG, LLP*, 537 F.3d 853, 855 (8th Cir. 2008)). The Eighth Circuit has "determined that motions for reconsideration are 'nothing more than Rule 60(b) motions when directed at non-final orders.'" *Elder-Keep v. Aksamit*, 460 F.3d 979, 984 (8th Cir. 2006) (quoting *Anderson v. Raymond Corp.*, 340 F.3d 520, 525 (8th Cir. 2003)).

Under Rule 60(b), the Court may relieve a party from an order on the narrow grounds of mistake,

inadvertence, surprise, or excusable neglect; newly discovered evidence; fraud, misrepresentation, or misconduct by an opposing party; voidness; satisfaction of judgment; or "any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b). "The rule 'provides for extraordinary relief which may be granted only upon an adequate showing of exceptional circumstances.'" *Jones v. Swanson*, 512 F.3d 1045, 1048 (8th Cir. 2008) (quoting *United States v. Young*, 806 F.2d 805, 806 (8th Cir. 1986)); *see also In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, 496 F.3d 863, 866 (8th Cir. 2007) ("Rule 60(b) authorizes relief in only the most exceptional of cases."); *United States v. One Parcel of Property Located at Tracts 10 & 11 of Lakeview Heights, Canyo Lake, Comal Cnty., Tex.*, 51 F.3d 117, 119 (8th Cir. 1995) (concluding that a motion to reconsider filed under Rule 60(b) requires the moving party to establish "exceptional circumstances" to obtain the "extraordinary relief" the rule provides). "Rule 60(b) is a motion grounded in equity and exists to prevent the [order or] judgment from becoming a vehicle of injustice." *Harley v. Zoesch*, 413 F.3d 866, 870 (8th Cir. 2005) (internal quotation marks omitted). "Motions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence." *Arnold v. ADT Sec. Servs., Inc.*, 627 F.3d 716, 721 (8th Cir. 2010). Importantly, a motion to reconsider should not be used "to raise arguments which could have been raised prior to the issuance of" the challenged order or judgment. *Hagerman v. Yukon Energy Corp.*, 839 F.2d 407, 414 (8th Cir. 1988), *cert denied*, 488 U.S. 820

(1988). In particular, as it pertains to Rule 60(b)(6), the Eighth Circuit has provided the following guidance:

> Relief is available under Rule 60(b)(6) only where "exceptional circumstances prevented the moving party from seeking redress through the usual channels." *In re Zimmerman*, 869 F.2d 1126, 1128 (8th Cir. 1989). . . . "Exceptional circumstances" are not present every time a party is subject to potentially unfavorable consequences as a result of an adverse judgment properly arrived at. Rather, exceptional circumstances are relevant only where they bar adequate redress.

Atkinson v. Prudential Prop. Co., Inc., 43 F.3d 367, 373 (8th Cir. 1994).

Furthermore, "[p]ermission to allow interlocutory appeals" pursuant to certification under 28 U.S.C. § 1292(b) "should be granted sparingly and with discrimination." *Union Cty., Iowa v. Piper Jaffray & Co., Inc.*, 525 F.3d 643, 646 (8th Cir. 2008). Such "motion[s] for certification must be granted sparingly, and the movant bears the heavy burden of demonstrating that the case is an exceptional one in which immediate appeal is warranted." *See White v. Nix*, 43 F.3d 374, 376 (8th Cir. 1994). It has long been the policy of courts to discourage piece-meal appeals because such appeals often result in additional and unnecessary burdens on the court and litigants. *See Union Cty.*, 525 F.3d at 646. Permission to allow an interlocutory appeal is intended to be used only in the extraordinary cases, where resolution of the appeal might avoid protracted and expensive litigation. *Id.* Section 1292(b)

interlocutory appeals are not intended merely to provide review of difficult rulings in hard cases. *Id.*

Section 1292(b) establishes three criteria for certification. The Court must be of the opinion that: (1) the order involves a controlling question of law; (2) there is substantial ground for difference of opinion; and (3) certification will materially advance the ultimate termination of the litigation. *See White*, 43 F.3d at 377. "Even if the requirements are satisfied, [the Eighth Circuit] may deny appeal for any reason." *Lloyd's Acceptance Corp. v. Affiliated FM Ins. Co.*, 557 Fed. App'x 618, 619 (8th Cir. 2014) (unpublished) (citing *Union Cty.*, 525 F.3d at 646).

III. Discussion

Union Pacific moves for reconsideration of the Court's Order denying its motion for summary judgment (Dkt. No. 74, ¶¶ 1-2). In the alternative, Union Pacific seeks certification under 28 U.S.C. § 1292(b) allowing Union Pacific to petition the Eighth Circuit for interlocutory review on whether the term "benefits and privileges of employment" is limited to employer-sponsored services, programs, and facilities and, if necessary, whether the ADA requires an employer to accommodate an employee under the "essential functions" prong when the employee is able to perform all of his or her essential job functions without an accommodation (Dkt. Nos. 74, ¶ 3; 75, at 3). Union Pacific argues that the "benefits and privileges of employment" should be properly understood as limited to services,

programs, and facilities affirmatively sponsored or provided by an employer (Dkt. No. 75, 3-8). Union Pacific maintains that the Equal Employment Opportunity Commission's interpretive guidance confirms that the "benefits and privileges of employment" does not extend beyond employer-sponsored services, programs, or facilities (*Id.*, at 8-9). Union Pacific also retreads its argument that the ADA does not require an employer to accommodate an employee under the "essential functions" prong when the employee is able to perform all of her essential job functions without an accommodation (*Id.*, at 11-16). Should the Court deny its motion for reconsideration, Union Pacific requests certification under 28 U.S.C. § 1292(b) (*Id.*, at 16-18). Union Pacific asserts that its interlocutory appeal would involve controlling questions of law, that the legal questions at issue entail a substantial ground for a difference of opinion, that an immediate appeal may materially advance the ultimate termination of the litigation, and that a short stay of the proceedings would be appropriate in the event that the Court enters a certification under § 1292(b) (*Id.*).

In response, Mr. Hopman argues that the relief Union Pacific seeks is unavailable at this stage of the litigation, particularly to the extent Union Pacific seeks to advance new arguments or legal theories (Dkt. No. 78, at 1-3). To the extent Union Pacific seeks relief under Rule 59(e), Mr. Hopman maintains that the challenged order is not appealable and is therefore inappropriate for consideration (*Id.*, at 2). To the extent Union Pacific seeks relief under Rule 60(b), Mr.

Hopman maintains that there are no exceptional circumstances justifying Union Pacific's request (*Id.*). Mr. Hopman also asserts that the "extraordinary relief" § 1292(b) affords should be unavailable in this case (*Id.*, at 2-3, 8). Additionally, Mr. Hopman asserts that Union Pacific's argument fails on the merits (*Id.*, at 3-8).

In reply, Union Pacific states that the Court has the inherent authority to reconsider its previous orders and that Rule 60(b)(6), which allows relief from an interlocutory order for "any other reason that justifies relief," applies here (Dkt. No. 79, at 2-3). Union Pacific also maintains that it has not presented any new arguments or legal theories, though Union Pacific does note that its current motion further explores the "benefits or privileges of employment" as a result of having the benefit of the Court's decision and rationale (*Id.*, at 3-4). Union Pacific reiterates its position that the "benefits and privileges of employment" are limited to employee-sponsored services, programs, and facilities, and Union Pacific maintains that the ADA regulations supporting this position cannot be interpreted beyond what their governing texts allow (*Id.*, at 4-7). As to certification, Union Pacific asserts that the legal issues at stake are sufficiently extraordinary to merit the Eighth Circuit's guidance before committing to a potentially wasteful trial and that substantial authority exists to support its position (*Id.*, at 7-8).

A. Motion For Reconsideration

Union Pacific states that it moves for reconsideration pursuant to Rule 60(b)(6), which allows relief from an interlocutory order for "any other reason that justifies relief" (Dkt. No. 79, at 2). Fed. R. Civ. P. 60(b)(6). As the Eighth Circuit has noted, Rule 60(b)(6) requires the movant to demonstrate "exceptional circumstances" warranting reconsideration. *Atkinson*, 43 F.3d at 373. The Eighth Circuit cautions that "'[e]xceptional circumstances'" are not present every time a party is subject to potentially unfavorable consequences as a result of an adverse judgment properly arrived at," but "are relevant only where they bar adequate redress." *Id.* In this case, Union Pacific has not demonstrated exceptional circumstances meriting the requested relief under Rule 60(b)(6). Union Pacific's argument boils down to a disagreement with the Court's legal conclusions and understanding of the term "privileges and benefits of employment." The Court considered the factual record, the parties' arguments, and the relevant legal authorities, and the Court concluded that Union Pacific's motion for summary judgment should be denied for the reasons explained in its May 26, 2020, Order (Dkt. No. 72). Union Pacific has had a "full and fair opportunity to litigate [its] claim," and there have been no "exceptional circumstances" that "have prevented the moving party from receiving adequate redress." *Zoesch*, 413 F.3d at 871 (citing *Atkinson*, 43 F.3d at 373). Additionally, the "usual channels," *In re Zimmerman*, 869 F.2d at 1128, remain available for Union Pacific to argue and vindicate its position—namely, trial

and the normal appeals process, if applicable. Thus, at this stage of the litigation, the Court considers Union Pacific's motion for reconsideration unfounded and denies the request for reconsideration sought therein (Dkt. No. 74).

B. Certification Under 28 U.S.C. § 1292(b)

The Court reiterates that under Eighth Circuit precedent a district court may certify an order for interlocutory appeal if: (1) the order involves a controlling question of law; (2) there is substantial ground for difference of opinion; and (3) certification will materially advance the ultimate termination of the litigation. *See White*, 43 F.3d at 377. Assuming without deciding that Union Pacific has demonstrated that there is substantial ground for difference of opinion, the Court concludes that Union Pacific has failed to satisfy the first and third elements for certification under § 1292(b).

The questions of law Union Pacific addresses in its motion cannot be severed from the contested factual record present in this case. If this case "turned on a pure question of law, something the court of appeals could decide quickly and cleanly without having to study the record, the court should be enabled to do so without having to wait till the end of the case." *Delock v. Securitas Sec. Servs. USA, Inc.*, 2012 WL 3150391, at *7 (E.D. Ark. Aug. 1, 2012) (quoting *Ahrenholz v. Bd. of Trs. of Univ. of Ill.*, 219 F.3d 674, 677 (7th Cir. 2000)); *see also Adair v. Conagra Foods, Inc.*, No. 09-0018-CV-W-DW, 2012 WL 12903713, at *2 (W.D. Mo. Sept. 11,

2012) (concluding that movant satisfied the first element of the Eighth Circuit's standard for certification under § 1292(b) because the challenged issue was "a pure question of law"). The case at bar is not such a case. Mr. Hopman's claims against Union Pacific and the evidence before the Court involve genuine disputes of material facts and complicated questions of the ADA's applicability to and governance of the disputed factual issues at hand.

Further, the Court is unconvinced that certification will materially advance the ultimate termination of the litigation. This matter is set for jury trial sometime during the week of September 28, 2020 (Dkt. No. 81). With this case on the cusp of trial, "the ultimate termination of the litigation" looms in just over two months. This action is ready to be tried, and the potential to save resources by avoiding trial is not as great as it would have been earlier in the proceedings. The Court has considered both the costs and the benefits to allowing an interlocutory appeal. *See S.E.C. v. Credit Bancorp, Ltd.*, 103 F. Supp. 2d 223, 226 (S.D.N.Y. 2000) ("[T]he benefit to the district court of avoiding unnecessary trial must be weighed against the inefficiency of having the Court of Appeals hear multiple appeals in the same case."). Given the nature and posture of the present action, the Court finds that the action does not fall within the narrow and extraordinary circumstances where certification for interlocutory appeal may be appropriate.

Accordingly, the Court denies Union Pacific's alternative request for certification under § 1292(b) (Dkt. No. 74).

IV. Conclusion

For the foregoing reasons, the Court denies Union Pacific's motion for reconsideration or, in the alternative, certification under 28 U.S.C. § 1292(b) (Dkt. No. 74).

It is so ordered this 9th day of September, 2020.

462 F.Supp.3d 913
United States District Court, E.D. Arkansas,
Central Division.

Perry HOPMAN, Plaintiff
v.
UNION PACIFIC RAILROAD, Defendant

Case No. 4:18-cv-00074-KGB
|
Signed 05/26/2020

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Brian A. Wadsworth, Pro Hac Vice, Linda C. Schoonmaker, Seyfarth Shaw LLP, Houston, TX, Torriano N. Garland, Union Pacific Railroad, Omaha, NE, for Defendant.

OPINION AND ORDER

Kristine G. Baker, United States District Court Judge

Before the Court is a motion for summary judgment filed by defendant Union Pacific Railroad ("Union Pacific") (Dkt. No. 54). Plaintiff Perry Hopman filed a response to this motion (Dkt. No. 59), Union Pacific filed a reply (Dkt. No. 61), and Mr. Hopman filed a surreply (Dkt. No. 62). For the following reasons, the Court denies Union Pacific's motion (Dkt. No. 54).

I. Factual Background

Mr. Hopman brings this action against Union Pacific under Section 504 of the Rehabilitation Act of 1973, as amended, ("Rehabilitation Act"), 29 U.S.C. § 794, *et seq.*, and the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq.* (Dkt. No. 4, ¶ 3). Mr. Hopman alleges that he was discriminated against and denied a reasonable accommodation in violation of both the Rehabilitation Act and the ADA (*Id.*, ¶¶ 18-26).

Mr. Hopman joined the U.S. Army in 1993 (Dkt. No. 55, ¶ 1). Mr. Hopman originally served as an active duty service member and spent approximately one and one-half years on duty before joining the National Guard in Arkansas (*Id.*). In 2006, Mr. Hopman deployed to Iraq as a member of the National Guard (*Id.*, ¶ 2). While deployed, Mr. Hopman discussed employment at Union Pacific with one of his fellow guardsmen and was told that it was a great place to work (*Id.*). Mr. Hopman decided to pursue a railroad career at Union Pacific when he returned from his deployment (*Id.*). At some point after Mr. Hopman returned to the United States, he was diagnosed with post-traumatic stress disorder ("PTSD") for the first time (*Id.*, ¶ 3).

In May 2008—while still a member of the National Guard but after returning from his deployment—Mr. Hopman accepted employment as a conductor at Union Pacific's North Little Rock service unit (*Id.*, ¶ 4). Conductors are responsible for train operations and movement, which includes operating locomotive

equipment (*Id.*, ¶ 5). A conductor's duties include, but are not limited to: pushing, pulling, lifting, and carrying up to 25 pounds frequently, 50 pounds occasionally, and assisting in the infrequent movement of weights of seven up to 83 pounds; riding railcars and climbing onto equipment; applying bilateral use of upper extremities when needed such as maintaining a grip with both hands; maintaining balance and coordination on stairs, ladders, uneven terrain, moving equipment, rails, and ballast; maintaining three-point contact when holding on a ladder or train; working and interacting with others; and riding at the rear of a car on a ladder (*Id.*). In addition to these duties, the conductor also spends time outside of the train to walk the train and deal with other problems (*Id.*, ¶ 6). This means the conductor must perform his or her duties in extreme weather and face any dangers the weather may pose (*Id.*). As a conductor, Mr. Hopman was required to work a variable schedule based on business needs, which included overnight travel (*Id.*, ¶ 7). This involved Mr. Hopman, as a conductor, pairing up with an engineer to operate Union Pacific's trains (*Id.*). Due to scheduling limitations, a conductor and engineer team is not constant and usually changes for each run (*Id.*).

In April 2010, Mr. Hopman took a leave of absence from Union Pacific to perform military service (*Id.*, ¶ 8). This leave of absence ultimately lasted five years (*Id.*). Mr. Hopman deployed to Kosovo during this time and also spent time at his local armory in Benton, Arkansas (*Id.*). Mr. Hopman asserts that he suffered a traumatic brain injury during his service in Kosovo

and spent time after his deployment trying to recover from his injuries, during which his PTSD became much worse (Dkt. No. 59-2, ¶ 8). Mr. Hopman received treatment at Walter Reed in Washington, D.C. and participated in an Army PTSD program in San Diego, California (Dkt. No. 55, ¶ 8). Mr. Hopman also asserts that he received treatment at the Intrepid Center for his traumatic brain injury and PTSD and the Oasis Center for his PTSD (Dkt. No. 59-2, ¶ 8). Union Pacific avers that it paid Mr. Hopman approximately $300.00 to $400.00 per month during this leave, which represented the difference between his pay at Union Pacific and the pay he received while serving on military duty, but Mr. Hopman disputes this claim (Dkt. Nos. 55, ¶ 8; 59-2, ¶ 8). Mr. Hopman medically retired from the Army National Guard in 2015 (Dkt. No. 55, ¶ 8).

Mr. Hopman claims that his medical team recommended that he get a service dog to help mitigate the flashbacks, anxiety, and migraine headaches he suffered (Dkt. No. 59-5, ¶ 5). In 2014, prior to returning to work at Union Pacific, Mr. Hopman got his dog Atlas, a two-month-old German Rottweiler (Dkt. No. 55, ¶ 9). Mr. Hopman returned from his military leave of absence on or about May 4, 2015 (*Id.*, ¶ 10). Mr. Hopman resumed working as a conductor at the North Little Rock Service Unit after his return (*Id.*). Union Pacific required Mr. Hopman to undergo a fitness-for-duty exam when he returned to work, as it requires all of its employees who work in a safety sensitive position to undergo a fitness-for-duty exam after returning from an absence of one year or longer (*Id.*, ¶ 11). While Mr.

Hopman informed Union Pacific of his PTSD diagnosis at that time, he did not request a reasonable accommodation and returned to work without restrictions (*Id.*).

On or about April 1, 2016, after working at Union Pacific for nearly a year after returning from his military leave of absence and approximately eight years after his PTSD diagnosis, Mr. Hopman requested that Union Pacific permit him to bring Atlas to work as a reasonable accommodation (*Id.*, ¶ 12). This request is the first time that Mr. Hopman ever sought a reasonable accommodation from Union Pacific (*Id.*). Mr. Hopman readily admits that from May 4, 2015, to April 1, 2016, prior to requesting this accommodation, he was able to perform safely all functions of his job, though he asserts that he suffered flashbacks, anxiety, and migraine headaches during that time (Dkt. Nos. 55, ¶ 12; 59-2, ¶ 12). Mr. Hopman made this 2016 request to his supervisor at the time, Josh Davis, and the only disability claimed at the time was his PTSD (Dkt. No. 55, ¶ 13). Mr. Hopman requested to bring Atlas to work because he believed Atlas would allow him to be more comfortable at work, make working easier, and help him both mentally and physically (Dkt. Nos. 54-6, at 2; 55, ¶ 13). After reviewing Mr. Hopman's request, Union Pacific denied it because it determined that the accommodation would result in a direct threat to health and safety (Dkt. Nos. 54-7, at 2; 55, ¶ 14). Specifically, Union Pacific noted that: (1) it is unclear how a dog would react to the dangerous conditions of the railyard, such as moving cars and locomotives; (2) there was no infrastructure to support a dog in a locomotive or on the

road; and (3) the dog would remain unmonitored and could pose a risk to other employees (*Id.*). Mr. Hopman asserts that Union Pacific refused to communicate with him about any concerns regarding this accommodation, that Union Pacific was not in a position to make a decision about whether Atlas would be or result in a direct threat to health and safety, and that the record shows that Union Pacific only communicated its concerns after it had already denied the accommodation (Dkt. No. 59-2, ¶ 14).

After the denial of this request, Mr. Hopman filed a Charge with the Equal Employment Opportunity Commission ("EEOC") on April 21, 2016 (Dkt. No. 55, ¶ 15). In his Charge, Mr. Hopman alleged that Union Pacific denied him a reasonable accommodation because of his disability (*Id.*). In the accompanying Intake Questionnaire, Mr. Hopman indicated the only discrimination he faced was Union Pacific's denial of a "use of service dog at work" (*Id.*). Mr. Hopman also indicated that the assistance he sought was "only to allow a service dog to accompany [him] at work" (*Id.*). At the time Mr. Hopman filed this Charge, Atlas had not completed his training (*Id.*). Because Mr. Hopman proactively requested an accommodation he would want in the future, the EEOC recommended that Mr. Hopman withdraw his Charge, which he did (*Id.*).

After Atlas completed his 18-month training program in or about April 2017, Mr. Hopman requested again that Union Pacific permit him to bring Atlas to work with him via an email to Pauline Weatherford, one of Union Pacific's senior vocational case managers

(*Id.*, ¶ 16). Union Pacific asserts that Ms. Weatherford's role in accommodation requests is to engage in the interactive process with the employee, clarify what the employee is seeking, and assist the employee in acquiring the desired accommodation request, if possible (*Id.*). In his email, Mr. Hopman wrote that he now had his service dog full-time and would like to ask for an accommodation enabling him to bring Atlas to work (*Id.*, ¶ 17).

Mr. Hopman completed a reasonable accommodation request intake form which addressed the concerns Union Pacific expressed in denying his 2016 request (*Id.*). Mr. Hopman claimed that: (1) Atlas was trained to perform necessary tasks in varied environments and trained to focus on his work; (2) Atlas was trained not to relieve himself for 14 straight hours; (3) Atlas was an extension of Mr. Hopman and should be viewed as such; (4) Mr. Hopman suffered physical and mental impairments in the form of anxiety and fatigue; (5) Mr. Hopman's impairments interfered with his job performance in the form of increased fatigue due to difficulty sleeping and a possible impact on his focus; and (6) Mr. Hopman was currently able to function but was fearful his impairments would lead to inability to perform essential functions without the accommodation (Dkt. Nos. 54-11, at 2-4; 55, ¶ 17). Union Pacific states that Ms. Weatherford assisted Mr. Hopman throughout the life of his accommodation request and beyond (Dkt. No. 55, ¶ 16). Mr. Hopman challenges this characterization and asserts that Ms. Weatherford did not: communicate management's concerns about Mr. Hopman's

request until she communicated that his request was denied; allow him to address any concerns about the requested accommodation before it was denied; engage in any interactive process with him, meet with him, or speak with him other than by phone or email; assist him or facilitate his request; play any role in the decisions made about his requests; or convey Mr. Hopman's response to Union Pacific's concerns (Dkt. No. 59-2, ¶ 16).

When questioned about this form in his deposition, Mr. Hopman testified that he had no job limitations at the time he requested his accommodation (Dkt. No. 55, ¶ 18). When asked why Mr. Hopman requested to bring Atlas to work, despite being able to perform all the essential functions of his job, Mr. Hopman claimed that he needed Atlas to assist him by: "grounding," or sensing Mr. Hopman's anxiety levels and placing pressure on his body; reminding him to take his medications; "hovering," or walking in circles around Mr. Hopman in a crowd to keep the crowd at bay; notifying Mr. Hopman of when a migraine is coming; blocking anyone from approaching Mr. Hopman from behind; finding the closest exit in a building; picking up and retrieving items; waking Mr. Hopman up from nightmares; forcing Mr. Hopman to get out of the house; and helping Mr. Hopman during flashbacks (Dkt. Nos. 55, ¶ 18; 59-2, ¶ 18). Union Pacific maintains that Atlas needs ongoing training to remain a viable service dog, but Mr. Hopman claims that Atlas only needs additional training because Union Pacific denied his request to bring Atlas to work and Atlas' skills have

dulled since he is not working on a daily basis (Dkt. Nos. 55, ¶ 19; 59-2, ¶ 19). Additionally, Mr. Hopman recognizes that Atlas was not trained for the railroad environment, complete with all the smells, noises, and safety hazards a service dog would encounter, though Mr. Hopman claims that Union Pacific's actions are the only reason Atlas has not been exposed to the railroad environment (*Id.*). However, Mr. Hopman claims that his lack of training in the railroad environment is not a barrier to him being a service animal supporting Mr. Hopman (Dkt. No. 59-1, ¶ 42).

After Mr. Hopman submitted his 2017 request for an accommodation, Ms. Weatherford and Mr. Hopman discussed Mr. Hopman's request and his needs (Dkt. No. 55, ¶ 20). Ms. Weatherford also researched cases and other information helpful to Mr. Hopman and his request (*Id.*). Mr. Hopman broadly asserts for many of the reasons cited that, through Ms. Weatherford, Union Pacific did not appropriately engage in the interactive process with him (Dkt. No. 59-2, ¶ 20). He claims that Ms. Weatherford did not communicate any suggestions or options to him but instead just issued the rejection (*Id.*). Mr. Hopman asserts that Ms. Weatherford did not deliberate with, make suggestions to, or even supply the decision-makers with his input (*Id.*). Mr. Hopman reasserts that Ms. Weatherford never shared with him any of management's concerns until his request was rejected (*Id.*). However, Mr. Hopman did testify that Ms. Weatherford was responsive to him, that she seemed concerned and compassionate, and that he had no complaints about the way that Ms.

Weatherford treated him (Dkt. No. 54-2, at 47). Union Pacific claims that it memorialized Ms. Weatherford's process with Mr. Hopman using its internal reasonable accommodation request forms, though Mr. Hopman states that he only saw these forms after his request was rejected and denies that they substitute in some way for an interactive process (Dkt. Nos. 55, ¶ 20; 59-2, ¶ 20).

Union Pacific forwarded Mr. Hopman's accommodation request on to the General Superintendent of his service unit, Jay Everett, for review (Dkt. No. 55, ¶ 21). Mr. Everett reviewed the request and conferred with Union Pacific's internal legal counsel and safety department (*Id.*). Mr. Everett and members of Union Pacific's legal team and safety department collaborated on whether Union Pacific could safely accommodate Mr. Hopman's request (*Id.*). Union Pacific claims that it took these actions pursuant to its routine process, but Mr. Hopman asserts that Union Pacific has produced no proof that it has a routine practice for handling accommodation requests or that it followed one in his case (Dkt. Nos. 55, ¶ 21; 59-2, ¶ 21). Union Pacific maintains that the decision as to whether Union Pacific could provide Mr. Hopman with his requested accommodation rested in Mr. Everett alone, though Mr. Everett could rely on those resources available to him to make the decision (Dkt. No. 55, ¶ 22).

Union Pacific states that Ms. Weatherford advocated on Mr. Hopman's behalf and explained to Mr. Everett, among others, how well a service animal is trained and a service animal's capabilities (*Id.*). Union

Pacific states that Mr. Everett determined that Atlas' presence would constitute a direct threat to health and safety and made the decision to deny Mr. Hopman's request (*Id.*). Union Pacific claims that this decision was based, in part, on an assessment performed by Union Pacific's Assistant Vice President of Safety, Rod Doerr (*Id.*). Union Pacific asserts that Mr. Doerr believed that Mr. Hopman would violate a number of safety rules in bringing Atlas aboard a train (*Id.*). Union Pacific maintains that it memorialized its decision by providing Mr. Hopman with a document describing the resolution of his reasonable accommodation request (*Id.*). Mr. Hopman claims broadly that there is clearly a fact issue about who made the decision regarding his accommodation, on what basis that decision was made, and why that decision was made (Dkt. No. 59-2, ¶¶ 21-22).

Separately, Mr. Doerr testified to the following facts: Union Pacific had no rule against employees bringing service animals to work; a Union Pacific engineer named Paul Birchfield had previously been permitted by supervisors to bring his service dog to work with him, including aboard Union Pacific trains; in Mr. Birchfield's case, Mr. Doerr ultimately determined that it was not feasible to accommodate animals in the work environment of an engineer; Union Pacific has its own canine units, and the dogs in those units work on and off of Union Pacific trains; and none of those dogs have misbehaved in a way that caused Union Pacific to reevaluate any of its policies (Dkt. No. 59-8, at 8-13, 17-18, 37-38). Relatedly, Brian Seibert, testified that he

has seen stray dogs or yard dogs in multiple Union Pacific locations, that Union Pacific has no rule prohibiting those dogs' presence in its yard, and that Union Pacific has no rule prohibiting its own canine dogs from being aboard its trains (Dkt. No. 59-13, at 7-8). Mr. Birchfield testified that he brought his service dog, Jack, to work with him on a regular basis, including on Union Pacific's trains, for a period of over four years to prevent the worst symptoms of his anxiety and panic attacks; that Jack never caused a problem, created any danger, or posed a threat to anyone else in his presence; and that he was given an ultimatum that he either give up asking Jack to be at work with him or he not go back to work (Dkt. No. 59-10).

Union Pacific maintains that Ms. Weatherford contemplated alternative forms of accommodation and that Union Pacific offered Mr. Hopman a reasonable accommodation in the form of a yard job which would prevent him from having to spend nights away from home and Atlas (Dkt. No. 55, ¶ 23). Mr. Hopman had approximately 25 yard jobs to choose from, though Mr. Hopman claims that these jobs were not all comparable and that he found one job that did not entail a huge pay cut (Dkt. Nos. 55, ¶ 23; 59-2, ¶ 23). Union Pacific states that its involvement in the process ensured Mr. Hopman would keep that job and not be bumped from the job by another union-represented employee with greater seniority (Dkt. No. 55, ¶ 23). Mr. Hopman disputes this, asserts that the yard job was not a reasonable accommodation, and asserts that it was not effective, making things worse for him because it was

a more dangerous and more stressful job that did not address working with PTSD day in and day out (Dkt. No. 59-2, ¶ 23).

Mr. Hopman disagreed with Union Pacific's decision (Dkt. No. 55, ¶ 24). Mr. Hopman stated that the yard job accommodation provided a more dangerous working environment, multiple new stressors, paid less than his current position, felt more like a punishment than a solution, and that Atlas was a medical necessity prescribed by a doctor to perform certain tasks that allowed him to be a productive person (Dkt. Nos. 54-14, at 5; 55, ¶ 24). In a follow-up email to Ms. Weatherford, Mr. Hopman conveyed his disagreement with Union Pacific's decision (Dkt. Nos. 54-15; 55, ¶ 25). Mr. Hopman claimed that his request for accommodation was in no way approved for the original request; that the yard option was not a viable option for him; that Atlas helped him with much more than sleeping and that overnight stays were not his sole need for Atlas; that he had PTSD which provided part of his need for Atlas; that the yard job provided myriad stressors; and that Atlas would not assist him in his essential functions while on duty (Dkt. No. 54-14, at 2).

Union Pacific elevated Mr. Hopman's request to Ms. Weatherford's supervisor, Peggy Grosskopf, director of clinical services, and Union Pacific's internal Equal Employment Opportunity ("EEO") team (Dkt. No. 55, ¶ 26). Ms. Grosskopf and the EEO team reviewed Mr. Hopman's objections to determine if Union Pacific could alter its decision but reached the same conclusion as Mr. Everett (*Id.*). Mr. Hopman claims

that he directly asked to appeal each of the decisions and that he has no idea if the people identified were involved in considering his appeals or, if they were, on what basis they decided to deny his appeal (Dkt. No. 59-2, ¶ 26).

Mr. Hopman testified that he pursued the yard job offered to him and eventually accepted a job as a conductor which was classified as a yard job (Dkt. No. 54-2, at 29-30). Mr. Hopman's pay did not radically change, and he testified that his fears about a dramatic pay decrease were not realized (Dkt. Nos. 54-2, at 31; 55, ¶ 27). Union Pacific characterizes Mr. Hopman's actions as his agreeing to pursue the alternative accommodation offered to him, but Mr. Hopman disputes that account (Dkt. Nos. 55, ¶ 27; 59-2, ¶ 27). Mr. Hopman claims that he did not accept any alternative accommodation and that Union Pacific never offered him any accommodation (Dkt. No. 59-2, ¶ 27). Mr. Hopman asserts that Union Pacific offered only Family Medical Leave Act ("FMLA") leave, to which he was already entitled, and use of his seniority to move to the yard, which is a right every worker has regardless of disability (*Id.*).

Despite agreeing to accept it, Mr. Hopman did not like the yard conductor job (Dkt. No. 55, ¶ 28). Mr. Hopman felt that this new position placed more stress on him because the yard job conductor is a dangerous job in a dangerous environment (*Id.*). Mr. Hopman states that he did not voluntarily accept this "reasonable accommodation" and that it did not address the burden of his PTSD day in and day out (Dkt. No. 59-2, ¶ 28).

Mr. Hopman tried the yard job for a time because he could be with Atlas at night (*Id.*). However, Mr. Hopman realized that the additional stress of the job made his life worse, and he decided to return to his previous job and resumed working as a conductor on the road (Dkt. Nos. 55, ¶ 28; 59-2, ¶ 28).

Mr. Hopman filed a second Charge against Union Pacific for its failure to accommodate his second request to permit him to bring his dog to work (Dkt. No. 55, ¶ 29). In this Charge, Mr. Hopman claimed that he "requested to be allowed to use a service dog to accompany [him] when walking train; ride within locomotive in down stay command or could be tethered or crated while switching and be allowed to travel to rest location" (*Id.*). In the associated Intake Questionnaire form, Mr. Hopman claimed that his disability was migraines, PTSD, anxiety, and depression (Dkt. No. 54-16, at 5). After receiving Notice of his Right to Sue, Mr. Hopman filed this lawsuit on January 26, 2018 (Dkt. No. 55, ¶ 30). Mr. Hopman's only claimed disability in this case is PTSD (*Id.*). Mr. Hopman has maintained, in testimony and otherwise, that he is able to perform the functions of his job safely and that he has never reached a point where he is unable to perform the essential functions of his job (*Id.*, ¶ 31). Mr. Hopman asserts, however, that he sought an accommodation to allow him to enjoy equal access to the benefits and privileges of employment by preventing the worst symptoms of his PTSD (Dkt. No. 59-2, ¶ 31).

Since Mr. Hopman filed his Charge and this lawsuit, Union Pacific has promoted him to engineer (Dkt.

No. 55, ¶ 32). He underwent training to become an engineer, which he was set to complete in or about April 2019 (*Id.*). Mr. Hopman requested that Union Pacific permit him to bring Atlas to the classroom portion of the engineer training, and Union Pacific states that it granted him this request (*Id.*). However, Atlas injured himself prior to the training and was unable to accompany Mr. Hopman (*Id.*). Further, Mr. Hopman disputes Union Pacific's account and claims that the request was granted by the community college where the training occurred, not by Union Pacific (Dkt. No. 59-2, ¶ 32). Mr. Hopman claims that Union Pacific demurred when he asked whether he was allowed to bring Atlas to his engineer training (*Id.*).

In mid-2018, Mr. Doerr and his safety team agreed to travel to Arkansas to meet with Mr. Hopman to discuss Atlas (Dkt. No. 55, ¶ 33). Union Pacific states that the intent of this meeting was to allow Mr. Hopman to demonstrate how he would mitigate the safety concerns associated with Atlas' presence onboard a locomotive, but Mr. Hopman cancelled the meeting the day before it was set to occur (*Id.*). Mr. Hopman states that the meeting was part of settlement discussions and purposed to allow a give and take discussion of Union Pacific's concerns and Mr. Hopman's responses (Dkt. No. 59-2, ¶ 33). Union Pacific states that Ms. Weatherford continued to work with Mr. Hopman on his request for an accommodation and exchanged emails with him as recently as September 2018 about the potential for Atlas to accompany him at work (Dkt. No. 55, ¶ 34). In these emails, Mr. Hopman and Ms.

Weatherford discussed how he planned to overcome issues presented by Atlas's presence (Dkt. No. 54-18). The parties have not agreed upon a workplace demonstration with Atlas to date (Dkt. No. 55, ¶ 34).

II. Legal Standard

Summary judgment is appropriate if there is no genuine issue of material fact for trial. *UnitedHealth Grp. Inc. v. Executive Risk Specialty Ins. Co.*, 870 F.3d 856, 861 (8th Cir. 2017) (citing Fed. R. Civ. P. 56). Summary judgment is proper if the evidence, when viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue of material fact and that the defendant is entitled to entry of judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). "In ruling on a motion for summary judgment '[t]he district court must base the determination regarding the presence or absence of a material issue of factual dispute on evidence that will be admissible at trial.'" *Tuttle v. Lorillard Tobacco Co.*, 377 F.3d 917, 923-24 (8th Cir. 2004) (internal citations omitted). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Johnson Reg'l Med. Ctr. v. Halterman*, 867 F.3d 1013, 1016 (8th Cir. 2017) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)). A factual dispute is genuine if the evidence could cause a reasonable jury to return a verdict for either party. *Miner v. Local 373*, 513 F.3d 854, 860 (8th Cir. 2008). "The mere

existence of a factual dispute is insufficient alone to bar summary judgment; rather, the dispute must be outcome determinative under the prevailing law." *Holloway v. Pigman*, 884 F.2d 365, 366 (8th Cir. 1989) (citation omitted).

However, parties opposing a summary judgment motion may not rest merely upon the allegations in their pleadings. *Buford v. Tremayne*, 747 F.2d 445, 447 (8th Cir. 1984). The initial burden is on the moving party to demonstrate the absence of a genuine issue of material fact. *Celotex Corp.*, 477 U.S. at 323, 106 S.Ct. 2548. The burden then shifts to the nonmoving party to establish that there is a genuine issue to be determined at trial. *Prudential Ins. Co. v. Hinkel*, 121 F.3d 364, 366 (8th Cir. 1997), *cert. denied*, 522 U.S. 1048, 118 S.Ct. 693, 139 L.Ed.2d 638 (1998). "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (citation omitted).

Importantly, "[t]here is no 'discrimination case exception' to the application of summary judgment, which is a useful pretrial tool to determine whether any case, including one alleging discrimination, merits a trial." *Torgerson v. City of Rochester*, 643 F.3d 1031, 1043 (8th Cir. 2011) (en banc) (citing *Fercello v. County of Ramsey*, 612 F.3d 1069, 1077 (8th Cir. 2010)). "Although employment discrimination cases are 'often fact intensive and dependent on nuance in the workplace, they are not immune from summary judgment.'" *Trierweiler v. Wells Fargo Bank*, 639 F.3d 456, 459 (8th

Cir. 2011) (quoting *Fercello*, 612 F.3d at 1077). "An employer is entitled to judgment as a matter of law if the record conclusively reveal[s] some other, nondiscriminatory reason for the employer's decision." *Ross v. Kan. City Power & Light Co.*, 293 F.3d 1041, 1047 (8th Cir. 2002) (internal quotations and citations omitted).

III. Failure To Accommodate

A. Legal Standard

Mr. Hopman brings identical claims of disability discrimination and failure to accommodate under the ADA and the Rehabilitation Act (Dkt. No. 4, ¶¶ 18-26). The Court notes that "[t]he ADA and the RA are 'similar in substance' and, with the exception of the RA's federal funding requirement, 'cases interpreting either are applicable and interchangeable.'" *Randolph v. Rodgers*, 170 F.3d 850, 858 (8th Cir. 1999) (quoting *Gorman v. Bartch*, 152 F.3d 907, 912 (8th Cir. 1998)); *see also Durand v. Fairview Health Servs.*, 902 F.3d 836, 841 (8th Cir. 2018) (same); *Allison v. Dep't of Corr.*, 94 F.3d 494, 497 (8th Cir. 1996) (noting that "the same basic standards and definitions are used under both Acts"). The only relevant difference between the claims is the burden of proof imposed on the plaintiff. "Rehabilitation Act claims are analyzed in a manner similar to ADA claims except that the Rehabilitation Act imposes a requirement that a person's disability serve as the *sole* impetus for a defendant's adverse action against the plaintiff." *Amir v. St. Louis Univ.*, 184 F.3d 1017, 1029 n.5 (8th Cir. 1999). Accordingly, the Court generally addresses Mr. Hopman's ADA and

Rehabilitation Act claims together, recognizing these differences.

"In a reasonable accommodation case, the 'discrimination' is framed in terms of the failure to fulfill an affirmative duty—the failure to reasonably accommodate the disabled individual's limitations." *Peebles v. Potter*, 354 F.3d 761, 767 (8th Cir. 2004). As the Eighth Circuit has held, an employer commits unlawful discrimination if the employer does not make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the employer. *See Ballard v. Rubin*, 284 F.3d 957, 960 (8th Cir. 2002); *Fjellestad v. Pizza Hut of Am., Inc.*, 188 F.3d 944, 951 (8th Cir. 1999) (quoting 42 U.S.C. § 12112(b)(5)(a)). "A reasonable accommodation should provide the disabled individual an equal employment opportunity, including an opportunity to attain the same level of performance, benefits, and privileges that is available to similarly situated employees who are not disabled." *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1136 (8th Cir. 1999) (en banc) (citation omitted). "To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the individual with a disability in need of the accommodation." 29 C.F.R. § 1630.2(o)(3). With a reasonable accommodation claim, "the employer's intent is not determinative." *Withers v. Johnson*, 763 F.3d 998,

1004 (8th Cir. 2014). "Rather, discrimination occurs when the employer fails to abide by a legally imposed duty." *Peebles*, 354 F.3d at 767.

To prevail on a failure to accommodate claim, a plaintiff "must establish both a prima facie case of discrimination based on disability and a failure to accommodate it." *Schaffhauser v. United Parcel Serv., Inc.*, 794 F.3d 899, 905 (8th Cir. 2015); *see also Moses v. Dassault Falcon Jet-Wilmington Corp*, 894 F.3d 911, 923-24 (8th Cir. 2018) (affirming summary judgment on plaintiff's failure to accommodate claim because plaintiff failed to show that he was a qualified individual); *Kelleher v. Wal-Mart Stores, Inc.*, 817 F.3d 624, 631 (8th Cir. 2016) (affirming summary judgment on plaintiff's failure to accommodate claim because plaintiff failed to show that she suffered an adverse employment action). A *prima facie* case requires a plaintiff to demonstrate that he or she: (1) has a disability; (2) is a qualified individual; and (3) has suffered an adverse employment action because of that disability. *Jeseritz v. Potter*, 282 F.3d 542, 546 (8th Cir. 2002). Upon establishing a prime facie case of discrimination, the plaintiff must show, "that the requested accommodation is 'reasonable on its face, *i.e.*, ordinarily or in the run of cases.'" *Peebles*, 354 F.3d at 768 (quoting *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 401, 122 S.Ct. 1516, 152 L.Ed.2d 589 (2002)). "Upon such a showing, the employer is left to 'show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances.'" *Id.* (quoting *Barnett*, 535 U.S. at 402, 122 S.Ct. 1516). In practice, the Eighth

Circuit has articulated a four-part test for evaluating these claims, under which the plaintiff must demonstrate: "(1) the employer knew about the employee's disability; (2) the employee requested accommodations or assistance for his or her disability; (3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and (4) the employee could have been reasonably accommodated but for the employer's lack of good faith." *Ballard*, 284 F.3d at 960 (internal quotations and citations omitted).

B. Analysis

Union Pacific makes several arguments in support of its motion for summary judgment. Union Pacific asserts that: (1) Mr. Hopman cannot demonstrate that he needed the requested accommodation; (2) Mr. Hopman cannot present a prima facie case of discrimination because he suffered no adverse employment action; and (3) Mr. Hopman's requested accommodation was not reasonable as a matter of law (Dkt. No. 54-1, at 17-24). Mr. Hopman responds that: (1) Union Pacific failed to engage in the interactive process with him; (2) Union Pacific's failure to grant him the requested accommodation represents an adverse employment action; (3) the issue of whether Mr. Hopman needed a reasonable accommodation is broader than whether he had the ability to perform the essential functions of his job; (4) the yard job did not represent a reasonable accommodation; and (5) Mr. Hopman's requested accommodation was not unreasonable (Dkt. No. 59, at 14-25).

Union Pacific maintains that Eighth Circuit precedent bars Mr. Hopman from arguing that he is entitled to an accommodation if he is capable of performing the essential functions of his job and that Mr. Hopman has not identified any "benefit" or "privilege" of employment that he cannot access without an accommodation (Dkt. No. 61, at 1-9). Mr. Hopman responds that Union Pacific misrepresents Eighth Circuit precedent and that Mr. Hopman's accommodation request is a request to work without the pain or symptoms of PTSD which represents a "benefit" or "privilege" of employment (Dkt. No. 62).

For purposes of summary judgment only, Union Pacific assumes that Mr. Hopman can show that he is disabled within the meaning of the ADA and is a qualified individual under the ADA (Dkt. No. 54-1, at 20). Union Pacific also acknowledges that, at this stage, it does not move for summary judgment on the issue of the interactive process (*Id.*, at 9 n.2). Instead, Union Pacific asserts that as a matter of law Mr. Hopman cannot demonstrate that he is entitled to a reasonable accommodation or suffered an adverse employment decision (*Id.*, at 20).

The Court considers the legal requirements of the type of ADA claim Mr. Hopman brings and whether, based on the record evidence, a reasonable juror could conclude that Mr. Hopman was "in need of assistance" and "denied a reasonable accommodation." *Dick v. Dickinson State Univ.*, 826 F.3d 1054, 1060 (8th Cir. 2016).

1. Necessity Of Requested Accommodation

Union Pacific argues that Mr. Hopman cannot meet the requirement of showing he needs an accommodation, that nothing suggests that he cannot perform the essential functions of his job as a conductor without an accommodation, and that he cannot demonstrate that there are any equal benefits of employment that he is unable to enjoy without an accommodation (Dkt. No. 54-1, at 19). Moreover, citing *Lowery v. Hazelwood School District*, 244 F.3d 654, 660 (8th Cir. 2001), and the Eighth Circuit Pattern Jury Charge, Union Pacific claims that Eighth Circuit precedent limits reasonable accommodations to instances where a plaintiff is incapable of performing the essential functions of his position (Dkt. No. 61, at 2-5). Mr. Hopman asserts that he needs the requested accommodation to enjoy equal benefits and privileges of employment, including the right to work without the burden and pain of PTSD (Dkt. No. 59, at 16-21). Mr. Hopman further argues that Union Pacific misstates Eighth Circuit precedent and disability law more generally and that working without the pain of PTSD qualifies as enjoying the same benefits and privileges as an employee without a disability (Dkt. No. 62, at 1-2).

The Court rejects Union Pacific's efforts to narrow as a matter of law the types of claims that may be brought under the ADA. The ADA's implementing regulations provide the following three definitions of the term reasonable accommodation:

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

29 C.F.R. § 1630.2(o)(1)(i)-(iii). Mr. Hopman has consistently testified that he remains able to perform the essential functions of his job and maintains that this action involves the third definition of reasonable accommodation (Dkt. Nos. 55, ¶ 31; 59, at 15). Thus, Mr. Hopman argues that he needs the requested accommodation to enjoy equal benefits and privileges of employment as are enjoyed by Union Pacific's other similarly situated employees without disabilities.

The Court finds unconvincing Union Pacific's argument that Mr. Hopman may only bring a reasonable accommodation claim if he is unable to perform the essential functions of his job for several reasons (Dkt. No. 61, at 1). First, the facts of *Lowery* upon which Union Pacific purports to rely differ from Mr. Hopman's

case. The Eighth Circuit found that the *Lowery* plaintiff requested the accommodation in "response to [a] suspension" and "[did] not argue that he indicated that he needed an accommodation for his disability." *Lowery*, 244 F.3d at 660. Thus, the *Lowery* plaintiff did not "request[] that his disability be accommodated." *Id.* The record evidence supports that Mr. Hopman requested an accommodation due to his disability, and Mr. Hopman has maintained throughout that this request stands independent of his ability to perform the essential functions of his job.

Second, Union Pacific misconstrues the thrust of the Eighth Circuit's Manual of Model Civil Jury Instructions as they relate to reasonable accommodations. Union Pacific notes that these instructions provide, in part, that to bring a reasonable accommodation claim, a plaintiff must demonstrate that he "could have performed the essential functions of the (specify job held or position sought) at the time the defendant (specify action(s) taken with respect to the plaintiff) if the plaintiff had been provided with (specify accommodation(s) identified by the plaintiff)." Model Civ. Jury Instr. 8th Cir. 9.42 (2019). However, Union Pacific fails to acknowledge that the instructions explicitly note that "[t]his [essential functions] element is designed to submit the issue of whether the plaintiff is a 'qualified individual' under the ADA." *Id.* at 9.42 n.5. Here, in its moving papers, Union Pacific states that it has expressly assumed the issue of whether Mr. Hopman is a "qualified individual" under the ADA for purposes of summary judgment, so the

Court is not inclined to examine this issue at this stage of the litigation (Dkt. No. 54-1, at 20). Further, based on the language quoted above and persuasive cases examining these types of claims, it is not all together clear that this requirement applies to the type of ADA claim Mr. Hopman brings.

Regardless, the Committee Comments to the instructions explicitly define the term "accommodation" as "making modifications to the work place that allows a person with a disability to perform the essential functions of the job *or allows a person with a disability to enjoy the same benefits and privileges as an employee without a disability.*" Model Civ. Jury Instr. 8th Cir. 9.42 (2019) (emphasis added). This definition makes plain that an accommodation need not be related to the essential functions of an employee's job and aligns with Mr. Hopman's request for an accommodation that allows him to enjoy equal benefits and privileges of employment, which he contends here includes the right to work without the burden and pain of PTSD (Dkt. No. 59, at 16-21).

Third, normal statutory construction indicates that reasonable accommodation requests are not solely tied to the essential functions of an employee's job. The ADA's implementing regulations provide three possible definitions of the term "reasonable accommodation." 29 C.F.R. § 1630.2(o)(1)(i)-(iii). The second definition states that a reasonable accommodation means "[m]odifications 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." 29 C.F.R. § 1630.2(o)(1)(ii). The other two definitions do not reference essential functions. *See id.* § 1630.2(o)(1)(i), (iii). The Court finds 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." *Id.* § 1630.2(o)(1)(iii). Interpreting "reasonable accommodation" to relate necessarily to the essential functions of an employee's job would render the other definitions meaningless, and the Court will not adopt an interpretation "to render general words meaningless." *United States v. Alpers*, 338 U.S. 680, 682, 70 S.Ct. 352, 94 L.Ed. 457 (1950); *see also Nachman Corp. v. Pension Ben. Guar. Corp.*, 446 U.S. 359, 384-85, 100 S.Ct. 1723, 64 L.Ed.2d 354 (1980).

Fourth, many courts have recognized, in accordance with the ADA and its implementing regulations, that an employee ably performing the essential functions of his job might still need a reasonable accommodation to enjoy equal benefits and privileges of employment. *See*, *e.g.*, *Hill v. Assocs. for Renewal in Educa., Inc.*, 897 F.3d 232, 239 (D.C. Cir. 2018), *cert denied*, ___ U.S. ___, 139 S. Ct. 1201, 203 L.Ed.2d 257 (2019) ("A reasonable jury could conclude that forcing [plaintiff] to work with pain when that pain could be alleviated by his requested accommodation violates the ADA."); *Gleed v. AT & T Mobility Servs., LLC*, 613 Fed. App'x 535, 538-39 (6th Cir. 2015) (rejecting an

employer's argument that providing a chair to an employee who experienced pain from prolonged standing was not a reasonable accommodation because "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.'" (quoting 29 C.F.R. § 1630.2(o)(1)(iii))); *Sanchez v. Vilsack*, 695 F.3d 1174, 1182 (10th Cir. 2012) ("[W]e conclude that a transfer accommodation for medical care or treatment is not per se unreasonable, even if an employee is able to perform the essential functions of her job without it."); *Buckingham v. United States*, 998 F.2d 735, 740 (9th Cir. 1993) ("[E]mployers are not relieved of their duty to accommodate when employees are already able to perform the essential functions of the job."); *Martin v. Neb. Methodist Health Sys., Inc.*, No. 8:17-CV-121, 2019 WL 802743, at *6 (D. Neb. Feb. 21, 2019) ("The need for a reasonable accommodation is not to be viewed narrowly by considering only an employee's ability to perform the essential functions of employment. A reasonable accommodation may also be necessary to allow a disabled employee 'to enjoy equal benefits and privileges of employment as are enjoyed by [the employer's] other similarly situated employees without disabilities.'" (quoting 29 C.F.R. § 1630.2(o)(1)(iii))); *Alonzo-Miranda v. Schlumberger Tech. Corp.*, No. 5:13-CV-1057, 2015 WL 13768973, at *2 (W.D. Tex. June 11, 2015) ("[A]n accommodation may enable the employee to 'enjoy equal benefits and privileges of employment'

even if it has no effect on the employee's ability to do the job."). These courts' opinions accord with the third definition of "reasonable accommodation" in the ADA's implementing regulations and Mr. Hopman's stated reason for seeking an accommodation. *See* 29 C.F.R. § 1630.2(o)(1)(iii). Accordingly, the Court concludes that it cannot find in favor of Union Pacific as a matter of law on this issue. Despite being able to perform the essential functions of his job, Mr. Hopman may request an accommodation from Union Pacific to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

Separately, Union Pacific argues that Mr. Hopman has not demonstrated that there are any equal benefits or privileges of employment that he is unable to enjoy without an accommodation and that his alleged disability does not prevent him from enjoying anything Union Pacific has to offer (Dkt. Nos. 54-1, at 19; 61, at 5-9). The EEOC has provided some guidance as to what "equal benefits and privileges of employment" means:

> The ADA requires employers to provide reasonable accommodations so that employees with disabilities can enjoy the "benefits and privileges of employment" equal to those enjoyed by similarly-situated employees without disabilities. Benefits and privileges of employment include, but are not limited to, employer-sponsored: (1) training, (2) services (e.g., employee assistance programs (EAP's), credit unions, cafeterias, lounges, gymnasiums, auditoriums, transportation), and (3) parties or

> other social functions (e.g., parties to celebrate retirements and birthdays, and company outings). If an employee with a disability needs a reasonable accommodation in order to gain access to, and have an equal opportunity to participate in, these benefits and privileges, then the employer must provide the accommodation unless it can show undue hardship.

Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act (2002), https://www.eeoc.gov/policy/docs/accommodation.html. The definition of "equal benefits and privileges of employment" in these guidelines aligns with the examples of "equal access to the benefits and privileges of employment" found in Union Pacific's Reasonable Accommodation Policy, which include "training, attending company sponsored events, [and] access to lunch and coffee rooms" (Dkt. No. 59-6, at 12). Here, Union Pacific specifically argues that a "benefit" or "privilege" must be "a tangible service offered by an employer—such as training—that the employee cannot access without an accommodation." (Dkt. No. 61, at 2).

The Court is not inclined to grant judgment as a matter of law in favor of Union Pacific on this point at this stage of the litigation. Though the EEOC has identified some examples of equal benefits and privileges of employment, that list is not all-inclusive. Union Pacific does not cite controlling authority for this proposition and does not meaningfully distinguish the holdings from other courts that have permitted claims like Mr.

Hopman's to proceed. Mr. Hopman contends that he seeks the equal benefit and privilege of employment of working without suffering the worst symptoms of his disability. The 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. Mr. Hopman contends that, due to his disabilities, he needed Atlas with him to work—as other employees do—without suffering from the flashbacks, migraines, anxiety, and depression that have accompanied his PTSD. 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." *Hill*, 897 F.3d at 239 (determining that "ARE'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,' [wa]s 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." (citations omitted)); *see also Gleed*, 613 Fed. App'x at 539 (rejecting the employer's argument that, as a matter of law, if plaintiff "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"); *Alonzo-Miranda*, 2015 WL 13768973, at *2 (rejecting the employer's argument post-trial that the ADA requires accommodations only

when they are necessary to perform essential functions of the job; concluding that "an accommodation may enable the employee to 'enjoy equal benefits and privileges of employment' even if it has no effect on the employee's ability to do the job").

Viewing the record evidence in the light most favorable to Mr. Hopman, the Court finds that a reasonable juror could conclude that Mr. Hopman has a disability and requested 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. Accordingly, at this stage of the litigation, the Court denies Union Pacific's motion for summary judgment, rejecting Union Pacific's arguments that Mr. Hopman was not entitled to request and did not need as a matter of law the requested accommodation.

2. Reasonableness Of Requested Accommodation

Union Pacific also argues that Mr. Hopman's requested accommodation was not reasonable as a matter of law (Dkt. No. 54-1, at 23-24). Specifically, Union Pacific maintains that a reasonable accommodation must assist the plaintiff in performing the duties of his job, rendering Mr. Hopman's requested accommodation unreasonable as it is unrelated to his limitations or his ability to perform his job duties because he has no limitations (*Id.*, at 23). Mr. Hopman counters whether an accommodation is reasonable is ordinarily

a fact issue for the jury and that the record evidence demonstrates the reasonableness of his request (Dkt. No. 59, at 23-25).

Employers are "only obligated to provide a *reasonable* accommodation, not the particular one that [an employee] request[s]." *Garrison v. Dolgencorp, LLC*, 939 F.3d 937, 942 (8th Cir. 2019) (emphasis in original) (citations omitted). However, upon an employer's motion for summary judgment an employee "need only show that an 'accommodation' seems reasonable on its face, *i.e.*, ordinarily or in the run of cases." *Barnett*, 535 U.S. at 401, 122 S.Ct. 1516 (citations omitted). "[I]n order for the accommodation to be reasonable, the request must relate to the individual's disability." *Hustvet v. Allina Health Sys.*, 910 F.3d 399, 410 (8th Cir. 2018) (citations omitted). "A reasonable accommodation [also] imposes no undue burden on the employer." *Peebles*, 354 F.3d at 767; *see also Gardea v. JBS USA, LLC*, 915 F.3d 537, 541 (8th Cir. 2019) ("Accommodations are not reasonable if an employer 'can demonstrate that the accommodation would impose undue hardship on the operation of the business.' ") (quoting 42 U.S.C. § 12112(5)(A)).

To the extent Union Pacific argues that a reasonable accommodation to permit an employee to enjoy the benefits and privileges of his job must as a matter of law relate to the essential functions of the job, the Court rejects that argument for the reasons explained. Likewise, to the extent Union Pacific asserts that as a matter of law the accommodation Mr. Hopman seeks does not qualify as one to permit him to enjoy equal

benefits and privileges of employment, the Court rejects that argument for the reasons explained.

Here, the Court must view the record evidence in the light most favorable to Mr. Hopman and, in doing so, determines that there is record evidence from which a reasonable juror could conclude the following: Mr. Hopman's requested accommodation costs no money and violates no rule; Union Pacific granted Mr. Birchfield the same accommodation Mr. Hopman seeks for several years, and it created no problems; Mr. Birchfield used his dog successfully to mitigate his anxiety disorder; Union Pacific uses its own dogs to assist personnel on and around trains; Union Pacific performs a thorough individualized assessment of its dogs and handlers before approving them and could conduct such an assessment with Mr. Hopman and Atlas; Union Pacific's dogs have caused no problems; yard dogs or stray dogs are common at Union Pacific worksites and not prohibited; and Union Pacific has not demonstrated any undue hardship it would suffer in accommodating Mr. Hopman's request.

Given this record evidence, the Court finds that a reasonable juror could conclude that Mr. Hopman's requested accommodation "seems reasonable on its face." *Barnett*, 535 U.S. at 401, 122 S.Ct. 1516. Accordingly, the Court denies Union Pacific's motion for summary judgment on the grounds that Mr. Hopman's requested accommodation was not reasonable as a matter of law.

3. Requisite Adverse Employment Action

Union Pacific also suggests that, as a matter of law, Mr. Hopman cannot demonstrate the requisite adverse employment action to maintain his claims. The Eighth Circuit has held that in failure to accommodate cases "there is no requirement to demonstrate any adverse action other than the failure to accommodate itself." *Mershon v. St Louis Univ.*, 442 F.3d 1069, 1077 n.5 (8th Cir. 2006) (citing *Peebles*, 354 F.3d at 766). "An employer is also liable for committing an adverse employment action if the employee in need of assistance actually requested but was denied a reasonable accommodation." *Dick*, 826 F.3d at 1060 (citing *Hatchett v. Philander Smith Coll.*, 251 F.3d 670, 675 (8th Cir. 2001)). Union Pacific denied Mr. Hopman's request to bring Atlas to work with him on the grounds that his request was neither necessary nor reasonable, and record evidence construed in the light most favorable to Mr. Hopman creates disputed genuine issues of material fact regarding Union Pacific's assertions.

To the extent Union Pacific also asserts that it offered to Mr. Hopman an alternative reasonable accommodation in the form of a yard job which would prevent him from having to spend nights away from home and Atlas and that Mr. Hopman took that job, the Court cannot grant Union Pacific judgment as a matter of law based on the record before it. Based on the record evidence before the Court construed in favor of Mr. Hopman, at a minimum, there are genuine issues of material fact in dispute regarding whether this was a

reasonable alternative offer on the part of Union Pacific based on Mr. Hopman's request, what Mr. Hopman made known to Union Pacific, and what the record evidence demonstrates about Union Pacific's decision making process. Further, there are genuine issues of material fact in dispute regarding whether Union Pacific granted to Mr. Hopman with the yard-job offer anything over-and-above that to which Mr. Hopman already was entitled by virtue of his position. For these reasons, the Court denies summary judgment as a matter of law in favor of Union Pacific on this point.

IV. Conclusion

The Court finds, based on the record evidence, that a reasonable juror could conclude that Mr. Hopman has demonstrated a prima facie case of discrimination by requesting a reasonable accommodation to enable him with his disability to enjoy equal benefits and privileges of employment at Union Pacific as are enjoyed by its other similarly situated employees without disabilities. Accordingly, the Court denies Union Pacific's motion for summary judgment (Dkt. No. 54).

So ordered this 26th day of May, 2020.