No. 23-

IN THE

# Supreme Court of the United States

JAY HANNAH,

*Petitioner,*

*v.*

UNITED PARCEL SERVICE, INC.,

*Respondent.*

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

This is a crucial matter involving the rights of disabled, union employees to receive reasonable accommodation that has not yet been, but should be, decided by this Court: Is an employer's decision that it cannot modify the equipment used by a union employee dispositive proof that the employer cannot offer a reasonable accommodation for the employee?

The Petitioner produced evidence that a smaller van was available for deliveries after he sought the same as a reasonable accommodation. The Respondent did not offer any specific records to rebut Petitioner's position that the van he sought was available. The Fourth Circuit ruled in favor of the Respondent, and held it would not second guess the Respondent's business decision that it could not provide another van to Petitioner as a reasonable accommodation. (Pet. App. 13a, 17a). The novel question presented is:

Whether an employer's selection of the equipment used to perform a job precludes a court from considering whether modification of such equipment would still allow a union employee to perform the essential functions of his job under the ADA?

## PARTIES BELOW

Petitioner is Jay Hannah.

Respondent is United Parcel Service, Inc.

## RELATED CASES

- Hannah v. UPS, No. 2:20-cv-120, U.S. District Court for the Southern District of West Virginia. Judgment entered June 2, 2021.

- Hannah v. UPS, No. 21-1647, U.S. Court of Appeals for the Fourth Circuit. Judgment entered July 10, 2023.

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The Fourth Circuit's decision is published at 72 F.4th 630. (Pet. App. 1a-17a). The district court's opinion is available at 2021 U.S. Dist. LEXIS 103497. (Pet. App. 18a-30a).

## JURISDICTION

The Fourth Circuit entered its decision on July 10, 2023. This Court has jurisdiction under 28 U.S.C. § 1254.

## STATUTORY AND REGULATORY PROVISIONS

The relevant provisions are 42 U.S.C. § 12112(a), (b)5) and 29 C.F.R. pt. 1630.2(n)(1), (3).

42 U.S.C. § 12112 (a) provides "[n]o covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."

42 U.S.C. § 12112(b)(5) provides "[a]s used in subsection (a), the term 'discriminate against a qualified individual on the basis of disability' includes-- (5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or (B) denying employment opportunities to a job applicant or

employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant; . . . ."

Code of Federal Regulation 29 pt. 1630.2(n)(1) provides "[t]he term essential functions means the fundamental job duties of the employment position the individual with a disability holds or desires. The term 'essential functions' does not include the marginal functions of the position."

Code of Federal Regulation 29 pt. 1630.2(n)(3) provides "[e]vidence of whether a particular function is essential includes, but is not limited to:

(i) The employer's judgment as to which functions are essential;

(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

(iii) The amount of time spent on the job performing the function;

(iv) The consequences of not requiring the incumbent to perform the function;

(v) The terms of a collective bargaining agreement;

(vi) The work experience of past incumbents in the job; and/or

(vii) The current work experience of incumbents in similar jobs."

## STATEMENT OF THE CASE

During litigation before the district court, Petitioner worked for Respondent as a delivery driver. Appendix Volume 2 at 472, lines 21-23. On December 13, 2017, Petitioner alleged he sustained injuries to his lower back and buttocks while driving. App. Vol 1 at 236; App. Vol. 2 at 542. Respondent opposed the claim and appealed Petitioner's case to the West Virginia Supreme Court of Appeals. Id. at 638-665. The West Virginia Supreme Court upheld Mr. Hannah's claim compensable for right hip bursitis. Id. at 661-665.

After missing several months of work to treat his compensable bursitis, Petitioner requested Respondent to provide him a reasonable accommodation. App. Vol. 2 at 553, lines 176:16-177:3. Petitioner explained that he required a vehicle with a softer suspension to perform his duties as a driver: App. Vol. 2 at 558, lines 181:2-7.

Petitioner requested Respondent to provide him with a delivery truck with a softer suspension than the usual truck Respondent supplied to its drivers. App. Vol. 2 at 8, ¶ 18. On September 6, 2018, Petitioner made another reasonable accommodation request for his back injury. App. Vol. 1 at 265-268; App. Vol. 2 at 627-635. Petitioner explained he could not return to work until his treating physician had released him to regular duty without restrictions. App. Vol. 2 at 573, lines 10-13. "And prolonged sitting is technically a restriction." Id.

On September 11, 2018, Petitioner's physician completed the medical portion of the request for a reasonable accommodation. App. Vol. 1 at 257-262. In

response to the question was "the employee currently able to perform all of the functions of his/her position," Petitioner's doctor marked "no," and stated Petitioner was unable to tolerate riding on a seat. Id. at 260. He diagnosed Petitioner with sacroiliitis that impaired his ability to tolerate riding. Id.

On September 17, 2018, Petitioner's doctor stated Petitioner "may return to work with no lifting restrictions. He should avoid prolonged sitting. These requests are related to his workers' compensation injury claim. They should be in effect until 11/1/2018." App. Vol. 1 at 264; App. Vol. 2 at 571, lines 21-25.

On October 19, 2018, Petitioner completed Respondent's written accommodation application. App. Vol. 1 at 266-267. Petitioner again explained that prolonged sitting in an UPS truck that was "full size—and 500 [cubic feet] and above" affected his ability to drive. Id. at 266. He made a specific request for a "delivery van or pickup truck that has softer suspension." Id. He also suggested transfer to another position that did not involve driving, and would accept assignment within a 30-mile area of Parkersburg, West Virginia, his home office. Id. at 524; App. Vol. 2 at 726. Petitioner did not seek a medical leave of absence as an accommodation.

In discovery, Petitioner requested Respondent's documentation on its West Virginia vehicle fleet for the period from April 2018 through October 2019. Respondent claimed it did not maintain the specific records of its fleet, and instead produced an Excel spreadsheet documenting the different types of vehicles it maintained at the time, including the make and size, and their assigned locations.

App. Vol. 2 at 695-696. The Excel spreadsheet does not capture the exact number of vehicles that Respondent may have maintained during 2018 when Petitioner first alleges he required an accommodation. It does reveal that Respondent had vehicles in West Virginia in 2019 that complied with Petitioner's request for a lighter vehicle. Petitioner also completed an affidavit supporting the same. App. Vol. 2 at 726.

Using the Excel spreadsheet, Respondent's designated representative admitted Respondent had Dodge trucks in its fleet, which were smaller in cubic feet than its full-size, delivery vehicles. App. Vol. 2 at 681, lines 19-23. He also acknowledged Respondent had Dodge trucks in use in West Virginia in 2019, which is when Respondent placed Petitioner on a leave of absence. Id. at 682, lines 8-9. Respondent's representative could not recall the year when it first adopted use of Dodge trucks in West Virginia. Id. at 680, lines 4-8; 682, lines 11-13. He testified that Respondent uses smaller vans, and could not recall when Respondent began use of the same. Id. at 684, lines 20-24.

Although Respondent's representative could not recall if Respondent had a Dodge pickup truck in use in 2018, a co-worker of Petitioner's did recall this information, and attested he "drove a UPS Dodge Ram pickup truck from Parkersburg to Charleston in [p]eak of 2018. It was more comfortable than the P70s. The Dodge Ram was available and sitting on the lot for the duration of peak." App. Vol. 2 at 697. Respondent did not depose Petitioner's co-worker, nor did it offer any evidence to rebut the co-worker's affidavit that it had a soft, suspension truck available for Petitioner to drive in 2018.

On October 19, 2018, Respondent's area human resource manager met with Petitioner to discuss his request for a job-related accommodation. App. Vol. 2 at 636. Two months later, Respondent denied Petitioner his request for a softer, suspension vehicle. App. Vol 1 at 270; App. Vol. 2 at 637.

Respondent's human resource manager claimed Respondent had reviewed and discussed Petitioner's request for a van or Dodge truck as a reasonable accommodation. App. Vol. 2 at 705, lines 16-22. Respondent's human resource manager opined that allowing Petitioner a van or Dodge truck would result in other drivers working over 9.5 hours in violation of UPS' collective bargaining agreement. Id. at 706, lines 7-18. He also claimed that placing Petitioner in a smaller vehicle would require him to make multiple trips, which was neither cost effective or safe. Id. at 706-707.

Respondent's Accommodation Checklist reminds its employees to "[b]e sure to memorialize the steps taken to search for an accommodation, preserve supporting documents, and send relevant documents and e-mails" for record keeping. App. Vol. 2 at 636. When asked what documentation, if any, he or Respondent had maintained to support its denial of a van or truck for Petitioner, the human resource manager admitted the denial letter does not memorialize what his committee discussed. Id. at 709, lines 4-9. Respondent's representative also could not recall the documentation, if any, that might support Respondent's decision that Petitioner did not merit a reasonable accommodation. Id. at 710, lines 11-14.

The record evidence from Respondent involving its response to Petitioner's request for a reasonable accommodation does not include any records reflecting its alleged search for other vehicles for him to drive. Nor did Respondent offer any documented studies or analysis that providing Petitioner a van or Dodge truck would cause it undue hardship or violate its obligations to other employees under the collective bargaining agreement ("CBA").

Respondent's human resource manager stated he did not explore Petitioner's request for a reasonable accommodation with him in a one-on-one conversation, and that he did not know if anyone else did. App. Vol. 2 at 714-715. Contrary to Respondent's position, Petitioner testified Respondent had a Dodge truck that fit his request for accommodation when he was off work from his injury from April 2018 to May 2019. App. Vol. 2 at 577-578; 726. He explained any truck that is full-size and has 500 or more cubic feet of storage capacity "has stiffer suspension. And vans and light-duty trucks have softer suspension because they're small vehicles." App. Vol. 2 at lines 8-10. Petitioner testified that Respondent did not attempt to locate a lighter van or truck for him, and that based on his work history and experience that Respondent had the resources and ability to provide him with another van as a reasonable accommodation. Id. at 587 lines 19-25 – 588, line 1.

When asked whether the packages on his route would fit in a delivery van or a light-duty truck, Petitioner believed that they could, but was not "a hundred percent sure" because he "never got a chance to try it out." App. Vol. 2 at 578, line 25-579, line 4. In an affidavit, Petitioner

attested that a Dodge truck and/or van "could hold all of my packages on my route because it was a country route. . . . [Respondent] has never made a determination to the contrary or provided me with information to the contrary." Id. at 726.

Although Respondent concluded that a smaller van could not hold the packages on Mr. Hannah's route, its designated representative could not recall any documentation to support that Respondent discussed how many packages a smaller van could hold. Id. at 710. Nor did Respondent provide any studies, analysis or other documentation for its defense that Petitioner would not have been able to complete his deliveries with a smaller truck.

Respondent's denial of Petitioner's request for a reasonable accommodation left him no choice but to accept an unpaid, leave of absence for the remainder of 2018 and several months of 2019. On May 4, 2019, after undergoing nerve ablation on his back, Petitioner returned to work as a driver for Respondent. App. Vol. 2 at 561, lines 3-11.

In early 2020, Petitioner initiated this action in West Virginia state court and asserted several theories of recovery, including a failure to accommodate claim under the ADA. After removal and discovery, Respondent sought summary judgment on all claims. On June 2, 2021, the district court granted Respondent summary judgment on all claims. The district court found that Petitioner had failed to establish a *prima facie* case of failure to accommodate under the ADA. Pet. App. 18a-30a.

Petitioner timely filed an appeal with the Fourth Circuit, and challenged the district court's award of summary judgment to Respondent on only his ADA claim. The Fourth Circuit affirmed the district court's grant of summary judgment to Respondent. Pet. App. 1a-17a. Although the enabling regulations of the ADA identify several factors in determining the essential functions of a job, the Fourth Circuit focused its analysis on two factors, the Respondent's business judgment on what functions were essential and the collective bargaining agreement. Pet. App. 8a-9a. The Fourth Circuit did not consider Petitioner's 16-years' experience in the job as evidence that providing him a smaller van was a reasonable modification of equipment. Of chief concern, the decision applied the ADA's regulatory guidance in determining what functions of a job are essential by equating the modification of equipment with modification of the job's essential functions. Pet. App. 8a-9a. No such existing precedent from this Court supports this result, which eviscerates the modification of equipment as a reasonable accommodation.

This petition followed.

## REASONS FOR GRANTING THE WRIT

### I. The Fourth Circuit's Decision Conflates Modification of Equipment With A Job's Essential Functions and Conflicts With This Court's Relevant Precedent.

In *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002), this Court established the burden-shifting analysis for reasonable accommodation cases involving a collective bargaining agreement. *US Airways* held an employer's

showing that a requested accommodation conflicts with seniority rules is ordinarily sufficient to demonstrate that an accommodation is not reasonable. The Court noted an employee remains free to present evidence of special circumstances that makes a seniority rule exception reasonable in the specific case.

Unlike Petitioner's case, *US Airways* considered an employee's requested reassignment to another position. It did not address modifications of the equipment or devices used to perform the employee's work. This is a crucial distinction, and one that supports a grant of certiorari. If upheld, the Fourth Circuit's decision imposes an overwhelming restriction on a union employee's ability to prove and receive a reasonable accommodation for a disability.

The ADA provides "reasonable accommodation" may include ". . . acquisition or modification of equipment or devices, . . . ." 42 U.S.C. § 12111(9)(B). The Fourth Circuit did not question that Petitioner's request for a lighter, suspension van constituted a "modification of equipment[1]." It instead considered Petitioner's request for a light, suspension van as redefining the essential functions of the delivery job, itself. Nothing in *US Airways* or the ADA's implementing regulations supports this result, which mistakes a job "modification" for an "essential function" of the job.

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1. The Fourth Circuit expressly noted 42 U.S.C. § 12111(9)(B) provides for "job restructuring, . . . modified work schedules. . . and other similar accommodations" but omits specific mention of the modification of equipment and devices, which is the crux of Petitioner's argument.

In upholding the district court's award of summary judgment to Respondent, the Fourth Circuit placed emphasis on the ADA's regulatory guidance that "consideration be given 'to the *employer's judgment* as to what functions of a job are essential.'" Pet. App. at 8a (Italics in original). It cited the following example from the ADA regulations:

> It is important to note that the inquiry into essential functions is not intended to second guess an employer's business judgment with regard to production standards, whether qualitative or quantitative, nor to require employers to lower such standards. . . . If an employer requires its typists to be able to accurately type 75 words per minute, it will not be called upon to explain why an inaccurate work product, or a typing speed of 65 words per minute, would not be adequate. Similarly, if a hotel requires its service workers to thoroughly clean 16 rooms per day, it will not have to explain why it requires thorough cleaning, or why it chose a 16 room rather than a 10 room requirement.

29 C.F.R. pt. 1630, app. § 1630.2(n).

In concluding Petitioner's requested accommodation for a smaller truck or van did not appropriately consider Respondent's requirements for the position, the Fourth Circuit confused the equipment Petitioner used to perform the job with the job's production standards. Petitioner never asked Respondent to alter the production standards of his job. He always remained ready, willing, and able to

deliver to his assigned area, and did not seek to limit or reduce his deliveries. Petitioner simply sought a smaller van to perform his job assignment. In contrast, the above examples of the typist and a service worker assume each employee's requested modification redefined the job's production standards.

Consider the example of the typist who uses a typewriter whose keys constantly stick and prevent him from typing 75 words a minute. The typist, who suffers from carpal tunnel syndrome, requests the employer for another typewriter whose keys do not stick. The request for a properly, working typewriter does not alter the essential functions of typing 75 words per minute. Nor could the employer credibly claim that securing a properly, working typewriter would result in an undue hardship on it, and it would ordinarily have to provide another typewriter to its typist to comply with the ADA's reasonable accommodation requirement. Under the Fourth Circuit's approach, though, the employer may argue the request for another typewriter changes the production standards of the typist's job, and deny the modification of equipment. That completely eviscerates modification of the equipment, a properly, functioning typewriter, as a reasonable accommodation.

The same holds true for a hypothetical union service worker who cleans rooms. Assume this service worker, like the Petitioner, develops a disabling back injury during her employment. The service worker asks the employer for a lighter, weight vacuum cleaner as a reasonable accommodation. This service worker, like the Petitioner, has worked nearly two decades for the employer, and is familiar with her job such that she knows she can still

clean 16 rooms efficiently and thoroughly with a smaller vacuum. She also knows the employer has a smaller vacuum available on the premises and produces an affidavit from another employee on the same. The employer denies the request and claims that the lighter vacuum cleaner will not allow the employee to clean the required 16 rooms a day. The employer offers no documentation or specific support for its business decision. Again, the employee's request for a smaller vacuum does not redefine the essential functions of her job or its production standards. Based on this example, though, which is similar to Petitioner's case, the Fourth Circuit would likely accept the employer's business decision that provision of a smaller vacuum to the service worker conclusively prevents her from cleaning the required 16 rooms a day. The ADA regulations do not support such result, which assumes a modification of equipment automatically redefines the job's production standards. Nor does anything in *US Airways* or this Court's jurisprudence hold that an employer's selection of the equipment used to perform a job precludes a court from considering whether modification of such equipment would still allow a union employee to perform the essential functions of a job under the ADA. For this reason, this Court should exercise certiorari and hear this case.

## II. The Decision Below Is Incorrect.

The Petitioner produced sufficient evidence that allowing him a lighter van would not have resulted in violation of the collective bargaining agreement. Petitioner's testimony, his co-worker's affidavit, and Respondent's failure to offer any documentation to rebut the same was more than sufficient to establish a material issue of disputed fact on Respondent's alleged attempts

to provide Petitioner another truck. The record evidence created a material issue of disputed fact that Respondent did not make a meaningful effort to secure another van for Petitioner. To the contrary, its denial of his request for reasonable accommodation constitutes a "rubber stamped" decision.

As a sixteen-year employee with Respondent, Petitioner's experience and familiarity with his work supports a finding that a smaller van would still have allowed him to complete his route's deliveries. To conclude, as the Fourth Circuit did, that Petitioner "needed to do more than express optimism that his intuition [about being able to perform his job with a smaller van] was correct," is to ignore the value of an employee's understanding of his job, and also that the Respondent offered absolutely no empirical support for its own opinion that Petitioner could not do the job with another vehicle. Pet. App. at 12a-13a.

In determining the essential functions of a job, the ADA regulations support Petitioner's view. While the employer's judgment on what duties are essential is one factor in determining a position's essential function, the ADA's regulation also acknowledges that the "work experience of past incumbents in the job" and/or "current work experience of incumbents in similar jobs" factor in the determination of a position's essential duties. See, Code of Federal Regulation 29 pt. 1630.2(n)(3)(i)-(vii). The Fourth Circuit's decision relies chiefly on the Respondent's assumption that it could not provide Petitioner with another van, and disregards Petitioner's relevant knowledge about a position he had performed for over 16 years.

In conflating a modification of equipment with a job's production standard, the Fourth Circuit misapplied the burden of proof in this ADA claim. To repeat, Petitioner developed evidence to support his claim that the Respondent could have easily provided him with a lighter van. Respondent's defense that it could not relied entirely on its own, self-serving speculation that a smaller truck could not hold the packages for Petitioner's route. Respondent had a duty to support its position with actual evidence; yet the record reveals the Respondent offered no documentation to support its denial of the accommodation. Rather than acknowledge the Respondent lacked evidentiary support for its opinion, the Fourth Circuit erroneously determined the Respondent's decision on the modification Petitioner requested was, itself, an essential function of Petitioner's job.

The Fourth Circuit's refusal to accept Petitioner's evidence that his request for another van was reasonable contravenes this Court's requirement of an "individualized inquiry" in cases determining the ability of a disabled person to perform the job in question. See, *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 (1986), *superseded on other grounds by statute*, (holding under § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq. that an individualized inquiry is essential to that statute's goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health or safety risks). The reason an "individualized inquiry" is important here is because as the Sixth Circuit also appreciates, the ADA recognizes that a defendant's justifications for its actions may well reflect a "rubber stamp" lacking factual grounds:

> While legitimate physical qualifications may be essential to the performance of certain jobs, both that determination and the determination of whether accommodation is possible are *fact-specific issues*. The court is obligated to scrutinize the evidence before determining whether the defendant's justifications reflect a well-informed judgment grounded in a careful and open-minded weighing of the risks and alternatives, or whether they are simply conclusory statements that are being used to justify reflexive reactions grounded in ignorance or capitulation to public prejudice.

See, *Hall v. United States Postal Service*, 867 F.2d 1073, 1079 (6th Cir. 1988) (italics in original), citing *Arline* (complete citation omitted).

In *Hall*, the district court granted the employer summary judgment finding no issue that a 70-pound lifting requirement was an essential function of the job, and that the employer did not have to modify such lifting requirement because it would eliminate an essential function of the work. *Hall* at 1076-1077. The Sixth Circuit reversed. It found that the employee had spent time doing clerk work and stated in her affidavit that she never observed other clerks doing any heavy lifting. Id. at 1079. The Sixth Circuit noted the employer did not dispute the accuracy of the employee's observations. Id. Most important, it disagreed that the affidavit of the employer's supervisor that heavy lifting was an essential part of the job qualified as a legal conclusion. Id. The court noted the employer's supervisor's assessment of what is "essential" may differ from a court's conclusion after it has conducted the "individualized inquiry" required by *Arline*. Id. The

Sixth Circuit remanded the case to the district court for a jury trial.

Neither the ADA or this Court's jurisprudence allows an employer a presumption that its selection of the equipment used to perform a job is binding in the reasonable accommodation process. If it were, then that would render modifications of equipment meaningless as reasonable accommodations. After Petitioner provided evidence that Respondent could provide him a smaller van, the Respondent had the duty to produce evidence that it violated the CBA. In crediting the Respondent's bare assertion that it could not offer Petitioner another van because it would violate the CBA, the Fourth Circuit refused to credit Petitioner's evidence casting doubt on the Respondent's position. *US Airways v. Barnett* does not support this result, and as a matter of law, the Fourth Circuit's decision is incorrect.

The Respondent has never justified why it denied Petitioner a trial run with a smaller van to determine if he could complete the deliveries on his route. Petitioner, a sixteen-year employee with experience handling packages on his route, testified he thought could perform his job with the smaller van. The record evidence supports a jury finding that allowing Petitioner to perform a trial run with the smaller van would not have violated the CBA. The bottom line is the Respondent's decision denying Petitioner's reasonable request for an accommodation is a rubber stamp. The Fourth Circuit's adoption of the Respondent's position results from a clearly erroneous application of this Court's existing ADA jurisprudence, the result of which severely limits union employees' ability to receive reasonable accommodations that may not violate CBAs.

## CONCLUSION

Based on the foregoing, your Petitioner respectfully urges that this Court should grant certiorari.

Respectfully Submitted:

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# APPENDIX

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**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, DATED JULY 10, 2023**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-1647

JAY HANNAH,

*Plaintiff-Appellant,*

v.

UNITED PARCEL SERVICE, INC.,

*Defendant-Appellee.*

January 26, 2023, Argued;
July 10, 2023, Decided

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. (2:20-cv-00120). Joseph R. Goodwin, District Judge.

Before NIEMEYER, RUSHING, and HEYTENS, Circuit Judges.

Affirmed by published opinion. Judge Niemeyer wrote the opinion, in which Judge Rushing and Judge Heytens joined.

*Appendix A*

NIEMEYER, Circuit Judge:

When Jay Hannah, a package delivery driver for United Parcel Service, Inc. ("UPS"), injured his hip and buttocks, he requested that he be allowed to drive his route with a smaller truck that would have a softer suspension or, alternatively, that he be assigned to an "inside job." Because UPS had determined that the route that Hannah had been driving required a larger truck and there were no openings for inside work at the time, UPS instead accommodated Hannah by allowing him to take an unpaid leave of absence until his hip and buttocks healed and he could return to work.

Hannah commenced this action under the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 *et seq.*, alleging that UPS's refusal to provide him with the accommodations he requested violated his rights under the ADA. The district court granted summary judgment to UPS, concluding, as a matter of law, that Hannah had not shown that the accommodations he requested were reasonable and that Hannah's unpaid leave of absence constituted a reasonable accommodation in the circumstances.

For the reasons given herein, we affirm.

I

Hannah, who had been a UPS employee in Parkersburg, West Virginia, since 2008, began experiencing pain in his lower back, hip, and buttocks in December 2017. His

condition was then diagnosed as hip bursitis. At the time, Hannah was assigned to a delivery route, for which he had bid under the governing collective bargaining agreement and which, as UPS had determined, required him to drive a truck with a 600-cubic-foot capacity to carry all the packages to be delivered on his route. That size truck, however, had a stiff suspension, which made for a rough ride that aggravated Hannah's injury. After UPS accommodated his request for a better padded seat, he still could only work sporadically until October 2018. At that time, his physician diagnosed him with sacroiliitis and cleared him to return to work, so long as he avoided prolonged sitting until November 1, 2018. Hannah then made a request to UPS for an accommodation under the ADA to provide him with a smaller vehicle, a van with a cargo capacity of 300 to 400 cubic feet, which would have a softer suspension and thus would provide him with an easier ride. Alternatively, he requested assignment to an "inside job" within a 30-mile radius for which he was qualified until he could return to his route.

UPS officials met with Hannah and then conferred among themselves and determined that UPS could not provide Hannah with the smaller vehicle he had requested because such a van would have an insufficient capacity to serve his route. Thus, providing Hannah with such a van would require either that Hannah give a part of his route to another driver or that Hannah himself complete the route in multiple trips. UPS found neither option to be feasible, as each would violate the governing collective bargaining agreement. With respect to inside work, UPS advised Hannah that it had no openings at the time,

but it would consider him for any such opening when it occurred. While UPS thus denied Hannah the particular accommodations he requested, it did allow him to retain his job and take leave without pay until he could return to work. And after several months, Hannah did return to work, continuing to drive the route to which he was assigned in a truck suited for that route.

After returning to work, Hannah commenced this action against UPS under the ADA for its failure to provide him with either of the accommodations that he requested. The district court granted UPS's motion for summary judgment, concluding that Hannah failed to carry his burden of demonstrating that he could perform the essential functions of his job with the accommodations requested. The court also concluded that the leave of absence that UPS provided was in fact a reasonable accommodation, even though not one that Hannah had requested.

This appeal followed.

## II

The issue in this case turns on whether Hannah, who was temporarily disabled, requested a reasonable accommodation under the ADA and whether UPS, in providing a different accommodation that was not requested by Hannah, complied with its duties in response to Hannah's request.

The record shows that because of his hip and buttocks condition, Hannah was unable to drive the 600-cubic-foot

truck provided to him for delivering the route's packages because the truck's stiff suspension resulted in too harsh a ride. He requested that UPS provide him with a 300- to 400-cubic-foot van, which had a softer suspension and which, he claimed, would enable him to drive his route. Hannah acknowledged that the smaller van would need to hold all of the packages for delivery on his assigned route. He also stated that he was not sure that such a van would be able to hold all of the packages because "I've never got a chance to try it out." But he agreed that if such a van could not accommodate all of the packages, his request would require that he "displace somebody from another route," implicating the collective bargaining agreement. Alternatively, he requested "an inside job," such as washing vehicles or sorting packages.

UPS rejected Hannah's requests. In defending its position, UPS explained that delivery routes were assigned to drivers based on seniority and their bids for the routes, as provided by the collective bargaining agreement. And the size of vehicle assigned to each route was based on the expected volume of packages for that route. Thus, a 600-cubic-foot truck was assigned to Hannah's route because UPS had determined that that was the size of truck that the route required. In addition, UPS noted that the collective bargaining agreement restricted drivers to working no more than 9.5 hours per day. In light of these restrictions, it explained that a 300- to 400-cubic-foot van would not be able to service Hannah's route — Hannah "would have . . . [to] put [work] on another driver or drivers . . . [w]hich potentially would put them over 9.5 hours dispatched; [and] they are protected from working

over 9.5 hours in the collective bargaining agreement." And, as UPS explained, Hannah's doing the route himself with a smaller truck would require multiple trips. That would not only require him to work more than 9.5 hours but would also be unreasonable because of the substantial increase in costs in terms of maintenance, wear and tear on the vehicle, and fuel and oil usage. UPS also noted that it would be a "safety risk to have Mr. Hannah continue to drive up and down the road all day long . . . [b]ecause it is proven the more miles that you incur, the more at risk you are to have an auto accident." As to an inside job, UPS told Hannah that it had no suitable vacancies at the time but that it would continue to look for one. In these circumstances, UPS provided Hannah with the accommodation of granting him an indefinite unpaid leave of absence with the option to return to work when his hip and buttocks healed. Hannah did not agree that that was a reasonable accommodation, although he remained on leave until finally returning to work several months later.

The issue, in short, is whether the accommodations Hannah requested were reasonable under the ADA and whether the accommodation UPS did provide was a reasonable one, albeit not agreeable to Hannah.

The ADA prohibits an employer from discriminating against an employee with a disability if the employee can perform the essential functions of his job with "reasonable accommodation." 42 U.S.C. § 12112(a), (b)(5); *id.* § 12111(8). In making a claim under the ADA for a failure to accommodate, the employee has the burden of establishing a prima facie case by showing "(1) that he was an individual

who had a disability within the meaning of the statute; (2) that the employer had notice of his disability; (3) that with reasonable accommodation he could perform the essential functions of the position; and (4) that the employer refused to make such accommodations." *Wilson v. Dollar Gen. Corp.*, 717 F.3d 337, 345 (4th Cir. 2013) (cleaned up). In carrying out the burden of establishing a reasonable accommodation in the context of a workplace governed by a collective bargaining agreement, the employee must show either that the requested accommodation would not violate the agreement or that some "special circumstances" exist that nonetheless make "the requested accommodation . . . reasonable on the particular facts." *US Airways, Inc. v. Barnett*, 535 U.S. 391, 403, 405, 122 S. Ct. 1516, 152 L. Ed. 2d 589 (2002) (cleaned up).

In this case, Hannah did not meet this burden. While he did request an accommodation of driving a smaller van with a softer suspension, he acknowledged that such a van would have a cargo capacity of 300 to 400 cubic feet, whereas the vehicle that UPS had designated as necessary to perform his route had a capacity of 600 cubic feet. And, as UPS determined, such a shortfall in capacity would prevent Hannah from completing his route in one trip and within 9.5 hours. UPS explained that, in that circumstance, it would have been necessary to adjust another driver's route to take on part of Hannah's route. But each scenario — requiring work longer than 9.5 hours or adjusting another driver's route — would violate the collective bargaining agreement, as UPS explained. Routes were assigned by seniority pursuant to a bidding process, and drivers could work no more than 9.5 hours per

day. Hannah has provided no solution to these problems arising from his request to be given a smaller truck or van.

Moreover, an accommodation is not reasonable if it does not "enable[] the employee to perform the essential functions of the job." *Myers v. Hose*, 50 F.3d 278, 283 (4th Cir. 1995). Here, Hannah has not addressed whether his proposed accommodation would require alteration of the "essential functions" of the job he had previously occupied as determined by UPS. UPS designed the delivery routes and assigned trucks to them with the capacity that it determined was needed to complete the routes. And when an employee, such as Hannah, bid on the route, the essential functions of the job of driving that route were so defined. Consequently, when Hannah sought an accommodation for his injury, part of his burden of demonstrating its reasonableness was to show that it would allow him to perform the essential functions of the position. *See* 42 U.S.C. § 12111(8); *Wilson*, 717 F.3d at 345. And to satisfy that burden, he is not free simply to redefine the job. The ADA directs that consideration be given "to *the employer's judgment* as to what functions of a job are essential." 42 U.S.C. § 12111(8) (emphasis added). The ADA's regulatory guidance explains this point in detail, stating:

> It is important to note that the inquiry into essential functions is not intended to second guess an employer's business judgment with regard to production standards, whether qualitative or quantitative, nor to require employers to lower such standards . . . . If

> an employer requires its typists to be able to accurately type 75 words per minute, it will not be called upon to explain why an inaccurate work product, or a typing speed of 65 words per minute, would not be adequate. Similarly, if a hotel requires its service workers to thoroughly clean 16 rooms per day, it will not have to explain why it requires thorough cleaning, or why it chose a 16 room rather than a 10 room requirement.

29 C.F.R. pt. 1630, app. § 1630.2(n). Yet, Hannah's requested accommodation for a smaller truck or van fails to give the appropriate consideration to UPS's requirements for his job; he fails to demonstrate that he can, with his requested accommodation, "perform the essential functions of the employment position" that he held before his injury. 42 U.S.C. § 12111(8). His requested accommodation was accordingly not reasonable within the meaning of the ADA.

In addition, Hannah has not shown that there was a vacancy that would allow him to do inside work.

In short, Hannah has not carried his burden of demonstrating that the accommodations he requested were reasonable.

In response to Hannah's request for accommodation and in light of the lack of reasonable alternatives, UPS decided to place Hannah on an indefinite unpaid leave of absence until he could return to work. But Hannah

complains that "[he] did not want medical leave" and that such leave "prevented [him] from earning his wages." Yet, he provides no authority as to why that accommodation was not a reasonable one in the circumstances. He only argues that it was not the accommodation he requested and that it provided him with no wages.

First, it is well settled that the "ultimate discretion" to choose among reasonable accommodations rests with the employer. *Reyazuddin v. Montgomery Cnty.*, 789 F.3d 407, 415-16 (4th Cir. 2015) (quoting *Hankins v. The Gap, Inc.*, 84 F.3d 797, 800 (6th Cir. 1996)). And it is also clear that the ADA specifically authorizes unpaid leave as a reasonable accommodation. The Act provides that a "reasonable accommodation" may include "job restructuring, . . . modified work schedules, . . . and other similar accommodations." 42 U.S.C. § 12111(9)(B). And these examples are further explained in regulatory guidance to include "permitting the use of accrued paid leave or *providing additional unpaid leave for necessary treatment*." 29 C.F.R. pt. 1630, app. § 1630.2(o) (emphasis added); *see also Wilson*, 717 F.3d at 344-45. While a period of unpaid leave might not always be a reasonable accommodation, such leave may be reasonable where the disability that interferes with an employee's capacity to complete assigned tasks is temporary and there is reason to believe that a leave of absence will provide a period during which the employee will be able to recover and return to work. *See Graves v. Finch Pruyn & Co.*, 457 F.3d 181, 185-86 (2d Cir. 2006); *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128, 1135-36 (9th Cir. 2001); *Cehrs v. Ne. Ohio Alzheimer's Rsch. Ctr.*, 155 F.3d 775, 783 (6th Cir.

1998); *Baucom v. Potter*, 225 F. Supp. 2d 585, 592 (D. Md. 2002) ("[A] leave of absence to obtain medical treatment for alcoholism can be a reasonable accommodation if it is likely that, following treatment, the plaintiff would be able to safely return to his duties"). Such was the case here. During the leave-of-absence accommodation provided by UPS, Hannah received treatment, and, when he felt ready, he returned to full-time employment as a UPS package delivery driver. That Hannah would have preferred to be accommodated in some other way does not support a claim of discrimination under the ADA.

At bottom, we conclude that the district court did not err in concluding that, as a matter of law, Hannah failed to demonstrate that he requested a reasonable accommodation that would allow him to perform the essential functions of his job, as is required to establish his ADA claim.

## III

Hannah maintains that in any event, material factual disputes precluded granting summary judgment to UPS and that the district court erred in overlooking or misstating them. He contends that there were factual disputes as to whether he would have "been able to complete his assigned route with one of his requested vehicles" and whether his requested accommodation "would have actually caused a violation of the [collective bargaining agreement]." He has acknowledged, however, that "*if* his requested truck could not hold all the packages for his route, *then* that would violate the [collective

bargaining agreement]." (Emphasis in original). Thus, the dispute actually reduces to whether the requested van could handle all the packages for delivery on his route. And on this issue, the record reveals no triable factual dispute.

First, it was undisputed that UPS selected a 600-cubic-foot truck for Hannah's route because it considered such a truck to be necessary for the number of packages to be delivered on the route. As the UPS representative explained, "[I]n order to let Mr. Hannah [drive] a smaller vehicle, he would have had to have taken the work off of that [vehicle] . . . and put it on another driver or drivers in that particular loop as we would call it." The representative also explained, "[I]f you were to put Mr. Hannah in a smaller vehicle and keep him on the same route, he would have to do multiple trips to and from the facility to continue to get his packages." He explained that those considerations led UPS to decide "that it [was] not a reasonable accommodation to get [Hannah] a smaller vehicle."

Hannah did not dispute those facts in his deposition. When asked whether the packages for his route would fit in a van, he could only say, "I believe so. It was never tried." He added that UPS simply "didn't try to see if a van would have worked on my route with all the packages." This does not contradict UPS's determination that a 600-cubic-foot truck was necessary to complete Hannah's route. It was more the expression of a hope or a request for an empirical study to determine whether he could do the route with a van of only 300 to 400 cubic feet. Because Hannah had the burden of proof, he needed to do more than express

optimism that his intuition was correct to create a triable issue of fact.

Perhaps recognizing this, Hannah filed an affidavit during the litigation, which he now argues sufficed to create a dispute of fact. In that affidavit, he stated, despite what he had said to the contrary in his deposition, "The Dodge Truck and UPS Van could hold all of my packages on my route because it was a country route. On some occasions a few stops might have received a lot of packages but then UPS could've put those on another driver and then gave me a few of that driver[']s stops that weren't bulky." This claim appears to be only a hopeful opinion, offered without any supporting factual basis. And more importantly, it is well established that "a party who has been examined at length on deposition [cannot] raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony," because to allow that "would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact." *Barwick v. Celotex Corp.*, 736 F.2d 946, 960 (4th Cir. 1984) (quoting *Perma Rsch. & Dev. Co. v. Singer*, 410 F.2d 572, 578 (2d Cir. 1969)); *see also Stevenson v. City of Seat Pleasant*, 743 F.3d 411, 422 (4th Cir. 2014).

## IV

Finally, Hannah contends that UPS did not, as required by the ADA, "engage in an interactive[] communication with [him] to determine if a reasonable accommodation existed" or that there was, at least, a factual dispute as to whether it did. *See* 29 C.F.R. § 1630.2(o)(3) (stating that

in determining an appropriate accommodation, "it may be necessary for the [employer] to initiate an informal, interactive process with the [employee]").

Hannah agrees that he first made his request for a reasonable accommodation under the ADA on or about September 6, 2018. Before that date, he requested that UPS fit his truck with a more padded and supportive seat so as to mitigate any undue jarring of his buttocks, and UPS accommodated that request. But he agrees that it was in September when he made his request for an ADA accommodation. The record shows that UPS acknowledged the request and asked that Hannah's medical provider complete a medical information form. Hannah's physician did complete the form, indicating that Hannah had sacroiliitis and was currently unable to perform all of the functions of his position based on Hannah's representation that he was "unable to tolerate riding on a seat." And his physician noted that his "only [job] restriction [was] driving [a] truck" and stated that Hannah could return to work but "should avoid prolonged sitting" until November 1, 2018.

Then, on October 19, 2018, Hannah met with several UPS officials, including its human resources manager, to discuss his request for an accommodation. During that meeting, Hannah completed an "Accommodation Checklist," on which he wrote that his medical restrictions prevented him from "prolong[ed] sitting in a UPS truck that[']s full size and 500 [cubic feet] and above." He also wrote that he was requesting a "delivery van or pickup truck that has softer suspension." As he later explained,

> The suspension [in a regular UPS truck] is harsh because we have to carry so many boxes. So they have to have stiff suspension to hold all those boxes. And that makes the harsh ride.

In the Accommodation Checklist, Hannah also requested alternatively that he be transferred to another position that did not involve driving, such as a "preload" role or "the night shift." Finally, he indicated that he would be willing to commute within 30 miles of the UPS center in Marietta, Ohio.

After meeting with Hannah and receiving Hannah's Accommodation Checklist, the human resources manager and other UPS employees "reviewed" and "discussed" Hannah's request for a smaller vehicle. After "discussing" and "evaluating" "how many packages [Hannah] was delivering on his route," they decided a smaller vehicle "would not be a reasonable accommodation." They also recognized that when drivers bid on different routes based on seniority, a "package car is typically assigned to [the] route" and "to switch a package car out on a route, it would have to be the same size of car due to . . . all things pertaining to that route." They also discussed how sharing Hannah's route with other drivers would not be possible under the collective bargaining agreement, and having Hannah drive the route in a smaller vehicle would involve multiple trips, which could not be done in a timely manner, would not be cost effective, and would implicate safety risks.

Thus, in a letter dated December 21, 2018, UPS informed Hannah that, "after carefully reviewing [his]

situation," it was "not aware of any available position at UPS at [the] time for which [he was] qualified and capable of performing the essential job functions with or without reasonable accommodation." The letter indicated that UPS would "continue to look for such available position for up to six months" and that if his "condition or abilities change[d] in the future," or if he were to "become aware of an open position that [he] believe[d] [he was] capable of performing," he should contact UPS so that it could "re-evaluate the situation."

Hannah has not proffered what additional interaction he believes was required or what additional discussions he and UPS representatives could have had with each other that could have made a difference. We conclude that nothing more was required. Accordingly, we reject this argument.

* * *

At bottom, Hannah has not presented evidence from which a jury could find that UPS was required to allow him to drive his assigned delivery route using a smaller vehicle when (1) UPS, in considering his request, discussed and evaluated the number of packages he was delivering on his route and determined that they would not consistently fit on the type of vehicle Hannah had requested and that there was no reasonable way to work around that impediment, and (2) Hannah has failed to present any real evidence to rebut that determination. Nor could a jury find that UPS was required to provide him with an alternative inside job when Hannah failed to

show any opening for such a job. Finally, Hannah has failed to show, as a matter of law, that his leave of absence was not a reasonable accommodation. Accordingly, we affirm the district court's grant of summary judgment to UPS.

AFFIRMED

**APPENDIX B — MEMORANDUM OPINION & ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA, CHARLESTON DIVISION, DATED JUNE 2, 2021**

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF WEST VIRGINIA

CHARLESTON DIVISION

CIVIL ACTION NO. 2:20-cv-00120

JAY HANNAH,

*Plaintiff,*

v.

UNITED PARCEL SERVICE, INC.,

*Defendant.*

June 2, 2021, Decided;
June 2, 2021, Filed

**MEMORANDUM OPINION & ORDER**

Pending before the court is Defendant's Motion for Summary Judgment [ECF No. 32]. Plaintiff has responded [ECF No. 35] and Defendant has replied [ECF No. 36]. For the reasons below Defendant's Motion is GRANTED.

*Appendix B*

## I. Relevant Facts

Plaintiff Jay Hannah began working part-time for Defendant United Parcel Service, INC. ("UPS") in 2004 in Parkersburg, West Virginia. He began working full time as a UPS truck driver in 2008. As a part of his employment, Plaintiff is a union member of IBT Local 175, and he is subject to the Union's Collective Bargaining Agreement.

On December 13, 2017, Plaintiff suffered an injury to his buttocks while at work. [ECF No. 17, at 2]. The following day, Plaintiff met with a healthcare provider who diagnosed him with right hip bursitis and cleared him to work with the following restrictions for one week: only 1-3 hours of kneeling and 1-3 hours of sitting. [ECF No. 32, Ex. K]. During this time, the seat in Plaintiff's UPS truck was replaced. Plaintiff filed a workers' compensation claim and between December 14 and December 29, 2017, Plaintiff was assigned Temporary Alternate Work, per the terms of the Collective Bargaining Agreement. [ECF No. 1, Ex. A, at 37:1-8]. Plaintiff was assigned to work four hours per day washing trucks to accommodate his restriction of limited sitting time. When his workers' compensation claim was initially denied[1] on December 29, 2017, he was notified that he was no longer eligible for Temporary Alternate Work. [ECF No. 1, Ex. A, at 172:3-7].

1. Plaintiff did ultimately appeal the denial of his workers' compensation claim to the Supreme Court of Appeals of West Virginia which found in his favor that the right hip bursitis was a compensable work-place injury.

Once he was no longer eligible for Temporary Alternate Work, Plaintiff took a Leave of Absence. Plaintiff received a sacroiliac injection in February 2018, and he was eventually cleared to return to work without restriction on March 21, 2018. Plaintiff's injury returned in April of 2018, rendering him unable to perform his job. [ECF No. 17, at 2]. Plaintiff requested that Defendant provide him with a "delivery truck with softer suspension than the usual truck Defendant supplied to its drivers." *Id.* This request was not granted, and Plaintiff once again went on a Leave of Absence.

In September 2018, while on his Leave of Absence, Plaintiff was diagnosed with sacroiliitis and the doctor stated that Plaintiff was unable to perform the functions of position and that his only work restriction was driving the truck. [ECF No. 32, Ex. P]. His doctor cleared him to return to work so long as he avoided prolonged sitting until November 1, 2018. In October, Plaintiff requested to return to work but to be assigned a "delivery van or pickup truck that has softer suspension." This request was denied because there was not "any available position at UPS at this time for which [Plaintiff was] qualified and capable of performing the essential job functions with or without reasonable accommodation." [ECF No. 32, Ex. R]. Plaintiff's Leave of Absence was extended again in December 2018. [ECF No. 32, Ex. S].

After having a nerve ablation which remedied his pain, Plaintiff returned to work full-time in May 2019 to his previous position as a UPS truck driver. He remains employed in this position.

*Appendix B*

In July 2020, Plaintiff filed a workers' compensation claim for heat exhaustion. Soon after filing that claim, Plaintiff was disciplined at work for violating Defendant's Grooming Policy which required that a male employee's hair should "not extend below the upper half of the ear, nor below the top of the shirt collar in the back." [ECF No. 17, at 4]. Plaintiff was told that he would serve a five-day suspension for this violation. Plaintiff filed a union grievance, and the suspension was ultimately rescinded. Plaintiff did not serve any of this five-day suspension and it has been removed from his record. [ECF No. 32, Ex. A, at 32:25-33:19].

Plaintiff filed this action alleging five counts. Count I: failure to accommodate a workplace disability in violation of the Americans with Disabilities Act; Count II: Disability Discrimination under the Americans with Disabilities Act; Count III: Gender Discrimination in violation of the West Virginia Human Rights Act; Count IV: Workers' Compensation Discrimination in violation of West Virginia Code § 23-5A-1; and Count V: Retaliation in Violation of the West Virginia Human Rights Act.

## II. Discussion

### A. Summary Judgment

Rule 56 of the Federal Rules of Civil Procedure governs motions for summary judgment. A court "may grant summary judgment only if, taking the facts in the best light for the nonmoving party, no material facts are disputed and the moving party is entitled to judgment as

a matter of law." *Ausherman v. Bank of Am. Corp.*, 352 F.3d 896, 899 (4th Cir. 2003). "Facts are 'material' when they might affect the outcome of the case, and a 'genuine issue' exists when the evidence would allow a reasonable jury to return a verdict for the nonmoving party." *The News & Observer Publ. Co. v. Raleigh-Durham Airport Auth.*, 597 F.3d 570, 576 (4th Cir. 2010).

The moving party may meet its burden of showing that no genuine issue of fact exists by use of "depositions, answers to interrogatories, answers to requests for admission, and various documents submitted under request for production." *Barwick v. Celotex Corp.*, 736 F.2d 946, 958 (4th Cir. 1984). "[A] party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby*, 477 U.S. 242, 256, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Although the court will view all underlying facts and inferences in the light most favorable to the nonmoving party, the nonmoving party nonetheless must offer some "concrete evidence from which a reasonable juror could return a verdict in his [or her] favor." *Anderson*, 477 U.S. at 256.

### B. Failure to Accommodate under the Americans with Disabilities Act

> [T]o establish a prima facie case against his employer for failure to accommodate under the ADA, the plaintiff must show: (1) that he was an individual who had a disability within the

> meaning of the statute; (2) that the employer had notice of his disability; (3) that with reasonable accommodation he could perform the essential functions of the position; and (4) that the employer refused to make such accommodations.

*Thomas v. City of Annapolis*, ---F. App'x ---, 851 Fed. Appx. 341, 2021 U.S. App. LEXIS 7314, *13 (4th Cir. Mar. 12, 2021) (quoting *Wilson v. Dollar Gen. Corp.*, 717 F.3d 337, 345 (4th Cir. 2013)). If Plaintiff establishes a prima facie case, Defendant "may avoid liability if it can show as a matter of law that the proposed accommodation "will cause undue hardship in the particular circumstances." *Halpern v. Wake Forest Univ. Health Scis.*, 669 F.3d 454, 464 (4th Cir. 2012).

"The term '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 . . . to perform the essential functions of that position.'" *EEOC v. Womble Carlyle Sandridge & Rice, LLP*, 616 F. App'x 588, 593 (4th Cir. 2015) (quoting 29 C.F.R. § 1630.2(o)(1)(ii)). The ADA provides that "reasonable accommodation" includes "job restructuring, part-time or modified work schedules, [and] reassignment to a vacant position." *Reyazuddin v. Montgomery Cty.*, 789 F.3d 407, 414 (4th Cir. 2015) (quoting 42 U.S.C. § 12111(9)(B)).

An accommodation can be reasonable even if it is not the employee's requested accommodation. *See*

*Reyazuddin v. Montgomery Cnty.*, 789 F.3d 407, 415 (4th Cir. 2015) ("An employer may reasonably accommodate an employee without providing the exact accommodation that the employee requested."); *see also Dones v. Brennan*, 147 F. Supp. 3d 364, 369 (D. Md. 2015) ("[A]n employer is not required to provide the employee's preferred accommodation."); *Scott v. Montgomery Cnty. Gov't*, 164 F. Supp 2d. 502, 508-09 (D. Md. 2001) ("The ADA does not require an employer to provide the specific accommodation requested, or even to provide the best accommodation, so long as the accommodation is reasonable.") (quoting *Walter v. United Airlines, Inc.*, 2000 U.S. App. LEXIS 26875, 2000 WL 1587489, at *4 (4th Cir. 2000) (internal alterations and quotation marks omitted)). A temporary leave of absence may, in some circumstances, be a reasonable accommodation. *Kitchen v. Summers Continuous Care Ctr., LLC*, 552 F. Supp. 2d 589, 595 (S.D. W. Va. 2008). Further, the requirement to provide reasonable accommodation does not require an employer to violate the terms of a collective bargaining agreement. *Doe v. Mylan Farms, Inc.*, No. 1:16CV72, 2017 U.S. Dist. LEXIS 169639, 2017 WL 4584044, at *3 (N.D. W. Va. Oct. 13, 2017). Plaintiff has not produced evidence necessary to satisfy the *prima facie* elements of a failure to accommodate claim.

Plaintiff repeatedly requested reassignment to driving a van or pickup truck with a softer suspension to accommodate his disability which caused him pain when he sat for long periods of time in a standard UPS delivery truck. According to Plaintiff, there were pickups in the fleet available to be driven. Defendant counters that Plaintiff

would not have been able to complete his assigned route with one of the requested vehicles. Plaintiff confirmed that this is the case. Assigning Plaintiff to a different route would also have required Defendant to remove another driver from their assignment, violating the terms of the collective bargaining agreement. However, Defendant was never required to provide the specific accommodation requested by Plaintiff. Defendant permitted Plaintiff to take two Leaves of Absence until he was able to return to work. Further Plaintiff never alleges that the terms of his Leave of Absence were unsatisfactory. During this time, Plaintiff was not removed from his role, and when he was medically able to return, he returned to his original role. There is no dispute over the fact that Plaintiff was permitted to take Leaves of Absence and still retain his original role. As a matter of law, Plaintiff has failed to offer evidence that Defendant denied him a reasonable accommodation for the pain he suffered while driving.

### C. Disability Discrimination under the Americans with Disabilities Act

The Americans with Disabilities Act prohibits a covered employer from discriminating "against a qualified individual on the basis of disability . . . in regard to . . . discharge of employees." 42 U.S.C. § 12112(a). To prove his case, Plaintiff must show that (1) he has a disability, (2) he is a "qualified individual" for the employment in question, and (3) the defendant took an adverse employment action against him because of his disability. *EEOC v. Stowe-Pharr Mills, Inc.*, 216 F.3d 373, 377 (4th Cir. 2000). A "qualified individual" is one "who, with or without reasonable

accommodation, can perform the essential functions" of his job. 42 U.S.C. § 12111(8). If the plaintiff can prove his prima facie case, the burden of production shifts to the defendant to establish a legitimate, non-discriminatory reason for the termination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); *Raytheon Co. v Hernandez*, 540 U.S. 44, 50 n.3, 124 S. Ct. 513, 157 L. Ed. 2d 357 (2003) (noting that courts use the *McDonnell Douglas* methodology for ADA claims). Once such a reason is proffered, the burden "reverts to the plaintiff to establish that the employer's non-discriminatory rationale is a pretext for intentional discrimination." *Heiko v. Colombo Sav. Bank*, 434 F.3d 249, 258 (4th Cir. 2006).

The element at issue here is whether Plaintiff suffered an adverse employment action. "An adverse employment action is a discriminatory act that 'adversely affect[s] the terms, conditions, or benefits of the plaintiff's employment.'" *Chang Lim v. Azar*, 310 F. Supp. 3d 588, 601 (D. Md. 2018) (quoting *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007)). Plaintiff has offered no evidence that he suffered an adverse employment action. Plaintiff was not terminated from his position, has not had his wages or benefits decreased, and to this day retains his job with Defendant. Plaintiff's claim of disability discrimination under the ADA fails as a matter of law.

### D. Gender Discrimination under the West Virginia Human Rights Act

The West Virginia Supreme Court of Appeals has held that

> [i]n order to make a prima facie case of employment discrimination under the West Virginia Human Rights Act, W. Va. Code § 5-11-1 et seq. (1979), the plaintiff must offer proof of the following: (1) That the plaintiff is a member of a protected class[;] (2) That the employer made an adverse decision concerning the plaintiff[;] and] (3) But for the plaintiff's protected status, the adverse decision would not have been made.

Syl. Pt. 3, *Conaway v. Eastern Associated Coal Corp.*, 178 W. Va. 164, 358 S.E.2d 423 (W. Va. 1986); *Higginbotham v. Appalachian Railcar Servs., LLC*, 2021 U.S. Dist. LEXIS 56302, 2021 WL 1146395, *2 (S.D. W. Va. Mar. 25, 2021). Again, Plaintiff's claim fails due to the lack of an adverse employment decision.

Plaintiff argues that his five-day suspension for violating Defendant's grooming policy constitutes gender discrimination because a female employee would not have been suspended for having hair that touched her collar or covered her ears. This is an interesting argument, but Plaintiff was never actually suspended. He received notice of a five-day suspension, but because of his union membership, he did not serve any of his suspension until the suspension was reviewed. During this review process, Defendant updated its grooming standards and the suspension was reversed. In addition, the suspension was removed from Plaintiff's employment record. Plaintiff was never subject to any consequences of an adverse decision. He continues to work at UPS and drives the same route

he has always been assigned. Plaintiff's claim of gender discrimination under the West Virginia Human Rights Act fails as a matter of law.

### E. Workers' Compensation Discrimination under West Virginia Code § 23-5A-1

West Virginia Code § 23-5A-1 provides that "[n]o employer shall discriminate in any manner against any of his present or former employees because of such present or former employee's receipt of or attempt to receive benefits under this chapter." The Supreme Court of Appeals of West Virginia has held that

> [i]n order to make a prima facie case of discrimination under W. Va. Code, 23-5A-1, the employee must prove that: (1) an on-the-job injury was sustained; (2) proceedings were instituted under the Workers' Compensation Act, W. Va. Code, 23-1-1, et seq.; and (3) the filing of a workers' compensation claim was a significant factor in the employer's decision to discharge or otherwise discriminate against the employee.

Syl. Pt. 1, *Powell v. Wyo. Cablevision*, 184 W. Va. 700, 403 S.E.2d 717 (W. Va. 1991). Again, a plaintiff must show that he has been subject to an adverse employment action. *See W. Va. Pattern Jury Instructions* § 308. An adverse employment action under this section includes termination and failure to reinstate to the employee to their previous position. *W. Va. Code* § 23-5A-3.

Here, Plaintiff was never terminated from his position and was re-employed in the same position that he held before he was injured. To the extent that the five-day suspension could be considered discrimination under this section, as discussed above, this suspension never came to pass. This claim fails for lack of any evidence that Plaintiff suffered any actual adverse impact from filing this workers' compensation claim.

**F. Retaliation in Violation of the West Virginia Human Rights Act**

West Virginia Code § 5-11-9(7)(C) provides that it is unlawful for any employer to "[e]ngage in any form of reprisal or otherwise discriminate against any person because he or she has opposed any practices or acts forbidden under this article or because he or she has filed a complaint . . . ."

> In an action to redress an unlawful retaliatory discharge under the West Virginia Human Rights Act, W.Va. Code, 5-11-1, et seq., as amended, the burden is upon the complainant to prove by a preponderance of the evidence (1) that the complainant engaged in protected activity, (2) that complainant's employer was aware of the protected activities, (3) that complainant was subsequently discharged and (absent other evidence tending to establish a retaliatory motivation) (4) that complainant's discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation.

Syl. Pt. 1, *Brammer v. West Va. Human Rights Comm'n*, 183 W. Va. 108, 394 S.E.2d 340 (W. Va. 1990). Some courts have held that actual discharge of employment is not necessary if a plaintiff can show an adverse employment action. *Larry v. Marion Cnt'y Coal Co.*, 302 F. Supp. 3d 763, 773-774 (S.D. W. Va. 2018). Regardless of whether a plaintiff must show discharge or merely an adverse employment action, I have already discussed at length that Plaintiff still maintains his job with Defendant and has not been subject to any adverse employment action. This claim also fails.

**III. Conclusion**

Defendant's Motion for Summary Judgment [ECF No. 32] is **GRANTED.** The court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented party.

ENTER: June 2, 2021

/s/ Joseph R. Goodwin
JOSEPH R. GOODWIN
UNITED STATES DISTRICT JUDGE