

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOUHAD DAGHER,

Plaintiff-Appellant

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING
NEITHER PARTY

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INTEREST OF THE UNITED STATES

The United States and the Equal Employment Opportunity Commission (EEOC) file this brief under Federal Rule of Appellate Procedure 29(a).

This appeal concerns the definition of “disability” under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794. Section 504 prohibits entities that receive federal financial assistance, including employers, from discriminating on the basis of disability. See 29 U.S.C. 794(a). Employment discrimination claims brought under Section 504 are evaluated under the standards in Title I of the

Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12111 *et seq.*, as amended by the ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110-325, 122 Stat. 3553. See 29 U.S.C. 794(d). The Department of Justice and the EEOC share enforcement and rulemaking authority under Section 504 and the ADA, see 29 U.S.C. 794, 794a; 42 U.S.C. 12116, 12117(a), 12133-12134, 12186(b), and 12188(b), and thus have an interest in the proper resolution of the legal issue raised in this appeal.

STATEMENT OF THE ISSUE

We address the following question only:

Whether the district court applied the wrong legal standards when it ignored the expanded definition of “disability” in the amended ADA, 42 U.S.C. 12102, to conclude that plaintiff was not a qualified individual with a disability as a matter of law under Section 504 of the Rehabilitation Act, 29 U.S.C. 794.

STATEMENT OF THE CASE

Plaintiff-appellant Jouhad Dagher filed a complaint against his employer, Washington Metropolitan Area Transit Authority (WMATA), alleging that it failed to provide a reasonable accommodation for his disability in violation of Section 504 of the Rehabilitation Act. JA193; see 29 U.S.C. 794; 42 U.S.C. 12112(a) and

(b)(5)(A).¹ WMATA hired Dagher in January 2012 as a construction engineer. JA25, 27. Dagher had a history of malignant hypertension, left ventricular hypertrophy, and chest pains, and his conditions were aggravated by stress, extreme temperatures, and poor air quality. JA68, 149-150, 165. During the relevant time, Dagher took medication to manage his conditions and mitigate their symptoms. JA157-158. WMATA put him in offices with poor ventilation and temperature control, which made it difficult for him to breathe and exacerbated his underlying medical conditions. JA31-32. On multiple occasions, Dagher had to go to the hospital after experiencing blood pressure spikes, difficulty breathing, and chest pains while at work. JA31-32, 35, 71-72, 148-149. WMATA denied Dagher's requests to have the ventilation and temperature control fixed and to allow him to telework until the issues were resolved. JA44-46, 52-53. In January 2013, WMATA fired Dagher because of his frequent absences from work. JA71-73, 194. Dagher found a new job doing similar work for a different company. JA199.

After a four-day trial that resulted in a jury awarding Dagher \$53,000 on his failure-to-accommodate claim, the district court granted WMATA's motion for

¹ "JA__" refers to the page numbers within the Joint Appendix filed in this Court on February 5, 2018.

judgment as a matter of law. JA194.² The court concluded that Dagher had not presented evidence from which any reasonable jury could find that he had a disability. JA194-195. In so holding, the court acknowledged that Dagher had alleged that he was substantially limited in breathing. JA198.³ But because he had only alleged that his breathing was limited at work, the court continued, Dagher had to satisfy the “foreclosure test.” JA199. Under the district court’s interpretation of the “foreclosure test,” Dagher had to show that his impairment was so severe that it prevented him from “satisfying the singular demands” of his job at WMATA and generally foreclosed him from working in the type of employment he had with WMATA. JA199 (citing *Rhoads v. FDIC*, 257 F.3d 373, 388 (4th Cir. 2001), cert. denied, 535 U.S. 933 (2002)). The court concluded that there was “no evidence * * * showing that [Dagher’s] preexisting conditions made him inherently incapable of satisfying the requirements of the” position he held at WMATA. JA199. Moreover, according to the court, Dagher’s

² By the parties’ consent, a magistrate judge presided over all aspects of the trial, including entry of final judgment. See 28 U.S.C. 636(c)(1). All references to “the district court” in this brief refer to the magistrate judge.

³ The district court’s order discusses what Dagher “alleged” rather than what he proved, even though the order followed a four-day jury trial and verdict. Because the United States takes no position on the facts but rather addresses only the legal standards under the ADA, this brief uses the same terminology as the district court when referring to its order.

“hypertension and difficulty breathing d[id] not preclude him from working in a similar capacity at a different company.” JA199.

SUMMARY OF THE ARGUMENT

The district court applied the wrong legal standards in concluding that Dagher did not have a “disability” within the meaning of the Rehabilitation Act. The Rehabilitation Act’s standard for determining disability is the same as that under the ADA, which provides that a person has a disability if, as relevant here, he has a physical or mental impairment that substantially limits one or more major life activities. The ADAAA, which amended the ADA and, by extension, Section 504, expanded the ADA’s definition of “disability” by adding a broad definition of “major life activities” that includes general activities like seeing, hearing, eating, breathing, and working. The ADAAA also included a category of “major bodily functions” within that definition.

The court’s analysis of whether Dagher’s impairments affected one or more of his major life activities was inconsistent with the amended ADA in at least three respects.⁴ First, it ignored the amended ADA’s inclusion of “major bodily functions” in the definition of “major life activities” and failed to analyze whether

⁴ Because the events in this case—Dagher’s requests for accommodation and WMATA’s denial of the same—took place after the ADAAA went into effect, the district court should have applied the post-ADAAA version of the ADA. See *Reynolds v. American Nat’l Red Cross*, 701 F.3d 143, 150-151 (4th Cir. 2012).

Dagher's malignant hypertension and other medical conditions affect his circulatory or respiratory functions. The amended ADA defines "major bodily functions" to include digestive, neurological, respiratory, and circulatory functions. The district court considered only whether Dagher's impairments substantially limited the general activity of working. By overlooking the "major bodily functions" category, the district court erroneously narrowed the amended ADA's definition of disability.

Second, the district court improperly considered only whether Dagher had demonstrated a substantial limitation in working, as opposed to breathing, as Dagher had alleged. The district court concluded that because Dagher only presented evidence that his breathing was limited at work, he had to prove that he was substantially limited in the major life activity of working. But that reasoning erroneously conflates the distinct major life activities of breathing and working. Under the amended ADA, a plaintiff is required only to show that he has a substantial limitation in one major life activity, and he is under no particular obligation to choose working as opposed to any other such activity.

Third, in analyzing Dagher's claim as one alleging a substantial limitation in working, the court improperly considered the episodic nature of Dagher's conditions, as well as Dagher's ability to manage his conditions outside the workplace, as factors suggesting that his conditions were not substantially limiting.

Because Dagher's impairments were previously managed and only infrequently flared up when Dagher was at work, the court reasoned, Dagher failed to present sufficient evidence that he had a disability. But under the amended ADA, an episodic condition must be considered in its active state and the ameliorative effects of mitigating measures are no longer relevant in making the disability determination. The district court should have considered whether Dagher's impairments, in their active state and unmanaged, would have substantially limited a major life activity.

Accordingly, this Court should reverse and remand the case for the district court to consider Dagher's failure-to-accommodate claim under the correct legal standards.

ARGUMENT

THE DISTRICT COURT'S ANALYSIS OF DAGHER'S CLAIM CONFLICTS WITH THE ADA AMENDMENTS ACT OF 2008

A. The ADAAA Broadened The Definition Of "Disability"

Section 504 prohibits discrimination against individuals with disabilities in "any program or activity receiving Federal financial assistance." 29 U.S.C. 794(a). "The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under [Section 504]" are "the standards applied under title I of the Americans with Disabilities Act of 1990." 29 U.S.C. 794(d); accord *Reyazuddin v. Montgomery Cty., Md.*, 789 F.3d 407, 413

(4th Cir. 2015). Under Title I, an employer may not “discriminate against a qualified individual on the basis of disability” by failing to make “reasonable accommodations to the known physical or mental limitations of” the employee, unless the employer “can demonstrate that the accommodation would impose an undue hardship on the operation of the business.” 42 U.S.C. 12112(a) and (b)(5)(A). An employee has a “disability” if he has “(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or” is “(C) * * * regarded as having such an impairment.” 42 U.S.C. 12102(1).

In 2008, Congress passed the ADAAA, which, among other things and as relevant here, made two changes to the ADA’s “disability” definition. See Pub. L. No. 110-325, 122 Stat. 3553. First, it added a definition for “major life activities.” See 42 U.S.C. 12102(2). Under this definition, “major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, *breathing*, learning, reading, concentration, thinking, communicating, and working.” 42 U.S.C. 12102(2)(A) (emphasis added). “Major life activities” also include certain “major bodily functions,” including but not limited to “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, *respiratory*, *circulatory*, endocrine, and reproductive functions.” 42 U.S.C. 12102(2)(B)

(emphases added). Second, the ADAAA clarified that “[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active,” 42 U.S.C. 12102(4)(D), and that “[t]he determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures,” 42 U.S.C. 12102(4)(E)(i).

The ADAAA instructs that whether an individual has a disability “should not demand extensive analysis,” and the primary focus of the inquiry should be “whether entities covered under the ADA have complied with their obligations.” Pub L. No. 110-325, § 2(b)(5), 122 Stat. 3554 (2008); see *Jacobs v. North Carolina Admin. Office of the Courts*, 780 F.3d 562, 572-574 (4th Cir. 2015) (recognizing that the ADAAA changed the focus from whether an individual has a disability to whether an employer has complied with the statute).⁵

The ADAAA was Congress’s effort “[t]o restore the intent and protections” of the ADA. Pub. L. No. 110-325, 122 Stat. 3553 (2008). Specifically, the amendments described above were a response to Supreme Court decisions that interpreted the definition of “disability” narrowly. See, e.g., *Toyota Motor Mfg.*,

⁵ The ADAAA’s findings and purposes are codified in the note to 42 U.S.C. 12101 and are cross-referenced in the main text, which provides that “[t]he term ‘substantially limits’ shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.” 42 U.S.C. 12102(4)(B).

Ky., Inc. v. Williams, 534 U.S. 184, 196-197 (2002) (holding that the terms “substantially” and “major” “need to be interpreted strictly to create a demanding standard for qualifying as disabled”); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482 (1999) (holding that whether an impairment is substantially limiting must be determined by considering the ameliorative effects of mitigating measures). Congress found that the Court’s holdings in *Sutton* and its companion cases had “narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect.” Pub. L. No. 110-325, § 2(a)(4), 122 Stat. 3553. As a result, “lower courts ha[d] incorrectly found * * * that people with a range of substantially limiting impairments are not people with disabilities.” § 2(a)(6), 122 Stat. 3553. Congress also found that the Court’s holding in *Toyota Motor* “interpreted the term ‘substantially limits’ to require a greater degree of limitation than was intended by Congress.” § 2(a)(7), 122 Stat. 3553. Congress therefore passed the ADAAA to reject the standards enunciated in *Sutton* and *Toyota Motor* and to ensure “a broad scope of protection” under the ADA. § 2(b)(1), 122 Stat. 3554; accord *Gentry v. E. W. Partners Club Mgmt. Co.*, 816 F.3d 228, 237 (4th Cir. 2016); *Summers v. Altarum Inst., Corp.*, 740 F.3d 325, 329 (4th Cir. 2014); *Adair v. City of Muskogee*, 823 F.3d 1297, 1305 (10th Cir. 2016).

B. The District Court's Analysis Of Whether Dagher Had A "Disability" Directly Conflicts With The Amended ADA

The district court acknowledged that Dagher had alleged that he suffered from malignant hypertension, left ventricular hypertrophy, and chest pains that periodically led to spikes in blood pressure and limited his ability to breathe.

JA193-194, 198. The court noted, however, that Dagher had not demonstrated that his breathing was impaired anywhere other than at his workplace. JA198.

Accordingly, the court, relying on pre-ADAAA case law, analyzed Dagher's claim as if he had alleged a substantial limitation only in working and required that

Dagher satisfy the demands of the "foreclosure test" ostensibly applicable to such

claims. JA199 (citing *Rhoads v. FDIC*, 257 F.3d 373, 390 (4th Cir. 2001), cert.

denied, 535 U.S. 933 (2002)).⁶ Under the "foreclosure test," the court explained,

⁶ Before the ADAAA, a plaintiff who had alleged a substantial limitation in working had to show that he was "unable to work in a broad class of jobs," as opposed to a single, particular job. *Sutton*, 527 U.S. at 491; see *Forrisi v. Bowen*, 794 F.2d 931, 935 (4th Cir. 1986). This Court sometimes referred to this requirement as the "foreclosure test." See, e.g., *Rhoads*, 257 F.3d at 389; *Williams v. Channel Master Satellite Sys., Inc.*, 101 F.3d 346, 349 (4th Cir. 1996), cert. denied, 520 U.S. 1240 (1997). We are unaware of any decision by this Court that has applied the *Sutton* analysis to a post-ADAAA claim or discussed whether it survives the amendments, which were designed to make it easier for someone to show that he or she has a "disability." See 29 C.F.R. Pt. 1630, App. at 390 (2012) (explaining that "[i]n keeping with the findings and purposes of the Amendments Act, the determination of coverage * * * should not require extensive and elaborate assessment, and the EEOC and the courts are to apply a lower standard in determining when an impairment substantially limits * * * the major life activity (continued...)

Dagher had to prove that his disability prevented him not only from “satisfying the singular demands” of his job at WMATA but also generally foreclosed him from working in a broad class of jobs. JA199 (citing *Rhoads*, 257 F.3d at 388). The court’s analysis directly conflicts with the amended ADA in at least three respects.

First, the district court erred by ignoring the amended ADA’s inclusion of “[m]ajor bodily functions” in the definition of “[m]ajor life activities.” 42 U.S.C. 12102(2)(B). Under this definition, a person has a “disability” if his impairment substantially limits “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, *respiratory*, *circulatory*, endocrine, and reproductive functions.” 42 U.S.C. 12102(2)(B) (emphases added). As the district court acknowledged, Dagher suffered from hypertension and other medical conditions that, when exacerbated, make it difficult for him to breathe. JA193-194. Hypertension is an impairment that could substantially limit one’s circulatory function, see, *e.g.*, 29 C.F.R. Pt. 1630, App. at 403 (2017), and breathing difficulties affect one’s respiratory function. But the district court failed to

(...continued)

of working, than they applied prior to the Amendments Act”). Moreover, “[i]n most instances, an individual with a disability will be able to establish coverage by showing substantial limitation of a major life activity other than working.” 29 C.F.R. Pt. 1630, App. at 408 (2017); see also *Isley v. Aker Phila. Shipyard, Inc.*, No. 16-1462, 2017 WL 3534982, at *4 n.8 (E.D. Pa. Aug. 17, 2017) (explaining that post-ADAAA the “need to conduct [a] ‘class-of-jobs’ analysis has been largely eliminated”).

consider whether Dagher's malignant hypertension and other medical conditions substantially limit these major bodily functions.

The Fifth and Seventh Circuits have concluded that similar oversights constitute error under the amended ADA. In *Ball v. LeBlanc*, the Fifth Circuit concluded that a district court erred by failing to consider whether inmates who had been subjected to extreme heat in prison had disabilities that substantially limited their major bodily functions within the meaning of the amended ADA and the Rehabilitation Act. 792 F.3d 584, 596-597 (2015). Although the Fifth Circuit concluded that the error was harmless, it explained that by ignoring the "major bodily functions" category the district court incorrectly rested its conclusion that the inmates were not disabled "on an abbreviated definition of disability." *Id.* at 596. In *Gogos v. AMS Mechanical Systems, Inc.*, the Seventh Circuit reversed the dismissal of an ADA claim, concluding that the plaintiff's alleged chronic hypertension and a blood-pressure spike sufficiently stated a claim that he was substantially limited in circulatory function, one of the listed "major bodily functions." 737 F.3d 1170, 1173 (2013).

By overlooking the possibility that Dagher's impairments substantially limit a major bodily function, like his circulatory or respiratory function, the district court misapplied the amended ADA's expanded definition of disability. Applying

a narrower definition of disability than is required by the statute constitutes reversible error.

Second, the district court erred by analyzing Dagher's impairment as one that substantially limits "working" rather than one that substantially limits "breathing." JA197-200. The district court acknowledged that Dagher had alleged a substantial limitation in breathing, but reasoned that because Dagher had shown only that his breathing was impaired at the workplace, it was appropriate to examine whether Dagher had demonstrated a substantial limitation in working. JA198-199. This analysis was improper.

Under the amended ADA, "breathing" and "working" are separate and distinct major life activities. See 42 U.S.C. 12102(2)(A). The ADA does not require that a plaintiff allege and prove a substantial limitation in more than one major life activity, see 42 U.S.C. 12102(1)(A) (stating that an impairment that "substantially limits *one* or more major life activities" constitutes a disability) (emphasis added), nor does it prioritize any major life activity (including working) over any other. Indeed, the ADAAA makes this express: "An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability." 42 U.S.C. 12102(4)(C). What Dagher alleged was a substantial limitation in breathing, and his claim should have been analyzed accordingly. By analyzing Dagher's claim as alleging a substantial

limitation in working, the district court violated the familiar canon of statutory interpretation that “[a] court must attempt to interpret a statute so as to give each word meaning.” *Hedin v. Thompson*, 355 F.3d 746, 750 (4th Cir. 2004); see also *Ratzlaf v. United States*, 510 U.S. 135, 140-141 (1994). The inclusion of breathing in the list of “major life activities” would be superfluous if a court were permitted to ignore it and consider only whether a person was substantially limited in the other major life activity of working.

Third, the district court’s analysis ignored the ADAAA’s instructions that an episodic impairment must be considered in its active state and that the fact that an impairment is well-controlled using medication no longer informs whether that impairment substantially limits a major life activity. The court concluded that Dagher’s impairments did not substantially limit a major life activity in part because Dagher had only presented evidence that his conditions were exacerbated at the workplace, leading to only periodic spikes in blood pressure and limitations on his breathing, and because Dagher’s conditions were previously managed outside the workplace. JA198-199.

But as the amended ADA makes clear, “[a]n impairment that is episodic * * * is a disability if it would substantially limit a major life activity when active.” 42 U.S.C. 12102(4)(D). Indeed, in *Class v. Towson University*, this Court recognized that one of the express purposes of the ADAAA was to clarify

that an impairment that is episodic or in remission can qualify as a disability. 806 F.3d 236, 245 (4th Cir. 2015).⁷ Similarly, the Fifth Circuit has explained that the ADAAA “make[s] it easier for a plaintiff with an episodic condition * * * to establish” disability. *Carmona v. Southwest Airlines, Co.*, 604 F.3d 848, 855 (2010).

The Seventh Circuit’s decision in *Gogos* is particularly instructive here because the plaintiff in that case suffered from hypertension and periodic blood-pressure spikes, much like Dagher. In *Gogos*, the court explained that even though the plaintiff’s blood-pressure spikes were brief and infrequent, the ADAAA instructs that those factors are no longer relevant in determining whether an impairment is substantially limiting. 737 F.3d at 1173. Instead, the Seventh Circuit concluded, the relevant inquiry is whether the plaintiff’s blood-pressure spikes were substantially limiting when they occurred. See *ibid.*

⁷ In *Class*, the plaintiff was a collegiate football player who had suffered severe exertional heatstroke at a team practice and was thereafter identified as limited in his ability to thermoregulate. 806 F.3d at 239-240. In this context, this Court questioned whether “the statutory term ‘when active’ must imply an activation of the impairment prompted by normal life conditions,” observing that when conditions are extreme enough “anyone could suffer heatstroke.” *Id.* at 245. Ultimately, though, the *Class* Court determined that it “need not engage in that novel analysis in this case” in light of its conclusion that Class was not “otherwise qualified” to participate in Towson’s football program. *Ibid.* Moreover, there is no suggestion in the record that, like Class’s impaired thermoregulatory capacity, Dagher’s malignant hypertension and other conditions were triggered only by “extreme” conditions such as collegiate athletics.

The amended ADA also instructs that “[t]he determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as * * * medication.” 42 U.S.C. 12102(4)(E)(i)(I). This Court’s decision in *Summers* confirms that the “new statute and regulations require courts to evaluate a plaintiff’s impairment as it would manifest without treatments such as medication, mobility devices, and physical therapy.” 740 F.3d at 330 n.3; accord *Kemp v. Holder*, 610 F.3d 231, 236 (5th Cir. 2010).

Accordingly, the district court erred by relying on evidence that Dagher’s conditions were episodic and previously managed outside the workplace to conclude that they did not substantially limit a major life activity instead of considering whether the conditions in their active state and unmanaged would substantially limit a major life activity.

* * * * *

In sum, the district court’s analysis of whether Dagher had an impairment that substantially limited on or more of his major life activities directly conflicts with the amended ADA’s expanded definition of “disability.”

CONCLUSION

For the foregoing reasons, the judgment of the district court should be vacated and remanded.

Respectfully submitted,

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Type-Volume Limit for Briefs: Appellant's Opening Brief, Appellee's Response Brief, and Appellant's Response/Reply Brief may not exceed 13,000 words or 1,300 lines. Appellee's Opening/Response Brief may not exceed 15,300 words or 1,500 lines. A Reply or Amicus Brief may not exceed 6,500 words or 650 lines. Amicus Brief in support of an Opening/Response Brief may not exceed 7,650 words. Amicus Brief filed during consideration of petition for rehearing may not exceed 2,600 words. Counsel may rely on the word or line count of the word processing program used to prepare the document. The word-processing program must be set to include headings, footnotes, and quotes in the count. Line count is used only with monospaced type. See Fed. R. App. P. 28.1(e), 29(a)(5), 32(a)(7)(B) & 32(f).

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(s) Elizabeth Nash

Party Name United States as Amicus Curiae

Dated: February 8, 2018

CERTIFICATE OF SERVICE

I certify that on February 8, 2018, the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING NEITHER PARTY was filed with the Clerk of the Court by using the Appellate CM/ECF system and that one hard copy of the same were sent to the Clerk of the Court via certified mail.

I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the Appellate CM/ECF system.

s/ Elizabeth Nash _____
ELIZABETH NASH
Attorney