RECORD NO. 13-1645

In The
United States Court of Appeals
For The Fourth Circuit

CARL R. SUMMERS,

Plaintiff – Appellant,

v.

ALTARUM INSTITUTE, CORPORATION,

Defendant – Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA AT ALEXANDRIA

BRIEF OF APPELLANT

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 13-1645 Caption: Carl R. Summers v. Altarum Institute, Corp.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Carl R. Summers
(name of party/amicus)

who is Appellant, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ David L. Scher Date: 05/17/2013

Counsel for: Appellant Carl R. Summers

CERTIFICATE OF SERVICE

****

I certify that on May 17, 2013 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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STATEMENT OF JURISDICTION

The United States District Court for the Eastern District of Virginia had subject matter jurisdiction over this civil action pursuant to 28 U.S.C. § 1331. The claims arose under the laws of the United States, specifically the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101, *et seq*. This Court has jurisdiction pursuant to 28 U.S.C. § 1291 to hear this appeal from the district court's final decision on May 15, 2013, granting the Appellee's Rule 12(b)(6) motion to dismiss. On May 16, 2013, a notice of appeal was timely filed with the Clerk of the District Court.

This appeal is from a final order.

STATEMENT OF THE ISSUE

I. Whether Appellant pled sufficient facts in his complaint that he was "actually disabled" under the Americans with Disabilities Act, 42 U.S.C. § 12102(1)(A), when he alleged that he severely broke both of his legs and without considering mitigating measures would be unable to walk at all for at least 14 months?

STATEMENT OF THE CASE

This action commenced on December 27, 2012, when Plaintiff-Appellant Carl R. Summers ("Summers") filed a claim for wrongful termination and failure to accommodate under the Americans with Disabilities Act alleging that he was terminated because he informed his employer of his disability and need for reasonable accommodation. J.A. at 1; D.E. 1. The employer is Defendant-Appellee Altarum Institute, Inc. ("Altarum") who provides consulting and research services to private-sector companies and various federal government agencies. Altarum filed a Rule 12(b)(6) motion to dismiss on March 11, 2013, claiming, *inter alia*, that Summers was not disabled. J.A. at 1; D.E. 8. On April 26, 2013, the district court heard oral arguments from both parties on the motion to dismiss. J.A. at 1; D.E. 20. The district court dismissed the action with prejudice and entered final judgment on May 15, 2013. J.A. at 1; D.E. 21. Summers filed a timely notice of appeal on May 16, 2013. J.A. at 1; D.E. 22.

STATEMENT OF THE FACTS

The Appellant, Carl R. Summers, began working for Appellee Altarum in its Alexandria, Virginia office in July 2011. J.A. at 38. Summers was a Senior Analyst who conducted research, data analysis, journal research, report writing, presentations, and SPSS programming. *Id.* Summers did not have any performance problems nor did Altarum ever suggest that he did. *Id.* at 39. He frequently commuted to the offices of one of Altarum's clients, the Defense Centers of Excellence for Psychological Health and Traumatic Brain Injury ("DCoE"), located in Silver Spring, Maryland. *Id.* at 38-39. The DCoE project was equipped with the capacity to work remotely. *Id.* at 39. The DCoE Deputy Director, Kathy Helmick, generally preferred that contractors work at the offices during normal business hours. *Id.* The contractors were permitted to bring their computers home and work remotely when putting in extra time on the project. *Id.* Altarum's policy permitted its employees to work remotely so long as the client approved. *Id.*

On October 17, 2011, Summers fell and injured himself on a MARC train while commuting to DCoE's office in Silver Spring, Maryland. *Id.* When the train arrived at his stop, Summers stood up and slung his computer bag with two laptop computers in it over his shoulder. *Id.* At the same time, Summers took a step toward the aisle of the train to exit, but lost his footing when he unknowingly

stepped off a six-inch platform. *Id.* at 39. Summers fell, landing on both knees, with his left knee bearing the brunt of the contact. *Id.* The weight of his computer bag then caused him to fall back, which put sudden and severe stress on his right knee. *Id.* Summers tried to stand up to exit the train but collapsed immediately upon his attempt. *Id.*

Summers was immediately taken to Howard University Hospital where the doctors determined that Summers had suffered a tibia plateau fracture in his left leg, which would require surgery to fit a metal plate, screws, and donated bone to his tibia. *Id.* Summers also ruptured the quadriceps-patellar tendon in his right leg, which would require surgery to drill a hole in the patella and refasten the tendons to the knee. *Id.* at 39-40. Further, Summers suffered a fracture in his right ankle and a meniscus tear in his left knee . *Id.* at 40. The doctor restricted Summers from bearing any weight on his left leg for about six weeks. *Id.* He restricted Summers from driving for five months and estimated that with proper treatment Summers might be able to walk normally in, at the earliest, seven months, even though he would continue to have mobility issues and substantial pain when he walked. *Id.* The doctor initially estimated that with appropriate mitigating measures Summers might regain complete mobility and walk free of pain within a year of his accident. *Id.*

During Summers' recovery he used various mitigating measures including surgery, implanted medical devices, bed rest, pain medication, and physical therapy for several months. *Id.* Summers was also confined to sedentary positions and activities and limited to the aid of a cast, brace, cane, or crutch for several months when attempting to walk. *Id.* at 40. Had Summers not used these measures, he would not be able to walk at all for at least 14 months. *Id.*

While still at Howard University Hospital, Summers called an HR Representative at Altarum regarding the potential of working from home and short-term disability. *Id.* She suggested Summers take short-term disability and focus on getting well. *Id.* A week later, on October 25, 2011, Summers sent an e-mail to his supervisors and colleagues, updating them about his recovery and expressing his hopes to return to work quickly. *Id.* at 40-41. Summers filed for short-term disability benefits on October 28, 2011 and was approved on November 10, 2011. *Id.* at 41. The benefits were effective from October 18, 2011, to January 16, 2012. *Id.* at 42.

On November 30, 2011, Kathy Call, Summers' supervisor at Altarum, and Megan Johnson, a Human Resources Generalist for Altarum, informed Summers that Altarum was terminating Summers effective December 1, 2011, in order to place another analyst in his role at DCoE during his absence. *Id.* at 41. Call and Johnson stated to the effect of, "The client requested replacement and [Altarum]

does not have another assignment for [Summers]." *Id.* On information and belief, Summers believed this statement was not true. *Id.* at 42.

To this day Summers continues to suffer from the residual effects of his disability. *Id.* More than a year after his injury, he still has significant pain when climbing stairs or when carrying as little as ten pounds upstairs, unlike most people in the general population. *Id.* Summers still has not regained his previous level of balance or ability to climb or descend more than two or three stairs safely without the use of a guardrail. *Id.* at 42-43.

SUMMARY OF THE ARGUMENT

The district court erred when it determined that Appellant did not sufficiently plead that he was disabled under the Americans with Disabilities Act. Appellant pled that he could not walk at all for at least 14 months, unless he underwent mitigating measures, and could not walk like the general population for a minimum of seven months to a year with mitigating measures. J.A. at 40, 44. First, Summers is disabled because he suffers from an impairment that substantially limits him in a major life activity. *See* 42 U.S.C. § 12102(1)(A); 29 C.F.R. § 1630.2(g)(1)(i). Second, the district court failed to properly weigh both the duration and severity of Summers' injury in determining whether he was substantially limited at the time of his injury. Third, the district court failed to give any weight to the Equal Employment Opportunity Commission's (EEOC) regulations implementing the Americans with Disabilities Act Amendments Act of 2008 (ADA Amendments Act). *See* 29 C.F.R. § 1630.2. The EEOC's regulations promulgated in response to the ADA Amendments Act deserve controlling *Chevron* deference. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984). Therefore, this Court should reverse and remand the district court's decision dismissing Summers' claim.

First, Appellant suffered the physical impairment of two severe leg injuries that substantially limited his ability to, *inter alia*, walk or stand. J.A. at 40, 44. An

individual's substantial limitation is to be considered in comparison to the general population without mitigating measures and without regard for potential reasonable accommodations. 42 U.S.C. § 12102(4)(E)(i); 29 C.F.R. §§ 1630.2(j)(1)(vi), (5)(iii). The district court erred by considering both mitigating measures and potential reasonable accommodations when evaluating whether Summers was substantially limited. The district court determined, counter to intuition, that a person who can work at a computer but who is restrained to a wheelchair is not disabled under the ADA. *See* J.A. at 77.

Second, the duration and severity of an injury are to be weighed as factors in determining whether someone is substantially limited. The district court erred by treating duration as an independent qualification for a disability under the ADA. The district court inquired as to whether the duration of the injury was sufficient and not whether the severity and duration of the injury together substantially limited Summers in a major life activity. *See* J.A. at 78. Injuries of shorter duration but of sufficient severity may be considered disabilities under the ADA. *See* 76 Fed. Reg. 16,982 (Mar. 25, 2011).

Third, regulations implementing statutes are given controlling *Chevron* deference when Congress' intent was ambiguous and the regulations are a permissible construction of the statute. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984). Congress intended to cover

disabilities like Summers' in passing the ADA Amendments Act of 2008. If there is any ambiguity, the EEOC regulations implementing the ADA Amendments Act were permissible and carried the force of law such that they should be given controlling deference by this Court. The district failed to consider the EEOC regulations and failed to give them controlling deference.

Because Appellant suffered from a physical impairment that substantially limited him in a major life activity, Appellant is disabled under the ADA as amended in 2008 and as implemented by the EEOC. This Court should reverse the decision below and remand the case for further adjudication.

STANDARD OF REVIEW

On appeal, the district court's decisions on matters of law and statutory interpretation are subject to *de novo* review. *See In Re Coleman*, 426 F.3d 719, 724 (4th Cir. 2005); *Commodity Futures Trading Comm'n v. Kimberlynn Creek Ranch, Inc.*, 276 F.3d 187, 191 (4th Cir. 2002) (finding that appellate level courts apply a *de novo* standard where an entry of judgment raises legal questions regarding proper statutory interpretation).

This Court also reviews the district court's grant of Appellee's Rule 12(b)(6) motion to dismiss with a *de novo* standard. *Gonzales v. State of Maryland Dep't of Health & Mental Hygiene*, 28 Fed. App'x 324, 324 (4th Cir. 2004); *Korb v. Lehman*, 919 F.2d 243, 246 (4th Cir. 1990). A Rule 12(b)(6) motion to dismiss should be granted in very limited circumstances and only when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45 (1957); *see also Steele v. Motz*, 2009 WL 8131857, at *4 (D. Md. Nov. 19, 2009) (quoting *Rogers v. Jefferson-Pilot Life Ins. Co.*, 883 F.3d 324, 325 (4th Cir. 1989).

ARGUMENT

I. Accepting All Factual Allegations in the Complaint as True and Making All Reasonable Inferences in Appellant's Favor, Summers Pled That He Was "Actually Disabled" under the Americans with Disabilities Act When He Pled that He Severely Broke Both of His Legs and Would Be Unable to Walk at All For at Least 14 Months Without Mitigating Measures.

The district court opinion should be reversed for three reasons. First, Summers sufficiently alleged that he had a physical impairment that substantially limited him in a major life activity. Second, the district court erred by using duration as an independent qualification for an individual to be disabled under the ADA instead of properly weighing both severity and duration as factors in determining whether Summers was substantially limited in a major life activity. Third, Congress intended to include injuries like Summers' injury as a disability under the ADA. Yet if there is any ambiguity in Congress' intent, then the EEOC's regulations implementing the ADA Amendments Act should be afforded controlling *Chevron* deference.

A. Summers' inability to walk at all for at least 14 months without mitigating measures or to walk without significant pain like the general population for seven months to a year with mitigating measures is a physical impairment that substantially limited Summers' major life activity of walking and standing.

Summers has an "actual disability" under the ADA because he has a physical impairment that substantially limited one or more of his major life activities. *See* 42 U.S.C. § 12102(1)(A); 29 C.F.R. § 1630.2(g). In October 2011,

Summers suffered a severe tibia plateau fracture in his left leg, a meniscus tear to his left knee, a ruptured quadriceps-patellar tendon in his right leg, and a simple fracture to his right ankle. J.A. at 39-40. The doctor told Summers that he would be unable to walk like the general population between seven months to a year even with the mitigating measures of surgery and physical therapy. J.A. at 40, 44. Without mitigating measures, Summers alleged he would not be able to walk at all for at least 14 months. J.A. at 40. Summers was substantially limited in his ability to walk and stand, and as result is disabled under the ADA.

An individual is disabled under the ADA when he or she suffers from "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(1)(A); 29 C.F.R. § 1630.2(g)(1)(i). Physical impairments include "any anatomical loss affecting one or more body systems, such as [the] musculoskeletal [system]." 29 C.F.R. § 1630.2(h)(1). Major life activities include, but are not limited to, activities like "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting…." 42 U.S.C. § 12102(2)(A); 29 C.F.R. § 1630.2(i)(1); *see also Wilson v. Phoenix Specialty Mfg. Co.*, 513 F.3d 378, 384 (4th Cir. 2008) (finding walking to be a major life activity).

The analysis of whether a physical impairment substantially limits an individual's major life activity is an individualized assessment of the person's

functional limitation. 29 C.F.R. § 1630.2(j)(1)(iv). The individual need not be significantly or severely limited. 29 C.F.R. § 1630.2(j)(1)(ii). The term "substantially limits" is also to be "construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA" and "should not demand extensive analysis" because the focus should not be on "whether an individual's impairment substantially limits a major life activity" but "whether covered entities have complied with their obligations." 29 C.F.R. §§ 1630.2(j)(1)(i), (iii). The individualized assessment must be done by comparing the functional abilities of the individual compared to most people in the general population without considering mitigating measures. 42 U.S.C. § 12102(4)(E)(i); 29 C.F.R. §§ 1630.2(j)(1)(ii), (vi). Mitigating measures that should not be considered include medication, medical supplies, equipment, mobility devices, assistive technology, or physical therapy. 42 U.S.C. § 12102(4)(E)(i)(I); 29 C.F.R. §§ 1630.2(j)(5)(i), (ii), (v).

The inability to walk at a reasonable pace or upstairs without substantial pain is considered a substantial limitation of a major life activity. *See, e.g.*, *E.E.O.C. v. Sears, Roebuck & Co.*, 417 F.3d 789, 801-02 (7th Cir. 2005) (finding appellant was disabled when she could not walk 20 feet without difficulty); *Gordon v. District of Columbia*, 480 F. Supp. 2d 112, 117 (D.D.C. 2007) (finding plaintiff's arthritis substantially limited her major life activity of walking);

E.E.O.C. v. E.I. Du Pont de Nemours & Co., 406 F. Supp. 2d 645, 654 (E.D. La. 2005) (finding that because plaintiff walked in significant pain at half the speed of an average person she was substantially limited in her major life activity of walking).

In the instant case, Summers severely injured both of his legs in October 2011. J.A. at 40. As a result, Summers suffered an anatomical loss to his musculoskeletal system and is thus physically impaired. J.A. at 44; s*ee* 29 C.F.R. § 1630.2(h)(1). This physical impairment affected his ability to walk, run, drive, climb stairs, and work in a broad range of jobs requiring walking, driving, or climbing. J.A. at 44. This severe physical impairment substantially limited Summers because Summers could not walk or stand like those in the general population for a significant period of time. J.A. at 44.

Assuming Summers would receive the mitigating measures of surgery, physical therapy, implanted medical devices, and medication, doctors estimated at the time of the injury that Summers would regain mobility and walk free of pain within seven months to a year of his injury. J.A. at 40. Even with these mitigating measures, more than a year and a half later, Summers continues to experience significant pain when climbing upstairs, and he still has not regained his previous level of balance. J.A. at 42-43. Summers still cannot walk or climb stairs as compared to the general population. J.A. at 42-43. Yet, without considering the

mitigating measures of surgery, physical therapy, medical devices, and medication as required by the ADA, Summers would be unable to walk at all for at least 14 months. J.A. at 40; *see* 42 U.S.C. § 12102(4)(E)(i)(I); 29 C.F.R. §§ 1630.2(j)(5)(i), (ii), (v).

The district court incorrectly considered mitigating measures and reasonable accommodations when determining whether Summers was substantially limited in a major life activity. The district court failed to recognize that Summers alleged he would be unable to walk at all for at least 14 months if mitigating measures are not considered.[1] *See* J.A. at 40, 73, 75. The district court also improperly concluded that a person needing the accommodation of a wheelchair to get to work but who could get to work himself and perform his normal job duties is not disabled. J.A. at 66-67. The district court stated:

> THE COURT: And so I'm asking why is it he could not work in a wheelchair on a computer at the office in October 2011?
> MR. SCHER: I'm not saying he couldn't. I'm saying that conversation never had an opportunity to happen.
> THE COURT: Well, doesn't that suggest that he was not really disabled?
> MR. SCHER: Well, Your Honor, in order to come to work in a wheelchair, he would need the accommodation of time. You know, it would take him longer to get to work. He would need to hire a service to get him there. He

[1] The exact duration of Summers' disability when not considering mitigating measures is not known at this time because the parties did not engage in formal discovery. Therefore, this Court must evaluate the complaint only by what Summers alleged. He alleged that he "would not have been able to walk at all, likely to this day" which at the time of filing was approximately 14 months. J.A. at 40.

> would then have to get in and out of a wheelchair, come into the office, have an elevator to get to wherever he's going –
> THE COURT: Well, most of these buildings are ADA. That's not the issue. I'm focused on whether or not a disability – a person with a broken leg –
> MR. SCHER: Yes, they're an ADA facility specifically because one in a wheelchair, physically needing to get from one to the other is disabled. And that is why the ADA said you need to have accommodations for such a person. J.A. at 66-67.

The district court then concluded:

> THE COURT: Paragraph 49 [of the complaint], "plaintiff requests that he could work from home remotely and then transition back to full-time employment." So that suggests to me that he was capable of working from a computer at home in a wheelchair with two broken legs. J.A. at 77.

Reasonable accommodations are not to be considered when determining whether someone is disabled. 42 U.S.C. § 12102(4)(E)(i)(III); 29 C.F.R. § 1630.2(j)(5)(iii). An individual requiring a wheelchair is disabled and could perform his job duties because of accommodations assisting those in wheelchairs or other assistive mobile devices. It is counterintuitive to suggest someone who requires a wheelchair for transportation is not disabled. *See* J.A. at 66-67, 77. Title III of the ADA requires certain entities to accommodate the disabled by providing, *inter alia*, ramps and elevators—mechanisms used by those in wheelchairs. *See* 42 U.S.C. § 12183(a). The definition of disability, a physical impairment that substantially limits a major life activity, applies to those disabled under Title I or Title III. 42 U.S.C. § 12102(1)(A). The requirement to accommodate individuals needing wheelchairs is evidence that such individuals are

disabled. Thus, even if Summers could find a way to work via a wheelchair and up an ADA elevator, that fact does not change that Summers was substantially limited in a major life activity and would require reasonable accommodations from his employer.

Summers pled that without mitigating measures he would be unable to walk at all for at least 14 months. The district court failed to consider his injury without mitigating measures and without potential accommodations. Summers' need for accommodations if he is confined to a wheelchair is evidence of a disability not evidence to the contrary as the district court concluded. Summers' inability to walk was a physical impairment that substantially limited his ability to walk or stand. Therefore, Summers pled sufficient facts that he was disabled under the ADA.

B. The district court erred by imposing duration as an independent qualification to be disabled under the ADA instead of applying severity and duration as factors in determining whether Summers was "substantially limited."

The severity and duration of Summers' injury when considered together suggest Summers was substantially limited in a major life activity. Summers suffered a debilitating injury that without mitigating measures would prevent him from being able to walk at all for at least 14 months. *See* J.A. at 40. If Summers underwent surgery, received physical therapy, received medical implants, and took medication, then doctors estimated Summers would walk like the general

population at the earliest in seven months to a year. J.A. at 40, 44. The combined severity and duration of Summers' disability "substantially limited" him as defined in the ADA.

An employee is disabled regardless of the duration of his disability if the court finds the employee had a "physical impairment that substantially limited a major life activity." *See* 42 U.S.C. § 12102(1)(A); 29 C.F.R. § 1630.2(g)(1)(i). In determining whether an individual is substantially limited, the ADA Amendments Act clarified that the duration of an injury is not an independent qualification for an employee to be disabled nor is it to be considered in isolation. 76 Fed. Reg. 16,982 (Mar. 25, 2011) ("the duration of an impairment is only one factor in determining whether the impairment substantially limits a major life activity"). Duration is only to be considered together with injury's severity as injuries of shorter duration but of sufficient severity are disabilities under the ADA. *Id.* ("impairments that last only a short period of time may be covered if sufficiently severe"). There is no minimum durational requirement for an injury to be a disability. *Id.* (declining to provide for a six-month minimum for showing disability under the actual disability prong of the ADA). Yet if an individual's injury lasts for more than six months when considered without mitigating measures, then he or she may be disabled. *See* 29 C.F.R. § 1630.2(j)(1)(ix) ("The

effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section.").

This Circuit has denied ADA protection to employees only when their injuries or impairments were both short in duration and minor in functional impact. *See Pollard v. High's of Balt., Inc.*, 281 F.3d 462, 469 (4th Cir. 2002) (nine month recovery from a surgery infection); *Rankin v. Loews Annapolis Hotel Corp.*, 2012 WL 1792637, at *3 (D. Md. May 14, 2012) (knee buckling and chronic knee pain prevented plaintiff from kneeling down for only one week); *Clark v. Western Tidewater Reg. Jail Auth.*, 2012 WL 253108, at *7 (E.D. Va. Jan. 26, 2012) (ACL injury prevented plaintiff from participating in "excessive exercise" for three weeks). Other circuits have similarly considered together the severity and duration of the injury and determined that only those minor injuries lasting for a very short period of time are not disabilities. *See, e.g., Zick v. Waterfront Comm'n of N.Y. Harbor*, 2012 WL 4785703, at *5 (S.D.N.Y. Oct. 4, 2012) (plaintiff suffered a single broken leg and could use crutches within eight to ten weeks); *Wanamaker v. Westport Bd. of Educ.*, 2012 WL 445314, at *16 (D. Conn. Sept. 25, 2012) (transverse myelitis was only to last 30 to 60 days and did not limit a major life activity); *Ramey v. Forest River, Inc.*, 2012 WL 4060884, at *2 (N.D. Ind. Sept. 12, 2012) (shoulder injury lasted only three weeks); *Budhun v. Reading Hospital &*

Medical Center, 2011 WL 2746009, at *3 (E.D. Pa. July 13, 2011) (finding that losing the ability to use pinky finger for two and a half months is not a disability).

Here, Summers suffered a severe injury that significantly impacted his life and would last for a significant duration when considered either with or without mitigating measures. *See* J.A. at 40, 42, 44. Thus, when considering both the severity and duration of Summers' injury in evaluating whether Summers was substantially limited in a major life activity, Summers is clearly disabled. With the mitigating measures of surgery, medical implants, medication, and physical therapy, Summers was unable to walk at all for a time and was not projected to walk like the general population up to a year. J.A. at 40. He could not put any weight on his left leg for six weeks. J.A. at 40. Summers still cannot walk very short distances like 50-100 feet without pain or walk upstairs carrying a mere ten pounds. J.A. at 40, 44. The severity of Summers' disability is even greater when Summers' disability is considered without the mitigating measures as required by the ADA. *See* 42 U.S.C. § 12102(4)(E)(i); 29 C.F.R. §§ 1630.2(j)(1)(ii), (vi). Without these measures, Appellant was completely debilitated because he would be unable to walk at all for at least 14 months. J.A. at 40.

In evaluating Summers' claim, the district court failed to properly weigh the duration and severity of the injury and instead gave duration independent consideration. J.A. at 78. The district court first inaccurately discounted

Summers' severe injury as a mere "broken leg." *Id.* Then the district court gave the duration of Summers' injury isolated analysis by directly comparing only the duration of Summers' injury to the duration of the injuries in *Pollard v. High's of Balt.* and *Bateman v. American Airlines*. *Id.* The ADA requires the district court to instead analyze the plaintiff's comparative substantial limitations in the aggregate. *See* 76 Fed. Reg. 16,982 (Mar. 25, 2011); 29 C.F.R. § 1630.2(j)(1)(iv). Summers' injury was much more severe than the nine month back infection in *Pollard* or the 28 month back pain in *Bateman*. Merely because Summers' injury may be similar in duration to the injuries in *Pollard* and *Bateman* is an insufficient basis to dismiss his claim when considering that Summers was completely unable to walk like the general population from seven months up to year or unable to walk at all to this day.[2] J.A. at 40, 44. The significant and completely debilitating nature of Summers' injury outweighs any minimizing impact the duration of Summers' may have in determining whether Summers' was substantially limited in a major life activity.

Unlike in either *Pollard* or *Rankin* where each employee's degree of functional limitation was very minor and lasted for only a few weeks or months,

[2] The following statement shows the district court's error: "The *Pollard* case declined to recognize a nine month injury disability, and a case called *Bateman versus American Airlines* where I thought 28 months was insufficient. And here, the timeframe is in between *Pollard* and *Bateman*, and I think they're insufficient." J.A. at 78.

Summers could not walk like the general population up to a year with mitigating measures and could not walk at all for at least 14 months without them. Furthermore, Summers did not suffer a single broken leg that allowed him to get around on crutches for a few weeks like the employee in *Zick*. Rather, Summers severely broke or ruptured both legs, could not put any weight on his legs for several weeks, and would not be able to walk normally without pain up to a year.

The district court failed to weigh both the severity and duration of Summers' injury and failed to consider the severity of Summers' injury without mitigating measures. Duration is not to be given isolated consideration, so Summers' disability can only be disqualified after a proper balancing of all the facts that include the severity of Summers' injury. Thus, Summers' allegation that he would unable to walk at all for at least 14 months without undergoing mitigating measures qualifies as a disability under the ADA, and under post-ADA Amendment Act law, is of longer duration and of greater severity than any disability denied ADA protection when duration is not given independent consideration.

C. Congress intended to cover disabilities like Summers' when it passed the ADA Amendments Act, but to any extent there is any ambiguity in Congress' intent, the EEOC's regulations should be afforded controlling *Chevron* deference.

When determining the applicability and weight of the EEOC's regulations implementing the ADA Amendments Act, this Court must first determine whether

Congress directly spoke to whether an injury like Summers' injury is a disability under the ADA. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842 (1984). If Congress' intentions are clear, then this Court must give effect to that intent. *Id.* at 842-43. However, if there is any ambiguity or silence on the specific issue, this Court must determine whether the EEOC's regulations are a permissible construction of the statute and carry the force of law. *Id.* at 842; *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001). If they do, courts must afford such regulations controlling weight. *Chevron*, 467 U.S. at 843.

1. Congress intended to broaden the definition of a disability under the ADA by passing the ADA Amendments Act and intended to cover disabilities like Summers' who alleged he could not walk at all for at least 14 months without mitigating measures.

In passing the ADA Amendments Act, Congress expressly intended to "reinstate a broad scope of protection to be available under the ADA," to reject the stringent substantial limitation standard enunciated by the United States Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* and *Sutton v. United Air Lines*, and to "convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." ADA Amendments Act of 2008, Pub. L. No.110-325, § 2, 122 Stat. 3553. Consistent with both legislative intent and the resulting statutory language,

disabilities like Appellant's were unambiguously intended to be covered under the ADA.

Congress intended to broaden the definition of a disability under the ADA by emphasizing that the ameliorative effects of mitigating measures are not to be considered when determining whether an impairment substantially limits a major life activity. *Id.* § 2(b)(2). The only mitigating measures excepted were ordinary eyeglasses and contact lenses. 42 U.S.C. § 12102(4)(E)(ii). None other exceptions to the mitigating measures were included and no other exceptions were intended. *See* 110 Cong. Rec. S8840-15 (daily ed. Sept. 16, 2008) (statement of managers) ("The legislation provides an illustrative but non-comprehensive list of the types of mitigating measures that are not to be considered…The bill provides one exception to the rule on mitigating measures…ordinary eyeglasses and contact lenses."). The resulting statutory language reflects this intent. *See* 42 U.S.C. §§ 12102(4)(E)(i)(I)-(III).

In the instant case, Summers underwent many of the mitigating measures to be excluded from consideration. Summers received pain medication, surgery, implanted medical devices, and physical therapy. J.A. at 40. Without considering these mitigating measures, Summers alleged he would not be able to walk at all for at least 14 months. J.A. at 40. Even with these measures, doctors estimated that

Summers would recover at a minimum of seven months to a year even though Summers cannot walk short distances without pain to this day. J.A. at 40, 44.

Congress also intended to lower the standard for "substantial limits" and to shift the focus of litigation from whether an employee was disabled to whether an employer complied with its obligations. Pub. L. No.110-325, § 2(b)(5), 122 Stat. 3553 (2008). Congress intended the determination of whether an individual is substantially limited to be a fact intensive inquiry where only those injuries that are minor and short term are excluded from ADA protection because their functional limitation is minimal. *See* 110 Cong. Rec. S8840-15 (daily ed. Sept. 16, 2008) (statement of managers) ("the functional limitation requirement already excludes claims by individuals with ailments that are minor and short term."). Because Congress recognized duration could not be viewed in insolation but only in determining whether an individual was substantially limited, Congress implicitly changed how duration was to be considered. Prior to the ADA Amendments Act, courts properly weighing duration and severity in determining whether someone was substantially limited applied the more stringent *Toyota* and *Sutton* standards existent at the time. *See, e.g.*, *Pollard*, 281 F.3d at 468 (applying the higher *Toyota* standard requiring an impairment to interfere with a major life activity "considerably" or "to a large degree."); *Bateman v. American Airlines*, 614 F. Supp. 2d 660, 670 (E.D. Va. Mar. 9, 2009) (finding that "temporary back injuries

such as [plaintiff's] rarely constitute disabilities under the *Toyota* analysis") (emphasis added).

Congress expressly expanded the definition of a disability by removing any consideration of mitigating measures and by restoring the lower standard of substantial limitation. By broadening the definition of a disability to the current standard, Congress sought to include disabilities like Summers' where his injury was severe and the duration significant.

2. If there is any ambiguity in Congress' intent, the EEOC's interpretation of the statute is permissible and thus should be afforded controlling weight.

Because Congress unambiguously intended the ADA Amendments Act to cover disabilities like Summers', "that is the end of the matter." *Chevron*, 467 U.S. at 842. However, if there is any ambiguity (which there isn't), then the EEOC's regulations carry the force of law as a permissible construction of the ADA Amendments Act and thus should be afforded controlling *Chevron* deference.

When Congress gives an administrative agency express authority to enact regulations consistent with a federal statute, the administrative agency's subsequent regulations are given "controlling weight." *Id.* at 843-44. The regulations must be a permissible interpretation of the statute that carry the "force of law" to be afforded this deference. *United States v. Mead Corp.*, 533 U.S. 218,

227 (2001); *Id.* at 844. Regulations carrying the "force of law" include those promulgated under the "notice and comment" provisions of Section 533 of the Administrative Procedure Act. *Mead Corp.*, 533 U.S. at 226-27 (2001) (finding that delegated authority to make rules carrying the force of law may be shown by an agency's power to engage in adjudication or notice-and-comment rulemaking); *see also Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) ("Of course, the framework of deference set forth in *Chevron* does apply to an agency interpretation contained in a regulation."); *United States v. Haggar Apparel Co.*, 526 U.S. 380, 390 (1999) (holding that regulations issued pursuant to its notice-and-comment rulemaking process are afforded *Chevron* deference). Regulations are permissible constructions of the statute when they are consistent with the legislative intent and statutory language and are not procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute. *See Mead Corp.*, 533 U.S. at 227; *Chevron*, 467 U.S. at 859-865. When regulations meet this standard they are binding on the courts. *Mead Corp.*, 533 U.S. at 227.

Congress gave the EEOC express authority to enact regulations elucidating specific provisions of the ADA Amendments Act of 2008. Pub. L. No.110-325, § 2(b)(6), 122 Stat. 3553. The EEOC's regulations were promulgated under the "notice and comment" provisions of § 553 of the Administrative Procedure Act (APA). 76 Fed. Reg. 16,978 (Mar. 25, 2011). The EEOC drafted a Notice of

Proposed Rulemaking (NPRM) and provided sixty-days for public comment receiving well over 600 public comments. 76 Fed. Reg. 16,979 (Mar. 25, 2011). By following a robust procedure in accordance with the APA, the EEOC's promulgated regulations carry the full force of the law. *See Mead Corp.*, 533 U.S. at 227.

The EEOC's regulations implementing the ADA Amendments Act are also permissible constructions consistent with Congress' statutory intent. The final regulations reflected Congress' desire to more broadly define "substantial limitation." In response, the EEOC provided nine rules of construction substantially mirroring the federal statute that "must be applied in determining whether an impairment substantially limits a major life activity." 76 Fed. Reg. 16,981 (Mar. 25, 2011). The nine rules to be considered include, *inter alia*: that "substantially limits" be construed broadly, that the focus of litigation under the ADA should focus on the covered entities obligations and not whether an individual is disabled, that "substantially limits" shall be interpreted to require a lower degree of functional limitation, that mitigating measures should not be considered when evaluating whether an impairment substantially limits a major life

activity[3], and an impairment lasting few than six months can be substantially limiting. 29 C.F.R. §§ 1630.2(j)(1)(i), (iii), (iv), (vi), (ix).

The EEOC's regulations also provided additional clarification to Congress' implicit expansion of the duration of injuries covered under the ADA. Declining to establish a six-month minimum standard to qualify as a disability under the ADA, the EEOC stated:

> A six-month durational requirement would represent a more stringent standard than the EEOC had previously required, not the lower standard Congress sought to bring about through enactment of the ADA Amendments Act. 76 Fed. Reg. 16,982 (Mar. 25, 2011).

The EEOC also reconfirmed its position that "if an impairment substantially limits…a major life activity for at least *several months*," it may be a disability. 76 Fed. Reg. 16,982 (Mar. 25, 2011). Finally, the EEOC reemphasized that whether someone is disabled is a fact specific balancing test in which "impairments that last only a short period of time may be covered if sufficiently severe." 76 Fed. Reg. 16,982 (Mar. 25, 2011).

Here, Summers is disabled under the ADA as clarified by the EEOC in its regulations. Summers alleged that without mitigating measures he would be unable to walk at all for at least 14 months and that with mitigating measures Summers' disability was to last at least seven months to a year. J.A. at 40, 44.

[3] The EEOC added only "human-mediated" treatments like physical therapy to the ADA Amendments Act's non-exhaustive list of mitigating measures. *See* 76 Fed. Reg. 16,981 (Mar. 25, 2011).

Because his injury was so substantially limiting and lasted longer than six months, under the ADA as implemented by the EEOC, Summers is disabled. This is especially true in light of the ADA Amendments Act which emphasize that substantial limitation is not to be construed broadly or to be a demanding standard. 29 C.F.R. § 1630.2(j)(1)(i). The district court erred by not considering the EEOC regulations or even giving them the controlling deference they should be afforded. *See* J.A. at 72-81.

Because Congress gave the EEOC express authority to pass regulations interpreting the ADA Amendments Act and those regulations were promulgated with notice and comment, they carry the force of law and are a permissible construction of the ADA Amendments Act. Therefore, the EEOC's regulations defining disability should be afforded *Chevron* deference and are binding upon this Court. If the EEOC's regulations are afforded this controlling deference, then Summers sufficiently alleged that he was disabled under the ADA and the district court's dismissal should be reversed.

CONCLUSION

For the foregoing reasons, Appellant Carl Summers respectfully requests that the decision of the district court granting the motion to dismiss be REVERSED and that the case be REMANDED for further adjudication.

Respectfully submitted,

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Dated: July 9, 2013

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 9th day of July, 2013, I caused this Brief of Appellant and Joint Appendix to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 9th day of July, 2013, I caused the required copies of the Brief of Appellant and Joint Appendix to be hand filed with the Clerk of the Court.

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