

**No. 22-50064**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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**CLINT MUECK,  
Plaintiff - Appellee,**

**v.**

**LA GRANGE ACQUISITIONS, L.P.,  
Defendant - Appellant**

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION  
CIVIL ACTION NO. SA-20-CV-00801-JKP  
THE HONORABLE JASON PULLIAM

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**BRIEF OF DISABILITY RIGHTS TEXAS AND THE LEGAL ACTION  
CENTER AS AMICI CURIAE IN SUPPORT OF APPELLANT**

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## **CERTIFICATE OF INTERESTED PERSONS**

(1) No. 22-50064; *Clint Mueck v. La Grange Acquisitions, L.P.*

(2) The undersigned counsel of record certifies that the following listed persons and entities described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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**RULE 29(a)(4)(E) STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), amici curiae certify that (A) no party's counsel authored this brief in whole or part; (B) no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and (C) no person, other than amici curiae, its members, or its counsel, contributed money that was intended to fund preparing or submitting the brief.

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## **IDENTITY OF AMICUS CURIAE AND STATEMENT OF INTEREST**

**Disability Rights Texas** (DRTx) is a nonprofit organization designated to serve as the Protection and Advocacy system (“P&A”) for the State of Texas. See Tex. Gov. Exec. Order No. DB-33, 2 Tex. Reg. 3713 (1977); Tex. Att’y Gen. Op. No. JC-0461 (2002). Its purpose is to protect and advocate for the legal and human rights of individuals with disabilities, and it is authorized to do so under the Developmental Disabilities Assistance and Bill of Rights Act of 2000, 42 U.S.C. §§ 15041 *et seq.*; Protection and Advocacy for Mentally Ill Individuals Act, 42 U.S.C. §§ 10801 *et seq.*; and Protection and Advocacy for Individual Rights Act, 29 U.S.C. § 794e. In accordance with its federal mandate, Disability Rights Texas has the authority, among other things, to pursue administrative, legal, and other appropriate remedies to ensure the protection of rights of persons with disabilities. 29 U.S.C. § 794e (f)(3); 42 U.S.C. § 10805(a)(1)(B). One of its priority areas is ensuring that governmental agencies do not discriminate against people with disabilities. Disability Rights Texas has filed numerous amicus briefs to ensure that courts and litigants follow the antidiscrimination mandates in the Americans with Disabilities Act (ADA), as amended, and in Sec. 504 of the Rehabilitation Act of 1974, as amended (Sec. 504).

**Legal Action Center** (LAC) is a national, non-profit law and policy organization, with offices in New York and Washington, D.C., that fights

discrimination against and promotes the privacy rights of individuals with substance use disorders, conviction records, and HIV/AIDS. LAC's work includes extensive legal and policy advocacy to ensure that the rights of people with substance use disorders are protected under the Americans with Disabilities Act and other anti-discrimination laws. LAC has also represented individuals with substance use disorders as they seek accommodations for their disability in employment, criminal legal, health care, and other settings. The issues raised in this case are of vital concern to LAC's constituency across the country.

## INTRODUCTION

Amici submit this brief to share the scientific understanding of alcohol use disorder. Amici also explain how the District Court failed to follow the requirements of the ADA Amendments Act and how, under the proper analysis, a reasonable jury could find that Clint Mueck’s condition was a substantially limiting impairment. Finally, a reasonable jury could find that the scheduling arrangement Mr. Mueck requested was required by his disability and its treatment, and was a reasonable accommodation, as shown herein.

## ARGUMENT

### **I. ALCOHOL USE DISORDER IS A CHRONIC BRAIN DISORDER THAT SUBSTANTIALLY LIMITS MAJOR LIFE ACTIVITIES EVEN WHEN NOT INTOXICATED**

Alcohol Use Disorder (AUD)—colloquially referred to as alcoholism<sup>1</sup>—is a chronic brain disorder characterized by compulsive drinking, loss of control over alcohol use despite adverse social, occupational, or health consequences, and negative emotions when not drinking.<sup>2</sup> Contrary to the characterization by the District Court below, AUD is not a “temporary” condition, marked merely by “bouts of inebriation” and impairments that are “short-term and not permanent.” *Mueck v.*

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<sup>1</sup> Nat’l Inst. on Alcohol Abuse and Alcoholism (NIAAA), *Understanding Alcohol Use Disorder* (updated April 2021), <https://www.niaaa.nih.gov/publications/brochures-and-fact-sheets/understanding-alcohol-use-disorder>.

<sup>2</sup> *Id.*; NIAAA, *Alcohol Facts and Statistics* (updated March 2022), available online at <https://www.niaaa.nih.gov/publications/brochures-and-fact-sheets/alcohol-facts-and-statistics>.

*LaGrange Acquisitions, L.P.*, No. SA-20-CV-00801-JKP, 2022 WL 36002, at \*6 (W.D. Tex. Jan. 3, 2022) (hereafter *Mueck*). Rather, AUD typically causes lasting changes to areas and functions of the brain critical to judgment, decision-making, learning, memory, and behavior control.<sup>3</sup> These changes to the brain last long after a person stops consuming alcohol; they contribute to cravings, compulsive use, and sometimes return to use after a period of recovery.<sup>4</sup> Therefore, AUD is long-term and chronic, and it is *also* characterized by episodic and acute manifestations. The District Court's own characterization of Mr. Mueck's AUD has no grounding in science.

AUD is defined by a cluster of behavioral and physical symptoms, which can include withdrawal, tolerance, and craving. An individual diagnosed with AUD uses alcohol in physically hazardous circumstances and continues to consume alcohol despite the knowledge that it poses significant personal problems like blackouts, psychological issues like depression, social or interpersonal problems, or neglect of household and other responsibilities. American Psychiatric Association,

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<sup>3</sup> *Understanding Alcohol Use Disorder*, *supra* note 1; NIAAA, *The Cycle of Alcohol Addiction* (2021), <https://www.niaaa.nih.gov/publications/cycle-alcohol-addiction>; NIAAA, *What is Alcohol Use Disorder (AUD)?*, <https://alcoholtreatment.niaaa.nih.gov/what-to-know/alcohol-use-disorder> (last visited April 8, 2022); National Institute on Drug Abuse (NIDA), *Drugs, Brains, and Behavior: The Science of Addiction* (July 2020), <https://nida.nih.gov/publications/drugs-brains-behavior-science-addiction/drug-misuse-addiction>.

<sup>4</sup> *The Cycle of Alcohol Addiction*, *supra* note 3; NIDA, *Principles of Drug Addiction Treatment: A Research Based Guide (Third Edition)* (updated Jan. 2018), <https://nida.nih.gov/download/675/principles-drug-addiction-treatment-research%20based-guide-third-edition.pdf?v=74dad603627bab89b93193918330c223>.



DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, at 492 (5th ed. 2013) (hereafter “DSM-5”).<sup>5</sup>

AUD manifests by various behaviors beyond intoxication itself, including, as relevant here:

- often drinking alcohol in larger amounts than intended;
- a persistent desire or unsuccessful efforts to cut down and control alcohol use;
- spending a great deal of time using alcohol;
- craving;
- recurrent alcohol use resulting in a failure to fulfill major role obligations, including at home;
- continued alcohol use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of alcohol;
- giving up or reducing important social or recreational activities because of alcohol use;
- recurrent alcohol use in situations in which it is physically hazardous;
- continued alcohol use despite knowledge of having a persistent or recurrent physical or psychological problem caused or exacerbated by alcohol.

DSM-5 at 490–91. The presence of six or more of these symptoms means the individual has a severe case of AUD. *Id.*

The District Court’s decision describes plaintiff Clint Mueck’s daily consumption of alcohol—to the point of passing out or illness—as “temporary impairments caused by the periodic and frequent overindulgence of alcohol.” *Mueck*,

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<sup>5</sup> Courts often rely on the DSM because the current manuals offer “the best available description of how mental disorders are expressed and can be recognized by trained clinicians.” *In re Johnson*, 935 F.3d 284, 292 n.2 (5th Cir. 2019), *quoting Moore v. Texas*, 137 S. Ct. 1039, 1053 (2017), in turn quoting the DSM-5, at xli.

2022 WL 36002, at \*6. This characterization grossly understates the severity of Mr. Mueck’s AUD, which Mr. Mueck attested would ruin his life if untreated and could “kill” him.<sup>6</sup> It also demonstrates a profound misunderstanding of AUD, which is neither “temporary” nor an “overindulgence,” but rather the compulsive use of alcohol causing and reinforced by changes to brain structure and functioning.<sup>7</sup> AUD is chronic disorder that substantially limits major life activities even when a person is not intoxicated.

According to the National Institute on Alcohol Abuse and Alcoholism (“NIAAA”), three stages characterize the cycle of AUD: the binge/intoxication stage, the negative affect/withdrawal stage, and the preoccupation/anticipation stage.<sup>8</sup> The cycle can occur over the course of hours, days, or longer.<sup>9</sup> Each of the three stages results in substantial limitations of major life activities or bodily functions, including brain and neurological functioning, sleeping, decision-making, concentrating, thinking, caring for oneself, and interacting with others.

During the binge/intoxication stage, the areas and functions of the brain responsible for reward—which produce feelings of pleasure—react to the presence of alcohol as well as environmental stimuli associated with alcohol use, leading to

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<sup>6</sup> ROA.185 (Mueck Deposition 69:14–21).

<sup>7</sup> ROA.442 (Declaration of licensed Chemical Abuse Counselor David Woodlee, ¶ 3 (“I assessed Mr. Mueck as meeting the criteria for alcohol dependency, and I diagnosed him as being an alcoholic. Alcoholism is a form of mental illness that affects a person’s brain function.”))

<sup>8</sup> *The Cycle of Alcohol Addiction*, *supra* note 3.

<sup>9</sup> *Id.*

increased alcohol craving and use.<sup>10</sup> A person's repeated consumption of alcohol causes changes in both the brain's reward and habit formation systems, leading to compulsive alcohol use.<sup>11</sup>

In the negative affect/withdrawal stage, someone with AUD experiences negative physical and emotional symptoms when not using alcohol, such as sleep disturbance, pain, dysphoria, irritability, and anxiety.<sup>12</sup> AUD also causes the body's reward system to become less sensitive, to both alcohol and other environmental stimuli, so the individual does not derive the same level of satisfaction or pleasure from once-pleasurable activities.<sup>13</sup> Additionally, during the negative affect/withdrawal stage, the body's stress system is activated.<sup>14</sup> The combination of a less sensitive reward system and activated stress system leads to negative emotions or feelings.<sup>15</sup> To attempt to suppress these negative thoughts and feelings, people with AUD are motivated to seek and consume alcohol.<sup>16</sup>

In the preoccupation/anticipation stage, a person's thinking becomes preoccupied with consuming alcohol, such that the prefrontal cortex, which is

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<sup>10</sup> U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *Facing Addiction in America: The Surgeon General's Report in, Drugs, and Health* 2-8-2-12 (2016), <https://addiction.surgeongeneral.gov/sites/default/files/surgeon-generals-report.pdf>.

<sup>11</sup> *The Cycle of Alcohol Addiction*, *supra* note 3; *Facing Addiction in America*, *supra* note 10, at 2-12.

<sup>12</sup> NIAA, *The Cycle of Alcohol Addiction*, *supra* note 3.

<sup>13</sup> *Facing Addiction in America*, *supra* note 10, at 2-13 to 2-14.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 2-14.

responsible for functions like organizing thoughts and activities, prioritizing tasks, managing time, and making decisions, is compromised.<sup>17</sup> The cycle of AUD then reinforces itself because changes to the brain's reward system cause people with AUD to need greater stimuli to activate that system, which in turn, leads to "compulsive escalation" of alcohol use.<sup>18</sup>

According to a national survey, about 5.6 percent of adults in the United States have AUD.<sup>19</sup> This highlights the crucial differentiation between occasional drinking and AUD, and it further reflects the fact that people with AUD are substantially limited "as compared to most people in the general population." 29 C.F.R. § 1630.2(j)(1)(ii).

Mr. Mueck's declaration describes his own experiences during all three stages of binge/intoxication, negative affect/withdrawal, and preoccupation/anticipation, including how his impairment of AUD substantially limited his major life activities of thinking, concentrating, and being awake:

My alcohol dependence increased over time. Since my college days [in the 1990's] I have craved alcohol, and I always has the desire to drink, even when I was working. In other words, even when I was not drinking (such as when I was working), I was thinking about drinking. Drinking was my priority, and my cravings made it difficult to focus intently on other things such as work. I placed drinking above most other responsibilities and duties in my life. And when I drank, I could not control myself, and I usually drank until I either passed out or got so

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<sup>17</sup> NIAA, *The Cycle of Alcohol Addiction*, *supra* note 3.

<sup>18</sup> *Facing Addiction in America*, *supra* note 10, at 2-13.

<sup>19</sup> *Understanding Alcohol Use Disorder*, *supra* note 1.

sick that I could not continue drinking to get rid of the hangover. This cycle would continue through my days off.<sup>20</sup>

Mr. Mueck also attested that his AUD substantially limited his “judgment” and that between periods of intoxication, his mind would be “in a total fog.”<sup>21</sup> In sum, Mr. testified that his alcoholism impaired his ability to make judgments, concentrate, think clearly, make rational decisions, care for himself, and have relationships with his family members and other people.<sup>22</sup> Moreover, his testimony shows that these limitations were not limited to “temporary” “bouts of inebriation,” as wrongly characterized by the District Court decision.

Treatment for AUD has two main components: behavioral therapy and medications.<sup>23</sup> The U.S. Food and Drug Administration (FDA) has approved three non-addictive medications for treating AUD, naltrexone, acamprosate, and disulfiram.<sup>24</sup> Medications and therapy can be used in combination and should be tailored to an individual’s needs because there is no “one-size-fits all” treatment plan for AUD.<sup>25</sup>

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<sup>20</sup> ROA.435 (Declaration of Clint Mueck, ¶ 2).

<sup>21</sup> ROA.186 (Mueck Deposition, 71:9–14); ROA.435 (Mueck Declaration, ¶ 3)

<sup>22</sup> ROA.186 (Mueck Deposition, 71:9–11); ROA.435–436 (Mueck Declaration at ¶¶ 4–5).

<sup>23</sup> NIAAA, *What Types of Alcohol Treatment Are Available?*, <https://alcoholtreatment.niaaa.nih.gov/what-to-know/types-of-alcohol-treatment> (last visited April 8, 2022).

<sup>24</sup> NIAAA, *Treatment for Alcohol Problems: Finding and Getting Help* (last updated Aug. 2021), <https://www.niaaa.nih.gov/publications/brochures-and-fact-sheets/treatment-alcohol-problems-finding-and-getting-help>.

<sup>25</sup> *What Types of Alcohol Treatment Are Available?*, *supra* note 22; NIAAA, *Why do Different People Need Different Options?*, <https://alcoholtreatment.niaaa.nih.gov/what-to-know/different-people-different-options>.

Due to the chronic nature of AUD, treatment can manage but does not cure a person's disorder.<sup>26</sup> Accordingly, NIAAA advises that treatment of AUD is an ongoing process and explains that “[i]t is rare that someone would go to treatment once and then never drink again. More often, people must repeatedly try to quit or cut back, experience recurrences, learn from them, and then keep trying. For many, continued follow up with a treatment provider is critical to overcoming problem drinking.”<sup>27</sup> Additionally, the National Institute on Drug Abuse (“NIDA”) cautions that “[m]ost patients need long-term or repeated care to stop using [substances] completely and recover their lives.”<sup>28</sup>

## **II. THE DISTRICT COURT ERRED IN RULING AS A MATTER OF LAW THAT MR. MUECK DID NOT HAVE AN ACTUAL DISABILITY WITHIN THE MEANING OF THE ADA AMENDMENTS ACT**

The ADA Amendments Act of 2008 made substantial changes to the ADA's disability analysis in ways that courts have labelled “significant.” *United States Equal Emp. Opportunity Comm’n v. St. Joseph’s Hosp., Inc.*, 842 F.3d 1333, 1343 (11th Cir. 2016). It was passed with overwhelming support because “years of court decisions narrowly defining who qualifies as an individual with disabilities left the ADA too compromised to achieve its purpose. In response, Congress passed the

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<sup>26</sup> *Drugs, Brains, and Behavior: The Science of Addiction*, *supra* note 3.

<sup>27</sup> *Id.*

<sup>28</sup> NIDA, *Treatment Approaches for Drug Addiction DrugFacts* (Jan. 2019), available online at <https://nida.nih.gov/publications/drugfacts/treatment-approaches-drug-addiction>.

ADA Amendments Act of 2008 (ADAAA) to invalidate those decisions.” *Hostettler v. Coll. of Wooster*, 895 F.3d 844, 848–49 (6th Cir. 2018).

The ADAAA’s goal was to “broaden the definition of disability,” and “[t]hose amendments make it easier for people with disabilities to obtain protection under the ADA.” *Cannon v. Jacobs Field Servs. N. Am., Inc.*, 813 F.3d 586, 590 (5th Cir. 2016) (internal quotes omitted).

#### **A. ADAAA Mandate Regarding Episodic Conditions**

According to the plain language of the statute, an 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). *See also* 29 C.F.R. § 1630.2(j)(1)(vii). This Court has recognized that the amendments are “very favorable” to plaintiffs “because they make it easier for a plaintiff with an episodic condition [] to establish that he is an individual with a disability.” *Carmona v. Southwest Airlines Co.*, 604 F.3d 848, 855 (5th Cir. 2010) (internal quotes omitted).

The case law is consistent. *See, e.g., Kurtzhals v. Cty. of Dunn*, 969 F.3d 725, 728 (7th Cir. 2020) (“[T]rier of fact could find that Kurtzhals has a history of PTSD, and that his symptoms, when they flare up, include insomnia, flashbacks, and loss of appetite.”); *Hostettler v. Coll. of Wooster*, 895 F.3d 844, 854 (6th Cir. 2018) (“[T]hat these [panic] attacks were episodic makes no difference under the ADA. So long as the impairment would substantially limit a major life activity when active,

that is enough.”) (internal quotes omitted); *Gogos v. AMS Mechanical Systems, Inc.*, 737 F.3d 1170, 1173 (7th Cir. 2013) (“Instead, the relevant issue is whether, despite their short duration in this case, Gogos’s higher-than-usual blood pressure and vision loss substantially impaired a major life activity when they occurred.”); *Olsen v. Capital Region Medical Center*, 713 F.3d 1149, 1154 (8th Cir. 2013) (“It is undisputed that Olsen was disabled, because Olsen suffered from seizures which, while occurring, incapacitated her and prevented her from performing her job duties.”).

Courts have recognized that under the ADAAA, many kinds of episodic conditions may be disabilities, including, e.g., depression,<sup>29</sup> post-traumatic stress syndrome,<sup>30</sup> panic attacks,<sup>31</sup> flare-ups of various mental-health impairments,<sup>32</sup> Meniere’s disease,<sup>33</sup> diverticulitis,<sup>34</sup> sarcoidosis,<sup>35</sup> lumbar radiculopathy,<sup>36</sup>

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<sup>29</sup> *Hostettler v. Coll. of Wooster*, 895 F.3d 844, 854 (6th Cir. 2018) (depression and anxiety); *Deister v. AAA Auto Club of Michigan*, 91 F. Supp. 3d 905, 918 (E.D. Mich. 2015); *Kinney v. Century Servs. Corp. II*, No. 1:10-CV-00787-JMS, 2011 WL 3476569, at \*10 (S.D. Ind. Aug. 9, 2011).

<sup>30</sup> *Garibay v. Hamilton Cty., Tennessee*, 496 F. Supp. 3d 1140, 1146–48 (E.D. Tenn. 2020); *Walters v. Mayo Clinic Health Sys.-EAU Claire Hosp., Inc.*, 998 F. Supp. 2d 750, 763 (W.D. Wis. 2014).

<sup>31</sup> *Equal Employment Opportunity Comm’n v. Crain Auto. Holdings LLC*, 372 F. Supp. 3d 751, 755 (E.D. Ark. 2019).

<sup>32</sup> *Dillaha v. Pascagoula Gautier Sch. Dist.*, No. 1:18CV301-LG-RHW, 2019 WL 5596420, at \*3 (S.D. Miss. Oct. 30, 2019).

<sup>33</sup> *Messenheimer v. Coastal Pet Prod., Inc.*, No. 5:17-cv-738, 2018 WL 3609488, at \*6 (N.D. Ohio July 27, 2018), *aff’d on other grounds*, 764 F. App’x 517 (6th Cir. 2019).

<sup>34</sup> *Rinehart v. Weitzell*, 964 F.3d 684, 688 (8th Cir. 2020).

<sup>35</sup> *Allen v. Baltimore Cty., Md.*, 91 F. Supp. 3d 722, 731 (D. Md. 2015).

<sup>36</sup> *Green v. Teddie Kossof’s Salon & Day Spa*, No. 13 C 6709, 2015 WL 5675463, at \*4 (N.D. Ill. Sept. 24, 2015).



hypertension,<sup>37</sup> migraines,<sup>38</sup> back pain flare-ups,<sup>39</sup> epilepsy,<sup>40</sup> asthma,<sup>41</sup> irritable bowel syndrome,<sup>42</sup> fibromyalgia,<sup>43</sup> heart condition,<sup>44</sup> vocal cord edema,<sup>45</sup> and multiple sclerosis.<sup>46</sup>

In addition, the ADA regulations list various episodic conditions that will “predictabl[y]” result in a determination of coverage, including epilepsy, major depressive disorder, bipolar disorder, PTSD, and schizophrenia. 29 C.F.R. § 1630.2(j)(3)(iii). Likewise, EEOC guidance also lists various episodic conditions such as epilepsy, PTSD, multiple sclerosis, asthma, major depressive disorder, bipolar disorder, and schizophrenia. 29 C.F.R. Part 1630 App., § 1630.2(j)(1)(vii). Moreover, “[t]he fact that the periods during which an episodic impairment is active and substantially limits a major life activity may be brief or occur infrequently is no

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<sup>37</sup> *Gogos v. AMS Mech. Sys., Inc.*, 737 F.3d 1170, 1173 (7th Cir. 2013).

<sup>38</sup> *Burns v. Nielsen*, 506 F.Supp.3d 448, 470 (W.D. Tex. 2020).

<sup>39</sup> *Jones v. Honda of Am. Mfg., Inc.*, No. 3:13-cv-167, 2015 WL 1036382, at \*10 (S.D. Ohio Mar. 9, 2015).

<sup>40</sup> *Crumpley v. Associated Wholesale Grocers*, No. 16-2298-DDC, 2018 WL 1933743, at \*40 (D. Kan. Apr. 24, 2018) (granting partial summary judgment to plaintiff); *Moore v. Marriott Int’l, Inc.*, No. CV-12-00770-PHX-BSB, 2014 WL 5581046, at \*6-7 (D. Ariz. Oct. 31, 2014).

<sup>41</sup> *Ali v. Hogan*, No. 9:12-CV-0104, 2013 WL 5466302, at \*7 (N.D.N.Y. Sept. 30, 2013); *Kobler v. Illinois Dept. Human Services*, No. 12 C 1277, 2012 WL 5995836, at \*2 (N.D. Ill. Nov. 30, 2012).

<sup>42</sup> *Edwards v. Chevron U.S.A., Inc.*, No. H-11-2568, 2013 WL 474770, at \*2 (S.D. Tex. Feb. 7, 2013).

<sup>43</sup> *Howard v. Pennsylvania Dept. of Public Welfare*, No. 11-1938, 2013 WL 102662, at \*11-12 (E.D. Pa. Jan. 9, 2013).

<sup>44</sup> *Gannett v. Poudre School Dist. R-I*, No. 11-cv-00363-RPM, 2012 WL 5954092, at \*2 (D. Colo. Nov. 28, 2012).

<sup>45</sup> *Pearce-Mato v. Shinseki*, No. 2:10-cv-1029, 2012 WL 2116533, at \*10-11 (W.D. Pa. June 11, 2012).

<sup>46</sup> *Carbaugh v. Unisoft Intern., Inc.*, No. H-10-0670, 2011 WL 5553724, at \*8 (S.D. Tex. Nov. 15, 2011).

longer relevant to determining whether the impairment substantially limits a major life activity. For example, a person with post-traumatic stress disorder who experiences intermittent flashbacks to traumatic events is substantially limited in brain function and thinking.” *Id.*

The legislative history is also consistent, stating that “an individual with epilepsy who experiences seizures that result in the short-term loss of control over major life activities ... is disabled under the ADA even if those seizures occur daily, weekly, monthly, or rarely.” H.R. Rep. No. 110-730, at 19–20 (2008) (footnote omitted), *quoted in Karatzas v. Herricks Union Free Sch. Dist.*, No. 15-CV-2888(ADS)(AKT), 2017 WL 3084409, at \*12 (E.D.N.Y. July 18, 2017). Congress further observed that the rule of construction on episodic conditions “rejects the reasoning of the courts in cases like *Todd v. Academy Corp.* [57 F. Supp. 448, 453 (S.D. Tex. 1999)] where the court found that the plaintiff’s epilepsy, which resulted in short seizures during which the plaintiff was unable to speak and experienced tremors, was not sufficiently limiting, at least in part because those seizures occurred episodically.” *Id.*

In *E.E.O.C. v. Old Dominion Freight Line, Inc.*, 2015 WL 3895095, at \*9 (W.D. Ark. June 24, 2015), the evidence regarding the employee’s Alcohol Use Disorder (referred to as “alcoholism” or “alcohol addiction”) was substantially similar to that in the instant case. Although the employee was not drinking or

intoxicated on the job, he drank at every other opportunity to the point of passing out, and he self-reported to his employer. Describing the condition in its active state, the court denied the defense motion for judgment as a matter of law, finding sufficient evidence that the worker was substantially limited in walking, standing, thinking, communicating, and caring for oneself.

The District Court's analysis in the instant case is an outlier, and is contrary to the plain language of the statute and regulation, and the weight of authority.

**B. The District Court Mistakenly Relied On Pre-ADAAA Precedent**

The lower court principally relied on only two cases. First, it cited this Court's opinion in *Burch v. Coca-Cola*, 119 F.3d 305 (5th Cir. 1997), which rejected any focus on the episodic nature of the plaintiff's condition, regardless of whether they were frequent or substantially limiting. But *Burch* was decided eleven years before the ADAAA, and before its statutory mandate to consider such episodes.

Second, the District Court relied on two opinions from a single district-court case—*Moore v. Centralized Mgmt. Servs., LLC*, No. CV 19-1592, 2020 WL 972711 (E.D. La. Feb. 28, 2020) 2020 WL 2037191 (E.D. La. Apr. 28, 2020), *reconsideration denied*, 2020 WL 2037191 (E.D. La. Apr. 28, 2020)—both of which were wrongly decided. Every case they relied on in assessing disability was decided under a pre-ADAAA analysis. And neither opinion made any mention of the ADAAA's episodic mandate set out in 42 U.S.C. § 12102(4)(D). This Court's

affirmance of *Moore* in a non-precedential *per curiam* opinion, 843 F. App'x 575 (5th Cir. 2021), was based on other grounds. *Id.* at 579 (“we need not address whether Moore’s alcoholism constituted a disability”); *id.* at 580 (“we decide this appeal without reaching that issue”).

The fact is that lower courts frequently err in relying on pre-ADAAA cases for their disability analysis. *See Summers v. Altarum Institute, Corp.*, 740 F.3d 325, 330 (4th Cir. 2014) (“In holding that Summers’s temporary injury could not constitute a disability as a matter of law, the district court erred not only in relying on pre-ADAAA cases but also in misapplying the ADA disability analysis.”). *See also Amsel v. Texas Water Development Bd.*, 2012 WL 913676, at \*3 n.2 (5th Cir. Mar. 19, 2012) (unpublished) (“[m]any of the cases cited in this discussion will be superseded in whole or in part as applied to cases arising under the new law”). As the Sixth Circuit explained in *Morrissey v. Laurel Health Care Co.*, 946 F.3d 292 (6th Cir. 2019):

[The employer] argues that pre-2008 cases are still good law in regard to determining whether a plaintiff was disabled. They are not. The 2008 Amendments were enacted to respond to years of court decisions narrowly defining who qualifies as an individual with disabilities, which left the ADA too compromised to achieve its purpose. Therefore ... the 2008 Amendments invalidate those decisions to restore the intent and protections of the Americans with Disabilities Act. The district court found otherwise, but it viewed this case through the wrong lens and relied on outdated authority.

*Id.* at 299 (internal quotes, cites, brackets, ellipses, and paragraph break omitted).

**C. The District Court Erred to the Extent It Suggested That the Ability to Do One's Job Undercuts a Disability Finding**

The District Court's suggestion that the ability to do one's job undercuts a finding of disability contravenes Fifth Circuit precedent and law in other circuits. The lower court stated that "[n]aturally" this case involves the major life activity of "work," and the court then stated that Mr. Mueck's alcoholism did not substantially limit his ability to perform his job duties, and he did not drink at work. *Mueck, supra*, 2022 WL 36002, at \*6. The exact point of this is unclear, because Mr. Mueck does not appear to argue that he was substantially limited in working. But as the Fifth Circuit has observed, the fact that a condition does not interfere with a person's job duties does not mean that it is not a disability. *See, e.g., Cannon v. Jacobs Field Servs. N. Am., Inc.*, 813 F.3d 586, 591 n.3 (5th Cir. 2016) (statements that plaintiff was able to do her work tasks "do not undermine the evidence indicating that his injury substantially limits his ability to lift, which is all that is required"); *Williams v. Tarrant Cty. Coll. Dist.*, 717 F. App'x 440, 448 (5th Cir. 2018) ("The court also erred in suggesting Williams' being certified to 'work a full, regularly scheduled day with no restrictions' undercut her disability claim."). The case law from other circuits is consistent.<sup>47</sup>

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<sup>47</sup> *See, e.g., Thompson v. Fresh Prod., LLC*, 985 F.3d 509, 523 (6th Cir. 2021); *Kurtzhals v. Cty. of Dunn*, 969 F.3d 725, 728–29 (7th Cir. 2020); *Morrissey v. Laurel Health Care Co.*, 946 F.3d 292, 300 (6th Cir. 2019); *Kopchik v. Town of E. Fishkill, New York*, 759 F. App'x 31, 37 n.6 (2d Cir. 2018) ("Kopchik alleges that he was able to perform the supervisor job after his head injuries ... but that is not mutually exclusive with being limited in thinking, learning, or concentrating

### **III. THE DISTRICT COURT ERRED IN HOLDING THAT THE PLAINTIFF WAS NOT ENTITLED TO A REASONABLE ACCOMMODATION**

Under the ADA, employers must make reasonable accommodations for known disabilities of their employees. 42 U.S.C. § 12112(b)(5). Reasonable accommodations include medical leave. *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 397–98 (2002) (ADA may require “additional breaks from work, perhaps to permit medical visits.”); *Delaval v. PTech Drilling Tubulars, L.L.C.*, 824 F.3d 476, 481 (5th Cir. 2016) (“[t]ime off, whether paid or unpaid, can be a reasonable accommodation”). Mr. Mueck requested to miss four days of work to participate in group therapy as part of an outpatient substance-abuse program to treat his AUD.<sup>48</sup> Rather than grant his request, LaGrange fired him. The District Court held that LaGrange did not violate the law because Mueck was not a person with a disability, he never requested a reasonable accommodation, and his request to miss four days of work to participate in a substance-abuse program was not related to his disability.

#### **A. Plaintiff’s Request for Time Off Was a Reasonable Accommodation Request**

If an employer knows that leave is required because of a disability, asking for leave suffices as a request for accommodation. *See E.E.O.C. v. Chevron Phillips*

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during that period.”); *Rowlands v. United Parcel Serv.-Fort Wayne*, 901 F.3d 792, 800–01 (7th Cir. 2018); *Yinger v. Postal Presort, Inc.*, 693 F. App’x 768, 772 (10th Cir. 2017).

<sup>48</sup> ROA.437, ¶ 13.

*Chem. Co., LP*, 570 F.3d 606, 621 (5th Cir. 2009). *See also Garrison v. Dolgencorp, LLC*, 939 F.3d 937, 941 (8th Cir. 2019) (“Here, Bell knew that Garrison suffered from various medical conditions, that those conditions had been worsening and had required regular doctor visits, and that she had repeatedly inquired about a leave of absence to deal with them. Under these circumstances, a reasonable jury could conclude that Garrison requested an accommodation, even if she never used those “magic words,” because she made Dollar General aware of the need for one.”) (internal quotes and cites omitted); *Graves v. Finch Pruyn & Co., Inc.*, 457 F.3d 181, 185 (2d Cir. 2006) (requesting a “couple of weeks” to allow the doctor to evaluate the possibility of returning to work); *Smith v. Diffie Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955, 967 (10th Cir. 2002) (“We have previously explained that limited leave for medical treatment may qualify as reasonable accommodation under the ADA. ... Because Smith had requested and taken no more leave than the FMLA already required that she be given, we cannot conclude that the length of time was unreasonable or that the leave unduly burdened Diffie.”); *Humphrey v. Memorial Hospitals Ass’n*, 239 F.3d 1128, 1136 (9th Cir. 2001) (statement that employee’s condition was treatable, but “she may have to take some time off until we can get the symptoms better under control,” was sufficient).

The District Court recognized that the law does not require the use of “magic words” in an accommodation request. *Mueck, supra*, 2022 WL 36002, at \*7, *citing*

*E.E.O.C. v. Chevron Phillips Chem. Co., LP*, 570 F.3d 606, 621 (5th Cir. 2009). But the lower court held that Mr. Mueck did not make a reasonable accommodation request because he “did not specifically identify his alcoholism as a disability,” and did not “specifically identify the need to miss work as a reasonable accommodation.” *Mueck, supra*, 2022 WL 36002, at \*7. This holding is inconsistent with the case law, inconsistent with the facts, and inconsistent with the summary-judgment standard.

Mr. Mueck testified that in early March of 2019, he told his supervisor that he had a drinking problem and a history of alcohol-related offenses. He also told him that he needed help to turn his life around.<sup>49</sup> In May, Mr. Mueck told his supervisor that he was an alcoholic, that he was entering an outpatient substance-abuse program, that he would have weekly sessions with a counselor, that he was attending Alcoholics Anonymous meetings four to five times per week, that he needed this help to save his life, and that he was 60-days sober.<sup>50</sup> His employer recognized that he needed help, and referred him to the Employee Assistance Program for counseling.<sup>51</sup> About a week later, Mr. Mueck explained that he would be in group-counseling sessions in addition to his individual counseling.<sup>52</sup> His supervisor largely confirmed the above, admitting that he knew that Mr. Mueck was struggling with

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<sup>49</sup> ROA.436, ¶ 8.

<sup>50</sup> ROA.436–37, ¶ 12.

<sup>51</sup> ROA.437, ¶ 12.

<sup>52</sup> ROA.437, ¶¶ 13, 15.



alcohol, knew he went to AA four to five times per week, knew he had been 60 days sober, and knew he was undertaking an outpatient treatment program.<sup>53</sup> His supervisor also admitted sharing this information with one or more of the decision-makers.<sup>54</sup>

There is no question that when Mr. Mueck asked for an accommodation to allow him to attend nighttime group-therapy sessions, LaGrange knew that the request was related to, and part of the treatment for, his “alcoholism.” LaGrange never suggested otherwise to Mr. Mueck, nor did they seek any additional information about his condition or his counseling, even though they had the right to seek either. *See, e.g., Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA*, Question 15 (EEOC July 26, 2000);<sup>55</sup> *Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, Question 6 (EEOC Oct. 17, 2002).<sup>56</sup>

When the District Court held that the court order for treatment somehow severed the connection between Mueck’s AUD and the substance-abuse program, it granted the order more power than either logic or the law permits. The character of

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<sup>53</sup> ROA.446.

<sup>54</sup> ROA.447.

<sup>55</sup> Available online at <https://www.eeoc.gov/laws/guidance/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees>.

<sup>56</sup> Available online at <https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada>.

a program designed to treat a substance use disorder does not change just because a court order (or for that matter any third party) selects its curriculum or schedule. In fact, the 90-day program that Mueck planned to attend has the same requirements for its patients, whether they are court-ordered to attend or are participating solely by personal choice.<sup>57</sup> Mr. Mueck was entitled to a reasonable accommodation to allow him to attend a program to treat his AUD.

**B. 42 U.S.C. § 12114(c)(4) Has No Application to This Case, and The District Court Erred in Relying On It To Excuse LaGrange’s Accommodation Obligation**

The District Court apparently relied on 42 U.S.C. § 12114(c)(4) to support its holding that LaGrange did not need to consider a schedule accommodation. *Mueck, supra*, 2022 WL 36002, at \*8. But that statutory provision speaks to something different—it provides that an employer may hold an “alcoholic” employee “to the same *qualification standards* for employment *or job performance and behavior* that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the ... alcoholism.” (emphasis added) None of those elements is applicable here.

“Qualification standards means the personal and professional attributes including the skill, experience, education, physical, medical, safety and other requirements established by a covered entity as requirements which an individual

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<sup>57</sup> ROA.442, ¶¶ 2, 4.

must meet in order to be eligible for the position held or desired.” 29 C.F.R. § 1630.2(q). But this is not a non-selection case, and Mr. Mueck was hired by LaGrange and worked successfully for it (and its predecessor) for several years. This case has nothing to do with his education, skills, or experience.

Nor is this a case about poor performance. In fact, Mr. Mueck’s supervisor had no complaints about his performance.<sup>58</sup>

Finally, this case does not concern misconduct. According to LaGrange, the reason it fired Mr. Mueck was not about his conduct but about his need for a schedule accommodation to allow him to attend group-therapy sessions as part of his alcohol-treatment program.<sup>59</sup>

Thus, by its plain language, § 12114(c)(4) does not apply. Also by its plain language, it has nothing to do with the employer’s accommodation obligation, and makes no mention of it. Congress knows how to restrict the requirement to provide a reasonable accommodation, as it did with regard to individuals with a regarded-as accommodation. 42 U.S.C. § 12201(d). Yet it did nothing of the sort with regard to people with AUD or alcoholism.

The District Court’s analysis on this point simply misses the mark. Section 12114(c) does not excuse an employer from modifying its attendance policy to make

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<sup>58</sup> ROA.445.

<sup>59</sup> *E.g.*, ROA.438, ¶ 19.

a reasonable accommodation. This Court recognized as much in *Burch v. Coca-Cola Co.*, 119 F.3d 305 (5th Cir. 1997). As shown above, *Burch*'s rejection of episodic conditions does not survive the ADAAA's substantial changes to the disability analysis. But *Burch* was also clear that individuals with alcoholism may still be entitled to reasonable accommodations if they have a disability. *Burch, supra*, 119 F.3d at 317 ("Under different circumstances—and additional evidentiary support—an alcoholic may establish the need for reasonable accommodation of an alcoholism-induced impairment.").

Mueck did not have performance or behavior issues at work, and LaGrange does not claim otherwise. Nor did LaGrange terminate Mueck for violating its Drug and Alcohol policy, its Punctuality and Attendance policy, or any other policy or work rule. Instead, LaGrange terminated Mueck because it refused to provide leave or schedule swaps to allow him to attend group therapy session as part of treatment for his AUD. Section 12114(c)(4) has no application here.

### CONCLUSION

As shown above, the District Court erred in holding that no reasonable jury could find that Mr. Mueck's Alcohol Use Disorder was substantially limiting, that he requested a reasonable accommodation for it. This Court should reverse and remand.

Respectfully submitted,

/s/ Brian East

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### **CERTIFICATE OF COMPLIANCE**

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) and FED. R. APP. P. 29(a)(5), because this brief contains 5,749 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5), and the type-style requirements of FED. R. APP. P. 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using Microsoft Word software, in Times New Roman 14-point font in text, and Times New Roman 12-point font in footnotes.

/s/ Brian East  
BRIAN EAST

### **CERTIFICATE OF SERVICE**

I certify that on this 18<sup>th</sup> day of April, 2022, a true and correct copy of the foregoing document was filed electronically. Notice of this filing will be sent, by operation of the ECF system, to all counsel of record.

/s/ Brian East  
BRIAN EAST