A MATTER OF *MCKNIGHT* & ADAAA:
Why Title I Protects Former Employees with Disabilities Who Receive Fringe Benefits

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I. INTRODUCTION

If an employee acquires a disability, some form of post-employment benefits may become available to him due to his disability. These benefits may come in the form of disability retirement, which "result[s] from a totally disabling injury or illness prior to eligibility for early or normal retirement," or a long-term disability insurance (LTDI) plan, which provides benefits "to eligible employees who, because of a non-work-related illness or injury, are unable to work for an extended length of time."[2] In the alternative, the same employee may choose to apply for public benefits based on his disability, such as Social Security Disability Insurance (SSDI). Generally, an applicant for benefits that available to him due to his disability must declare himself unable to work in order to qualify.[3]

Title I of the Americans with Disabilities Act, 1990 (ADA) protects a "qualified

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[2] Bureau of Labor Statistics, National Compensation Survey: Glossary of Employee Benefit Terms, http://www.bls.gov/ncs/ebs/glossary20112012.htm#disability (last visited, May 9, 2013).

[3] *See* Donald Bell & William Wiatrowski, *Disability Benefits for Employees in Private Pension Plans*, 105 MONTHLY LAB. REV. 36, 38 (1982); *see also* EEOC Notice No. 915.002, Pt. B, § 3 (Feb. 12, 1997), http://www.eeoc.gov/policy/docs/qidreps.html (last visited Oct. 14, 2013) (discussing the differences between disability definitions in the ADA and benefits plans).

individual with disability" (QID) from discrimination in the provision of "fringe benefits."[4] Despite the ADA's express prohibition of fringe benefits-related discrimination, many circuit courts have found that persons with disabilities who receive fringe benefits may not bring Title I claims because they do not satisfy its threshold definition of QID, namely, "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[5] Many circuit courts have held that a plaintiff who declares himself unable to work cannot also claim himself capable of performing essential job functions.[6] As a result, it appears that many fringe benefits recipients cannot benefit from Title I's prohibition on benefits-related discrimination.[7]

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[4] *See* 42 U.S.C. §§ 12112(a), (b)(2) (1994).

[5] *Id.* at § 12111(8); *see McKnight v. Gen. Motors Corp.*, 550 F.3d 519 (6th Cir. 2008); *Slomcenski v. Citibank, N.A.*, 432 F.3d 1271 (11th Cir. 2005); *Morgan v. Joint Admin. Bd., Ret. Plan of the Pillsbury Co. & Amer. Fed'n of Grain Millers, AFL-CIO-CLC*, 268 F.3d 456 (7th Cir. 2001); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104 (9th Cir. 2000).

[6] *See, e.g.*, *McKnight*, 550 F.3d at 525-26.

[7] *See Parker v. Metro. Life Ins. Co.*, 99 F.3d 181, 187 (6th Cir. 1996), *rehr'g en banc on Title III grounds*, 121 F.3d 1006, 1015 (6th Cir. 1997) ("Perhaps the drafters of the statute intended that Ms. Parker's situation bring her within the coverage of the [ADA]. If that is the case, they failed to provide definitions that lend themselves to doing so."); *compare also Statutory Interpretation-Americans with Disabilities Act-Third Circuit Holds That Unemployable Former Employees May Sue Employers*, 112 HARV. L. REV. 1118, 1123 (1999) (arguing that despite the statutory language's "shortcoming," Title I must be construed to estop fringe benefits recipients, even

This paper discusses circuit courts' decisions to bar fringe benefits recipients from bringing Title I claims, critiques their application of the Supreme Court's holding in *Robinson v. Shell Oil Co.* that Title VII of the Civil Rights Act, 1964 (CRA) covers fringe benefits recipients from race-based retaliation,[8] and recommends that these courts revise their holdings in light of the ADA Amendments Act, 2008 (ADAAA).[9] Part II.A discusses the ambiguity in the statutory language of Title I of the ADA, which does not expressly state whether fringe benefits recipients may bring suit. Part II.B discusses the three factors in the *Robinson* Court's analysis: the plain language, the context in which that language is used, and the broader context of the statute. Part II.C discusses the split among circuit courts that have applied *Robinson* to hold that Title I's antidiscrimination provisions both do and do not cover fringe benefits recipients.

Part III argues that these circuit courts' justifications for barring fringe benefits recipients from bringing Title I claims are seriously flawed. Specifically, these courts have distorted the statute's plain language by misapplying the rules of grammar, have selectively interpreted Title I's antidiscrimination provisions, and have failed to distinguish between the divergent purposes of the ADA and benefits plans. Part III.A argues that the rules of grammar governing tense do

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though "such an exclusion may appear illogical") *with Fed. Deposit Ins. Corp. v. Tremaine*, 133 F.2d 827, 830 (2d Cir. 1943) (L. Hand, C. J.) ("There is no surer guide in the interpretation of a statute than its purpose when that is sufficiently disclosed; nor any surer mark of over solicitude for the letter than to wince at carrying out that purpose because the words used do not formally quite match with it.")).

[8] *See* 519 U.S. 337, 346 (1997).

[9] Pub. L. 110-325, 122 Stat. 3553 (Sept. 25, 2008) (effective Jan. 1, 2009).

not permit statutory constructions that the QID definition in Title I of the ADA contains temporal qualifiers. Part III.B argues that some of Title I's antidiscrimination provisions expressly cover persons who do not satisfy the QID definition, thereby creating ambiguity. Part III.C argues that statutory constructions barring former employees from bringing Title I claims fail to distinguish the ADA's aim to prevent discrimination and the rationale of benefits provision regimes.

Part IV recommends that circuit courts revise their bars on fringe benefits recipients from bringing Title I claims in light of the ADAAA's passage, which has strengthened both legal and policy arguments in favor of broad coverage. First, the ADAAA expressly rejected the Supreme Court's decision in *Sutton v. United Airlines, Inc.*, where the Court narrowly construed the QID definition based on a misapplication of the rules of grammar governing tense. Moreover, the ADAAA instructs courts not to "demand extensive analysis" of whether a Title I plaintiff meets threshold definitional criteria but to focus on covered entities' compliance with their substantive obligations under Title I. Finally, barring fringe benefits recipients from Title I claims grants employers carte blanche to discriminate in how they provide fringe benefits relating to disability, thereby undermining Congress' intent to provide broad protections through the ADAAA.

Finally, Part V concludes by observing the urgency of reversing restrictive constructions of the ADA at the circuit level before the Supreme Court resolves the split both because of the Court's historically restrictive interpretation of the ADA and the limitations of its holding on Title I's conditional coverage of recipients of disability-related public benefits. At the same time, the Equal Employment Opportunity Commission (EEOC) should employ its statutory authority to regulate Title I to clarify how the ADAAA strengthens arguments that favor permitting fringe benefits recipients to bring suit under Title I.

II. THE CIRCUIT SPLIT ON WHETHER TITLE I PROTECTS FRINGE BENEFITS RECIPIENTS

Many courts have applied the *Robinson* Court's three-factor analysis to decide whether fringe benefits recipients may bring Title I claims, but they have reached various conclusions, creating a circuit split. The Second and Third Circuits first applied *Robinson* to hold that Title I's prohibition against fringe benefit-related discrimination would be virtually unenforceable unless fringe benefit recipients could bring suit. The Ninth Circuit first applied *Robinson* in finding that Title I plaintiff could not simultaneously be able to perform essential job functions and eligible for disability-related fringe benefits, an analysis which was paralleled by the Seventh Circuit and which the Sixth Circuit most recently endorsed. While an apparent majority of circuit courts have found that the ADA's QID definition contains a temporal qualifier that unambiguously requires that Title I plaintiffs be able to perform essential job functions at the time the alleged discrimination occurred, a closer look reveals a more heterogeneous judicial landscape.

A. TITLE I DOES NOT EXPRESSLY STATE THAT FORMER EMPLOYEES WITH DISABILITIES RECEIVING FRINGE BENEFITS MAY BRING SUIT.

In 1990, Congress enacted the ADA "to eliminate unwarranted discrimination against disabled individuals in order both to guarantee those individuals equal opportunity and to provide the Nation with the benefit of their consequently increased productivity."[10] The ADA was intended to improve upon the Rehabilitation Act's antidiscrimination provision Section 504, including by prohibiting discrimination by private employers.[11] Title I of the ADA governs employment-related discrimination, which includes

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[10] *Cleveland v. Pol'y Mgmt. Sys. Corp.*, 526 U.S. 795, 801 (1999).

[11] Cheryl L. Anderson, *Ideological Dissonance, Disability Backlash, and the ADA Amendments Act*, 55 WAYNE L. REV. 1267, 1277 (2009).

> participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with . . . an organization providing fringe benefits to an employee of the covered entity . . .)[.][12]

To bring any employment-related discrimination claim, including in relation to fringe benefits, plaintiffs must satisfy the Title I "qualified individual with a disability" definition. A qualified individual is "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[13] Thus, as a threshold matter, Title I plaintiffs must prove themselves able to perform essential job functions with reasonable accommodations.[14]

Although Congress enacted the ADAAA to roll back the Supreme Court's crabbed statutory constructions that had "narrowed the broad scope of protection intended to be afforded by the ADA,"[15] the ADAAA does not directly address whether a fringe benefits recipient may

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[12] 42 U.S.C.A. § 12112(b)(2); *see also* 39 C.F.R. § 1360.4(a)(1)(vi) (prohibiting discrimination in regard to "[f]ringe benefits available by virtue of employment"). Even courts that have estopped would-be fringe benefits recipient Title I claimants have not disputed that Title I prohibits discrimination regarding fringe benefits. *See, e.g.*, *Johnson*, 273 F.3d at 1050; *Parker*, 121 F.3d at 1015; *EEOC v. CNA Ins. Cos.*, 96 F.3d 1039, 1044 (7th Cir. 1996).

[13] 42 U.S.C. § 12111(8).

[14] *See id*. Title I plaintiffs have often struggled to satisfy the elements of Section 101(8). *See, e.g.*, *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999).

[15] Pub. L. 110-325 § 2(a)(4), (5).

simultaneously be considered a QID for the purposes of Title I protection. In its interpretive guidance, amicus briefs, and litigation, the EEOC has long adopted the view that fringe benefits recipients may bring suit under Title I.[16] However, despite various inconsistent circuit court rulings since the ADA's enactment, the EEOC "declined to make revisions requested by commenters relating to health insurance, disability and other benefit programs" following the ADAAA's passage, because it "believes the proposed regulatory language was clear with respect to any application it may have to these issues."[17] Thus, at first blush, the ADAAA's passage appears to leave the law regarding Title I coverage of fringe benefits recipients untouched.[18]

B. THE *ROBINSON* COURT CONSTRUED AMBIGUOUS SECTIONS OF TITLE VII BROADLY TO PROTECT FORMER EMPLOYEES ALLEGING RETALIATION.

Circuit courts generally have applied the Supreme Court's three-factor analysis in *Robinson* to determine whether fringe benefits recipients may bring Title I claims.[19] After

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[16] *See, e.g., EEOC v. CNA Ins. Cos.*, 96 F.3d 1039 (7th Cir. 1996); Br. of the EEOC as Amicus Curiae in Support of Plaintiff-Appellant, *Johnson*, 1999 WL 33921927 (11th Cir.).

[17] Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, As Amended, 29 C.F.R. Pt. 1630, 76 Fed. Reg. 16978-01, 16979 (Mar. 25, 2011).

[18] *Cf.* Alex B. Long, *Introducing the New and Improved Americans With Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 NW. U. L. REV. COLLOQUY 217, 226-29 (2008) (observing that "nearly all of the focus of the ADAAA is on the definition of disability").

[19] 519 U.S. 337, 346 (1997); *id.* at 341 (stating the three factors: "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole"); *see also Morgan*, 268 F.3d at 458-59 (distinguishing *Robinson*, but still holding that disability

finding in *Robinson* that the language in Title VII of the CRA defining which individuals could pursue retaliation claims was ambiguous, the Court construed the statute to permit former employees' retaliation claims because the term "employees" in Title VII was ambiguous and excluding former employees "would undermine [Title VII's] effectiveness . . . and would provide a perverse incentive for employers to fire employees who might bring Title VII claims."[20] While before *Robinson* courts routinely barred fringe benefits recipients from Title I claims,[21] a number of circuit courts found that *Robinson* required reversing similar precedents.[22]

The *Robinson* Court considered three factors in construing Title VII: "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."[23] Applying this rule, the Court first found the plain statutory language alone to be ambiguous. Without a temporal qualifier, the Court considered that "employee" may just as

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retirees are barred from bringing Title I claims because "they are totally disabled and so utterly unable to work," and therefore not "qualified individuals").

[20] *Id.* at 346.

[21] *See, e.g., CNA Ins. Cos.*, 96 F.3d at 1044; *Gonzales*, 89 F.3d at 1529; *Kennedy v. Applause, Inc.*, 90 F.3d 1477 (9th Cir. 1996); *McNemar v. The Disney Store, Inc.*, 91 F.3d 610 (3d Cir.1996); *Parker*, 99 F.3d 181.

[22] *See, e.g., Johnson*, 273 F.3d at 1045-46, *rev'g Gonzales*, 281 F.3d 1368 (11th Cir. 2002); *Ford*, 145 F.3d at 605-08, *dist'g McNemar*, 91 F.3d 610.

[23] *Id.* at 341 (internal citations omitted).

readily refer to either former employees or future and current employees or both.[24] Second, the Court found that the context in which the term "employee" is either used or not used did not resolve this ambiguity. While sections of Title VII use the term "employee" to refer not only to current employees,[25] the Court rejected the argument that a reference to "applicants for employment" in one section evidenced congressional intent to exclude former employees.[26] Nor did the Court find that the use of the term "individual" in two sections of Title VII indicated that the term "employee" would exclude former employees. Last, the Court found that "several sections of the statute plainly contemplate that former employees will make use of the remedial mechanisms of Title VII."[27] The Court found that "it would be destructive of this purpose of the

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[24] *Id.* ("That the statute could have expressly included the phrase 'former employees' does not aid our inquiry. Congress also could have used the phrase 'current employees.'"); *accord Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-24 (1992) (finding that the term "employee" in the ERISA statute covered a former insurance agent whose only relationship with his former employer was his receipt of fringe benefits; observing that the term "employee" has long been construed according to common-law agency doctrine, which authorizes considering numerous factors, including the "provision of employee benefits").

[25] *Id.* at 342 (interpreting sections regarding hiring, reinstatement, and discriminatory discharge claims, all of which do not involve current employees).

[26] *Id.* at 344 ("The use of the term 'applicants' in § 704(a) does not serve to confine, by negative inference, the temporal scope of the term 'employees.'").

[27] *Id.* at 345.

anti[-]retaliation provision for an employer to be able to retaliate with impunity[.]"[28] Thus, the Court held that former employees may also bring Title VII anti-retaliation claims because the term "employees" itself was ambiguous and neither the specific context in which it is used nor the statute's broader context resolved this ambiguity to the contrary.

C. THE SECOND, THIRD, AND (INITIALLY) THE ELEVENTH CIRCUITS HAVE APPLIED *ROBINSON* TO INTERPRET TITLE I TO PROTECT FRINGE BENEFITS RECIPIENTS.

The Second, Third, and Eleventh Circuits each applied *Robinson* to hold that disability retirees may bring Title I claims despite contrary circuit precedent.[29] Similar to *Robinson*, the Eleventh Circuit in *Bailey v. USX Corp.* had held that Title VII's anti-retaliation provision covers former employees.[30] However, before *Robinson*, the court declined to extend its *Bailey* holding to a disability retiree's Title I claim, because it would have rendered the QID definition

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[28] *Id.* at 346 (acknowledging the "persuasive force" of the Br. for the United States & EEOC as *Amici Curiae* 18-21) ("[E]xclusion of former employees from the protection of § 704(a) would undermine the effectiveness of Title VII . . . and would provide a perverse incentive for employers to fire employees who might bring Title VII claims.").

[29] The Third and Eleventh Circuits considered a two-year cap on LTDI benefits for mental but not physical disabilities. *See Johnson*, 273 F.3d at 1048; *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 605-08 (3d Cir. 1998). The Second Circuit heard appeals by over 2,800 New York City police officers and firefighters receiving disability retirement benefits who were barred from more lucrative plans. *See Castellano v. City of New York*, 142 F.3d 58, 66-70 (2d Cir.1998).

[30] *See* 850 F.2d 1506, 1509 (11th Cir. 1988) (noting that courts have also applied similar rationales to anti-retaliation provisions in the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.*, and in the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.*).

"meaningless."[31] But because the Supreme Court in *Robinson* found the term "employee" to be ambiguous due to the lack of a temporal qualifier, and because Title I imported this term from Title VII, the Eleventh Circuit could "no longer maintain that the term 'employee' unambiguously excludes former employees in the ADA."[32] The *Robinson* Court's emphasis on temporal qualifiers had made it "hard to argue that §§ 12112(b)(1)-(b)(3) unambiguously contemplate discrimination encountered solely by job applicants and/or current employees."[33]

Next, each circuit held that the plain language of Title I's antidiscrimination provisions was ambiguous. Applying *Robinson*, the courts found the QID definition ambiguous because it lacked a temporal qualifier. The *Ford* court observed that as with Title VII "Congress could have restricted the eligibility for plaintiffs under the ADA to *current* employees or could have explicitly broadened the eligibility to include *former* employees."[34] "Since Congress did neither

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[31] *Cf. Johnson*, 273 F.3d at 1041 (distinguishing *Gonzales*, 89 F.3d at 1529).

[32] *Id.*; *see also Ford*, 145 F.3d at 606 ("[T]he ADA is essentially a sibling statute of Title VII.").

[33] *Johnson*, 273 F.3d at 1045; *see also id.* at 1046 ("[F]ollowing *Robinson*, the distinction that we relied on in *Gonzales* between general anti-discrimination provisions and anti-retaliation provisions, can no longer be understood as dispositive of the meaning of the term 'qualified individual with a disability.'") (internal citation omitted).

[34] *Compare Ford*, 145 F.3d at 606-07 (emphasis original) *with Weyer*, 198 F.3d at 1111 ("Congress could reasonably decide to enable disabled people who can work with reasonable accommodation to get and keep jobs, without also deciding to equalize post-employment fringe benefits for people who cannot work.").

but still created rights regarding disability benefits, we are left with an ambiguity in the text of the statute regarding eligibility to sue under Title I."[35]

Following *Robinson*, each court next found ambiguity in the specific contexts where the statute used the term "employees" and "qualified individual." The Eleventh Circuit observed that the term QID "includes former employees in some sections, but not in others[.]"[36] Since a wooden interpretation of Title I's QID definition and antidiscrimination provision might strip a fringe benefits recipient of his ability to sue if he cannot work with or without reasonable accommodations,[37] such a construction "would permit employers to discriminate freely against disabled retirees who had been 'qualified individuals' up to the point of retirement, but who (i) no longer held employment positions, and/or (ii) were no longer able to perform the essential functions of their former employment due to infirmity."[38]

Finally, each circuit held that excluding fringe benefits recipients from Title I coverage would frustrate the statute's purpose. The Second Circuit resolved the tension between an exclusive QID definition and an inclusive antidiscrimination provision by finding that the QID definition simply did not apply to disability retirees in the way it did to other applicants or

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[35] *Id.* at 607.

[36] *Johnson*, 273 F.3d at 1045 (citing *Robinson*, 519 U.S. at 343-44).

[37] *See id.* at 1042 (quoting Judge Anderson) ("It would be counter-intuitive, and quite surprising, to suppose (as the majority nevertheless does) that Congress intended to protect current employees' fringe benefits, but intended to then abruptly terminate that protection upon retirement or termination, at precisely the time that those benefits are designed to materialize.").

[38] *Castellano*, 142 F.3d at 67.

employees.[39] Rather, it found that the ADA's internal logic and "broad remedial purpose required that disability retirees be considered to satisfy the "essential functions" element of the QID definition in order to bring suit.[40] Similarly, the Third and Eleventh Circuits resolved to effectuate "the rights that the ADA confers" notwithstanding the apparent "disjunction" between the QID definition and the prohibition on discrimination in regard to fringe benefits.[41] The Third Circuit held that "for the rights guaranteed by Title I to be fully effectuated, [it] would have to permit suits . . . by more than just individuals who are currently able to work with or without reasonable accommodations."[42] The Eleventh Circuit similarly found that the "provisions of Title I other than 42 U.S.C. § 12112(a) 'plainly contemplate that former employees will make use of the remedial mechanisms of' Title I of the ADA."[43]

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[39] *See id.* at 68 (finding that while "Congress was concerned that employers not be forced to hire, promote, or retain unqualified, disabled employees," with respect to fringe benefits, "Congress's expressed [*sic*] concern about qualifications is no longer implicated;" therefore, fringe benefits recipients who "no longer work or seek to work for their former employers . . . plainly need not perform the essential functions, or indeed *any* functions, of their former employment").

[40] *Id.* at 69; *see also id.* at 68 ("Provided that retired employees were qualified . . . while employed and on that basis became entitled to post-employment benefits, the purpose of the 'essential functions' requirement has been met.").

[41] *Johnson*, 273 F.3d at 1046 (quoting *Ford*, 145 F.3d at 605-06).

[42] *Ford*, 145 F.3d at 606.

[43] *Johnson*, 273 F.3d at 1045-46 (quoting *Robinson*, 519 U.S. at 345); *see also Castellano*, 142 F.3d at 68 (deeming post-employment protection against benefits-related discrimination just as,

D. THE SIXTH, SEVENTH, NINTH, AND (SUBSEQUENTLY) THE ELEVENTH CIRCUITS HAVE FOUND TITLE I TO EXCLUDE FRINGE BENEFITS RECIPIENTS.

By contrast, the Sixth, Seventh, Ninth, and the Eleventh Circuits either distinguished *Robinson* or in applying *Robinson* found that Title I did not protect fringe benefits recipients' claims regarding fringe benefits discrimination, despite similar facts.[44]

The Ninth Circuit found that "Title I unambiguously excludes totally disabled persons" because "Title I, unlike the section of Title VII at issue in *Robinson,* has a temporal qualifier."[45] The court construed the words "*can perform*" to restrict temporally a qualified individual to one who is "able to perform the essential functions of employment at the time that one is discriminated against[.]"[46] The court reasoned that the qualified individual definition requires contemporaneity since the phrase "can perform" "uses the present tense."[47] Likewise, the Ninth Circuit interpreted the present tense of both "holds" and "desires" to refer exclusively to job applicants, for which reason the definition was "designed to help people get and keep jobs, not to

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if not more warranted than against retaliation since "an employee's entitlement to post-employment fringe benefits arises . . . during his period of employment").

[44] *Compare Weyer*, 198 F.3d at 1107-08 *with Ford*, 145 F.3d at 603-04; *Slomcenski*, 432 F.3d at 1273-75 *with Johnson*, 273 F.3d at 1036-38; *Morgan*, 268 F.3d at 457 *with Castellano*, 142 F.3d at 63-66. The facts before the Sixth Circuit differed in that two plaintiffs challenged the reduction of their fringe benefits by the amount of public Social Security Disability Income (SSDI) benefits they later applied for and received. *See McKnight*, 550 F.3d at 520-22.

[45] *Weyer*, 198 F.3d at 1112 (internal quotations omitted).

[46] *Id.* (emphasis original).

[47] *Id.* at 1112.

help those no longer able to work get disability pay."[48] The Ninth Circuit's construction was adopted wholesale by the Sixth.[49] Both the Seventh Circuit and the Eleventh Circuit in *Slomcenski* also relied on the Ninth's decision.[50]

The Sixth, Seventh, Ninth, and Eleventh Circuits did not square the QID definition with its use in Section 102(b)(2), which expressly prohibits discrimination in regard to fringe benefits.[51] The Seventh Circuit found no ambiguity in how Title I uses the term "qualified individual," observing that Title I prohibits discrimination only against QIDs in contrast to the ADA's anti-retaliation provision, which expressly covers individuals regardless of disability.[52] Similarly, the Ninth Circuit rejected the Second and Third Circuit's interpretation that the right conferred by Section 102(b)(2) requires that Title I protect fringe benefits recipients, "because the statutes are not analogous. Title I of the [ADA], unlike Title VII in the [CRA], is unambiguous."[53]

Nor did the Sixth, Seventh, Ninth, Eleventh Circuits find that barring fringe benefits recipients from Title I claims creates ambiguity given the ADA's context as a whole. The Ninth

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[48] *Id.*

[49] *See McKnight*, 550 F.3d at 526-27 (discussing *Weyer* at length).

[50] *See Slomcenski*, 432 F.3d at 1280; *Morgan*, 268 F.3d at 457-58.

[51] *See* discussion *supra*, at Part II.A.

[52] *See Morgan*, 268 F.3d at 458 (comparing 42 U.S.C. §§ 12112(a), 12203(a) (1994)). While the court did compare across titles, it did not compare Section 102(a) to Section 102(b)(2), which prohibits specific forms of discrimination. *See* discussion *infra*, at Part III.B.

[53] *Weyer*, 198 F.3d at 1111; *see also Morgan*, 268 F.3d at 458 ("The difference is stark.").

Circuit cautioned against construing the gatekeeper Section 101(8) solely with a mind to effectuating the right conferred in Section 102(b)(3) when "[l]egislation often results from a delicate compromise among competing interests and concerns."[54] The Seventh Circuit went a step further by finding that allowing disability retirees "to complain about postemployment discrimination that does not involve retaliation would actually hurt them" by "creat[ing] perverse incentives."[55] It reasoned that requiring equality in fringe benefits would deter employers from offering them in the first place. Rather, an employer "would tell its employees to buy their own disability insurance or to rely on social security disability benefits should they become disabled."[56] In this way, circuit courts have split on whether *Robinson* should be applied to allow former employees with disabilities to bring Title I claims.

III. WHY SOME CIRCUIT COURTS HAVE INCORRECTLY CONSTRUED TITLE I TO EXCLUDE FRINGE BENEFITS RECIPIENTS

The circuit split may only continue to widen. In the First Circuit, three district courts have interpreted Title I to protect fringe benefits recipients, while one has not.[57] Two district courts

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[54] *Id.* at 1113 (enumerating the various of interests Congress had to consider); *see also id.* (eschewing the prospect of "overturning the nuanced compromise in the legislation, and substituting our own cruder, less responsive mandate for the law that was actually passed") .

[55] *Morgan*, 268 F.3d at 458.

[56] *Id.*; *see also id.* (hypothesizing that reduced incentives to provide fringe benefits would undermine Title I's purpose: "to draw workers with a disability into the workforce.").

[57] *Compare Hatch v. Pitney Bowes, Inc.*, 485 F.Supp.2d 22, 35 (D.R.I. 2007) *with Fletcher v. Tufts Univ.*, 367 F. Supp. 2d 99, 106 (D. Mass. 2005); *Iwata v. Intel Corp.*, 349 F. Supp. 2d 135, 147 (D. Mass. 2004) *and Conners v. Me. Med. Ctr.*, 42 F. Supp. 2d 34, 45 (D. Me. 1999).

have reached contrary conclusions.[58] The Tenth Circuit has not held directly on this issue, but did find that a Title I claimant satisfied the QID definition, even though he could not perform his existing job, so long as he could perform another available reassignment job.[59] Other circuits' interpretations of similar statutes indicate that they might go either way.[60] In this context, there is an enormous need to critique the justifications proffered by circuit courts that have barred fringe benefits recipients from Title I claims, especially when they have so held by relying on their misapplication of the rules of grammar, willful ignorance of ambiguities in Title I's use of the terms "employee" and QID, and failure to distinguish between the divergent goals of antidiscrimination and welfare statutes.

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[58] *Compare Lewis v. Aetna Life Ins. Co.*, 982 F. Supp. 1158, 1163 (E.D. Va. 1997) *with Rogers v. Dept. of Health & Envtl. Control*, 985 F. Supp. 635, 639-40 (D.S.C. 1997) (declining to follow *Lewis* but deciding on Title II grounds), *aff'd by* 174 F.3d 431 (4th Cir. 1999); *see also Fennell v. Aetna Life Ins. Co.*, 37 F.Supp.2d 40 (D.D.C. 1999), *aff'd on other grounds sub nom., EEOC v. Aramark*, 208 F.3d 266 (D.C. Cir. 2000).

[59] *See Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1161 (10th Cir. 1999); *but see McKnight*, 550 F.3d at 523 (characterizing *Smith*, 180 F.3d at 1161-62 as having "seemingly adopt[ed]" the bar to fringe benefits recipients "in *dicta*").

[60] *Compare Faris v. Williams WPC-I, Inc.*, 332 F.3d 316, 320 (5th Cir. 2003) (protected under the Family Medical Leave Act, 29 U.S.C. § 2601 *et seq.*) *with Beauford v. Father Flanagan's Boys' Home*, 831 F.2d 768, 771 (8th Cir.1987) (not protected under the Rehabilitation Act, 29 U.S.C. § 701 *et seq.*).

A. COURTS HAVE MISAPPLIED THE RULES OF GRAMMAR GOVERNING TENSE IN CONSTRUING THE QID DEFINITION TO CONTAIN A TEMPORAL QUALIFIER.

Tense has long played a role in statutory construction, and its prominent role only serves to emphasize the need for correct application of the rules of grammar that govern it. The Ninth Circuit and its companion circuits found that the QID definition contained a *Robinson* temporal qualifier by incorrectly applying the rules of grammar rules governing verb tense.[61] The Ninth Circuit interpreted the phrase "can perform" to require contemporaneity between the existence of a disability and the discriminatory act.[62] In so doing, the court mistakenly identified *can perform* as a present tense verbal phrase; rather, *can perform* contains a modal verb (can) and a bare infinitive (perform). Simply put, modal verb phrases do not possess tense; rather, modal verb forms, such as *can*, function as auxiliaries that accompany and confer modality on infinitive verb forms, such as *perform*.[63]

The unique context of the QID definition, reinforces Congress' rationale for employing a modal verb phrase. The modal verb form ensures that the QID definition covers both those who do and those who do not require reasonable accommodations.[64] In reference to someone who can perform essential job functions without reasonable accommodations, "can perform" likely has

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[61] *Weyer*, 198 F.3d at 527 (accusing the Second Circuit of having "manufactured ambiguity where none existed" by ignoring purported temporal qualifiers in Section 101(8)).

[62] *See generally* RODNEY HUDDLESTON, ENGLISH GRAMMAR 69-83 (1988).

[63] *See id*. at 79-82.

[64] 42 U.S.C. § 12111(8) (providing that a QID "means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position").

dynamic modality; the same phrase likely has epistemic modality in reference to an individual who can perform essential job functions with reasonable accommodations.[65] Had the Ninth Circuit interpreted the phrase "can perform" only to have dynamic modality, then its interpretation would have lent support to its ultimate conclusion that qualified individuals include only those who contemporaneously are capable of performing essential job functions. However, modality does not serve the same grammatical function as tense.[66] By relying on the purported tense of the verb form "can perform," the Ninth Circuit lacks justification for identifying a temporal qualifier á la *Robinson*.

The Ninth Circuit believed it found additional support for construing the QID definition to require contemporaneity in the terms "holds or desires."[67] However, the present tense generally does not refer to contemporaneous events, which happen in the immediate "now," but to events that happen generally or habitually. That is, "[s]ituations can be classified as either static (states of affairs, relations, etc.) or dynamic (actions, processes, events etc.)."[68] Whereas static situations endure beyond the moment of utterance, dynamic situations typically are not

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[65] *Kim can perform* may signify that Kim is capable of performing due to either extrinsic or intrinsic conditions. That is, *Kim can perform* alternatively because she possesses the inherent skills or abilities required by the action (dynamic modality) or because the surrounding circumstances allow her to complete the action (epistemic modality).

[66] *See* HUDDLESTON *supra* note 62, at 79.

[67] *See Weyer*, 198 F.3d at 1112; discussion *supra*, at Part II.D.2.

[68] *See* HUDDLESTON *supra* note 62, at 69.

understood in this way.[69] Thus, the phrase *Kim plays defensive forward* does not signify a dynamic situation where in the very moment of the utterance Kim plays the game in a certain manner; rather, it signifies a static situation where she generally or habitually plays the game in this way.[70] Had the QID definition instead contained the verbal phrase "is holding or is desiring" (present progressive tense), it would have dispositively restricted the action of holding or desiring to contemporaneous events. By contrast, because the present tense signifies an action that generally or habitually occurs, "holds or desires" is more similar to "generally or habitually holds or desires" than "is holding or is desiring." Therefore, the Ninth Circuit's construction of the "holds or desires" element of the QID definition relied on a misunderstanding of the present tense's grammatical function.[71]

Moreover, the Ninth Circuit's reliance on the present tense in construing Title I contrasts with how other courts have incorporated tense into statutory constructions. In the Supreme Court's similar tense-laden construction of the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, to permit citizen suits only for ongoing violations in the absence of administrative enforcement action, the Court reasoned that "the undeviating use of the present tense strongly suggests[] the harm sought to be addressed by the citizen suit lies in the present or the future, not in the past."[72] In addition to tense, however, the Court looked to phrases such as "which is in effect", "the violation of which is occurring in another State and is causing an adverse effect on the public

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[69] *See id.* at 69-70.

[70] *See id.* at 70.

[71] *See Weyer*, 198 F.3d at 1112 (construing the terms "can perform" and "desires or holds") .

[72] *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 59 (1987).

health," and the definition of "citizen" as a person "having an interest which is or may be adversely affected" by the defendant's violations of the Act.[73] While the being verb *is* expresses either a contemporaneous or general state or condition, the adverbial phrase *in effect* recommends a contemporaneous construction; both verbal phrases *is occurring* and *is causing* have present progressive tense, signifying contemporaneity; and *having* is a present participle, whose progressive aspect also implies contemporaneity. Similarly, in *Dole Food Co. v. Patrickson*, where the Court determined, in the absence of temporal qualifiers, that for foreign sovereign immunity purposes "the present tense" used in the phrase "a majority of whose shares or other ownership interest *is owned* by a foreign state," 28 U.S.C. § 1603(b)(2), requires contemporaneity between a company's instrumentality status and the time of suit, the Court construed this temporally ambiguous verb phrase in the context of the well-settled principle "that federal-diversity jurisdiction depends on the citizenship of the parties at the time suit is filed."[74] Thus, the Supreme Court's reliance on verbs' present tense together with other language indicating contemporaneity casts more doubt on circuit courts which have relied on verbs' present tense alone to construe a contemporaneity requirement in Title I's QID definition.

B. TITLE I DOES NOT UNAMBIGUOUSLY EXCLUDE FRINGE BENEFITS RECIPIENTS BECAUSE ITS USE OF THE TERMS "EMPLOYEE" AND "QUALIFIED INDIVIDUALS" IS AMBIGUOUS.

Even if the *Robinson* Court's holding that the term "employee" in Title VII is ambiguous may not in isolation require courts to find a similar terms in an analogous statute is also

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[73] *Id.* (quoting, respectively, 33 U.S.C. §§ 1365(f), (h), and (g)).

[74] 538 U.S. 468, 478 (2003) (cataloging cases).

ambiguous,[75] the *Robinson* rule warrants at minimum simultaneous consideration of the use of the terms "employee" and "qualified individual." However, circuits courts that have denied Title I coverage to fringe benefits recipients have not found that the term "employee" is ambiguous in the specific context in which the ADA uses it.[76] By terminating their inquiries into textual ambiguity at the plain language itself, however, these courts failed to consider whether how these terms are used in Title I creates ambiguity, as required by *Robinson*.[77] As it happens, the use of

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[75] *See Johnson*, 273 F.3d at 1063 ("The terms the *Gonzales* Court concluded had a 'plain and ordinary meaning' instead were found to be ambiguous by the Supreme Court.").

[76] Courts applying *Robinson* have justified terminating their inquiries upon finding that the language itself is unambiguous. *Weyer*, 198 F.3d at 1111 (quoting *Robinson*, 519 U.S. at 340) ("Our inquiry must cease if the statutory language is unambiguous *and* 'the statutory scheme is coherent and consistent.'") (emphasis added).

[77] The *Robinson* Court employed a simultaneous analysis of the totality of three factors, not a sequential, three-step test. *See* 519 U.S. at 341 ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, *and* the broader context of the statute as a whole.") (emphasis added); *see also* Jeffrey E. Dolan, Note, *Employment Discrimination Law – Sixth Circuit Denies Standing to Former Employees under Title I of Americans with Disabilities Act*, 43 SUFFOLK L. REV. 511, 516 (2010) ("The Sixth Circuit's over-reliance on the plain language of the text represents a misreading of the *Robinson* decision, which instructed courts to consider multiple factors when analyzing potential ambiguity in statutory language.").

the term "employee" in other sections of the statute strongly suggests that it is at least as ambiguous as it was in *Robinson*.

These courts' inquiries need have gone no further than Section 102(b)'s seven subsections: some appear to require a Title I plaintiff to satisfy the QID definition while others do not. Some subsections by their own terms prohibit certain acts that adversely affect an "applicant or employee because of the disability of such applicant or employee[.]"[78] By contrast, other subsections do not refer to QIDs but to persons with disabilities more generally.[79] Moreover, some subsections of Section 102 prohibit forms of discrimination on the basis of disability but not directed against QIDs.[80]

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[78] 42 U.S.C. § 12112(b)(1) (1994); *see also id.* at § 12112(b)(5)(A-B) (prohibiting denials of reasonable accommodations to "an otherwise *qualified individual with a disability* who is an applicant or employee" and denials of "employment opportunities to *a job applicant or employee who is an otherwise qualified individual with a disability*") (emphasis added).

[79] *See id.* at § 12112(b)(6) (prohibiting "using qualification standards, employment tests or other selection criteria that screen out or tend to screen out *an individual with a disability* or a class of individuals with disabilities") (emphasis added); *id.* at § 12112(b)(7) (prohibiting the discriminatory administration of employment-related tests "to a job applicant or *employee who has a disability* that impairs sensory, manual, or speaking skills") (emphasis added).

[80] *See, e.g.*, *McPherson v. O'Reilly Auto., Inc.*, 491 F.3d 726, 732 (8th Cir. 2007) ("To prevail [under Section 102(b)(4)], McPherson need not have a disability within the meaning of the ADA."); *Den Hartog v. Wasatch Acad.*, 129 F.3d 1076, 1081-82 (10th Cir. 1997) (finding that although Section 102(a) "standing alone, would provide no protection to Den Hartog, who does

Even if the various uses of these terms in Section 102(b)'s sub-provisions did not warrant at least some other justification for interpreting the fringe benefits provision as restricted to QIDs, Section 102(b)(2) itself is ambiguous: it prohibits discriminatory acts by with respect to "providing fringe benefits to *an employee*," rather than to a QID.[81] While it prohibits "participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's *qualified applicant or employee with a disability*," it defines one such relationship as "an organization providing fringe benefits to *an employee*[.]"[82] Section 102(b)(2)'s use of the "qualified employee" is unique not only within Title I but throughout the ADA. Even assuming that "qualified employee" denotes a "qualified individual who is also an employee," this term on its face is inconsistent with the bare term "employee" which appears in the same subsection. Regardless of which interpretation of the plain language of Section 102(b)(2) is correct, the terms "employee" and "qualified individual with a disability" are used throughout Section 102(b) in various ways.

Yet circuit courts denying Title I protections to fringe benefits recipients have not analyzed the language of Section 102's subsections in this kind of detail.[83] Rather, they have interpreted Section 102 only to protect qualified individuals as defined by Section 101(8). In so

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not suffer from any disability[,]" Section 102(b)(4) does); *see also* 42 U.S.C. § 12112(b)(3) (prohibiting discriminatory acts "that *have the effect* of discrimination on the basis of disability[] or that *perpetuate the discrimination of others*") (emphasis added).

[81] 42 U.S.C. § 12112(b)(2) (emphasis added).

[82] *Id.* (emphasis added).

[83] *See* discussion *supra*, at Part II.D.

doing, they overlook the express language of Section 102(b)(2). The Seventh Circuit found that Section 102(a) protects only qualified individuals, noted that by contrast the ADA's "retaliation provision protects individuals, period," but failed to discuss Section 102(b).[84] Similarly, without considering Section 102(b), the Ninth Circuit found that "[t]he plain language of the Act thus allows only those who are 'qualified individuals' to bring suit," on the basis of Section 102(a) in isolation and pre-*Robinson* holdings to this effect.[85] The Sixth Circuit, while acknowledging that the Second and Third Circuits had "concluded that a broader interpretation would comport with 'the plain purpose of sections 12112(a) and (b)(2): to provide comprehensive protection from discrimination in the provision of fringe benefits,'" merely countered that previous courts that nonetheless found the language of Title to be unambiguous.[86] In this manner, the Sixth and Ninth Circuits applied *Robinson* but rather than consider the meaning of "employees" in Section 102(b)(2), they limited their analysis to the meaning of QID in Sections 101(8) and 102(a).

C. TITLE I'S PURPOSE IS TO PROTECT BROADLY AGAINST DISCRIMINATION BASED ON DISABILITY IN ALL EMPLOYMENT CONTEXTS, NOT ONLY AGAINST QIDS.

A categorical exclusion of former employees receiving disability benefits from anti-discrimination protections runs contrary to the *Cleveland* Court's rationale for striking similar exclusions of plaintiffs who had previously testified to their inability to work to receive Social

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[84] *See Morgan*, 268 F.3d at 458 (citing 42 U.S.C. §§ 12112(a), 12203(a)).

[85] *Weyer*, 198 F.3d at 1108; *see id.* at 1109 (ruling that the fact that Weyer's claim regarded alleged discrimination that occurred at "a time following her employment does not alter the plain statutory requirement that she must be able to 'perform the essential functions of the employment position' to sue under Title I of the Act" because "[f]ive circuits have so held").

[86] *McKnight*, 550 F.3d at 525-26.

Security benefits.[87] By holding plaintiffs are not to be precluded from the ADA's protections, the *Cleveland* Court required courts to afford plaintiffs the opportunity to reconcile statements made in applying for SSDI benefits.[88] Although most courts considering Title I's coverage of fringe benefits recipients have not considered *Cleveland*, several courts, including those denying Title I coverage, have found that it applies not only to SSDI but also to employer-provided benefits.[89]

The *Cleveland* Court clarified that former employees' receipt of public benefits does not preclude Title I coverage as a matter of law because "there are too many situations in which an SSDI claim and an ADA claim can comfortably exist side by side."[90] First, an "SSA representation of total disability differs from a purely factual statement in that it often implies a context-related legal conclusion, namely, 'I am disabled for purposes of the Social Security Act.'"[91] Second, "when the SSA determines whether an individual is disabled for SSDI purposes, it does not take the possibility of reasonable accommodation into account."[92] Third, SSA

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[87] 526 U.S. at 802.

[88] *Id.* at 802-03.

[89] *See, e.g.*, *Slomcenski*, 432 F.3d at 1281; *Hatch*, 485 F. Supp. 2d at 35.

[90] *Compare Cleveland*, 526 U.S. at 802-03 *with* 145 F.3d at 605 (rather than "unearth an internal contradiction in the ADA," the plaintiff alleged "he could still work despite his disability" although "he simultaneously received benefits for being unable to work due to his disability").

[91] *Id.* at 802.

[92] *Id.* at 803.

inquiries "inevitably simplify, eliminating consideration of many differences potentially relevant to an individual's ability to perform a particular job."[93]

Indeed, these differences emerge because the two statutes "pursue different statutory purposes and require different, though related, inquiries into an individual's disability."[94] Sufficient divergence exists between the definitions of "disability" under the ADA and SSDI that, in some circumstances, an individual can claim truthfully both that she is unable "to engage in any substantial gainful activity" under SSDI but also a "qualified individual with a disability" under the ADA.[95] The *Cleveland* Court provided several examples for how plaintiffs may reconcile apparently contradictory statements.[96] Moreover, former employees may have

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[93] *Id.* at 804 (observing that 60 percent of all SSDI awards occurred where applicants' impairments were clearly one in an enumerated list).

[94] *Feldman v. Am. Mem'l Life Ins. Co.* 196 F.3d 783, 790 (7th Cir. 1999).

[95] *See Feldman*, 196 F.3d at 790; *see also Wilson v. Chrysler Corp.*, 172 F.3d 500, 504-05 (7th Cir. 1999); *Weigel*, 122 F.3d at 467-68; *Rascon v. U.S. W. Commun.*, 143 F.3d 1324, 1330-31 (10th Cir. 1998); *Swanks v. Wash. Metro. Area Transit Auth.*, 116 F.3d 582, 584 (D.C. Cir. 1997).

[96] *See* 526 U.S. at 807 (SSA eligibility determinations do not involve possible reasonable accommodations, SSDI benefits are available even when a recipient is working, discrimination claims may be filed pending an SSA eligibility determination, and a plaintiff's abilities may change in the interval between his application for benefits and a discriminatory act); *see also* Daniel B. Kohrman & Kimberly Berg, *Reconciling Definitions of "Disability:" Six Years Later,*

"chosen" to receive benefits for reasons that do not necessarily implicate their performance of essential job functions or the merits of their claims.[97] Empirical research also suggests that current and future employment conditions affect the number of fringe benefits applications relating to disability.[98]

None of the Circuits determining a fringe benefits recipients not to be eligible for Title I coverage have reconciled their holdings with the *Cleveland* decision. While SSDI may be

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Has Cleveland v. Policy Management Systems *Lived Up to Its Initial Reviews As a Boost for Workers' Rights?*, 7 MARQ. ELDER'S ADVISOR 29, 51-60 (2005) (discussing such cases).

[97] *See, e.g.*, *Sheehan v. City of Gloucester*, 321 F.3d 21 (1st Cir. 2003) (plaintiff was involuntarily retired based on his employer's belief that he was incapable of working); *Fox*, 247 F.3d 169 (plaintiff chose to retire and apply for SSDI before filing a hostile work environment claim); *Pearce-Mato v. Shinseki*, 2:10 cv-1029, 2012 WL 2116533 (W.D. Pa. June 11, 2012) (Rehabilitation Act) (plaintiff "chose" to retire or be terminated); *Harvey v. Wal-Mart La. L.L.C.*, 665 F. Supp. 2d 655 (W.D. La. 2009) (plaintiff chose to retire and apply for SSDI benefits after his new supervisor denied him accommodations he had previously received); *EEOC v. E.I. Du Pont de Nemours*, 347 F.Supp.2d 284 (E.D. La. 2004), *aff'd* 480 F.3d 724 (5th Cir. 2007) (plaintiff's employer repeatedly encouraged to get her to retire on disability).

[98] *See* H. J. Smoluk & Bruce H. Andrews, *Group Long-Term Disability Insurance Claims and the Business Cycle*, 32 J. OF INS. ISSUES 154, 155-56 (2009) (finding that "some . . . impaired individuals continuously evaluate both the overall economy and their personal economic/employment circumstances. Then, at some point, their perceptions of either their current or their expected future economic conditions (or both) trigger them to file a claim.").

distinguishable from private benefits plans which may not be required by statute, both private and SSDI benefits require applicants to make conclusory statements of total disability to receive benefits.[99] Moreover, giving undue to weight to the factual content of such conclusory statements obscures other factual circumstances that may induce people to claim total disability even where they feasibly could still perform essential job functions, including adverse employment actions that employees choose not to litigate. To cleave the working age population into the "can works" and the "cannot works," as did the Ninth Circuit,[100] fails to take into consideration the *Cleveland* factors for discerning the differences among various statutory definitions of disability and their underlying purposes. Moreover, restricting Title I to its "main purpose" of bringing qualified individuals into the workplace ignores its express prohibition on discrimination in regard to fringe benefits.[101]

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[99] *See* Bell, *supra* note **Error! Bookmark not defined.**, at 38; Diane Hill, *Employer-Sponsored Long-Term Disability Insurance*, 110 MONTHLY LAB. REV. 16, 17 (1987) ("During the first 12 to 24 months of sickness or injury, disability is usually defined as total if an employee is unable to perform his or her job. Afterwards, the definition of total disability becomes more restrictive, requiring that an employee be unable to engage in any gainful employment.").

[100] *Weyer*, 198 F.3d at 1112.

[101] *See McKnight*, 550 F.3d at 523 (quoting *Parker*, 99 F.3d at 186) ("The legislative history . . . indicates that the *main* purpose of Title I was to ensure that disabled persons could obtain and keep employment, and therefore, it was not intended to provide relief for [fringe benefits recipients]."); *compare also Morgan*, 268 F.3d at 458 (citing *Tyndall v. Nat'l Educ. Ctrs., Inc. of Cal.*, 31 F.3d 209, 215 (4th Cir. 1994)) ("*The* purpose of the Act's employment provisions is to

IV. WHY COURTS SHOULD INTERPRET THE ADAAA TO REQUIRE THAT FRINGE BENEFITS RECIPIENTS BE PERMITTED TO BRING TITLE I CLAIMS

Although the ADAAA does not expressly address narrow constructions of the Title I QID definition, it does strengthen arguments under a *Robinson* analysis for permitting fringe benefits recipients to bring Title I suits. Specifically, the ADAAA rejects the *Sutton* Court's analogous restriction of the ADA's "disability" definition that relied on a misinterpretation of the present tense, instructs courts to focus on whether an act constitutes discrimination on the basis of disability rather than on whether a plaintiff satisfies definitional criteria, and warrants constructions of the ADA such that afford a broad scope of protection against discrimination. For this reason, courts should not require that Title I plaintiffs receiving fringe benefits satisfy the QID definition at the time of suit, should interpret Title's threshold requirements in a way that allows plaintiffs to claim the substantive rights established therein, and should not interpret that plaintiffs' declarations required by public welfare statutes or policies act as waivers to protections against discrimination.

A. THE ADAAA EXPRESSLY REJECTED THE SUPREME COURT'S NARROW CONSTRUCTION OF TITLE I BASED ON ITS MISAPPLICATION OF THE RULES OF GRAMMAR.

Even if the Ninth Circuit had correctly applied the rules of grammar to construe a contemporaneity requirement, Congress expressly rejected the similar "*reasoning*" of the *Sutton* Supreme Court's construction of the phrase "substantially limits."[102] In the ADAAA, Congress

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draw workers with a disability into the workforce.") (emphasis added) *with Tyndall*, 31 F.3d at 215 (noting "the *primary* purpose of the ADA: to encourage employers to take on qualified individuals") (emphasis added).

[102] Pub. L. 110–325 § 2(b)(3) (emphasis added).

rejected "the requirement enunciated by the Supreme Court in *Sutton* . . . and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures[.]"[103] The *Sutton* Court held that any determination of whether a person meets the substantial limitation requirement must also account for mitigating measures "[b]ecause the phrase 'substantially limits' appears in the Act in the present indicative verb form[.]"[104] The Court considered the tense of "limits" to construe the ADA to require that "a person be contemporaneously—not potentially or hypothetically—substantially limited in order to demonstrate a disability."[105] The Court's construction of "substantially limits" rested on the same assumption made by the Ninth Circuit that the present tense grammatically limits the verbal phrase to contemporaneous actions.

In enacting the ADAAA, Congress rejected not only restrictive Supreme Court holdings but also specifically the Court's reasoning in *Sutton*.[106] Instead, Congress sought "to reinstate the

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[103] *Id.* at § 2(b)(2) (internal citation omitted).

[104] *Sutton*, 527 U.S. at 482. In identifying a "present indicative tense," the Court apparently conflated tense and mood. Verb tenses include (simple) present, present progressive, present perfect, etc.; moods include indicative, imperative, and subjunctive. Although the Court's construction does not turn on the mood of "limits," the Court's conflation belies its imprecision in applying the rules of grammar in construing statutory language.

[105] *Id.* at 482.

[106] *Compare* Pub. L. 110–325 § 2(b)(3) (the ADAAA's purpose includes "to reject the Supreme Court's *reasoning* in *Sutton*") *with id.* at § 2(b)(4) ("to reject the *standards* enunciated by the Supreme Court in *Toyota*) (internal citations omitted; emphases added).

reasoning of the Supreme Court in [*Sch. Bd. of Nassau Cnty., Fla. v. Arline*]."[107] The *Arline* Court determined that the Respondent satisfied the Rehabilitation Act's "handicapped individual" definition[108] because she showed that she had been regarded as having such an impairment "which substantially limits one or more of [her] major life activities[.]"[109] But the *Arline* Court did not interpret the substantial limitation element to require contemporaneity, partly because it did not consider the same prong of the "disability" definition.[110] Still, the Court conceivably could have otherwise construed the third "regarded as" prong to require plaintiffs to show that their impairments were causing substantial limitations at the time they were "regarded

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[107] *Id.* at § 2(b)(3) (internal citation omitted); *see also* 2008 Senate Statement of the Mgrs. to Accompany S. 3406 at 3, *in* Regulations To Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended, 76 Fed. Reg. 16978-01, 17004 (stating Congress' intent that constructions of the ADA track those of the Rehabilitation Act because "with [the latter's] generous and inclusive definition of disability, courts treated the determination of disability as a threshold issue but focused primarily on whether unlawful discrimination had occurred."); 2008 House Judiciary Comm. Rep. at 6, 6 n.6, *in id.* (noting that courts had interpreted the Rehabilitation Act broadly).

[108] The ADA's "disability" definition mirrors this "handicapped individual" definition.

[109] 480 U.S. 273, 279 (1987) (citing 29 U.S.C. § 706(7)(B)) (emphasis added). The Supreme Court analyzed Respondent's coverage under the third prong of even though she originally sought coverage in the trial court under the second prong.

[110] *Id.* at 279 (quoting *Davis*, 442 U.S. at 405-406, n. 6) ("A person who has a record of, or is regarded as having, an impairment may have no actual incapacity at all.").

as." However, by finding that "regarded as" plaintiffs do not necessarily need to be substantially limited at the time of the discriminatory acts they allege, the *Davis* and *Arline* Courts both implicitly ruled out a contemporaneity requirement in the substantial limitation element that the ADA "disability" definition imported from the Rehabilitation Act.[111] The ADAAA's express intent to reinstate the *Arline* Court's reasoning, which implicitly precluded a contemporaneity requirement, buttresses its intent to reject the *Sutton* Court's reasoning in construing "substantially limits" to include a contemporaneity requirement.

Not only did both the *Sutton* and the *Weyer* constructions rely on a misapplication of the rules of grammar governing tense, they also resulted in similar obstacles for would-be plaintiffs. By requiring that modifications be considered in substantial limitation determinations, the *Sutton* construction narrowed the ADA's protected class.[112] Similarly, by requiring that former employees be capable of performing essential job functions at the time alleged discrimination occurs, the *Weyer* construction also narrowed the ADA's protected class. Congress' purpose in enacting the ADAAA was to reinstate "a broad scope of protection," to require that the definition of disability "be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act," and to reject overly restrictive judicial and

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[111] *See Arline*, 480 U.S. at 283 ("Such an impairment might not diminish a person's physical or mental capabilities, but *could* nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment.") (emphasis added).

[112] *See* Pub. L. 110–325 § 2(a)(4-6); *see also id.* at § 2(a)(8) ("Congress finds that the current [EEOC] ADA regulations defining the term 'substantially limits' as 'significantly restricted' are inconsistent with congressional intent, by expressing too high a standard").

administrative interpretations of the ADA.[113] Congress' disapproval of the *Sutton* construction because it was overly restrictive likely implicates other similarly restrictive constructions, including the *Weyer* construction, especially those which rely on similar reasoning.[114]

B. THE ADAAA EXPRESSLY INSTRUCTS COURTS TO FOCUS ON COMPLIANCE WITH TITLE I'S SUBSTANTIVE OBLIGATIONS RATHER THAN ON ITS THRESHOLD CRITERIA.

However subtly, the ADAAA's modification serves to clarify congressional intent that Title I anti-discrimination provisions cover not only qualified individuals.[115] The ADAAA leaves the language of Section 102(b)(2) unchanged, but amends Section 102(a-b) to prohibit discrimination not merely directed against qualified individuals, but more broadly "on the basis of disability."[116] Per the ADAAA, Section 102(a) now generally prohibits discrimination "against a *qualified individual on the basis of disability* " and Section 102(b) defines the entire term "*discriminate against a qualified individual on the basis of disability*[.]"[117] By modifying

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[113] *Id.* at §§ 2(b)(1), 2(b)(1-6), 3(4)(A).

[114] *Cf.* Pub. L. 110–325 § 2(b)(3) (the ADAAA's purpose includes "to reject the Supreme Court's in *Sutton*" and "to reinstate the of the Supreme Court in *Arline*") (internal citations omitted) (emphasis added).

[115] *See* Anderson, *supra* note TBD, at 1284 ("One thing is clear—the ADAAA should finally move the judicial focus away from the definitional stage and onto the substantive rights[.]").

[116] 42 U.S.C.A. § 12112(a-b) (2012). The original Section 102(a) defined prohibited discrimination "against a qualified individual with a disability," and Section 102(b) defined the term "discriminate." 42 U.S.C. § 12112(a-b) (1994).

[117] 42 U.S.C.A. § 12112(a-b) (2012) (emphasis added); *see also* Pub. L. 110–325 § 5(a)(1) (striking "with a disability because of the disability of such individual" and inserting "on the

the original Section 102(a) so that it prohibits discriminatory acts based on disability rather than acts directed against persons with disabilities, the ADAAA clarifies that not all discriminatory actions prohibited by Section 102 are restricted to actions against "qualified individuals" per Section 101(8). By pegging the Title I anti-discrimination provision to the nature of the act rather than its target, the ADAAA's modification to Section 102(a) undermines the holdings of courts that have interpreted the ADA's antidiscrimination provisions to protect only QIDs.

C. THE ADAAA EXPRESSLY REINSTATES THE BROAD SCOPE OF PROTECTION CONGRESS HAD ORIGINALLY INTENDED WITH THE ADA.

The Ninth Circuit suggested that "Congress could reasonably decide to enable disabled people who can work with reasonable accommodation to get and keep jobs, without also deciding to equalize post-employment fringe benefits for people who cannot work."[118] Even without directly addressing whether Title protects fringe benefits recipients, the ADA's legislative history contains indications that Congress did not thus reasonably decide. Title I seeks to prohibit discrimination in virtually all aspects of the employment relationship.[119] Several

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basis of disability"); *id.* at § 5(a)(2) (striking "discriminate" and inserting "discriminate against a qualified individual on the basis of disability").

[118] *Weyer*, 198 F.3d at 1112; *see also McKnight*, 550 F.3d at 523 (quoting *Parker*, 99 F.3d at 186) ("The legislative history . . . indicates that the *main* purpose of Title I was to ensure that disabled persons could obtain and keep employment, and therefore, it was not intended to provide relief for [fringe benefits recipients].") (emphasis added).

[119] *See Johnson*, 273 F.3d at 1050 (quoting *EEOC v. Staten Island Savings Bank*, 207 F.3d 144, 149 (2d Cir. 2000)) (describing the language of Section 102(a) as "capacious"); *Castellano*, 142 F.2d at 68 ("all aspects of the employment relationship"); *Menkowitz v. Pottstown Mem'l Med.*

times, the record contains concerns about protecting employees' rights in regard to benefits, even if it does not specifically delineate covered Title I claimants.[120] Moreover, the ADAAA's Regulations state "[Section 102(a)] prohibits discrimination on the basis of disability against a qualified individual in *all* aspects of the employment relationship."[121] Indeed, the EEOC has consistently argued that Title I covers fringe benefits recipients[122] and only declined to address this issue in its Regulations because it believed existing language was sufficiently clear.[123]

Ctr., 154 F.3d 113, 126 n.2 (3d Cir. 1998) (quoting *Motzkin v. Trustees of Boston Univ.*, 938 F. Supp. 983, 996 (D. Mass. 1996)) ("virtually all aspects of the employment relationship"); *Conners*, 42 F. Supp.2d at 42 (citing 42 U.S.C.A. § 12101(b) (2012)) ("all aspects of the employment relationship"); *cf. Lewis*, 982 F. Supp. at 1163 ("So enormous a gap in the protection afforded by Title I would be clearly at odds with the expressed [*sic*] purpose of the ADA to address the major areas of discrimination faced day-to-day by people with disabilities[.]") (internal citations and quotations omitted).

[120] *See, e.g.*, H.R. Rep. 101-485(III), at 459 (May 15, 1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 459 (preventing employers from providing different benefits to employees with disabilities).

[121] 29 C.F.R. Pt. 1630(4), 76 Fed. Reg.16978-01, 17015 (emphasis added); *see also* EEOC, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS OF TITLE I OF THE AMERICANS WITH DISABILITIES ACT, EEOC-M-1A, at II-4.3100 (1992), *available at* http://www.ada.gov/taman2.html ("every aspect of employment . . . including fringe benefits").

[122] The Commission has filed *amicus curiae* briefs in at least five courts of appeals emphatically advancing that interpretation of the ADA. *See* discussion *supra*, at Part II.A.

[123] 29 C.F.R. Pt. 1630, 76 Fed. Reg. 16978-01, 16979.

That Title I was intended to protect fringe benefits recipients has become more apparent with the ADAAA's enactment, because the ADAAA aims to harmonize interpretations of the ADA with those of other civil rights statutes.[124] Multiple sections of the ADA import terms from Title VII or incorporate Title VII provisions by reference.[125] Like Section 102(b)(2), Title VII prohibits discrimination in regard to fringe benefits.[126] Unlike with Section 102(b)(2), courts have generally held that former employees may sue under Title VII in regard to not only

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[124] *Cf. Johnson*, 273 F.3d at 1061 n.1 (citing *Gonzales*, 89 F.3d at 1531-32 (Judge Anderson, dissenting) ("[I] t is clear that Congress intended for Title VII's provisions and the ADA's provisions to be interpreted similarly, as the ADA in many cases borrows terms from Title VII . . ., the statute's legislative history explicitly indicates that the ADA incorporates Title VII's definition for many terms it uses . . . and the EEOC's interpretive guidelines on the ADA indicate that the analysis performed under the statute is similar[.]")).

[125] 42 U.S.C.A. § 12111(4); *see also Gonzales*, 89 F.3d at 1527 (citing H.R. Rep. No. 485(II), 101st Cong., 2d Sess. 54, *reprinted in* 1990 U.S.C.C.A.N. 303, 336; 56 Fed. Reg. 35726, 35740 (July 26, 1991)) (observing that terms such as "employee" "are identical, or almost identical to those found in Title VII and should be given the same meaning") (internal quotations omitted).

[126] *See* 42 U.S.C.A. § 2000e-2(a)(1) (prohibiting discrimination "with respect to [the employee's] compensation, terms, conditions, or privileges of employment"); *see also Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998); *Herrnreiter v. Chicago Housing Auth.*, 315 F.3d 742, 744 (7th Cir. 2002) (cataloging cases).

retaliation but also discrimination in post-employment fringe benefits.[127] The legislative history of the ADAAA evidences congressional intent that "the bill modifies the ADA to conform to the structure of Title VII and other civil rights laws[.]"[128]

V. CONCLUSION

Although the ADAAA does not expressly affirm that fringe benefits recipients may bring Title I claims, it does lend support to this construction of Title I. By rejecting the reasoning of the *Sutton* Court, it undermines other constructions of Title I that rely on the misapplication of

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[127] *See, e.g.*, *EEOC v. J.M. Huber Corp.*, 927 F.2d 1322, 1331 (5th Cir. 1991) (retirement and profit sharing plans challenged by former employee); *Brown v. N.Y. State Teachers' Ret. Sys.*, 834 F.2d 299 (2d Cir. 1987) (challenge by two retired teachers of pension annuity benefits determined by sex-distinct mortality tables); *EEOC v. S.D. Wheat Growers Ass'n*, 683 F.Supp. 1302, 1304–05 (D.S.D. 1988) (continuation of health insurance coverage for spouse of former employee); *Pantchenko v. C.B. Dolge Co., Inc.*, 581 F.2d 1052, 1055 (2d Cir. 1978) ("In short, [Title VII] prohibits discrimination related to or arising out of an employment relationship, whether or not the person discriminated against is an employee at the time of the discriminatory conduct."); *see also id.* (quoting *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960) (L. Hand, C.J.) ("[I]t is a commonplace that a literal interpretation of the words of a statute is not always a safe guide to its meaning.").

[128] Joint Hoyer-Sensenbrenner Statement at 4, *in* 76 Fed. Reg. 16978-01, 17016; *see also* H.R. Rep. 110-730(II), at 21 (June 23, 2008), 2008 WL 2502301 ("This change harmonizes the ADA with other civil rights laws[.]"); *see also* Chai R. Feldblum, Kevin Barry & Emily A. Benfer, *The ADA Amendments Act of 2008*, TEX. J. CIV. LIB. & CIV. R. 187, 225-26 (2008).

grammatical rules to narrow its scope.[129] By prohibiting discrimination on the basis of disability rather than merely against qualified individuals, it undermines interpretations that Title I only protects those who satisfy the QID definition.[130] By affirming congressional intent to provide broad coverage and congressional preference that claims be decided on their merits, it undermines interpretations of Title I that would bar broad classes of claimants as a matter of law.[131] Thus, to the extent there was any doubt under the ADA, the ADAAA only reinforces the position of the Second and Third Circuits and the Eleventh Circuit in *Johnson* that courts to allow fringe benefits recipients to bring Title I claims.

But with the Sixth, Seventh, and Ninth Circuits' rulings, along with the Eleventh Circuit in *Slomcenski*, allowing Title I claims by fringe benefits recipients appears to be the minority view. Yet the circuit split has not been sufficient to warrant the Supreme Court's review; it has denied certiorari multiple times in similar cases involving Title I claims by fringe benefits recipients.[132] Even if the Court took up the matter, its analogous ruling in *Cleveland* that receiving public benefits does not foreclose Title I claims has led to "anything but a bonanza."[133] Moreover, its historically restrictive interpretation of the ADA casts doubt on how it will interpret the ADAAA.[134] While the ADAAA may tip the balance in circuits like the First, where

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[129] *See* discussion *supra*, at Part IV.A.

[130] *See* discussion *supra*, at Part IV.B.

[131] *See* discussion *supra*, at Part IV.C.

[132] *See, e.g.*, *McKnight*, 550 F.3d 519, *cert. denied* 129 S. Ct. 2862 (2009).

[133] *See* Kohrman, *supra* note 96, at 34.

[134] *Cf.* Pub. L. 110–325 § 2(b)(3-4) (rejecting *Sutton* and *Toyota*).

district courts have already embraced the minority view, other circuit courts have declined to distinguish between pre- and post-*Robinson* holdings in siding with the majority.[135]

Given the confused reasoning that majority circuits have relied upon, the EEOC should urgently adopt stronger interpretative guidance. While it declined to exercise its statutory authority to regulate Title I to clarify that the ADAAA strengthens its longstanding position that fringe benefits recipients may bring suit under Title I,[136] its position influenced the *Ford*, *Castellano, Johnson,* and other courts.[137] However, the position it has adopted in litigation is not nearly as forceful in its interpretive guidance.[138] It should seize the ADAAA's passage as an opportunity to hammer its message home by issuing additional interpretive guidance that articulates why the ADAAA undermines the rationale behind categorical bars on fringe benefits recipients from Title I claims. In this way, the EEOC can help to chip away at the restrictive interpretations of the Title I that have eroded antidiscrimination protections for former employees with disabilities.

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[135] *See, e.g., McKnight*, 550 F.3d at 528 (selectively citing concurring district court rulings).

[136] *See* discussion *supra*, at Part II.A.

[137] *See, e.g., Johnson*, 273 F.3d at 1061, n.1 (citing the EEOC's interpretive guidelines).

[138] *Compare* EEOC Notice No. 915.002 (emphasizing public benefits rather than employer-provided fringe benefits in its analysis) *with* Br. of the EEOC as Amicus Curiae, *Castellano*, No. 96-7920 (2d. Cir.) at 1-2 (arguing that barring fringe benefits recipients "would insulate blatantly discriminatory benefit programs from challenge under Title I of the ADA whenever the discrimination is directed at former employees. Such a result, in our view, would subvert Congress' intent to prohibit disability discrimination in the provision of benefits").