Vanderbilt Law Review

Volume 52
Issue 3 *Issue 3 - April 1999*

Article 5

4-1999

Disabled Former Employees Under the ADA: Unprincipled Decisions and Unpalatable Results

Austin L. McMullen

Disabled Former Employees Under the ADA: Unprincipled Decisions and Unpalatable Results

I. INTRODUCTION 770
II. JUDICIAL INTRRPRETATION OF ACTS PROTECTING DISABLED EMPLOYEES 772
A. *The Rehabilitation Act* 772
B. *The Americans with Disabilities Act* 774
1. Relationship Between the Anti-Retaliation Provisions of Title VII and the Claims of Former Employees Under the ADA 777
2. Benefits Receipt as an Indelible ADA Protection 779
3. Benefits Recipient as an Employment Position 779
4. Differing Benefit Levels for Various Disabilities 780
III. COURTS' RECENT EXPANSION OF PROTECTIONS FOR FORMER EMPLOYEES 781
A. *Expansion Based Upon ADA Ambiguity Resulting from the Statute's Failure to Specify When a Plaintiff Must Be a Qualified Individual* 782
B. *Expansion Based Upon ADA Ambiguity Resulting from Internal Inconsistency* 786
IV. ADDITIONAL PROBLEMS WITH THE *CASTELLANO* AND *FORD* APPROACHES 789
A. *The Problematic Application of* Castellano *and* Ford *to Claims of Discrimination in Termination* 789
B. *Congressional Approval of Decisions Limiting the Ability of Disabled Former Employees to Bring Claims Under the ADA* 790
V. CONCLUSION 793

I. INTRODUCTION

A number of disabled former employees have turned to the Americans with Disabilities Act ("ADA") to redress alleged discrimination in their termination or in the benefit plans of their former employers.[1] Several courts, however, have held that these plaintiffs are not "qualified individual[s] with a disability,"[2] and, therefore, may not recover under the ADA.[3] Other courts of appeals have recently found the ADA's proscription of discrimination in the "terms, conditions, and privileges of employment"[4] to contradict the definition of qualified individuals.[5] These courts resolved the ambiguity by allowing disabled former employees a federal right to sue their former employers for denying certain disability benefits.[6]

This difference of opinion presents a significant problem for employers, employees, and insurers. Support payments to the

---

1. The typical benefits discrimination case arises when a former employee complains of a distinction in an employer's disability benefits program between physically disabled former employees and mentally disabled former employees. *See, e.g.*, Parker v. Metropolitan Life Ins. Co., 875 F. Supp. 1321, 1324 (W.D. Tenn. 1995), *aff'd en banc*, 121 F.3d 1006 (6th Cir. 1997) (observing that plaintiff's former employer had provided disability benefits through age 65 for physically disabled former employees while providing only 24 months of benefits to mentally disabled former employees). In this situation, an employee suffers no harm from the distinction until he becomes disabled and no longer able to work, at which time he becomes eligible for benefits. A termination discrimination case arises when a former employee complains that his employer terminated the employment relationship because of the disability. *See, e.g.*, Rogers v. International Marine Terminals, 87 F.3d 755, 757-59 (5th Cir. 1996) (finding that plaintiff suffered an ankle injury rendering him unable to work and was subsequently terminated during a reduction in production). In this situation, an employee is unable to work at the time of termination. *See id.* at 759.

2. 42 U.S.C. § 12112(a) (1994).

3. *See, e.g.*, EEOC v. CNA Ins. Cos., 96 F.3d 1039, 1045 (7th Cir. 1996) (holding employee lacked standing to sue under Title I of the ADA); Gonzales v. Garner Food Servs., Inc., 89 F.3d 1523, 1526-27 (11th Cir. 1996) (holding employee failed to satisfy the "qualified individual with a disability" requirement, as the employee was not employed during alleged discrimination); *Rogers*, 87 F.3d at 759, 761 (employee was not a "qualified individual with a disability" nnder the ADA because he was unable to attend work); Fobar v. City of Dearbern Heights, 994 F. Supp. 878, 884 (E.D. Mich. 1998) (holding employee does not satisfy ADA's "qualified individual with a disability" definition because he was unable te perform police officer duties); Dickey v. Peoples Energy Corp., 955 F. Supp. 886, 889-90 (N.D. Ill. 1996) (holding plaintiff lacked standing to sue under ADA when he failed to consistently perform essential job functions); *Parker*, 875 F. Supp. at 1326 (granting defendants' motions to dismiss for plaintiff's failure to sbow standing under tlie ADA).

4. 42 U.S.C. § 12112(a).

5. *See* Ford v. Schering-Plough Corp., 145 F.3d 601, 606-07 (3d Cir. 1998) (finding ambiguity in provision's text defining "employee"), *cert. denied*, 119 S. Ct. 850 (1999); Castellano v. City of New York, 142 F.3d 58, 69 (2d Cir. 1998) (observing that Congress left textual aınbiguity in the ADA's provision as to "employee"), *cert. denied*, 119 S. Ct. 60 (1998).

6. *See Ford*, 145 F.3d at 607; *Castellano*, 142 F.3d at 69.

disabled amount to billions of dollars annually,[7] and a large percentage of current workers will ultimately suffer a disability.[8] Given these economic and demographic realities, if the approach of the Second and Third Circuits gains momentum, litigation on the issue will force a great number of employers and insurers to defend the structure of their benefit plans. While this litigation will not likely force employers and insurers to change their plans to end discrimination among disabilities—discrimination that the ADA does not prohibit[9]—the cost of this litigation will naturally pass first to employers,[10] and then to consumers.

This Note argues that those courts of appeals that granted a right to sue under the ADA to former employees alleging discrimination in post-employment benefits found ambiguity where none existed. In so doing, these courts rendered useless the "essential functions" requirement of the ADA. Besides reaching a result contrary to the express language of the Act, these courts leave unresolved the question of eligibility to sue in termination discrimination cases, where ADA protection is impossible by the terms of the statute. This serves only to complicate matters for employers, who must, under the holdings of these courts, address the possibility of discrimination in their benefits plans and who, given the implications of these decisions, may be forced to retain disabled employees unable to perform the essential functions of their jobs.

---

7. The value of support payments to the disabled and lost productivity from underutilization of the skills of disabled workers totals $200 to $300 billion annually. *See* Ben Cristal, Note, *Going Beyond the Judicially Prescribed Boundaries of the Americans with Disabilities Act*, 13 HOFSTRA LAB. L.J. 493, 495 (1996) (citing Tony Coelho, *Disabilities Laws Work*, ATLANTA J. CONST., Aug. 4, 1995, (Letters to the Editer), at A12).

8. One in five people will experience a diagnosable mental illness in his life. *See* DEBORAH ZUCKERMAN ET AL., THE ADA AND PEOPLE WITH MENTAL ILLNESS: A RESOURCE MANUAL FOR EMPLOYERS 60 (citing OFFICE OF SCIENTIFIC INFORMATION, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, NUMBER OF U.S. ADULTS WITH MENTAL DISORDERS (1992)). This figure, which represents the probability of mental disability, when combined with the probability for physical disability, makes it clear that disabilities will cut short the careers of many Americans.

9. *See, e.g.*, *Ford*, 145 F.3d at 608, 614 (concluding that the ADA prohibits discrimination between individuals with disabilities and non-disabled individuals, not discrimination among various disabilities); *Castellano*, 142 F.3d at 70 (same).

10. *See* Steven B. Epstein, *In Search of a Bright Line: Determining When an Employer's Financial Hardship Becomes "Undue" Under the Americans with Disabilities Act*, 48 VAND. L. REV. 391, 440-41 (1995) (suggesting that ambiguity in ADA terms will result in litigation costs to employers); *see also* Recent Case, *Third Circuit Holds That Unemployable Former Employees May Sue Employer:* Ford v. Schering-Plough Corp., 112 HARV. L. REV. 1118, 1118, 1123 (1999) (suggesting that the Third Circuit's decision to find a right to sue former employers for alleged discrimination in post-employment benefits may result in increased litigation costs).

Part II of this Note reviews the historical development of federal statutory protections for disabled employees under the Rehabilitation Act and the ADA and explains the judicial conclnsion that neither act protects former employees who are unable to perform the essential functions of their former jobs. Part III examines the recent holdings of the Second and Third Circuits and argues that these courts arrive at a result contrary to the express language of the statute. Part IV argues that, in light of the limitations placed on the ADA, Congress—not the judiciary—has the option of changing the meaning of the statute. In addition, this Note observes that the application of the Second and Third Circuits' benefits discrimination reasoning to discrimination in termination cases is irrational. Given the express language of the ADA and the silence of Congress on the issue, courts should continue to interpret the ADA as not providing a cause of action for former employees.

II. JUDICIAL INTERPRETATION OF ACTS PROTECTING DISABLED EMPLOYEES

The Rehabilitation Act of 1973 was the first law to prohibit discrimination against otherwise qualified persons with disabilities.[11] Yet the Rehabilitation Act did not go so far as to protect completely disabled former employees from discrimination.[12] Since the ADA shall be interpreted consistently with the Rehabilitation Act,[13] a number of courts have relied on the earlier act and refused to extend the ADA's protectious to completely disabled former employees.[14]

A. The Rehabilitation Act

The Rehabilitation Act protects the employment positions and benefits of employees and participants in programs receiving federal financial assistance.[15] Under the Act, no such program can discrim-

---

11. *See* IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT: RIGHTS AND RESPONSIBILITIES OF ALL AMERICANS 11, 18 (Lawrence O. Gostin & Henry A. Beyer eds., 1993).

12. *See* Beauford v. Father Flanagan's Boys' Home, 831 F.2d 768, 771 (8th Cir. 1987) (holding that a disabled plaintiff unable to perform the functions of her job is ineligible to sue under the Rehabilitation Act).

13. *See* 42 U.S.C. § 12117(b) (1994) (stating that the ADA and Rehabilitation Act are to be interpreted in a manner that "prevents imposition of inconsistent or conflicting standards").

14. *See* Parker v. Metropolitan Life Ins. Co., 875 F. Supp. 1321, 1326 (W.D. Tenn. 1995) *aff'd en banc*, 121 F.3d 1006 (6th Cir. 1997).

15. *See* 29 U.S.C.A. § 794(a) (West 1998) ("No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded

inate against an otherwise qualified handicapped individual solely because of his handicap.[16]

The applicability of the Rehabilitation Act to individuals who are unable to fulfill certain program requirements due to their handicap quickly became an issue.[17] In *Southeastern Community College v. Davis*, the Supreme Court rejected the proposition that the Rehabilitation Act's protections extended to individuals who would be able to fulfill the requirements of a position or program were it not for their handicap.[18] Instead, the Court held that under the statute's plain language, protection extended only to handicapped individuals able to fulfill the requirements of a program in spite of their handicap.[19] The Court observed that allowing the disabled access to programs for which they are qualified notwithstanding their handicap reinforced Congress's intent to provide even-handed treatment of individuals with disabilities.[20]

The Eighth Circuit addressed a similar question when an individual's disability left her unable to perform some of the functions of her job.[21] The court held that the Rehabilitation Act did not provide

---

from the participation in, be denied the benefits of, or be subjectod to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.").

16. *See id.*

17. *See* Southeastern Community College v. Davis, 442 U.S. 397, 400 (1979). In *Southeastern*, a student at a state college receiving federal funds sought training as a nurse. *Id.* The college denied her access to the nursing program after learning of the student's hearing disability. *See id.* at 401-02. The college concluded that the student's ability to hear only when able to read a person's lips made the student's practice of nursing unsafe. *See id.* at 401.

18. *Id.* at 406. The Court observed that "[t]aken literally, this holding would prevent an institution from taking into account any limitation resulting from the handicap, however disabling." *Id.* Under this interpretation, a blind person possessing all the qualifications for driving a bus except for the ability to see would be "otherwise qualified" for the position of bus driver. *See id.* at 407 n.7. The Court discarded the notion "that a person need not meet legitimate physical requirements in order to be 'otherwise qualified,'" instead finding that requiring a person to meet the requirements of a program came closer to the plain meaning of the statute. *Id.* at 406. The Court found support for this conclusion in the regulations promulgated by the Department of Health, Education, and Welfare. *See id.*

19. *See id.*

20. *See id.* at 410. The Court rejected a more expansive view of congressional intont—that Congress, through the Rehabilitation Act, imposed an obligation on programs receiving federal assistance to take measures to overcome the disabilities caused by handicaps. *See id.* The Rehabilitation Act placed this obligation on the federal government, but not upon state agencies such as Southeastern Community College. *See id.* at 410-11.

21. *See* Beauford v. Father Flanagan's Boys' Home, 831 F.2d 768 (8th Cir. 1987). The case involved a plaintiff who had been under the defendant's employ for seven years when she was hospitalized and terminated. *See id.* at 769. An arbitrator, acting under the terms of the plaintiff's employment contract, found that the tormination was procedurally improper and ordered reinstatement. *See id.* at 769-70. After reinstatement, plaintiff notified defendant of her inability to work and applied for benefits under a salary continuation program, a disability insurance program, and a health insurance program. *See id.* at 770. When defendant refused to

a cause of action for individuals whose disabilities leave them completely unable to work because, under the Supreme Court's reasoning in *Southeastern Community College*, these individuals are not "otherwise qualified."[22]

B. The Americans with Disabilities Act

The Rehabilitation Act prohibited the federal government, its contractors, and recipients of federal funds from discriminating against qualified individuals with disabilities.[23] The Americans with Disabilities Act went farther. The ADA's protections apply not just to recipients of federal funds but to employers engaged in industries affecting interstate commerce.[24]

As with the Rehabilitation Act, courts soon faced the issue of discrimination against former employees. In *Parker v. Metropolitan Life Insurance Co.*, the court held that the ADA's protections do not apply to former employees who are unable to work.[25] The plaintiff sued under the ADA when her disability benefits expired.[26] Plaintiff's employer had provided long-term disability benefits that distinguished disability arising from mental disorders, for which a disabled former employee collected twenty-four months of benefits, from disability based upon physical disorders, for which a disabled former employee received benefits until age sixty-five.[27] In adjudicating the ADA Title I claim, the court relied upon the Eighth Circuit's holding that, under the Rehabilitation Act, a completely

---

provide the salary and health insurance benefits, the plaintiff sued. *See id.* The district court found that the Rehabilitation Act applied to defendant because of defendant's receipt of federal funds, but held that the Act did not apply to plaintiff because she was no longer able to perform the functions of her job. *See id.* at 770-71.

22. *See id.* at 771. The Eighth Circuit observed that while the equities of the case may suggest a contrary result, the language of the Rehabilitation Act is clear. *See id.* ("Though it may seem undesirable to discriminate against a handicapped employee who is no longer able to do his or her job, this sort of discrimination is simply not within the protection of [the Rehabilitation Act].").

23. *See* Statement by President George Bush Upon Signing S.933, 26 WEEKLY COMP. PRES. DOC. 1165-66 (July 30, 1990), *reprinted in* 1990 U.S.C.C.A.N. 601-02.

24. *See* 42 U.S.C. § 12111(5)(A) (1994). The ADA also limits the term "employer" to those business entities that have employed 15 or more employees during each working day for 20 or more consecutive calendar weeks. *See id.* During the two year period immediately following the effective date of the Act, the business entity must have employed 25 or more employees during each working day for 20 or more consecutive calendar weeks to be considered an "employer" under the Act. *See id.*

25. Parker v. Metropolitan Life Ins. Co., 875 F. Supp. 1321, 1326 (W.D. Tenn. 1995), *aff'd en banc*, 121 F.3d 1006 (6th Cir. 1997).

26. *See id.* at 1324.

27. *See id.*

disabled former employee is not "otherwise qualified."[28] Since Congress intended the ADA to be interpreted consistently with the Rehabilitation Act,[29] the court found a disabled former employee not a "qualified individual with a disability."[30]

The Eleventh Circuit later rejected a similar claim of post-employment benefits discrimination in *Gonzales v. Garner Food Services, Inc.*[31] As a Garner employee, plaintiff's decedent, Bourgeois, was entitled to health care benefits of up to $1 million.[32] After Bourgeois was diagnosed with AIDS, Garner terminated him, prior to the effective date of the ADA.[33] Bourgeois continued his health care coverage under COBRA.[34] Garner subsequently amended its benefit plan to limit AIDS benefits to $10,000 annually and $40,000 lifetime.[35] At the time of his death, Bourgeois had exhausted his Garner benefits, and claims totaling $90,000 had been denied.[36]

The court analyzed plaintiff's ADA claim and noted that the decedent's termination and the reduction in AIDS benefits occurred before the ADA became effective.[37] Plaintiff nonetheless alleged that maintaining the limitation on AIDS benefits beyond the effective date of the ADA—in effect discrimination between plan members with AIDS and members without AIDS—constituted a violation of the general rule of Title I.[38] While both parties in *Gonzales* agreed that health care benefits constitute one of the "terms, conditions, and privileges of employment" protected from unlawful discrimination

---

28. *See id.* at 1325 (citing Beauford v. Father Flanagan's Boys' Home, 831 F.2d 768 (8th Cir. 1987)).

29. *See* 42 U.S.C. § 12117(b) (1994) (stating that the ADA and Rehabilitation Act are to be interpreted in a manner that "prevents imposition of inconsistent or conflicting standards").

30. *See Parker*, 875 F. Supp. at 1326:

> As with plaintiff in the present case, it may seem undesirable and perhaps unpalatable that a tetally disabled individual is not entitled to relief under Title I of the ADA. However, the plain language of the Act clearly indicates that the ADA was designed to afford relief only to those individuals with disabilities who can perform the essential functions of the job that they hold or seek.

31. Gonzales v. Garner Food Serv., Inc., 89 F.3d 1523 (11th Cir. 1996).

32. *See id.* at 1524.

33. *See id.*

34. *See id.* The Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA") requires employers to allow former employees to continue coverage under the employer's group health insurance plan for up to 18 months following termination of employment. *See id.* at 1524 n.3 (citing 29 U.S.C. §§ 1161-1162 (1994)).

35. *See Gonzales*, 89 F.3d at 1524.

36. *See id.* at 1525.

37. *See id.*

38. *See id.*

under the ADA,[39] the court found Bourgeois not a qualified individual with a disability and therefore unprotected from discrimination.[40] The Eleventh Circuit reached this conclusion after observing that Bourgeois neither held nor desired to hold a position with Garner when the discriminatory conduct occurred, but that Bourgeois was instead a participant in the health care plan only by virtue of his status as a former employee.[41]

Disabled former employees have not restricted their actions to claims of benefits discrimination. In *Rogers v. International Marine Terminals*, the Fifth Circuit held that a plaintiff unable to perform the functions of his job at the time of termination is not a qualified individual with a disability under the ADA.[42] The *Rogers* plaintiff took paid sick leave for pain in his ankle; when his sick leave expired, he received a year of disability benefits through a company plan.[43] Plaintiff underwent ankle surgery, but his physician did not approve his return to work until the end of the one year disability period.[44] Eleven months earlier the employer downsized and terminated plaintiff, ceasing his disability benefits.[45] Plaintiff admitted to his inability to work at the time of termination, so the Fifth Circuit found him not a "qualified individual" under the Act.[46]

---

39. *Id.* at 1526. Generally, the ADA prohibits discrimination in the "terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a) (1994). In its explanation of the Act, the House Committee on Education and Labor stated that:

> [E]mployers may not deny health insurance coverage completely to an individual based on the person's diagnosis or disability. For example, while it is permissible for an employer to offer insurance policies that limit coverage for certain procedures or treatments, e.g., only a specified number of blood transfusions per year, a hemophiliac who exceeds this treatment limit may not be denied coverage for other conditions, such as a broken leg or for heart surgery, because of the existence of the hemophilia .... All people with disabilities must have equal access to the health insurance coverage that is provided by the employer to all employees.

H.R. REP. NO. 101-485(II), at 59 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 341. Similarly, the House Committee on the Judiciary, to which the bill was referred in order te establish a clear and comprehensive prohibition on discrimination on the basis of disability, stated that:

> [E]mployers may not deny health insurance coverage completely to an individual based on the person's diagnosis or disability. For example, it is permissible for an employer te offer insurance policies that limit coverage for certain procedures or treatments .... It would not be permissible, however, to deny coverage to individuals ... who are affected by these limits on coverage for procedures or treatments, for other procedures or treatments connected with their disability.

H.R. REP. NO. 101-485(III), at 38 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 460-61.

40. *See Gonzales*, 89 F.3d at 1526.

41. *See id.*

42. Rogers v. International Marine Terminals, Inc., 87 F.3d 755, 759 (5th Cir. 1996).

43. *See id.* at 757.

44. *See id.*

45. *See id.*

46. *See id.* at 759. The Fifth Circuit may have applied the protections of the ADA te Rogers had he been able to return to work in a period of time less than 11 months from the date

In reaching the conclusion that disabled former employees are not "qualified individuals" under the ADA, courts have had to deal with a number of counter-arguments. Some plaintiffs have analogized the ADA to Title VII and suggested that, given Title VII's protection of former employees from post-employment retaliation, the ADA should also protect former employees from post-employment discrimination.[47] Other plaintiffs have argued that, despite the "essential functions" requirement, Congress must have intended the ADA to protoct former employees because many employment benefits are realized after employment.[48] Still other plaintiffs have suggested that their status as a benefits recipient qualifies as an employment position, the essential functions of which they are able to fulfill.[49] Finally, some plaintiffs have proposed that Congress intended the ADA to prohibit discrimination among individuals with various disabilities.[50]

1. Relationship Between the Anti-Retaliation Provisions of Title VII and the Claims of Former Employees Under the ADA

Some ADA plaintiffs have asserted that former employees should be protected from post-employment discrimination just as former employees are protected from post-employment retaliation under Title VII of the Civil Rights Act of 1964.[51] Title VII prohibits retaliation against employees or applicants who oppose unlawful employment practices or participate in the processing of an unlawful employment practice claim.[52] Although the text of Title VII limits anti-retaliation protection to employees and applicants, the Supreme Court has expanded its reach to former employees.[53]

---

of termination. *See* Carr v. Reno, 23 F.3d 525, 530 (D.C. Cir. 1994) ("An essential function of any . . . job is an ability to appear for work . . . and to complete assigned tasks *within a reasonable period of time*" (emphasis added)), *quoted in Rogers*, 87 F.3d at 759.

47. *See* EEOC v. CNA Ins. Cos., 96 F.3d 1039, 1045 (7th Cir. 1996); Gonzales v. Garner Food Servs., Inc., 89 F.3d 1523, 1527 (11th Cir. 1996).

48. *See Gonzales*, 89 F.3d at 1526.

49. *See CNA*, 96 F.3d at 1043; Dickey v. Peoples Energy Corp., 955 F. Supp. 886, 889-90 (N.D. Ill. 1996).

50. *See* Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006, 1015-19 (6th Cir. 1997) (en banc), *cert. denied*, 118 S. Ct. 871 (1998); Cramer v. Florida, 885 F. Supp. 1545, 1550-51 (M.D. Fla. 1995), *aff'd*, 117 F.3d 1258 (11th Cir. 1997).

51. *See* 42 U.S.C. § 2000e-2(a)(1) (1994). Title VII generally prohibits an employer's refusal to hire individuals or discharge employees based upon race, color, religion, sex, or national origin. *See id.*

52. *See* 42 U.S.C. § 2000e-3(a) (1994).

53. *See* Robinson v. Shell Oil Co., 519 U.S. 337, 345-46 (1997); *see also* Veprinsky v. Fluor Daniel, Inc., 87 F.3d 881, 890-91 (7th Cir. 1996) (holding that former employees may bring an

Courts have used two lines of reasoning in rejecting the proposition that, by analogy to Title VII, disabled former employees should have a right of action under the ADA. First, retaliation claims have a nexus to employment while post-employment benefits discrimination claims have no such connection.[54] Second, realizing the purpose of Title VII requires expanding protection to former employees, while no such expansion is necessary to effectuate the purpose of the ADA.[55] Post-employment retaliation in Title VII actions has a nexus to the employment relationship because the action against which the former employer retaliates occurred during the former employee's employment.[56] This nexus is absent, however, from former employees' complaints of discrimination in benefits programs since no discrimination occurs during employment.[57] Furthermore, the original expansion of Title VII anti-retaliation protection to former employees was based on the remedial nature of the statute: without protection of former employees, the anti-retaliation provisions of Title VII would be rendered useless.[58] The ADA, however, contains no anti-retaliation provision; allowing former employees to sue for benefit discrimination is thus unnecessary to effectuate the purpose of the Act.[59] In addition, allowing disabled former employees to bring actions would actually render meaningless the express provision of the ADA that requires that an individual be able to perform the essential functions of an employment position in order to sue.[60] Given the primary canon of statutory interpretation—that a court should construe a statute in accordance with its ordinary meaning[61]—courts have elected to give effect to the

---

action under Title VII's anti-retaliation provisions when a former employer retaliates against a protected activity that occurred while the individuals were employees); Bailey v. USX Corp., 850 F.2d 1506, 1509 (11th Cir. 1988) (holding that the remedial purpose of Title VII requires that the plain meaning rule not apply to retaliation cases brought by former employees).

54. *See CNA*, 96 F.3d at 1045 (distinguishing the facts of *Veprinsky* from the case at bar).

55. *See* Gonzales v. Garner Food Servs., Inc., 89 F.3d 1523, 1528-29 (11th Cir. 1996).

56. *See CNA*, 96 F.3d at 1045 ("[T]he law in this Circuit permits former employees who are suffering retaliation for protected activity while they were employees to bring an action under Title VII anti-retaliation provisions").

57. *See id.* Furthermore, discrimination in fringe benefits, which involves a distinction between whole classes (e.g., the mentally disabled versus the physically disabled), lacks the protected individual interest that exists in retaliation cases. *See id.*

58. *See Gonzales*, 89 F.3d at 1527-29 (citing Bailey v. USX Corp., 850 F.2d 1506, 1509 (11th Cir. 1988)).

59. *See id* at 1528-29.

60. *See* 42 U.S.C. § 12111 (8) (1994); *id.* § 12112 (a) (1994).

61. *See Gonzales*, 89 F.3d at 1528 (citing Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980); *Bailey*, 850 F.2d at 1506, 1509).

express provisions of the ADA rather than to loosely analogous language in Title VII.[62]

2. Benefits Receipt as an Indelible ADA Protection

Some plaintiffs have argued that since the benefits of many plans are realized during the post-employment period, Congress must have intended the ADA to protect former employees.[63] The *Gonzales* court rejected this proposition and instead looked to the text of the ADA and its legislative history to reach the conclusion that the Act covers only employees and applicants able to perform the essential functions necessary for employment.[64] As the *Beauford* and *Parker* courts observed, the protections of the Rehabilitation Act and the ADA, respectively, do not apply to all individuals with disabilities but only to "qualified" individuals with disabilities.[65] The Act defines "qualified" individuals as those "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[66] Thus, while some benefits may be realized after employment, the express language of the Act limits its protections to individuals who are currently employed or who currently seek employment.[67]

3. Benefits Recipient as an Employment Position

At least one ADA plaintiff has argued that the Act's protections should apply to a disabled former employee because he holds the employment position of benefits recipient.[68] This argument finds its roots in the definition of "qualified individual," which is limited to one

---

62. *See CNA*, 96 F.3d at 1045; *Gonzales*, 89 F.3d at 1528-29.

63. *See Gonzales*, 89 F.3d at 1526 ("Appellant . . . argues that since the fruits of many fringe benefits are realized during the post-employment period, Congress must have intended former employees to be protected under the ADA as well.").

64. *See id.* at 1526-27.

65. *See* 42 U.S.C. § 12112(a) (1994); Beauford v. Father Flanagan's Boys' Home, 831 F.2d 768, 771 (8th Cir. 1987); Parker v. Metropolitan Life Ins. Co., 875 F. Supp. 1321, 1325-26 (W.D. Tenn. 1995) *aff'd en banc*, 121 F.3d 1006 (6th Cir. 1997).

66. 42 U.S.C. § 12111(8) (1994). The House Committee on Education and Labor included the "essential function" language to "ensure that employers can continue te require that all applicants and employees, including those with disabilities, are able to porform the essential, i.e., the non-marginal functions of the job in question." H.R. REP. NO. 101-485(II), at 55 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 337.

67. *See Gonzales*, 89 F.3d at 1527-28 (limiting protection to these individuals).

68. *See* EEOC v. CNA Ins. Cos., 96 F.3d 1039, 1043 (7th Cir. 1996) ("The EEOC's principal theory . . . asserts that [the disabled former employee's] 'employment position' *vis-a-vis* CNA is now that of 'disabled benefit recipient.' ").

who "can perform the essential functions of the employment position that such individual holds or desires."[69] Rather than argue that the definition of "qualified individual" should be expanded to include former employees, the *CNA* plaintiff proposed a "strained" alternative—expansion of the term "employment position."[70] If a court regarded a completely disabled former employee as holding the employment position of "benefits recipient," that individual could perform the essential functions of the position because no essential functions exist.[71] The Seventh Circuit summarily rejected this argument, stating that "[a]n 'employment position' is a job."[72]

4. Differing Benefit Levels for Various Disabilities

While the limitation of ADA protection to employees and applicants for employment has been sufficient to deal with most claims of disabled former employees alleging discrimination in fringe benefit plans, some courts have chosen to address the issue of whether Congress intended the ADA to eliminate disparate benefit levels for different disabilities. The Supreme Court has held that Congress intended the Rehabilitation Act, the forerunner to the ADA, to prohibit discrimination between the disabled and non-disabled, not discrimination between those with various disabilties.[73] A number of circuit and district courts have since applied the same reasoning to the ADA.[74] This conclusion is supported by the fact that in 1996,

---

69. 42 U.S.C. § 12111(8).

70. *CNA*, 96 F.3d at 1043.

71. *See id.* at 1043-44 (noting that there are no essential functions imposed on beneficiaries of disability plans other than collecting benefits checks).

72. *Id.* at 1044. (declaring that the court "need not tarry long" on the benefits-recipient-as-a-job argument); *see also* Dickey v. Peoples Energy Corp., 955 F. Supp. 886, 890 (N.D. Ill. 1996) (quoting *CNA*, 96 F.3d at 1043-44).

73. *See* Traynor v. Turnage, 485 U.S. 535, 548-49 (1988) (upholding a special benefit for veterans disabled for reasons other than their own "willful misconduct" despite the fact that the benefit was unavailable to other disabled veterans).

74. *See, e.g.*, Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006, 1019 (6th Cir. 1997) (en banc), *cert. denied*, 118 S. Ct. 871 (1998) (holding that the ADA does not prohibit an insurance company from differentiating between various disabilities); Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674, 678 (8th Cir. 1996) (upholding plan excluding infertility regardless of disability); Rogers v. Department of Health and Envtl. Control, 985 F. Supp. 635, 639 (D.S.C. 1997) (upholding long term disability plan with different benefits for physical and mental disabilities), *aff'd*, No. 97-2780, 1999 WL 193895 (4th Cir. Apr. 8, 1999); Cramer v. Florida, 885 F. Supp. 1545, 1550-53 (M.D. Fla. 1995) (upholding Florida workers' compensation statute that granted greater benefits to persons with "disabilities" than persons with "impairments"), *aff'd*, 117 F.3d 1258 (11th Cir. 1997); *see also* Nicole Martinson, *Inequality Between Disabilities: The Different Treatment of Mental Versus Physical Disabilities in Long-Term Disability Benefit Plans*, 50 BAYLOR L. REV. 361, 373-77 (1998) (discussing the reasoning of a number of courts on the

Congress passed the Mental Health Parity Act, which requires health insurance plans to equalize limitations on medical or surgical benefits with limitations on mental health benefits.[75] If Congress believed that the ADA mandated this parity, it would not have passed the Mental Health Parity Act.[76]

III. COURTS' RECENT EXPANSION OF PROTECTIONS FOR FORMER EMPLOYEES

While the holdings of a number of courts illustrate the acceptance of the proposition that disabled former employees—whether bringing claims of benefits discrimination or discrimination in termination—may not sue under the ADA,[77] the Second and Third Circuits have allowed disabled former employees an ADA cause of action for benefits discrimination.[78] These courts found ambiguity, based either on the ADA's failure to provide a temporal qualification to the qualified individual requirement,[79] or the ADA's creation of rights inconsistent with eligibility to sue,[80] where none existed, prompting an analysis of the ADA's purpose.[81] These courts then imitated the Supreme Court's reasoning in *Robinson* without giving consideration to the differences between the ADA and Title VII;[82] by granting disabled former employees a right to sue, the courts' holdings render the "essential functions" requirement of the ADA meaningless.[83]

---

question of whether benefit level distinctions between disabilities violates the ADA). An in-depth discussion of this issue is beyond the scope of this Note.

75. *See* 42 U.S.C. § 300gg-5 (Supp. II 1996).

76. *See Parker*, 121 F.3d at 1017-18 (arguing that Congress did not intend the ADA to create parity in long term disability plans).

77. *See* cases cited *supra* note 3.

78. *See* Ford v. Schering-Plough Corp., 145 F.3d 601, 606-07 (3d Cir. 1998) (resolving textual ambiguity to allow employee to sue), *cert. denied*, 119 S. Ct. 850 (1999); Castellano v. City of New York, 142 F.3d 58, 69 (2d Cir. 1998) (using an analogy to Title VII to allow cause of action), *cert. denied*, 119 S. Ct. 60 (1998).

79. *See Castellano*, 142 F.3d at 67.

80. *See Ford*, 145 F.3d at 605-06.

81. *See id.* at 607; *Castellano*, 142 F.3d at 68.

82. *See Ford*, 145 F.3d at 606-07; *Castellano*, 142 F.3d at 68-69.

83. *See* 42 U.S.C. § 12111(8) (1994) (stating that "[t]he term 'qualified individual with a disability' means an individual with a disability who, with or without reasonable accomodation, can perform the essential functions of the employment position that such individual holds or desires."); 42 U.S.C. § 12112(a) (1994) (prohibiting discrimination "against a qualified individual with a disability"); Gonzales v. Garner Food Servs., Inc., 89 F.3d 1523, 1529 (11th Cir. 1996) (stating that "interpreting the ADA te allow any disabled former employee to sue a former employer essentially renders the [qualified individual with a disability] requirement

A. Expansion Based Upon ADA Ambiguity Resulting from the Statute's Failure to Specify When a Plaintiff Must Be a Qualified Individual

Plaintiffs' claims in *Castellano v. City of New York* arose in much the same way as the claims of other benefits discrimination plaintiffs. In that case, fire and police force retirees asserted discrimination in retirement benefits when they were denied a variable supplemental benefit ("VSF") in addition to their retirement and disability incomes.[84] In evaluating plaintiffs' claims, the Second Circuit initially remarked that, where statutory language is clear, the court should focus only on the text, but where the language is ambiguous, the court may consider the broader context of the statute and its purpose.[85] The court asserted that the ADA definition of "qualified individual with a disability" fails to specify *when* a plaintiff must have been a "qualified individual."[86] The absence of a temporal limitation in the term "qualified individual with a disability," the court concluded, renders the ADA ambiguous and allows the court to delve into the broader context of the statute.[87]

. . . meaningless.") Ignoring the express provisions of the Act, *compare Ford*, 145 F.3d at 606-07 (allowing former employee to sue), *and Castellano*, 142 F.3d at 69 (granting disabled former employees a right to sue under the ADA despite their inability to perform the essential functions of their employment position), *with* sources cited *supra* note 3 (holding that disabled former employees unable to porform the essential functions of their employment position have no right to sue under the ADA), and creatively reading its legislative history, *see Castellano*, 142 F.3d at 67 (misconstruing the House of Representatives' temporal qualification to the qualified individual requirement), proved largely unnecessary, however, given these courts' ultimate conclusion that the disabled plaintiffs' claims fail on their merits. *See Ford*, 145 F.3d at 614; *Castellano*, 142 F.3d at 70.

84. *See Castellano*, 142 F.3d at 63. The City of New York offered three retirement plans to its fire and police force retirees. *See id.* at 63-64. Ordinary disability retirement, the first of these plans, was for physically or mentally disabled officers who could no longer perform their duties. *See id.* (citing N.Y.C. ADMIN. CODE §§ 13-251, 13-352 (1970)). Accident disability retirement, the second plan, was for officers whose physical or mental incapacitation was the result of service to the city. *See id.* at 64 (citing N.Y.C. ADMIN. CODE §§ 13-252, 13-353 (1970)). The third plan, retirement for service, was for officers who had provided 20 years of service to the city and who did not elect to retire with disability benefits. *See id.* (citing N.Y.C. ADMIN. CODE §§ 13-246, 13-247, 13-249, 13-350 (1970)). Some retirees may have provided twenty years of service but would not fall within the "for service" option because they elected to receive disability benefits. *See id.* The VSF benefit was available only to retirees who fell within the "for service" plan. *See id.* To receive the VSF benefit, the retiree must have retired after the VSF-eligibility dato applicable to the branch of uniform service in which the retiree served. *See id.* For example, fire and municipal police officers who retired before October 1, 1968, were ineligible to receive VSF benefits, while the VSF-eligilibity date for transit police officers was July 1, 1987. *See id.* at 64-65.

85. *See id.* at 67 (quoting Rebinson v. Shell Oil Co., 519 U.S. 337, 345-46 (1997)).

86. *Id.* at 67 (quoting 42 U.S.C. § 12111(8)).

87. *See id.*

At this critical juncture, the Second Circuit misconstrued the legislative history of the ADA,[88] opening the door for an expansionist interpretation of the Act. The court quoted the language of the House committee report: "[D]etermination of whether a person is qualified should be made at the time of the [discriminatory] employment action, e.g. hiring or promotion, and should not be based on the possibility that the employee or applicant will become incapacitated and unqualified in the future."[89]

The Second Circuit proposed that a "literal reading" of this language suggests that " 'at the time of the employment action' refers to the actual moment when the employer perform[s] the [allegedly] discriminatory act."[90] The court observed that this interpretation of the ADA's legislative history would allow employers to lawfully discriminate against individuals not qualified at the time of the discriminatory act, which may occur years after the employment relationship has ended.[91] This result, "unsatisfactory" to the court, supposedly compelled the court's conclusion that the ADA's text is ambiguous.[92] For the court to reach this result, however, it had to hold that "employment action" does not equate with discriminatory act—i.e., holding that the ADA fails to specify when a plaintiff must have been a qualified individual.[93] If any doubt existed as to whether "employment action" equated with "discriminatory act," the court removed it and undermined its own position by adding "[discriminatory]" to its quotation of the House Report.[94]

The finding that the term "qualified individual" was ambiguous allowed the court to look beyond the "inconclusive and unsatisfactory legislative history" and to examine the broader context and purpose of the Act.[95] A significant hurdle in the court's path to establishing a right of action for disabled retirees in benefits discrimination

88. *See id.*

89. *Id.* (quoting H.R. REP. NO. 101-485(III), at 34 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 456).

90. *Castellano*, 142 F.3d at 67. Here, the allegedly discriminatory act was the city's withholding of VSF benefits from the plaintiffs. *See id.*

91. *See id.*

92. *See id.*

93. *See id.*

94. *Compare id.* (stating that "determination of whether a person is qualified should be made at the time of the [discriminatory] employment action"), *with* H.R. REP. NO. 101-485(III), at 34 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 456 (noting that "determination of whether a person is qualified should be made at the time of the employment action"). "[D]iscriminatory" did not appear in the text of the House report, but was added in the text of the *Castellano* opinion.

95. *See Castellano*, 142 F.3d at 67.

claims under the ADA was the "essential functions" element of the definition of "qualified individual with a disability."[96] Congress included the "essential functions" language to avoid compelling employers to hire, promote, or retain employees who are unable to perform the functions of their job.[97] Several other courts have held that former employees who are unable to perform the essential functions of an employment position are unable to sue under the ADA.[98] The *Castellano* court, however, reached the contrary result by reasoning that retirees, while unable to presently perform the essential functions of an employment position with their former employer, nevertheless satisfy the "essential functions" requirement because they were once able to perform the functions of their jobs.[99]

The court's reasoning sabotages the temporal detormination of qualification the court earlier propounded.[100] Even though currently disabled retirees were once able to perform the essential functions of their employment, they nonetheless fail to meet the ADA's standards for qualification in that they were unable to perform the essential functions of their employment position at the time of the allegedly discriminatory action. The *Castellano* court then declared this "essential functions" requirement ambiguous,[101] and concluded that disabled retirees fulfill the requirement by having been able to perform the functions of their employment positions at some time other than when the allegedly discriminatory act occurred.[102]

Having eliminated the roadblock that the "essential functions" definition presentod, the *Castellano* court turned to the ADA's purpose. One express purpose of the Act is "to provide a clear and comprehensive national mandate for the elimination of discrimination

---

96. *See* 42 U.S.C. § 12111(8) (1994) (" 'qualified individual with a disability' means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires").

97. *See Castellano*, 142 F.3d at 68; *see also* H.R. REP. NO. 101-485(II), at 55 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 337:

> The point of including this phrase . . . is to ensure that employers can continue to require that all applicants and employees, including those with disabilities, are able to perform the essential, i.e., the non-marginal functions of the job in quesiton [sic] . . . the Committee intends to reaffirm that this legislation does not undermine an employer's ability to choose and maintain qualified workers.

98. *See* cases cited *supra* note 3.

99. *Castellano*, 142 F.3d at 68.

100. *See id.* at 67 (quoting H.R. REP. NO. 101-485(III), at 34 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 456) (stating that "determination of whether a person is qualified should be made at the tiune of the [discriminatory] employment action").

101. *See Castellano*, 142 F.3d at 67.

102. *See id.* at 68.

against individuals with disabilities."[103] Barring suits of disabled retirees, the court intoned, violates this purpose because it leaves disabled former employees unprotected from discrimination in the provision of post-employment benefits.[104] The court found support for this conclusion in *Robinson*, wherein the Supreme Court held that former employees filing anti-retaliation suits under Title VII have a right of action.[105]

Title VII of the Civil Rights Act of 1964 and the ADA are, however, dissimilar,[106] undermining the premise of the Second Circuit's reliance on *Robinson*. The primary distinctions between Title VII and the ADA relevant here are Title VII's inclusion of an anti-retaliation provision,[107] absent from the ADA, and the ADA's inclusion of an "essential function" requirement,[108] absent from Title VII. The former distinction rests on the belief that prohibiting retaliation against former employees by giving negative references prevents another employer from unknowingly discriminating against applicants.[109] The expansion of Title VII's anti-retaliation protection from employees and applicants for employment[110] to former employees[111] is thus necessary to give full force to the anti-retaliation provision.[112] The ADA ignores retaliation but prohibits discrimination against qualified individuals with disabilities in the "terms, conditions, and privileges of employment."[113] This critical difference eliminates the concern that prompted the anti-retaliation provision of Title VII. Protection of disabled former employees from discrimination by their former employers based on their disabilities is not necessary to prevent a second employer from unknowingly discriminating based upon disability. While granting former employees a right of action under Title VII may effectuate the purpose of that Act, granting former employees a right of action under the

---

103. 42 U.S.C. § 12101(b)(1) (1994).
104. *See Castellano*, 142 F.3d at 68.
105. *See id.* at 68-69 (citing Robinson v. Shell Oil Co., 519 U.S. 337, 345-46 (1997)).
106. *See supra* Part II.B.1.
107. *See* 42 U.S.C. § 2000e-3(a) (1994).
108. *See* 42 U.S.C. § 12111(8) (1994).
109. *See* 42 U.S.C. § 2000e-3(a).
110. *See id.*
111. *See* Robinson v. Shell Oil Co., 519 U.S. 337, 345-46 (1997).
112. *See* 42 U.S.C. § 2000e-3(a). The anti-retaliation language provides that it is unlawful for an employer to discriminate against any employee or applicant for employment because he has opposed an unlawful employment practice, or because "he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" concerning an unlawful employment practice. *Id.*
113. 42 U.S.C. § 12112(a) (1994).

ADA renders its unique "essential functions" requirement meaningless given that completely disabled former employees are unable to perform the essential functions of an employment position and only individuals who can perform the essential functions of a job receive ADA protection.[114]

After finding the ADA's "qualified individual" language ambiguous, resorting to the purpose of the Act, and analogizing to Title VII, the Second Circuit held that disabled former employees have an ADA cause of action for benefits discrimination, provided the former employee was a "qualified individual" during the term of his employment.[115] The court nonetheless observed that the ADA prohibits discrimination between the disabled and non-disabled, not discrimination among disabilities.[116] Finding no discrimination due to disability-status on the facts, the court concluded that the plaintiffs did not state a cause of action under the ADA.[117]

B. Expansion Based Upon ADA Ambiguity Resulting from Internal Inconsistency

In *Ford v. Schering-Plough Corp.*, the Third Circuit faced a similar question.[118] Rather than finding ambiguity through the Act's failure to state when a plaintiff must be a qualified individual, the court found an internal inconsistency in the ADA. As a Schering employee, Ford enrolled in a disability insurance plan, the benefits of which continued until former employees reached age sixty-five, provided the employee suffered from a physical disability.[119] Benefits

---

114. *See* 42 U.S.C. § 12111(8) (1994); 42 U.S.C. § 12112(a); Gonzales v. Garner Food Servs., Inc., 89 F.3d 1523, 1529 (11th Cir. 1996).

115. *See* Castellano v. City of New York, 142 F.3d 58, 69 (2d Cir. 1998), *cert. denied*, 119 S. Ct. 60 (1998). In reaching this conclusion, the Second Circuit also held that the protections of the ADA should apply when the benefits of employment terms are reaped. *See id.* at 68-69. The court posited that retirees "earned" the fringe benefits in question (i.e., VSF benefits) through "years of service in which they performed the essential functions of their employment." *Id.* at 69. However, the limitations on receipt of VSF benefits, *see supra* note 84, were included in the employees' collective bargaining agreement and the City Code. *See Castellano*, 142 F.3d at 63-64. The court should have therefore assigned knowledge of the VSF limitations to the disabled retirees, thus deeming that the retirees would have known that the fringe benefits earned through years of service did not include VSF benefits. In addition, a number of other courts have rejected the proposition that the protections of the ADA should be linked with the time of benefit receipt. *See supra* Part II.B.2.

116. *See Castellano*, 142 F.3d at 70; *see also supra* Part II.B.4 (discussing the limitation on the ADA's prohibition of discrimination between the disabled and non-disabled).

117. *See Castellano*, 142 F.3d at 70.

118. Ford v. Schering-Plough Corp., 145 F.3d 601, 604-05 (3d Cir. 1998), *cert. denied*, 119 S. Ct. 850 (1999).

119. *See id.* at 603-04.

for mental disabilities, however, ceased after two years.[120] When her disability benefits expired, Ford, who suffered from a mental disability, charged benefits discrimination and filed suit under the ADA.[121] In her pleadings, Ford admitted her inability to work even with a reasonable accommodation.[122]

The Third Circuit had previously ruled plaintiffs who admit inability to work judicially estopped from asserting qualified-individual-with-a-disability status.[123] The court distinguished the cases on the nature of the discrimination claim: the prior case involved a discrimination in termination claim, while *Ford* implicated benefits discrimination.[124] In making this distinction, the Third Circuit observed that the *McNemar* plaintiff's claim failed for internal inconsistency—a person cannot be both completely disabled and available for work.[125] The *Ford* claim is not internally inconsistent, as it never asserts the ability to work.[126]

The *Ford* claim should fail nonetheless, because a former employee who is unable to work has no right of action under the ADA.[127] The Third Circuit did not reach this conclusion; instead it held that the claim illustrated an internal contradiction in the *statute*: while the ADA prohibits discrimination in the "terms, conditions, and privileges" of employment, only employees or prospective employees who can perform the essential functions of an employment position with or without a reasonable accomodation may recover for such discrimination.[128] The perceived imbalance between the rights guaranteed under the Act and the requirements for classification as a "qualified individual" led the court to view the ADA as ambiguous and

---

120. *See id.* at 604.

121. *See id.*

122. *See id.* at 605.

123. *See* McNemar v. Disney Store, Inc., 91 F.3d 610, 618 (3d Cir. 1996). In *McNemar*, plaintiff took two dollars from a company cash register to purchase cigarettes and did not replace the funds. *See id.* at 613-14. Company policy prohibited this commingling, and evidence demonstrated that the company had terminated 52 employees for violating the policy, some infractions involving amounts as small as two dollars. *See id.* at 614 n.1. When company representatives questioned plaintiff about the infraction, he broke into tears and revealed that he was HIV-positive. *See id.* at 614. The company subsequently terminated plaintiff. *See id.* at 614-15. Following his termination, plaintiff sought and received state and federal disability benefits based upon his assertion that he had become tetally and permanently disabled. *See id.* at 615. Plaintiff then filed suit under the ADA, asserting that his termination constituted unlawful discrimination in violation of the ADA. *See id.* at 616.

124. *See Ford*, 145 F.3d at 605 (comparing Ford's claim to the employee's claim in *McNemar*).

125. *See id.*

126. *See id.*

127. *See supra* Part II.B.

128. *See Ford*, 145 F.3d at 605-06 (citing 42 U.S.C. §12112(a) (1994)).

thus to consider the congressional purpose that motivated adoption of the Act.[129]

Given the incongruence of rights, ostensibly protected for all, and eligibililty to sue, apparently limited to those able to fulfill the functions of an employment position, the Third Circuit proposed two alternatives: the protections of the ADA could be limited to those able to sue, or those able to sue could be expanded to encompass all whose rights the ADA protects.[130] Having considered the purpose of the statute and the Supreme Court's decision in *Robinson*, the Third Circuit resolved the inconsistency by construing the ADA to allow disabled former employees to sue their former employers over discrimination in provision of disability benefits.[131] Yet the *Ford* plaintiff won only a Pyrrhic victory in the court's finding of a right of action, for the court concluded that the ADA does not prohibit discrimination among disabilities, only discrimination between individuals with and without disabilities.[132] Thus, as in *Castellano*, the *Ford* plaintiff failed to state a claim under Title I of the ADA.[133]

---

129. *See id.* This imbalance is the natural result of statutes, like the ADA, in which Congress balances competing interests by limiting eligibility te sue. *See* Recent Case, *supra* note 10, at 1121.

130. *See Ford*, 145 F.3d at 605-606:

> 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. Since Congress did neither 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.

131. *See id.* (citing Robinson v. Shell Oil Co., 519 U.S. 337, 340-45 (1997)). The court's reasoning concerning the relationship between the right of former employees to bring anti-retaliation claims under Title VII and the right of former employees te bring benefits discrimination claims under the ADA closely parallels that of the *Castellano* court. *See Ford*, 145 F.3d at 606-07 (reasoning that both the ADA and Title VII contain textual ambiguities and that because the Supreme Court resolved the Title VII ambiguity by allowing former employees te bring anti-retaliation claims against their former employees, former employees should be given the right to bring benefits discrimination claims against their former employers); Castellano v. City of New York, 142 F.3d 58, 68-69 (2d Cir. 1998) (same), *cert. denied*, 119 S. Ct. 60 (1998). The *Ford* court's exposition of the ADA's purpose is brief: Granting former employees a right of action "is in keeping with the ADA's rationale, namely 'to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities . . . [and] to provide clear, strong, consistent, enforceable standards addressing [such] discrimination.'" *Ford*, 145 F.3d at 607 (quoting 42 U.S.C. § 12101(b)(1)-(2) (1994)).

132. *Ford*, 145 F.3d at 608.

133. *Id.* at 614.

IV. ADDITIONAL PROBLEMS WITH THE *CASTELLANO* AND *FORD* APPROACHES

A. The Problematic Application of Castellano *and* Ford *to Claims of Discrimination in Termination*

Even assuming that *Castellano* and *Ford* are correct in allowing disabled former employees to sue under the ADA for discrimination in post-employment benefits provision, the next logical holding, one that extends ADA coverage to disabled former employees for alleged discrimination in termination, is suspect at best.

A temporal separation of employment termination and discriminatory action distinguishes claims of benefits discrimination from claims of discrimination in termination.[134] In *Rogers*, which involved allegations of discriminatory termination, plaintiff was unable to work with or without reasonable accommodation both when the alleged discrimination occurred and when his employment relationship ended.[135] In *Castellano*, a case of alleged discrimination in post-employment benefits, plaintiffs were able to work when their employment ended but not when the alleged discrimination occurred.[136] A House committee report states that determination of whether a person is an individual qualified to sue should be made at the time of the employment action.[137] While a court could conclude that benefits-discrimination plaintiffs are able to work at the end of their employment and that this eligibility should constructively continue even after they later become disabled,[138] this logic does not apply to termination-discrimination plaintiffs who are disabled at the time of their dismissal—the employment action in question. At the time of the employment action, disabled termination-discrimination plaintiffs

134. *Compare* Rogers v. International Marine Terminals, Inc., 87 F.3d 755, 757, 759 (5th Cir. 1996) (finding that plaintiff's termination constituted both the end of employment and the allegedly discriminatory action), *with Castellano*, 142 F.3d at 63-66 (finding that plaintiffs' retirement constituted the end of employment, and the denial of VSF benefits, which occurred some time later, constituted the allegedly discriminatory action).

135. *Rogers*, 87 F.3d at 757, 759.

136. *Castellano*, 142 F.3d at 63-66.

137. *See* H.R. REP. NO. 101-485(III), at 34 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 456.

138. *See, e.g.*, *Castellano*, 142 F.3d at 68 (reasoning that retirees, while currently disabled, should be considered qualified individuals because they were once able to perform the functions of their jobs).

are unable to work and are thus not qualified individuals under the ADA.[139]

Protection of disabled former employees alleging discrimination in their termination, the logical consequence of the *Castellano* and *Ford* holdings, highlights the error of the Second and Third Circuits. The ADA provides no basis for allowing the claims of benefits-discrimination plaintiffs while barring the claims of termination-discrimination plaintiffs, a point which suggests that courts may either hear both types of claims or bar both types of claims. Since termination-discrimination claims, which arise when no temporal separation of employment termination and discriminatory action exists, fly in the face of the ADA's express language[140] and legislative history,[141] allowing such claims would do great harm to the Act's qualified individual requirement.[142]

B. Congressional Approval of Decisions Limiting the Ability of Disabled Former Employees to Bring Claims Under the ADA

Congressional silence following the decisions limiting ADA eligibility to employees and applicants for employment who are able to perform the essential functions of their employment positions, and Congressional action in expressly applying the protections of the ADA to former employees of the executive branch, suggest that Congress approved of the interpretation that restricts ADA protections to individuals able to perform the essential functions of their employment positions.

Some courts have given weight to congressional silence,[143] while others have not.[144] Generally, congressional silence alone is in-

---

139. *See Rogers*, 87 F.3d at 759 (holding that an employee was not qualified under the ADA because his ankle injuries made him unavailable for work). Finding no right of action in disabled former employees alleging discrimination in termination is in keeping with the ADA's "essential functions" definition and the legislative purpose of allowing employers to hire and retain individuals who are able to work. *See* H.R. REP. NO. 101-485(II), at 55 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 337.

140. *See* 42 U.S.C. § 12111(8) (1994); 42 U.S.C. § 12112(a) (1994).

141. *See* H.R. REP. NO. 101-485(III), at 34 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 456.

142. *See Rogers*, 87 F.3d at 759.

143. *See, e.g.*, Flood v. Kuhn, 407 U.S. 258, 283 (1972) (stating that because Congress allowed professional baseball to develop and expand unhindered by federal legislative action, its silence constituted more than silence and passivity); Poleto v. Consolidated Rail Corp., 826 F.2d 1270, 1279 (3d Cir. 1987) (reasoning that congressional inaction was "a sufficient expression of congressional approval" in the context of pre-judgment interest awards), *abrogated on other grounds by* Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827 (1990) (involving post-judgment interest awards, a subject with which the *Poleto* court dealt but did not use a

sufficient to determine a controlling rule of law.[145] However, when congressional silence follows an accepted judicial approach of which Congress knows, silence is at least instructive to a court faced with a challenge to the prevailing rule.[146] Following the decisions of courts finding no right of action under the ADA for disabled former employees,[147] Congress did not amend the ADA to provide disabled formerly employed individuals eligibility to sue. While this inaction implies Congress's acquiescence to the judicial result, it may just as well suggest that Congress was unaware of the cases limiting eligibility to individuals able to perform the essential functions of an employment position.

However the subsequently-enacted Presidential and Executive Office Accountability Act ("PEOAA")[148] provides evidence that Congress knew of the limitations on ADA coverage. The PEOAA defines an "employee" as an applicant for employment *or a former employee*.[149] This departs from both the ADA's "essential functions"

---

congressional silence argument, thus suggesting that *Poleto*'s reliance upon congressional silence was legitimate); United States v. Groupp, 459 F.2d 178, 182 (1st Cir. 1972) (stating that the lack of adverse congressional reaction lent additional weight te an administrative interpretation of the statute); Pueblo of Santa Ana v. Hodel, 663 F. Supp. 1300, 1310 n.13 (D.D.C. 1987) (noting the legislature's failure to overturn the Court's interpretation of a statute for 170 years).

144. *See, e.g.*, Burns v. United States, 501 U.S. 129, 136-37 (1991) (stating that an inference should not be drawn from congressional silence when it is contrary to all other textual and contextual evidence of the legislature's intent); Girouard v. Unitod States, 328 U.S. 61, 69-70 (1946) (declining to find in congressional silence alone the adoption of a rule of law); Helvering v. Halleck, 309 U.S. 106, 119-20 (1940) (stating that the lack of congressional repudiation of a line of cases did not serve as an implied instruction to prohibit the Court from reexamining its doctrine).

145. *See Girouard*, 328 U.S. at 69-70 ("It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law").

146. *See Burns*, 501 U.S. at 136-37 (holding that inferences drawn from congressional silence are not to be credited when they are contrary to other textual evidence of congressional intent or when they render what Congress has expressly said absurd); *Flood*, 407 U.S. at 283 (stating that congressional silence accompanied by a consistent judicial rule and failed congressional attempts to change the rule is sufficient to detormine a controlling rule of law); *Hallock*, 309 U.S. at 119-20 (declaring that congressional silence is not sufficient to determine a rule of law when evidence does not exist te suggest that Congress explicitly approved of the prevailing judicial interpretation). *But see Poleto*, 826 F.2d at 1279 (holding that congressional silence following a consistent judicial approach is sufficient for the court to determine a rule of law); *Groupp*, 459 F.2d at 182 (same); *Pueblo*, 663 F. Supp. at 1310 (same).

147. *See* sources cited *supra* note 3.

148. *See* 3 U.S.C. § 402 (1994 and Supp. II 1996) (applying the Fair Labor Standards Act, Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Family and Medical Leave Act, the Occupational Safety and Health Act, Chapter 71 of Title 5, the Employee Polygraph Protection Act, the Worker Adjustment and Renotification Training Act, the Rehabilitation Act, and Chapter 43 of Title 38 to the executive branch).

149. *See id.* § 401 (1994 and Supp. II 1996).

requirement and its definition of "employee"—an individual employed by an employer.[150] A House committee report describes the "employee" defimition in the PEOAA as "special."[151] lf Congress understood the ADA to protect disabled former employees, it would not have needed to include "former employee" within the definition of "employee" in the PEOAA. The express inclusion of former employees within the protections of the ADA as applied to the Executive Branch,[152] when coupled with the congressional statement that the PEOAA contains a "special" definition of "employee,"[153] indicates that Congress recognized the court-imposed limitations on eligibility to sue under the ADA. Given the then-uniformly applied exclusion of disabled former employees from the ADA's "qualified individual" definition,[154] and Congress's awareness of this rule,[155] Congress's silence should be instructive to a court resolving the question of a former employee's eligibility to sue imder the ADA.[156] The *Castellano* and *Ford* courts reach a conclusion contrary to that which Congress's silence suggests.[157]

---

150. *See* 42 U.S.C. § 12111(4),(8) (1994).

151. H.R. REP. No. 104-820, at 29 (1996), *reprinted in* 1996 U.S.C.C.A.N. 4343, 4364.

152. *See* 3 U.S.C. §§ 401-402 (1994 and Supp. II 1996).

153. H.R. REP. No. 104-820, at 29 (1996), *reprinted in* 1996 U.S.C.C.A.N. 4348, 4864.

154. *See* sources cited *supra* note 3.

155. *See* 3 U.S.C. §§ 401-402; H.R. REP. No. 104-820, at 28-29 (1996), *reprinted in* 1996 U.S.C.C.A.N. 4848, 4363-64 (amending the definition of "employee" to include former employees).

156. The Supreme Court has held that even where congressional silence leads a court to a conclusion, the weight of Congress's silence is to be disregarded if tbe conclusion is contrary to the textual evidence of congressional intent or if the conclusion is absurd. *See* Burns v. United Statos, 501 U.S. 129, 136-37 (1991). The toxt and legislative history of the ADA suggest that Congress intended to limit eligibility to sue to individnals who are able to perform tbe essential functions of an employment position. *See* 42 U.S.C. § 12111(8); 42 U.S.C. § 12112(a) (1994); H.R. REP. No. 101-485(II), at 55 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 337 (stating that a "qualified individual" must be able to perform essential functions, or tasks that are fundamental and not marginal, of tbe job); *see also* sources cited *supra* noto 3. This is also the result that Congress's silence suggests. While some courts have suggested that restricting the abililty of disabled former employees to sue under the ADA is the result of ambiguous statutory language, *see* Ford v. Schering-Plough Corp., 145 F.3d 601, 606-07 (3d Cir. 1998), *cert. denied*, 119 S. Ct. 850 (1999); Castellano v. City of New York, 142 F.3d 58, 69 (2d Cir. 1998), *cert. denied*, 119 S. Ct. 60 (1998), no court has suggested that limiting eligibility to sue to those able to perform essential job functions is absurd. Thus the suggestion that results from Congress's silence—that disabled former employees do not constitute "qualified individuals" who are eligible to sue under the ADA—sbould meet tbe *Burns* test.

157. *See Ford*, 145 F.3d at 606-07; *Castellano*, 142 F.3d at 69. One commentator has argued that the Third Circuit should have used the *Ford* case as a way "to alert Congress that the current statutory scheme excludes protoctions for a significant number of disabled litigants," rather than an opportunity to adopt a strained intorpretation of the law. Recent Case, *supra* note 10, at 1121.

V. CONCLUSION

Decisions of the Fifth, Seventh, and Eleventh Circuits, as well as a number of federal district courts establish that a disabled former employee has no cause of action under the Americans with Disabilities Act. The Second and Third Circuits have reached the contrary result—that the ADA grants a disabled former employee the right to sue his former employer—when the plaintiff alleges discrimination in post-employment benefits. The latter courts overlook the plain meaning of the "essential functions" requirement and improperly find the ADA's language ambiguous. With misplaced reliance on the Supreme Court's decision in *Robinson*, these courts have issued unprincipled decisions that render the express language of the statute meaningless. Congress's silence following decisions limiting eligibility to sue under the ADA to those able to perform the essential functions of an employment position and its subsequent express inclusion of former employees in the ADA as it applies to the executive branch indicates that the Second and Third Circuits should have limited the scope of the ADA's protections, unpalatable as this result may be.

The *Ford* and *Castellano* decisions are expressly confined to plaintiffs alleging discrimination in post-employment benefits provision. Even assuming that the Second and Third Circuits have reached the proper conclusion on this issue, claims of discrimination in post-employment benefits and discrimination in termination are unique. The reasoning that allowed disabled former employees to bring ADA actions in the benefits arena cannot logically apply to claims of discrimination in termination, where the "essential functions" requirement governs. *Ford* and *Castellano* have significantly undermined the "essential functions" requirement of the ADA, and, to the extent that the reasoning of these courts applies to plaintiffs asserting discrimination in termination, employers would be forced to reinstate employees unable to perform the necessary functions of their employment position—a result Congress did not intend.

*Austin L. McMullen**

* I would like to thank Colin Delaney, Jim McCray, Ann Bjerke, and Scott Fielding for their contributions. I am grateful to my parents, Lenoy and Sonja McMullen, for their encouragement and love during my education. Above all, I want to thank my wife Kelly, for her love and support.