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U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. ALABAMA DEPARTMENT OF TRANSPORTATION, Defendant.	)	Case No. 2:23-cv-01001-NAD

PLAINTIFF UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff United States of America (United States) submits this response in opposition (Opposition) to the Motion for Summary Judgment (Doc. 30) filed by Defendant Alabama Department of Transportation (ALDOT) on November 22, 2024, Def.'s Mot. for Summ. J., ECF No. 30, and to Defendant's Motion to Strike, In Part, Plaintiff's Motion for Summary Judgment (Doc. 37) filed on December 6, 2024, Def.'s Mot. to Strike, ECF No. 37.[1]

[1] Defendant ALDOT's Motion to Strike was denied, but the Court ordered ALDOT's brief to be construed as a brief in support of its pending summary judgment motion. Text Order, ECF No. 39.

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I. Introduction

This Court should deny ALDOT's motion for summary judgment because Mr. Ronald Davis had an actual disability when ALDOT decided not to hire him in 2018: he had a permanent shoulder impairment, and that impairment was substantially limiting. Mr. Davis worked as a successful Transportation Maintenance Technician (TMT) beginning in 1999 through 2015. In 2007, while on the job at ALDOT, Mr. Davis was thrown off a truck, requiring two surgeries to repair his rotator cuff. After a long recovery, he returned to work with a permanent impairment. Nonetheless, Mr. Davis continued as a successful TMT until he retired in 2015—he consistently met expectations and was recognized for his exceptional work. But when he sought to return to work as a TMT in 2017–18, ALDOT refused to hire him on the basis of his disability.

There is no dispute that Mr. Davis had a permanent shoulder impairment when he applied to work for ALDOT in 2018. Mr. Davis's physician conducted a functional capacity evaluation and determined that Mr. Davis had reached maximum medical improvement and had permanent functional limitations restricting his ability to lift objects. There also is no dispute that Mr. Davis's permanent impairment substantially limited his ability to perform manual tasks, reach, lift, and the operation of his musculoskeletal function. This is supported by Mr. Davis's own testimony describing his employment at ALDOT and his limitation when he reapplied to work at ALDOT. And Mr. Davis's substantial limitation was noted by his former manager, who testified that he observed Mr. Davis's limitation throughout their employment together. Given that the undisputed facts establish that Mr. Davis has an impairment that substantially limits one or more major life activities, this Court should deny ALDOT's motion for summary judgment on the basis of actual disability.

In addition, this Court should find that the United States' theory under the "regarded as" definition of disability was properly pled and reject ALDOT's attempt to cabin its liability. Instead, for the reasons argued in its opening brief, this Court should grant summary judgment for the United States on that claim.

II. Response to ALDOT's "Undisputed Facts"

Below are responses to several of ALDOT's factual assertions where those facts are disputed or immaterial. The responses reference the numbers used in ALDOT's Motion for Summary Judgment.

4. Disputed, however, this is not a fact, but rather an application of a legal standard to the facts. As explained *infra, see* section III.C, the United States' Complaint is not limited to ALDOT's discrimination based on an "actual disability." The United States also pleads that ALDOT discriminated against Mr. Davis under the "regarded as" prong of the definition of disability. ALDOT narrows the description of this lawsuit in an effort to improperly narrow the United States' claims.

13. Disputed, but immaterial. Mr. Davis did not testify that he "received no further evaluation or treatment to his shoulder," Def.'s Br. in Supp. of Mot. for Summ. J. at 5-6, ¶ 13, ECF No. 33 ("Def.'s Br."), but rather that he never went back to the doctor who gave him the restrictions, and that was the last time he was told by a doctor that he had lifting restrictions. *Id.* (citing Dep. of Ronald Davis, Def.'s Ex. 2 at 23:20–25:21, ECF No. 33-2 ("Davis Dep., Def.'s Ex. 2")). The record does not support a finding that he "received no further evaluation or treatment to his shoulder." Additionally, while Mr. Davis stated that he "never used" his restrictions, this does not mean that he did not have a limited ability to reach or lift—it instead supports that he could perform the job notwithstanding his impairment. Davis Dep., Def.'s Ex. 2

at 25:2-8, ECF No. 33-2. Mr. Davis would lift objects when he could, and when he could not lift an object alone, he relied on heavy machinery to lift it or lifted in teams, as was standard practice for TMTs. *Id.* at 363:19–364:13, 365:6–17, 366:13–367:16.

14. Disputed. Although Mr. Davis could perform all his job duties after he returned to work following his on-the-job injury, he had to, and did, perform his job differently as a result of his disability. *Id.* at 253:4–19 (describing the ways in which he performed his job duties differently).

16. Disputed, but immaterial. ALDOT's assertion that the objects Mr. Davis lifted may have weighed thirty or more pounds is unsupported by the record—Mr. Davis testified that he did not know the weight of the objects. Davis Dep., Def.'s Ex. 2 at 20:7–22:21, ECF No. 33-2 (stating "I have no idea" how heavy they were; "I really don't know. I really couldn't tell you the weight of the tire . . . ."). The only suggestion that they may have weighed thirty pounds or more came from ALDOT. Davis Dep., Def.'s Ex. 2 at 22:1–5, ECF No. 33-2. Further, that Mr. Davis could perform the functions of a valet does not mean that he did not have an impairment—he was able to complete these tasks, just as he could have completed comparable tasks if he were hired by ALDOT as a TMT.

18. Disputed, but immaterial. ALDOT's assertion that Mr. Davis was not under any restrictions at the time he began his employment with Hoover Toyota is disputed by his physician's findings that Mr. Davis's restrictions were permanent. Def.'s Ex. 10 at 1, ECF No. 33-10. Further, Mr. Davis clarified in testimony that he was not under any doctor's orders at that time, but this does not mean that he had no impairments impacting his ability to lift objects—he separately clarified that he did. Davis Dep., Def.'s Ex. 2 at 23:20–24:3, 25:22–26:9, ECF No. 33-2.

19. Immaterial. That Mr. Davis did not mention any shoulder restriction in applying for his job or working at Hoover Toyota is not material to the analysis of whether he is a person with a disability. As an initial matter, Mr. Davis stated that he could carry out every job assignment he was given at Hoover Toyota, so any restrictions he had did not need to be brought up or mentioned. Davis Dep., Def.'s Ex. 2 at 26:5–18, ECF No. 33-2. Regardless, that he did not bring up his prior shoulder restrictions, and that they did not impede his job performance as a valet is immaterial to whether he was a person with a disability under the ADA when he applied to work at ALDOT. The proper analysis under the ADA's definition of "actual disability" is discussed *infra* III.B.1–2, and Mr. Davis meets that definition.

22. Disputed, but immaterial. ALDOT's assertion that Mr. Davis was not under any physical restrictions related to his shoulder when he submitted his TMT I application is contradicted by Mr. Davis's other testimony. He stated that when he retired, a percentage of his shoulder still "wasn't working properly." Davis Dep., Def.'s Ex. 2 at 23:20–24:3; 165:21–166:10, ECF No. 33-2. He also clarified that at the time of the interview for the TMT I position, regarding lifting objects that were fifty pounds, "I could have lift[ed] so much waist high, but . . . I[] might not have been able to lift it over my head." *Id.* at 199:5–21. And ALDOT's own interview records contain a notation that Mr. Davis could not lift 50 pounds. Pl.'s Summ. J. Ex. 7 at 10, ECF No. 34-15 (Calera District Hiring Records). ALDOT's assertion is further disputed by Mr. Davis's physician's findings that his restrictions were *permanent*. Def.'s Ex. 10 at 1, ECF No. 33-10.

23. Immaterial. That Mr. Davis did not return to the physician who determined that he had permanent functional limitations, and whether he has seen a doctor regarding his shoulder injury since his functional capacity evaluation, is immaterial to whether he met the definition of a

person with a disability under the ADA when he applied to work at ALDOT.

26. Disputed, however, this is not a fact, but rather an application of a legal standard to the facts. Mr. Davis cannot and did not attempt to testify, as a lay person, as to the legal conclusion of whether he has a disability according to any of the definitions of that term under the ADA. Mr. Davis testified that he incurred a shoulder injury that caused permanent restrictions in his use of his shoulder and that the impairment limits his ability to lift. Davis Dep., Def.'s Ex. 2 at 23:20–25:1, ECF No. 33-2.

27. Disputed, however, this is not a fact, but rather an application of a legal standard to the facts. Mr. Davis testified, as a lay person, that his basis for alleging disability discrimination in his EEOC charge was that employees at ALDOT were aware of his injury: "Because it was in my record and it would have been coming up soon. Most people knew about it anyway, you know." Davis Dep., Def.'s Ex. 2 at 316:21–317:3, ECF No. 33-2. When asked whether he was alleging that he was "regarded as" having a disability—again, a legal standard he as a lay person is unqualified to opine on—he answered only "It could have been; it could not have been." *Id.* at 317:4–12. In response to another question asking him to draw a legal conclusion—this time about whether "in [his] mind" he had a disability when he interviewed for the job—he answered "I did not have a disability. All I had was what was left from, you know, this shoulder injury." *Id.* at 317:13–18. Thus, ALDOT's assertion that Mr. Davis testified "only that it was possible he was not selected for the position based on his record of disability, not any *actual* impairment" is a mischaracterization not only of his testimony, but also of his ability to testify as to a legal conclusion.

28. Disputed to the extent ALDOT means to argue that the excerpted testimony supports the assertion in ALDOT Fact #27, for the same reasons as discussed in the response to

that assertion, discussed *supra* p. 5.

III. Argument

A. Summary Judgment Standard

Under Federal Rule of Civil Procedure 56, courts shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997). The party moving for summary judgment has the burden of showing the absence of a genuine issue as to any material fact, and in deciding whether the movant has met that burden, the Court must view the movant's evidence and all factual inferences arising from it in the light most favorable to the nonmoving party. *Allen*, 121 F.3d at 646 (citations omitted). The evidence of the non-movant should be believed and all justifiable inferences should be drawn in their favor. *Id.* (citations and quotations omitted). "If reasonable minds could differ on the inferences arising from undisputed facts, then a court should deny summary judgment." *Id.* (citation omitted).

B. ALDOT's summary judgment motion should be denied because Mr. Davis had an actual disability under the ADA in 2018.

Summary judgment should be denied because the evidence demonstrates that when he applied for the position he formerly held, Mr. Davis had an actual disability under the broad definition of disability in the ADA. One way to meet the definition of disability is to show that an individual has "a physical or mental impairment that substantially limits one or more major life activities of such individual." 42 U.S.C. § 12102(1)(A); 29 C.F.R. § 1630.2(g)(1)(i) (sometimes called "actual" disability). Congress amended the ADA in 2008 with the express goal of broadening the interpretation of a disability under the ADA. *Lewis v. City of Union City, Ga.*, 934 F.3d 1169, 1180 (11th Cir. 2019). In doing so, Congress sought to "convey that the

question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." *Id.* (citation omitted). This is reinforced by regulations implementing Title I of the ADA. 29 C.F.R. § 1630.1(c)(4). The regulation explicitly provides that the definition of "disability" shall be construed broadly in favor of expansive coverage to the maximum extent permitted, and that the "primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of disability." *Id.* (noting that the question of whether an individual meets the definition of disability under the Title I regulation should not demand extensive analysis).

The evidence establishes that Mr. Davis meets the expansive definition of "actual" disability under the ADA. ALDOT's motion for summary judgment on that basis should therefore be denied.

1. Mr. Davis had an impairment in 2018.

Mr. Davis meets the broad definition of disability under the ADA because he had an impairment when he applied for the TMT position in 2017–18. A physical impairment means, *inter alia*, "Any physiological disorder or condition . . . such as . . . musculoskeletal [conditions]." 29 C.F.R. § 1630.2(h)(1); *see also Mazzeo v. Color Resols. Int'l, LLC*, 746 F.3d 1264, 1267–70 (11th Cir. 2014). The undisputed facts show that Mr. Davis had an impairment in 2018. After Mr. Davis's workplace injury, his doctor confirmed that he tore his rotator cuff, ultimately requiring two surgeries. Def.'s Br., at 5, ¶ 9, ECF No. 33. During his recovery, Mr. Davis's physician performed a functional capacity evaluation and determined that Mr. Davis had reached maximum medical improvement, and that he had *permanent* functional limitations impacting his ability to lift frequently or constantly on the left side of his body. *Id.* at 5, ¶ 10;

Def.'s Ex. 10 at 1–2, ECF No. 33-10. Thus, Mr. Davis had a physiological condition that was permanent and existed at the time of his application for employment in 2017.

Mr. Davis's testimony further demonstrates the persistence of his permanent impairment, including when he applied again for the TMT position. When he retired in 2015, about seven years after his functional capacity evaluation, Mr. Davis stated that he had limitations stemming from his rotator cuff injury. Davis Dep., Def.'s Ex. 2 at 23:17–24:3, ECF No. 33-2 ("Q: [] When you retired from ALDOT in 2015 did you have any lifting restrictions then? A: Yes. Q: What were they? A: Well, let me – I didn't have any lifting restrictions. I just had a percentage of my shoulder wasn't working properly."); *Id.* at 25:2–8 ("Q: [] At the time you retired in 2015 did you have those restrictions then? A: I had them but . . . I wasn't given any light duty or nothing like that."). And Mr. Davis further clarified that at the time of the interview for the TMT position, regarding lifting objects that were fifty pounds: "I could have lift[ed] so much waist high, but . . . I[] might not have been able to lift it over my head." *Id.* at 199:5–21.

Even setting aside Mr. Davis's own testimony, others around Mr. Davis observed his impairment throughout his employment until he retired in 2015. For example, his supervisor, Mr. Blankenship, provided several examples of times he could "physically see" that Mr. Davis "wasn't able to lift;" "his rotation was hindered;" "[h]e couldn't lift his arms all the way up;" "[h]e couldn't lift his arms;" and "he didn't have full rotation of his shoulder." Dep. of Derek Blankenship, Def.'s Ex. 8 at 69:21–70:9, ECF No. 33-8 ("Blankenship Dep., Def.'s Ex. 8"). Mr. Blankenship noted as well that he "personally saw" Mr. Davis using his shoulder differently, stating "he couldn't lift the arm, so he would have to use his other one more frequently . . . he could probably [lift his arm] straight out as far as it goes." *Id.* at 71:9–72:7. Mr. Blankenship said that he doesn't believe that ability changed throughout his and Mr. Davis's employment

together. *Id.* at 72:11–14. This evidence is sufficient to meet the broad standard for disability established under the ADA. *See* 29 C.F.R. § 1630.1(c)(4).

2. Mr. Davis's impairment was substantially limiting.

Further, Mr. Davis's impairment was substantially limiting under the ADA's intentionally lenient standard. Congress found that prior to the ADA Amendments Act (ADAAA), courts had interpreted the phrase "substantially limits" to result in an "inappropriately high level of limitation necessary to obtain coverage." *Mazzeo*, 746 F.3d at 1269 (citation omitted). Following the ADAAA, the term is to be construed broadly in terms of extensive coverage and is not meant to be a demanding standard. 29 C.F.R. § 1630.2(j)(1)(i); *Mazzeo*, 746 F.3d at 1269. This threshold issue should not demand extensive analysis, as the primary object of courts' attention should be whether entities have complied with their obligations and whether discrimination has occurred. 29 C.F.R. § 1630.2(j)(1)(iii). To be substantially limiting, "[a]n impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity . . . ." *Id.* § 1630.2(j)(1)(ii). Instead, an impairment need only substantially limit the individual's ability "to perform a major life activity as compared to most people in the general population." *Id.*

Mr. Davis easily meets this standard. His major life activities were substantially limited after he suffered a musculoskeletal injury requiring surgery which could not fully repair his shoulder functioning, and as a result his ability to care for himself, perform manual tasks, reach, lift, and work is substantially limited. *See* Pl.'s Br. in Supp. of Mot. for Summ. J. at 3–4, ¶¶ 8–10, 15–16, ECF No. 32 ("Pl.'s Br."). In a similar case, *Mazzeo*, the court pointed out that plaintiff's disc herniation problems and resulting pain—that had existed for years and were serious enough to require surgery—substantially and permanently limited his ability to lift more than ten pounds, *inter alia*. *Mazzeo*, 746 F.3d at 1269–70. The Eleventh Circuit held that this

was sufficient for plaintiff to establish a prima facie case of disability discrimination at summary judgment. *Id.* Here too, Mr. Davis's physician evaluated Mr. Davis and certified that he would have permanent limitations. Def.'s Br. at 5, ¶¶ 10–11, ECF No. 33; Def.'s Ex. 10 at 1, ECF No. 33-10.

In addition, Mr. Davis's testimony, supported by the observations of those around him, further demonstrates that these limitations continued throughout his employment and when he applied to work at ALDOT. *See supra* pp. 8–9. ALDOT's argument that Mr. Davis's testimony proves his impairment was not substantially limiting ignores the sum of this evidence. Def.'s Br. at 14, ECF No. 33. Further, those who worked with Mr. Davis bolster his testimony, similarly testifying that his limitations resulted in a reduced range of motion, and that he at times had to use only one arm for certain tasks. *See supra* pp. 8–9. This is sufficient to meet the lenient standard established in the ADA.

The cases ALDOT cites regarding substantial limitations are materially different from the facts in this case. In *Abbott v. Elwood Staffing Services, Inc.*, the court granted summary judgment against the plaintiff because she did not identify any major life activity that was substantially limited. 44 F. Supp. 3d 1125, 1166 (N.D. Ala. 2014). Here, Mr. Davis does identify and provide such evidence: he had a functional capacity evaluation performed by a physician which demonstrated he had *permanent* functional limitations. Def.'s Br. at 5, ¶¶ 10–11, ECF No. 33; Def.'s Ex. 10 at 1, ECF No. 33-10. That functional capacity evaluation detailed specific major life activities that were limited, including reaching and lifting at various specified levels. Def.'s Ex. 10 at 2, ECF No. 33-10. *May v. American Cast Iron Pipe Co.* is inapposite because the court decided a motion to dismiss based purely on the pleadings which, unlike those here, did not describe the plaintiff's injury or restrictions. No. 2:12-CV-0285-SLB, 2014 WL

1043440, at *6 (N.D. Ala. Mar. 17, 2014). Finally, *Munoz v. Selig Enterprises, Inc.* focused on the lack of evidence to support the timing, frequency, and duration of plaintiff's symptoms. 981 F.3d 1265, 1273 (11th Cir. 2020). Here, there is ample evidence of the timing, frequency, and duration of Mr. Davis's limitations. In Mr. Davis's functional capacity evaluation his physician determined that he had reached maximum medical improvement, and the physician provided detailed observations on the timing and frequency with which Mr. Davis can perform various tasks including reaching, lifting, and carrying. Def.'s Br. at 5, ¶¶ 10–11, ECF No. 33; Def.'s Ex. 10 at 1–2, ECF No. 33-10. That evaluation also includes detail on the duration of his symptoms—Mr. Davis's physician concluded that these limitations would be permanent based upon his functional capacity evaluation and visits evaluating Mr. Davis. *See id.* This evidence—coupled with Mr. Davis's testimony that those limitations persisted, and the testimony of those around Mr. Davis observing his limitations—is sufficient to meet the ADA's standard to show Mr. Davis had an impairment that was substantially limiting.

3. ALDOT's efforts to refute Mr. Davis's disability do not withstand scrutiny.

Mr. Davis's testimony supports that he has a shoulder impairment that substantially limits his ability to function; despite this, he was always able to get the job done as a TMT at ALDOT. His ability to work successfully while having a disability demonstrates that he was "qualified" for the position, but it is not evidence that he does not have an impairment, despite ALDOT's claim. And Mr. Davis's lay use of the word "disabled" or "disability" is immaterial to whether he meets the legal standard for "disability" under the ADA.

ALDOT first argues that the United States cannot establish that Mr. Davis had an impairment in 2018 because evidence of a 2007 shoulder injury is insufficient to support a conclusion that he had an impairment in 2018, and he has not seen a doctor for the injury since 2008. Def.'s Br., at 11, ECF No. 33. This argument is wrong. The evidence establishes that the

2007 injury gave rise to a permanent functional impairment in Mr. Davis's shoulder. Def.'s Br., at 5, ¶ 9, ECF No. 33; Def.'s Ex. 10 at 1–2, ECF No. 33-10. As discussed *supra* p. 4, ¶ 22, Mr. Davis's physician made specific findings in a functional capacity evaluation that his restrictions were permanent. Def.'s Ex. 10 at 1, ECF No. 33-10. These restrictions included only being able to occasionally reach overhead on the left side on a non-sustained basis. *Id.* at 2. They also included only being able to occasionally lift three pounds from waist to head level with his left arm, and no more than twenty-five pounds from waist to overhead occasionally with the right arm. *Id.*

That Mr. Davis did not see a physician following the conclusion of his surgeries and treatment for his 2007 shoulder injury is completely irrelevant to whether he has an impairment. A person is not required to be under the treatment of a physician for a condition in order for it to be an impairment under the ADA. *See Rivera v. Delta Air Lines, Inc.*, No. CIV.A. 96-CV-1130, 1997 WL 634500, at *8 (E.D. Pa. 1997); *cf. Schultz v. Royal Caribbean Cruises, Ltd.*, 465 F. Supp. 3d 1232, 1269 (S.D. Fla. 2020) (noting that the functional limitation required for a disability usually does not require the consideration of medical evidence).

ALDOT further argues that Mr. Davis admits he did not have an impairment around the time the 2018 hiring decision was made. Def.'s Br. at 11–12, ECF No. 33. This misconstrues his testimony and attempts to make an unsupported inference. When ALDOT asked Mr. Davis whether, "in [his] mind" he had a disability, Mr. Davis responded that he did not, but "[a]ll I had was what was left from, you know, this shoulder injury." Davis Dep., Def.'s Ex. 2 at 317:13–18, ECF No. 33-2. While Mr. Davis may not have identified as disabled, he explicitly noted his shoulder impairment. Because that impairment substantially limited one or more major life activities, Mr. Davis's impairment meets the definition of disability under the ADA.

Furthermore, the definition of disability under the ADA is a legal standard, which Mr. Davis, as a layperson, is not qualified to opine on. *Gonzalez v. Batmasian*, No. 9:16-CV-81696, 2017 WL 11532266, at *4-5 & *4 n.3 (S.D. Fla. Aug. 16, 2017) (internal citations and quotation marks omitted) (finding that a lay witness can never be called upon to offer a legal conclusion, including on "an issue with a separate, distinct and specialized meaning in the law different from that present in the vernacular."). Indeed, various statutes relating to disability contain widely differing legal definitions of "disability" depending on their contexts. *See e.g.,* Social Security Act, 42 U.S.C. § 416 (defining disability as an impairment that, *inter alia*, prevents a person from doing any substantial gainful activity). Thus, whether a person meets the definition of disability under an applicable law is a purely legal question. What is relevant is whether the factual evidence establishes an impairment that substantially limits a major life activity. Here, the undisputed facts, including his own testimony, establish that Mr. Davis had an injury that gave rise to a permanent impairment, and that his impairment substantially limited his major life activities of lifting, reaching, and his musculoskeletal function, among others. These facts meet the legal definition of actual disability under the ADA.

ALDOT's argument that there is not "a single item of evidence" to support how Mr. Davis's impairment limited his ability to lift or perform manual tasks is patently false. Def.'s Br. at 13, ECF No. 33. Mr. Davis underwent a functional capacity evaluation by his physician, and he was given detailed descriptions of exactly which activities would be limited *permanently*. Def.'s Ex. 10 at 1–2, ECF No. 33-10. Additionally, Mr. Davis's own testimony demonstrates the persistence of these limitations. Davis Dep., Def.'s Ex. 2 at 199:5–21, ECF No. 33-2 (saying at the time of the interview for the TMT I position, regarding lifting objects that were fifty pounds, "I could have lift[ed] so much waist high, but . . . I[] might not have been able to lift it over my

head."). Indeed, the managers interviewing Mr. Davis at the time noted on the ALDOT hiring form that Mr. Davis was restricted in his lifting ability. Pl.'s Summ. J. Ex. 7 at 10, ECF No. 34-15 (Calera District Hiring Records). ALDOT further ignores the evidence in the record from others who witnessed the way in which Mr. Davis's ability to lift and perform manual tasks were limited. *See, e.g.*, Blankenship Dep., Def.'s Ex. 8 at 69:21–70:9, ECF No. 33-8 (providing examples of times he could "physically see" that Mr. Davis "wasn't able to lift;" "his rotation was hindered;" "[h]e couldn't lift his arms all the way up;" "[h]e couldn't lift his arms;" and "he didn't have full rotation of his shoulder.").

ALDOT further argues that Mr. Davis was not substantially limited because he "confirmed his shoulder injury had no impact on any major life activities whatsoever" from 2009 until 2018. Def.'s Br., at 13, ECF No. 33. This assertion ignores Mr. Davis's testimony regarding limitations lifting overhead. Davis Dep., Def.'s Ex. 2 at 199:5–21, ECF No. 33-2. And it further misconstrues Mr. Davis's other testimony, in which he clarifies that he would lift objects when he could, and when he could not lift an object, he relied on heavy machinery and support from his teams to accomplish his task. *Id.* at 363:19–365:17, 366:13–367:16 ("if I, you know, pushed on it or tried to move it and I found it was difficult, I . . . would call for help.").

And finally, ALDOT argues that Mr. Davis was not substantially limited in any major life activities because he could perform his job duties at ALDOT and Hoover Toyota without accommodation or issue. Def.'s Br. at 13–14, ECF No. 33. Whether an individual has a disability and whether an individual can perform the essential functions of the job such that he is qualified for it are separate questions under the ADA. Mr. Davis's ability to complete his work duties as a TMT is relevant to whether he was qualified to do the job, not whether he had a disability. 42 U.S.C. § 12111(8), 29 C.F.R. § 1630.2(m). As courts have held, previous ability

to perform a position notwithstanding a disability does not mean that an individual is not disabled under the ADA. *Huddleston v. Metro. Atlanta Rapid Transit Auth.*, No. 1:23-CV-04552-SDG-LTW, 2024 WL 4347882, at *2 (N.D. Ga. Sept. 30, 2024) (internal citations omitted) (finding that factor irrelevant because the individual alleging discrimination need only show that he has a disability, he is a qualified individual, and the defendant unlawfully discriminated against him because of the disability). Mr. Davis had an impairment at the time he applied to work at ALDOT in 2018, and notwithstanding this impairment, he could perform all the work duties of a TMT, including any lifting or manual tasks. *See* Pl.'s Br. at § IV.C.2, ECF No. 32; *see also* Blankenship Dep., Def.'s Ex. 8 at 82:17–86:5, ECF No. 33-8 (observing that although Mr. Davis "wasn't able to use the one arm fully," he had always been able to get the job done). Mr. Davis is therefore both an individual with a disability, and a qualified individual for the position of TMT.

C. The United States has met the standard for summary judgment under the "regarded as" theory of the definition of disability.

The United States has also met the standard for summary judgment on a "regarded as" theory of the definition of disability, which was properly pled in its original Complaint. As discussed previously, to have regarded Mr. Davis as having an impairment, ALDOT must have enough knowledge to at least perceive him to have a disability. *See* Pl.'s Br. at 18, ECF No. 32. ALDOT did have that knowledge. One hiring manager who interviewed Mr. Davis testified that he worked with Mr. Davis previously, remembered his shoulder injury, and remembered "physically see[ing]" that Mr. Davis "wasn't able to lift;" "his rotation was hindered;" "[h]e couldn't lift his arms all the way up;" "[h]e couldn't lift his arms;" and "he didn't have full rotation of his shoulder." *Id.* at 19–20 (Blankenship Dep., Ex. 3 at 69:21–70:9). ALDOT's notes from Mr. Davis's interview state "can't lift 50lbs," and the hiring managers acknowledged that

the only reason he was not hired was their belief that he could not lift heavy objects. *Id.* at 19. The ALDOT decisionmakers thus had enough knowledge to perceive Mr. Davis as having a disability.

ALDOT's only response to the clear facts establishing that it regarded Mr. Davis as disabled is that the United States has not properly pled this basis for disability. Def.'s Mot. to Strike, ECF No. 37; Def.'s Br. at 1 n.1, 14 n.5, ECF No. 33. This response fails. The United States had already sufficiently alleged "regarded as" disability under the liberal pleading standard established by Federal Rule of Civil Procedure 8(a)(2). Pl.'s Mot. for Leave to File Am. Compl. at 3, ECF No. 18. Under Fed. R. Civ. P. 8, a sufficient complaint "[does] not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "The takeaway from . . . post-*Twombly* district court decisions . . . is that a plaintiff must allege facts to plausibly show that the plaintiff has a disability in one of the three ways defined by the ADA." *EEOC v. Allstate Beverage Co.*, No. 2:19-CV-657-WKW, 2023 WL 158211, at *3 (M.D. Ala. Jan. 11, 2023), *appeal dismissed*, No. 23-10802-GG, 2023 WL 5835756 (11th Cir. Aug. 23, 2023).

The United States' original complaint ably meets this pleading standard, because it contains factual allegations stating that the ALDOT employees interviewing Mr. Davis knew about his impairment and the accommodations he had received. As this Court discussed, the government's initial complaint contains factual allegations including: "'This manager had worked with Complainant previously and was aware of his injury and accommodations that he received from ALDOT. This manager was also one of the individuals who subsequently interviewed Complainant for the TMT position.'"; "'Complainant was interviewed by at least two ALDOT employees, including the manager he spoke with previously. The second employee

also knew that Complainant was injured during his previous employment with ALDOT.'"; "'[a]lthough the ALDOT interviewers were aware of Complainant's injury, they moved on without asking any questions about how Complainant could get the job done with or without reasonable accommodations.'" Oct. 22, 2024 Mem. Op. on Order Denying Pl.'s Mot. to Am. at 10, ECF No. 27 ("Mem. Op.") (citations omitted); *see also* Sept. 23, 2024 Hr'g Tr. 9:7–24, 10:6–13 ECF No. 36 ("Hr'g Tr."), (facts that support a "regarded as" claim discussed in hearing on motion for leave to amend the complaint); Compl. at 5–6, ¶¶ 20, 23–25 ECF No. 1. These factual allegations are more than sufficient for the United States to plausibly allege that the "regarded as" definition of disability applies to Mr. Davis's claim.

In addition, although the court in *EEOC v. Allstate Beverage Co.* held that plaintiff in that case had not pled "enough facts that plausibly show which definition of disability applies" to his ADA claim, here the factors the court discussed support that the United States has done so. 2023 WL 158211 at *4–5 (citation omitted). First, as discussed *supra* §§ III.B, III.C pp. 15–16, the United States alleges facts that support both that Mr. Davis has an actual disability and that he was regarded as having a disability by ALDOT. Second, reasonable accommodations are not at issue in this case; although the Complaint mentions that ALDOT provided accommodations to Mr. Davis when he returned to work after his injury, Compl. at. 4–5, ¶¶ 16–18, ECF No. 1, and that a hiring manager was aware of his accommodations, *Id.* at 5, ¶ 20, the existence of accommodations at some point in Mr. Davis's career does not foreclose that ALDOT regarded him as having a disability when they refused to re-hire him later. Third, the "regarded as" claim flows properly from the EEOC investigation. The "proper inquiry" is whether the "[plaintiff's] complaint [is] like or related to, or grew out of, the allegations contained in [the] EEOC charge." *Batson v. Salvation Army*, 897 F.3d 1320, 1327–28 (11th Cir. 2018) (internal citation and

quotation marks omitted). "Under the 'like or related' rule "the scope of the judicial complaint is limited to the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." *Eastland v. Tenn. Valley Auth.*, 714 F.2d 1066, 1067 (11th Cir. 1983) (per curiam) (internal citation and quotation marks omitted). Mr. Davis's EEOC charge stated that he applied for the position he had previously held, he was not selected, and that he believed he was discriminated against based on disability, among other reasons. Pl.'s Summ. J. Ex. 11 at 2, ECF No. 34-19 (EEOC Documentation, Charge of Discrimination). This is sufficient to encompass discrimination under any of the definitions of disability.[2] And fourth, ALDOT's Answer indicates that it had fair notice of the "regarded as" claim: ALDOT's Twelfth Defense provides: "Defendant did not discriminate against Complainant on the basis of any actual and/or record of disability or because Complainant is regarded as disabled." Def.'s Answer at 8, ECF No. 7.[3]

The cases ALDOT cites for the proposition that the United States is not permitted "to amend its theories or claims" in summary judgment arguments are distinguishable. *See* Def.'s Br. at 1 n.1, ECF No. 33; Def.'s Mot. to Strike at 1, 5–8, ECF No. 37. *Lightfoot v. Henry County*

[2] In addition to focusing myopically on the EEOC determination letter, ALDOT also points to the Department of Justice's October 19, 2022 letter to ALDOT and accompanying consent decree proposal in an attempt to argue the Department made a determination on "actual" disability only. ALDOT's attempt to introduce settlement negotiations to disprove the validity of the United States' "regarded as" claim are improper under Federal Rule of Evidence 408, and those portions of ALDOT's brief should be disregarded by this Court. *See Guijosa-Silva v. Wendell Roberson Farms, Inc.*, No. 7:10-CV-17 HL, 2012 WL 860394, at *4-5 (M.D. Ga. Mar. 13, 2012) (improper to introduce settlement letter in summary judgment briefing). Furthermore, the Department's letter and consent decree proposal state only generally that ALDOT discriminated against Mr. Davis—they do not address how Mr. Davis meets the definition of disability under the ADA. Ex. 2 to Def.'s Mot. to Strike at ¶¶ 7–22, ECF No. 37.

[3] And as discussed *supra* p. 5, ¶ 27, ALDOT also already asked Mr. Davis directly in his deposition about his "regarded as" claim.

School District dealt with a Plaintiff who asked the district court to construe her allegations supporting her FMLA count as also applying to an ADA retaliation count, when they were not specifically included in her ADA count. 771 F.3d 764, 779 (11th Cir. 2014). Here, the United States put forward one cause of action under one statute—a violation of Title I of the ADA—and the relevant factual allegations supporting a "regarded as" theory of disability under Title I of the ADA are specifically incorporated under that cause of action. Compl. at 8, ¶ 36, ECF No. 1. The other cases cited by ALDOT involve plaintiffs raising new claims for the first time in summary judgment briefing, or alleging no facts that support their disability claim. *See Hurlbert v. St. Mary's Health Care Sys.*, 439 F.3d 1286, 1297 (11th Cir. 2006) (citation omitted) (raising entirely new FMLA allegations regarding a family member in summary judgment briefing); *Chancey v. Fairfield Southern Co.*, 949 F. Supp. 2d 1177, 1194 (N.D. Ala. 2013) (raising claim for breach of confidentiality under the ADA for the first time in summary judgment briefing without supporting facts in the complaint), *aff'd in part on other grounds,* 580 F. App'x 718 (11th Cir. 2014) (per curiam); *Postell v. Metro. Atlanta Rapid Transit Auth.*, No. 1:17-CV-02296-WMR-WEJ, 2018 WL7079178 at *9 (N.D. Ga. Nov. 13, 2018) (raising a "record of" disability claim for the first time in summary judgment response brief), *report & recommendation adopted*, No. 1:17-cv-02296-WMR, 2019 WL 275968 (N.D. Ga. Jan. 8, 2019); *Gordon v. Bd. of Sch. Comm'rs of Mobile Cnty.*, No. 09-CV-0797-WS-C, 2011 WL 773033 at *5 n.13 (S.D. Ala. 2011) (court opining in a footnote that although plaintiff did not advance a "regarded as" claim, the facts alleged would not support one); *Taylor v. Ala. Power Co.*, No. 1:23-CV-00116-KD-N, 2024 WL532309 at * 4–5 (S.D. Ala. Feb. 8, 2024) (motion to dismiss granted where pro se plaintiff alleged no facts sufficient to establish disability under any prong

of the definition). These cases are inapplicable to the present case, in which the United States pled factual allegations in its initial complaint related to the "regarded as" theory of disability.

Furthermore, this Court's decision on the United States' Motion for Leave to Amend the Complaint does not address the merits of its "regarded as" summary judgment claim, contrary to ALDOT's assertions. In its Motion for Leave to Amend the Complaint, the United States sought only to "provide complete clarity" for the bases of its "regarded as" claim by adding additional details it had learned in discovery. Pl.'s Mot. for Leave to File Am. Compl. at 2, ECF No. 18. However, this Court noted, "the government's initial complaint already includes allegations relating to all of this purported newly discovered information." Mem. Op. at 9, ECF No. 27. The Court then recited the various factual allegations the United States put forward in its Complaint. *Id.* at 9–10. These facts support a theory that Mr. Davis was regarded by ALDOT as having a disability. This Court then ruled only that "the government has not shown the good cause and diligence that Rule 16(b) requires in order to amend," and did not make any finding that the United States had not pled a "regarded as" theory of the definition of disability.[4] *Id.* at 11. ALDOT's assertion that the United States' Motion for Leave to Amend the Complaint is an "inherent admission" that the United States did not plead a "regarded as" theory should therefore be disregarded. Def.'s Br. at 1 n.1, ECF No. 33.

Finally, ALDOT argues in a footnote that under the "regarded as" definition of disability, the United States cannot show causation. Def.'s Br. at 14 n.5, ECF No. 33. This is incorrect.

[4] ALDOT also argues that this Court must have meant to foreclose a "regarded as" claim because it did not grant ALDOT additional time for discovery. Def.'s Mot. to Strike at 12–13, ECF No. 37. However, as the United States has pointed out, ALDOT and its own witnesses are most likely to possess any information relevant to this claim. Pl.'s Reply to Def.'s Resp. in Opp'n to the Mot. for Leave to File an Am. Compl. at 6, ECF No. 20; Hr'g Tr. 41:6–19, ECF No. 36 (discussing why reopening Mr. Davis's deposition is unnecessary).

The evidence shows that the hiring managers involved perceived Mr. Davis as having an impairment, and they admitted that the impairment was their only reason for not hiring him. *See supra* pp. 15–16; Pl.'s Br. at §§ IV.C.1.ii, C.3, ECF No. 32; *Lewis*, 934 F.3d at 1184 (no separate causation analysis required for a "regarded as" theory of liability). ALDOT asserts that Mr. Davis could not say for certain why he was not hired, but Mr. Davis's knowledge about ALDOT's perceptions are irrelevant. *See Kingsley v. Tellworks Commc'ns, LLC*, No. 1:15-CV-4419-TWT-JSA, 2017 WL 2624555, at *27 (N.D. Ga. May 24, 2017) (finding a Plaintiff who testified that she "does not know" why her employment was terminated could still establish Defendant's reason was pretextual), *report & recommendation adopted*, No. 1:15-CV-4419-TWT, 2017 WL 2619226 (N.D. Ga. June 15, 2017); *c.f. Walker v. Mortham*, 158 F.3d 1177, 1183 n.10 (11th Cir. 1998) ("The presumption of intentional discrimination in employment discrimination cases forces the employer—who is in the best position among the parties to know why certain employment decisions were made—to present evidence regarding why the plaintiff was not given the desired position"). ALDOT has put forward no other evidence or explanation for why Mr. Davis was not hired. The undisputed evidence thus establishes that ALDOT regarded Mr. Davis as having a disability and declined to hire him for that reason. The United States is therefore entitled to summary judgment.

IV. Conclusion

For the foregoing reasons, the Court should deny ALDOT's motion for summary judgment.

Dated: December 24, 2024

For the United States of America:

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CERTIFICATE OF SERVICE

I hereby certify that on this the 24th day of December, 2024, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will forward a copy thereof to all attorneys of record.

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