

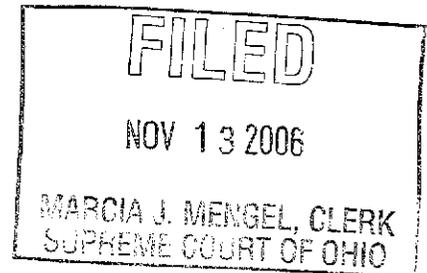
IN THE SUPREME COURT OF OHIO

RANDY PARROT,)	Case No. 2006-1886
)	Discretionary Appeal (Non-felony)
Plaintiff-Appellant,)	
)	On Appeal from:
)	
v.)	The Fifth District Court of Appeals,
)	Case No. 2006 CA 00005
)	
A.R.E., INC.,)	Stark County Court of Common Pleas,
)	Case No. 2005 CV 01758
Defendant-Appellee.)	

**APPELLEE A.R.E.'S MEMORANDUM IN RESPONSE TO APPELLANT RANDY
PARROT'S MEMORANDUM IN SUPPORT OF JURISDICTION**

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I. STATEMENT AS TO WHY APPELLANT'S DISCRETIONARY APPEAL MUST BE REFUSED

Appellant argues that this case is one of public or great general interest because the terms “handicap” and “disability” require further clarification under Ohio employment discrimination law and because there are no clear standards regarding an employer’s responsibility to make reasonable accommodations to an otherwise qualified employee. Appellant’s Memorandum in Support of Jurisdiction (“Memo in Support”) at 1. Accordingly, Appellant requests this Court to accept jurisdiction of this case so that these “important issues” can be clarified. *Id.*

As is thoroughly discussed *infra*, all of Appellant’s propositions of law present issues that have already been the subject of numerous court decisions and are all well-settled under both Ohio and federal law. In addition, Appellant’s propositions are all based primarily on questions of fact that are unique to this case alone and do not present an issue that is of any public or great general interest. Finally, the lower court decisions were based on law that has been settled and are therefore neither novel nor erroneous and could not possibly appeal to the legal profession or to this Court’s collective interest in jurisprudence.

II. LEGAL ARGUMENT AGAINST APPELLANT’S PROPOSITIONS OF LAW

- A. **Response to Proposition of Law No. 1:** In order to establish a disability under O.R.C. §4112.01(A)(13), courts have uniformly held that a plaintiff must do more than merely allege that he suffers from an impairment and summary judgment is appropriately granted where a plaintiff fails to provide evidence that his impairment is substantially limiting.

In his first proposition of law, Appellant argues that he met his burden of demonstrating that he is an individual with a disability because evidence exists in the record that he suffers from an impairment that restricts the major life activity of lifting. Consequently, according to Appellant, summary judgment in this case was inappropriate because of the existence of such evidence. Memo in Support at 5-7. As is discussed below, Appellant’s proposition wholly

ignores the statutory and judicial definitions of disability that have been applied since the inception of the ADA and Chapter 4112 of the Ohio Revised Code.

To establish that one is disabled means that one must suffer from an impairment that substantially limits one or more major life activities. O.R.C. §4112.01(A)(13). Ohio courts have routinely held that not every physical or mental condition from which a person may suffer constitutes a disability. See, e.g., *McPherson v. Goodyear Tire & Rubber Co.*, 9th Dist. No. 21499, 2003 Ohio 7190 at ¶ 30; *Maloney v. Barberton Citizens Hosp.* (1996), 109 Ohio App. 3d 72, 376; *Kemo v. The City of St. Clairsville* (1998), 128 Ohio App. 3d 178, 185; *Sadinsky v. EBCO Manufacturing Co.*, (1999), 134 Ohio App. 3d 54, 60.

Federal courts interpreting the Americans with Disabilities Act (“ADA”) have similarly held that not every physical condition is a disability.¹ In 1999, the United States Supreme Court decided a trilogy of cases interpreting the ADA. See *Sutton v. United Air Lines, Inc.* (1999), 527 U.S. 471, 144 L. Ed. 2d 450, 119 S. Ct. 2139; *Albertson's, Inc., v. Kirkingburg* (1999), 527 U.S. 555, 144 L. Ed. 2d 518, 119 S. Ct. 2162; and *Murphy v. United Parcel Service, Inc.* (1999), 527 U.S. 516, 144 L. Ed. 2d 484, 119 S. Ct. 2133. In these cases, the Supreme Court made it clear that not every physical or mental impairment constitutes a disability, even though the person may have an impairment that involves one or more of his major life activities.

The rationale underlying both the Ohio and federal courts interpretation is that the extent of the physical or mental impairment, regardless of its nature, must be substantially limiting. *Albertson's, Inc.*, 527 U.S. at 563. As the Supreme Court explained, "the definition of disability also requires that disabilities be evaluated 'with respect to an individual' and be determined based

¹ Because Ohio's handicap discrimination law was modeled after the federal ADA, Ohio courts may seek guidance when interpreting the Ohio handicap-discrimination statute from regulations and cases that interpret the ADA. *Columbus Civ. Serv. Comm. v. McGlone* (1998), 82 Ohio St.3d 569, 571.

on whether an impairment substantially limits the 'major life activities of such individual.'" *Sutton*, 527 U.S. at 483, citing § 12102(2), Title 42, U.S. Code. The Supreme Court further stated that the phrase "substantially limits" "is properly read as requiring that a person be presently--not potentially or hypothetically--substantially limited in order to demonstrate a disability." *Sutton*, 527 U.S. at 482. If the plaintiff is unable to establish a *prima facie* case of handicap discrimination, the trial court's grant of summary judgment to the defendant is appropriate. See *Markham v. Earle M. Jorgensen Co.* (2000), 138 Ohio App.3d 484, 497.

Contrary to the applicable Ohio and federal case law, Appellant argues that he is *per se* disabled because he has a lifting restriction in one arm. Memo in Support at 4-7. However, this is not, and has never been, the standard under either Ohio or federal law. As properly found by both lower courts, being unable to lift more than 5 lbs. repeatedly for purposes of performing a single job is simply not enough to establish a disability under the law. See 5th App. Op. at 9-10.

Appellant's reliance on *House v. Kirtland Capital Ptnrs* (2004), 158 Ohio App.3d 68, 2004 Ohio 3688, *cert. denied*, 104 Ohio St.3d 1409, 2004 Ohio 6364, is misplaced and actually supports both lower court decisions. In that case, the plaintiff contended that her impairment restricted her from lifting. *Id.* at ¶ 38. However, the plaintiff further testified that her impairment did not fully prohibit her from accomplishing certain tasks and instead stated that there was only a certain level of pain associated with their performance. *Id.* As such, the court held that the plaintiff's lifting restriction did not render her disabled under Ohio law. *Kirtland*, at ¶ 43.

Also is misplaced is Appellant's reliance on *Huberty v. Esber Bev. Co.* (July 3, 2000), 5th Dist. No. 1999CA00346, 2000 Ohio App. LEXIS 3011, 18-19 (5th App. Dist.) (*Huberty I*). Therein, the plaintiff's *own doctor* testified that the plaintiff had substantial limitations in lifting, performing a manual task and/or working. Herein, there is absolutely no such evidence in the

record but for Appellant's own self-serving affidavit. What is in the record is that Appellant could not meet the essential lifting restrictions of production jobs at one employer. What is also in the record is that Appellant's own medical records, his own physician's opinion and his own testimony all consistently demonstrate that his impairment does not limit his activities of daily living.

As properly found by both lower courts, Appellant provided absolutely no evidence whatsoever that his impairment substantially limited him in the major life activity of lifting or in any other major life activity. Because Appellant's first proposition of law is of interest only to Appellant and not of any public or great general interest, it must be denied as a basis for establishing this Court's jurisdiction.

- B. Response to Proposition of Law No. 2:** Appellant's failure to submit any evidence that his lifting impairment restricted his ability of working in a broad class of jobs or in performing manual tasks in general supports the granting of summary judgment for Appellee.

In his second Proposition of Law, Appellant argues that summary judgment was erroneously granted because his lifting restriction negatively affects his ability to work and perform manual tasks. Memo in Support at 7. He takes direct issue with the Appellate Court's holding, at ¶47, that there "was no evidence that Appellant's injury otherwise substantially limits him from engaging in the major life activities of working, lifting or performing manual tasks." However, the Appellate Court's particularized factual finding was consistent with the record and the applicable law.

The issue raised by Appellant in his second Proposition has already been squarely settled by the United States Supreme Court in *Sutton* and *Toyota Motor Mfg. v. Williams* (2002), 534 U.S. 184, 196-199, and followed by numerous Ohio courts. See, e.g. *Pinchot v. Mahoning County Sheriff's Department* (2005), 164 Ohio App. 3d 718, 2005 Ohio 6593, at ¶¶ 13-18;

Vickers v. Wren Industries, Inc., 2nd Dist. No. 20914, 2005 Ohio 3656, at ¶¶ 35-36; *Stockinger v. Ohio Civil Rights Commission*, 5th Dist. No. 2003-CA-0116, 2004 Ohio 6639 at ¶ 26; *Yamamoto v. Midwest Screw Products*, 11th Dist. No. 2000-L-200, 2002 Ohio 3362 at ¶ 24; and *Cox v. Kettering* 2nd Dist. No. 20614, 2005 Ohio 5003, ¶¶ 21-25.

Both *Sutton* and *Toyota Motor* make clear that one alleging a disability must show more than his impairment merely negatively affects his ability to work and perform manual tasks. “[W]hen the major life activity under consideration is that of working, the statutory phrase ‘substantially limits’ requires . . . that plaintiffs allege that they are unable to work in a broad class of jobs.” *Sutton, supra*, 527 U.S. 471 at 491; see also *Gerton v. Verizon South Inc.*, 145 Fed. Appx. 159, 165-166 (five pound lifting restriction is not enough to demonstrate that plaintiff’s impairment restricted her from performing a broad class of jobs). In *Toyota Motor, supra* at 200-201, the Court provided clarification of the major life activity of performing manual tasks:

When addressing the major life activity of performing manual tasks, the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people’s daily lives, not whether the claimant is unable to perform the tasks associated with her specific job. Otherwise, *Sutton’s* restriction on claims of disability based on a substantial limitation in working will be rendered meaningless because an inability to perform a specific job always can be recast as an inability to perform a “class” of tasks associated with that specific job.

In the case at bar, absent from the record is any evidence, report or otherwise that demonstrates that Appellant was precluded from a broad class of jobs or that he cannot perform the variety of tasks central to most people’s daily lives. When stripped to its essence, Appellant’s argument is that, since he has a lifting restriction, he is “disabled” under Ohio law. This is a clear misstatement of the distinction between an impairment and disability. Because both lower courts properly applied the law in finding that Appellant is not substantially limited in

any major life activity, Appellant's second proposition of law must be denied as a basis for jurisdiction as it is of interest only to Appellant and not of any public or great general interest.

- C. **Response to Proposition of Law No. 3:** Both Ohio and federal courts have routinely and consistently held that, in order to demonstrate a "disability" under R.C. § 4112.01(A)(13), one must still demonstrate either a "record of," or being "regarded as" having a disability that substantially limits one or more major life activities.

On pages 9-10 of his Memo in Support, Appellant relies on a single case, *Johnson v. Metrohealth Medical Center*, 8th Dist. No. 82506, 2004 Ohio 2864, to argue that neither the second nor third prong of Ohio's disability statute require proof that his impairment substantially limits one or more major life activities. However, Appellant's reliance is misplaced.

Ohio's disability discrimination statute defines "disability" in one of three ways:

- (1) a physical or mental impairment that substantially limits one or more major life activities;
- (2) a record of a physical or mental impairment; or
- (3) being regarded as having a physical or mental impairment.

R.C. § 4112.01(A)(13). Other than the authoring judge in *Johnson*,² every single court to have addressed this issue both before and after *Johnson* has held that under any of the three prongs of the disability statute, the plaintiff must demonstrate that the physical or mental impairment substantially limits a major life activity. See Judge McMonagle's concurring opinion, wherein he wrote that "no other Ohio case or federal case interpreting Ohio law has reached the same conclusion as the majority does in this case." [Emphasis added] *Id.* at ¶ 44 and ¶ 47; see also *Vickers, supra*, at ¶ 11 ("the authoring judge [in *Johnson*] stands alone on the conclusion that R.C. 4112.01(A)(13), which defines disability, 'does not require all physical or mental

² The three judge panel in *Johnson* was split with two judges concurring in judgment only. The authoring judge, Judge Kilbane, was the only judge to so hold that the second and third prong of Ohio's disability statute does not require proof that the plaintiff's impairment substantially limits one or more major life activities. Judge McMonagle wrote the concurring opinion and Judge Dyke concurred with Judge McMonagle's concurring opinion.

impairments to substantially limit a major life activity before qualifying as disabilities”); and *Hayest v. The Cleveland Clinic Foundation*, 2006 U.S. Dist. LEXIS 76013 (N. D., Ohio), at 7 (noting that the *Johnson* opinion “is a singular instance, which other courts have declined to follow”).

In fact, Appellant’s other case citations support Appellee’s position. In *Pierson v. Norfolk S. Corp.*, 11th Dist. No. 2002-A-0061, 2003 Ohio 6682,³ that court held that an individual is “regarded as” being disabled when the employer “mistakenly believes that a person has a physical impairment *that substantially limits one or more major life activities.*” [Emphasis added]. *Pierson*, at ¶ 24, quoting *Sutton, supra*, at 489. In *Miller v. Premier Indus. Corp.*, 136 Ohio App. 3d 662, 669 (8th App. Dist., 2000),⁴ that court also held that the “regarded as” prong is established “whenever the employer regards, or perceives, the employee as having an impairment *that substantially limits one or more major life activities.*” [Emphasis added]. *Miller*, at 669.

Finally, to demonstrate a “record of” a disability, the plaintiff must have had a record of an impairment that substantially limited one or more major life activities. *Cox, supra*, at ¶¶16, 25. Moreover, a “record of” impairment exists only “whenever a record or history of an impairment remains, but the impairment no longer exists.” *Miller, Id.* Herein, and aside from the fact that Appellant failed to demonstrate a substantial limitation of any major life activity, the record shows that Appellant *fully admitted that his impairment still existed* at the time of the filing of A.R.E.’s summary judgment motion. See Memo in Support at 12-14.

In conclusion, Appellant’s reliance on a single, unreported case that has not been followed and in fact has been criticized by both Ohio and federal courts can hardly be considered

³ Footnote 1, page ten of Appellant’s Memo in Support.

⁴ Memo in Support at 5.

to be of general or great public interest. Therefore, Appellant's third proposition of law must be denied as a basis for establishing this Court's jurisdiction.

- D. Response to Proposition of Law No. 4:** It is well settled under both Ohio and federal law that an employer need not provide an accommodation that shifts an essential function of the job to another employee. Furthermore, the lower courts never held as dispositive whether or not Appellant failed to request a reasonable accommodation, so the issue is irrelevant.

Appellant argues on pages 12-14 of his Memo in Support that Appellee had a duty to indefinitely accommodate him by letting other employees perform essential functions of his position.⁵ However, such accommodations are neither reasonable nor required under both Ohio and federal law.

In Ohio, employers must make *reasonable* accommodations to employees with disabilities unless such an accommodation would impose undue hardship on the execution of the employer's business. *Shaver v. Wolske & Blue* (2000), 138 Ohio App.3d 653, 663. "Reasonable accommodations will vary according to the particular circumstances of the business, the employer and the employee." *Huberty v. Esber Beverage Co.*, 5th dist. No. 2001-CA-00202, 2001 Ohio 7048, at 8 (*Huberty II*). However, a reasonable accommodation will never require an employer to:

- (1) restructure or change the essential functions of the job;
- (2) create a new or special position or to assign the employee to a position already occupied;
- (3) re-train his employee for another position within the company; or
- (4) provide a helper or assistant to perform any of the essential functions of the job or to reassign essential functions to other employees.

⁵ As a preliminary matter, the 5th Appellate District Court was correct in deciding not to address Appellant's failure to accommodate argument because Appellant failed to establish his *prima facie* case. 5th App Op. at 10. However, assuming, *arguendo*, that Appellant was in fact "disabled" as a matter of law, the trial court correctly held that Appellee had no duty to accommodate Appellant by shifting an essential function of his position to another employee.

Id., at 8-9. See also *Hoskins v. Oakland County Sheriff's Dept.*, 227 F.3d 719, 730 (6th Cir. 2000) (the ADA does not require employers to accommodate individuals by shifting an essential job function onto others). Similarly, an employer is not required to convert temporary, light duty positions into permanent positions for disabled employees, *Hoskins* at 729, nor to wait indefinitely for an employee's medical condition to be corrected. *Gantt v. Wilson Sporting Goods*, 143 F.3d 1042, 1047 (6th Cir. 1998).

To establish a claim for failure to accommodate, Appellant must demonstrate (1) that he was disabled, (2) that A.R.E. was aware of the disability, and (3) that he was an otherwise qualified individual with a disability in that he or she satisfied the prerequisites for the position and could perform the essential functions of the job with or without reasonable accommodation. *Planck v. Cinergy Power Generation*, 2003 Ohio 6785, 2003 Ohio App. LEXIS 6112 (12th App. Dist.), at ¶ 32, citing *Shaver, supra*, at 663-664.

The plaintiff must further demonstrate that the "accommodation is objectively reasonable." *Monette v. Electronic Data Sys., Inc.*, 90 F.3d 1173, 1183, (6th Cir. 1996); see also *Pfost v. Ohio State Attorney General*, 10th Dist. No. 98AP-690, 1999 Ohio App. LEXIS 1792, at 7-8. Moreover, the plaintiff bears the burden of establishing that he is capable of performing the essential functions of the job with the proposed accommodation. *Id.* As such, if the employer claims that "the disabled individual would be unqualified to perform the essential functions of the job even with the proposed accommodation, the disabled individual must prove that he or she would in fact be qualified for the job if the employer were to adopt the proposed accommodation." *Id.*; see also *Hoskins, supra* (the ADA does not require an employer to shift the essential functions of a position onto others, there were no permanent jobs available that fit plaintiff's restrictions and an employer is not obligated under the ADA to convert temporary,

light duty positions into permanent positions); *Bratten v. SSI, Servs., Inc.*, 185 F.3d 625, 632-33 (6th Cir. 1999) (district court was correct in holding that the requested accommodation of having other workers assist plaintiff was not reasonable); *Huberty II, supra* at 9 (holding that an “employer is not required to provide a helper or assistant to perform any of the essential functions of the job [or] to reassign essential job functions to other employees.”); *Planck v. Cinergy Power Generation Serv. LLC*, 12th Dist. No. CA2002-12-104, 2003 Ohio 6785, at ¶¶ 32-36.

The only possible accommodation that Appellant “proposed” that can be gleaned from the record was for him to be permanently excused from performing the essential job function of lifting and to force his co-workers to perform all of the heavy lifting of his job or to continue to perform temporary light duty jobs. However, as properly found by the trial court, and as per clear Ohio and federal law, neither “proposal” was reasonable because a “reasonable accommodation” will never require an employer to “provide a helper or assistant to perform any of the essential functions of the job or to reassign essential functions to other employees.” *Huberty II, supra; Hoskins, supra*. Moreover, where an employer is unable to find the existence of a reasonable accommodation, it is not required to pursue the matter further. *Huberty II*, at 18. Significantly, Appellant nowhere addresses this case law. Because no reasonable accommodation was available, the trial court’s decision was proper and is not a basis for establishing this Court’s jurisdiction.

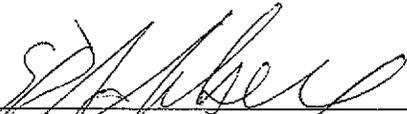
Finally, Appellant’s fourth proposition of law further argues that Appellant was not required to request an accommodation after one had already been provided but later rescinded. However, this issue was never held as dispositive by the lower courts. Furthermore, even if it were, it is irrelevant because “an employer’s decision to cease making accommodations related

to essential functions of an employee' position does not violate the ADA." *Dabney v. Ohio Dept. Admin. Serv.*, 2006 U.S. Dist. LEXIS 23435 (D. Ohio), at 25.

III. CONCLUSION

For all the foregoing reasons and legal authority cited, Appellee respectfully requests that this Court decline to hear this discretionary appeal.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Appellee's Memorandum in Response to Appellant's Memorandum in Support of Jurisdiction to the Supreme Court of Ohio was served via regular U.S. mail, postage prepaid upon the following:

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This 9th day of November, 2006.



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