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Former Employees' Right to Relief under the Americans with Disabilities Act

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FORMER EMPLOYEES' RIGHT TO RELIEF UNDER THE AMERICANS WITH DISABILITIES ACT

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Abstract: The Americans with Disabilities Act (ADA) does not state whether a former employee may sue a former employer regarding post-employment fringe benefits. Some courts have held that former employees who are retired or have total disabilities have no right to relief under the statute because they do not meet the ADA's requirement that a claimant be a "qualified individual with a disability." Other courts have concluded that former employees receiving post-employment benefits do have a right to relief under the statute. These courts reasoned that an internal ambiguity in the statute requires courts to look to the legislative history and purpose of the ADA, and construe the statute in accord with its broad remedial purpose. This Comment argues that post-employment benefits recipients have a right to relief under the ADA. The ADA expressly prohibits discrimination in terms, conditions, and privileges of employment; individuals must have legal recourse when faced with this type of discrimination. By broadly construing the employment relationship to include individuals who no longer work but continue to receive benefits from a former employer, the "qualified individual with a disability" requirement is satisfied and does not stand as an artificial barrier to relief under the ADA.

In 1990, Congress passed the Americans with Disabilities Act (ADA)[1] to stamp out pervasive societal discrimination against people with disabilities.[2] The ADA prohibits employers from discriminating based on disability in virtually all aspects of employment, including fringe benefits.[3] Yet, consider the Eleventh Circuit's holding in *Gonzales v. Garner Food Services, Inc.* that the ADA's protection did not extend to Timothy Bourgeois, a former employee receiving discriminatory post-employment benefits.[4] Bourgeois worked for Garner Food Services (GFS) until GFS learned that Bourgeois was being treated for AIDS. Shortly thereafter, GFS fired Bourgeois to avoid paying future insurance claims stemming from his AIDS treatment;[5] however, Bourgeois

1. Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101–12213 (1994)).

2. *See* 42 U.S.C. § 12101(b).

3. H.R. Rep. No. 101-485, pt. 2, at 54–55 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 336–37. The ADA "sets forth prohibitions against discrimination on the basis of disability by employers . . . with regard to hiring and all terms, conditions, and privileges of employment. . . . This section is intended to include the range of employment decisions . . . includ[ing] . . . fringe benefits available by virtue of employment." *Id.* The ADA also prohibits discrimination in areas such as public services and public accommodations. *See* 42 U.S.C. §§ 12131–12165, 12181–12189.

4. 89 F.3d 1523, 1531 (11th Cir. 1996).

5. *Id.* at 1524.

continued to participate in the GFS health insurance plan after his termination.[6] While Bourgeois was collecting post-employment health care benefits, GFS amended the health plan to limit AIDS-related treatment, in part as a result of Bourgeois's continued participation in the plan.[7] After Bourgeois's death, his estate sued GFS, claiming GFS violated the ADA by reducing benefits on the basis of Bourgeois's disability.[8] The district court dismissed the claim, and on appeal, the Eleventh Circuit acknowledged that although GFS's deliberate reduction in benefits could violate the ADA,[9] Bourgeois had no right to relief because the ADA's protection does not extend to former employees.[10]

Gonzales illustrates the problem that arises when an employee who has a total disability or is retired is finally in a position to use benefits earned by virtue of previous employment, but finds that the insurance, disability, or retirement plan discriminates based on disability. By barring employees from bringing claims because they are no longer employed, courts deny such employees the full rights granted by the ADA.[11] Circuits disagree on whether the ADA protects former employees who allege that post-employment benefits are discriminatory.[12]

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6. *Id.* Bourgeois continued to participate in GFS's health insurance plan pursuant to a provision of the Consolidated Omnibus Reconciliation Act of 1985 (COBRA), 29 U.S.C.A. § 1161 (1998). COBRA requires employers to allow former employees the option of continuing health insurance coverage after termination of employment.

7. *Gonzales*, 89 F.3d at 1524.

8. *Id.*

9. *Id.* at 1525. Indeed, it is likely that deliberately reducing benefits violated the ADA. The Equal Employment Opportunity Commission (EEOC), the agency charged with enforcing Title I of the ADA, has determined that benefit reductions adopted for discriminatory reasons violate the ADA. *See* 29 C.F.R. pt. 1630, app. § 1630.5 (1998); *see also Cutting Benefits for AIDS Violates ADA, EEOC Determines*, 25 Daily Lab. Rep. (BNA), at 1 (Feb. 9, 1993).

10. *Gonzales*, 89 F.3d at 1530–31.

11. Section 12201(c) of the ADA clarifies that the statute does not prohibit insurance or benefit plan providers from offering bona fide plans that differentiate in coverage based on recognized standards of risk assessment. In other words, a benefit plan that provides different benefits for different types of conditions or disabilities does not necessarily violate the ADA. *See* 42 U.S.C. § 12201(c) (1994). However, the lawfulness of a particular plan under the ADA is a separate issue from whether or not a former employee may bring a claim to challenge a benefit plan. At least one court has conflated the two issues, reasoning that because the benefit plan did not violate the ADA, the former employee could not sue. *See* EEOC v. CNA Ins. Cos., 96 F.3d 1039, 1044 (7th Cir. 1996). While the ultimate outcome in some cases may be that the ADA provides no relief to the former employee alleging discriminatory benefits, it is important to distinguish between the issues of merit and right to relief. The right to judicial recourse is crucial if the underlying claim has merit.

12. *Compare Gonzales*, 89 F.3d at 1531, *and CNA*, 96 F.3d at 1045 (holding that former employee with total disability has no right to relief under ADA because she is not "qualified individual with a disability"), *with* Ford v. Schering-Plough Corp., 145 F.3d 601, 607 (3d Cir. 1998)

This Comment argues that the ADA allows individuals to bring claims against former employers alleging discriminatory decisions regarding post-employment fringe benefits. Because the ADA protects fringe benefits, former employees are entitled to judicial recourse when a former employer discriminates in this arena. Furthermore, a proper reading of the "qualified individual with a disability" requirement affirms that it does not bar claims by former employees receiving post-employment benefits. Courts that construe the requirement to exclude former employees wrongly prevent those employees from pursuing their statutorily conferred rights.

Part I of this Comment provides a background of the ADA's statutory framework and legislative history. Part II examines the case law interpreting former employees' coverage under the ADA and other employment discrimination statutes. Part III argues that because Congress included in the ADA the right to non-discriminatory fringe benefits, it intended to give employees legal recourse to secure those rights. This Comment concludes that the "qualified individual with a disability" requirement does not prohibit former employees from bringing ADA claims to enforce post-employment benefits.

I. STATUTORY DEFINITIONS AND LEGISLATIVE HISTORY OF THE ADA

A. Statutory Framework

Congress enacted the ADA to provide clear and comprehensive guidelines for eliminating discrimination against people with disabilities.[13] Although the Act does not explicitly address whether former employees are protected, Title I of the ADA broadly prohibits employment discrimination.[14] Under Title I, a covered entity[15] may not discriminate on the basis of disability against a "qualified individual with a

(holding that ADA allows former employee with total disability to sue former employer regarding discriminatory disability benefits), *cert. denied*, 119 S. Ct. 850 (1999), *and* Castellano v. City of New York, 142 F.3d 58, 69 (2d Cir. 1998) (holding that former employee entitled to fringe benefits is "qualified individual with a disability" for purpose of suing under ADA).

13. 42 U.S.C. § 12101(b)(1) (1994).

14. 42 U.S.C. §§ 12111–12117 (1994).

15. "Covered entity" includes an employer, an employment agency, a labor organization, or a joint labor-management committee. 42 U.S.C. § 12111(2).

disability"[16] in regard to "job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[17] A "qualified individual with a disability"[18] is one who, with or without reasonable accommodation,[19] can perform the essential functions of the employment position.

Based on this statutory language, courts have developed a three-part test to determine whether a claimant has established a prima facie case of discrimination under the ADA. To prevail on an ADA claim, plaintiffs must show that they have a disability, are otherwise qualified and able to perform the essential functions of the job, and the employer unlawfully discriminated on the basis of disability.[20] The cases addressing former employees' right to relief have focused on the second part of the test: whether the would-be claimant was a qualified individual able to perform the essential functions of the job.[21]

B. Legislative History

The ADA's legislative history reflects Congress's intent to cover the full range of employment decisions,[22] including decisions regarding fringe benefits available to employees by virtue of employment.[23]

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16. 42 U.S.C. § 12112(a).

17. 42 U.S.C. § 12112(a). While the statute does not explicitly state that it covers "fringe benefits," courts have unanimously assumed such protection as a "term, condition or privilege of employment." *See infra* Part III.A.1. The legislative history underlying the statute's enactment confirms this interpretation. *See infra* Part I.B. Moreover, while the EEOC regulations, like the ADA itself, do not address the former employee's right to sue, the regulations do expressly extend the ADA's coverage to fringe benefits. *See* 29 C.F.R. § 1630.4(f) (1998). In addition, the EEOC regulations echo the comprehensive approach of Title I itself, forbidding discrimination against qualified individuals with disabilities in all aspects of the employment relationship. *See* 29 C.F.R. pt. 1630, app. § 1630.4 (1998).

18. 42 U.S.C. § 12111(8).

19. "Reasonable accommodation" by an employer includes making the physical facility accessible to individuals with disabilities; modifying a job, work schedule, equipment, device, examination, or training material or policy; providing qualified readers or interpreters; or making other accommodations. *See* 42 U.S.C. § 12111(9)–(10).

20. *See, e.g.*, Holbrook v. City of Alpharetta, 112 F.3d 1522, 1526 (11th Cir. 1997); Aucutt v. Six Flags Over Mid-America, Inc., 85 F.3d 1311, 1318 (8th Cir. 1996); White v. York Int'l Corp., 45 F.3d 357, 360–61 (10th Cir. 1995).

21. *See infra* Part II.A.

22. H.R. Rep. No. 101-485, pt. 2, at 54 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 336.

23. *Id.* at 54–55, *reprinted in* 1990 U.S.C.C.A.N. at 336–37.

Elaborating on the intended scope of the employment discrimination provision, the House of Representatives' Report provides an extensive, but not exclusive, list of employment decisions subject to the ADA's protection that explicitly includes fringe benefits.[24]

The ADA's legislative history also explains the purpose of the statute's "qualified individual with a disability" and "essential functions" requirements. Both the House and Senate Reports clarify that the ADA does not compel employers to hire, promote, or retain fundamentally unqualified workers.[25] Congress did not intend the ADA to interfere with employers' freedom to choose and maintain workers who are able to perform job duties.[26] Instead, Congress sought to prevent employers from discriminating against qualified individuals on the basis of disability.[27] Similarly, the Committee Reports accompanying the legislation note that the "essential functions" requirement ensures that employers can maintain a qualified work force "able to perform the essential, i.e., the non-marginal functions of the job in quesiton [sic]."[28] Employers may not disqualify individuals with disabilities from employment simply because the individual cannot perform some marginal job function peripheral to that job's essential function.[29]

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24. The House Report states:

> [T]he decisions covered [by Title I of the ADA] include: (1) recruitment, advertising, and the processing of applications for employment; (2) hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring; (3) rates of pay or any other form of compensation and changes in compensation; (4) job assignment, job classification, organizational structures, position descriptions, lines of progression, and seniority lists; (5) leaves of absence, sick leave, or any other leave; (6) *fringe benefits available by virtue of employment, whether or not administered by the covered entity*; (7) selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training; and (8) employer-sponsored activities, including social or recreational programs.

Id. (emphasis added).

25. *Id.* at 55, *reprinted in* 1990 U.S.C.C.A.N. at 337; S. Rep. No. 101-116, at 26 (1989).

26. H.R. Rep. No. 101-485, pt. 2, at 55, *reprinted in* 1990 U.S.C.C.A.N. at 337; S. Rep. No. 101-116, at 26.

27. H.R. Rep. No. 101-485, pt. 2, at 55, *reprinted in* 1990 U.S.C.C.A.N. at 337; S. Rep. No. 101-116, at 26.

28. H.R. Rep. No. 101-485, pt. 2, at 55, *reprinted in* 1990 U.S.C.C.A.N. at 337; S. Rep. No. 101-116, at 26.

29. H.R. Rep. No. 101-485, pt. 2, at 55, *reprinted in* 1990 U.S.C.C.A.N. at 337.

II. JUDICIAL INTERPRETATION OF FORMER EMPLOYEES' RIGHT TO RELIEF UNDER THE ADA AND OTHER STATUTES

The U.S. circuit courts are split regarding former employees' right to relief under the ADA. The heart of the issue dividing the courts is whether the "qualified individual with a disability" requirement denies former employees the right to sue[30] when they have a total disability or are retired. The Second and Third Circuits have held that in light of the ADA's ambiguity regarding former employees, the statute's broad remedial purpose mandates coverage of former employees who receive post-employment benefits.[31] However, the Seventh and Eleventh Circuits have precluded relief under the ADA based on the failure of individuals with total disabilities to meet the "qualified individual with a disability" requirement.[32]

Courts have also considered the question of former employees' right to relief under other employment discrimination statutes. Most of the cases interpreting Title VII of the Civil Rights Act of 1964 (Title VII),[33] the Age Discrimination in Employment Act (ADEA),[34] and the Fair Labor Standards Act (FLSA)[35] affirm that former employees have a right to relief,[36] although the sparse case law interpreting the Rehabilitation Act of 1973[37] concludes otherwise.[38]

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30. Some courts and litigants have framed this issue in terms of a former employee's "standing" to sue under the ADA. *See, e.g.*, Parker v. Metropolitan Life Ins. Co., 99 F.3d 181, 185–87 (6th Cir. 1996), *vacated on reh'g*, 121 F.3d 1006 (6th Cir. 1997) (en banc); Bril v. Dean Witter, Discover & Co., 986 F. Supp. 171, 173–75 (S.D.N.Y. 1997); Graboski v. Giuliani, 937 F. Supp. 258, 265–66 (S.D.N.Y. 1996). However, as the Third Circuit noted in *Ford v. Schering-Plough Corp.*, the issue is not one of standing, because the plaintiff suffered injury in fact and was "arguably within the zone of interests regulated by the ADA." 145 F.3d 601, 604–05 (3d Cir. 1998), *cert. denied*, 119 S. Ct. 850 (1999). Instead, the issue is whether the ADA's protection extends to former employees, giving them the right to sue under the statute. *See* EEOC v. CNA Ins. Cos., 96 F.3d 1039, 1043 (7th Cir. 1996) (reframing parties' "standing" argument as "right to relief").

31. *Ford*, 145 F.3d at 608; Castellano v. City of New York, 142 F.3d 58, 69 (2d Cir. 1998).

32. *CNA*, 96 F.3d at 1043–45; Gonzales v. Garner Food Servs., Inc., 89 F.3d 1523, 1530–31 (11th Cir. 1996).

33. 42 U.S.C. §§ 2000e–2000h-6 (1994).

34. 29 U.S.C.A. §§ 621–634 (1998).

35. 29 U.S.C.A. §§ 201–219 (1998).

36. Prior to *Robinson v. Shell Oil Co.*, courts were split over whether Title VII's anti-retaliation provision protected former employees. 519 U.S. 337, 340 (1997). *Robinson* resolved that split in favor of granting protection to former employees. *See infra* notes 98–103 and accompanying text.

37. 29 U.S.C.A. §§ 701–796 (1998).

38. *See infra* Part II.B.2.

A. *Circuits Are Split on Whether Former Employees Have a Right to Relief Under the ADA*

Circuits differ regarding the ADA's coverage of former employees receiving post-employment benefits.[39] The crux of this disagreement stems from the "qualified individual with a disability" requirement. The Second and Third Circuits have found that the ADA's coverage of former employees is ambiguous because the requirement that a plaintiff be a "qualified individual with a disability" conflicts with the right to nondiscriminatory fringe benefits, some of which are provided after employment has ended.[40] Thus, the Second and Third Circuits reasoned, courts should liberally construe the provision in keeping with the ADA's broad remedial purpose and grant former employees a right to relief.[41]

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39. *Compare* EEOC v. CNA Ins. Cos., 96 F.3d 1039 (7th Cir. 1996) (refusing to extend ADA coverage to former employees), *and* Gonzales v. Garner Food Servs., Inc., 89 F.3d 1523 (11th Cir. 1996) (same), *with* Ford v. Schering-Plough Corp., 145 F.3d 601 (3d Cir. 1998) (extending ADA coverage to former employees), *cert. denied*, 119 S. Ct. 850 (1999), *and* Castellano v. City of New York, 142 F.3d 58 (2d Cir. 1998) (same). Additionally, the Sixth Circuit held in *Parker v. Metropolitan Life Insurance Co.* that former employees with total disabilities are not "qualified individuals with disabilities," and therefore are unable to sue under the ADA. 99 F.3d 181, 183 (6th Cir. 1996). However, this decision was vacated, and on rehearing the Title I issue was not raised. 121 F.3d 1006 (1997) (en banc); *see also* Fobar v. City of Dearborn Heights, 994 F. Supp. 878, 883 (E.D. Mich. 1998) (concluding that despite ADA's protection of fringe benefits, it "does not apply to people who are no longer able to perform the essential functions of their jobs"); Bril v. Dean Witter, Discover & Co., 986 F. Supp. 171, 176 (S.D.N.Y. 1997) (concluding that former employee with total disability is not qualified individual with disability and therefore lacked standing to challenge discriminatory long-term disability benefits under ADA); Lewis v. Aetna Life Ins. Co., 982 F. Supp. 1158, 1162–63 (E.D. Va. 1997) (recognizing that former employee with total disability has right to bring claim against former employer and allege discriminatory disability benefits, and noting that barring such claim would contravene purpose of ADA); Dickey v. Peoples Energy Corp., 955 F. Supp. 886, 889–90 (N.D. Ill. 1996) (rejecting "benefits recipient" as employment position under ADA); Esfahani v. Medical College of Pa., 919 F. Supp. 832, 836 (E.D. Pa. 1996) (finding that plaintiff can bring claim of discriminatory benefits only for period of time during which he was qualified individual with disability; part of plaintiff's claim covering time he had total disability was barred by ADA's "qualified individual with a disability" requirement); Agster v. Furnival/State Mach. Co., No. CIV.A. 94-0654, 1995 WL 568488, at *2 (E.D. Pa. Sept. 25, 1995) (finding that former employee with total disability is not "qualified individual with disability" and therefore cannot bring ADA claim challenging discriminatory post-employment health benefits); Foote v. Folkes, Inc., 864 F. Supp. 1327, 1329 (N.D. Ga. 1994) (holding that wife of former employee lacked standing to sue under ADA because she herself was not employee, former employee, or job applicant); Felde v. City of San Jose, 839 F. Supp. 708, 710–11 (N.D. Cal. 1994) (finding former employer's payment of accrued sick time to retiree non-discriminatory but not addressing issue of former employee's right to sue); Northen v. City of Chicago, 841 F. Supp. 234, 236 (N.D. Ill. 1993) (determining that pleading stage was too early to say if ADA covers retirees).

40. *Ford*, 145 F.3d at 606; *Castellano*, 142 F.3d at 66–67.

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

The Seventh and Eleventh Circuits, on the other hand, have seen no such ambiguity. These circuits were satisfied that the plain language of the "qualified individual with a disability" requirement was sufficient to bar relief to former employees who were unable to work because of total disability or retirement.[42]

1. *Some Circuits Have Concluded that Former Employees Have a Right to Relief Under the ADA*

The Third Circuit Court of Appeals held in *Ford v. Schering-Plough Corp.* that the ADA allows former employees to sue former employers alleging discrimination in disability benefits.[43] The plaintiff in *Ford* alleged that her former employer's disability benefits plan violated the ADA because it provided greater coverage for physical disability than for mental disability.[44] The Third Circuit recognized an internal contradiction in the ADA.[45] Although the statute protects only qualified individuals with disabilities, it expressly prohibits employers from discriminating in the "terms, conditions and privileges of employment,"[46] including such fringe benefits as disability plans.[47] Reading Title I to protect only currently employable qualified individuals with disabilities would wrongly deny former employees with disabilities judicial recourse to effectuate their rights to non-discriminatory disability benefits under the ADA.[48]

The *Ford* court found that the U.S. Supreme Court's decision in *Robinson v. Shell Oil Co.*[49] added to the ambiguity surrounding former employees' eligibility to sue under the ADA.[50] In *Robinson*, the Court affirmed that Title VII's anti-retaliation provision covered former

42. *CNA*, 96 F.3d at 1043–45; *Gonzales*, 89 F.3d at 1530–31.

43. 145 F.3d at 608. Despite holding that the ADA indeed permitted the plaintiff to sue, the court concluded that the ADA does not require that benefits plans equally cover mental and physical disabilities. *Id.* The court stated that "[s]o long as every employee is offered the same plan regardless of that employee's contemporary or future disability status, then no discrimination has occurred even if the plan offers different coverage for various disabilities." *Id.*

44. *Id.* at 604.

45. *Id.* at 605.

46. 42 U.S.C. § 12112(a) (1994).

47. *Ford*, 145 F.3d at 605–06 (citing 42 U.S.C. § 12112(b)(2) (1994)).

48. *Id.* at 607.

49. 519 U.S. 337 (1997).

50. *Ford*, 145 F.3d at 606.

employees.[51] Finding Title VII precedent relevant to ADA analysis because the two are "sibling statutes,"[52] *Ford* followed *Robinson* and broadly interpreted the ADA's ambiguous provision to include former employees.[53] The *Ford* court found this consistent with *Robinson*'s precedent, and the ADA's comprehensive goal of eliminating discrimination against individuals with disabilities in all aspects of employment.[54]

Ford rejected the reasoning in the two court of appeals cases that denied relief to former employees, *EEOC v. CNA Insurance Cos.*[55] and *Gonzales v. Garner Food Services, Inc.*[56] The *Ford* court found the Seventh Circuit's reasoning in *CNA* faulty because it conflated eligibility to sue with the merits of the case; finding no merit in the allegation of discriminatory fringe benefits, the Seventh Circuit concluded that the plaintiff was not eligible to sue.[57] Similarly, *Ford* determined that in *Gonzales*, the Eleventh Circuit erred by failing to see the ambiguity created by the disjunction between the ADA's rights and remedies.[58] The *Ford* court rejected the reasoning in both cases and concluded that the ADA does indeed protect former employees from discrimination in the provision of post-employment fringe benefits.[59]

In *Castellano v. City of New York*, the Second Circuit likewise concluded that former employees collecting retirement disability benefits were qualified individuals with disabilities under the ADA, and were therefore eligible to sue their former employer regarding alleged discrimination in the provision of retirement benefits.[60] The appeal consolidated five district court cases brought under the ADA,[61] all

51. *Robinson*, 519 U.S. at 346; *see infra* Part II.B.1.

52. *Ford*, 145 F.3d at 606 (citing 42 U.S.C. § 12111(7) (1994) (incorporating Title VII terms into ADA); H.R. Rep. No. 101-485, pt. 3, at 48 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 471).

53. *Id.* at 607.

54. *Id.*

55. 96 F.3d 1039 (7th Cir. 1996); *see infra* Part II.A.2.

56. 89 F.3d 1523 (11th Cir. 1996); *see infra* Part II.A.2.

57. *Ford*, 145 F.3d at 607.

58. *Id.* at 608.

59. *Id* at 607–08.

60. 142 F.3d 58, 69 (2d Cir. 1998).

61. *Id.* at 62–63. The district court cases consolidated on appeal were: *Castellano v. City of New York*, 946 F. Supp. 249 (S.D.N.Y. 1996); *Graboski v. Giuliani*, 937 F. Supp. 258 (S.D.N.Y. 1996); *Clifford v. New York City Police Pension Fund*, No. 96 Civ. 6806, (S.D.N.Y. Mar. 6, 1997); *Adornetti v. New York City Employees' Retirement Systems*, No. 95 Civ. 3842, 1996 WL 518097 (E.D.N.Y. Aug. 28, 1996); *Houlihan v. City of New York*, No. 95 Civ. 6373, 1996 WL 393576 (S.D.N.Y. July 15, 1996). After the Second Circuit's decision in *Castellano*, the litigants in that case

involving certain retirement benefits that were available only to retirees not on disability retirement.[62]

After noting the statute's ambiguity regarding former employees' right to sue, the *Castellano* court turned to statutory interpretation and the legislative history of the ADA.[63] The court looked to the purpose behind the requirement that the "qualified individual with a disability" be able to fulfill the essential functions of the position.[64] According to the legislative history, that purpose is to ensure that the ADA does not force employers to hire unqualified employees with disabilities.[65] As long as a former employee was a "qualified individual with a disability" during the employment period, the "essential function" requirement was met.[66] The court also found support for its holding in the broad remedial purpose of the ADA and its comprehensive scope.[67] Finally, the Second Circuit cited *Robinson*, noting that Title VII also has a broad remedial purpose and that courts are to give the term "employee" the same meaning in the ADA as in Title VII.[68] Thus, the court held that the ADA grants retirees a right to relief.

2. *Other Circuits Have Found that Former Employees Have No Right to Relief Under the ADA*

The Seventh Circuit held in *EEOC v. CNA Insurance Cos.* that a former employee with a total disability who alleged discrimination in her employer's long-term disability benefits plan had no right to relief under the ADA.[69] This case involved a former employee whose disability benefits plan covered physical disability until age sixty-five, but limited mental disability benefits to two years.[70] The court first rejected the

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and in *Graboski* subsequently petitioned for, and were denied, certiorari by the U.S. Supreme Court. *See* Graboski v. Giuliani, 119 S. Ct. 276 (1998); Castellano v. City of New York, 119 S. Ct. 60 (1998).

62. *Castellano*, 142 F.3d at 63–64. Only "for-service" retirees, those who had retired after a certain number of years of service, were eligible for the favorable retirement benefits.

63. *Id.* at 67.

64. *Id.* at 67–68.

65. *Id.* (citing H.R. Rep. No. 101-485, pt. 2, at 55 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 337; S. Rep. No. 101-116 (1989), *reprinted in* Arnold & Porter Legis. History P.L. 101-336, Americans with Disabilities Act of 1989, at 26).

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

67. *Id.*

68. *Id.* at 69 (citing 29 C.F.R. pt. 1630 app., at 349 (1997)).

69. 96 F.3d 1039, 1045 (7th Cir. 1996).

70. *Id.* at 1041.

argument of the Equal Employment Opportunity Commission (EEOC) that "benefit recipient" is an employment position within the scope of the ADA.[71] Although acknowledging that a pension plan may be a "term, condition or privilege of employment," the court determined that the pension plan was not discriminatory because the ADA does not prohibit disparity in coverage between mental and physical disabilities.[72] Finally, the court found inapposite the analogy to the Title VII anti-retaliation cases in which former employees were allowed to sue former employers for post-employment retaliatory acts.[73] The court concluded that the Title VII cases are distinguishable because in those cases the employee's "protected interest" arose during the period of employment, whereas in *CNA* nothing discriminatory happened to the plaintiff during her period of employment.[74]

Similarly, in *Gonzales v. Garner Food Services, Inc.*, the Eleventh Circuit held that a former employee with a total disability was not a "qualified individual with a disability" within the meaning of the ADA and therefore was not entitled to the statute's protection.[75] The plaintiff in *Gonzales*, the administrator of an AIDS victim's estate, sued the decedent's former employer under the ADA, on the ground that the employer had amended its health insurance plan to place a cap on AIDS-related treatment after finding out the decedent was infected with HIV.[76] The *Gonzales* court rejected an analogy to Title VII's anti-retaliation cases because the plaintiff did not allege retaliation.[77] The court reasoned that allowing a former employee with a total disability to sue would render meaningless the requirement that an individual must be a "qualified individual with a disability" in order to sue.[78] Finally, the court rejected the plaintiff's argument that the decedent met the "qualified

71. *Id.* at 1044; *see also supra* Part I.A (defining "qualified individual with a disability").

72. *CNA*, 96 F.3d at 1044.

73. *Id.* at 1044–45 (citing Veprinsky v. Fluor Daniel, Inc., 87 F.3d 881 (7th Cir. 1996); Robinson v. Shell Oil Co., 70 F.3d 325 (4th Cir. 1995) (en banc); Charlton v. Paramus Bd. of Educ., 25 F.3d 194 (3d Cir. 1994)).

74. *Id.* at 1045.

75. 89 F.3d 1523, 1530–31 (11th Cir. 1996).

76. *Id.* at 1524. The language of the case indicates GFS did not dispute their discriminatory motive in amending the health plan: "At least partly because of Bourgeois's continued participation in the health insurance benefit plan after his discharge, GFS amended the plan . . . to cap AIDS-related treatment . . . ." *Id.*

77. *Id.* at 1528–29.

78. *Id.* at 1529.

individual with a disability" requirement by performing the essential functions of his position as health insurance program participant.[79]

The dissent in *Gonzales* disputed the majority's opinion that the ADA's plain language clearly limits protection to current employees. The dissent argued that the structure of the statute extending protection to fringe benefits indicates Congress's intent to protect the rights of individuals covered by such plans.[80] To resolve this ambiguity, the dissent turned to the legislative history and structure of the ADA,[81] as well as case law interpreting Title VII,[82] and determined that the ADA's protection extends to former employees. The dissent relied on a "common sense" reading of the ADA to conclude that because many fringe benefits are to be enjoyed in the post-employment period, a former employee need only be qualified to receive fringe benefits to be considered a "qualified individual with a disability."[83]

B. *Cases Interpreting Former Employees' Right to Relief Under Other Employment Discrimination Statutes*

The statutory language and definitions in the ADA closely resemble those of previously enacted employment discrimination statutes. Although each of these statutes has its own focus,[84] they all share the goal of comprehensive application to end employment discrimination.[85] The ADA

79. *Id.* at 1530.

80. *Id.* at 1532–33 (Anderson, J., dissenting).

81. *Id.* (Anderson, J., dissenting).

82. *Id.* at 1533 (Anderson, J., dissenting).

83. *Id.* at 1535 (Anderson, J., dissenting).

84. Title VII prohibits employment discrimination based on race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2 (1994). The ADEA prohibits employment discrimination based on age. 29 U.S.C.A § 623 (1998). The Rehabilitation Act prohibits recipients of federal funds from discriminating against individuals with disabilities. 29 U.S.C.A. § 794(a) (1998). The Fair Labor Standards Act is a more general employment statute that seeks to establish a minimum standard for working conditions. 29 U.S.C.A. § 202 (1998). It does, however, contain a provision that forbids employers from discriminating or retaliating against employees who file complaints about their employers with the Department of Labor. 29 U.S.C.A. § 215(a)(3) (1998).

85. The U.S. Supreme Court stated:

> The ADEA, enacted in 1967 as part of an ongoing congressional effort to eradicate discrimination in the workplace, reflects a societal condemnation of invidious bias in employment decisions. The ADEA is but part of a wider statutory scheme to protect employees in the workplace nationwide. See Title VII of the Civil Rights Act of 1964 . . . the Americans with Disabilities Act of 1990 . . . the National Labor Relations Act . . . [and] the Equal Pay Act of 1963, [incorporated into the FLSA].

adopts or incorporates by reference many of the definitions of Title VII of the Civil Rights Act of 1964, including that of "person," "labor organization," "employment agency," and "commerce."[86] The definition of "employee" in the ADA, as "an individual employed by an employer,"[87] is virtually identical[88] to that in Title VII,[89] the ADEA,[90] and the FLSA.[91] The anti-discrimination provisions in Title VII and the ADEA are also similar to the ADA's, generally prohibiting discrimination in hiring and firing, compensation, and the terms, conditions, or privileges of employment.[92] In addition, Title VII and the ADEA prohibit segregating or classifying employees in any way that deprives them of opportunities, or otherwise adversely affects their employment status.[93] Similarly, the FLSA prohibits employers from discharging, or in any other way discriminating, against employees who, alleging unfair labor practices, file claims against that employer.[94] Finally, the Rehabilitation Act's text does not expressly name prohibited employment conduct,[95] but the EEOC interpretive regulations implementing the statute share the framework of other employment discrimination statutes.[96] Thus, all of these statutes share a fairly consistent and comprehensive anti-discrimination scheme.

McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 358 (1995).

86. 42 U.S.C. § 12111(7) (1994).

87. 42 U.S.C. § 12111(4) (1994).

88. The definitions of "employee" under Title VII and the ADEA contain an exception for elected officials and their employees or appointees, and the FLSA has additional sections defining employees of public agencies. Otherwise, the statutory definitions are virtually identical. *See infra* notes 89–91.

89. *See* 42 U.S.C. § 2000e(f) (1994). ("The term 'employee' means an individual employed by an employer....").

90. *See* 29 U.S.C.A. § 630(f) (1998). ("The term 'employee' means an individual employed by any employer....").

91. *See* 29 U.S.C.A. § 203(e)(1) (1998). ("[T]he term 'employee' means any individual employed by an employer.").

92. *See* 29 U.S.C.A. § 623(a)(1) (1998) (ADEA); 42 U.S.C. § 2000e-2(a)(1) (1994) (Title VII).

93. *See* 29 U.S.C.A. § 623(a)(2) (1998) (ADEA); 42 U.S.C. § 2000e-2(a)(2) (1994) (Title VII).

94. *See* 29 U.S.C.A. § 215(a)(3) (1998). The FLSA does not define "discrimination." *See* 29 U.S.C.A. § 203 (1998) (defining statutory terms in FLSA). However, the statutory remedies for violations of § 215(a)(3) include employment, reinstatement, and promotion, suggesting that the FLSA prohibits the same kinds of conduct prohibited by other employment statutes, for example, discriminatory discharge, failure to hire, and failure to promote. *See* 29 U.S.C.A. § 216(b) (1998).

95. *See* 29 U.S.C.A. § 794 (1998).

96. *Compare* 45 C.F.R. § 84.11 (1998) (interpreting Rehabilitation Act), *with* 29 U.S.C.A §§ 623, 630 (1998) (interpreting ADEA), 42 U.S.C. §§ 2000e, 2000e-2 (1994) (interpreting Title VII), *and* 42 U.S.C. §§ 12111, 12112(a) (1994) (interpreting ADA).

1. *Title VII, ADEA, and FLSA Cases Provide Protection to Former Employees*

In *Robinson v. Shell Oil Co.*, the U.S. Supreme Court resolved a circuit split, ruling that the anti-retaliation provision of Title VII[97] extends to former as well as current employees.[98] The Court first found that the term "employee" was not "plain and unambiguous" because neither the retaliation provision itself, nor Title VII's definition of "employee" includes any temporal qualifier specifying whether "employee" can include a former employee.[99] In addition, the term "employee" has different meanings in different provisions of Title VII, sometimes including employees other than just current employees.[100] To resolve the ambiguity surrounding the meaning of "employee," the Court looked at the broad context of Title VII.[101] Several sections of the statute contain provisions that make sense only in the context of former employees, which convinced the Court that the statute's protection extends to former employees.[102] Finally, the Court found that excluding former employees from the protection of Title VII's anti-retaliation statute would undermine its effectiveness and its primary remedial purpose.[103]

Courts have largely agreed that employment discrimination statutes other than Title VII also protect former employees. In *EEOC v. Cosmair, Inc.*,[104] the Fifth Circuit examined the term "employee" in the context of the ADEA's anti-retaliation provision.[105] Arguing that "employee" is to

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97. *See* 42 U.S.C. § 2000e-3(a) (1994). The section states:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because [the employee or applicant] has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a).

98. 519 U.S. 337, 346 (1997).

99. *Id.* at 340–42.

100. *Id.* at 324. For example, the statutory reference to "reinstatement or hiring of employees" necessarily includes former and prospective employees, as reinstating or hiring current employees makes little sense. *See* 42 U.S.C. § 2000e-5(g)(1) (1994).

101. *Robinson*, 519 U.S. at 345.

102. *Id.* For example, Title VII prohibits discriminatory discharge. 42 U.S.C. § 2000e-2(a) (1994). Thus, only former employees would bring claims under this provision.

103. *Robinson*, 519 U.S. at 346.

104. 821 F.2d 1085 (5th Cir. 1987).

105. *See* 29 U.S.C.A. § 623(d) (1998). The language of this provision is virtually identical to that in Title VII's antiretaliation statute. *See supra* note 97.

be broadly interpreted, the court found that the term includes former employees as long as the alleged discrimination is "related to" or "arises out of" the employment relationship.[106] Similarly, in *Dunlop v. Carriage Carpet Co.*, the Sixth Circuit found that the anti-retaliation provision of the FLSA protected a former employee.[107] The *Dunlop* court concluded that to find otherwise would be to disregard the FLSA's broad remedial purpose.[108] Thus, case law interpreting Title VII, the ADEA, and the FLSA affirms that these statutes extend protection to former employees.

2. *Rehabilitation Act Case Law Fails to Provide Guidance in Interpreting "Employee"*

The Rehabilitation Act of 1973[109] prohibits discrimination against individuals with disabilities participating in federally funded programs.[110] The Rehabilitation Act is the ADA's predecessor, and the ADA incorporates many of the standards promulgated in the Rehabilitation Act's regulations.[111] Similar to the ADA, the Rehabilitation Act extends coverage to "otherwise qualified" individuals with disabilities,[112] and Congress intended that the scope of protected employment decisions under the ADA and the Rehabilitation Act be consistent.[113] Accordingly,

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106. *Cosmair*, 821 F.2d at 1088 (citations omitted); *see also* Passer v. American Chem. Soc'y, 935 F.2d 322, 330 (D.C. Cir. 1991) (citing *Cosmair*, court found that plaintiff "remained protected by the [ADEA's antiretaliation provision] even after he was forced to retire and ceased to be an active employee of ACS").

107. 548 F.2d 139, 147 (6th Cir. 1977).

108. *Id.*; *see also* Hodgson v. Charles Martin Inspectors of Petroleum, Inc., 459 F.2d 303, 304, 306 (5th Cir. 1972) (holding that because of risk of retaliation, "informer's privilege" under FLSA extends to statements made by former as well as current employees).

109. 29 U.S.C.A §§ 701–796 (1998).

110. The Rehabilitation Act requires federal agencies to develop affirmative action plans for recruiting, hiring, and promoting individuals with disabilities, and requires federal agencies to recommend to state agencies policies and procedures to facilitate employment of individuals with disabilities. *See* 29 U.S.C.A. § 791(b)–(c). The Act also prohibits discrimination against persons with disabilities in any federally funded program or activity, including housing, education, physical accessibility, and health and social services. *See* 29 U.S.C.A. § 794.

111. H.R. Rep. No. 101-485, pt. 2, at 23 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 304.

112. 29 U.S.C.A. § 794(a). The ADA requires that a claimant be a "qualified individual with a disability." 42 U.S.C. § 12112(a) (1994).

113. H.R. Rep. No. 101-485, pt. 2, at 54 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 336.

courts have turned to Rehabilitation Act case law when interpreting the ADA.[114]

The one case addressing a post-employment benefit recipient's right to relief under the Rehabilitation Act[115] departed from the holdings of other employment discrimination cases. In *Beauford v. Father Flanagan's Boys' Home*,[116] the Eighth Circuit determined that the Rehabilitation Act did not protect an employee with total disability[117] on the grounds that she was not an "otherwise qualified handicapped individual."[118] Because the plaintiff's disability did not allow her to perform the essential functions of her teaching job, the court concluded that the Rehabilitation Act did not reach her claim of discriminatory disability benefits.[119]

III. FORMER EMPLOYEES SHOULD HAVE A RIGHT TO RELIEF UNDER THE ADA WHEN EMPLOYERS PROVIDE DISCRIMINATORY POST-EMPLOYMENT BENEFITS

Individuals alleging discriminatory post-employment benefits have a right to relief under Title I of the ADA. The ADA expressly prohibits discrimination based on disability in the "terms, conditions, and

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114. *See, e.g.*, Munoz v. H & M Wholesale, Inc., 926 F. Supp. 596, 604 (S.D. Tex. 1996); Harding v. Winn-Dixie Stores, Inc., 907 F. Supp. 386, 391 (M.D. Fla. 1995); Haysman v. Food Lion, Inc., 893 F. Supp. 1092, 1102 (S.D. Ga. 1995).

115. *Modderno v. King* also addresses discriminatory benefits under the Rehabilitation Act. 871 F. Supp. 40 (D.D.C. 1994), *aff'd*, 82 F.3d 1059 (D.C. Cir. 1996). The dissent in *Gonzales v. Garner Food Services, Inc.* cited *Modderno* in support of finding post-employment benefits recipients eligible to sue. 89 F.3d 1523, 1535 (11th Cir. 1996) (Anderson, J., dissenting). In *Modderno*, the District of Columbia Court of Appeals recognized that the plaintiff met the Rehabilitation Act's "otherwise qualified handicapped individual" requirement by virtue of her participation in a federal health plan. 871 F. Supp. at 42. However, the case is inapposite because the Rehabilitation Act forbids discrimination in the context of employment and in any federally funded plan or program. *See* 29 U.S.C.A. § 794. Thus, the plaintiff in *Modderno* was able to bring a claim under the Rehabilitation Act simply because she participated in a federal program, not because of her employment status.

116. 831 F.2d 768 (8th Cir. 1987).

117. The Eighth Circuit found that the plaintiff was "apparently" still an employee of Boys Town at the time of the appeal, although she was unable to work because of mental and physical problems. *Id.* at 770. Boys Town had discharged Beauford in 1981, but reinstated her after an arbitrator found that the discharge did not comply with the procedural requirements of Beauford's employment contract. *Id.* at 769–70. After her reinstatement, Beauford told Boys Town that she was unable to work and applied for disability and health benefits provided by Boys Town. These benefits gave rise to her claim. *Id.*

118. *Id.* at 771.

119. *Id.*

privileges of employment."[120] Many of these prerequisites, such as retirement benefits, disability benefits, or health insurance, arise only in the post-employment context. Recognizing a former employee's right to challenge a former employer's discriminatory provision of a post-employment benefit is the only way to effectuate the ADA's express protection of the terms, conditions, and privileges of employment.

Contrary to the Seventh and Eleventh Circuits' overly narrow reading of the ADA, the "qualified individual with a disability" requirement does not prohibit post-employment benefits recipients from seeking relief under the statute. When the employment relationship is construed broadly to include post-employment benefits recipients, a former employee can meet the "qualified individual with a disability" requirement by fulfilling the essential functions of the employment position of benefits recipient. Alternately, the "qualified individual with a disability" requirement need not bar relief to post-employment benefits recipients because the requirement is no longer necessary to protect employers from being forced to retain or hire unqualified workers.

A. The ADA's Ambiguity Should Be Resolved in Favor of Former Employees

1. The ADA Is Ambiguous and Internally Inconsistent with Regard to Former Employees' Right to Relief

The text of the ADA is ambiguous in its protection of former employees. The statute does not expressly address whether or not former employees may bring a claim, and two relevant sections of the ADA give conflicting answers. Section 12112(a) of the ADA states: "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[121] Ambiguity arises because this provision's language limits protection to qualified individuals with disabilities who are able to perform the essential functions of the job in question. Reading only this part of section 12112(a), the ADA would appear to preclude relief to employees with total disabilities or retired employees because they are

120. 42 U.S.C. § 12112(a) (1994).

121. 42 U.S.C. § 12112(a).

not qualified individuals with disabilities. Indeed, a number of courts have so held, ending their inquiry into former employees' right to relief at this point in the analysis.[122]

However, these decisions have failed to consider the protection section 12112(a) extends to the "terms, conditions and privileges of employment."[123] This provision includes fringe benefits available by virtue of employment.[124] Neither section 12112(a) nor the EEOC regulations provide an exhaustive list of which fringe benefits fall within the ADA's protection. However, health insurance is one fringe benefit expressly included in the EEOC regulations as a term, condition, or privilege of employment.[125] Furthermore, courts have universally concluded that other benefits, such as[126] retirement benefits[127] and disability benefits plans,[128] are "terms, conditions and privileges of employment" protected by the ADA.[129] Although these fringe benefits, particularly

122. *See, e.g.*, EEOC v. CNA Ins. Cos., 96 F.3d 1039, 1043–45 (7th Cir. 1996); Gonzales v. Garner Food Servs., Inc., 89 F.3d 1523, 1530–31 (11th Cir. 1996); *supra* Part II.A.2.

123. 42 U.S.C. § 12112(a).

124. H.R. Rep. No. 101-485, pt. 2, at 54 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 337.

125. 29 C.F.R. § 1630.4 (1998).

126. 29 C.F.R. § 1630.5 (1998). The ADA requires that employers offer employees equal access to health insurance. However, employers may offer plans with specific limitations such as benefit caps or pre-existing condition clauses, as long as these limitations apply equally to all employees. *See, e.g.*, Anderson v. Gus Mayer Boston Store, 924 F. Supp. 763, 779–80 (E.D. Tex. 1996) (finding that although disability-based distinctions in health insurance are allowable, employer violated ADA by switching to group benefit plan that would not cover HIV-positive employee, thereby completely denying employee access to health insurance).

127. *See, e.g.*, Horth v. General Dynamics Land Sys., Inc., 960 F. Supp. 873, 877 (M.D. Pa. 1997) (finding denial of retirement benefits to be adverse employment action under ADA); Graboski v. Giuliani, 937 F. Supp. 258, 266 (S.D.N.Y. 1996) (discussing pension plans and health insurance as fringe benefits under ADA).

128. *See, e.g.*, Ford v. Schering-Plough Corp., 145 F.3d 601, 604 (3d Cir. 1998) (concluding that disability plan is fringe benefit under ADA), *cert. denied*, 119 S. Ct. 850 (1999); Lewis v. Aetna Life Ins. Co., 982 F. Supp. 1158, 1161 (1997) (same); Schroeder v. Connecticut Gen. Life Ins. Co., No. 93-M-2433, 1994 WL 909636, at *3 (D. Colo. Apr. 22, 1994) (same).

129. Title VII has identical language prohibiting discrimination in the terms, conditions, and privileges of employment. *See* 42 U.S.C. § 2000e-2(a)(1) (1994). Courts evaluating Title VII claims have also been consistent in recognizing health insurance, retirement, and disability benefits plans as terms, conditions, and privileges of employment. *See, e.g.*, Arizona Governing Comm. for Tax Deferred Annuity v. Norris, 463 U.S. 1073, 1079 (1983) (noting that, under Title VII, opportunity to participate in deferred compensation plan is "term, condition, or privilege" of employment and retirement benefits are "compensation"); Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 682 (1983) (stating that "[h]ealth insurance and other fringe benefits are 'compensation, terms, conditions, or privileges of employment'" under Title VII); Bartmess v. Drewrys U.S.A., Inc., 444 F.2d 1186, 1189 (7th Cir. 1971) (reading Title VII to include retirement plan as condition of employment).

disability and retirement plans, are provided in the period following employment, the U.S. Supreme Court explicitly has recognized that benefits received exclusively in the period following employment are nonetheless protected from discrimination.[130] By expressly protecting the terms, conditions and privileges of employment, many of which arise only after employment has ended, the statute extends ADA protection past the period of active employment. Thus, the ADA is ambiguous because it covers fringe benefits of individuals who may have total disabilities, while simultaneously requiring claimants to be qualified to work.[131]

2. *ADA Legislative History and EEOC Guidelines Reflect Congress's Intent to Provide Former Employees with a Right to Relief*

Because section 12112(a) is internally ambiguous, courts must look beyond the provision itself when interpreting its terms.[132] The ADA's legislative history and EEOC guidelines affirm that courts should construe the statute broadly to provide former employees with a right to relief. Neither the legislative history nor the EEOC regulations expressly address the question of former employees. The legislative history of the ADA makes clear, however, that Congress intended the Act's scope of protection to be comprehensive.[133] The House Report noted that disability-

130. Hishon v. King & Spalding, 467 U.S. 69, 77 (1984) (evaluating Title VII claim and noting that "[a] benefit need not accrue before a person's employment is completed to be a term, condition, or privilege of that employment relationship. Pension benefits, for example, qualify as terms, conditions, or privileges of employment even though they are received only after employment terminates.").

131. In addition, interpreting the ADA to exclude protection of post-employment fringe benefits creates additional ambiguity because such a narrow reading conflicts with the statute's broad intent of eliminating discrimination in all aspects of employment. *See infra* Part III.A.2.

132. Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 858 (1st Cir. 1998). Two important sources of statutory interpretation are legislative history and the interpretation given a statute by the agency charged with enforcing it. *Id.*

133. The House Report states:

> [T]here is a compelling need to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities and for the integration of persons with disabilities into the economic and social mainstream of American life. Further, there is a need to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities. Finally, there is a need to ensure that the Federal Government plays a central role in enforcing these standards on behalf of individuals with disabilities.

H.R. Rep. No. 101-485, pt. 2, at 50 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 332; *see supra* Part I.B.

based discrimination is pervasive and persistent in the employment sphere, and includes denial of benefits or opportunities to individuals with disabilities on par with those provided to others.[134] As a result, Congress found a compelling need for clear and comprehensive prohibitions against discrimination.[135] The EEOC adopted this broad approach, recognizing that the ADA protects benefit recipients by virtue of the employment relationship with their former employer.[136] Thus, Congress and the EEOC have indicated that the ADA is to be construed broadly, despite the absence of express reference to claims by former employees.

3. *Case Law Supports Former Employees' Right to Sue Under the ADA*

Case law supports reading the ADA to cover former employees. Although courts are split on the issue of former employees' right to relief, courts interpreting other ambiguous ADA provisions have observed consistently that the ADA is a remedial statute to be construed broadly.[137] Accordingly, these courts have applied this rule of broad construction in interpreting a variety of ADA provisions.[138] A narrow reading of section 12112(a) that denies relief to post-employment benefit recipients is inconsistent with ADA precedent.

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134. H.R. Rep. No. 101-485, pt. 2, at 28, *reprinted in* 1990 U.S.C.C.A.N. at 310.

135. *Id.*

136. *See infra* notes 159–60 and accompanying text.

137. *See, e.g.*, Kornblau v. Dade County, 86 F.3d 193, 194 (11th Cir. 1996) (noting ADA is remedial statute that must be broadly construed to effect its purpose); Anderson v. Gus Mayer Boston Store, 924 F. Supp. 763, 771 (E.D. Tex. 1996) (noting that, "unlike other legislation designed to settle narrow issues of law, the ADA has a comprehensive reach and should be interpreted with this goal in mind"); Lincoln CERCPAC v. Health & Hosps. Corp., 920 F. Supp. 488, 497 (S.D.N.Y. 1996) (finding that ADA must be construed broadly to effectuate its purpose).

138. *See, e.g.*, Kirkingburg v. Albertson's, Inc., 143 F.3d 1228, 1233 (9th Cir. 1998) (rejecting as inconsistent with expansive goals of ADA defendant's argument that plaintiff blind in only one eye has no disability under ADA); Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 863 (1st Cir. 1998) (concluding that ADA's remedial purpose indicates that court should evaluate plaintiff's disability without considering effect of ameliorative medication on underlying condition); Reeves v. Queen City Transp., 10 F. Supp. 2d 1181, 1183 (D. Colo. 1998) (noting that "[a]lthough the ADA does not explicitly define 'services, programs, or activities,' courts broadly construe Title II [of the ADA] as covering a variety of community services and programs"); Pacourek v. Inland Steel Co., 916 F. Supp. 797, 803 (N.D. Ill. 1996) (viewing reproduction as "major life activity" protected by ADA in accordance with canon of broadly construing civil rights statutes to effectuate remedial purposes); Kinney v. Yerusalim, 812 F. Supp. 547, 551–52 (E.D. Pa. 1993) (broadly construing "alteration" under Title III of ADA to include resurfacing of street because it affects street's usability and because resurfacing constitutes "alteration," city must install curb ramps), *aff'd*, 9 F.3d 1067 (3d. Cir. 1993).

Similarly, most of the case law interpreting other employment discrimination statutes supports a liberal construction of the ADA's terms to provide a right to relief for aggrieved former employees.[139] The ADA, the Rehabilitation Act, Title VII, the ADEA, and the FLSA are all broad remedial statutes that have virtually identical definitions of "employee."[140] The ADA's text[141] and legislative history[142] explicitly incorporate many of Title VII's provisions and definitions into the ADA. Accordingly, in interpreting the ADA, courts have looked to Title VII for guidance.[143] The ADA does not explicitly incorporate ADEA or FLSA terms or case law, but it is well established that any statute with a broad remedial purpose should be construed broadly to effectuate its purposes.[144] Thus, broadly interpreting "employee" comports with the liberal construction given the term under other employment discrimination statutes.[145]

Although much of the case law under Title VII, the ADEA, and the FLSA focuses on anti-retaliation provisions,[146] the holdings that former employees are entitled to relief are nonetheless relevant to the ADA's

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139. *See supra* Part II.B.

140. *See supra* Part II.B.

141. 42 U.S.C. §§ 12111(1) & (7), 12117(a) (1994).

142. H.R. Rep. No. 101-485, pt. 2, at 54 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 336.

143. *See, e.g.*, Carparts Distrib. Ctr. v. Automotive Wholesaler's Ass'n, 37 F.3d 12, 16 (1st Cir. 1994) (looking to Title VII for guidance in evaluating ADA claim); DeJoy v. Comcast Cable Communications, Inc., 941 F. Supp. 468, 474–75 (D.N.J. 1996) (looking to Title VII for guidance in interpreting "employer" under ADA); Miller v. CBC Cos., 908 F. Supp. 1054, 1065 (D.N.H. 1995) (looking to Title VII to determine whether supervisors were personally liable under ADA).

144. Tcherepnin v. Knight, 389 U.S. 332, 336 (1967) (holding that in construing "security" under Securities Exchange Act, Court must be "guided by *familiar canon of statutory construction* that remedial legislation should be construed broadly to effectuate its purposes") (emphasis added).

145. The one Rehabilitation Act case that addressed the right of employees with total disabilities to relief concluded that the Act did not extend to former employees. Beauford v. Father Flanagan's Boys Home, 831 F.2d 768 (8th Cir. 1987); *see supra* Part II.B.2. However, this holding suffers from the same flawed reasoning and unduly narrow statutory interpretation as the holdings in *EEOC v. CNA Insurance Cos.*, 96 F.3d 1039 (7th Cir. 1996), and *Gonzales v. Garner Food Services, Inc.*, 89 F.3d 1523 (11th Cir. 1996). The *Beauford* court found dispositive the Rehabilitation Act's requirement that a claimant be an "otherwise qualified handicapped individual." 831 F.2d at 771 (citing 29 U.S.C. § 794). Without considering the broad range of employment decisions targeted by the Rehabilitation Act, the court concluded that discrimination in benefits, while "undesirable," was not within the scope of the statute. Such a narrow construction of the Rehabilitation Act's terms disregards the Act's broad remedial purpose. *See, e.g.*, Gilbert v. Frank, 949 F.2d 637, 641 (2d Cir. 1991) (noting that Rehabilitation Act is to be interpreted broadly).

146. *See, e.g.*, Robinson v. Shell Oil Co., 519 U.S. 337 (1997); Passer v. American Chem. Soc'y, 935 F.2d 322 (D.C. Cir. 1991); EEOC v. Cosmair, Inc., 821 F.2d 1085 (5th Cir. 1987); Dunlop v. Carriage Carpet Co., 548 F.2d 139 (6th Cir. 1977).

coverage of post-employment benefit recipients. The anti-retaliation cases have noted ambiguity in the statutory language and resolved that ambiguity in keeping with the purpose of the anti-retaliation provision in particular,[147] and the broad remedial purpose of employment discrimination statutes in general.[148] Thus, although the substantive right protected in anti-retaliation cases (freedom to file charges without fear of retaliation) differs from the substantive right protected by the ADA in these cases (right to nondiscriminatory fringe benefits), the analysis and conclusion are analogous. Courts would properly interpret the ADA by extending its protection to former employees.

B. The "Qualified Individual with a Disability" Requirement Can Be Reconciled with the ADA's Intent to Protect Former Employees

Courts should not use the ADA's "qualified individual with a disability" requirement to deny relief to former employees. There are two ways to reconcile the "qualified individual with a disability" requirement with the ADA's coverage of former employees. First, a court can construe a retiree or post-employment benefits recipient to be a valid employment position protected by the ADA, entitling such an individual to judicial recourse. Alternately, because the "qualified individual with a disability" requirement serves no purpose in the post-employment context, its use properly can be limited to evaluating claims involving prospective or current employment. Although each of these approaches has merit, the former is preferable because it comports with the preponderant employment discrimination case law and provides courts with a uniform framework for evaluating ADA claims.

1. Recognizing "Benefits Recipient" as an Employment Position Satisfies the "Qualified Individual with a Disability" Requirement

Because it is appropriate to construe broadly the ADA's provisions, one way to satisfy the "qualified individual with a disability" requirement is to recognize post-employment benefits recipient as a valid employment position. The plaintiff in *EEOC v. CNA Insurance Cos.* relied on this logic, arguing that because the only essential function of the benefits recipient position was the ability to receive disability

147. *See, e.g., Robinson*, 519 U.S. at 346; *Dunlop*, 548 F.2d at 147.

148. *See, e.g., Robinson*, 519 U.S. at 346; *Dunlop*, 548 F.2d at 147.

benefits, the former employee qualified for that position.[149] The court, however, rejected this argument, stating that an "employment position" is a job, and as a result, only current employees and applicants are covered.[150] This unduly narrow conclusion completely disregards the ADA's broad remedial purpose.[151]

In contrast to the *Gonzales* and *CNA* courts, most courts have construed the employment relationship broadly and have refused to limit statutory protection to narrowly defined employer-employee relationships. In *Veprinsky v. Fluor Daniel, Inc.*,[152] the Seventh Circuit found that Title VII protects former employees against retaliation that affects future employment prospects or has some other link to employment.[153] Similarly, in *EEOC v. South Dakota Wheat Growers Ass'n*, the district court considered whether Title VII governed a health insurance policy provided to a former employee as a consequence of employment.[154] The *Wheat Growers* court rejected a strict interpretation of the employment relationship, finding discrimination arising out of the employment relationship within the scope of Title VII regardless of the employee's status as a current or former employee at the time of the discriminatory conduct.[155] The insurance policy was offered as a result of the plaintiff's employment status and therefore discrimination was a

149. *CNA*, 96 F.3d at 1043–44.

150. *Id.* at 1044.

151. Like the *CNA* plaintiff, the dissent in *Gonzales v. Garner Food Services, Inc.* argued that "employment position" should be construed broadly, and the "qualified individual with a disability" analysis applied to the former employee in the benefits recipient position. 89 F.3d 1523, 1535 (11th Cir. 1996) (Anderson, J., dissenting). The dissent further stated:

> [I]t is obvious that retirees and other former employees, who because of their prior employment are entitled to participate in post-employment fringe benefit plans, are not expected to perform the functions of the job they previously held before retirement. Rather, they are expected to meet whatever criteria are mandated by the fringe benefits plan for the accrual and continuation of coverage, including, for example, any required minimum years of employment, honorable discharge, and the payment of premiums.

Id. (Anderson, J., dissenting).

152. 87 F.3d 881 (7th Cir. 1996). This is a pre-*Robinson* case considering the right of former employees to sue under Title VII's anti-retaliation provision.

153. *Id.* at 891. For example, retaliatory termination of post-employment fringe benefits would violate this provision because fringe benefits are linked to employment.

154. 683 F. Supp. 1302, 1304 (D.S.D. 1988).

155. *Id.* at 1304–05 (citing Pantchenko v. C.B. Dolge Co., 581 F.2d 1052, 1055 (2d Cir. 1978)).

direct result of the employment relationship.[156] Courts have reached similar conclusions in ADEA and FLSA cases.[157]

The EEOC, the agency charged with implementing Title I of the ADA, also recognizes that an employment position encompasses more than a "job." Although the EEOC regulations are silent on former employees' eligibility to sue under the ADA,[158] the EEOC has argued as plaintiff or amicus in a number of ADA cases that "post-employment benefit recipient" is an employment position subject to the ADA's protection.[159] The EEOC's recognition of a broadly defined employment relationship, while not controlling on the courts, is entitled nonetheless to some deference even absent codified regulations.[160] The EEOC's inclusive definition is a reasonable interpretation of the statute; this interpretation accords with the ADA's broad remedial purpose[161] as well as the majority of employment discrimination case law.

Once courts acknowledge that a former employee has an employment relationship with the former employer, it is logical to recognize "benefits recipient" as the most accurate description of that employee's status. This "title" reflects the individual's unique position: no longer an active employee, but still the beneficiary of a statutorily protected tie to the former employer. An employee's transfer from an assembly line to a desk job within the same company would certainly affect the "qualified

156. *Id.*

157. *See, e.g.*, EEOC v. Cosmair, Inc., 821 F.2d 1085, 1088 (5th Cir. 1987) (holding that in ADEA claim, term "employee" includes former employees "as long as the alleged discrimination is related to or arises out of the employment relationship"); Dunlop v. Carriage Carpet Co., 548 F.2d 139, 144–47 (6th Cir. 1977) (holding that court should construe "employee" broadly to include former employee under FLSA, in keeping with that statute's broad policies and intentions).

158. *See supra* note 17.

159. *See, e.g.*, Castellano v. City of New York, 142 F.3d 58, 69 (2d Cir. 1998); Parker v. Metropolitan Life Ins. Co., 99 F.3d 181, 186–87 (6th Cir. 1996), *vacated on reh'g*, 107 F.3d 359 (6th Cir. 1997); EEOC v. CNA Ins. Cos., 96 F.3d 1039, 1043–44 (7th Cir. 1996); Gonzales v. Garner Food Servs., Inc., 89 F.3d 1523, 1529–30 (11th Cir. 1996).

160. Under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, courts should defer to an administrative agency's interpretation of a statute it is charged to enforce, as long as the agency's interpretation is "based on a permissible construction of the statute." 467 U.S. 837, 843 (1984). While the issue in *Chevron* was judicial deference to agency regulations, other courts have found that less formal agency interpretations of statutes are also entitled to "some level" of deference. *See, e.g.*, Reno v. Koray, 515 U.S. 50, 61 (1995) (holding that "internal agency guideline" is to be given "some deference" because it is permissible construction of statute); Massachusetts v. FDIC, 102 F.3d 615, 621 (1st Cir. 1996) (holding that informal administrative practices or newly announced policies are entitled to some deference even if "not yet reduced to specific regulations").

161. *See supra* notes 133–35 and accompanying text.

individual with a disability" analysis, as the essential job functions and necessary employee skills depend on the job in question. Likewise, it would be illogical to consider the essential functions of a post-employment benefits recipient's former job when evaluating whether the "qualified individual with a disability" requirement is met.

Limiting the ADA's protection of former employees to those who are in an "employment relationship"—collecting benefits from a former employer—disarms one of the *Gonzales* court's fears. The *Gonzales* court opined that "interpreting the ADA to allow any disabled former employee to sue a former employer essentially renders the ['qualified individual with a disability'] requirement . . . meaningless."[162] However, the court overlooked one important feature: plaintiffs in these cases are in employment relationships with former employers. Plaintiffs still receive benefits from former employers, and the benefits themselves are the subject of the claims. Allowing benefits recipients to sue in no way suggests that a former employee with a total disability and no ongoing relationship with the former employer can bring a claim alleging past discriminatory treatment. Thus, the requirement that the former employee still have an employment relationship with the former employer will preclude the flood of litigation the Eleventh Circuit apparently feared.

By recognizing "retiree" or "post-employment benefits recipient" as an employment position within the context of the ADA, the statute's "qualified individual with a disability" requirement is met. The ADA's legislative history, case law, and the EEOC's stance all require broad construction of the terms "qualified individual with a disability" and "employment position."[163] Precedent involving other remedial employment discrimination statutes also supports this approach.[164] Thus, the "qualified individual with a disability" requirement can be reconciled with the right of employees who have total disabilities or are retired to sue under the ADA.

2. *The "Qualified Individual with a Disability" Requirement Is Unnecessary to Protect Employers Following Employment*

The "qualified individual with a disability" requirement is an artificial barrier to relief for post-employment benefits recipients because the requirement no longer serves a function in the post-employment context.

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162. *Gonzales*, 89 F.3d at 1529; *see also supra* notes 75–79.

163. *See supra* Part III.A.2.

164. *See supra* Part III.A.3.

The purpose of the "qualified individual with a disability" and "essential function" requirements is to ensure that the ADA does not force employers to hire or retain unqualified workers.[165] When a former employee sues to challenge discrimination in benefits, there is no threat that the employer's ability to choose qualified workers will be compromised. Instead, it is the former employee whose rights must be protected. Courts misconstrue the ADA when they use the "qualified individual with a disability" requirement to bar relief to former employees.

By recognizing that the "qualified individual with a disability" requirement is meaningful only in the context of current or prospective employment, much of the ADA case law denying relief to former employees is distinguishable from cases involving post-employment benefits recipients. For example, one of the most common ADA claims is wrongful discharge on the basis of disability.[166] Related cases include those in which claimants allege that they were not hired or not promoted because of disability.[167] In these contexts, the "qualified individual with a disability" and "essential functions" requirements are clearly meaningful, and the purpose of including such a requirement in the statute is evident. The "qualified individual with a disability" requirement is a valid and necessary screen to protect an employer from a groundless claim brought by a discharged or not-hired worker who was unable to perform the essential functions of the job in question. Thus, much of the case law precluding relief to employees with total disabilities can be distinguished. Such case law fails to consider the difference between a wrongful discharge claim in which ability to perform the essential functions of the previously held job is relevant, and a discriminatory benefits claim where ability to perform job functions is wholly irrelevant.

Other ADA cases distinguishable from post-employment benefits recipients cases are those involving the doctrine of judicial estoppel. Like wrongful discharge cases, judicial estoppel cases are sometimes cited in support of the argument that former employees with total disabilities are

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165. *See supra* notes 25–29 and accompanying text.

166. *See, e.g.*, McDonald v. Pennsylvania, 62 F.3d 92, 93 (3d Cir. 1995); White v. York Int'l Corp., 45 F.3d 357, 359 (10th Cir. 1995); Nunes v. Wal-Mart Stores, Inc., 980 F. Supp. 1336, 1338 (N.D. Cal. 1997); EEOC v. Kinney Shoe Corp., 917 F. Supp. 419, 422 (W.D. Va. 1996).

167. *See, e.g.*, Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 856 (1st Cir. 1998) (alleging unlawful failure to hire based on disability); Olson v. General Elec. Astrospace, 101 F.3d 947, 950 (3d Cir. 1996) (same); Kocsis v. Multi-Care Management, Inc., 97 F.3d 876, 880 (6th Cir. 1996) (alleging unlawful failure to promote based on disability); Buchanan v. City of San Antonio, 85 F.3d 196, 197 (5th Cir. 1996) (alleging unlawful failure to hire based on disability).

not protected by the ADA.[168] The judicial estoppel doctrine arises when employees represent to the Social Security Administration (or some comparable agency) that they have total disabilities while simultaneously bringing ADA wrongful discharge claims against former employers on the ground that they are in fact qualified individuals with disabilities.[169] Many jurisdictions have ruled that a former employee who claims to have a total disability is not a "qualified individual with a disability," and therefore has no prima facie ADA case against the former employer.[170] Again, it is evident that the "qualified individual with a disability" requirement is meaningful and necessary in this context; an employee who claims to one party to have a total disability and be unable to work should not be allowed to assert simultaneously to another party that he or she is in fact a qualified individual entitled to relief for wrongful discharge. Thus, assertions such as "a person unable to work is not intended to be, and is not, covered by the ADA"[171] may be persuasive in judicial estoppel cases, but such statements overlook post-employment discrimination where inability to work is simply not an issue.

3. *The Better Approach Is to Construe the Statute Broadly and Recognize "Benefits Recipient" as an Employment Position*

Although both of the above approaches for reconciling the "qualified individual with a disability" requirement with allowing former employees to sue are legally sound, recognizing post-employment benefit recipient as an employment position is the better approach. The other approach—recognizing that the "qualified individual with a disability" requirement serves no purpose in the post-employment context—is valuable because it distinguishes other ADA cases denying relief to former employees with total disabilities. It also demonstrates how a "qualified individual with a disability" analysis necessarily

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168. *See, e.g.*, Ford v. Schering-Plough Corp., 145 F.3d 601, 605 (3d Cir. 1998) (rejecting defendant's analogy to judicial estoppel case, *McNemar v. Disney Store, Inc.*, 91 F.3d 610, 618–19 (3d Cir. 1996), *cert. denied*, 117 S. Ct. 958 (1997)), *cert. denied*, 119 S. Ct. 850 (1999); Parker v. Metropolitan Life Ins. Co., 99 F.3d 181, 187 (6th Cir. 1996) (citing *McNemar* as support for denying ADA relief to former employees), *vacated on reh'g*, 107 F.3d 359 (6th Cir. 1997) (en banc).

169. *See* Marney Collins Sims, Comment, *Estop It! Judicial Estoppel and Its Use in Americans with Disabilities Act Litigation*, 34 Hous. L. Rev. 843, 844 (1997).

170. *See id.* at 845. Not all jurisdictions accept the judicial estoppel argument as a defense to an ADA claim. *See id.* The U.S. Supreme Court has granted certiorari to resolve this issue. Cleveland v. Policy Management Sys. Corp., 120 F.3d 513 (5th Cir. 1997), *cert. granted*, 119 S. Ct. 39 (1998).

171. *McNemar*, 91 F.3d at 618.

depends on the type of claim being brought. Nonetheless, the first approach—broadly construing the employment relationship—is preferable for several reasons. First, it comports with judicial precedent endorsing broad construction of the employment relationship when interpreting remedial legislation. Second, while the other approach makes sense of the ADA's contradictory provisions, it essentially calls for a court to apply the statutory definition of a qualified individual with a disability in some situations (current or prospective employment), but not in others (post-employment). The first scheme has the advantage of allowing uniform application of the ADA's terms in all types of claims—claims involving prospective employment, current employment, as well as post-employment. Thus, by broadly construing the employment relationship to recognize the employment position of "benefits recipient," the framework for evaluating ADA claims remains consistent.

IV. CONCLUSION

Retired individuals or those with total disabilities who receive post-employment benefits from former employers must be allowed to challenge discriminatory fringe benefits. An unduly narrow reading of the ADA that denies relief to such individuals is unfounded. The ambiguity inherent in the statute demands that the ADA's legislative history and broad purpose be guidelines for resolving the ambiguity in favor of recognizing former employees' right to relief. Reading the statute to preclude relief to an individual who worked despite a disability, earned the fringe benefits that accompany employment, and then suffered discrimination when the benefits were most needed is inconsistent with the ADA's goal. Allowing post-employment benefits recipients their day in court is necessary to meet the ADA's goal of comprehensive protection from disability-based employment discrimination.