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InSight

An Analysis of Recent Developments & Trends

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Federal Appeals Court Holds that Employers May Be Obligated Under the ADA to Accommodate Commuting to Work

By Bruce Millman and Naveen Kabir

The U.S. Court of Appeals for the Second Circuit[1] recently reiterated that employers may be obligated under the Americans with Disabilities Act (ADA) to accommodate requests by a disabled employee for assistance with her commute to work. *Nixon-Tinkelman v. N.Y. City Dep't of Health & Mental Hygiene*, Case No. 10-cv-3317 (2d Cir. Aug. 10, 2011). The plaintiff in Nixon-Tinkelman was hearing impaired and suffered from cancer, heart problems and asthma. Her employer, the New York City Department of Health and Mental Hygiene (DOHMH), reassigned her to work for nine months in Manhattan, rather than Queens, where she previously had been assigned. She requested that DOHMH assist her with her commute to Manhattan during this time. The district court granted summary judgment to DOHMH, finding that "commuting falls outside the scope of the plaintiff's job, and is thereby not within the province of an employer's obligations under the ADA and Rehabilitation Act." The Second Circuit reversed, stating that its prior decisions[2] establish that "there is nothing inherently unreasonable . . . in requiring an employer to furnish an otherwise qualified disabled employee with assistance related to her ability to get to work."

Remanding the case, the Second Circuit instructed the district court to analyze whether it would have been reasonable for DOHMH to "provide assistance related to Tinkelman's ability to get to work." The court listed several examples of accommodations that "should have [been] considered" by the lower court (and, by implication, the employer), given that the plaintiff had "worked for many years in a more suitable location": (1) transferring the plaintiff back to Queens or another closer location; (2) allowing the plaintiff to work from home; or (3) providing the plaintiff with a car or parking permit.[3]

The Second Circuit also suggested a non-exclusive list of factors for evaluating the reasonableness of the possible accommodations, such as:

- The number of employees employed by DOHMH;
- The number and location of its offices;
- Whether other available positions existed for which the plaintiff showed she was qualified;
- Whether the plaintiff could have been shifted to a more convenient office without unduly burdening DOHMH; and

- Whether it would be reasonable for the plaintiff to work without on-site supervision.

The Current Trend Among Circuit Courts

While several circuit courts have held that commuting falls outside the scope of employers' obligations under the ADA,[4] the *Nixon-Tinkelman* case marks the latest and perhaps most far-reaching foray by a federal appeals court suggesting otherwise: in some cases, it may in fact be reasonable for an employer to accommodate commute-related requests – especially if changes in shifts or assignments are at issue.

In 2010, the Third Circuit[5] ruled that "under certain circumstances the ADA can obligate an employer to accommodate an employee's disability-related difficulties in getting to work, if reasonable. One such circumstance is when the requested accommodation is a change to a workplace condition that is entirely within an employer's control and that would allow the employee to get to work and perform her job.[6] In *Colwell v. Rite Aid Corp.*, the plaintiff, a drugstore cashier whose vision impairment prevented her from driving at night, requested that she only be scheduled for day shifts. In reversing summary judgment for the employer, the Third Circuit broadly interpreted the ADA and held that changing the plaintiff's work schedule "in order to alleviate her disability-related difficulties in getting to work is a type of accommodation that the ADA contemplates."[7]

The Third Circuit took care to distinguish its holding from one that "makes employers 'responsible for how an employee gets to work,'" (emphasis added), noting that the plaintiff did not "ask for help in the method or means of her commute." It explained, however, that shift scheduling decisions are made in the workplace, and a jury could "decide whether a shift change was a reasonable accommodation under the circumstances." By contrast, the *Nixon-Tinkelman* decision appears to reject such a distinction, as the plaintiff there explicitly requested accommodation for her commute and the court enumerated several accommodation options that relate directly to *how* the plaintiff would get to work (*e.g.*, offering the plaintiff a car or parking permit).

The Ninth Circuit[8] has also recently addressed the reasonableness of accommodating shift changes. Like the plaintiff in *Colwell*, the plaintiff in *Livingston v. Fred Meyer Stores, Inc.*, 388 F. App'x 738 (9th Cir. 2010), suffered from a vision impairment that affected her ability to drive after dark, but did not impact her ability to perform her job. The plaintiff worked as a wine steward in a retail store and requested to work earlier shifts so she could avoid driving at night. The district court granted summary judgment to the employer, concluding that the plaintiff's vision impairment did not substantially limit any major life activity, and therefore did not entitle her to protection under the ADA. The Ninth Circuit reversed, explaining that "seeing" is in and of itself a major life activity.

Like the Second Circuit in *Nixon-Tinkelman*, the Ninth Circuit pointed out that it has also previously "recognized that an employer has a duty to accommodate an employee's limitations in getting to and from work."[9] However, in contrast to the Second Circuit, the Ninth Circuit did not suggest examples of accommodations for the district court to consider on remand – because it concluded that the accommodation requested by the plaintiff was in fact reasonable. The plaintiff had worked a modified schedule during the previous winter, during which time the store had not faced any hardship; to the contrary, wine sales had increased. Thus the plaintiff had raised a triable issue of fact as to whether her employer failed to reasonably accommodate her.[10]

The First Circuit[11] has also addressed the reasonableness of accommodating commuters under the ADA. In *Jacques v. Clean-Up Group, Inc.*, 96 F.3d 506 (1st Cir. 1996), the employer prevailed based on a factual finding that the plaintiff could not perform the essential functions of the job and that the requested accommodation was not reasonable. But it is significant that the issues went to the jury. Unlike the district court in *Nixon-Tinkelman*, neither the district court nor the court of appeals found that the employee's commute did not have to be accommodated as a matter of law. In that case, the plaintiff was a cleaning person who bicycled to work (approximately 2.5 miles away from his home) because his epilepsy prevented him from obtaining a driver's license. Shortly after he was laid off, his employer offered another full-time cleaning assignment at a different job site that was approximately three miles from his home and required him to report to work by 8 a.m. every morning. The plaintiff informed his employer that he could not accept the assignment unless he was provided transportation by the company or allowed to start at a later time. Because neither option was feasible, the employer assigned another employee to that location and the plaintiff later resigned.[12] The jury found for the employer on the plaintiff's ADA claims and the plaintiff appealed. The First Circuit upheld the jury verdict, explaining that the evidence presented at trial supported the jury's finding that the plaintiff was not "otherwise qualified" to perform the essential function of reporting to work by 8 a.m. The court explained that accommodating the plaintiff with a later start time

was not reasonable under the circumstance (because it eliminated an essential function of the position), and that there was ample evidence to demonstrate that furnishing transportation to the plaintiff imposed an undue burden on the employer.

Observations and Recommendations

Employers in the First, Second, Third and Ninth Circuits should be aware that the ADA may obligate them to accommodate certain requests by employees to assist with their commutes – but determining whether accommodation may be required or will be reasonable will vary with the individual circumstances of each request. Dismissal of failure-to-accommodate claims flowing from commute-related requests is not guaranteed in these jurisdictions, especially without a sufficient evidentiary record on the reasonableness of the accommodation(s) at issue and undue hardship imposed on the employer. While the *Nixon-Tinkelman, Colwell, Livingston* and *Jacques* decisions offer some guidance on what circumstances courts consider reasonable (or unreasonable) for employers to accommodate commute-related requests, employers should be aware that their obligation to engage in the interactive process under the ADA may be triggered[13] as soon as these requests arise – especially if these requests are precipitated by employer decisions that impact an employee's commute. Employers are advised to consult with legal counsel to assess the extent of their legal obligations when confronted with requests by disabled employees to accommodate their commute to work.

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[1] The Second Circuit covers the states of New York, Connecticut and Vermont.

[2] *Lyons v. Legal Aid Society*, 68 F.3d 1512, 1514 (2d Cir. 1995) (reversing dismissal of plaintiff's claims alleging failure to accommodate her request for a parking space near her office and interpreting the ADA to require employers in some circumstances to assist employees in getting to and from work); *see also DeRosa v. Nat'l Envelope Corp.*, 595 F.3d 99, 105 (2d Cir. 2010) (suggesting that employer had provided reasonable accommodation to disabled employee who was unable to commute by allowing him to work from home for two years); *Lovejoy-Wilson v. Noco Motor Fuel, Inc.*, 263 F.3d 208, 217-18 (2d Cir. 2001) (employer who failed to consider alternate methods of accommodating epileptic store manager's inability to drive failed to satisfy its reasonable accommodation obligation under the ADA).

[3] The examples articulated by the Second Circuit appear to fall within the scope of categories set forth in current ADA regulations. See 29 C.F.R. § 1630.2(o)(2)(i)-(ii) (2011) (listing access to existing facilities, modified work schedules, reassignment to a vacant position, and appropriate adjustment or modification of policies as examples of reasonable accommodations).

[4] *See, e.g., Kimble v. Potter*, 390 F. App'x 601 (7th Cir. 2010) (plaintiff whose vertigo prevented her from driving to work was not protected by the ADA because she could access other jobs in Chicago by foot or by public transportation); *Carlson v. Liberty Mut. Ins. Co.*, 237 F. App'x 446 (11th Cir. 2007) (plaintiff whose epilepsy interfered with her ability to drive to work but had no impact on her ability to perform her job duties was not protected by the ADA); see also *Kellogg v. Energy Safety Servs., Inc.*, 544 F.3d 1121, 1126 (10th Cir. 2008) (vacating jury verdict that impermissibly relied on the notion that driving alone may be considered a "major life activity" under the ADA). Some Circuit Courts have also been hesitant to consider telecommuting as a "reasonable" accommodation given that attendance at the workplace is an essential function of almost every job. *See Smith v. Ameritech*,129 F.3d 857, 867 (6th Cir. 1997) (sales representative who requested to work from home failed to establish that his was one of the "exceptional circumstances" that could be considered reasonable for an employer to accommodate); *Vande Zande v. Wisconsin*, 44 F.3d 538, 545 (7th Cir. 1995) (the ADA does not require employers "to allow disabled workers to work at home, where there productively would be greatly reduced"); *Tyndall v. Nat'l Educ. Ctrs., Inc.*, 31 F.3d 209, 214 (4th Cir. 1994) ("except in the *unusual* case where an employee can effectively perform *all* work-related duties from home, an employee who cannot meet the attendance requirements of the job at issue cannot be considered a 'qualified' individual protected by the ADA.") (internal citations and quotations omitted) (emphasis added). If attendance is an essential function, then it follows logically that providing a reasonable accommodation to enable a disabled employee to attend work is required by the ADA. However, the continuum for "reasonable" accommodations may be shifting in light of recent technological advances; in some circumstances, it may be "more" reasonable to allow an employee to work from home than to assist her in getting to work, or vice versa.

[5] The Third Circuit covers Pennsylvania, New Jersey and Delaware.

[6] *Colwell v. Rite Aid Corp.*, 602 F.3d 495 (3d Cir. 2010).

[7] *See* 42 U.S.C. § 12111(9)(B) (2005) (listing "modified work schedules" as an example of reasonable accommodation).

[8] The Ninth Circuit covers Washington, Montana, Idaho, Oregon, Nevada, California, Arizona, Alaska, Hawaii, the Northern Mariana Islands and Guam.

[9] *See Humphrey v. Memorial Hosp. Ass'n*, 239 F.3d 1128, 1135 (9th Cir. 2001) (holding that employer was obligated to accommodate plaintiff whose obsessive compulsive disorder interfered with her ability to get to work on time but not did not impact her ability to fulfill her duties as a medical transcriptionist).

[10] Note that in *Nixon-Tinkelman*, the Second Circuit remanded the threshold issue of whether it was possible to provide reasonable accommodation without undue hardship on DOHMH in the first place, and alluded to the possibility of resolving that issue on summary judgment.

[11] The First Circuit covers Maine, New Hampshire, Massachusetts and Rhode Island.

[12] Although the district court ruled there was a material dispute as to whether the plaintiff's employment had been terminated, his ADA claim proceeded to trial regarding his right to return to work from layoff, be rehired, and receive job assignments.

[13] In *Jacques*, the First Circuit explained that even though it was "painfully aware" that the employer lacked proper knowledge of its obligations under the ADA, it would nonetheless be "spared from walking the plank" with respect to its failure to engage in the interactive process because the only issue before the court was the reasonableness of the jury's verdict. Note, however, that under *Phillips v. City of New York*, 884 N.Y.S.2d 369, 380 (App. Div. 1st Dept. 2009), failure to engage in the interactive process constitutes a separate and actionable violation of the New York City Human Rights Law.