The Viability of Freestanding Claims for Failure to Accommodate Disabilities Remains Unsettled

by Benjamin S. Teris and Kayleen Egan

Is an employer's failure to accommodate an employee's disability, in and of itself, sufficient to form an actionable claim? This question remains unresolved, and courts are divided on whether a plaintiff can pursue a "freestanding failure to accommodate claim."

Typically, a plaintiff asserting a claim based on a failure to accommodate a disability will have suffered a distinct adverse employment action coupled with the accommodation denial, such as termination or demotion. An employee might also resign due to the denial of his or her accommodation request and claim constructive discharge. In a rare scenario, an employer denies an employee's accommodation request, but the employee neither suffers a distinct adverse employment action nor resigns. The latter scenario is where the issue of a freestanding failure to accommodate claim manifests.

Federal courts are split on whether a freestanding failure to accommodate claim is cognizable under the Americans with Disabilities Act (ADA). Additionally, the New Jersey Supreme Court has analyzed the issue under the Law Against Discrimination (LAD), but ultimately refrained from resolving it. This article examines the key cases on freestanding failure to accommodate claims under the ADA and the LAD, and provides guidance for New Jersey practitioners.

Americans with Disabilities Act

The ADA's anti-discrimination provision, at 42 U.S.C. § 12112(a), prohibits an employer from "discriminat[ing] against a qualified individual on the basis of disability in regard to job applications, procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." In turn, 42 U.S.C. § 12112(b)(5)(A) defines a failure to make reasonable accommodations as a type of disability discrimination. Accordingly, because the ADA prohibits discrimination strictly in regard to hiring, discharge, etc., and defines failure to accommodate as a *type of discrimination*, the plain language of the ADA appears to require a distinct adverse employment action as an element of a failure to accommodate claim.

Notwithstanding the statutory language of the ADA, several courts of appeal, including the Third Circuit, have seemingly endorsed freestanding failure to accommodate claims. The 10th Circuit, however, recently reached the opposite conclusion.

Distinct Adverse Employment Action Not Required

The Third Circuit touched on the issue of freestanding failure to accommodate claims in two precedential opinions. However, in both cases the issue was not central to the plaintiff's claims. In *Williams v. Philadelphia Housing Authority Police Department*, the Third Circuit pronounced, with little explication, that "[a]dverse employment decisions in [the context of the plaintiff's claim] include refusing to make reasonable accommodations for a plaintiff's disabilities."[1] The focus of the *Williams* opinion was whether an employee who is "regarded as disabled" is entitled to a reasonable accommodation under the ADA.[2] Moreover, the plaintiff actually suffered an adverse employment action. In response to his request for an accommodation, the employer offered him an *unpaid* leave of absence and later terminated him.[3] As such, whether a failure to accommodate constitutes an adverse employment action was irrelevant to the plaintiff's claims.

More recently, in *Colwell v. Rite Aid Corporation*, the Third Circuit reiterated its pronouncement from *Williams* that a failure to accommodate is an adverse employment action in a disability discrimination claim.[4] The plaintiff asserted, in part, claims of constructive discharge and failure to accommodate under the ADA.[5] Although the Third Circuit affirmed the district court's grant of summary judgment with respect to the plaintiff's constructive discharge claim, it reversed the district

court's decision for the failure to accommodate claim, holding that there was a genuine issue of material fact as to whether "either party violated the duty to engage with good faith in the interactive process."[6] Notably, the Third Circuit did not focus on whether a freestanding failure to accommodate claim is cognizable under the ADA, but assumed that failing to accommodate an employee's disability constitutes an adverse employment action based on *Williams*. Also, the employee alleged an adverse employment action in the form of a constructive discharge, thereby diminishing the relevancy of the freestanding failure to accommodate claim issue.

The Seventh Circuit has also endorsed freestanding failure to accommodate claims. In *EEOC v. AutoZone, Inc.*, in a footnote, the Seventh Circuit confirmed that "[n]o adverse employment action is required to prove a failure to accommodate."[7] According to the panel, the district court had strayed from Seventh Circuit precedent "by requiring that the EEOC demonstrate an adverse employment action against [the employee]."[8] Nonetheless, the district court's purported "misstep was not decisive for the court's judgment."[9] Notably, the employee in *Autozone* had been terminated, thereby making any decision on the freestanding failure to accommodate claim issue irrelevant—which is presumably why the Seventh Circuit addressed the issue in a footnote rather than the body of the opinion.

In all of these decisions the courts either discussed the issue of freestanding failure to accommodate claims *in dicta* or resolution of the issue was unnecessary because the employee suffered a distinct adverse employment action. None of the courts engaged in a detailed analysis of the ADA to reach its determination.

Distinct Adverse Employment Action Required

In *Exby-Stolley v. Board of County Commissioners*, the 10th Circuit diverged from its sister circuits on the issue of freestanding failure to accommodate claims under the ADA.[10] In a 2-1 decision, the court held that: 1) a plaintiff must show that he or she suffered an adverse employment action to establish a failure to accommodate claim; and 2) a failure to accommodate alone is not an adverse employment action.

Laurie Exby-Stolley was employed as health inspector for Weld County, Colorado (county). While employed, she broke her arm, which required multiple surgeries.[11] Following her return to the workplace, she struggled to complete the number of required inspections for her job and received a poor performance evaluation.[12] Her physician then placed her on medical restrictions.[13] The county assigned her to a part-time office job at her same salary because it could not accommodate her in the health inspector position.[14] Eventually, Exby-Stolley asked the county to create a new position for her, which it refused.[15] She resigned, and then filed a lawsuit, alleging the county had fired her and discriminated against her by failing to reasonably accommodate her disability.[16] The jury ruled in favor of the county, finding that Exby-Stolley had not shown she was subject to an adverse employment action, which was listed as a necessary proof on the jury charge.

On appeal, Exby-Stolley argued that the trial court erred in instructing the jury "that she had to prove she had suffered an adverse employment action."[17] In the alternative, she argued that, if proof of an adverse employment action was necessary, the county's failure to accommodate was, in and of itself, an adverse employment action.[18] The 10th Circuit majority rejected both arguments.

The majority first addressed Exby-Stolley's argument "that an adverse employment action is not required to establish an ADA claim based on a failure to accommodate."[19] The majority determined that Section 12112(a), which specifies that discrimination must be "in regard to...terms, conditions, and privileges of employment[,]" establishes that an adverse employment action is necessary component of a disability discrimination claim.[20] Thus, although the term 'adverse employment act' is judicially created and absent from the ADA, it originates from the statutory language. Accordingly, the statutory language dictates "that the [adverse employment action] requirement applies to every discrimination claim under the ADA, including those based on failure to make reasonable accommodations."[21]

The majority rejected other circuits' opinions, including *AutoZone, Inc.*, *supra*,[22] because the freestanding failure to accommodate claim issue was not raised by the parties in those cases, and, thus, the issue was not thoroughly examined by the courts.

The majority also rejected Exby-Stolley's argument that a failure to accommodate is an adverse employment action—holding that "mere inconvenience or an alteration of job responsibilities" is not an adverse employment action.[23] The 10th Circuit was not persuaded by

the Third Circuit's opinions in *Colwell* and *Williams*. According to the majority, neither opinion examined the statutory language of the ADA nor provided "any other support for [the] proposition" that refusing to reasonably accommodate an employee is an adverse employment action.[24] The lack of thorough statutory analysis was understandable in *Williams* given the case involved a "clear adverse employment action arising from a failure to make reasonable accommodations."[25]

Accordingly, the majority held that a plaintiff must establish an adverse employment action to state a claim for disability discrimination under the ADA based on a failure to accommodate.[26] In other words, a freestanding failure to accommodate claim is not cognizable under the ADA.

The sharply worded dissent rejected "the majority's assertion that reading an adverse-employment-action requirement into the ADA's failure-to-accommodate claim is not 'contrary' to" the 10th Circuit's "controlling precedent."[27] According to the dissent, "the majority's misguided endeavor to incorporate an adverse-employment-action requirement into an ADA failure to-accommodate-claim" was mostly based on "'confusion[]...[in] failing to clearly differentiate between disparate treatment and failure to accommodate claims': the former require a showing of an adverse employment action and the latter do not."[28] The dissent, therefore, would have remanded the case for a new trial.

The 10th Circuit's Oct. 2018 opinion will not be the court's final say on the issue, as the full court agreed to hear the case *en banc*, with oral argument tentatively scheduled for May of this year.[29]

Law Against Discrimination

A notable difference between the ADA and the LAD is the absence of an explicit provision in the LAD requiring employers to provide reasonable accommodations to disabled employees. Instead, an employer's duty to accommodate disabled employees has been read into the LAD by the courts and implemented through administrative regulation.

Against that backdrop, the Appellate Division and New Jersey Supreme Court analyzed the issue of freestanding failure to accommodate claims under the LAD. In *Victor v. State*, the Appellate Division held an adverse employment action is a component of a failure to accommodate a disability claim under the LAD and not, in and of itself, an adverse employment action.[30] On certification, the New Jersey Supreme Court declined to endorse the Appellate Division's holding. The Court, however, stopped short of endorsing freestanding failure to accommodate claims, leaving the issue for another day.[31]

Appellate Division Says No to Freestanding Failure to Accommodate Claims

Roy Victor, a state trooper, returned to work after an extended medical leave of absence.[32] Upon return, he advised his supervisor that he had injured his back after he was cleared to return to work but before he reported to work that day.[33] He requested to perform administrative tasks rather than road patrol due to fear of exacerbating his injury.[34] His request was denied.[35] He then performed patrol duties for four hours as ordered, but took sick leave for the remaining two hours of his shift.[36] Shortly thereafter he went on paid leave for psychological issues.[37]

Victor then sued the state. He alleged, *inter alia*, a failure to accommodate claim under the LAD, solely based on the denial of his request to perform administrative duties on the day he returned to work.[38] At trial, the state requested that the jury charge include an adverse employment action as a required element of Victor's proofs.[39] The trial judge denied the request.[40] The jury returned a verdict in favor of Victor on the failure to accommodate claim. The trial judge denied the state's motion for a new trial or alternatively for a judgment notwithstanding the verdict.[41] The state appealed.

Upon review, the Appellate Division noted that although the LAD does not specifically address reasonable accommodation, New Jersey courts require employers to reasonably accommodate employees' disabilities.[42] The Appellate Division also described "[t]he failure to accommodate [a]s one of two distinct categories of disability discrimination claims…the other being disparate treatment discrimination."[43]

The Appellate Division was "at a loss to locate a state court decision addressing whether [a] plaintiff must prove an adverse employment action occurred as a result of a failure to accommodate a claimed disability."[44] In most disability discrimination cases, the "adverse employment action [is] self-evident[.]"[45] But in Victor's case, he "was not passed over for promotion, fired, transferred, reassigned, demoted or even docked wages when he was told to resume patrol duty despite his back discomfort."[46]

Looking to the ADA for guidance, the Appellate Division disagreed with the trial court's determination that a "failure to accommodate 'is in and of itself an adverse employment action'" and held that "[f]ailure to accommodate is not discrete from discrimination, but an act that may prove discrimination."[47] Accordingly, the Appellate Division reversed the trial court's denial of the state's challenge to the jury charge because "the jury must determine whether plaintiff suffered an adverse employment action," and that such action is not "presumed by the failure to accommodate…."[48]

New Jersey Supreme Court Says Yes…Maybe

The New Jersey Supreme Court granted certification on the issue of "whether a plaintiff must prove he suffered an adverse employment action as a result of his employer's failure to accommodate a physical disability under the LAD[.]"[49]

Victor argued that the Appellate Division's decision conflicted with federal precedent under the ADA, particularly *Williams*, and the Appellate Division overlooked LAD regulations on reasonable accommodation, at N.J.A.C. 13:13-2.5(b).[50] The state argued that Victor cannot recover under the LAD because he did not suffer a distinct adverse employment action.[51] The state further argued that *Williams* is not persuasive because the plaintiff was terminated in that case, thereby making the Third Circuit's pronouncement that a failure to accommodate can be an adverse employment action *dicta*.[52]

In consideration of the parties' arguments, the Court analyzed the ADA's anti-discrimination provision, at 42 U.S.C. § 12112(a), and provision on reasonable accommodation, at 42 U.S.C. 12112(b)(5)(A). Similar to the analysis in *Exby-Stolley*, *supra*, the Court determined that under the plain language of the ADA, an employer's "failure to accommodate...would not extinguish the requirement that [a] plaintiff demonstrate an adverse employment [action]."[53] The Court, however, noted that the same might not be true under the LAD, "because its reasonable accommodation provisions are not explicit" and must be interpreted under the "LAD's overarching goal [of] the eradication of the cancer of discrimination."[54]

The Court reviewed prior decisions of the Appellate Division but did not find any opinion directly supporting freestanding failure to accommodate claims. The Third Circuit's holding in *Williams* was not persuasive because it "involved an employee who was terminated rather than accommodated[.]"[55]

Reiterating the broad remedial nature of the LAD, the Court determined "[t]he LAD's purposes suggest that we chart a course to permit plaintiffs to proceed against employers who have failed to reasonably accommodate their disabilities or who have failed to engage in an interactive process even if they can point to no adverse employment consequence that resulted."[56] While noting an employee who does not suffer an adverse employment action coupled with the denial of his or her request for an accommodation might be able to assert a hostile work environment claim, the Court determined "there also might be circumstances in which such an [employee's] proofs, while falling short of [the standard for a hostile work environment claim] would cry out for a remedy."[57] That remedy might be a freestanding failure to accommodate claim.[58]

Despite teetering on the edge of holding that a failure to accommodate without a distinct adverse employment action is actionable under the LAD, the Court refrained from resolving the issue. The particular facts of the case were a "poor vehicle" for doing so because there was no record evidence that Victor was disabled or that he sought a reasonable accommodation, as courts have defined it.[59] The Court, therefore, concurred with the Appellate Division's decision to reverse the verdict and remand for a new trial, but not based on the issue of freestanding failure to accommodate claims.

The New Jersey Supreme Court has not revisited the issue since *Victor*.[60]

Practice Points

Freestanding failure to accommodate claims will rarely arise in practice. As recognized by the New Jersey Supreme Court, "[s]uch cases would be unusual, if not rare, for it will ordinarily be true that a disabled employee who has been unsuccessful in securing an accommodation will indeed suffer an adverse employment consequence."[61] In fact, the issue only arose in *Exby-Stolley* because the plaintiff mistakenly failed to assert a constructive discharge claim.[62] Nonetheless, if the issue arises in practice, given that the viability of such claims has not been settled, employment law practitioners in New Jersey can make credible arguments on either side under the ADA and LAD.

While the Third Circuit seemingly endorsed freestanding failure to accommodate claims under the ADA in *Williams*, the court's pronouncement was arguably *dicta*, because the employee in that case suffered

an adverse employment action and the court did not provide any support for its assertion. Indeed, the New Jersey Supreme Court and the 10th Circuit have both questioned whether *Williams* is persuasive precedent on the issue.

Nevertheless, *Williams* has not been overturned on this point, and was seemingly confirmed by the Third Circuit in *Colwell*. Thus, proponents of freestanding failure to accommodate claims can cite to *Williams* and *Colwell* to support their position that such claims are viable under the ADA.

As for the LAD, the New Jersey Supreme Court's language in *Victor* can arguably be read as a tacit approval of freestanding failure to accommodate claims. While the Court refrained from endorsing such claims, it refused to uphold the Appellate Division's outright prohibition of them. No court has addressed the issue in a precedential opinion since *Victor*. Although in a non-precedential decision, *Bull v. UPS*, the Third Circuit affirmed the District of New Jersey's denial of an LAD plaintiff's motion for a new trial, notwithstanding that "the jury verdict sheet failed to advise the jury that UPS's failure to accommodate Bull's disability could result in her 'de facto' termination."[63] Citing *Victor*, the Third Circuit held that "[a]lthough the New Jersey Supreme Court may later decide to strike 'adverse employment action' as a distinct element in a failure to accommodate claim, it has not yet done so."[64] Accordingly, despite *Victor* leaving an opening for freestanding failure to accommodate claims under the LAD, courts might be hesitant to allow such claims to proceed until (or unless) the New Jersey Supreme Court definitively rules on the issue.

Conclusion

Only time will tell whether the United States Supreme Court will resolve the issue of whether freestanding failure to accommodate claims are actionable under the ADA or if the New Jersey Supreme Court will revisit the issue with respect to the LAD. For now, it remains open to interpretation, and practitioners have multiple arguments to support whichever position they may take in a case.

Benjamin S. Teris and Kayleen Egan are associates at Post & Schell, P.C. in Philadelphia, Pennsylvania. They advise and defend New Jersey and Pennsylvania employers in state and federal courts.

Endnotes

1. 380 F.3d 751, 761 (3d Cir. 2004), *cert. denied*, 544 U.S. 961 (2005).
2. *Id.* at 768-76.
3. *Id.* at 757-58.
4. 602 F.3d 495, 504 (3d Cir. 2010).
5. *Id.* at 499.
6. *Id.* at 508.
7. 630 F.3d 635, 638 n.1 (7th Cir. 2010).
8. *Id.*
9. *Id.*
10. 906 F.3d 900, *rehear'g granted en banc*, 910 F.3d 1129 (10th Cir. 2018).
11. *Id.* at 903.
12. *Id.*
13. *Id.*
14. *Id.* at 903.
15. *Id.* at 904.
16. Exby-Stolley failed to include a claim of constructive discharge in her pre-trial order, and instead, asserted that she was fired by her employer. *Id.* at 918. Based on that failure, the trial court did not allow the plaintiff to include a jury instruction for constructive discharge. *Id.*
17. *Id.* at 905.
18. *Id.* at 917.
19. *Id.* at 921.
20. *Id.* at 907-09.
21. *Id.* at 911 (*quoting* 42 U.S.C. § 12112(a)).
22. *Id.* at 914-15.
23. *Id.* at 917.
24. *Id.* at 918.
25. *Id.*
26. *Id.* at 917.
27. *Id.* at 920.

28. *Id.* at 921.
29. *Exby-Stolley v. Bd. of County Comm'rs*, 910 F.3d 1129 (10th Cir. 2018).
30. 401 N.J. Super. 596 (App. Div. 2008).
31. 203 N.J. 383 (2010).
32. *Victor*, 401 N.J. Super. at 602-04.
33. *Id.* at 604.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at 604-05.
38. *Id.* at 605.
39. *Id.* at 607.
40. *Id.*
41. *Id.* at 607-08.
42. *Id.* at 609.
43. *Id.* (*quoting Tynan v. Vicinage 13 of Superior Court*, 351 N.J. Super. 385, 397 (App. Div. 2002)).
44. *Id.* at 611.
45. *Id.*
46. *Id.* at 612.
47. *Id.* at 614.
48. *Id.* at 617.
49. *Victor*, 203 N.J. 383 at 396 (*quoting* 99 N.J. 542 (2009)).
50. *Id.* at 396.
51. *Id.* at 397.
52. *Id.*
53. *Id.*
54. *Id.* at 412 (internal quotation marks and citations omitted).
55. *Id.* at 416.
56. *Id.* at 421.
57. *Id.* at 422.
58. *Id.*
59. *Id.* at 422.
60. In *Royster v. New Jersey State Police*, 227 N.J. 482, 499-500 (2017), however, the Court did not include an adverse employment action as an element of a failure to accommodate claim: "[t]o establish a failure-to-accommodate claim under the LAD, a plaintiff must demonstrate that he or she (1) qualifies as an individual with a disability…; (2) is qualified to perform the essential functions of the job…; and (3) that defendant failed to reasonably accommodate [his or her] disabilities." (internal quotation marks and citation omitted).
61. *Id.* at 421.
62. 906 F.3d at 918.
63. 620 Fed. Appx. 103 (3d Cir. 2015).
64. *Id.* at 103.