To Commute or Not to Commute: That is the Question

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Where and when does an employer's duty to provide reasonable accommodations for an employee's disability begin under federal and state law? According to a recent decision from a federal appeals court in a case brought by the Equal Employment Opportunity Commission, the duty begins before the employee steps inside the workplace or begins working. Employers in New Jersey and nationwide should take note of the EEOC's stance and the appeals court's decision and evaluate all requests for commuting-related accommodations on a case-by-case basis.

In *Equal Employment Opportunity Commission v. Charter Communications, LLC* (Kimmons), the Seventh Circuit recently considered an employee's request for a modified work schedule under the Americans with Disabilities Act (ADA). No 22-131, ___ F.3d ___ (Jul. 28, 2023). The claim involved James Kimmons, who lived in Racine, Wisconsin and worked at a call center operated by Charter Communications in Milwaukee. He had cataracts in both eyes leading to blurred vision and difficulty seeing in the dark, which rendered nighttime driving unsafe.

Kimmons worked the 12 p.m. to 9 p.m. shift and had a one-hour commute by car in each direction. To minimize the danger of driving in the dark, he asked for his workday to start and end earlier. Charter granted his request and permitted him to start at 10 a.m. and leave at 7 p.m., but only for thirty (30) days. When Kimmons sought an extension of this modified work schedule to allow him time to try and move closer to the call center, Charter denied the request. It informed Kimmons that assistance with his commute was not required under the ADA and recommended he use public transportation or carpool. However, the local bus system did not operate after 9 p.m., and Charter declined his request for the names of other employees who lived near him asserting this information was confidential.

Kimmons filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC). Conciliation efforts failed, and the EEOC sued Charter for a failure to accommodate under the ADA and sought damages as well as injunctive relief. The United States District Court for the Eastern District of Wisconsin granted Charter's motion for summary judgment. Relying on prior Seventh Circuit precedent, the district court concluded that the ADA did not apply because Kimmons did not require an accommodation to perform the essential functions of his job once he arrived at the workplace. The EEOC appealed.

The Seventh Circuit focused on whether Kimmons had the right to a modified schedule because of his difficulties commuting home from work during nighttime hours. The court of appeals noted the ADA provided a non-exclusive list of potential accommodations, including “part-time or modified work schedules.” 42 U.S.C. § 12111(9)(B). It further referenced the legislative history of the ADA, in which a report of a House of Representatives committee found that: “Other persons who may require modified work schedules are persons who depend on a public transportation system that is not currently fully accessible.” H.R. Rep. No. 101-485, pt. 2, at 62-63 (1990).

The Seventh Circuit also considered precedent from other circuits, including *Colwell v. Rite Aid. Corp*., 602 F.3d 495, 505 (3d Cir. 2013), a matter decided by the Third Circuit whose jurisdiction includes New Jersey. The facts in *Colwell* were strikingly similar to *Kimmons*. There, the plaintiff, a retail clerk who worked both day and evening shifts, lost her vision in one eye, making it unsafe for her to drive at night. Because no public transportation was available, she requested to be assigned daytime shifts only but her employer refused.

The lower court ruled in her employer's favor, but that decision was set aside on appeal. The Third Circuit held that "the ADA can obligate an employer to accommodate an employee's disability-related difficulties in getting to work, if reasonable" in certain circumstances, such as "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." The *Colwell* court rejected drawing a sharp line between on-site accommodations and transportation-related accommodations and reasoned Colwell, as a cashier, was required to be at her workplace to perform her job responsibilities, and any change in shifts was clearly a change in a workplace condition entirely under her employer's control. Further, the Third Circuit noted that Colwell was not seeking help "in the method or means of her commute, but only a change in schedule" that was solely within her employer's control.

The Seventh Circuit found *Colwell* and other jurisprudence from around the country persuasive. The court made two general observations. First, "where a disability makes it difficult for an employee to travel to and from work safely, the employee usually controls some key variables, most important where the employee lives, but the employer controls another key variable, the work schedule." Second, "in most cases, an employer had no duty to help an employee with a disability with the method and means of his commute to and from work, assuming the employer does not offer such help to employees without disabilities."

The Seventh Circuit held that an employee may preliminarily show he has the right to a commuting-related accommodation from his employer based on a fact-sensitive analysis of "the benefits of the [requested] accommodation, alternatives to the accommodation, the cost to the employer, and consequences for others." Even then, the employer can show that the requested accommodation would cause undue hardship.

Applying these principles, the Seventh Circuit held that Charter had not shown that Kimmons' requested accommodation was an undue hardship as a matter of law and failed to show that the accommodation would have unduly burdened other employees or would have been too expensive. It also held that Kimmons was not seeking "an unaccountable, work-when-able schedule or a permanent accommodation." Because he asked only "for a temporary work schedule that would start and end two hours earlier while he found time to move closer[,]" the court of appeals held that "[a] jury could have [found] his requested accommodation to be reasonable." Consequently, the Seventh Circuit reversed the district court's grant of summary judgment to Charter and remanded the matter for further consideration of the EEOC's claim.

Recommended Actions for Employers

The Seventh Circuit's recent decision in *Kimmons* and the Third Circuit's earlier decision in *Colwell* should serve as a reminder for employers that their obligations to provide disability-related accommodations under the ADA or its state counterparts, such as the New Jersey Law Against Discrimination, may – in some circumstances – extend beyond the limits of the physical workplace. Depending on the particular situation, an employer may have to provide a modified work schedule or another commuting-related accommodation when an employee's disability interferes with their ability to travel to or from work.

Employers should consider the following:

- Providing additional training and guidance to human resources personnel about the need to consider requests for commuting-related accommodations, including modified work schedules, on a case-by-case basis;

- Properly documenting the reasons for granting, denying, or proposing an alternative commuting-based accommodation in response to a request from an employee; and
- Recognizing that employees may rely on public transportation options (instead of private car transport), which often operate on more limited schedules outside of traditional business hours and have differing levels of accessibility.

Employers should also consult with experienced employment counsel as needed.

The Porzio Employment Team is available to assist in all aspects of the implementation of these new requirements, including policy development, training, and guidance.

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