11TH CIRCUIT CREATES CIRCUIT SPLIT HOLDING THAT AN "ADVERSE ACT" IS NEEDED TO BRING AN ADA CLAIM FOR FAILURE TO ACCOMMODATE

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OVERVIEW

On 24 May 2023, in *Beasley v. O'Reilly Auto Parts*,[1] the United States Court of Appeals for the Eleventh Circuit created a split in the circuit courts by holding that an employee must establish the occurrence of an adverse employment action in order to bring a lawsuit for failure to accommodate under the Americans with Disabilities Act, as amended (the ADA).[2] Plaintiff Teddy Beasley, a deaf man capable of understanding only 30% of oral communication via lip reading, sued his employer O'Reilly Auto Parts (O'Reilly) alleging that O'Reilly failed to provide him with reasonable accommodations he requested for his disability. As part of its ruling, the Eleventh Circuit conclusively declared that "discrimination in the form of a failure to reasonably accommodate is actionable only if that failure negatively impacts the employee's hiring, advancement, discharge, compensation, training, and other terms, conditions, and privileges of his employment," i.e., a failure to reasonably accommodate does not in and of itself constitute an "adverse act." The Eleventh Circuit decision creates a split among the circuits that do not require a showing of an adverse employment action separate from the failure to reasonably accommodate itself.

FACTUAL BACKGROUND

Beasley was hired by O'Reilly to work at a distribution center in Alabama. He utilized the services of an American Sign Language (ASL) interpreter during his initial interview, and notified O'Reilly that he needed an accommodation to perform the essential functions of the position at the time of his hire. O'Reilly acknowledged that *Beasley* would need accommodations, including having an ASL interpreter during his initial training, requesting an ASL interpreter as needed in the future, and keeping his cell phone with him while working to facilitate work-related communication through text.

Beasley's claim that O'Reilly violated the ADA by failing to provide him with reasonable accommodations stems from four distinct instances. First, Beasley requested either that his supervisor provide him with text message summaries of mandatory pre-shift meetings during which tasks for the day, any concerns, and safety information were discussed, or that O'Reilly provide Beasley with an ASL interpreter for these meetings. Beasley's supervisor repeatedly failed to provide sufficient summaries, and O'Reilly did not provide an ASL interpreter. Second, Beasley requested an ASL interpreter during forklift training with his supervisor, but rather than provide an ASL interpreter, Beasley's supervisor stopped the training. Third, Beasley requested an ASL interpreter to discuss a

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disciplinary write-up he received for an unexcused absence. Beasley was ultimately unable to sufficiently communicate that the absence was indeed excused, so the write up remained in place. As a result, the punishment imposed on Beasley for subsequent violations was more severe under O'Reilly's progressive discipline policy. Fourth, Beasley requested an ASL interpreter during O'Reilly's company picnic, which O'Reilly did not provide. Beasley's wife attended the picnic, and she was able to interpret for him.

On cross-motions for summary judgment, the district court granted O'Reilly's summary judgment motion and denied Beasley's summary judgment motion, relying on a footnote in a prior Eleventh Circuit decision and determining "that to succeed on a failure-to-accommodate claim a plaintiff must show that he suffered an adverse employment action." The district court found that Beasley had not suffered any such adverse employment action. Alternatively, the district court also found that none of the four instances in which Beasley requested a reasonable accommodation involved the performance of "essential job functions."

ADVERSE EMPLOYMENT ACTION REQUIRED

The Eleventh Circuit noted that "[a]n employer violates the ADA when it (1) 'discriminates against a qualified individual on the basis of disability' and (2) does so '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.'" Endorsing the district court's ruling, the Eleventh Circuit declared "discrimination in the form of a failure to reasonably accommodate is actionable under the ADA only if that failure negatively impacts the employee's hiring, advancement, discharge, compensation, training and other terms, conditions and privileges of his employment." Accordingly, Beasley was required to "show that any failure of O'Reilly to accommodate his deafness negatively impacted the hiring, promotion, firing, compensation, training, or other terms, conditions or privileges of Beasley's employment."

The Eleventh Circuit disagreed with the district court, however, and found that a factfinder could reasonably determine that Beasley's inability to understand or participate in the pre-shift meetings, and the inability to effectively communicate the circumstances surrounding his absence did indeed impact the terms, conditions, and privileges of his employment. As for the forklift training and company picnic, the Eleventh Circuit sided with the district court's determination that Beasley suffered no adverse employment decision as a result of O'Reilly's failure to provide an ASL interpreter. The Eleventh Circuit also found that even if a reasonable accommodation had to relate to an essential job function, which it held it does not, the pre-shift meetings and disciplinary hearings were indeed essential job functions.

CIRCUIT SPLIT

Beasley creates a circuit split regarding whether a plaintiff alleging a failure to accommodate claim under the ADA must establish that they suffered an adverse employment action. In 2020, the United States Court of Appeals for the Tenth Circuit weighed in on this issue, reaching the opposite conclusion. In *Exby-Stolley v. Board of County Commissioners,*[3] the district court instructed a jury that for a plaintiff to prevail on her failure to accommodate claim under the ADA, she was required to establish that she suffered an adverse employment action. A three-judge panel of the Tenth Circuit affirmed in a 2-1 decision. But on rehearing en banc, the court held in a 7-6 decision that the district court erred and "an adverse employment action is not a requisite element of an ADA failure-to-accommodate claim."

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At the time of its decision, the Tenth Circuit noted that "research has not revealed even one circuit that has regularly incorporated an adverse-employment-action requirement into an ADA failure-to-accommodate claim." It further found that "no less than six circuits–the First, Fourth, Fifth, Sixth, Eleventh, and the D.C. Circuit–either state, or strongly suggest, that there is no adverse-employment-action requirement in ADA failure-to-accommodate claims." The Tenth Circuit further found that two additional circuits, the Third and the Eighth, purport to incorporate an adverse action requirement, but that this is in name only, as the failure to accommodate is in and of itself an adverse employment action. Similarly, in an amicus curiae brief the Equal Employment Opportunity Commission (EEOC) submitted in support of Beasley, the EEOC argued that "because the denial of a reasonable accommodation inherently impacts 'terms, conditions, and privileges of employment' … no separate 'adverse employment action' is required."[4]

The Tenth Circuit concluded that the "critical takeaway" was that "*none* of [the] sister circuits has regularly incorporated an adverse-employment-action requirement into an ADA failure-to-accommodate claim." The Tenth Circuit recognized that if it were to take the opposite position, it would be alone in doing so, and while it was free to do so, it did not want to create a circuit split. The United States Supreme Court denied a petition for certiorari from the Tenth Circuit's en banc ruling.[5]

IMPLICATIONS

With the Eleventh Circuit's ruling in *Beasley*, there is now a clear circuit split on the issue whether a plaintiff asserting a failure to accommodate claim under the ADA must also establish that they suffered an adverse employment action as a result of the failure to accommodate. So, if the *Beasley* decision stands, plaintiffs in Alabama, Georgia, and Florida will be required to establish an additional element of an ADA failure-to-accommodate claim that plaintiffs in the majority of other circuits are not required to establish. Employers should continue to monitor this legal issue as the narrow 7-6 en banc decision in *Exby-Stolley* and the circuit split created by *Beasley* suggests that the United States Supreme Court may take up the issue.

FOOTNOTES

[1] No. 21-13083, --- F.4th --, 2023 WL 3608276 (11th Cir. May 24, 2023).

[2] 42 U.S.C. § 12101–12213.

[3] 979 F.3d 784 (10th Cir. 2020) (en banc).

[4] Brief for the EEOC as Amicus Curiae, *Beasley v. O'Reilly Auto Parts*, No. 21-13083 (11th Cir. May 24, 2023),https://www.eeoc.gov/sites/default/files/2021-12/Beasley%20v%20O%27Reilly%20Auto%20Parts%2011C%20am-br%2011-21%20ccs_0.html.

[5] *Bd. of Cty. Comm'rs of Weld Cty., Col. v. Exby-Stolley,* 141 S. Ct. 2858 (June 28, 2021).

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