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Can the ADA Protect Persons with Disabilities in Their Ability To Get to Work?

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James Kimmons worked at a Charter Communications call center.[1] He suffered cataracts in both eyes, which made it difficult to drive in the dark.[2] Kimmons requested a modification to his work schedule, seeking permission to work earlier hours so he could commute home in the daylight.[3] Notably, the work-schedule accommodation Kimmons sought is one that many other Americans may need, as 22.8% of all working age adults are considered accommodation-sensitive[4] and 47% to 58% "of those who would actually benefit from a workplace accommodation do not receive one."[5] His employer granted his request for a short period of time but ultimately refused to extend the accommodation, arguing that the call center was under no obligation to change his schedule under the Americans with Disabilities Act (ADA).[6] Kimmons filed a complaint with the Equal Opportunity Employment Commission (EEOC), which prompted the Commission to initiate litigation on his behalf.[7] While the district court ruled in favor of Kimmons' employer, the Court of Appeals for the Seventh Circuit recently held for Kimmons.[8]

The issue of work-schedule disability accommodations is not a new one for courts. Currently, there is a circuit split amongst five appellate courts[9] regarding whether employees with disabilities are entitled to a work-schedule accommodation under the ADA "to allow [them] to commute more safely."[10] In *EEOC v. Charter Communications*—the Seventh Circuit's recent decision in Kimmons' favor—the court suggested that a case-by-case approach should be taken when addressing "whether a work-schedule accommodation of a disability that affects a commute is reasonable."[11] The court found that Kimmons was entitled to reasonable accommodation in his schedule but declined to "prescribe [a] bright-line" rule.[12] Further, the court concluded that if an employee's disability "substantially interferes with his ability to get to work and attendance at work is an essential function, an employer may sometimes be required to provide a commute-related accommodation, if reasonable under the circumstances."[13]

In *Colwell v. Rite Aid Corp.*, the Third Circuit Court of Appeals came to a similar but more conclusive outcome in finding that it was possible for the ADA to require an employer to accommodate an employee's difficulty getting to work.[14] The plaintiff in *Cowell* sought to adjust her cashier work schedule after being diagnosed with glaucoma, which made night driving dangerous.[15] She asked her employer to only schedule her for the day shift, which would ensure her commute took place in daylight hours.[16] In finding for the plaintiff, the court relied on the language of the ADA which expressly states that a reasonable accommodation may include "job restructuring, part-time or modified work schedules."[17] Additionally, the Second Circuit provided support for this position in *Lyons v. Legal Aid Society* where the court noted that "an essential aspect of many jobs is the ability to appear at work regularly and on time" and "[C]ongress envisioned that employer assistance with transportation to get the employee to and from the job might be covered" under the ADA.[18]

On the other hand, the Tenth and Sixth Circuits have failed to recognize a work-schedule modification as a reasonable accommodation. In *Unrein v. PHC-Fort Morgan, Inc.*, the Tenth Circuit determined that an employee's request for a flexible work schedule to address challenges in commuting to work was unreasonable.[19] The court found that getting to work was not an essential part of the plaintiff's job, and therefore the requested accommodation did not have to be granted under the ADA.[20] However, this decision is erroneous because it goes directly against the text of the ADA which contemplates a "modified work schedule" within the definition of a "reasonable accommodation."[21] Moreover, the Sixth Circuit in *Regan v. Faurecia Automotive Seating, Inc.* also

concluded that an employee's requested accommodation to "work an earlier schedule so that she could commute in what she believed to be lighter traffic" was unreasonable because it fell outside the workplace.[22]

Ultimately, the best approach to addressing commute-related work-schedule modifications is the one taken in *Colwell* and supported with the decisions of *Charter Communications* and *Lyons*. That is, courts should engage in a fact-specific analysis anchored in these three principles: (1) the ADA clearly states that a reasonable accommodation may include "job restructuring, part-time, or modified work schedules";[23] (2) "the employee may be entitled to a reasonable accommodation if commuting to work is a prerequisite to an essential job function, including attendance in the workplace";[24] and (3) a commute-related accommodation request may "ameliorate the disability" and enable the employee to continue in their job.[25]

[1] Equal Empl. Opportunity Comm'n v. Charter Commun., LLC, 75 F.4th 729, 731 (7th Cir. 2023).
[2] *Id.*
[3] *Id.*
[4] Nicole Maestas & Kathleen J. Mullen, *Unmet Need for Workplace Accommodation,* 38 J. Pol'y Analysis & Mgmt., 1, 1 (2019).
[5] *Id.* at 5.
[6] Charter Comm., 75 F. 4th at 732. The ADA is "a federal civil rights law that prohibits discrimination against people with disabilities in everyday activities." *Introduction to the Americans with Disabilities Act*, U.S. Dep't of Just. Civ. Rts. Div., https://www.ada.gov/topics/intro-to-ada/.
[7] *Id.* at 733.
[8] *Id.* at 743.
[9] Bernie Pazanowski, *Circuit Splits Reported in U.S. Law Week—July 2023*, Bloomberg L. (Aug. 7, 2023, 1:51 PM), https://shorturl.at/iDJX6.
[10] Charter Comm., 75 F. 4th at 731.
[11] *Id.* at 729-30.
[12] *Id.* at 743.
[13] *Id.*
[14] Colwell v. Rite Aid Corp., 602 F.3d 495, 505 (3d Cir. 2010).
[15] *Id.* at 498-9.
[16] *Id.* at 498.
[17] *Id.* at 505 (citing 42 U.S.C. § 12111(9)(B)).
[18] Lyons v. Legal Aid Soc'y, 68 F.3d 1512, 1516 (2d Cir. 1995).
[19] Unrein v. PHC-Ft. Morgan, Inc., 993 F.3d 873, 879 (10th Cir. 2021).
[20] *Id.* at 878.
[21] 42 U.S.C. § 12111.
[22] Regan v. Faurecia Automotive Seating, Inc., 679 F.3d 475, 480 (6th Cir. 2012).
[23] 42 U.S.C. § 12111(9)(B)).
[24] Charter Comm., 75 F. 4th at 734.
[25] *Id.* at 740.