

Insights, News & Events

## 10TH CIRCUIT: ADA ACCOMMODATION CLAIMS DO NOT NEED ADVERSE EMPLOYMENT ACTIONS TO SUCCEED

Insights  
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To prove that an employer failed to accommodate an employee's disability in violation of the Americans With Disabilities Act, an employee alleging disability bias does not need to show that the employer fired them or took a similar adverse employment action, the 10th Circuit Court of Appeals opined yesterday. The issue in *Exby-Stolley v. Bd. of Cty. Comm'rs* – whether an adverse employment action is required to maintain an ADA claim – has split the appeals courts across the country and may require final resolution by the Supreme Court. For now, though, employers in Colorado, Kansas, New Mexico, and other nearby states will need to be extra cautious when it comes to ADA compliance efforts due to this decision.

### LOWER COURT FINDS NO ADVERSE EMPLOYMENT ACTION OCCURRED

Laurie Exby-Stolley was a health inspector for the Board of County Commissioners of Weld County in Colorado. Her job required her to inspect restaurants and bars, interview employees, and observe safety practices. While on the job, she broke her right arm, requiring prolonged treatment. Because she had to use makeshift devices to perform her tasks, it took her longer to complete inspections and she did not

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complete the number required of her position. The parties disagreed about the efforts the county made to accommodate her impairments and whether she had been told to resign or voluntarily resigned.

Exby-Stolley sued, alleging that the county violated the Americans With Disabilities Act (ADA) by failing to reasonably accommodate her disability, failing to engage in the ADA-required interactive process to find an accommodation, and terminating her because her physical restrictions did not allow her to perform all the duties that her original job description included. The jury found that Exby-Stolley had not proven that she suffered an adverse employment action and handed a victory to the county.

Exby-Stolley appealed and a three-judge panel of the 10th Circuit affirmed the judgment in the employer's favor, agreeing that an adverse employment action is an element of a failure-to-accommodate claim. Following the decision, at Exby-Stolley's request, the appeals court agreed to a rehearing before the entire 10th Circuit, known as an *en banc* review.

## **FAILURE TO OFFER A REASONABLE ACCOMMODATION /SUNLAWFUL DISCRIMINATION**

In yesterday's *en banc* opinion, the 10th Circuit rejected the three-judge panel's majority ruling that employees alleging disability bias must show an adverse employment action when they sue employers for failing to accommodate their disability. In its decision, the 10th Circuit considered the text of the ADA, 10th Circuit precedent, opinions from outside the 10th Circuit, views of the Equal Employment Opportunity Commission, and the ADA's general remedial purposes.

The court explained that the phrase "adverse employment action" does not appear in the ADA. It rejected the county's endeavor to incorporate an adverse-employment-action requirement into an ADA failure-to-accommodate claim, stating that the county was failing to differentiate between disparate treatment

and failure-to-accommodate claims. Disparate treatment claims assert that an employer took adverse employment actions because of an individual's disability. On the other hand, the court said, failure-to-accommodate claims assert that the employer failed to take reasonable steps to accommodate an employee's disability.

According to the court, the former requires a showing of an adverse employment action and the latter does not. This is because, based on the text of the ADA, Congress has already determined that a failure to offer a reasonable accommodation to an otherwise qualified disabled employee *is* unlawful discrimination.

In its opinion, the court stated that 10th Circuit has expressly described in prior cases what an employee must show to successfully proceed with an ADA claim of failure to accommodate. The court explained that, in those cases, the 10th Circuit's explanation did not include an adverse employment action as a requirement of a *prima facie* case. Thus, the court held that an adverse employment action is not a required element of an ADA failure-to-accommodate claim.

Further, the 10th Circuit agreed with Exby-Stolley that the decisions by other circuit courts of appeal confirmed that an adverse employment action is not an element of a failure-to-accommodate claim. The court was not persuaded by the county's argument that the 1st, 2nd, 7th, 8th, 9th, and District of Columbia circuits have all stated that an adverse employment action is a requisite element of an ADA failure-to-accommodate claim. The court stated: "In sum, from this survey of the decisions of our sister circuits, the critical takeaway is this: *none* of our sister circuits has regularly incorporated an adverse-employment-action requirement into an ADA failure-to-accommodate claim."

## **IMPLICATIONS FOR EMPLOYERS FACING ADA CLAIMS**

The 10th Circuit's decision demonstrates the proper elements plaintiffs are required to satisfy when they allege that their employer discriminated against them because of their disability – at least in the 10th Circuit (encompassing cases from Colorado, Kansas, New Mexico, and other nearby states). An employer's failure to reasonably accommodate — by itself — may result in liability.

As always, you should continue to engage in good faith in the ADA-interactive process: communicate with the employee, explore possible accommodations, and determine whether the proposed accommodation poses an undue hardship. You also should document every step of the interactive process from the initial request through the selection and implementation of the accommodation (or denial of the request for an accommodation).

Because there is a circuit split and courts from across the country disagree on the correct legal standard, we may eventually see Supreme Court intervention to resolve the matter. We will continue to monitor any developments on this issue and provide updates, so be sure you are subscribed to [Fisher Phillips' alert system](#) to gather the most up-to-date information. If you have questions, please contact your Fisher Phillips attorney or any attorney in [our Denver office](#).

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