FILED
United States Court of Appeals
Tenth Circuit

February 7, 2024

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DENISE FREEMAN,

Plaintiff - Appellant,

v.

CITY OF CHEYENNE, a duly incorporated Municipal Corporation under the laws of the State of Wyoming,

Defendant - Appellee.

No. 23-8022
(D.C. No. 2:22-CV-00080-NDF)
(D. Wyo.)

ORDER AND JUDGMENT*

Before **EID**, **CARSON**, and **ROSSMAN**, Circuit Judges.

Denise Freeman appeals from the district court's entry of summary judgment in favor of her former employer, the City of Cheyenne, on her claims under the Americans with Disabilities Act (ADA). Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

I. BACKGROUND

In February 2016, Freeman began working as the Human Resources Director (HR Director) for the City of Cheyenne. In January 2017, a new Mayor, Marian Orr, was sworn in. Mayor Orr was Freeman's direct supervisor. According to Freeman, her working relationship with Mayor Orr deteriorated to the point Freeman experienced anxiety, burn-out, exhaustion, and other symptoms. Freeman sought treatment. In April 2018, her health care provider, Dr. Howton, completed a certification for leave under the Family and Medical Leave Act (FMLA) stating that he was treating Freeman for "depression, anxiety, [and] insomnia exacerbated by work stresses" that rendered her "unable to effectively interact [with] fellow co-workers." Aplt. App., Vol. I at 246. His initial treatment would involve her absence from work until she was stable, an estimated six weeks. The City approved six weeks of FMLA leave and extended that leave for another six weeks on Dr. Howton's recommendation.

On July 16, 2018, the day before Freeman's twelve weeks of FMLA leave was to end, Freeman sent Mayor Orr and her Chief of Staff an email stating: "I am unable to return to work when my FMLA ends tomorrow. I have vacation time on the books that will take me to approximately July 27th. Once that expires, I would like to be considered for 160 hours from the sick bank." *Id.* at 290. She also submitted a request for 160 hours of leave from the sick bank, which is the maximum amount available to an employee in a year, explaining that she was "still recovering

from physical & mental exhaustion and not yet able to return to work." *Id.* at 295. Freeman did not indicate when she might be able to return to work.

Two days later, on July 18, Mayor Orr denied Freeman's request for sick bank leave because she did not include a physician's approval. Mayor Orr also terminated Freeman's employment, notifying her that she could apply for open positions after she was released to return to work. *Id.* at 297.

Freeman filed an action against the City, asserting two ADA claims: (1) denial of reasonable accommodation, in violation of 42 U.S.C. § 12112(b)(5)(A); and (2) discriminatory discharge, in violation of § 12112(b)(5)(B). Both sides moved for summary judgment. The district court granted the City's motion and denied Freeman's. The court concluded that Freeman could not establish an element of her prima facie case for either claim—that she was otherwise able to perform the essential functions of her job.

In reaching that conclusion, the district court considered and rejected each of Freeman's four proposed accommodations as unreasonable because none would have enabled her to perform two essential functions of her job: (1) physical attendance for a minimum of 40 hours per week and (2) interaction with co-workers. The court first concluded that reassignment was not a reasonable accommodation because Freeman had not identified a specific vacant position to which she could have been reassigned. Second, the court determined that remote work was not a reasonable accommodation because it would not allow Freeman to meet the physical-attendance requirement. Third, the court reasoned that working part-time was not a reasonable

accommodation because it would not allow Freeman to meet the forty-hour minimum work week. And fourth, the court rejected Freeman's reliance on her request for additional leave because, even viewed in conjunction with the twelve-week estimated duration Dr. Howton provided in support of her FMLA requests, Freeman did not provide an expected duration of her impairment, and employers are not required "to retain a disabled employee on unpaid leave indefinitely or for an excessive amount of time." Aplt. App., Vol. II at 515.

Accordingly, the district court granted the City's motion for summary judgment, denied Freeman's motion for summary judgment, and dismissed all claims with prejudice. Freeman timely appealed.

II. STANDARD OF REVIEW

We review de novo a district court's decision to grant summary judgment, applying the same standard governing the district court. *Rivero v. Bd. of Regents of Univ. of N.M.*, 950 F.3d 754, 758 (10th Cir. 2020). A "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "We view all facts and evidence in the light most favorable to the party opposing summary judgment." *Craft Smith, LLC v. EC Design, LLC*, 969 F.3d 1092, 1099 (10th Cir. 2020) (internal quotation marks omitted).[1]

[1] In her opening brief, Freeman asks us to take judicial notice of new evidence—that during the Covid-19 pandemic and a building-repair issue, the City's human-resources employees worked remotely; and that there are companies that provide workers to perform human resources tasks fully off-site. We decline to take

III. DISCUSSION

A. General legal standards under the ADA

To establish a prima facie case for both her failure-to-accommodate claim and her discriminatory discharge claim, Freeman had to establish, among other things, that she was "otherwise qualified." *Aubrey v. Koppes*, 975 F.3d 995, 1006, 1014 (10th Cir. 2020). The ADA defines a "qualified individual" as one "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). The focus is on whether the individual can "perform the essential functions of her job," with or without reasonable accommodations, at the time of the requested accommodation or adverse employment event, "or in the near future." *Aubrey*, 975 F.3d at 1006–07. The employee has the burden to show that a proposed accommodation is facially reasonable. *Id.* at 1010. "A proposed accommodation is not reasonable on its face if it would not enable the employee to perform the essential function[s] at issue." *Id.* (internal quotation marks omitted).

B. Freeman's arguments

Freeman does not dispute that the HR Director position required physical attendance for a minimum of 40 hours per week and the ability to interact with

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judicial notice of this evidence because it is merely an attempt to fill in unexplained evidentiary gaps Freeman left open in the district court. *See W. Coast Life Ins. Co. v. Hoar*, 558 F.3d 1151, 1156–57 (10th Cir. 2009) (declining to take judicial notice of evidence in part because the appellants failed to explain why they did not present it to the district court, and limiting review to record that was before the district court).

co-workers. Instead, she raises essentially two arguments. First, she contends the district court erred in determining she was not otherwise qualified because she failed to include an expected duration of her impairment in her request for additional leave. Freeman argues that her request was sufficient to trigger the City's duty to engage in the interactive process, during which the City could have considered what accommodations might have worked for her, including a period of additional leave. The City's failure to do so, she concludes, is sufficient to establish the otherwise-qualified element of her prima facie case. Second, Freeman argues that each of her proposed accommodations was reasonable. We reject both arguments.

1. Freeman's request for additional leave and the interactive process

The interactive process is a dialogue between the employer and the employee to determine if a reasonable accommodation is possible. *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1171–72 (10th Cir. 1999) (en banc). To trigger the employer's responsibility to engage in the interactive process, the employee must notify the employer of her disability and her desire to continue working, and she must suggest the possibility of a reasonable accommodation. *Id.* at 1172.

We may assume Freeman's request for additional leave was sufficient to trigger the City's responsibility to engage in the interactive process and that the City did not fulfill that responsibility. But we have long held that even if an employer does not engage in the interactive process, a plaintiff cannot survive summary judgment unless she "can *also* show that a reasonable accommodation was possible." *Id.* at 1174 (emphasis added). Since *Smith*, we have repeatedly invoked this

principle. *See, e.g.*, *Aubrey*, 975 F.3d at 1009–10; *Lincoln v. BNSF Ry. Co.*, 900 F.3d 1166, 1207 n.29 (10th Cir. 2018); *Hennagir v. Utah Dep't of Corr.*, 587 F.3d 1255, 1265 (10th Cir. 2009); *Frazier v. Simmons*, 254 F.3d 1247, 1261 (10th Cir. 2001); *Boykin v. ATC/VanCom of Colo., L.P.*, 247 F.3d 1061, 1065 (10th Cir. 2001).

Resisting this line of precedent, Freeman points to a broad statement in *Wilkerson v. Shinseki*, 606 F.3d 1256, 1265 (10th Cir. 2010): "We have established that before an individual can be deemed not 'otherwise qualified' the employer must make an effort to accommodate the employee's disability." According to Freeman, this statement means that when an employer fails to engage in the interactive process, the employer cannot prevail on summary judgment by showing that the employee was not otherwise qualified. *Wilkerson*, however, is distinguishable.

In *Wilkerson*, the employer considered the employee's proposed accommodations, denied them, concluded there were no other reasonable accommodations, and reassigned him to a lower-paying position. *See id.* We held that under the circumstances, the employer had made a reasonable accommodation. *See id.* We also observed that although the employer had not discussed the employee's proposed accommodations in person, the employer had considered the employee's request and denied it. We determined that under "the circumstances . . . it was reasonable for the [employer] to conclude that any further interactive process would be futile and that no reasonable accommodation was possible," and therefore the employee was not otherwise qualified. *Id.* at 1266. Thus, we had no occasion to consider whether an employer's failure to engage in the interactive process

foreclosed the employer's ability to prevail on summary judgment by showing the employee was not otherwise qualified; the employer had adequately engaged in the process.

Given this distinction, together with our repeated insistence that an employee must show a reasonable accommodation was possible even if an employer does not engage in the interactive process, we decline to extend *Wilkerson*'s broad statement to Freeman's case.[2]

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[2] We note that *Wilkerson* involved a federal employee's claim under the Rehabilitation Act, not an ADA claim. *See Wilkerson*, 606 F.3d at 1262. The Rehabilitation Act provides a cause of action for disability discrimination by a federal agency or a program that receives federal funding. *See id.* In support of its broad statement "that before an individual can be deemed not 'otherwise qualified' the employer must make an effort to accommodate the employee's disability," *id.* at 1265, *Wilkerson* relied on another Rehabilitation Act case, *Woodman v. Runyon*, 132 F.3d 1330, 1337–38 (10th Cir. 1997). In *Woodman*, we emphasized that federal employers have "an affirmative duty," imposed by statute, "to meet the needs of disabled workers." 132 F.3d at 1337–38. We therefore concluded that federal employers have greater duties under the Rehabilitation Act to accommodate disabled workers than do employers subject to the ADA. *See id.* at 1338, 1343–44. We observed that as a result, once a federal employee suggests the existence of a plausible accommodation, a federal employer must engage in the interactive process and gather the information required to determine which accommodations are necessary. *See id.* at 1343–45.

Given *Wilkerson*'s recognition that ADA and Rehabilitation Act jurisprudence are generally coextensive, *see* 606 F.3d at 1262, *Wilkerson*'s reliance on *Woodman* suggests that its broad statement was more likely due to a federal employer's heightened duties under the Rehabilitation Act rather than to any intent to modify the ADA jurisprudence in *Smith* and its progeny set out above.

Freeman also points to one ADA case that quoted *Wilkerson*'s broad statement—*Koessel v. Sublette County Sheriff's Department*, 717 F.3d 736, 744 (10th Cir. 2013). But resolution of the otherwise-qualified inquiry in *Koessel* turned on the employee's failure to request modification of his particular job and failure to identify a specific vacant position to which he could have reasonably been reassigned, not on the employer's failure to engage in the interactive process. *See id.* at 744–45. *Koessel*, therefore, does not assist Freeman.

2. Freeman did not identify any reasonable accommodations

Freeman argues that each of her four proposed accommodations were reasonable: (1) request for additional leave; (2) reassignment; (3) remote work; and (4) part-time work. We disagree.

a. Request for additional leave

"'[I]t is well-settled that a request for leave may lead to a 'reasonable' accommodation[.]" *Punt v. Kelly Servs.*, 862 F.3d 1040, 1051 (10th Cir. 2017) (quoting *Cisneros v. Wilson*, 226 F.3d 1113, 1129 (10th Cir. 2000), *abrogated on other grounds by Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001)). But "'employers are not obligated to retain a disabled employee on unpaid leave indefinitely or for an excessive amount of time.'" *Aubrey*, 975 F.3d at 1011 (quoting *Boykin*, 247 F.3d at 1065). Thus, we have held that "a request for indefinite leave is not reasonable as a matter of law." *Herrmann v. Salt Lake City Corp.*, 21 F.4th 666, 676 (10th Cir. 2021). "This is because a reasonable accommodation 'refers to those accommodations which presently, or in the *near future*, enable the employee to perform the essential functions of his job.'" *Id.* (quoting *Cisneros*, 226 F.3d at 1129). Therefore, "an employee is required to inform the employer of the '*expected duration of the impairment* (not the duration of the leave request).'" *Punt*, 862 F.3d at 1051 (quoting *Cisneros*, 226 F.3d at 1130). "'Without an expected duration of an impairment, an employer cannot determine whether an employee will be able to perform the essential functions of the job *in the near future* and therefore whether the

leave request is a "reasonable" accommodation.'" *Id.* (quoting *Cisneros*, 226 F.3d at 1130).

Applying these rules, the district court concluded that Freeman's request for additional leave was not a reasonable accommodation because she failed to indicate the expected duration of her impairment, stating only that she was "unable to return to work," Aplt. App., Vol. II at 407, and "not yet able to return to work," *id.* at 408. The court noted that Freeman's initial FMLA request was accompanied by a physician's note indicating a six-week period of incapacity, and the physician's note accompanying her second FMLA request, which made no mention of the incapacity period, could reasonably be construed as extending the physician's estimate for an additional six weeks. In contrast, the court observed, Freeman's request for additional leave set out only finite periods of leave (eight vacation days and 160 hours from the sick bank) and lacked any statement by the physician that would extend the initial twelve-week period of incapacity set out in the FMLA requests. The court further noted that although Freeman submitted a statement from her therapist with her request for additional leave, the statement merely listed Freeman's diagnosis, not the expected duration of her impairment.

Freeman contests the district court's application of the expected-duration requirement to her case. She argues that this court has never required a disabled employee to provide an expected duration of her impairment in her initial request for an accommodation or where an employee who took twelve weeks of FMLA was terminated immediately after requesting additional leave. Instead, she contends

(again) that her request for additional leave triggered the City's obligation to participate in the interactive process and that the City was at fault for not doing so. She points out that in three cases where we upheld a summary judgment ruling based on a failure to provide an expected duration of the impairment (*Punt*, *Cisneros*, and *Hudson v. MCI Telecommunications Corp.*, 87 F.3d 1167 (10th Cir. 1996)), the parties had engaged in some form of the interactive process, which we take as an assertion that Freeman had no obligation to include an expected duration of her impairment in her request for additional leave. Freeman adds that even if her request for additional leave had included an expected duration of her impairment, it would not have mattered because Mayor Orr testified she fired Freeman without investigating the nature and scope of Freeman's limitations, thus suggesting that Mayor Orr would have done the same even if Freeman had provided an expected duration of her impairment.

Freeman's arguments are unpersuasive. Her continued reliance on the City's failure to engage in the interactive process ignores that regardless of any failure by the City to engage in the interactive process, it was her burden at summary judgment to "show that a reasonable accommodation was possible," *Smith*, 180 F.3d at 1174. Any failure by the City or Mayor Orr with respect to the interactive process in response to Freeman's request for additional leave does not relieve Freeman of that burden. *See Brigham v. Frontier Airlines, Inc.*, 57 F.4th 1194, 1201 (10th Cir. 2023) ("[T]he failure to engage in an interactive process is not independently actionable under the [ADA].").

As for *Punt*, *Cisneros*, and *Hudson*, Freeman correctly notes that the parties in those cases had engaged to some degree in the interactive process. But nothing in those cases indicates that our application of the expected-duration requirement was dependent on that fact. Furthermore, the district court's ruling in this case is consistent with those cases.

In *Punt*, we enforced the expected-duration requirement because the employee "was very vague about how much time she was going to miss." 862 F.3d at 1051 (ellipsis and internal quotation marks omitted). Here, Freeman's request was not merely vague about the expected duration of her impairment, it was silent.

In *Cisneros*, the employee provided the employer with letters from her doctors, but those "letters state[d] that the duration of the illness [was] both 'uncertain' and 'unknown,'" and the employee conceded "that the record contain[ed] 'no firm date of return to work.'" 226 F.3d at 1130 (quoting record on appeal). Here, Freeman provided a letter from her therapist, but it said nothing about the duration of her illness. And Freeman conceded that there was no documentation in the record from a medical provider estimating the duration of her impairment. *See* Aplt. App., Vol. 2 at 526:1–4; *id.* at 547:16–18.

In *Hudson*, our application of the expected-duration requirement turned solely on the employee's failure "to present any evidence of the expected duration of her impairment as of the date of her termination." 87 F.3d at 1169. Similarly here, Freeman presented no evidence of the duration of her impairment as of the date of her termination.

Aubrey buttresses our conclusion that application of the expected-duration requirement is not dependent on whether the parties have engaged in the interactive process. In *Aubrey*, we determined there was "strong evidence" the employer had not engaged in the interactive process. 975 F.3d at 1009. Yet we analyzed the employee's request for additional leave to determine if she had provided an expected duration of her impairment, concluding that she had. *See id.* at 1011.

Read together, *Aubrey*, *Punt*, *Cisneros*, and *Hudson* make clear that the level of participation in the interactive process is not germane to the requirement that a request for leave is not a reasonable accommodation unless the employee provides an expected duration of her impairment.

Finally, we consider Freeman's reliance on *Herrmann*. In that case, the parties engaged in the interactive process at some length, and the employee made several requests for leave under both FMLA and the ADA. *See* 21 F.4th at 670–73, 676. The employer argued that because the employee's medical providers requested leave for the employee through a particular date "without providing a definite end-date of her impairment," the employee failed to satisfy the expected-duration requirement. *Id.* at 677. We declined to "construe the duration requirement so narrowly," particularly "in chronic impairment cases." *Id.* We then concluded that the employee had met the duration requirement through a combination of FMLA and ADA leave requests. *Id.*

Freeman emphasizes statements in *Herrmann* to the effect that in a case of chronic impairment, there may be multiple communications from the employee and

the employee's medical providers that the employer will have to consider in order to determine if a leave request "is unreasonable or indefinite." *Id.* But we fail to see how *Herrmann* helps her. Dr. Howton's estimate (in support of Freeman's FMLA requests) that she would miss twelve weeks of work sheds no light on the expected duration of her impairment beyond those twelve weeks. And in support of her request for additional leave, her therapist provided only a diagnosis, not an expected duration. Unlike the circumstances in *Herrmann*, the multiple communications Freeman sent to the City did not combine to meet the durational requirement. And to the extent Freeman suggests *Herrmann* lends further support to her argument that the City failed to engage in the interactive process, the suggestion is unpersuasive for reasons already stated.

In sum, we conclude that Freeman's request for additional leave was not a reasonable accommodation, whether viewed as separate requests for eight days of vacation and 160 hours of sick bank leave, or as a single combined request.

b. Reassignment, remote work, part-time work[3]

Freeman argues that reassignment, remote work, or part-time work would have been a reasonable accommodation. *See* 42 U.S.C. § 12111(9)(B) ("The term

[3] Freeman's request for additional leave was the only accommodation she proposed to the City. In the district court, she asserted she would have considered other positions with the City, remote work, or part-time work. The district court rejected each of those accommodations as unreasonable. On appeal, the City points out the practical difficulty with these alternative accommodations—how could the City have reasonably accommodated her by reassigning her or allowing her to work remotely or part-time when her request for additional leave stated she was unable to

'reasonable accommodation' *may* include . . . part-time or modified work schedules [or] reassignment to a vacant position . . . ." (emphasis added)). We disagree.

In order to show that reassignment would have been a reasonable accommodation, Freeman had to "identify[] a vacant position, reassignment to which would serve as a reasonable accommodation." *Duvall v. Ga.-Pac. Consumer Prods., L.P.*, 607 F.3d 1255, 1263 (10th Cir. 2010). "[A] position is 'vacant' with respect to a disabled employee for the purposes of the ADA if it would be available for a similarly-situated non-disabled employee to apply for and obtain." *Id.* at 1262. "[I]f a position is not vacant it is not reasonable to require an employer to bump another employee in order to reassign a disabled employee to that position." *Id.* at 1261 (internal quotation marks omitted).

Freeman argues that she could have been reassigned to the Deputy HR Director position because during her FMLA leave, the Deputy HR Director was serving as the Interim HR Director, and she had at least twice informed the Mayor's Chief of Staff that she would be willing to serve as Deputy HR Director.[4] This

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return to work at all? We decline to answer this question because Freeman's alternative accommodations fail on the merits.

[4] It is clear from the record that the two times Freeman discussed moving to the Deputy HR Director position with the Mayor's Chief of Staff occurred prior to her FMLA leave. *See* Aplt. App., Vol. II at 311, ¶ 18 (stating that one occasion occurred "during a meeting in [the Chief of Staff's] office" and the other "during a trip to Denver for a conference"). We fail to see where in the district court she identified reassignment to the Deputy HR Director as a possible reasonable accommodation after she went on leave. Instead, she stated only that she "would have considered other positions with the City that she could perform." Aplt. App., Vol. II at 316, ¶ 49. This likely explains the district court's conclusion that

argument fails because the Deputy HR Director was serving only as the *Interim* HR Director, that is, temporarily; and Freeman points to no evidence in the record that the Deputy HR Director position was "available for a similarly-situated non-disabled employee to apply for and obtain," *id.* at 1262.

Freeman also argues that working remotely or part-time would have been a reasonable accommodation. But "[a] proposed accommodation is not reasonable on its face if it would not enable the employee to perform the essential function[s] at issue." *Aubrey*, 975 F.3d at 1010 (internal quotation marks omitted). And it is undisputed that an essential function of the HR Director position was physical attendance for a minimum of forty hours per week. Remote work, therefore, would not have been a reasonable accommodation because it would not have allowed Freeman to meet the physical-attendance requirement. *See Mason v. Avaya Commc'ns, Inc.*, 357 F.3d 1114, 1124 (10th Cir. 2004) (concluding that request to work remotely was unreasonable because it would eliminate essential function of "physical attendance"). Similarly, working part-time would not have been a reasonable accommodation because it would not have allowed Freeman to meet the forty-hour minimum work week. *See Carter v. Pathfinder Energy Servs., Inc.*,

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reassignment was not a reasonable accommodation because Freeman had not identified a vacant position. Thus, because Freeman has not argued for plain-error review, we might conclude she has waived her reassignment argument on appeal. *See United States v. Leffler*, 942 F.3d 1192, 1196 (10th Cir. 2019) (argument waived on appeal where it was not raised in district court and appellant failed to argue for plain-error review). But because the City has not argued waiver and Freeman's argument is unpersuasive, we address the issue on the merits.

662 F.3d 1134, 1146 (10th Cir. 2011) ("[A]n employee who proposes [a part-time work] accommodation may only prevail in an ADA action if he can demonstrate that he could perform the essential functions of his job while working part-time." (internal quotation marks omitted)).

IV. CONCLUSION

The district court's judgment is affirmed.

Entered for the Court

Allison H. Eid
Circuit Judge