

UNITED STATES SUPREME COURT

BRIAN PRESTON

Plaintiff-Appellant,

v.

Sixth Circuit Court of Appeals
Case No. 17-3512

GREAT LAKES SPECIALTY
FINANCE, INC. D/B/A AXCESS
FINANCIAL SERVICES

Defendants-Appellees.

**PLAINTIFF-APPELLANT'S APPLICATION TO UNITED
STATES SUPREME COURT JUSTICE THE
HONORABLE ELENA KAGAN FOR AN EXTENSION OF
TIME TO FILE HIS PETITION FOR A WRIT OF
CERTIORARI**

Pursuant to Rules 13.5, 21, 22 and 33.2 of the Rules of the United States Supreme Court, Plaintiff –Appellant in the above-captioned case, Brian Preston, by his undersigned counsel, respectfully applies for a 60-day extension of time to file his Petition for a Writ of *Certiorari* to review the judgment of the Sixth Circuit of the Court of Appeals. The application is being directed the Honorable Elena Kagan since she is the Supreme Court Justice assigned to hear such applications from parties seeking review of judgments from the Sixth Circuit Court of Appeals.

The Judgment from which Plaintiff-Appellant Preston is seeking Supreme Court review is the Sixth Circuit's Order Denying his petition for *en banc* review of a previous decision of the Sixth Circuit's three-judge panel affirming the lower court's grant of Defendant-Appellees' Motion for Summary Judgment. A copy of the Sixth Circuit's panel decision, dated March 19, 2018, is attached hereto as Attachment A. A copy of the Sixth Circuit's Order denying Petition for Rehearing and Rehearing *En Banc*, dated May 8, 2018 is attached hereto as Attachment B.

The 90-day deadline set forth in Rule 13.3 of the Rules of the United States Supreme Court for Plaintiff-Appellant to file his Writ of Certiorari with this Court is August 6, 2018. For the following reasons, however, Plaintiff-Appellant respectfully requests a 60-day extension of time, October 6, 2018 for his undersigned counsel to file a Petition for a Writ of *Certiorari* on his behalf:

- (1) While Plaintiff-Appellant's counsel has been working on drafting Plaintiff Appellant's Petition for a Writ of Certiorari, Plaintiff- Appellant has been facing some very important decisions as to whether he can afford the cost of having the Petition printed in the form and fashion required by Rule 33.1 of the United States Supreme Court Rules. The problem has been compounded by chronic physical medical conditions whose pain medications have immobilized him to the point where he is

unable to make rational business decisions, such as if and how he can underwrite the cost of having his Petition printed, as well the cost of filing and mailing the Petition to the Clerk of the United States Supreme Court. The undersigned had previously emailed him of Cockle Press' deadline for receiving a down payment from Plaintiff-Appellant by July 30, 2018 in order to begin the printing process, but he failed to respond to the undersigned as to whether he could meet that deadline, which ultimately passed. In order to maximize his ability to file his Petition in timely fashion, I then emailed him as to the possibility of filing a Motion for Leave to file his Petition for Writ of Certiorari *in forma pauperis*. The undersigned responded to my email today explaining that the medication issues cited above have caused his delay in responding not only to my proposal for him to proceed *in forma pauperis*, but also my earlier request that he meet Cockle Press' deadline for submitting his down payment for the printing. In sum, Plaintiff-Appellant currently lacks the mental acuity to make important decisions to either underwrite Cockle Press' printing costs, or proceed *in forma pauperis*, involving as it does the completion of a comprehensive and detailed Form 4 Questionnaire/Affidavit required by Supreme Court Rule 39. Nor has he been in such condition for several weeks. Medical documents will be

furnished should this Court request it. That being the case, I am simply unable to file his Petition for a Writ of Certiorari by August 6, 2018. If the deadline for filing his petition is granted the undersigned will use the time to work with him in those limited blocks of time when he is mentally alert to either persuade him to finance the printing of his petition, or to assist him with his motion to proceed *in forma pauperis*.

- (2) The basis for a 60-day extension is that the undersigned will be involved in a multi-day jury trial in the United States District Court for the Eastern District of Kentucky beginning August 27, 2018, and preparation for that trial, as well as finishing up discovery in another piece of federal court litigation will take up the greater part of August and into September. If this Court deems a 60-day extension to be excessive, the undersigned shall, needless to say, comply with any alternative deadline granted.
- (3) The undersigned fully recognizes that he is filing this extension of time relatively late, but he did not fully appreciate the extent, severity, and chronic nature of the decision-making challenges facing his client. Until today the undersigned reasonably assumed his lack of response was due to his apathy, or desire not to proceed with the petition. Now, the undersigned knows otherwise.

For all of these reasons, Plaintiff-Appellant's Counsel respectfully request a reasonable 60-day extension of the Plaintiff-Appellant's deadline for submitting his Petition for Writ of *Certiorari* to October 6, 2018. That should give his counsel the time such a Petition warrants to allow him to effectively advocate for his client.

Respectfully submitted,

/s/ Donald B. Hordes

Donald B. Hordes (0014212)

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Brian Preston

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

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Filed: March 19, 2018

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Mr. Donald Bernard Hordes
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Re: Case No. 17-3512, *Preston v. Great Lakes Specialty Fin Inc., et al*
Originating Case No. : 1:15-cv-00114

Dear Counsel,

The Court issued the enclosed opinion today in this case.

Sincerely yours,

s/Cathryn Lovely
Opinions Deputy

cc: Mr. Richard W. Nagel

Enclosure

Mandate to issue



NOT RECOMMENDED FOR PUBLICATION

File Name: 18a0144n.06

No. 17-3512

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT****FILED**

Mar 19, 2018

DEBORAH S. HUNT, Clerk

BRIAN PRESTON,

Plaintiff-Appellant,

v.

GREAT LAKES SPECIALTY FINANCE, INC., dba
Axxess Financial; JOHN DOES

Defendants-Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT
COURT FOR THE SOUTHERN
DISTRICT OF OHIO

OPINION

BEFORE: COLE, Chief Judge; WHITE and BUSH, Circuit Judges.

JOHN K. BUSH, Circuit Judge. Plaintiff Brian Preston appeals the district court's grant of summary judgment in favor of Defendant Great Lakes Specialty Finance, Inc. ("Great Lakes"), against plaintiff in his suit for failure to accommodate and disability discrimination under the Americans with Disabilities Act ("ADA"). Because Preston cannot show that he was otherwise qualified for the position that he held with Great Lakes, we affirm.

I

The facts pertinent to this appeal are as follows. On May 31, 2012, Great Lakes hired Preston as a senior financial analyst. Over the next four months, Preston had repeated difficulties meeting the deadlines imposed by his supervisor. He attributed these delays both to issues with the assignments (e.g., large datasets, limitations inherent in a spreadsheet program, and the like) and to a sensitivity to light that made work in his cubicle difficult.

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On September 28, 2012, Preston informed Great Lakes that he had been diagnosed with Autism Spectrum Disorder, which causes him to have heightened sensory sensitivities to visual and audio stimuli in his surrounding environment. During an ongoing period in which the parties discussed methods of ameliorating Preston's difficulties, he continued to miss deadlines. On November 1, 2012, Great Lakes agreed to allow Preston to work from home between Tuesday and Friday every week, starting on November 5, 2012.

On November 5, 2012, the day that Preston began to work from home, he was assigned a new project, the Ohio Title Project, which was due on November 13, although the deadline was later extended to November 26.¹ Preston, complaining that he required additional market analysis to complete the project and that the manner in which he was asked to complete the project violated "accepted convention in the field of finance," had not completed the project by December 7. On December 7, Preston told Great Lakes that he would have the project completed by December 8, but he was fired later that day.

Preston filed a complaint against Great Lakes on February 13, 2015, alleging a failure to accommodate and disability discrimination in violation of the ADA.

On April 18, 2017, the district court granted Great Lakes' motion for summary judgment, holding as a matter of law that Preston was unqualified for the senior analyst position with or without a reasonable accommodation and that the accommodation provided to Preston by Great Lakes was reasonable, as well as that Preston had failed to show any direct evidence of discrimination on the part of the defendant.

¹ Initially, the Ohio Title Project was due on November 12, but the deadline was extended by one day because Preston was told to prioritize another project. Because this initial one-day extension was unrelated to Preston's difficulties with the Ohio Title Project, we treat November 13 as the original deadline.

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II

Summary judgment is appropriate only when “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). In evaluating a motion for summary judgment, the district court must “assess the factual evidence and draw all reasonable inferences in favor of the non-moving party.” *Walton v. Hammons*, 192 F.3d 590, 592 (6th Cir. 1999). When reviewing the district court’s grant of summary judgment, we review the district court’s factual findings for clear error and its legal conclusions de novo. *Howard v. City of Beavercreek*, 276 F.3d 802, 805 (6th Cir. 2002).

To survive summary judgment, Preston was required to point to evidence sufficient for a reasonable jury to find that he was “otherwise qualified to perform the essential functions of the position, with or without reasonable accommodation,” either to show that Great Lakes had failed to provide a reasonable accommodation, *Green v. Bakemark USA, LLC*, 683 F. App’x 486, 491 (6th Cir. 2017) (citation omitted), or to show that Great Lakes had discriminated against him on the basis of his disability, *Ferrari v. Ford Motor Co.*, 826 F.3d 885, 891 (6th Cir. 2016). To prove that he is “otherwise qualified” for the position, an employee bears the burden of demonstrating that he “can perform the essential functions of the employment position that such individual holds or desires.” 42 U.S.C § 12111(8). “If the employer claims [] that the disabled individual would be unqualified to perform the essential functions of the job even with the proposed accommodation, the disabled individual must prove that he or she would in fact be qualified for the job if the employer were to adopt the proposed accommodation.” *Johnson v. Cleveland City Sch. Dist.*, 443 F. App’x 974, 982–83 (6th Cir. 2011) (alteration in original) (quoting *Monette v. Elec. Data Sys. Corp.*, 90 F.3d 1173, 1184 (6th Cir. 1996)).

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Preston's argument that he was otherwise qualified for the senior-financial-analyst position comes down to the assertion that because he was never afforded an opportunity to work under his preferred accommodation (telecommuting five days a week, as opposed to four), there is a genuine issue of material fact as to whether, if he had been afforded his preferred accommodation, he would have been able to perform the essential functions of his job. Preston argues that, by being forced to come into the office one day a week, he "was in essence forced to work at 80% capacity in this work week" and that if he had been allowed to work at 100% capacity, he would have been able to perform the essential functions of his job.

The district court correctly rejected Preston's argument. A closer look at the calendar shows why, based on the evidence of record, Preston cannot show a genuine issue of material fact as to his ability to perform the essential functions of his job with an extra day per week of telecommuting. Preston was assigned to the Ohio Title Project on Monday, November 5, 2012. Allowing Preston the reasonable inference that he had until November 26 (his extended deadline, rather than November 13, his original deadline), that meant that Preston had fifteen working days to work on the project, including the day of assignment and its due date but excluding weekends and Thanksgiving. With Preston's preferred accommodation, all fifteen of those days would have been telecommuting days. But even without his preferred accommodation, Preston still had *nineteen telecommuting days* (again, counting only Tuesdays through Fridays, excluding Thanksgiving) to work on the project before his employment was terminated, at which time the project still remained incomplete. In short, however we count calendar days or make inferences, Preston cannot show a genuine issue of material fact as to his ability to perform his job functions with an extra day of telecommuting each week.

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Because Preston does not allege, let alone offer proof, that there were any disability-related impediments to his work during his telecommuting days, or that completing tasks within assigned deadlines was not an essential function of the senior-financial-analyst position, or that the deadline for the Ohio Title Project was ginned up as a pretext for terminating his employment, the evidence before the district court amply supported its determination that Preston was not otherwise qualified for his position.

III

For the above reasons, the decision of the district court is **AFFIRMED**.

No. 17-3512

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

May 08, 2018

DEBORAH S. HUNT, Clerk

BRIAN PRESTON,

Plaintiff-Appellant,

v.

GREAT LAKES SPECIALTY FINANCE, INC., DOING BUSINESS AS
AXCESS FINANCIAL; JOHN DOES,

Defendants-Appellees.

ORDER

BEFORE: COLE, Chief Judge; WHITE and BUSH, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court.* No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Wm L. Hunt

Deborah S. Hunt, Clerk

* Judge Moore recused herself from participation in this ruling.

EXHIBIT

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
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Filed: May 08, 2018

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Re: Case No. 17-3512, *Brian Preston v. Great Lakes Specialty Fin Inc, et al*
Originating Case No. : 1:15-cv-00114

Dear Mr. Hordes,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

cc: Ms. Shennan Harris
Ms. Jill S. Kirila

Enclosure

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been served by via electronic mail this 1st day of August 2018, on the following:

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