

No. 23-7400

IN THE
SUPREME COURT OF THE UNITED STATES

LESLIE J. REYNARD

Petitioner,

v.

WASHBURN UNIVERSITY OF TOPEKA

Respondent.

REPLY BRIEF FOR PETITIONER
IN SUPPORT OF PETITION FOR CERTIORARI

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REPLY BRIEF FOR PETITIONER

INTRODUCTION

This case involves three ADA claims, with the most egregious being Washburn's failure to accommodate Dr. Reynard's request to teach in a safely lit classroom, despite having at least a decade of documented communications raising the neurological issue and Dr. Reynard having following every protocol required to notify administrators of the light-related issue. The failure to accommodate for nearly a month while Dr. Reynard was forced to work in the unsafe environment was even more improper given that the course in question was already in place on the learning management system and all enrolled students were already accessing elements of the course online; the course has been taught fully online in a recently previous semester, and nothing whatsoever would have been required of administrators to simply allow Dr. Reynard to notify her students that the course would be online-only part (or all) of the semester. Instead, Washburn chose to delay taking action to safeguard Dr. Reynard's well-being, instead putting her health at risk by imposing requirements of additional documentation and form-completion.

Dr. Reynard's case presents a critical opportunity for the Court to resolve conflicting interpretations of the Americans with Disabilities Act (ADA) across multiple circuits, particularly regarding the standards for failure-to-accommodate claims. Contrary to Respondent's opposition, this case is not merely fact-specific but concerns a fundamental legal question that affects the rights of disabled workers nationwide: Whether a plaintiff bringing a failure-to-accommodate claim under the ADA must demonstrate an adverse employment action, akin to the requirements under Title VII of the Civil Rights Act, or whether the ADA, by its plain language and legislative intent, allows such claims even absent a formal adverse action.

As Petitioner has shown in her Petition for Certiorari, the lower courts are divided on this issue. Some circuits have erroneously imported Title VII standards into the ADA context and used these to improperly apply various burden-shifting formula to dismiss disabled petitioners claims, while others have recognized the distinct and remedial purpose of the ADA : to ensure that individuals with disabilities receive reasonable accommodation to perform their essential job functions. This split undermines uniform enforcement of the ADA, creating significant confusion for courts, employers, and employees alike. The Court’s intervention is necessary to clarify this critical aspect of disability law, ensuring that the ADA’s protections are applied consistently nationally.

Respondent Washburn’s opposition fails to engage with these important legal questions and mischaracterizes both the nature of the circuit split and the national significance of the issue. Petitioner respectfully urges this Court to grant certiorari and resolve the circuit split, ensuring that the ADA’s accommodation requirements are applied uniformly.

I. THE CIRCUIT SPLIT ON THE REQUIREMENT OF ADVERSE EMPLOYMENT ACTION IN ADA FAILURE-TO-ACCOMMODATE CLAIMS WARRANTS THIS COURT’S REVIEW

The beating heart of this case lies in the split among circuits regarding whether a failure-to-accommodate claim under the ADA requires proof of an adverse employment action. Contrary to Respondent’s assertion, this is not a “fact-bound” issue. Instead, it involves a fundamental legal disagreement over the interpretation of the ADA—a disagreement affecting millions of disabled individuals across the country who rely on the ADA’s protections to secure reasonable accommodation in the workplace.

A critical problem in the District Court's, 10th Circuit Court of Appeals, and Washburn's viewpoint is a failure to recognize and apply the vastly different standards¹ relative to failure to accommodate claims embodied in Title VII and the ADA. While Title VII IX focuses on gender discrimination, the ADA centers around ensuring reasonable accommodation for individuals with disabilities, creating different standards for what constitutes a failure to accommodate. T

A. Circuits Are Deeply Divided on Whether an Adverse Employment Action Is Required

Respondent Washburn attempts to downplay the significance of the circuit split, but the reality is that the split is real, entrenched, and impacts a broad range of ADA cases. The Tenth Circuit, in *Exby-Stolley v. Board of County Commissioners, Weld County*, 979 F.3d 784 (10th Cir. 2020), held that an adverse employment action is not required in failure-to-accommodate claims under the ADA. The court emphasized that the purpose of the ADA is to ensure that disabled individuals have equal access to employment opportunities, which includes receiving reasonable accommodation to perform their essential job functions.

This decision is truly relevant in properly deciding Dr. Reynard's failure to accommodate claims because, here, both the District Court and the Tenth Circuit Appeals Courts flouted established precedent in failing to allow Dr. Reynard's claim to proceed to trial.

The Tenth Circuit's decision in *Exby-Stolley* illustrates the circuit split on this issue. While some circuits, like the Eleventh Circuit, require proof of adverse employment action for failure-to-accommodate claims, the Tenth Circuit (after its en banc decision) does not. This divergence among the circuits creates a strong argument for Supreme Court review to resolve the

1 Taylor S. Parker, The Less Told Story: The Intersection of Title IX and Disability, AHEAD Learning Library (2022), available at <https://www.ahead.org/professional-resources/learning-library/title-ix>.

inconsistency, a key point that Dr. Reynard has raised in her lower court documents and Petition for Certiorari.

In the Tenth Circuit dealt with a failure-to-accommodate claim under the ADA. The case centered around whether Tracy Frank, a former employee, could prove her employer failed to reasonably accommodate her disability without showing an adverse employment action.

The Tenth Circuit ruled that failure-to-accommodate claims under the ADA do **not** require a showing of an adverse employment action, affirming the court's prior stance in *Exby-Stolley v. Board of County Commissioners*.² In this decision, the court emphasized that the ADA's language clearly distinguishes between disparate treatment claims, which require proof of an adverse action, and failure-to-accommodate claims, which focus solely on whether the employer fulfilled their affirmative duty to accommodate a known disability.

The Tenth Circuit's ruling rejected the application of Title VII's adverse employment action requirement to ADA accommodation cases, arguing that such a requirement would be contrary to the ADA's remedial purposes of ensuring full participation and equal opportunity for disabled employees in the workforce. Note that the 10th Circuit Appeals Court ruled in favor of *Exby-Stolley* on October 28, 2020; the Kansas District Court ruled contrary to this decision in Dr. Reynard's case on October 5, 2022; and the 10th Circuit Court of Appeals also ruled contrary to its *Exby-Stolley* decision on October 2, 2023 – Both decisions reversing the Courts' own precedent by denying Dr. Reynard the opportunity of a jury trial several years after creating a precedent that determined her failure to accommodate claims did not require adverse action.

² *Exby-Stolley v. Bd. of Cnty. Comm'rs*, 979 F.3d 784 (10th Cir. 2020) (en banc). This case addressed whether a failure-to-accommodate claim under the ADA requires proof of an adverse employment action. The en banc 10th Circuit ruled that plaintiffs bringing such claims do not need to show they suffered an adverse employment action, diverging from the requirement in other circuits.

This case supports Dr. Reynard's claim that the Tenth Circuit and District Court misapplied Title VII standards to her ADA failure-to-accommodate claim by requiring proof of an adverse action. It highlights the Tenth Circuit's clarification that failure-to-accommodate claims focus on whether the employer met its obligations under the ADA, without the need for additional adverse action proof, aligning with ADA statutory language and intent.

Other circuits, including the Second and Sixth Circuits, have similarly held that failure-to-accommodate claims are distinct from discrimination claims and do not require proof of an adverse employment action.

In contrast, the Seventh Circuit in *Hooper v. Proctor Health Care Inc.*, 804 F.3d 846 (7th Cir. 2015), and the Eighth Circuit in *Gardea v. JBS USA, LLC*, 915 F.3d 537 (8th Cir. 2019), have required plaintiffs to prove an adverse employment action as part of a failure-to-accommodate claim. These circuits improperly conflate failure-to-accommodate claims with traditional Title VII discrimination claims, which typically require an adverse action, and thus fail to account for the unique nature of the ADA's accommodation mandate.

This split creates inconsistent results, leaving the rights of disabled workers contingent on the jurisdiction in which they bring their claims. It is this Court's responsibility to resolve such conflicts and provide clarity on the proper interpretation of federal law. The circuit split alone warrants this Court's intervention.

B. The Circuit Split Has Far-Reaching Consequences for ADA Litigants Nationwide

Respondent contends that this case lacks national significance because it involves a fact-specific dispute. This argument is unsupported and unconvincing. The question presented here is one of broad importance; affects how courts nationwide interpret the ADA's reasonable

accommodation requirements. Whether an adverse employment action is required to sustain a failure-to-accommodate claim has profound implications for disabled employees who seek accommodation and for employers who are unsure of their obligations under the law.³

For example, in circuits that require an adverse employment action, disabled employees may be left without a remedy if they request but are denied a reasonable accommodation, as long as they are not formally terminated or demoted. This undermines the ADA's goal of promoting equal employment opportunities for disabled individuals. The ADA was designed to remove barriers, not to wait until the barrier causes an adverse employment action before providing a remedy. By resolving this circuit split, the Court can ensure that the ADA is applied consistently and that its protections are not eroded by conflicting interpretations of the statute.

This divergence in legal standards undermines the uniform application of the ADA's protections, particularly for vulnerable workers who rely on reasonable accommodation. In jurisdictions that require proof of adverse action, disabled employees could be denied critical accommodation unless they suffer additional harm, such as termination or demotion. This undermines the ADA's proactive goal of removing barriers and ensuring full workplace participation for individuals with disabilities.

II. TITLE VII'S ADVERSE ACTION REQUIREMENT SHOULD NOT BE IMPORTED INTO THE ADA CONTEXT

³ Circuits Are Deeply Divided on Whether an Adverse Employment Action Is Required: OVERVIEW
Tenth Circuit (No Adverse Action Required): *Exby-Stolley v. Board of County Commissioners, Weld County*, 979 F.3d 784 (10th Cir. 2020)
Sixth Circuit (No Adverse Action Required): *Smith v. Ameritech*, 129 F.3d 857 (6th Cir. 1997)
Seventh Circuit (Adverse Action Required) *Hooper v. Proctor Health Care Inc.*, 804 F.3d 846 (7th Cir. 2015)
Eighth Circuit (Adverse Action Required): *Gardea v. JBS USA, LLC*, 915 F.3d 537 (8th Cir. 2019)

As discussed in Petition for Certiorari, Title VII does not offer valid guidance to deciders of ADA failure to accommodate claims and should not be relied upon. **§42 U.S.C. § 12112(b)(5)(A)** distinguishes specific ADA failure-to-accommodate requirements. Respondent's opposition relies heavily on Title VII precedent to argue that an adverse employment action should be required in ADA failure-to-accommodate claims. This reliance is wrong. Title VII and the ADA serve distinct purposes and operate under different frameworks. Title VII prohibits employment discrimination based on characteristics such as race, sex, and national origin, and its case law generally requires an adverse employment action for claims to proceed. However, the ADA is remedial legislation specifically designed to ensure that disabled individuals are provided reasonable accommodation to perform their job duties. This distinction is critical to understanding why the adverse action requirement should not apply to ADA claims.

The Tenth Circuit and District Court erred in applying the legal standard for discrimination under Title VII to Ms. Raynard's failure-to-accommodate claims under the ADA by requiring proof of an adverse employment action, instead of applying the correct standard provided by ADA regulations and case law. Under Title VII, claims of disparate treatment do require proof of an adverse employment action. However, ADA failure-to-accommodate claims fall under a distinct legal framework, as recognized in *Exby-Stolley v. Board of County Commissioners* (Tenth Circuit, 2020), where the Tenth Circuit held en banc that a failure-to-accommodate claim does not require an adverse employment action for success.

Unlike Title VII, which addresses intentional discrimination, the ADA is designed to eliminate barriers to employment by imposing an affirmative obligation on employers to provide reasonable accommodation. The ADA's purpose is to ensure equal opportunity, not

merely to remedy intentional acts of discrimination, making it improper to require adverse employment action in failure-to-accommodate cases.

A. The ADA's Text and Purpose Support a Distinct Legal Framework

The ADA's statutory framework makes clear that failure-to-accommodate claims are separate from discrimination claims that require an adverse action. Section 12112(b)(5)(A) of the ADA defines discrimination to include an employer's failure to make "reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability." This provision reflects Congress's intent to ensure that disabled employees are not simply protected from discriminatory adverse actions but are also afforded the accommodation necessary to perform their jobs. The statute does not mention the need for an adverse employment action in connection with failure-to-accommodate claims, reinforcing that this requirement should not be read into the ADA.

Moreover, the ADA was enacted to provide robust protections for individuals with disabilities in the workplace, beyond the narrow confines of adverse employment actions. In passing the ADA, Congress recognized that many disabled individuals face structural and environmental barriers that impede their ability to work effectively. The ADA's accommodation requirement is meant to address those barriers, ensuring that disabled employees are given the tools they need to succeed in their jobs. Requiring an adverse employment action would undermine this goal by leaving employees without a remedy until the harm is fully realized.

B. Courts That Import Title VII Standards Into ADA Claims Have Misapplied the Law

As discussed, several circuits have erroneously imported Title VII's adverse action requirement into the ADA context. This approach is fundamentally flawed because it conflates

the distinct legal standards of the two statutes. Title VII addresses direct discrimination, while the statutory guidance for ADA's accommodation requirement -- **§42 U.S.C. § 12112(b)(5)(A)** -- is the proper authority. It is designed to proactively ensure that disabled individuals can participate fully in the workforce. Requiring proof of an adverse action in failure-to-accommodate claims effectively nullifies the accommodation mandate, as employers could deny accommodation without consequence as long as they do not formally terminate or demote the employee.

For example, in *Gardea v. JBS USA, LLC*, the Eighth Circuit required the plaintiff to demonstrate that he suffered an adverse employment action, despite his employer's failure to provide a reasonable accommodation. This decision effectively placed an undue burden on disabled employees, forcing them to endure adverse treatment before seeking relief under the ADA. The ADA's accommodation requirement, however, is meant to prevent precisely this type of outcome by ensuring that employees receive the accommodation they need before an adverse action occurs.

The circuits that have recognized the distinct nature of failure-to-accommodate claims, such as the Tenth Circuit in *Exby-Stolley*, have correctly applied the law by focusing on the ADA's text and legislative intent. This Court should adopt the reasoning of those courts and reject the importation of Title VII standards into the ADA.

III. THIS CASE PRESENTS AN IDEAL VEHICLE FOR CLARIFYING THE LAW ON ADA FAILURE-TO-ACCOMMODATE CLAIMS

Finally, Respondent argues that this case is not an appropriate vehicle for resolving the circuit split because it purportedly involves fact-specific issues. This argument is without merit.

The legal question at the heart of this case—whether a failure-to-accommodate claim requires proof of an adverse employment action—is clearly presented and fully developed in the record. This case provides an ideal vehicle for resolving the circuit split and clarifying the law on an issue of national importance.

The lower courts in this case applied the adverse employment action requirement, in line with circuits like the Eighth and Seventh Circuits, which have imposed such a requirement on ADA claims. The legal issue is squarely presented, and the factual record is sufficient to allow this Court to resolve the question without the need for further factual development. Resolving this issue now will provide much-needed clarity to courts, employers, and disabled employees nationwide.

IV. DR. REYNARD’S CLAIM SHOULD NOT BE TIME-BARRED UNDER “HOSTILE ENVIRONMENT” AND “CONTINUING VIOLATIONS” THEORIES

Whether or not a pro se party has raised a legal theory early in litigation does not deter that party from raising those theories – by “name” – later under certain circumstances. In the *Baylie Bye v. Affinia*⁴ case, the 10th Circuit Court addressed whether a plaintiff could raise a legal theory that was not properly named in the initial stages of litigation. The court clarified that while new legal theories may not be fully developed early on, if they arise from the same set of facts presented in the case, they can still be considered. The key factor is whether the factual basis for the legal theory has been properly established, even if the precise legal theory was not explicitly stated earlier.

⁴ *Bye v. Affinia Group*, 807 F. App'x 859 (10th Cir. 2020).

For further analysis, consider referencing this concept as outlined in similar rulings like *Johnson v. City of Shelby* (2014), where the U.S. Supreme Court held that a plaintiff does not need to cite the correct legal theory at the outset as long as the underlying facts entitle them to relief. Dr. Reynard objected to her claim being time barred due to hostile environment and continuing violations theories, which she described and documented throughout 2018-2022. These facts were consistent, supported by documentation and affidavits.⁵

In cases involving a hostile work environment, the Tenth Circuit and the U.S. Supreme Court have recognized the "continuing violation" doctrine, which can override time bars that would otherwise prevent a lawsuit from moving forward. A key example is *National Railroad Passenger Corp. v. Morgan* (2002), where the Supreme Court ruled that hostile environment claims, which consist of repeated acts over time, allow plaintiffs to bring forward older instances of harassment as long as one act occurred within the limitations period. This decision broadened the scope of recoverable damages by linking older discriminatory acts to newer ones as part of a continuing violations.

Similarly, in the Tenth Circuit, courts have recognized that a hostile work environment can effectively toll the statute of limitations for filing claims, provided the environment was sufficiently pervasive to create an abusive atmosphere that persisted within the statutory period. This was illustrated in cases where the court emphasized the broader context of workplace harassment and how even intermittent actions, when part of a continuing pattern, could defeat time-bar arguments by employers.

⁵ Judge Teeter declared it a "hostile environment" in a filed Order / Memorandum.

These rulings highlight that when a workplace is permeated with discriminatory conduct, courts may allow claims to proceed despite some acts falling outside the standard filing window, as long as they are part of a continuing hostile environment. This approach is critical in enabling employees to challenge long-term discriminatory practices.

V. IT HAS BEEN WELL-SETTLED SINCE EARLY IN THE EEOC AND LITIGATION PROCESSES IN THIS CASE THAT DR. REYNARD IS A PERSON WITH A DISABILITY AS SET FORTH IN THE ADA.

Respondent's denial that Dr. Reynard is not disabled under the ADA is refuted so extensively and thoroughly throughout Her four EEOC filings and this long litigation process that they could be construed as deliberate misrepresentation of the truth of Dr. Reynard's experience as a disabled Washburn employee.

For example, District Court Judge Teeter's Order denying Washburn's dismissal motion makes it clear that the lower court had long held that Dr. Reynard had standing to bring her claims before it under the auspices of the ADA :

... The Court finds this states a plausible claim of disability discrimination: Reynard is disabled, she was performing her job to Washburn's highest level of satisfaction, and she suffered allegedly adverse employment actions ⁶that could plausibly be linked to her requests for continued accommodation, and thus her disability. [App. M, P. 2]

CONCLUSION

The circuits are deeply divided on the legal standard for failure-to-accommodate claims under the ADA, specifically on whether plaintiffs must show an adverse employment action to prevail. This divergence undermines the uniform application of the ADA's protections for

⁶ It should be noted that even though Dr. Reynard **could and did** provide solid and expansive evidence of adverse employment actions throughout her long tenure at Washburn, **she was not required to make such a showing** under the plain language of the ADA and its criteria for determining failure to accommodate.

disabled workers across the country. By requiring proof of an adverse employment action, courts such as the Seventh and Eighth Circuits improperly conflate the ADA's initiative-taking accommodation mandate with Title VII's disparate treatment framework, which focuses on intentional discrimination.

In contrast, the Tenth Circuit, along with other circuits, has correctly held that failure-to-accommodate claims do not require an adverse employment action, focusing instead on whether the employer met its affirmative duty to accommodate the known disability. Yet, in Dr. Reynard's case the lower court and Appeals Court went against their own mandates.

This case presents an important issue of national significance, affecting the rights of millions of disabled workers who rely on the ADA's protections to secure reasonable accommodation in the workplace. By resolving this circuit split, this Court can restore consistency and fairness to the legal standard governing ADA failure-to-accommodate claims, ensuring that disabled workers nationwide have equal access to the accommodation they need to succeed. Petitioner respectfully requests that the Court grant certiorari to ensure the ADA's accommodation requirements are applied consistently and fairly across the country.

Respectfully submitted,



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