No. 24-5069

IN THE

SUPREME COURT OF THE UNITED STATES

FOR THE FIFTH CIRCUIT

Phile Andra Watson,

Petitioner

v.

FedEx Express

Respondent

BRIEF PETITION FOR MOTION FOR REHERING
RULE 44.2

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CERTIFICATE OF INTRESTED PERSONS

No. 24-5069

Phile Andra Watson,

Petition- Appellant

v.

FedEx Express

Respondent - Appellee

Petitioner
Phile Andra Watson

Counsel for Petitioner *is*
Pro Se

Respondent – Appellee

Counsel for Respondent – Appellee
Daniel T. French (lead counsel)
Barak J Babcok
Federal Express Corporation

/s/ Phile Andra Watson

Phile Andra Watson
Pro Se
Petitioner-Appell

TABLE OF CONTENTS

TABLE OF AUTHORITES

Cases

STATUTES:

ISSUES PRESENTED

1. Rule 44.2 certificate stating the grounds are limited circumstances of substantial grounds not previously presented: Recused/ conflict of interest. Magistrate Judge. Referred: Rebecca Rutherford Case #: 3:21-cv-01075 and # 3:22-cv-1738

4. Whether the district court erred in dismissing Watson's ADA failure-to-accommodate claim, which is premised on his employer's undue delay in providing a reasonable accommodation.

STATEMENT OF JURISDICTION

The district court entered judgment on July 13, 2023 R. O.A 23-10806.942.

Petitioner filed Notice to Appeal on August 3, 2023. R.O.A. 23-10806.943.

The district court had jurisdiction over petitioner claims pursuant to

28U.S.C. ~1313 and 1343(a)(4). This court has jurisdiction over this appeal

Pursuant to 28U.S.C~1291.

STATEMENT OF THE CASE

The court of appeals correctly stated the nature of this case, which is a suit for ADA mental illness discrimination, failure to reasonably accommodate, harassment, retaliation, damages following Litigant and Respondent FedEx Defendant. However, more facts are necessary to understand the issues presented.

This is a suite for American with Disabilities Act of 1990, Hostile work environment, ADA disability discrimination, failure to accommodate and retaliation.

Trial Court: Honorable Jane J. Boyles, Magistrate Judge Rebecca Rutherford. Trial Court grant of motion to dismiss for failure to state a claim De novo. Court of United States District Court Northern District of Texas Dallas Division

Appeals: United States Court of Appeals for the 5th Cir. Before DAVIS, HO, and WILSON, Circuit Judges No.23-10806 (5th Cir. January 30, 2024)

Deposition: Based on the forgoing, the district court's judgement is AFFIRMED. Motion for rehearing was filed. Status of Opinion: This opinion is not designated for publication. See 5th Cir. R..47.5

The panel decision conflicts with decisions of the United States Supreme Court, including *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973*), Guidry v. Bank of The LaPlace*, 954 F 2d278, 281,(5th

This raises important questions about the scope of an employer's obligations under Title I of the Americans with Disabilities Act of 1990 (ADA), *42 U.S.C. § 12111 et seq.*, to provide reasonable accommodations and to refrain from interfering with individuals in the exercise or enjoyment of their rights under the ADA. See *42 U.S.C. §§ 12112(b)(5)(A), 12203(b).* The Department of Justice and the Equal Employment Opportunity Commission (EEOC) share enforcement responsibilities under Title I and the ADA's anti-interference provision, *42 U.S.C. §§ 12117(a), 12203(c),* and the EEOC has Title I rulemaking *authority, 42 U.S.C. § 12116.*

STATEMENT OF THE RELEVANT FACTS

A. This Motion for rehearing arise out of claims of workplace discrimination,

Mental Illnesses Discrimination, Veteran Status Harassment; ADA/ADAAA; Failure to Accommodate; and Retaliation; Wrongful Termination Phile Andra ("Watson") (petitioner) was a rehire with FedEx Express Corporation, U S Army Disable American Veteran. R.O.A 23-10806.504, Watson was rehired with FedEx Express from May 2018 – February 18, 2020. Watson (Petitioner) was rehired as a Material Handler/Ramp, where I worked alone side other Veterans. Watson (Watson) reported "veteran status harassment" from two different veterans to fear of my life. Daily I was experiencing harassment, intimidation threats once assaulted where it affected my psychological well-being.

1 Because the main issue we address here arises from a dismissal for failure to state a claim, I draw these facts from Watson's operative complaint and present them in the light most favorable to Watson. *See Hester v. Bell-Textron, Inc.*, 11 F.4th 301, 304 (5th Cir. 2021). Note that because the district court dismissed Watson's failure-to- reasonable accommodate claim and granted summary judgment on other claims in the same order—its summation of the facts goes beyond the allegations in the complaint.

1. Rule 44.2 certificate stating the grounds are limited circumstances of substantial grounds not previously presented:

Recused/ conflict of interest. Magistrate Judge. Referred: Rebecca Rutherford Case #: 3:21-cv-01075 and # 3:22-cv-1738. If the magistrate judge is presiding over two different cases involving the same defendant's employer with the same attorney representing the employer in both cases, this situation could raise concern about potential conflicts of interest and could lead to a request for the judge to recuse themselves for from one or both case. **Judicial Disqualification.**

2. Magistrate Judge Ignored Essential evidence/ facts January 2018. District Court's Decision.

Watson's operative complaint asserted failure-to accommodate, interference, and other claims under the ADA. Watson generally alleged that the Defendant violated the ADA by unreasonably delaying his accommodation request, and by unreasonably demanding a grievance retaliation and harassment. Afterwards Watson was Suspended eventually was terminated for performance reminder/ Attendance (Retaliation) under Federal Rule of Civil Procedure 12(b)(6) and granted summary judgment to the on the remaining claims.

Watson's complaint asserts hostile-work-environment, harassment, failure to accommodate retaliation claims under the ADA.

1 **Erred on ignoring essential evidence/ facts failure to reasonably accommodate**

January 8, 2020 I received and signed the Offer Letter R.O.A.23-10806.622-623, date is located at the bottom of the page. .

Failure to Accommodate/ Retaliation:

January 10, 2020 Watson asked managers about start date. Unduly delay Retaliation/ Failure to Accommodate

January 14, 2020 R.O.A. 23-10806.615 On Watson's day off, requested a meeting for harassment / retaliation. Watson was wrongfully suspended and this was unreported but the text messages and email proves, and they all failed to provide grievances or complaint forms. Essential evidence and facts

January 16-26, 20120 R.O.A. 20-10806.616. Wrongfully Suspended

January 26, 2020 – February 2-10, 2020 R.O.A. 23.10806-852 was in the hospital or out on recurrence because of mental illness.

February 13, 2020 wrongfully suspended again. R.O.A. 23-10806.853 by manger that had nothing to do with me nor was I on his schedule.

February 18, 2020 called back in form unknown suspension and wrongfully terminated Mental Illness Performance Reminder/ Attendance

NOT Performance. By the HCMP Myriam Rayne for a day(s) will in the hospital January 26, 2019. Performance Reminder/ Attendance reason for termination NOT performance. Unreasonable delay was a factor of termination

SUMMARY OF THE ARGUMENT

I. Contrary to the district court's ruling, Watson alleged facts sufficient to state a failure-to-accommodate claim under the ADA. As other circuits have recognized, an employer's unreasonable delay in providing an accommodation can amount to a failure to accommodate in some circumstances. Here, Watson plausibly alleged that the FedEx Express("FedEx") delay in granting his accommodation request was unreasonable under the circumstances, and that the FedEx was responsible for the delay. Furthermore, the fact that Watson could continue working without

accommodation and suffered no workplace injuries while his request was pending is not dispositive because an accommodation may be reasonable— and thus required—where, as here, it enables an employee with a disability to perform his job not harder or more safely.

Accordingly, the district court's dismissal of Watson's failure-to-accommodate claim should be remand or thrown out for judicial disqualification on magistrate judge.

Contrary to the district court's understanding, the relevant statutory text does not require a plaintiff asserting an interference claim to show either that he engaged in protected activity or that her employer took an adverse action against him "on account of" any protected activity. Instead, the text encompasses employer actions that prevent or deter an employee from exercising or enjoying her ADA rights, including conduct that frustrates an employee's attainment of a reasonable accommodation. I take no position on the ultimate disposition of Watson's interference claim.

ARGUMENT

I. The district court ERRED in dismissing Watson's failure-to accommodate claim, which was premised on his employer's undue delay in providing a reasonable accommodation.

A. An unreasonable delay in providing a reasonable accommodation can amount to a failure to accommodate under some circumstances. Title I of the ADA prohibits a covered entity from "discriminat[ing] against a qualified individual on the basis of disability" in employment. *42 U.S.C. § 12112(*a). The statute defines unlawful discrimination to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability." *Id.*§ 12112(b)(5)(A). A covered entity violates this requirement when it fails to reasonably accommodate a qualified individual's known disability unless it can prove that doing so would impose an undue hardship. *Riel v. Elec. Data Sys. Corp.*, 99 F.3d 678, 681-82 (5th Cir. 1996). With respect to Watson's failure-to-accommodate claim, this appeal presents two related questions: Can an unreasonable

delay in providing an accommodation, by itself, amount to a failure to accommodate? If so, what constitutes an unreasonable delay?

The answer to the first question is a straightforward yes: Every circuit that has confronted the issue has recognized that "[a]n unreasonable delay in providing an accommodation for an employee's known disability can amount to a failure to accommodate his disability." *McCray v. Wilkie*, 966 F.3d 616, 621 (7th Cir. *2020) (Rehabilitation Act case);5 see also Valle-Arce v. P.R. Ports Auth.,* 651 F.3d 190, 200 (1st Cir. 2011) ("[An] unreasonable delay may amount to a failure to provide reasonable accommodations."); *Mogenhan v. Napolitano*, 613 F.3d 1162, 1168 (D.C. Cir. 2010) ("[T]here are certainly circumstances in which a long-delayed accommodation could be considered unreasonable and hence actionable under the ADA."(quotation marks omitted)); *Selenke v. Med. Imaging of Colo.*, 248 F.3d 1249, 1262 (10th Cir. 2001) ("[A] few courts have concluded that an employer's delay in providing reasonable accommodation may violate the ADA.").6 Consistent with these

authorities, the EEOC's enforcement guidance explains that "[u]nnecessary delays can result in a violation of the ADA." EEOC, Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA, No. 915.002, 2002 WL 31994335, at *10 (Oct. 2002) ("Enforcement Guidance").7 The district court here likewise recognized that an "undue delay in granting [an] accommodation may constitute an ADA violation" under some circumstances.

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5 "[T]he ADA and Rehabilitation Act are interpreted in pari materia," and"[c]ases interpreting the applicable standards under one of the statutes arethus applicable to both." *Luke v. Texas, 46 F.4th 3*01, 306 n.3 (5th Cir. 2022).

6 See also *Farquhar v. McCarthy,* 814 F. App'x 786, 788 (4th Cir. 2020) (although an employer need not "move with 'maximum speed' in addressing a request for accommodations," an "unreasonable delay in providing an accommodation for an employee's known disability can amount to a failure to accommodate his disability that violates the Rehabilitation Act" (quotation marks and citations omitted)); *Perkins v. City of New York,* No. 22-196, 2023 WL 370906, at *3 (2d Cir. Jan. 24, 2023) (under Rehabilitation Act, "a refusal of a request for a reasonable accommodation can be

both actual or constructive, as an indeterminate delay has the same effect as an outright denial" (quotation marks and citation omitted)); *Cheatham v. Postmaster Gen. of U.S.*, No. 20-4091, 2022 WL 1073818, at *8 n.4 (6th Cir. Apr. 11, 2022) (White, J., concurring in part, dissenting in part) ("[A]n unreasonable delay in providing an accommodation may constitute a discriminatory act.")

Although this Court has not squarely decided the issue, it too hassuggested in dicta that unreasonably delayed accommodations could violate the ADA. *See Loulseged v. Akzo Nobel Inc.,* 178 F.3d 731, 737 n.6 (5th Cir. 1999); see also *Schilling v. La. Dep't of Transp. & Dev.,* 662 F. App'x 243, 246 (5th Cir. 2016) (stating that "[t]his Court has discussed only in dicta whether delay alone may constitute an ADA violation," and declining to resolve the issue). To be sure, this Court has said that the ADA requires an employer to engage in an interactive process with an employee who requests a reasonable accommodation, and the statute does not require an employer to "move with maximum speed to complete this process." *Loulseged,* 178 F.3d at 737. Instead, "the employer is entitled to move at whatever pace he chooses as long as the ultimate problem—the employee's performance of her duties—is not truly imminent." *Id.* (employer not required to immediately provide

accommodation where discrete task requiring accommodation was not regular part of plaintiff's job). But where, as here, "the employee continues working in a capacity arguably needing accommodation while the interactive process is ongoing," and a delay "could force the employee to work under suboptimal conditions," the "employer's delaying of the process ... might create liability." *Id.* at 737 n.6.[8]

The next question is what constitutes an *unreasonable* delay in providing an accommodation. The answer is that "[w]hether a particular delay qualifies as unreasonable necessarily turns on the totality of the circumstances." *McCray,* 966 F.3d at 621. Relevant circumstances include "the employer's good faith in attempting to accommodate the disability, the length of the delay, the reasons for the delay, the nature, complexity, and burden of the accommodation requested, and whether the employer offered alternative accommodations." *Id.* at 621; *see* also *Selenke,* 248 F.3d at 1262-63 (listing factors); Enforcement Guidance, 2002 WL 31994335, at *10 n.38 (articulating similar factors).[9]

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viewed as illustrative, not exhaustive, and no single factor controls. Cf., e.g., *Ganpat v. E. Pac. Shipping PTE, Ltd.,* 100 F.4th 584, 590 (5th Cir. 2024); *Pizza Hut L.L.C. v. Pandya,* 79 F.4th 535, 544 (5th Cir. 2023); *Rollerson v. Brazos*

B. **Watson plausibly alleged that the FedEx Express unreasonably** 8 Although the example discussed *in Loulsege*d contemplated a situation in which the delayed accommodation led to the employee's termination, 178 F.3d at 737 n.6, a plaintiff need not show that her employer's failure to provide a reasonable accommodation resulted in a separate adverse action (like termination). Infra at 21-22 & n.11. *Loulseged* does not suggest otherwise.

9 As with other totality-of-the-circumstances tests, these factors are best

delayed providing him with a reasonable accommodation. (Unduly delay)

Here, his plausibly alleged that the FedEx Express's delay in providing the accommodation he requested was unreasonable under the circumstances. Fabrication / altering documents

c. The district court ignored the elements of an ADA interference claim. Interference claim is that the defendant 'interfered on account of the plaintiff's protected activity . Contrary to the district court's understanding, the relevant statutory text reveals that protected activity is not an element of an ADA interference claim. The ADA's anti-interference provision makes it "unlawful to coerce,

intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter." *42 U.S.C. § 12203(b).* The statutory text thus requires a showing that the employer (1) coerced, intimidated, threatened, or interfered with any individual (2) (a) in the exercise or enjoyment of, or (b) on account of his or her having exercised or enjoyed, or (c) on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, (3) any right granted or protected by this chapter.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Honorable Court grant a Writ of Certiorari and remand/throw out this case for further proceedings consistent with the arguments presented herein.

Respectfully submitted,

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