

No. _____

In the Supreme Court of the United States

VIOREL COTUNA,

Petitioner,

v.

WAL-MART STORES INC.,

Respondent.

*On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit*

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Americans with Disabilities Act (ADA), 42 U.S.C. § 12111(10), requires employers to provide reasonable accommodations to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless the employer can demonstrate that the accommodation would impose an undue hardship. Similar to ADA, Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e *et seq.*, also prohibits discrimination and retaliation against a status based individual who engaged in protected conduct (42 U.S.C. § 12112). The questions presented, on which the circuits have persistently disagreed, is:

1. Whether an employee with a documented disability could be granted a longer and definite amount of medical leave as a reasonable accommodation, absent undue hardship, necessary in this case to participate in training of his/her service dog.
2. Whether an employer should grant an at least equal amount of leave to a disabled employee as concurrently granted to employees in a distinct protected class under the same policy.
3. Whether the courts should consider ADA's requirements that an employer engage in the "interactive process" with a qualified individual with a disability before taking a detrimental employment action.

PARTIES TO THE PROCEEDING

Viorel Cotuna was the plaintiff-appellant in the proceedings bellow.

Wal-mart Stores, Inc. (Walmart), was the defendant-appellee in the proceedings below.

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The opinion of the court of appeals is reprinted in the appendix (App.) at 1. The opinion of the district court is reprinted at App. 11.

JURISDICTION

The court of appeals entered judgment on August 31, 2017, and denied rehearing on October 18, 2017. App. 30. The petition is filed within 90 days of the latter date. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

Relevant provisions Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act of 1990, as well as of the Americans with Disabilities Act's implementing regulations, are reprinted at App. 32.

STATEMENT OF THE CASE

This case involves interpretation of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12111-12117 and the regulation implementing title I, 29 C.F.R. § 1630, which requires that an employer provides reasonable accommodations, and Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e *et seq.* statutory provisions that prohibit private employers from discriminating and retaliating because an individual engaged in "protected activity". Petitioner brought this case to seek damages for the financial, social and emotional harm caused by the Walmart management's termination of employment after engaging in protected conduct, during the training of a service dog for the purpose of returning to active work.

A. The Facts

During my entire employment with Walmart of more than ten years, I had a permanent disabling medical condition and limited mobility due to Degenerative Disc Disease. I have requested and obtained reasonable accommodations until about March 2011. In August 2011, I started FMLA leave due to the exacerbation of my medical condition as a result of hostile work conditions created by one of my immediate Supervisors. After the exhaustion of the FMLA leave, I requested and obtained unpaid leave for my own serious health condition. After one year of unpaid leave, on or around August 2012, I requested and obtained medical leave as a reasonable accommodation for my disability. Walmart's leave of absence policy allows an individual with a disability additional undefined amount of leave, past the 12 month mark, absent undue hardship.

While on medical leave, on or around January 2012, I was diagnosed with a second mobility related permanent disability, Ankylosing Spondylitis. At about the same time, I started to train my dog, a Siberian Husky named "Rex" to assist me at home with mobility difficulties and daily activities, such as removing the socks from my feet, assistance when lifting up and walking, stabilizing support, retrieving bottled water and/or a ringing telephone. Rex became a type of assistive device while at home and was eventually certified as a service dog.

At the same time, I followed a medical treatment plan and instructions as directed by my Doctors. During my entire medical leave, the Doctors completed, and I then provided to Walmart numerous times sufficient medical certification on a regular basis, detailing my disability and limitations. I requested, and I was granted medical leave extensions up to 90 days at the time, as allowed and provided by Walmart's policy. The last medical documentation and request for medical was submitted to Walmart on November 14, 2012. The request for an extension of my medical leave but not the medical certification, was denied on November 27, 2012, without reason or explanation by my immediate Human Resources Manager.

On November 29, 2012 I submitted a formal request for reconsideration with a definite date, until February 15, 2013, for the needed leave, with sufficient details as to why I needed the medical leave: to further continue my medical treatment and the training of my service dog. The additional training was essential to overcome distractions in public places like Walmart, Walgreens, CVS, etc., to stay focused on its

job, and help me return to the Assistant Store Manager position I held with Walmart. On the same day, contrary to Walmart's policy and ADA regulations, I was asked to submit another medical certification by December 9, 2012 and instructed to call off for my scheduled shift on a daily basis, pending a decision of my request for medical leave.

Despite my diligent and reasonable efforts to obtain a new medical certification, I was unable to do so since the Doctor was on maternity leave. I informed Walmart about this fact and I granted permission to contact the Doctor's office to obtain any additional information deemed necessary.

At the same time, while calling off for my scheduled shifts, my former Supervisor answered my calls on several days, when she continued her hostile actions towards me. As a result, on December 7, 2012, I made a formal discrimination complaint against her. A week later, Walmart initiated an investigation that eventually terminated her employment for gross misconduct as many of my claims were substantiated.

Despite reconsideration and appeal requests to Senior Management and Walmart's Home Office, my employment was eventually terminated on January 6, 2013, while Walmart is investigating my complaint, which concluded on or around January 23, 2013.

The Exit Interview form did not list a reason for my termination such as undue hardship, excessive medical leave or failure to provide medical certification. My reconsideration requests for medical leave were left unanswered, as no alternate solutions were ever sought or proposed in a good faith interactive process.

Concurrently, two non-disabled employees of a distinct national origin than mine and from the same store location, were granted longer leaves, under the

same leave of absence policy that distinguishes between disabled and non-disabled employees. My nationality is Romanian.

From my working experience and training, Walmart maintained its policies aligned to requirements by the federal statutes and regulations as well as State laws.

At the time of my termination I had three weeks of accrued vacation considered time off under Walmart's policies.

B. Statutory Background

The ADA was signed into law on July 26, 1990, by President George H.W. Bush. The ADA is one of America's most comprehensive pieces of civil rights legislation that prohibits discrimination and guarantees that people with disabilities have the same opportunities as everyone else to participate in the mainstream of American life -- to enjoy employment opportunities, to purchase goods and services, and to participate in State and local government programs and services. Modeled after the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, religion, sex, or national origin -- and Section 504 of the Rehabilitation Act of 1973 -- the ADA is an antidiscrimination statute that substantively requires "equal opportunity" law for people with disabilities. The ADA differs from other civil rights statutes in imposing an "affirmative" obligation upon employers: the duty to accommodate an employee's disability.

In particular, Title I and V of the ADA provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the

disability of such individual" in the terms, conditions, and privileges of employment. 42 U.S.C. § 12112(a). To avoid discrimination, the statute specifically contemplates that the term "discriminate" includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity". 42 U.S.C. § 12112(b)(5)(A). The term reasonable accommodation may include, and such a covered entity will be required to make "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities". 42 U.S.C. § 12111(9)(B). Another common accommodation is a leave of absence to enable an employee to receive treatment for a disabling condition. 29 C.F.R. § 1630.2(o) (noting that "accommodations could include permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment").

Congress authorized the Equal Employment Opportunity Commission (EEOC) and the Department of Justice to issue regulations consistent with the ADA and its Amendments Act of 2008 including rules of construction. 42 U.S.C. 12205(a). The EEOC enforces the federal laws that prohibit employment discrimination, including Title I ADA, 42 U.S.C. § 12101 et seq., which prohibits discrimination on the basis of disability, and Title VII of the Civil Rights Act

of 1964, as amended (Title VII), 42 U.S.C. § 2000e et seq., which prohibits discrimination on the bases of race, color, religion, sex, and national origin. The EEOC also has responsibility under Executive Order 12067 to coordinate the federal government's enforcement of laws, executive orders, regulations, and policies that require equal employment opportunity without regard to race, color, religion, sex, national origin, age or disability. 43 F.R. 28967 (July 5, 1978).

Because of the importance of service animals to ensuring equal access for many people with disabilities, the Department of Justice has interpreted the statute's "reasonable modifications" language to require that, with certain exceptions not applicable here, "[i]ndividuals with disabilities shall be permitted to be accompanied by their service animals in all areas of a public entity's facilities where members of the public, participants in services, programs or activities, or invitees, as relevant, are allowed to go," 28 C.F.R. § 35.136(g).

Under the employment provisions of ADA and its regulations implemented by the EEOC but not the Department of Justice, there is no specific definition of service animal nor specific guidelines for employers to follow when an employee asks to participate in the training of his/her service animal. Yet, the service animal must be properly trained in order to accompany a disabled individual and accepted in public places, as outlined by the ADA.

Unlike the ADA, in its Enforcement Guidance Manual, the EEOC states that: "Permitting the use of accrued paid leave, or unpaid leave, is a form of

reasonable accommodation when necessitated by an employee's disability". It further directs that: "An employee with a disability may need leave for a number of reasons related to the disability, including, but not limited to: training a service animal (e.g., a guide dog)...." (EEOC Notice 915.002). However, the EEOC Regulations, Guidance or the ADA do not set a specific amount of time relative to the use of leave as a reasonable accommodation.

The EEOC's Interpretive Guidance takes a stronger stand: "The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the qualified individual with a disability." (29 C.F.R. § 1630.9 ("Process of Determining the Appropriate Reasonable Accommodation")) and its regulations well known to employers, clearly provides that once a qualified individual with a disability requests an accommodation, "it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation." 29 C.F.R. § 1630.2(o)(3).

Because entitlement to a reasonable accommodation depends on qualification under the ADA, an employer is entitled to know whether an employee requesting an accommodation is a qualified individual with a disability. *See* EEOC Enforcement Guidance, at 7. Addressing the Medical Substantiation, EEOC has taken the position that when the employee's disability and/or need for accommodation is not "obvious," the employer may ask the employee for "reasonable documentation" (and ask that it come from a medical provider). *Id.* Reasonable

accommodation requested, requires documentation “that is needed to establish that a person has an ADA disability, and that the disability necessitates a reasonable accommodation.” *Id.* An employer may not request information beyond those parameters. It is important to note that where the disability and/or need for accommodation are not obvious, the employee must provide sufficient documentation, or she will not be entitled to reasonable accommodation. *Id.* at 8. Documentation is sufficient if it: (1) describes the nature, severity, and duration of the employee’s impairment, the activity or activities that the impairment limits, and the extent to which the impairment limits the employee’s ability to perform the activity or activities; and, (2) substantiates why the requested reasonable accommodation is needed. See “Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans With Disabilities Act (ADA),” at 11. If the employee provides sufficient documentation, however, “continued efforts by the employer to require that the individual see the employer’s health professional could be considered retaliation.” *Id.* at 8 n.33.

Numerous Courts reasoned that requests for an extension of leave under ADA, may also be reasonable accommodations if the employee can be considered disabled under the ADA (i.e., substantially limited in a major life activity) and the EEOC has concluded that the employer “may consider the impact on its operations caused by the initial . . . absence, along with other undue hardship factors.” See Enforcement Guidance at 16. See *Bukta v. J.C. Penney Co., Inc.*, 359 F.Supp.2d. 649 (N.D. Ohio 2004) (denying summary judgment where employee requested additional leave

of one month after using at least five months of leave, and where employer had not replaced employee during her leave); *Rogers v. New York Univ.*, 250 F. Supp. 2d 310, 317 (S.D.N.Y. 2002) (denying summary judgment to employer where employer denied plaintiff reasonable accommodation of extended leave and employed had not filled the position but used temporary workers); *Shannon*, No. CIV.A. 98- 5277, 1999 WL 1065210, at *6 (denying summary judgment where employee requested additional three month leave after using twelve weeks of FMLA leave, where employee's physician was "hopeful" that employee would be able to return to work within three to six months, and employer had another employee assume duties in employee's absence). Thus, unless the employer can demonstrate that the additional leave would create an undue hardship, it should allow it as an accommodation under the ADA.

Similar to ADA, Title VII, also prohibits employers from discriminating and retaliating against employees on the basis of sex, race, color, national origin, and religion. (42 U.S.C. § 12203), (28 C.F.R. § 35.134), (28 C.F.R. § 36.206).

Prior Proceedings

In 2013, following the refusal to reconsiderate my request for medical leave, and termination of my employment on January 6, 2013, I filed a charge of employment discrimination with EEOC. The charge was filed on October 30, 2013, alleging discrimination on the basis of national origin, retaliation, and/or disability. On the same day, the EEOC issued a Dismissal and Notice of Rights, where I was notified that I "may file a lawsuit for claims under Title VII of the Civil Rights Act of 1964 ("Title VII") and the

Americans with Disability Act (“ADA”) within 90 days of receipt of the notice”. (*Am. Compl., Ex. 5, “Right to Sue Notice”*).

On January 29, 2014, I filed a Complaint followed by an Amended Complaint in the Eastern District Court of Michigan against Walmart alleging the following claims in the Amended Complaint: (i) discrimination based on gender in violation of Title VII and Michigan’s Elliot-Larsen Civil Rights Act (“ELCRA”); (ii) discrimination based on national origin in violation of Title VII and ELCRA; (iii) discrimination based on disability in violation of the ADA and Michigan’s Persons with Disabilities Civil Rights Act; (iv) violation of the Equal Pay Act (“EPA”); and (vii) violation of the Michigan Compensation Laws §§408.473, 408.474, and 408.475. The District Court granted Walmart’s Motion for Summary Judgment on September 30, 2016.

On January 25, 2017, I filed a petition with the Court of Appeals of the Sixth Circuit. The District Court Order was affirmed on August 31, 2017. A petition for rehearing was denied on October, 18 2017.

REASONS FOR GRANTING THE PETITION

A. There is a Persistent Conflict in the Circuits

Numerous courts have held that a leave of absence may constitute a reasonable accommodation. *See Humphrey v. Mem’l Hosp. Ass’n*, 239 F.3d 1128, 1135-36 (9th Cir. 2001) (“We have held that where a leave of absence would reasonably accommodate an employee’s disability and permit him, upon his return,

to perform the essential functions of the job, that employee is otherwise qualified under the ADA.”); *Cehrs v. Northeast Ohio Alzheimer’s Research Ctr.*, 155 F.3d 775, 783 (6th Cir. 1998) (concluding that “no presumption should exist that uninterrupted attendance is an essential job requirement” and holding that “a medical leave of absence can constitute a reasonable accommodation under appropriate circumstances”); *Criado v. IBM*, 145 F.3d 437, 443 (1st Cir. 1998); *Rascon v. US West Commc’ns, Inc.*, 143 F.3d 1324, 1333 (10th Cir. 1998). The use of leave as a reasonable accommodation is premised on the ability of the employee, upon treatment, recuperation, and return, to perform the essential functions of the position. *See Humphrey*, 239 F.3d at 1135-36; *Stewart v. United States*, No. C-99-4058 JCS, 2000 WL 1705657, at *6 (N.D. Cal. 2000); *Powers v. Polygram Holding, Inc.*, 40 F. Supp. 2d 195, 199-200 (S.D.N.Y. 1999). Even then, the Ninth Circuit has held that “the ADA does not require an employee to show that a leave of absence is certain or even likely to be successful to prove that it is a reasonable accommodation.” *Humphrey*, 239 F.3d at 1136. In *Humphrey*, the Ninth Circuit reversed summary judgment upon sufficient evidence from the plaintiff’s physician that the plaintiff’s condition was “treatable” and that she would need “some time off” to get “the symptoms better under control.” *Id.*

Courts also found that an employer may not simply reject proposed accommodations without offering other suggestions or expressing a willingness to discuss possible accommodations. As the Seventh Circuit has stated, “An employer cannot sit behind a closed door and reject the employee’s requests for accommodation without explaining why the requests have been rejected or offering alternatives.” *See EEOC*

v. Sears, Roebuck & Co., 417 F.3d 789, 806 (7th Cir. 2005); see also *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128, 1138-39 (9th Cir. 2001); *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 648 n.12 (1st Cir. 2000) (reversing grant of summary judgment for employer where the employer "simply rejected the request for the accommodation without further discussion and it did so without pointing to any facts making the accommodation harmful to its business needs").

Other cases have also found that approximate return to work dates do not make the leave request indefinite. For example, in *Haschmann v. Time Warner Entm't Co.*, 151 F.3d 591 (7th Cir. 1998), the court rejected employer's contention that an it would be an undue hardship to give an employee an additional two to four weeks of medical leave on the grounds that the approximate return to work date would create uncertainty. The court pointed out that the employer had not made any inquiry about what accommodations might be needed, and did not make any efforts to independently assess the employee's prognosis and the reasonableness of the request for leave. The court also highlighted evidence that the job had been vacant for many months before the employee had been hired, that the company took almost six months to fill her position after her discharge, and that subordinates handled the job in the interim. Similarly, in *Graves v. Finch Pruyn & Co.*, 457 F.3d 181 (2d Cir. 2006), the court held that a where an employee already on a medical leave asked for "more time" to schedule an appointment with a specialist and said it would take "maybe a couple of weeks," the request was not one for an indefinite leave.

B. The Sixth Circuit's Decision is Wrong

This Court clearly stated that "An employee who alleges status-based discrimination under Title VII need not show that the causal link between injury and wrong is so close that the injury would not have occurred but for the act. So-called but-for causation is not the test. It suffices instead to show that the motive to discriminate was one of the employer's motives, even if the employer also had other, lawful motives that were causative in the employer's decision." *Univ. of TX. SW Med. Ctr. v. Nassar*, 570 U.S. (2013).

Both, the District and the Appeal Court in the Sixth Circuit found that my employment was terminated due to excessive amount of medical leave taken for a legitimate purpose, and failure to provide sufficient medical certification without taking in consideration the fairly recent, sufficient and uncontested medical certification provided to Walmart on November 14, 2012. Also, it did not take into consideration the absent undue hardship when Walmart already posted and filled my position while on medical leave, the lack of interactive process required, nor Walmart's Leave of Absence Policy inconsistently and discriminatorily applied when two other non-disabled employees of a distinct national origin and from the same location, were granted concurrently, longer leaves as it apperared that my termination was done in retaliation for my engagement in protected conduct, first by asking for an extension of my medical leave and second, by lodging a discrimination complaint against my supervisor.

Medical information isn't always needed when an accommodation is requested and could also come from the person who trains a service dog as a Doctor is

never involved in such activity. Moreover, under the ADA, an employer may not request medical information where both the disability and need for reasonable accommodation are known or obvious or where the individual has already provided the employer with sufficient information to substantiate that s/he has a disability and needs an accommodation. As there was no new and different accommodation requested, the last complete medical certification provided, had sufficient information supporting my disability.

In its Guidance Manual the EEOC clearly states that once sufficient documentation has been provided, continued efforts by the employer to require that the individual provide more documentation and/or submit to a medical examination could be considered retaliation. However, an employer that requests additional information or requires a medical examination based on a good faith belief that the documentation the employee submitted is insufficient would not be liable for retaliation. As mentioned above, Walmart did not point to any regulations, nor inform me about any deficiencies or insufficiency related to the last medical certification submitted in November 2012.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

A handwritten signature in black ink, appearing to read "Viorel Cotuna". The signature is fluid and cursive, with the first name "Viorel" being more prominent than the last name "Cotuna".

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