

No. _____

**In The
Supreme Court of the United States**

◆

TAYLOR CHRISTIAN PROFITA,

Petitioner,

v.

THE REGENTS OF THE UNIVERSITY OF
COLORADO, THE UNIVERSITY OF COLORADO
HEALTH SCIENCES CENTER, a/k/a University of
Colorado Denver/Anschutz Medical Campus, and
JOHN J. REILLY, JR., M.D., in his official capacity as
Dean of the University of Colorado Health Sciences Center,

Respondents.

◆

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

◆

PETITION FOR A WRIT OF CERTIORARI

◆

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QUESTIONS PRESENTED

Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132, as amplified by the Title III provision in 42 U.S.C. § 12182(b)(2)(A)(ii), prohibits discrimination by a public entity for refusal to make a reasonable accommodation for an otherwise qualified individual with a disability, unless it would fundamentally alter services. An “individualized” inquiry into reasonableness is required, *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 690 (2001), and “‘reasonable’ means no more than ‘effective’ . . . [to] ‘enable’ a person with a disability to perform the essential functions of a task . . . [,] the statutory provision’s basic objective.” *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 401 (2002).

A “second chance” doctrine has developed in Title I, II, and III accommodation caselaw where the request for accommodation comes after an issue with performance. The Tenth Circuit in this case denies an after-the-fact “reasonableness inquiry” and accommodation to perform. Other jurisdictions require evaluation as to efficacy and reasonableness, allowing for “second chance” accommodation. There is a substantial split of authorities as to correct application of the doctrine, with irregular results unfairly impacting protection of disabled persons in a wide range of human activities including education, employment and public housing. Questions presented are:

1. Whether the “second chance” doctrine forecloses the “reasonableness inquiry,” as a matter of law, based solely upon timing of an

QUESTIONS PRESENTED – Continued

accommodation request coming after a performance problem.

2. Whether the determinant in an after-the-fact accommodation request should be efficacy and reasonableness in order to enable successful performance.
3. Whether the “second chance” doctrine bars the “reasonableness inquiry” in an after-the-fact accommodation request when a disabled person has not already been accommodated through no fault of their own.
4. Whether the Tenth Circuit erred by affirming/adopting the district court’s finding that: “[t]he ADA in my and the Tenth Circuit’s estimation . . . was not designed to give disabled individuals ‘a second’ . . . chance.”

LIST OF PARTIES

The caption of the case contains the names of all the parties.

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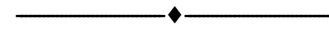
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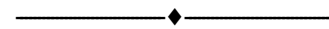
PETITION FOR A WRIT OF CERTIORARI

Taylor Profita respectfully petitions for a writ of certiorari to review the Order And Judgment of the United States Court of Appeals for the Tenth Circuit in *Taylor Christian Profita v. The Regents of the University of Colorado, et al.*, No. 17-1127 (October 11, 2017), before Circuit Judges Hartz, McKay, and Matheson.



OPINIONS BELOW

The Order And Judgment in *Taylor Christian Profita v. The Regents of the University of Colorado, et al.*, Tenth Circuit No. 17-1127 (October 11, 2017), is not reported in the Federal Reporter but is available at App. 1 and 2017 WL 4534758. The Order in *Taylor Christian Profita v. The Regents of the University of Colorado, et al.*, U.S. District Court for the District of Colorado, Civil Action No. 16-cv-03032-RBJ (March 15, 2017), is not reported in the Federal Supplement but is available at App. 18 and 2017 LEXIS 37145. The District Court's Final Judgment, No. 16-cv-03032-RBJ (March 15, 2017), is available at App. 31.



STATEMENT OF JURISDICTION

The Tenth Circuit Court's Order And Judgment sought to be reviewed was entered October 11, 2017. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).



STATUTORY PROVISIONS INVOLVED

Americans with Disabilities Act, 42 U.S.C. § 12101, et seq. [ADA]:

42 U.S.C. § 12101. Findings and purpose

(a) Findings

The Congress finds that –

- (1) physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination. . . .

. . .

- (3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services. . . .

. . .

- (5) individuals with disabilities continually encounter various forms of discrimination, including . . . overprotective rules and policies, failure to make modifications to existing . . . practices. . . .

. . .

(b) Purpose

It is the purpose for this chapter –

. . .

- (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities. . . .

ADA Amendments Act of 2008, 110 PL 325 [ADAAA]

Sec. 2. Findings and Purposes

(a) Findings. – Congress finds that –

- (1) in enacting the Americans with Disabilities Act of 1990 (ADA), Congress intended that the Act “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities” and provide broad coverage. . . .

Title II of the ADA [Public Services], 42 U.S.C. § 12132.
Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

Title III of the ADA [Public Accommodations And Services Operated By Private Entities], 42 U.S.C. § 12182

(b)(2)(A) [D]iscrimination includes –

...

- (ii) a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford ... services, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such ... services. ...



STATEMENT OF THE CASE

This case arises under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, et seq., as amended by the ADA Amendments Act of 2008, 110 PL 325 (ADAAA), in particular Title II of the ADA, 42 U.S.C. § 12132, as amplified by the Title III provision in 42 U.S.C. § 12182(b)(2)(A)(ii),¹ discrimination by a public entity (Respondents, The Regents of the University of Colorado, et al.), for refusal to make reasonable accommodation for an otherwise qualified individual with a disability (Petitioner, Taylor Profita).

¹ Title III standards are applicable to Title II, *Wash. v. Ind. High Sch. Athletic Ass'n*, 181 F.3d 840, 848 (7th Cir. 1999), *Powell v. National Bd. of Med. Examiners*, 364 F.3d 79, 85 (2d Cir. 2004), *Henrietta D. v. Bloomberg*, 331 F.3d 261, 272 (2d Cir. 2003).

Jurisdiction of the district court was predicated upon 28 U.S.C. §§ 1331 and 1343 and the above statutory provisions.

Mr. Profita's § 12182(b)(2)(A)(ii) request for accommodation is for prospective declaratory relief of reinstatement back into his last year of medical school, with retake of two clinical rotations. (App. 5) These rotations were failed due to an episode of underlying Major Depressive Disorder (MDD), not recognized at the time, resulting in dismissal. (App. 34, 35) Mr. Profita's position is that a second chance ADA accommodation of reinstatement may be permitted following efficacy and reasonableness inquiry into the request.

By the time of Mr. Profita's request for accommodation, subsequent to his dismissal, the MDD was recognized, understood, and the symptoms brought under complete control and into remission due to correct diagnosis and treatment. At the time of the request (which was denied), this information was clearly communicated to Respondents with a detailed report from the psychiatrist stating that there was "no [longer] significant or appreciable risk of recurrence of symptoms which would interfere with completion of Mr. Profita's medical studies." (App. 41, 42)

When the performance issue occurred in Mr. Profita's senior year, the University of Colorado School of Medicine's evaluator did not recognize the MDD, which misled the Promotions Committee and Mr. Profita into

avoiding the issue of ADA accommodation. (App. 40) Through no fault of his own Mr. Profita therefore never received accommodation addressed to his disability when he was enrolled (App. 40), this aspect pertaining to the reasonableness of his reinstatement request to complete the last year of medical school with re-take of the two clinical rotations. Taylor Profita was dismissed “for unsatisfactory academic performance” pertaining to the two rotations in his fourth year of medical studies. (App. 41) His performance up to that point for three years had been highly successful with all Pass and High Pass grades, exemplary completion of five of the seven required clinical rotations, and passage of Step 1 of the National Board of Medical Examiners. (App. 38) Despite this aptitude and performance, given his status of having been dismissed, reapplication with likelihood of acceptance to the school or another accredited medical school in this country is essentially an impossibility. (App. 44, 45)

The district court dismissed this case at the Fed. R. Civ. P. 12(b)(6) stage, applying the Tenth Circuit’s “employment misconduct/no second chance” doctrine in *Dewitt v. S.W. Bell Tel. Co.*, 845 F.3d 1299 (10th Cir. 2017), categorically denying the “reasonableness inquiry.” The district court expanded the *Dewitt* “doctrine” to a broad performance-based “no second chance/no retroactive leniency” rule. The Tenth Circuit adopted this expansion, holding as follows:

[W]e conclude that the district court properly applied the rule in *Dewitt*. . . . (App. 10)

...

Mr. Profita's argument that decisions in second chance accommodation cases "do not turn on [the] timing of the requested accommodation" but on the "effectiveness of the accommodation," . . . is contrary to *Dewitt*, which stated that the employer was "not . . . obligated to stay its disciplinary hand" . . . merely because the employee requested a last-minute accommodation. (App. 14)

The Tenth Circuit rejected out-of-circuit authorities recognizing after-the-fact second chance ADA accommodation following an efficacy and reasonableness inquiry. It found that that authority was not binding on it and was contrary to *Dewitt*. (App. 14) The Tenth Circuit decided that there was no obligation to reinstate Mr. Profita because this was an "eleventh hour" request (App. 13), and affirmed the district court (App. 17) which had taken the position on behalf of itself and the Tenth Circuit that:

The ADA in my and the Tenth Circuit's estimation . . . was not designed to give disabled individuals a "second" . . . chance. (App. 28)



REASONS FOR ALLOWANCE OF THE WRIT

The Tenth Circuit erred in deciding that the ADA does not allow for a second chance accommodation. The decision violates the letter, spirit and intent of the ADA and the ADAAA which were enacted to protect persons

with disabilities – certainly a matter of national importance mandated by Congress.² The decision conflicts with the decisions of at least three other circuit courts of appeals and a considerable number of district courts. The courts are in disarray on this issue.

Often an individual is not aware of a disability or the effects thereof until there has been a problem with performance. These people need a second chance. Uniformity is lacking in ADA protection of these individuals. Currently, a disabled person who lives in one jurisdiction may obtain a second chance accommodation, while someone else in another jurisdiction under the same fact scenario will not obtain a second chance to successfully perform their given task in life. It is indeed a contradiction that Congress mandates “consistent . . . standards addressing discrimination,” ADA 42 U.S.C. § 12101(b)(2), yet there are inconsistent and unclear accommodation standards being applied here among the circuits. This arbitrariness results in unfairness. There is need for the Court to clarify and settle this important question of federal law and provide a clear and uniform standard as to “second chance” accommodation involving Titles I, II, and III of the ADA that affects disabled persons in numerous areas of

² See, *supra* in STATUTORY PROVISIONS INVOLVED, 42 U.S.C. § 12101. Findings and purpose, and the ADA Amendments Act of 2008, 110 PL 325, Sec. 2. Findings and Purposes, subsection (a)(1) (“Congress intended that the Act . . . provide broad coverage.”). And, “[e]ven . . . [if an] offending policy excludes only a tiny number of disabled individuals, the ADA demands that the interests of those individuals be protected.” *Dudley v. Hannaford Bros. Co.*, 333 F.3d 299, 312 (1st Cir. 2003).

human activity including education, employment and public housing. The Court’s intervention is warranted.

I. THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT HAS ENTERED A DECISION IN CONFLICT WITH DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS ON THE SAME IMPORTANT MATTER INVOLVING ADA PROTECTION OF DISABLED PERSONS.

The Tenth Circuit decision that the ADA does not allow for a “second chance” accommodation conflicts with decisions in the First, Second and D.C. Circuits.

First Circuit

“In *Dudley [v. Hannaford Bros. Co.]*, 333 F.3d 299 (1st Cir. 2003)], the First Circuit found that a second chance – a reconsideration of a decision – could be required under the ADA.” *Singh v. George Washington University*, 368 F. Supp. 2d 58, 71 (D.D.C. 2005).³

³ Travel of the *Singh* case: *Singh v. George Washington University*, 368 F. Supp. 2d 58 (D.D.C. 2005), *reconsideration denied*, 383 F. Supp. 2d 99 (D.D.C. 2005), *Singh v. George Washington Univ. Sch. Of Med. & Health Scis.*, 439 F. Supp. 2d 8 (D.D.C. 2006), *remand, vacating* 439 F. Supp. 2d 8; *Singh v. George Washington Univ. School of Med.*, 508 F.3d 1097 (D.C. Cir. 2007), *clarified on remand*, 597 F. Supp. 2d 89 (D.D.C. 2009), *aff’d*, 667 F.3d 1 (D.C. Cir. 2011), *rehearing, rehearing en banc denied*, 2012 U.S. App. LEXIS 5834 (D.C. Cir. 2012), *cert. denied*, 568 U.S. 821 (2012), 54 ALR Fed.2d 641.

Plaintiff Dudley had a disability that caused him to appear drunk. After being refused a purchase of liquor he explained his situation, but the store still refused the sale because of a store policy forbidding reconsideration of a decision not to sell. In this Title III 42 U.S.C. § 12182(b)(2)(A)(ii) case,⁴ the First Circuit held that requiring an exception or modification to the store’s “refusal to reconsider policy” for disabled persons was reasonable and necessary given the policy’s discriminatory effect. The court upheld the district court’s injunction requiring the store to abandon its refusal to reconsider policy. *Dudley, supra* at 308-11.

The First Circuit recognized that such “a bright-line rule . . . offers certain administrative efficiencies. . . . But even though an individualized inquiry will consume more resources and involve less logistical ease, such an inquiry is precisely what the ADA requires. *See PGA Tour*, 532 U.S. at 690 . . . (noting that the ADA has a ‘basic requirement that the need of a disabled person be evaluated on an individual basis’). . . .” *Id.* at 310.

“This makes perfect sense, as Congress, in enacting the ADA, explicitly warned that ‘overprotective rules and policies’ erect discriminatory barriers to people with disabilities. . . . We hold, therefore, that the ADA bars ‘Hannaford’s unrelenting refusal to reconsider’ policy.” *Id.*

⁴ See fn. 1.

Second Circuit

Doe v. New York University, 666 F.2d 761 (2d Cir. 1981), a Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 case, analogous to an ADA Title II claim,⁵ involved a dismissed student seeking readmission to the medical school as an accommodation under Section 504. NYU was not entitled to summary judgment, because there was a substantial factual issue as to Doe being otherwise qualified to continue her studies in spite of her disability which was the cause of misconduct. The after-the-fact “second chance” nature of relief sought was not an impediment in this Second Circuit decision.

D.C. Circuit

Contrary to the Tenth Circuit decision in Mr. Profita’s case where the court found that timing of the requested accommodation instead of effectiveness was the determinant (“last minute accommodation” requests prevent the “reasonableness inquiry,” App. 14), the D.C. Circuit in *Singh v. George Washington Univ. School of Med.*, 508 F.3d 1097, 1105 (D.C. Cir. 2007),⁶ a Title III 42 U.S.C. § 12182(b)(2)(A)(ii) case⁷ where reconsideration of dismissal of a medical student and reinstatement were allowed, decided that the issue of

⁵ “[W]e treat claims under the two statutes [, Title II of the ADA and Section 504 of the Rehabilitation Act,] identically.” *Henrietta D. v. Bloomberg*, 331 F.3d 261, 272 (2d Cir. 2003).

⁶ See fn. 3.

⁷ See fn. 1.

“timeliness” of the request for accommodation was part of an “underlying reasonableness [inquiry].”

GW argued that Singh’s request was untimely as she did not notify the school of her diagnosis or disability until the faculty Committee had already recommended her dismissal. Her request came between this final Committee decision and the formal dismissal letter. The D.C. Circuit Court stated, by way of dicta, that it “need not address the case of the plaintiff who, once ousted [by the formal dismissal letter] seek[s] reinstatement under the ADA.” *Id.* at 1105. Validity of an accommodation request coming after issuance of a formal dismissal letter was left open. To the extent that an accommodation decision would come down to such an arbitrary “before or after formal dismissal letter” demonstrates the absurdity of the timing-based approach versus a rational efficacy and reasonableness method of deciding ADA “second chance” accommodation cases. Foreshadowing how the court would rule in deciding the case of a “once ousted” student, “timeliness” of Singh’s request was held to be part of the *PGA Tour* “reasonableness inquiry,” *id.*, contrary to the Tenth Circuit’s position.

II. THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW INVOLVING ADA PROTECTION OF DISABLED PERSONS THAT HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

Although this Court has spoken as to the requirement of an “individualized reasonableness inquiry” and efficacy in deciding accommodation cases, *PGA Tour* and *Barnett, supra*, those decisions did not specifically address an after-the-fact second chance accommodation. Despite these general Supreme Court guidelines, which should have been applied by the Tenth Circuit and certain other circuits where there is a request for a second chance accommodation, the courts are in disarray with conflicting standards for such after-the-fact requests for ADA accommodation.

The lack of consistency of a standard applicable to second chance accommodation results in unpredictability of ADA protection, a kind of institutionalized discrimination in itself. Congress mandates “*consistent . . . standards addressing discrimination against individuals with disabilities. . .*” (emphasis added) 42 U.S.C. § 12101(b)(2). The following array of “second chance” caselaw, both allowing and disallowing second chance accommodation, with differing approaches, while not all-inclusive, exemplifies the need for a clear, consistent, and thereby fair “second chance” standard to be established by this Court.

A. Circuit and District Court Decisions by Circuit *Allowing* “Second Chance” ADA Accommodation.

First Circuit

See Dudley v. Hannaford Bros. Co., 333 F.3d 199 (1st Cir. 2003), discussed *supra* at pp. 9, 10 herein.

Second Circuit

See Doe v. New York University, 666 F.2d 761 (2d Cir. 1981), discussed *supra* at p. 11 herein.

In *Garcia v. State Univ. of N.Y. Health Sci. Ctr.*, 2000 U.S. Dist. LEXIS 13561 (E.D.N.Y. 2000), *aff’d*, 280 F.3d 98 (2d Cir. 2001), a Title II after-the-fact reinstatement accommodation case, where SUNY had dismissed the plaintiff from its medical program after he failed certain classes and before he was subsequently diagnosed with a learning disability, the court found that the school’s proposal for “readmission [with retake of the failed courses]”⁸ evidenced a reasonable accommodation. . . .” *Id.* at *37.

In *Super v. J.D’Amelia & Assoc., LLC*, 2010 WL 3926887 (Dist. Conn. 2010), an ADA Title II “second chance” accommodation case, the question was whether a mentally ill person who commits a crime at

⁸ The Tenth Circuit and the district court in the present case characterize Mr. Profita’s accommodation request for readmission with retake of the last two clinical rotations (App. 5) as a request to “overlook,” for “excusal,” “absolution” and to “ignore” the two rotations. (App. 8, 25, 26, 27)

her federal housing is categorically barred from seeking a reasonable accommodation of qualification to continue public housing while she obtains mental health treatment. The court denied the motion to dismiss which was premised upon the “no second chance” theory drawn from the employment misconduct cases such as *Siefken v. Village of Arlington Hgts.*, 65 F.3d 664 (7th Cir. 1995) (discussed *infra*).

Sandra Super’s request for a second chance exception to defendant’s neutral rule barring continued rental was “cognizable as an ‘accommodation’ under . . . [Title II of the] ADA. . . .” *Super*, 2010 WL 3926887 at *13. The court reasoned that causationally “but for her mental illness, she would not have needed to request an exception . . . ,” *id.* at *10; and, moreover, what is helpful in understanding the rationale behind application of the “second chance” or “no second chance” rule is the court’s explanation of the “effectiveness” determinant:

“[No second chance] caselaw] can be generally unified as expressing the point that a request for . . . [a second chance] accommodation is valid only if it will effectively enable the person to perform the essential functions. . . . cf. *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 401 . . . (2002) (defining, in ADA case, an “accommodation” in terms of its [enabling] effectiveness). In all of the [employment misconduct] . . . decisions [defendants cite], the requested “second chance” would be an ineffective way of ensuring . . . perform[ance]. . . . [A] second chance by itself [in these cases] offers no

additional safeguard . . . of effectiveness. . . . [Sandra Super’s] request is distinguishable from the defendants’ . . . cases . . . because she is seeking psychiatric treatment . . . [, and u]nlike the diabetic employment cases, Super did not have adequate . . . therapy before . . . the requested accommodation [of continued housing]. The accommodation, therefore, is not a return to the status quo.

Id. at *7. The accommodation of qualifying Sandra Super for continued housing benefits, because she was seeking psychiatric treatment, effectively enabled her to perform the essential function of keeping her public housing without being a threat. *Id.*

Super was authority for the recognition in *Siniscallo v. Town of Islip Housing Auth.*, 865 F. Supp. 2d 307, 342 (E.D.N.Y. 2012), that “[s]econd chance accommodation’ has been adopted as a reasonable accommodation by a number of courts.”

In the case at bar, the Tenth Circuit specifically rejected *Super* and the reasoning of this line of cases (App. 14):

[T]he district court’s reasoning in *Super* is not binding on us and we do not find it persuasive, particularly given the analysis in *Dewitt*. . . . [The] argument that decisions in second-chance accommodation cases “do not turn on [the] timing of the requested accommodation” but on the “effectiveness of the accommodation” . . . is contrary to *Dewitt*. . . .

In *McInerney v. Rensselaer Polytechnic Inst.*, 688 F. Supp. 2d 117 (N.D.N.Y. 2010), an analogous ADA Title III 42 U.S.C. § 12182(b)(2)(a)(ii) “second chance” accommodation case, the court held that “[t]he question of whether a proposed accommodation is reasonable is fact-specific and must be evaluated on a case-by-case basis.” *Id.* at 125. The plaintiff sought “re-activation of his student status,” surviving motion for summary judgment.

D.C. Circuit

See *Singh v. George Washington Univ. School of Med.*, 508 F.3d 1097 (D.C. Cir. 2007), discussed *supra* at pp. 11, 12 herein.

In *Singh v. George Washington University*, 368 F. Supp. 2d 58 (D.D.C. 2005), the same case, *see again* fn. 3 for travel of the case, where a dismissed medical student’s “request for reconsideration, like Dudley’s [, *Dudley* discussed *supra* at p. 8 herein,] . . . [was found to be] a reasonable request for a modification,” *id.* at 71, the court explained that:

The second chance doctrine, in so far as it is a doctrine, works to deny already accommodated and at-fault plaintiffs from winning an endless string of new accommodations after each failure. The doctrine does not apply to plaintiffs who, through no fault of their own, have not yet had a chance to get the modifications they need. See *Dudley v. Hannaford Bros. Co.*, 333 F.3d 299 (1st Cir. 2003).

The district court in *Singh*, *id.* at 70, notes in dicta that *Ferrell v. Howard Univ.*, 1999 U.S. Dist. LEXIS 20900 (D.D.C. 1999), *aff'd without opinion*, 254 F.3d 315 (D.C. Cir. 2000), would prohibit readmission of a student who subsequently learns of a disability, where the school did not have reason to know of the disability prior to dismissal. This position as to reinstatement is succeeded by the 2007 D.C. Circuit's decision in *Singh*, 508 F.3d at 1105, using the "reasonableness inquiry."

**B. Circuit and District Court Decisions by
Circuit *Not Allowing* "Second Chance"
ADA Accommodation.**

Second Circuit

Notwithstanding the decisions in *Doe*, *Garcia*, *Super*, and *McInerney*, *supra*, the Second Circuit, in *McElwee v. County of Orange*, 700 F.3d 635 (2d Cir. 2012), decided that second chance accommodation for workplace misconduct caused by a disability is unreasonable "as a matter of law," without engaging in the efficacy or "reasonableness inquiry." *Id.* at 641. Whether that strict workplace misconduct rule would be applicable in all employment contexts, or expanded to any performance-based "second chance" situation as the Tenth Circuit has done, poses a question the answer to which is precarious ADA protection.

Fourth Circuit

In *Martinson v. Kinney Shoe Corp.*, 104 F.3d 683 (4th Cir. 1997), an ADA Title I wrongful discharge case, where the plaintiff did not prevail because he was not otherwise qualified, the court by footnote added that “misconduct – even misconduct related to a disability – is not itself a disability. . . .” *Id.* at fn. 3.

Martinson was cited as authority in *Halpern v. Wake Forest Univ. Health Sci.*, 669 F.3d 454, 465 (4th Cir. 2012), where a medical student was dismissed for unprofessional behavior. The court determined that Halpern’s request for readmission was “not a disability accommodation, but ‘a second chance to better control [his] treatable medical condition [causing behavior problems]’ This, however, ‘is not a cause of action under the ADA’ [according to *Martinson* and *Hill v. Kansas City Area Transp. Auth.*, 181 F.3d 891, 894 (8th Cir. 1999)].” *Hill* is discussed *infra* at p. 21 herein.

In *Zimmeck v. Marshall Univ. Bd. of Governors*, 106 F. Supp. 3d 776 (S.D.W.V. 2015), another case involving a medical student dismissed for behavioral problems caused by an impairment, the district court relied on *Halpern*, *Martinson* and *Hill*, *supra*, in not allowing for a “second chance” accommodation.

The “behavioral” or “unprofessional conduct” decisions would seem to fall into an auxiliary second chance rule alongside employment misconduct cases. Whether a “misconduct/unprofessional conduct/no second chance” rule would apply to any performance-based circumstance hangs as a Damocles sword over

disabled persons who may require a second chance accommodation to perform.

Fifth Circuit

Burch v. Coca-Cola Co., 119 F.3d 305 (5th Cir. 1997), an ADA Title I case, involved denial of a return to work accommodation for a recovering alcoholic, because “a ‘second chance’ or a plea for grace is not an accommodation as contemplated by the ADA. See *Siefken* at 666. . . .”

Seventh Circuit

In *Siefken v. Village of Arlington Hgts.*, 65 F.3d 664 (7th Cir. 1995), an ADA Title I case, a diabetic police officer was terminated for disability-caused “misconduct,” erratically driving his squad car while suffering a severe diabetic reaction. Summary judgment was affirmed for defendant because of the plaintiff’s failure to control his known diabetes symptoms. “When asked what accommodation Siefken would request, his counsel replied, ‘A second chance.’ But this is not an accommodation, as envisioned in the ADA.” *Id.* at 666.

This *Siefken* case is utilized by the courts to exclude disabled persons who are not at fault for failure to control symptoms of a disability. *See, e.g., Caniano, infra* at *4, and *Dewitt, supra* at 1316, particularly as *Dewitt* forms the basis for decision with Mr. Profita. (App. 10, 13, 14, 17) Again, *Singh v. George Washington University*, 368 F. Supp. 2d 58, 71 (D.D.C. 2005),

quotation set out *supra* at p. 17 herein, would exempt not at fault disabled individuals from application of a “no second chance” rule.

Eighth Circuit

Hill v. Kansas City Area Transp. Auth., 181 F.3d 891 (8th Cir. 1999), another Title I case, involved an employee who asked for a second chance to better control her hypertension medication. Her “second chance” accommodation request was denied as “not a cause of action under the ADA.” *Id.* at 894. *Hill* was also cited as authority for the *Dewitt* decision, *supra* at 1316, which case also forms the basis for decision with Mr. Profita.

Ninth Circuit

In *Caniano v. Johnson Controls, Inc.*, 1999 U.S. App. LEXIS 20648 (9th Cir. 1999), a Title I case, the plaintiff former employee argued that defendant failed to provide reasonable accommodation of rehire when the disability became known after the company had terminated him. Summary judgment was granted to the employer because the plaintiff did not demonstrate that rehiring was a reasonable ADA accommodation for a newly diagnosed disability of dysthymia that had caused unexcused absences. The court found that “reinstatement is not an accommodation required under the Act. See *Siefken*. . . .” *Id.* at *4.

Siefken came up again in *Equal Empl. Opportunity Comm’n v. Walgreen*, 34 F. Supp. 3d 1049 (N.D. Cal. 2014), where, conversely, the court discounted it by stating: “The Court will not follow the reasoning of an out of circuit decision from 1995, in light of contrary and much more recent Ninth Circuit decisions which explicitly import an employee’s disability into the causation analysis. . . .” *Id.* at 1055. Second chance accommodation of rehire was viable, with fact issues existing as to causation of the employee performance problem. There appears to be a conflict as to ADA second chance accommodation even within the Ninth Circuit.

Tenth Circuit

See Dewitt, discussed *supra* at pp. 6, 7 herein, the “employment misconduct/no second chance” decision that the Tenth Circuit has now expanded in Mr. Profita’s case. (App. 10, 13, 14, 17)

D.C. Circuit

See Ferrell v. Howard Univ., 1999 U.S. Dist. LEXIS 20900 (D.D.C. 1999), *aff’d without opinion*, 254 F.3d 315 (D.C. Cir. 2000), disallowing second chance accommodation, discussed *supra* at p. 18 herein.



CONCLUSION

The conflict and uncertainty that exists as to application and scope of “second chance” ADA accommodation calls out for clarification by this Court.

The “second chance” doctrine should not foreclose the *PGA Tour* “reasonableness inquiry” associated with 42 U.S.C. § 12182(b)(2)(A)(ii) based solely upon timing of an accommodation request. The effects of a disability are often not known until there is an issue with performance. Accommodation requests that come during or after a performance problem are entitled to an evaluation as to efficacy and reasonableness aimed at enabling successful performance. This is the basic objective of the ADA and ADAAA, as specifically stated in these statutes and per this Court’s guidance in *PGA Tour* and *Barnett*.

The position taken by the Tenth Circuit that “[t]he ADA was not designed to give disabled individuals a second chance” is unacceptable in light of the ADA’s purpose and the ADAAA mandate to provide “broad coverage” under the Act.

For the reasons stated herein, Petitioner respectfully requests that the petition for a writ of certiorari be granted.

Respectfully submitted,

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