

IS THE FAILURE TO REASONABLY ACCOMMODATE A STANDALONE CAUSE OF ACTION OR DOES IT REQUIRE AN ADDITIONAL ADVERSE ACTION?

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The question of whether a plaintiff may succeed in demonstrating a violation of the New Jersey Law Against Discrimination based only upon the failure to accommodate remains an open question. Cases where the failure to accommodate has not resulted in a termination, suspension, demotion, or some other adverse job action will be rare and very fact dependent. At some point, our Supreme Court will need to answer the big question, but it is clear that the Court will not do so until they are presented with the proper fact pattern.

Test #1 - The Interactive Process

The genesis of the controversy regarding whether the failure to accommodate can be a standalone cause of action began with Tynan v. Vicinage 13 of Superior Ct., 351 N.J. Super. 385, 400-01 (App. Div. 2002). In that case, the Court held that an employer has an obligation to engage in an interactive process with the employee and her physician when the employee requests a reasonable accommodation, and that the failure to do so constitutes a violation of the Law Against Discrimination. The Appellate Division adopted a test, first set forth in an ADA case, Taylor v. Phoenixville School Dist., 184 F.3d 296, 319-20 (3d. Cir. 1999) for proving failure to participate in the interactive process:

To show that an employer failed to participate in the interactive process, a disabled employee must demonstrate: (1) the employer knew about the employee's disability; (2) the employee requested accommodations or assistance for her disability; (3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and (4) the employee could have been reasonably accommodated but for the employer's lack of good faith.

Following Tynan, the Third Circuit adopted this test not only for determining whether there was a failure to engage in an interactive process, but to prove, under the LAD, that the employer failed to reasonably accommodate. *See, e.g.* Armstrong v. Burdette Tomlin Memorial Hosp., 438 F.3d 240 (3d. Cir. 2006).

One of the best explanations of how the failure to engage in interactive process interplays with other statutes, such as the Family Medical Leave Act, is contained in a wonderfully written unpublished opinion by District Judge Jerome B. Simandle in Brown v. Dunbar Armored, Inc. 2009 WL 4895237 (D.N.J. 2009). The opinion is attached.

Test #2 - Disability Discrimination

The Taylor case had not actually created a standalone cause of action for disability discrimination where there was a failure to engage in the interactive process. The Third Circuit had originally stated a different four part test for determining a *prima facie* case for violation of the ADA:

in order for a plaintiff to establish a prima facie case of discrimination under the ADA, the plaintiff must show: “(1) he is a disabled person within the meaning of the ADA; (2) he is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and (3) he has suffered an otherwise adverse employment decision as a result of discrimination.” Taylor, supra, 184 F.3d at 306 (quoting Gaul v. Lucent Techs., 134 F.3d 576, 580 (3d Cir.1998)).

Yet, four years later, in Armstrong v. Burdette Tomlin Memorial Hospital, 438 F.3d 240 (3d Cir. 2006), the Third Circuit applied Test #1 instead of Test #2. The confusion has continued through the decade following Tynan. Does the failure to reasonably accommodate or the failure to engage in an interactive process constitute an actionable discrimination claim in the absence of some other adverse action?

The biggest hurdle in addressing this issue has been for the Courts to find a case where the employee can provide a *prima facie* case of discrimination without an accompanying adverse action. In all of the cases cited above, the employee had been terminated and therefore the question of separate adverse action was not in play. In Victor v. State, however, there was not a separate adverse action, and so it seemed the elusive question would finally be answered.

VICTOR v. STATE - The Supreme Court Cites a Third Test, Then Punts

The Supreme Court agreed to take up this precise issue in Victor v. State, 203 N.J. 383 (2010). In Victor, a primary issue reviewed by the Court was whether a failure to reasonably accommodate could stand alone as a cause of action for disability discrimination under the New Jersey LAD in the absence of any adverse action. Mr. Victor was a State Police Officer who brought a claim for race discrimination and retaliation. A minor component of the case involved an allegation that the Defendant failed to accommodate a back problem for a four hour shift. The entire reasonable accommodations claim was limited to the four hours. Nevertheless, this minor factual issue presented a case of first impression as to whether a reasonable accommodation claim can stand on its own in the absence of adverse action. The Supreme Court addressed it in great detail.

The Supreme Court began with the *prima facie* analysis set forth in Tynan v. Vicinage 13 of the Superior Court of New Jersey, supra:

To show that an employer failed to participate in the interactive process, a disabled employee must demonstrate: 1) the employer knew about the employee's disability; 2) the employee requested accommodations or assistance for his or her disability; 3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and 4) the employee could have been reasonably accommodated but for the employer's lack of good faith.

Contrary to the Defendant's argument, the Supreme Court provided substantial support

for this *prima facie* analysis of a reasonable accommodation, and the test, which does not require a showing of adverse action, remains the appropriate test under the New Jersey LAD. Victor at 145-49.

The Supreme Court then analyzed Federal case law and discussed at great length a Third Test - the *prima facie* test adopted by the Seventh Circuit, which does not require adverse action to demonstrate a failure to reasonable accommodate under the ADA:

To make out a claim under the ADA an individual must show: 1) that she is disabled; 2) that she is otherwise qualified to perform the essential functions of the job with or without reasonable accommodation; and 3) that the employer took an adverse job action against her because of her disability *or* failed to make a reasonable accommodation.

Victor at 419, *citing* Stevens v. Ill. Dep't of Transp., 210 F.3d 732, 736 (7th Cir.2000). (*emphasis as in original*).

Having made a detailed analysis of Federal law, the Supreme Court explained why New Jersey should follow a course providing broader protections to employees:

Although the question therefore remains unsettled in the federal courts, our LAD's broad remedial purposes and the wide scope of its coverage for disabilities as compared to the ADA support an expansive view of protecting rights of persons with disabilities in the workplace. The LAD's purposes suggest that we chart a course to permit plaintiffs to proceed against employers who have failed to reasonably accommodate their disabilities or who have failed to engage in an interactive process even if they can point to no adverse employment consequence that resulted. Such cases would be unusual, if not rare, for it will ordinarily be true that a disabled employee who has been unsuccessful in securing an accommodation will indeed suffer an adverse employment consequence.

Victor at 420-21 (citations omitted).

The Supreme Court then went on to list examples of circumstances where the failure to reasonably accommodate could be, in and of itself, an adverse action. In fact, the Court was hard pressed to come up with a single circumstance in which a failure to reasonably accommodate would not result in an adverse action:

That is, the disabled employee who is denied a requested reasonable accommodation necessary to perform the job's essential functions will generally, as a result, not be hired or promoted, or will be discharged. Indeed, it is difficult for us to envision factual circumstances in which the failure to accommodate will not yield an adverse consequence. But there may be individuals with disabilities who request reasonable accommodations, whose requests are not addressed or are denied, and who continue nonetheless to toil on.

Perhaps in those circumstances the employee could demonstrate that the

failure to accommodate forced the employee to soldier on without a reasonable accommodation, making the circumstances so unbearable that it would constitute a hostile employment environment. But there also might be circumstances in which such an employee's proofs, while falling short of that standard, would cry out for a remedy. We cannot foresee all of the factual settings that might confront persons with disabilities and, although hard to envision, we therefore cannot entirely foreclose the possibility of circumstances that would give rise to a claim for failure to accommodate even without an identifiable adverse employment consequence.

Victor at 421-22.

Ultimately, the only reason that the Supreme Court stopped short of adopting this test is because it found that Mr. Victor was not disabled, and therefore failed to make out a *prima facie* case for other reasons. So, the Supreme Court punted, but provided future Courts a detailed analysis.

BOTTOM LINE

Practitioners should assume that adverse action will need to be demonstrated in order to prevail in a claim for failure to provide reasonable accommodations or failure to engage in the interactive process. Ordinarily, such a failure will result in an adverse job action. Where the employee has not been terminated, demoted, suspended, or transferred to a less favorable position, plaintiff's counsel will need to demonstrate a physical injury arising from the failure to accommodate or else prove adverse action through a series of minor actions taken against an employer, as explained in the CEPA case of Green v. Jersey City Bd. Of Educ., 177 N.J. 434, 448 (2003) (“adverse employment action taken against an employee in the terms and conditions of employment,” N.J.S.A. 34:19-2e, can include, as it did in this case, many separate but relatively minor instances of behavior directed against an employee that may not be actionable individually but that combine to make up a pattern of retaliatory conduct).