No.

IN THE
SUPREME COURT OF THE UNITIES STATES

KATHLEEN WARREN, PETITIONER

v.

VOLUSIA COUNTY FLORIDA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12111 *et seq.* establishes a duty upon employers to engage in an interactive process with a disabled employee to identify and seek reasonable accommodations and, if so, is the process triggered upon notice of the disability and a desire for accommodations, or must the employee specifically identify and request a particular reasonable accommodation such that if there is a defect in the request (such as using the word "retraining" rather than "reassignment") or in the method of communicating the request (such as using a personal physician or a worker's compensation attorney), the employer need do nothing and has no duty to try to accommodate the employee by interactively seeking to identify reasonable accommodations?

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Petitioner, Kathleen Warren, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported. It is reproduced in the Appendix at App. 1a. The opinion of the District Court granting Respondent's Renewed Motion for Judgment as a Matter of Law is unreported and is reproduced in the Appendix at App. 10a.

STATEMENT OF JURISDICTION

The Court of Appeals judgment was entered on July 5, 2006. A timely petition for rehearing was denied on August 29, 2006. Appendix at App. 34a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 42 United State Code, Section 12112(a)

Discrimination.

(a) **General rule**

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) **Construction**

As used in subsection (a) of this section, the term "discriminate" includes-

…

(5) (A) 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.

STATEMENT OF THE CASE

Petitioner asserts that a request for an accommodation made by Petitioner's workers compensation attorney to Respondent's attorney and employees was sufficient to trigger an interactive process to identify a reasonable accommodation for a disabled employee under the ADA despite a failure to use certain "magic words". Thus, the jury's verdict, in favor of plaintiff should not have been disturbed.

The Eleventh Circuit's decision conflicts with the authoritative decisions of the other United States Courts of Appeal that have addressed the issue because it states that before an employer has any responsibilities to engage in an interactive process to identify a reasonable accommodation for a disabled employee, the burden is entirely on plaintiff to specifically identify and request a particular reasonable accommodation to the employer. The other circuits hold that once the employer has notice of the employee's disability and desire for accommodation,

the ADA requires the employer to engage in an interactive process with the employee to jointly identify particular reasonable accommodations.

Plaintiff Kathleen Warren was a corrections officer for the County since 1989. On September 27, 1993, Mrs. Warren sustained an on-the-job injury which aggravated pre-existing rheumatoid arthritis. As the result of that injury and the complications therefrom, Plaintiff was unable to return to her current position but able to work other positions in the Department of Corrections and other County jobs.

Mrs. Warren regularly and periodically informed the County of her condition, limitations, intentions, and abilities from October 28, 1993 through May 2, 1997 and beyond through reports from her doctor, the County's doctor, the County's short and long term benefit insurance company, and employer required incident reports.

The County unilaterally ceased workers compensation benefits on December 3, 1993 and instructed Mrs. Warren to apply for unpaid medical leave which she did. The County never communicated with Mrs. Warren nor did it seek to accommodate her known disability in any way from 1993 until she was terminated in April, 2001.

In April, 1997, Plaintiff's worker's compensation attorney asked the County to assist Mrs. Warren by retraining her for some other position. The County

denied the request. Not until 2000, did the County notify Mrs. Warren that it intended to terminate her employment. On March 28, 2001, the County sent written notice to Plaintiff that it intended to terminate her general leave of absence and Plaintiff was advised for the first and only time to contact the Corrections Administration to inquire regarding the availability of ADA accommodations.

A Notification of Right to Sue was received from the Equal Employment Opportunity Commission through the Department of Justice, Civil Rights Division on or about July 30, 2003 and this action was commenced within 90 days of the receipt of the Notification of Right to Sue.

Plaintiff sued pursuant to the ADA seeking compensatory damages, equitable relief, and the attorney's fees, costs and disbursements of this action. The trial judge bifurcated the trial and a four day trial was held resulting in a jury verdict in favor of plaintiff on liability on September 13, 2005. A special verdict specifically concluded that Mrs. Warren or her representative requested an accommodation, the requested accommodation was reasonable; and the County unreasonably refused the accommodation.

Defendant filed a Renewed Motion for Judgment as a Matter of Law on September 23, 2005. A final judgment in favor of defendant was entered October 18, 2005 following an order granting defendant's renewed motion for judgment as a matter of law entered October 17, 2005. Plaintiff filed a notice of appeal on

November 16, 2005. The panel issued an opinion entered on July 5, 2006 affirming the ruling of the district court. A timely motion for rehearing en banc was denied on August 29, 2006.

The Eleventh Circuit's decision essentially holds that there is no interactive process requirement in the ADA because if there is a defect in the form or manner of the request, such as using the word "retraining" rather than "reassignment", the request was *ipso facto* unreasonable. The sufficiency of the request turns on which word was used or omitted and the identity and authority of the person making the request. The other circuits avoid such a Draconian result by requiring an employer to assist the employee in identifying reasonable accommodations in an informal interactive process after notice of the disability and the desire for accommodation. The form and manner of the notice and the desire for accommodation can take many forms and do not require magic words of inclusion or poison words such as "retraining". Similarly, the fact of notice and not the manner of communicating the notice is dispositive, such that it need not come from the employee herself but from other sources which reasonably convey the extent of the employee's disability and desire for accommodation.

REASONS FOR GRANTING THE PETITION

In conflict with the other circuits considering the issue, the Eleventh Circuit has never expressly held that the ADA requires an employer to engage in an interactive process with the employee to identify reasonable accommodations, including reassignment. *Cf. Beck v. Univ. of Wisc. Bd. of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996), with *Willis v. Conopco, Inc.*, 108 F.3d 282, 285 (11th Cir. 1997) and *Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1256 n.2 (11th Cir. 2001).

The Eleventh Circuit has avoided squarely addressing whether such a duty exists by finding that employees in various situations failed to trigger or otherwise comply with the interactive process even if one hypothetically exists. *Willis v. Conopco,* 108 F.3d 282 (11th Cir. 1997); *Lucas v. W.W. Grainger Inc.*, 257 F.3d 1249, n. 2 (11th Cir. 2001); *Earl v. Mervyns Inc.*, 207 F.3d 1361, 1367 (11th Cir. 2000); *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278 (11th Cir. 1997).

In our case, the Eleventh Circuit similarly holds that even if such a duty exists, Mrs. Warren failed to trigger it by not specifically identifying and requesting a particular reasonable accommodation. Specifically, the panel held that even though Mrs. Warren's attorney requested the County to assist her in finding another position within her capabilities, such a request was *ipso facto* not a

request for a specific reasonable accommodation because it used the word "retraining" not reassignment. Moreover, it refused to consider the numerous doctor's reports submitted to the County as requests for accommodations because the doctor was not Mrs. Warren's agent for the purpose of requesting ADA accommodations from the County.

The Eleventh Circuit, therefore, holds that requests for accommodations under the ADA must be made by specifically authorized agents and cannot contain the word "retraining". If either mistake is made by the employee, the employer can simply refuse to consider any accommodations and never be obligated to request more information or otherwise participate in an interactive process even if it is proved at trial that such accommodations existed, were vacant, and the employee was qualified for the positions without retraining. In holding such formalities necessary to trigger any theoretical interactive process, the Eleventh Circuit is in direct conflict with the other circuits considering the issue.[1]

In *Equal Empl. Opportunity Commn. v. Sears*, 417 F.3d 789 (7th Cir. 2005) the Seventh Circuit held that the notice necessary to trigger the interactive process "requires *at most* that the employee indicate to the employer that she has a

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[1] The Fourth Circuit has evidently not ruled one way or the other on whether the interactive process is mandatory or what would trigger it. The D.C. Circuit and the Federal Circuit appear to adopt the interactive process but do not define its triggers or parameters. *Office of the Architect of the Capitol v. Office of Compliance*, 361 F.3d 633 (Fed. Cir. 2004); *Breen v. Dept. of Transportation*, 282 F.3d 839 (D.C. Cir. 2002).

disability and desires an accommodation." *Sears*, 417 F.3d at 803 (emphasis added) (citations omitted). It notes that in some cases, an employee may not even need to explicitly request an accommodation and that the key is notice to the employer, not the employee specifically identifying a particular accommodation. That is the purpose of the process: "to determine the extent of the disability and what accommodations are appropriate and available." *Sears*, 417 F.3d at 804 (citation omitted). "Where notice is ambiguous as to the … desired accommodation, but it is sufficient to notify the employer that the employee may have a disability that requires accommodation, the employer must ask for clarification." *Sears*, 417 F.3d at 804 (citation omitted).

The Third Circuit in *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296 (3d Cir. 1999) analyses the manner and form of the notice required to trigger the interactive process. It then favorably cites the EEOC compliance manual that all that is necessary is notice "that the employee wants assistance for his or her disability." *Phoenixville*, 184 F.3d at 313. The "notice does not have to be in writing, be made by the employee, or formally invoke the magic words 'reasonable accommodation' …" *Phoenixville*, 184 F.3d at 313.

> What matters under the ADA are not formalisms about the manner of the request, but whether the employee or a representative for the employee provides the employer with enough information that, under the circumstances, the employer can be fairly said to know of both the disability and desire for an accommodation.

Phoenixville, 184 F.3d at 313.

In *Tobin v. Liberty Mut. Ins. Co.*,433 F.3d 100, 108 (1st Cir. 2005) the First Circuit holds "once the employer becomes aware of the disability of an employee, he is expected to engage in a meaningful dialogue with the employee to find the best means of accommodating that disability."

The Second Circuit also finds that an interactive process is required by the ADA "by which employers and employees work together to assess whether an employee's disability can be reasonably accommodated." *Lovejoy-Wilson v. Noco Motor Fuel Inc.*, 263 F.3d 208, 218 (2nd Cir. 2001).

In *Cutrera v. Board of Sup'rs of Louisiana State University*, 429 F.3d 108 (5th Cir. 2005) the Fifth Circuit states:

> In general ... it is the responsibility of the individual with the disability to inform the employer that an accommodation is needed. Once such a request has been made, [t]he appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the qualified individual with a disability. … However, when an employer's unwillingness to engage in a good faith interactive process leads to a failure to reasonably accommodate an employee, the employer violates the ADA.

Cutrera, 429 F.3d at 112 (internal quotes and citations omitted).

The Eleventh Circuit's decision sets a different standard by stating that the request for accommodation must be "specific" and "identified". In *Cutrera*, the employee was unable to suggest any accommodation before termination, but the court held that the employer's "awareness" of the employee's disability and

intention to return to work "triggered the [employer's] obligation to participate in an interactive process with Cutrera to attempt to identify a reasonable accommodation for Cutrera's disability." *Cutrera*, 429 F.3d at 113.

In *Smith v. Henderson*, 376 F.3d 529, 535 (6th Cir. 2004) the Sixth Circuit found that since the employer was aware of the employee's disability and her need to work restricted hours, a factfinder could infer that the employee's letter constituted a request for an accommodation even though the letter did not use the word "accommodation" or specifically mention that she was seeking to delegate job duties because of her disability.

The Eighth Circuit holds:

> Where the employee requests accommodation, the employer must engage in an "informal, interactive process" with the employee to identify … the potential reasonable accommodations to overcome those limitations. An employer hinders this process when: the employer knows about the employee's disability; the employee requests accommodations *or assistance*; the employer does not in good faith assist the employee in seeking accommodations; and the employee could have been reasonably accommodated but for the employer's lack of good faith.

Battle v. United Parcel Service, Inc., 438 F.3d 856, 862 - 63 (8th Cir. 2006) (emphasis added) (citations omitted).

These cases can be reconciled with prior Eleventh Circuit cases but not with the decision herein. In the previous cases, the failure to specifically identify a reasonable accommodation was a failure of proof at trial and not an essential element of the trigger.

In *Willis v. Conopco*, 108 F.3d 282 (11th Cir. 1997) plaintiff argued that the ADA did not require a request for a specific accommodation but merely a general request for assistance to trigger the interactive process. But, since Willis did not prove the existence of any reasonable accommodation at trial, the question of the trigger was moot. Similar proof problems of identification of reasonable accommodations at trial are present in *Lucas v. W.W. Grainger Inc.*, 257 F.3d 1249, n. 2 (11th Cir. 2001); *Earl v. Mervyns Inc.*, 207 F.3d 1361, 1367 (11th Cir. 2000); and *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278 (11th Cir. 1997)

At trial, there is no question that Mrs. Warren specifically identified many jobs which were open, available, and permanent for which she was qualified without retraining. The Eleventh Circuit essentially held that Mrs. Warren must have specifically requested these jobs as part of her request for accommodation or the employer was under no duty to engage in an interactive process because "the burden is entirely on the plaintiff."

If the Eleventh Circuit's standard is true, it is hard to understand the "interactive" part of the interactive process. If the burden is entirely on the employee to formally request a specifically identified reasonable accommodation before the employer has any responsibilities then there would be no need for

interaction or for any process at all. The employee would just specifically identify the accommodation and the employer would have to comply.

The Ninth Circuit certainly does not place such a Draconian burden on the employee. It writes:

> we join explicitly with the vast majority of our sister circuits in holding that the interactive process is a mandatory rather than a permissive obligation on the part of employers under the ADA and that this obligation is triggered by an employee or an employee's representative giving notice of the employee's disability and the desire for accommodation. In circumstances in which an employee is unable to make such a request, if the company knows of the existence of the employee's disability, the employer must assist in initiating the interactive process.

Barnett v. U.S. Air, Inc., 228 F.3d 1105 (9th Cir. 2000) vacated on other grounds, *U.S. Airways, Inc. v. Barnett,* 535 U.S. 391, 122 S.Ct. 1516, 152 L.Ed.2d 589 (2002).

The Tenth Circuit is in accord holding

> The interactive process must ordinarily begin with the employee providing notice to the employer of the employee's disability … and expressing a *desire for reassignment* if no reasonable accommodation is possible in the employee's existing job. Once the employer's responsibilities … are triggered … both parties have an obligation to proceed in a reasonably interactive manner to … identify an appropriate reassignment opportunity if any is reasonably available.

Albert v. Smith's Food & Drug Centers, Inc., 356 F.3d 1242, 1252 (10th Cir. 2004) (emphasis added).

Thus, no other circuit places the burden entirely on the employee to identify and specifically request, through a specifically authorized representative, an accommodation that does not require any retraining, is open, available, and

permanent, is not a promotion or in any other way unreasonable *before* the employer has any obligations whatsoever to interact with the employee to see if a reasonable accommodation might exist. Even where, as here, it is proven at trial that numerous reasonable accommodations existed for which no retraining was necessary, plaintiff is simply out of luck because she didn't have herself or a specially authorized representative specifically identify and request those particular accommodations in 1997.

The circuit court also implies that Mrs. Warren's failure to contact a specific department, personnel, was significant. This is another example of the formalism of the Eleventh Circuit's approach as opposed to its sister circuit's emphasis on substance over form. The County conceded that it never attempted to afford Mrs. Warren assistance with finding another position. Not until March 2001 was she was told to contact Corrections Administration to discuss reasonable ADA accommodations. The County's employees testified at trial that a requirement to report to personnel as if one was not already a County employee would make no sense and was not required of anyone else.

In short, the Eleventh Circuit has isolated itself against its sister circuits by holding that when requesting an accommodation under the ADA, the burden is entirely on the employee to do everything perfectly. If Mrs. Warren had done the same things in Illinois rather than Florida, there is little doubt that the Seventh

Circuit would not have disturbed the jury's verdict. The same result would apply for Kentucky, Louisiana, Arkansas, New Mexico, California, Pennsylvania or any other state outside of the jurisdiction of the Eleventh Circuit. The ADA is remedial legislation for the protection of the disabled. The decision appealed from herein has turned it into a trap for the unwary. Under this decision, any mistake in the form or manner of a request for accommodation can keep the employer from engaging in an interactive process despite notice of the disability and desire for accommodation. Such an approach eviscerates the ADA and the statutory duty to reasonably accommodate known disabilities.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully Submitted,

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