

**IN THE UNITED STATES DISTRICT COURT**

EMPLOYEE,

Plaintiff,

v.

EMPLOYER,

Defendant.

**MEMORANDUM IN OPPOSITION TO DEFENDANT'S**  
**MOTION FOR SUMMARY JUDGMENT**

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Plaintiff Employee (“Employee”), by and through her undersigned counsel, respectfully submits her Memorandum in Opposition to Defendant’s Motion for Summary Judgment.

## **INTRODUCTION**

As demonstrated below, Defendant Employer (“Employer”) is not entitled to summary judgment. Employer’s primary argument is that Employee was not a qualified individual with a disability. That argument fails for a number of reasons, not the least of which is that Employee actually performed the position for years with a reasonable accommodation, before Employer took away that reasonable accommodation. Employer also argues that Employee failed to participate in the interactive process of determining a reasonable accommodation. To the contrary, Employee provided Employer with all relevant information it needed to identify a reasonable accommodation and Employer delayed the process for an unreasonable length of time.

## **STATEMENT OF DISPUTED MATERIAL FACTS**

Employee disputes that she did not tell anyone at Employer that she could not attend the December 18, 2012 performance meeting. She testified that she informed the pharmacy manager that she would not be at work, due to a concussion. Even though she had informed Employer that she would be absent that day, Employer conducted the meeting without her. (Employee Depo., Ex. 3, p. 164).

Employee also disputes Employer’s statement of fact that she could not perform the essential functions of her position, with or without a reasonable accommodation. She asserts that she performed the essential functions of the position, from 2006 until December 2012, with the reasonable accommodation of using a stool to sit occasionally. (Employee Depo., Ex. 3, pp. 166, 168, 169).

### **ARGUMENT**

Summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). A genuine dispute means that “a reasonable jury could return a verdict for the nonmoving party.” *Libertarian Party of Va. v. Judd*, 718 F.3d 308, 313 (4th Cir. 2013) (quoting *Dulaney v. Packaging Corp. of Am.*, 673 F.3d 323, 330 (4th Cir. 2012)). A material fact is one that “might affect the outcome of the suit under the governing law.” *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986)).

In considering a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party and summary judgment may not be granted simply because the court believes that the movant is more likely to prevail at trial. *Jacobs v. N.C. Administrative Office of the Courts*, 780 F.3d 562, 568 (4th Cir. 2015). The court is not permitted to weigh the evidence or make

credibility determinations. *Mercantile Peninsula Bank v. French (In re French)*, 499 F.3d 345, 352 (4th Cir.2007) (citing *Anderson*, 477 U.S. at 255, 106 S. Ct. 2505).

To demonstrate a failure to accommodate under the Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq.*, a plaintiff must show that (1) she is an individual with a disability; (2) the employer had notice of her disability; (3) she could perform the essential functions of her job with a reasonable accommodation; and (4) the employer refused to make a reasonable accommodation. *Reyazuddin v. Montgomery County, Maryland*, 789 F.3d 407, 414 (4th Cir. 2015) (citing 29 U.S.C.A. § 794(a); *Wilson v. Dollar Gen. Corp.*, 717 F.3d 337, 345 (4th Cir. 2013)).

Defendant concedes that Employee meets factors (1) and (2) and focuses its motion for summary judgment on factors (3) and (4). As discussed below, Employee has demonstrated she is a qualified individual with a disability and that Employer's significant delay in making a reasonable accommodation was unreasonable. At the very least, there is a genuine issue of material fact on those issues that precludes summary judgment.

## **I. EMPLOYEE IS A QUALIFIED INDIVIDUAL WITH A DISABILITY**

Under the ADA, a qualified individual with a disability is a person “who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” 42 U.S.C. § 12111(8). Employee has already demonstrated that she is a qualified individual, in that she had

been performing the job of pharmacy technician for six years, with the reasonable accommodation of occasionally sitting on a stool.

Employer argues she is not a qualified individual with a disability, because she could not perform all of the essential functions of the position when seated. But that argument is flawed. The real question is whether she can perform the essential functions with a reasonable accommodation. In this case, the reasonable accommodation of occasionally performing her work seated. Because Employee performed her work satisfactorily from 2006-2012 and then again from 2013-2015, with occasional use of a stool as a reasonable accommodation, there is ample evidence that she is a qualified individual with a disability. She has clearly been meeting the essential functions of the position.

“The term essential functions means the fundamental job duties of the employment position the individual with a disability holds or desires. The term ‘essential functions’ does not include the marginal functions of the position.” 29 C.F.R. § 1630.2.

In this case, Employer has provided a job description that states that all of the tasks performed by a pharmacy technician in the pharmacy are “essential.” (Employee Depo., Ex. 3, p. 81). The only task not listed as essential relates to assisting other departments (*Id.*).

When determining whether a function of the pharmacy technician position is essential, certainly Employer's written description of the pharmacy technician job is relevant evidence. However, it is not, by itself, dispositive of the issue. In addition to the employer's judgment as to what functions are essential and any written job description, evidence of whether a function is essential may include the amount of time spent on the job performing the function; the consequences of not requiring the incumbent to perform the function; the work experience of past incumbents in the job; the current work experience of incumbents in similar jobs, and other factors. 29 C.F.R. § 1630.2; *see also Hill v. Harper*, 6 F. Supp. 2d 540, 543 (E.D. Va. 1998) (citing 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(n)).

The EEOC regulations provide three examples of situations in which a function would be considered essential: (1) the job exists specifically to perform the function; (2) the small size of the workforce requires all employees to be able to perform the function; or (3) the employee is hired for her expertise in performing the highly specialized function. 29 C.F.R. § 1630.2(n)(2)(i)-(iii).

In this case, factor (3) is irrelevant; the functions listed on the job analysis include such tasks as ringing up order, typing, tagging products, cleaning, etc., that would not be classified as "highly specialized."

For factor (2), Employee presented evidence that there are usually two pharmacists and five or six technicians on duty during her shift. (Employee Depo. p.

75). Given that there were usually four or five technicians in addition to Employee, there is evidence that the workforce is not small enough to require that all employees perform all functions.

As to factor (1), whether the job exists specifically to perform the function, that is a question that is primarily fact-based and not suitable for summary judgment. *See, e.g., Brown v. Smith*, 827 F.3d 609 (7th Cir. 2016). Employee has presented sufficient evidence that she could in fact meet the essential functions of the position. There is no dispute that she could do the tasks during most of her shift; Employer is arguing that she couldn't do them during the brief periods while she was seated.

In *Rohan v. Networks Presentations LLC*, 375 F.3d 266 (4th Cir. 2004), the Fourth Circuit tackled the issue of when an employee is meeting the essential functions of a position. In *Rohan*, an actress who suffered from PTSD had difficulty interacting with others, which was an essential function of her position. The court explained that because there was no dispute that she could interact with others to some extent, the relevant question was “whether her problems interacting with others rose to a level that made her unable to ‘perform’ this essential function within the meaning of the ADA.” *Rohan*, 375 F.3d at 279. The court noted that she had only missed part of one performance due to her inability to interact with others and that while she did have problems interacting with certain cast members, the court was unwilling to find that her “difficulties with social interaction in this one, narrow

aspect of her job establishes that she could not perform this essential function.” *Id.* at 280.

Similarly here, there is no dispute that Employee could perform all of the essential functions of her position during most of her shift. The question becomes whether any failure to meet essential functions for brief time periods rises to the level that affects the purpose of her employment. That she performed the job using the accommodation for a number of years is evidence that it did not.

In a recent Sixth Circuit case, the court considered a similar situation where an employee had been performing the job for years, but then the employer decided that it could no longer provide a reasonable accommodation. *Camp v. BI-LO, LLC*, 2016 WL 6134855 (6th Cir. 2016). Plaintiff-employee Camp, who had a back impairment due to scoliosis, had worked for the store for a number of years as a stock clerk, as part of a team of three employees. *Id.* at \*1. On one occasion, the crew failed to complete the stocking task on time because Camp could not lift some of the boxes and his co-workers had to complete some of his tasks. Because of that incident, the store management learned that Camp was unable to lift more than 35 pounds. The written job description for Camp’s position stated that a stock clerk needed to be able to lift 20-60 pounds frequently. *Id.* The store put Camp on leave after learning of his restriction; Camp filed suit under the ADA.

The district court granted summary judgment for the store, finding that because the job description required that Camp be able to lift more than 35 pounds, the lifting requirement was an essential function of the position and Camp was not a qualified individual with a disability. *Id.* However, the Sixth Circuit vacated the decision, holding that there was a material fact dispute as to whether Camp was a qualified individual with a disability. *Id.* at \*7. The court noted that the store had not submitted evidence outside of the job description as to whether heavy lifting was a significant percentage of the job, or that Camp’s inability to lift heavy loads was a burden on the store. *Id.* at \*4. The court pointed out that for year, Camp’s co-workers had worked around his inability to lift more than 35 pounds; therefore, there was evidence that there were not significant consequences due to Camp’s lifting restrictions. On the issue of whether summary judgment was appropriate, the court stated:

In this case we also must take into consideration that Camp fulfilled the duties of the job for years with his disability and the help of his coworkers. We do not “require blind deference to the employer's stated judgment” that the ability to lift more than 35 pounds is an essential function when ruling on a motion for summary judgment. The record contains facts that might allow a reasonable jury to discount Bi–Lo's reliance on the written job description as it relates to the necessity of the stock clerk lifting more than 35 pounds. In particular, Camp's actual on-the-job experience, and that of his coworkers, including his immediate supervisor, provide evidence to rebut Bi–Lo's contention that heavy lifting is in fact an “essential function” of the stock clerk job.

*Camp*, at \*5.

Although Employer argues that Employee cannot meet the essential functions of the position as stated in the job description, the fact that she had been performing the job for years prior to the removal of her reasonable accommodation is good evidence that she was meeting those functions. In addition, she continued to meet those essential functions from 2013 to 2015, after Employer once again provided her with a stool. As with the employee in *Camp*, Employer's argument that Employee cannot meet the essential functions of the position is defeated by the fact that she did perform the job satisfactorily for a number of years. Employer has presented no evidence that her occasional use of a stool is a burden on the store or affects a significant percentage of her job.

Employee has also shown that her occasional use of a stool was a "reasonable accommodation." A "reasonable accommodation" is defined as: "Modifications or adjustments to the work environment, or to the manner or circumstances under which the position is held or desired, is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position." 29 C.F.R. § 1630.2(o)(1)(ii). The reasonable accommodation Employee sought was occasional use of a stool for short periods when her condition had a flare-up.

There are many cases in which courts have noted that taking a complete break from work may be a reasonable accommodation. For example, it has been noted that

“Even if plaintiff could only perform essential functions with ‘break time’ and ‘other work shifts,’ ...she is not outside ADA coverage.” *Johnson v. SecTek, Inc.*, 2015 WL 502963, at \*11 (D. Md. 2015).

Clearly, an employee can perform no functions, essential or marginal, while on a break; the test is whether that employee can perform essential functions in the working time outside of the breaks. In other words, do the breaks allow the employee to do the job? Employer argues that Employee cannot be a qualified individual with a disability because she cannot perform the essential functions of the job while seated. But she was not requesting to be able to sit all the time; only occasionally. By Employer’s logic, an employee requesting occasional break time as a reasonable accommodation would have to demonstrate that she could perform the essential functions of the position while on a break, which is nonsensical.

Employee was not asking for break time during which she would perform no work; she was asking for a stool and the ability to potentially have slight delays in performing tasks. If occasional break time during which no functions of a position can be performed can be a reasonable accommodation, then clearly Employee’s request could be considered reasonable. *See also* U.S. Equal Emp. Opportunity Comm'n Enforcement Guidance No. 915.002, Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, "Types of Reasonable Accommodations Related to Job Performance" (Oct. 17, 2002) (stating that altering

when or how an essential or marginal function is performed may be a reasonable accommodation).

Employee's tenure in her job provides additional proof that she could perform the essential tasks of the pharmacy technician position. In *Johnson*, the plaintiff had been performing her job while taking medication for an underlying medical condition. When the employer discovered that she had a disability, it then failed to provide her with a reasonable accommodations. She had received excellent performance reviews during her tenure with the company and had not been disciplined. The court found that those facts gave rise to an inference that she was able to perform the essential functions of her position, with or without a reasonable accommodation. *Johnson*, 2015 WL 502963, at \*11. Similarly here, Employee has been performing the job of pharmacy technician for years, using the reasonable accommodation of occasionally using a stool as opposed to standing. This demonstrates that she can and has been performing the essential functions of her job, with a reasonable accommodation.

Cases with issues relating to essential functions and whether plaintiff could meet them are not good candidates for summary judgment. *See, e.g., Brown*, 827 F.3d 609 (inquiry as to whether employee can perform essential functions of the position with or without a reasonable accommodation is a factual question for the jury). This is true even where the answer might appear to be obvious. *See Taylor v.*

*Hampton Roads Regional Jail Authority*, 550 F. Supp. 2d 614 (E.D. Va. 2008) (question of whether one-handed person could perform the duties of a jail officer precluded summary judgment). In the present case, Employee worked as a pharmacy technician for years, using a stool occasionally. That fact would allow a reasonable jury to conclude that Employee could, with the reasonable accommodation of occasionally sitting on a stool, perform the essential functions of the position.

## **II. EMPLOYER REFUSED TO PROVIDE A REASONABLE ACCOMMODATION FOR EMPLOYEE**

Employer's delay in making available a reasonable accommodation for Employee was so lengthy as to be unreasonable. This is especially true in light of the fact that Employer already had knowledge of a reasonable accommodation that Employee had been using for years. The circumstances surrounding this case show that Employer's six month delay in providing Employee the same accommodation she had been using for years was unreasonable, in that it was a very lengthy delay to provide a simple accommodation.

An unreasonable delay in providing a reasonable accommodation may be actionable. Even though an employer engages at some level in the interactive process, a failure to accommodate may be found where there is an unreasonable delay. The employer is required to act in good faith and "the absence of good faith, including unreasonable delays caused by an employer, can serve as evidence of an ADA violation." *Pantazes v. Jackson*, 366 F. Supp. 2d 57, 70 (D.D.C. 2005); *see*

also *Garcia-Hicks v. Vocational Rehab. Admin.*, No. CV 13-1491 (FAB), 2015 WL 7720343, at \*4 (D.P.R. Nov. 30, 2015) ("An unreasonable delay in providing accommodations may also qualify as discriminating against a qualified individual on the basis of disability." (citing *Valle-Arce v. P.R. Ports Auth.*, 651 F.3d 190, 200 (1st Cir. 2011))).

Insight into the analysis of whether a delay is unreasonable may be found in EEOC Enforcement Guidance. EEOC Guidance states that "the employer should act promptly to provide the reasonable accommodation. Unnecessary delays can result in a violation of the ADA." U.S. Equal Emp. Opportunity Comm'n Enforcement Guidance No. 915.002, Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, "Requesting Reasonable Accommodation" Q&A 10 (Oct. 17, 2002). The Guidance further states:

In determining whether there has been an unnecessary delay in responding to a request for reasonable accommodation, relevant factors would include (1) the reason(s) for the delay, (2) the length of the delay, (3) how much the individual with a disability and the employer each contributed to the delay, (4) what the employer was doing during the delay, and (5) whether the required accommodation was simple or complex to provide.

*Id.* Q&A (10) n.38.

In this case, a review of the above factors provided by the EEOC shows that Employer's delay was unnecessary and unreasonable.

As to the length of the delay, the delay dragged on for over six months. While there is no bright-line test as to how many days or weeks is an unreasonable delay, courts have found a delay of several months to be unreasonable. *See Gupta v. Int'l Bus. Machines Corp. (IBM)*, No. 5:14- CV-01358-EJD, 2015 WL 7075691, at \*7 (N.D. Cal. Nov. 13, 2015) (evidence of employer's bad faith, which included a delay of three and one-half months, was sufficient to deny summary judgment for the employer). In this case, the six month period of time combined with other factors as discussed below could lead a reasonable jury to find that the delay was unreasonable.

As to whether the requested accommodation was simple or complex, it is clear that the accommodation was simple. Providing Employee with a stool for occasional use throughout the work period did not require any expense on Employer's part. It was a completely obvious accommodation that Employer had provided for Employee in the past. In addition, Employer provided stools to other employees for occasional use. (Employee Depo., Ex. 3, p. 93). Employee would note that this factor alone is evidence that refusing to provide a stool was her was unreasonable. *See, e.g., Riel v. Electronic Data Systems Corp.*, 99 F.3d 678 (5th Cir. 1996) (if disabled employee asks for an accommodation that employer regularly gives to nondisabled employees, e.g., extension of deadlines, employer cannot refuse).

A review of the reasons for the delay and what Employer was doing during the delay provides additional evidence that the delay was unreasonable. Employer

argues that the delay was caused by Employee; this issue is discussed below. Fundamentally, the delay comes down to the fact that Employer took six months to determine whether it could continue to provide the accommodation that it had provided Employee for six years: a stool. During the delay, Employer did not attempt to resolve the problem until it received a letter from Employee's attorney. Once Employer was put on notice of legal action, it suddenly decided that perhaps it could once again provide Employee with the reasonable accommodation it had provided for years.

On the factor of how much each party contributed to the delay, Employer argues didn't have all of the information from Employee that it needed to determine whether providing a stool for her to occasionally sit on was reasonable. But there are two problems with that arguments. First, Employer knew that Employee had been performing the job of pharmacy technician for years, using a stool as an accommodation. That alone was sufficient information for it to determine that the stool she requested to continue using was a reasonable accommodation. Second, even if Employee did not immediately supply Employer with every piece of documentation it requested, that does not excuse Employer from its failure to act for over six months. In a recent Maryland case, the court found that the employer was at fault where it failed to consult information it already had in its possession:

The County responds that Allen's "own failure to engage in the 'interactive process' caused the process to break down[.]" It is true that

Allen perhaps not always provided timely and consistent updates on his worsening condition either to his own specialist or to anyone with the County. This lack of communication may have contributed to his deteriorating condition. At the same time, Allen is not a doctor, nor is there any evidence that he withheld information intentionally...Finally, to the extent the County argues it “did not have the full medical picture ... because [Allen] himself had failed to provide it to the County [,]”, such failure did not cause the breakdown because the record shows the County failed even to check Allen's medical file before starting the demotion process.

*Allen v. Baltimore County, Md.*, 91 F.Supp.3d 722, 734 (D. Md. 2015) (internal citations omitted).

In the present case, Employee provided as much medical information as was possible. In fact, she provided medical information meeting the EEOC requirements. The EEOC Guidance on this topic states that an employee must provide information substantiating that she has an ADA disability and needs a reasonable accommodation. U.S. Equal Emp. Opportunity Comm'n Enforcement Guidance No. 915.002, Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, “Requesting Reasonable Accommodation” Q&A 7 (Oct. 17, 2002). Employer argues that she failed to provide medical information as to exactly how long a flare-up would last. But the precise details of her condition are not that exact. Her doctor explained that she would need to sit occasionally during the course of a work shift. That information, along with Employee’s work history, was sufficient for Employer to determine that occasional use of a stool was a reasonable accommodation.

## **CONCLUSION**

For the foregoing reasons, Plaintiff respectfully requests that this Court deny Defendant's Motion for Summary Judgment.