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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2012

(Argued: October 11, 2012 Decided: March 4, 2013)

Docket No. 11-3932

-----x
RODNEY MCMILLAN,

Plaintiff-Appellant,

-- v. --

CITY OF NEW YORK,

Defendant-Appellee.¹
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B e f o r e : WALKER, LIVINGSTON, and DRONEY, Circuit Judges.

Plaintiff-Appellant Rodney McMillan appeals from the August 23, 2011 order of the United States District Court for the Southern District of New York (Jed S. Rakoff, Judge) granting Defendant-Appellee the City of New York's motion for summary judgment. We hold that the district court's grant of summary judgment with regard to the disability discrimination claim and failure to accommodate claims was based on an incomplete factual analysis.

VACATED and REMANDED.

MICHAEL G. O'NEILL, New York, NY,
for Plaintiff-Appellant.

¹ The Clerk is directed to update the case's caption to reflect the corrected spelling of the plaintiff-appellant's name.

1 JANET L. ZALEON (Michael A. Cardozo,
2 Kristin M. Helmers, Andrea O'Connor,
3 on the brief), Corporation Counsel
4 of the City of New York, New York,
5 NY, for Defendant-Appellee.
6

7 JOHN M. WALKER, JR., Circuit Judge:

8 One of the central goals of the Americans with Disabilities
9 Act of 1990 ("ADA"), 42 U.S.C. § 12101 et seq., is to ensure that,
10 if reasonably practicable, individuals are able to obtain and
11 maintain employment without regard to whether they have a
12 disability. To accomplish this goal, the ADA requires that
13 employers provide reasonable accommodations to qualified
14 individuals. See id. § 12112(b)(5). This case highlights the
15 importance of conducting a fact-specific analysis in ADA claims.

16 It is undisputed that Rodney McMillan's severe disability
17 requires treatment that prevents him from arriving to work at a
18 consistent time each day. In many, if not most, employment
19 contexts, a timely arrival is an essential function of the
20 position, and a plaintiff's inability to arrive on time would
21 result in his failure to establish a fundamental element of a prima
22 facie case of employment discrimination. But if we draw all
23 reasonable inferences in McMillan's favor—as we must at summary
24 judgment—it is not evident that a timely arrival at work is an
25 essential function of McMillan's job, provided that he is able to

1 offset the time missed due to tardiness with additional hours
2 worked to complete the actual essential functions of his job.

3 In our view, the United States District Court for the Southern
4 District of New York (Jed S. Rakoff, Judge) did not conduct a
5 sufficiently detailed analysis of the facts that tend to undermine
6 the City's claim that a specific arrival time is an essential
7 function of McMillan's position before granting summary judgment
8 for the City. VACATED and REMANDED.

9 **BACKGROUND**

10 McMillan has schizophrenia, which is treated with calibrated
11 medication. Despite this impairment, McMillan worked for ten years
12 as a case manager for the City's Human Resources Administration
13 ("HRA") before assuming his present role in 1997 as a case manager
14 for the HRA Community Alternative Systems Agency ("CASA").
15 McMillan's current job duties include conducting annual home
16 visits, processing social assessments, recertifying clients'
17 Medicaid eligibility, making referrals to other social service
18 agencies, and addressing client concerns. He also meets with
19 clients daily in the office.

20 CASA's flex-time policy allows employees to arrive at the
21 building anytime between 9:00 and 10:00 a.m. Due to elevator wait
22 times, they are not considered late unless they arrive at the
23 office after 10:15 a.m. When an employee is late, the tardiness can
24 be approved or disapproved by a supervisor. When a tardiness is

1 approved, an employee may apply accumulated annual leave, sick
2 leave, or other "banked time" (i.e., additional hours worked) to
3 cover the time missed due to the late arrival and still be paid in
4 full. If the employee does not have or does not wish to use his
5 banked time, the time prior to the late arrival is unpaid. Under
6 their collective bargaining agreement, CASA employees are required
7 to take a one-hour break for lunch unless they receive prior
8 approval to work overtime through lunch, and under CASA's flex-time
9 policy, they may leave between 5:00 and 6:00 p.m. CASA employees
10 are expected to work approximately 35 hours per week, excluding
11 their one-hour break for lunch.

12 Although McMillan testified that he usually wakes between 7:00
13 and 7:30 a.m., his morning medications make him "drowsy" and
14 "sluggish." As a result, he often arrives late to work, sometimes
15 after 11:00 a.m. The City makes no allegations that McMillan
16 malingers; instead, it is undisputed that his inability to arrive
17 at work by a specific time is the result of the treatment for his
18 disability.

19 Prior to 2008, and for a period of at least ten years,
20 McMillan's tardy arrivals at CASA were either explicitly or tacitly
21 approved. At some time in 2008, his supervisor Loshun Thornton, at
22 her supervisor Jeanne Belthrop's direction, refused to approve any
23 more of McMillan's late arrivals. As explanation, Thornton stated

1 that she "wouldn't be doing [her] job if [she] continued to approve
2 a lateness every single day."

3 After Thornton stopped approving his late arrivals, McMillan
4 repeatedly made verbal requests for a later start time to avoid
5 being disciplined for tardiness. Thornton informed McMillan that a
6 later start time would not be possible because he could not work
7 past 6:00 p.m. without a supervisor present.

8 On June 9, 2008, Thornton and Belthrop held a "supervisory
9 conference" with McMillan to discuss his continued tardiness. A
10 memorandum describing the meeting noted that his late arrivals were
11 due to his medication. The memorandum also noted Thornton's request
12 that McMillan speak with his treating physician to determine if his
13 schedule could be altered. In October and December, his treating
14 psychiatrist wrote two letters stating that McMillan's medication
15 schedule should not be altered.

16 On May 8, 2009, McMillan was fined eight days' pay for his
17 late arrivals. In December 2009, Belthrop recommended additional
18 disciplinary action in light of McMillan's "long history of
19 tardiness." In March 2010, the City brought charges of "Misconduct
20 and/or Incompetence" against McMillan. On April 22, 2010, in a Step
21 II grievance hearing resulting from the March 2010 charges, a City
22 representative recommended that McMillan's employment be
23 terminated. McMillan's union representative argued that there were
24 mitigating circumstances due to McMillan's disability.

1 On March 23 and April 22, 2010, McMillan formally requested
2 accommodations for his disabilities,² including a later flex start
3 time that would permit him to arrive at work between 10:00 a.m. and
4 11:00 a.m. These requests were forwarded to Donald Lemons, the
5 Deputy Director of HRA's Equal Employment Opportunity Office, for
6 evaluation. After speaking with Thornton and others, but not with
7 McMillan, Lemons determined that McMillan's request for a later
8 flex start time could not be accommodated because there was no
9 supervisor at the office after 6:00 p.m. Ultimately, the City
10 reduced the recommended sanction of termination to a thirty day
11 suspension without pay.

12 Contending that the City's response to his request for
13 accommodations was insufficient, McMillan brought suit alleging
14 violations of the ADA, the New York State Human Rights Law, N.Y.
15 Executive Law § 290, et seq., and the New York City Human Rights
16 Law, N.Y.C. Administrative Code § 8-101, et seq. McMillan alleged
17 that he often worked past 7:00 p.m. and that the office is open
18 until 10:00 p.m., so that he could arrive late and still work 35
19 hours per week. Alternatively, McMillan asserted that he would be
20 willing to work through lunch to bank time. McMillan argued that

² In addition to his schizophrenia, McMillan was also born without a left arm, and therefore he requested a headset for voice activation software and a reduced caseload. The parties dispute the adequacy of the City's response to these requests. The district court dismissed these claims as well.

1 these suggested accommodations would allow him to complete the
2 essential functions of his position.

3 On August 23, 2011, the district court granted summary
4 judgment for the City and dismissed all of McMillan's claims with
5 prejudice. After noting that it could not distinguish between
6 absenteeism and tardiness, the district court observed that a court
7 was "required to give considerable deference to the employer's
8 judgment and its general policies" in "determining whether the
9 ability to arrive at work within a designated time period with some
10 degree of consistency is an essential function of plaintiff's job."
11 McMillan v. City of New York, No. 10 Civ. 4806 (JSR), 2011 WL
12 5237285, at *5, *6 (S.D.N.Y. Aug. 23, 2011). Because the City
13 "determined that an ability to consistently arrive at work within a
14 one-hour time frame is a fundamental requirement of plaintiff's
15 position," the district court granted summary judgment to the City
16 "on the ground that plaintiff cannot state a prima facie case of
17 disability discrimination because he has failed to demonstrate that
18 he could perform the essential functions of his job with or without
19 reasonable accommodation." Id. at *6. As an alternative basis for
20 its holding, the district court found that McMillan could not
21 demonstrate that the City's legitimate business reason for his
22 discipline—his repeated tardiness—was pretext for discrimination.

23 The district court also dismissed McMillan's claims that the
24 City failed to provide him with reasonable accommodations. The

1 district court concluded that McMillan's request for a later start
2 time was "unreasonable as a matter of law because [he] has failed
3 to demonstrate that he would be able to arrive at work on time even
4 if he were granted a later flex starting time." Id. at *7.

5 DISCUSSION

6 On appeal, McMillan challenges the district court's findings
7 (1) that arriving at work by 10:15 a.m. was an essential function
8 of his job; (2) that he was unqualified because of his tardiness,
9 which was undisputedly a result of his disability; (3) that his
10 requested accommodations were unreasonable; and (4) that his other
11 failure to accommodate claims were without merit. "We review an
12 award of summary judgment *de novo*, construing the evidence in the
13 light most favorable to the nonmoving party and drawing all
14 reasonable inferences in his favor." McElwee v. Cnty. of Orange,
15 700 F.3d 635, 640 (2d Cir. 2012).

16 "Claims alleging disability discrimination in violation of the
17 ADA are subject to the burden-shifting analysis originally
18 established by the Supreme Court in McDonnell Douglas Corp. v.
19 Green, 411 U.S. 792 (1973)." McBride v. BIC Consumer Prods. Mfg.
20 Co., 583 F.3d 92, 96 (2d Cir. 2009). In accordance with this
21 familiar standard,

22 [t]o establish a prima facie case under the ADA, a
23 plaintiff must show by a preponderance of the evidence
24 that: (1) his employer is subject to the ADA; (2) he was
25 disabled within the meaning of the ADA; (3) he was
26 otherwise qualified to perform the essential functions of

1 his job, with or without reasonable accommodation; and
2 (4) he suffered adverse employment action because of his
3 disability.

4
5 Sista v. CDC Ixis N. Am., Inc., 445 F.3d 161, 169 (2d Cir. 2006)

6 (quotation marks omitted). The parties do not dispute the first,
7 second, or fourth elements. The district court's decision turned on
8 its analysis of the question presented by the third: whether
9 McMillan was "otherwise qualified to perform the essential
10 functions of his job, with or without reasonable accommodation."

11 Id.

12 An employer may also violate the ADA by failing to provide a
13 reasonable accommodation. A plaintiff states a prima facie failure
14 to accommodate claim by demonstrating that

15 (1) plaintiff is a person with a disability under the
16 meaning of the ADA; (2) an employer covered by the
17 statute had notice of his disability; (3) with reasonable
18 accommodation, plaintiff could perform the essential
19 functions of the job at issue; and (4) the employer has
20 refused to make such accommodations.

21
22 McBride, 583 F.3d at 97 (quotation marks omitted).

23 In discrimination claims based both on adverse employment
24 actions and on failures to accommodate, the plaintiff "bears the
25 burdens of both production and persuasion as to the existence of
26 some accommodation that would allow [him] to perform the essential
27 functions of [his] employment." Id. at 97; Borkowski v. Valley
28 Cent. Sch. Dist., 63 F.3d 131, 137-38 (2d Cir. 1995).

1 **I. Determining the Essential Functions of a Position**

2 Although a court will give considerable deference to an
3 employer's determination as to what functions are essential, there
4 are a number of relevant factors that may influence a court's
5 ultimate conclusion as to a position's essential functions. Stone
6 v. City of Mt. Vernon, 118 F.3d 92, 97 (2d Cir. 1997) (stating that
7 relevant factors to consider include the employer's judgment,
8 written job descriptions, the amount of time spent on the job
9 performing the function, the mention of the function in a
10 collective bargaining agreement, the work experience of past
11 employees in the position, and the work experience of current
12 employees in similar positions (citing 29 C.F.R. § 1630.2(n)(2))).
13 "Usually, no one listed factor will be dispositive." Id. A court
14 must avoid deciding cases based on "unthinking reliance on
15 intuition about the methods by which jobs are to be performed."
16 Borkowski, 63 F.3d at 140. Instead, a court must conduct "a fact-
17 specific inquiry into both the employer's description of a job and
18 how the job is actually performed in practice." Id.

19 The district court appears to have relied heavily on its
20 assumption that physical presence is "an essential requirement of
21 virtually all employment" and on the City's representation that
22 arriving at a consistent time was an essential function of
23 McMillan's position. While the district court's conclusion would be
24 unremarkable in most situations, we find that several relevant

1 factors here present a somewhat different picture: one suggesting
2 that arriving on or before 10:15 a.m.—or at any consistent time—may
3 not have been an essential requirement of McMillan’s particular
4 job. For many years prior to 2008, McMillan’s late arrivals were
5 explicitly or implicitly approved. Similarly, the fact that the
6 City’s flex-time policy permits all employees to arrive and leave
7 within one-hour windows implies that punctuality and presence at
8 precise times may not be essential. Interpreting these facts in
9 McMillan’s favor, along with his long work history, whether
10 McMillan’s late and varied arrival times substantially interfered
11 with his ability to fulfill his responsibilities is a subject of
12 reasonable dispute.

13 This case highlights the importance of a penetrating factual
14 analysis. Physical presence at or by a specific time is not, as a
15 matter of law, an essential function of all employment. While a
16 timely arrival is normally an essential function, a court must
17 still conduct a fact-specific inquiry, drawing all inferences in
18 favor of the non-moving party. Such an inquiry was not conducted
19 here.³

³ The district court could not “discern a principled distinction between total absence from work on certain days and partial absence from work on most days,” because “the fundamental problem is that the employee is not physically present at the job site, an essential requirement of virtually all employment.” McMillan, 2011 WL 5237285, at *5. However, there is an important distinction between complete absence and tardiness in jobs that require work to be done at the office: an absent employee does not complete his

1 The City and district court relied on cases that are
2 distinguishable, because the plaintiffs' positions in those cases
3 absolutely required plaintiffs' presence during specific business
4 hours. The plaintiffs' requested accommodations of flexible start
5 times would have therefore impaired an essential function of their
6 jobs. See Guice-Mills v. Derwinski, 772 F. Supp. 188, 199 (S.D.N.Y.
7 1991), affirmed, 967 F.2d 794, 798 (2d Cir. 1992) (finding that "an
8 administrative shift commencing at 7:30 or 8:00 a.m. was an
9 essential requirement of the head nurse position" because the
10 plaintiff was a head nurse who supervised others); Carr v. Reno, 23
11 F.3d 525, 529 (D.C. Cir. 1994) (finding that a flexible arrival
12 time would not allow plaintiff to meet a specific 4:00 p.m. daily
13 deadline and that the failure to make this deadline would
14 constitute an undue hardship to the employer). These cases do not
15 hold that, as a matter of law, a specific starting time is an
16 essential function of all jobs. Indeed, the D.C. Circuit has

work, while a late employee who makes up time does. Similarly, while it may be essential in many workplaces that all tasks be performed by employees who are both physically present and supervised, these requirements are not invariably essential. Thus, depending on the requirements of the position, an employee might need to be physically present and supervised only for certain tasks. By way of example, and without expressing any view on the question, it might be necessary for a supervisor to be present when McMillan meets with clients in the office, but not when he fills out forms. The district court appears to have simply assumed that McMillan's job required at least seven hours of work each day and that the work could not be successfully performed by banking time on some days to cover tardiness on others, while working a total of at least 35 hours each week. A fact-specific inquiry, however, requires consideration of this possibility on remand.

1 distinguished Carr in finding that certain requests for flexible
2 schedules are not unreasonable as a matter of law. See, e.g., Breen
3 v. Dep't of Transp., 282 F.3d 839, 843 (D.C. Cir. 2002); see also
4 Ward v. Mass. Health Research Inst., Inc., 209 F.3d 29, 34-35 (1st
5 Cir. 2000) (noting that the employer bears the burden of
6 demonstrating that a regular and reliable schedule is an essential
7 job function).

8 On the present record, it appears to us that a reasonable
9 juror could find that arriving at a specific time was not an
10 essential function of the case manager position, provided that
11 McMillan still would be able to complete his work in a sufficiently
12 timely fashion. Accordingly, on the present record, the district
13 court erred in concluding that summary judgment was appropriate on
14 this basis.

15 **II. Performance of Essential Functions**

16 After the essential functions of the position are determined,
17 the plaintiff must demonstrate that he or she could have performed
18 these functions, with or without reasonable accommodation, at the
19 time of the termination or discipline. See Borkowski, 63 F.3d at
20 137-38. This burden is not heavy: "It is enough for the plaintiff
21 to suggest the existence of a plausible accommodation, the costs of
22 which, facially, do not clearly exceed its benefits." Id. at 138.
23 "Reasonable accommodations" may include adjustments to work
24 schedules or other job restructuring. See 45 C.F.R. § 84.12(b)

1 (2005). Of course, “[a] reasonable accommodation can never involve
2 the elimination of an essential function of a job.” Shannon v.
3 N.Y.C. Transit Auth., 332 F.3d 95, 100 (2d Cir. 2003).

4 McMillan has suggested that he could work through lunch and
5 work late in order to “bank” time. If his lunchtime overtime and
6 tardy arrivals were approved, he would then be able to apply this
7 banked time against future late arrivals. On this record, and
8 drawing all inferences in McMillan’s favor, we conclude that
9 McMillan has suggested a plausible accommodation, meeting his
10 burden at this stage of the analysis.

11 **III. Undue Hardship**

12 If a plaintiff suggests plausible accommodations, the burden
13 of proof shifts to the defendant to demonstrate that such
14 accommodations would present undue hardships and would therefore be
15 unreasonable. See Borkowski, 63 F.3d at 135, 138. An “undue
16 hardship” is “an action requiring significant difficulty or
17 expense.” 42 U.S.C. § 12111(10)(A).

18 The City already has a policy of allowing employees to “bank”
19 any hours they work in excess of seven hours per day and apply
20 banked time against late arrivals, provided that those late
21 arrivals are approved. Because there is no evidence that pre-
22 approving McMillan’s tardiness would constitute an undue burden on

1 the City, the question is whether McMillan would be able to bank
2 sufficient time to cover his late arrivals.

3 The district court correctly concluded that assigning a
4 supervisor to work past 6:00 p.m. would constitute an undue
5 hardship. However, McMillan was presumably unsupervised when he
6 made home visits for his clients or when he worked past 7:00 p.m.
7 It is unclear from this record whether his home visits or after-
8 hours work was supervised and, if not, whether McMillan could bank
9 these unsupervised hours.⁴

10 Even if McMillan could not bank post-6:00 p.m. time, he also
11 states that he would be willing to work through his one-hour lunch.
12 The City has a policy, based on a collective bargaining agreement,
13 of not allowing employees to work through lunch unless they receive
14 advanced approval. The district court concluded, without further

⁴ McMillan's request to work unsupervised after 6:00 p.m. is not unlike a request to work from home. Both accommodations are potentially problematic because they are unsupervised. We have implied, however, that unsupervised work might, in some cases, constitute a reasonable accommodation. See Nixon-Tinkelman v. N.Y.C. Dep't of Health & Mental Hygiene, 434 F. App'x 17, 20 (2d Cir. 2011) (summary order) (remanding to the district court to consider, inter alia, whether it would have been reasonable for the defendants to have allowed plaintiffs to work from home); DeRosa v. Nat'l Envelope Corp., 595 F.3d 99, 104 (2d Cir. 2010) (suggesting that employer had provided a reasonable accommodation by allowing employee to work from home). The majority of cases on this issue, however, find that requests to work without supervision are unreasonable. See Konspore v. Friends of Animals, Inc., No. 3:10cv613 (MRK), 2012 WL 965527, at *12 (D. Conn. Mar. 20, 2012) (citing cases). The question of whether McMillan can reasonably perform portions of his job without supervision, as he apparently has been permitted to do previously, should be considered on remand.

1 explanation, that "plaintiff's proposed accommodation could not
2 have been accommodated without undue hardship." McMillan, 2011 WL
3 5237285, at *8 n.5. We disagree. On the limited record before us,
4 such pre-approval does not strike us as "requiring significant
5 difficulty or expense." 42 U.S.C. § 12111(10)(A).

6 Additionally, although the parties do not discuss this in
7 their briefs, it might be the case that on some days McMillan would
8 be able to arrive (relatively) early. If he also worked through
9 lunch or stayed through 6:00 p.m. on those days, he would be able
10 to bank that time against future tardiness as well.

11 On the present record, we cannot find as a matter of law that
12 McMillan's suggested accommodations would constitute undue
13 hardships to the City and are therefore unreasonable.⁵ Accordingly,
14 McMillan states a prima facie case of discrimination based on his
15 disability and, at least with regard to his late arrivals,⁶ a prima
16 facie case for failure to provide accommodations.

⁵ The district court found McMillan's request to arrive by 11:00 a.m. "unreasonable as a matter of law because plaintiff has failed to demonstrate that he would be able to arrive at work on time even if he were granted a later flex starting time." McMillan, 2011 WL 5237285, at *7; see also McBride, 583 F.3d at 99-101. This analysis, however, is based on the district court's faulty assumption that no disputed factual issues exist as to whether a timely arrival was an essential function of the case manager position.

⁶ McMillan also brings failure to accommodate claims with regard to his request for software training and a reduced caseload. On remand, the district court should reconsider these claims in light of this opinion.

1 As a final matter, the district court found that, even if
2 McMillan could state a prima facie case of discrimination, he could
3 not demonstrate that the City's legitimate business reason for
4 disciplining him—his repeated tardiness—was pretextual.

5 While the burden-shifting McDonnell Douglas analysis is useful
6 in most discrimination cases, it is not helpful here. When the
7 reason given by the employer for the adverse employment action is
8 unrelated to the employee's disability, the McDonnell Douglas
9 approach can be used to weed out non-viable claims of
10 discrimination based on circumstantial evidence. When the parties
11 agree that the employer complains of conduct that is the direct
12 result of the employee's disability, however, there is no need to
13 evaluate whether the employer's adverse employment action made in
14 response to that conduct is pretextual. See Teahan v. Metro-N.
15 Commuter R.R. Co., 951 F.2d 511, 514, 516 (2d Cir. 1991).

16 Here, it is undisputed that McMillan was tardy because of his
17 disability and that he was disciplined because of his tardiness. In
18 other words, McMillan was disciplined because of his disability.
19 Pretext is not an issue in this case; instead, McMillan need only
20 demonstrate that, with reasonable accommodations, he could have
21 performed the essential functions of his job.

22 For the reasons given above, on this record, we cannot
23 conclude that a reasonable juror would find McMillan's claims to be
24 without merit. If the factual record is developed further, some or

1 all of McMillan's claims may not survive summary judgment. On the
2 record before us, however, dismissal is premature.

3 **CONCLUSION**

4 For the foregoing reasons, the district court's order granting
5 summary judgment to the City with regard to the federal, state, and
6 city law claims is VACATED and the case is REMANDED for further
7 proceedings consistent with this opinion.