No. 12-5123

In the United States Court of Appeals
for the District of Columbia Circuit

LINDA SOLOMON,

Plaintiff-Appellant,

v.

THOMAS J. VILSACK, SECRETARY OF AGRICULTURE,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia (No. 1:07-CV-01590)
The Honorable John D. Bates

Amicus Curiae Brief of the Metropolitan Washington Employment Lawyers Association in Support of Appellant and Urging Reversal

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Les Alderman
Alderman, Devorsetz & Hora PLLC
1025 Connecticut Avenue, N.W.
Suite 615
Washington, D.C. 20036
Telephone: 202-969-8220
lalderman@adhlawfirm.com

Denise M. Clark
Clark Law Group, PLLC
1250 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036
Telephone: 202-293-0015
dmclark@benefitcounsel.com

Counsel to Amicus Curiae

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Certificate as to Parties, Rulings, and Related Cases

(A) **Parties and Amici.** Except for the Metropolitan Washington Employment Lawyers Association, appearing as *amicus curiae* on behalf of Plaintiff-Appellant, all parties appearing before the district court and in this Court are listed in the Brief of Appellant.

(B) **Rulings Under Review.** References to the rulings at issue appear in the Brief of Appellant.

(C) **Related Cases.** This case has previously been before this Court, *Solomon v. Vilsack*, 628 F.3d 555 (D.C. Cir. 2010). There are no related cases.

Rule 29(c)(1) Corporate Disclosure Statement

The Metropolitan Washington Employment Lawyers Association is an association. It does not have any corporate parent. It does not have any stock, and therefore no publicly held company owns 10% or more of the stock of this *amicus*.

Rule 29(c)(5) Statement

No party or party's counsel authored or funded this brief, and no person other than *amicus curiae* covered the printing costs of the brief.

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ADA	Americans with Disabilities Act
MWELA	Metropolitan Washington Employment Lawyers Association

JURISDICTIONAL STATEMENT

MWELA agrees with the statement of jurisdiction in the Brief for Appellant.

ISSUES PRESENTED FOR REVIEW[1]

1. Whether an employee's request for a reasonable accommodation for a disability was, in and of itself, protected activity, so that any materially adverse action taken by the employer could support a retaliation claim.

2. Whether an employee seeking a flexible work schedule is still entitled to an individualized inquiry by the employer into the reasonableness of the requested accommodation under the Rehabilitation Act.

STATUTES AND REGULATIONS

The statutes and regulations are contained in the Brief for Appellant.

STATEMENT OF THE FACTS

We refer to the Appellant's brief.

SUMMARY OF ARGUMENT

Amicus respectfully submits that this Court should clarify the law governing retaliation claims under the Rehabilitation Act (and the Americans with Disabilities Act) by confirming that an employee's request for a reasonable accommodation is, by itself, protected activity, so that an employee can bring a retaliation claim based upon the employer taking a materially adverse employment

[1] Amicus is only addressing two of the issues raised in Ms. Solomon's brief.

almost immediately action after the employee's request.

This Court should further clarify the law governing disability discrimination claims by allowing employees to bring such claims based on the employer's failure to provide an individualized inquiry into her request for a flexible work schedule as a reasonable workplace accommodation for a disability.

STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE

The Metropolitan Washington Employment Lawyers Association (MWELA) submits the following pursuant to D.C. Cir. R. App. P. 29(b). MWELA, founded in 1991, is a professional association and is the local chapter of the National Employment Lawyers Association, a national organization of attorneys who specialize in employment law. MWELA conducts continuing legal education programs for its over 300 members, including an annual day-long conference which usually features one or more judges as speakers.

MWELA has frequently submitted *amicus curiae* briefs in cases of interest to this Court, the Fourth Circuit, the D.C. Court of Appeals, and the U.S. District Court for the District of Columbia. *See, e.g.*, *West v. Potter*, 2013 WL 2476936 (D.C. Cir. June 11, 2013); *Talavera v. Shah*, 638 F.3d 303 (D.C. Cir. 2011); *Solomon v. Vilsack*, 628 F.3d 555 (D.C. Cir. 2010); *Barbour v. WMATA*, 374 F.3d 1161 (D.C. Cir. 2004); *Trout v. Secretary of Navy*, 317 F.3d 286 (D.C. Cir. 2003).

MWELA's members represent employees, including those who need

reasonable accommodations on the job and those who also need disability retirement benefits. MWELA's members, and their clients, have an important interest in the clarity and proper interpretation of the relationship between a federal employee's request for a reasonable accommodation, including a flexible work schedule, and the employee's rights under federal anti-disability discrimination statutes, including those prohibiting retaliation in the workplace.

People with disabilities continue to face barriers to employment and adverse actions within the workplace. The ADA Amendments Act of 2008 reaffirmed the need for a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities," 42 U.S.C. § 12101, and the federal government should be a model employer of adults with disabilities, 29 U.S.C. § 791(b); 29 C.F.R. § 1614.203. To accomplish these objectives, the Rehabilitation Act's requirement that federal employers reasonably accommodate employees' disabilities must be enforceable, and federal agencies must be held accountable when they fail to provide required accommodations, or retaliate against employees who have made reasonable requests for accommodation in the workplace.

MWELA previously filed an *amicus* brief on the first appeal of this case. *See Solomon v. Vilsack*, 628 F.3d 555 (D.C. Cir. 2010).

On February 11, 2013, this Court granted MWELA's motion for leave to participate as *amicus curiae*.

ARGUMENT

I. An employee's request for a reasonable accommodation for a disability is, in and of itself, protected activity, so that any materially adverse action taken by the employer can support a retaliation claim.

The District Court held that Ms. Solomon could not bring a claim of retaliation, resulting from the denied accommodation, because "any claim under the Rehabilitation Act for denial of an accommodation request would also provide an identical retaliation claim. That would make no sense." *Solomon v. Vilsack*, 845 F. Supp. 2d 61, 77 (D.D.C. 2012).

This Court should find that the District Court's analysis runs contrary to the plain language of the ADA and a wealth of cases interpreting federal anti-retaliation statutes broadly. *See, e.g.*, *Kasten v. Saint-Gobain Performance Plastics Corp*., 563 U.S. __, 131 S. Ct. 1325 (2011) (addressing the scope of protected activity under the Fair Labor Standards Act); *Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 555 U.S. 271 (2009); *Burlington Northern & S.F. Ry. Co. v. White*, 548 U.S. 53, 67 (2006) ("Interpreting the antiretaliation provision to provide broad protection from retaliation helps ensure the cooperation upon which accomplishment of the Act's primary objective depends."); *NLRB v. Scrivener*, 405 U.S. 117, 121-22 (1972) (recognizing that retaliation is protected under the National Labor Relations Act).

The Americans with Disabilities Act ("ADA") contains an antiretaliation

provision which states:

> It shall be unlawful to coerce, intimidate, threaten or interfere with any individual in the exercise or enjoyment of, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by the chapter.

42 U.S.C. § 12203(b). The plain language of the ADA itself, which broadly protects the "exercise or enjoyment" of any right under the ADA, *see* 42 U.S.C. § 12203(b) (*supra*) and 42 U.S.C. § 12112 (b)(5), therefore includes the exercise of the right to seek a reasonable accommodation as protected activity.

The ADA imposes a duty on the employer to engage in an interactive process to determine the appropriate accommodation:

> Once a qualified individual with a disability has requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the [employee] with a disability.

29 C.F.R. § 1630, App. § 1630.9.

The ADA recognizes that the ultimate accommodation may be different than that which the employee had initially requested: "The interactive process the ADA foresees is not an end in itself; rather it is a means for determining what reasonable accommodations are available to allow a disabled individual to perform the essential job functions of the position sought." *Sieberns v. Wal-Mart Stores, Inc.*, 125 F.3d 1019, 1023 (7th Cir. 1997).

The ADA's antiretaliation provision also protects employees who do not succeed on an underlying disability discrimination claim. *Luna v. Walgreen Co.*, 575 F. Supp. 2d 1326, 1343 (S.D. Fla. 2008), *aff'd*, 347 F. App'x 469 (11th Cir. 2009) ("It would be sufficient for her to show that she had a good faith, objectively reasonable belief that she was entitled to such an accommodation under the ADA.").

The district court's analysis of Ms. Solomon's retaliation claim starts and ends with whether the accommodations requested were reasonable. Having concluded that the accommodations that Ms. Solomon sought were unreasonable, the court determined that the denial of those accommodations could not have been materially adverse. *Solomon*, 845 F. Supp. 2d at 76-77. The district court's ruling also ignores the ADA retaliation framework adopted by this Court – did Ms. Solomon proffer evidence from which a reasonable jury could find that the Agency retaliated against her in ways that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Mogenhan v. Napolitano*, 613 F.3d 1162, 1166 (D.C. Cir. 2010) (*citing Burlington Northern*, 548 U.S. at 68).

Although the district court acknowledged that "It is possible to imagine circumstances under which a later denial of an accommodation request could constitute retaliation for making an earlier request," *Solomon*, 845 F. Supp. 2d at 76-77, the court failed to analyze any factors that removed Ms. Solomon's case

from the theoretically protected case. Specifically, the court failed to consider whether an employer's refusal to engage in the interactive process could qualify as materially adverse conduct for the purposes of a retaliation claim.

In the typical case, the employer's failure to engage in the interactive process would qualify as a separately actionable violation of the ADA. This Court should find that recognition of claims such as that by Ms. Solomon is crucial to ensure that the interactive process is not ignored or avoided on the incorrect theory that the accommodation requested was allegedly unreasonable. Without recognizing the existence of a retaliation cause of action, the district court's decision creates a safe harbor for employers who engage in retaliatory conduct against employees who seek accommodation. Under the district court's approach, an employer is free to engage in materially adverse conduct toward the employee so long as the employer can ultimately prove that the employee's initial request for an accommodation was "unreasonable."

The employer's refusal to engage in the interactive process, and leaving the employee without any accommodation at all – which frequently leads to either the employee's termination or resignation – strongly deters others from seeking an accommodation for their own disabilities. *Burlington Northern*, 548 U.S. at 68 (a materially adverse is one that "well might have dissuaded a reasonable worker from making or supporting" a claim).

The district court attempted to side-step any analysis of whether the employer's actions were "materially adverse" by reference to the conclusion that the requested accommodation had been unreasonable. *Solomon*, 845 F. Supp. 2d at 77 ("the denial of an unreasonable accommodation request does not constitute adverse action."). But the district court's conclusion fails to consider that engaging in the interactive process may have led to the identification of an accommodation that would have been acceptable to both sides. The employer's conduct foreclosed that result.

Therefore, this Court should find that an employee's request for a reasonable accommodation for a disability is, in and of itself, protected activity, so that any materially adverse action taken almost immediately afterwards by the employer could support a retaliation claim.

II. An employee can bring a Rehabilitation Act claim based on the employer's failure to provide an individualized inquiry into her request for a flexible work schedule as a reasonable accommodation.

The District Court incorrectly held that there is a category of accommodation requests that is *per se* unreasonable. Specifically, the District Court held that: "an employee's request to work whenever he or she wants is unreasonable as a matter of law." *Solomon*, 845 F. Supp. 2d at 71 (relying on *Carr v. Reno*, 23 F.3d 525 (D.C. Cir. 1994)). *Carr*, however, should not be read for the broad, *per se* rule that the District Court described. (Moreover, as described in Ms.

Solomon's appellate brief, she was not even seeking that kind of an accommodation.)

In *Carr*, the employee suffered from a condition that resulted in periodic dizziness, nausea and vomiting, usually in the early morning and when the employee travelled. *Carr*, 23 F.3d at 527. The U.S. Attorney's Office expected Ms. Carr, a GS-5 Coding Clerk, to keep regular hours of 9:00 to 5:30 each day. That schedule was necessary because the coding clerks had to code papers relating to recent arrests for documents that were picked up at 4:00 pm daily, so that they could be entered into a database. Unfortunately, due to the unpredictable nature of her condition, Ms. Carr often missed work and was unable to call her supervisors to inform them of her absence; her absences occasionally lasted for periods of months, and the employer had to transfer her work to other employees. *Id.* at 527.

The U.S. Attorney's attempts to accommodate Ms. Carr included permitting her to "work on her schedule" and "come and go at will." Nevertheless, Ms. Carr was still unable to work an eight-hour day; and, consequently, the Agency terminated Ms. Carr in March 1990. *Id.* at 528. A crucial fact in *Carr* was that the employee was not able to show up for work – no matter how flexible the working hours were and that – despite the accommodations given – Ms. Carr failed to appear for work, sometimes for months at a time.

In *Carr*, it was undisputed that: (1) the plaintiff's work was time-sensitive;

(2) failure to complete the work on time resulted in substantial negative consequences for the employer; (3) the work had to be done at the office; and (4) the plaintiff was unable to reliably appear for work in the office. Under these facts, this Court determined that there was no obligation to conduct a further individualized inquiry into the availability of reasonable accommodations. *Id.* at 530 ("The 'individualized inquiry' need be no more extensive than the facts of the case demand.").

Consistent with 29 C.F.R. § 1630.2 (m)[2], this Court recognized that "an essential function of any government job is an ability to appear for work (whether in the workplace or, in the unusual case, at home) and to complete assigned tasks within a reasonable period of time." *Id.* at 530. Therefore, the Court held, "With or without reasonable accommodation, [Carr] could not perform the essential function of coming to work regularly." *Id.* at 529. Another way of saying this is that where it is undisputed that the employee cannot meet the qualification standard, even with an accommodation, there is no need to conduct the individualized inquiry into the availability of a reasonable accommodation. *Buck v. U.S. Dept. of Transportation*, 56 F.3d 1406, 1408 (D.C. Cir. 1995) ("Where the agency has established a certain safety standard, however, and there is no way in

[2] An employee cannot be considered "qualified" unless, among other things, he or she can, "with or without reasonable accommodation, … perform the essential functions of such position." 29 C.F.R. § 1630.2(m).

which an individual with a certain handicap can meet that standard, the law does not require the pointless exercise of allowing him to try.").

Carr should be recognized as having limited applicability to a narrow category of cases, and not used to establish the existence of a broad, *per se*, rule about the reasonableness of accommodation requests seeking flexibility with respect to duty hours. Indeed this Court recognized that *Carr* was atypical and cautioned that the case should not be used to undermine the important public policy goal embodied in the Rehabilitation Act:

> [I]t is the unusual Rehabilitation Act case that, like this one, can be resolved against the plaintiff without extensive fact finding. In section 501, Congress has placed a heavy burden on government employers to accommodate the needs of individuals with handicaps. This statute represents an important public policy goal, and we do not take lightly our role in enforcing its dictates. But to require an employer to accept an open-ended 'work when able' schedule for a time-sensitive job would stretch 'reasonable accommodation' to absurd proportions and imperil the effectiveness of the employer's public enterprise.

23 F.3d at 531. Consequently, *Carr* should only apply to the narrow circumstance where the accommodation requested is one that would permit the employee not to work at all, without negative repercussion.

Carr does not stand for the proposition that any time an employee seeks to work a flexible schedule, the request is *per se* unreasonable – the issue in Ms. Solomon's appeal. A rule providing that a request for a flexible schedule is *per se*

unreasonable would contradict the holdings of the Supreme Court and this Court that the district court should undertake an individualized analysis of the request for accommodation, except for those few cases in which Congress has specifically excused an employer from specific types of accommodation, or it is apparent that there is no possible accommodation that would permit the employee to perform the essential duties of the position, as was the case in *Carr*. *See Traynor v. Turnage*, 485 U.S. 535, 551, n.11 (1988) (individualized inquiry excused where "Congress had specifically determined that no individualized inquiry was necessary"); *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 (1987) (To determine "whether [an employee] is otherwise qualified for the job ... in most cases the district court will need to conduct an individualized inquiry and make appropriate findings of fact."); *Buck*, 56 F.3d at 1408 ("Where the agency has established a certain safety standard, however, and there is no way in which an individual with a certain handicap can meet that standard, the law does not require the pointless exercise of allowing him to try."); *Carr*, 23 F.3d at 530 ("The "individualized inquiry" need be no more extensive than the facts of the case demand.").

Consistent with the foregoing, the U.S. Court of Appeals for the First Circuit has indicated that an agency is excused from conducting the individualized inquiry only if: "1) the agency behaves reasonably in doing so, 2) a more individualized inquiry would impose significant additional burdens upon the agency, and 3)

Congress, as well as the agency, has expressed some kind of approval of the general rules or principles concerned." *Ward v. Skinner*, 943 F.2d 157, 162 (1st Cir. 1991).

Thus, there is no precedential support in this Circuit for the proposition that the district court need not make an individualized inquiry into the reasonableness of the accommodation when an employee seeks a flexible work schedule. Although *Carr* establishes that "the individualized inquiry need be no more extensive than the facts of the case demand" (*supra*), the requirement to conduct an inquiry remains. Where federal employees need flexibility with respect to their duty hours or location, the district court should determine: (1) whether there are specific hours that the employer requires the employee's presence or availability, (2) whether the work can be performed from home or at the office; (3) whether the employee is in fact seeking permission not to work at all (*i.e.*, to be absent at will and require the employer to transfer the work to other employees during the periods of absence), and (4) whether the employee could do the essential functions of her job under the flexible work schedule. The district court here did not conduct that analysis. This Court should provide guidance regarding the appropriate analysis when an employee requests a flexible work schedule as a reasonable accommodation for her disability.

CONCLUSION

For the foregoing reasons, *amicus*, the Metropolitan Washington Employment Lawyers Association, respectfully submits that this Court should vacate the grant of summary judgment, and should clarify the law governing discrimination and retaliation claims under the ADA and the Rehabilitation Act.

Respectfully submitted,

/s/ Les Alderman

Les Alderman
Alderman, Devorsetz & Hora PLLC
1025 Connecticut Avenue, N.W.
Suite 615
Washington, D.C. 20036
Telephone: 202-969-8220
lalderman@adhlawfirm.com

Denise M. Clark
Clark Law Group, PLLC
1250 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036
Telephone: 202-293-0015
dmclark@benefitcounsel.com

Counsel to Amicus Curiae

Certificate of Compliance with Rule 32(a)(7)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29 and D.C. Cir. Rule 32(a)(7) because the brief contains 3,065 words, less than half the length permissible for the principal brief, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and (6) and D.C. Cir. Rule 32(a)(1) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point Times New Roman.

/s/ Les Alderman

Les Alderman

CERTIFICATE OF SERVICE

I certify that on this date, July 1, 2013, the foregoing Amicus Curiae Brief has been served upon the following via the Court's CM/ECF system, and a copy will be sent by first-class mail, postage prepaid:

John Karl, Jr.
McDonald & Karl
1150 Connecticut Avenue, N.W.
Suite 900
Washington, D.C. 20036
Counsel for the Appellant

Heather Graham-Oliver
Craig Lawrence
Jane Lyons
U.S. Attorney's Office
555 Fourth Street N.W.
Washington, D.C. 20530
Counsel for the Appellee

/s/ Les Alderman
_____
Les Alderman