

Outside Counsel

‘NOLL’: WHAT CONSTITUTES A ‘REASONABLE’ ACCOMMODATION UNDER THE ADA?

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In *Noll v. IBM*,¹ the U.S. Court of Appeals for the Second Circuit held that the Americans with Disabilities Act (ADA) does not impose liability for an employer’s failure to explore alternative accommodations for an employee’s disability where the accommodations provided to the employee were “plainly reasonable.” The *Noll* decision was significant in that it addressed the limitations of an employer’s requirement to provide an accommodation when dealing with employees with a disability.

Under *Noll*, while an accommodation must be “reasonable and effective,” it need not be one that is perfect or the one that is most preferred by the employee. This article briefly discusses the background of the ADA as it relates to the issue of providing “reasonable accommodations,” analyzes the *Noll* decision, and concludes with a discussion of how *Noll* has been subsequently applied in recent court decisions.

Relevant Background of ADA

The ADA, as amended by the ADA Amendments Act of 2008, prohibits discrimination and ensures equal opportunity for persons with disabilities in employment, state and local government services, public accommodations, commercial facilities, and transportation.² The ADA requires employers to provide reasonable accommodations to disabled workers so that they can perform the essential functions of their jobs. It imposes an affirmative duty on employers to provide “reasonable accommodations” for those who are considered “disabled” under the ADA, unless the accommodation would impose an “undue hardship” on the employer.³

A reasonable accommodation is one that “enable[s] an individual with a disability who is qualified to perform the essential functions of that position...[or] to enjoy equal benefits and privileges of employment.”⁴ As a result of the Amendments Act, the threshold for proving a worker is “disabled” has been significantly lowered. Virtually anyone with a chronic bodily function limitation is protected by the ADA.⁵

To establish an accommodation claim under the ADA, an employee must show that: (1) he or she is a person with a disability within the meaning of the ADA; (2) the employer had notice of the disability; (3) with reasonable accommodation, the employee could perform the essential functions of the job at issue; and (4) the employer has refused to make such accommodation.⁶

Accommodation Issue in ‘Noll’

Alfred Noll, who is deaf, worked as a software engineer for International Business Machines (IBM) since 1984. IBM provided him with several accommodations including on-site and remote American Sign Language (ASL) to assist him in performing his job. Noll, however, took issue with the accommodations he received in relation to the use of corporate intranet video and audio files which contained various content ranging from official management messages and training resources to employees’ personal vacation photos. Noll was given transcripts of the videos as well as interpreters.

It was not disputed that Noll was a person with a disability, and that IBM was aware of his disability. The issue was whether IBM had refused to provide “reasonable accommodations.”

Noll did not dispute that the accommodations provided by IBM enabled him to perform the essential functions of his position. Rather, he argued that the transcripts provided to him were inadequate, because they were occasionally subject to delivery delays, and that not all of the video and audio files were captioned. There was no dispute that ASL interpreters were available to Noll whenever he wished to view a video or access an audio file. However, Noll contended that there was a genuine issue of material fact as to the effectiveness of ASL interpreters for the intranet videos. He claimed that using the interpreters for intranet videos was too difficult to switch back and forth between the interpreter and the video screen and he could not simultaneously watch the interpreter and the video.⁷

Noll also alleged that IBM failed to engage in the interactive process required under the ADA when he requested captioning of video and transcripts of audio prior to Internet posting.

In August 2012, Noll filed suit against IBM in the U.S. District Court for the Southern District of New York, alleging that IBM had: (a) discriminated against him on the basis of his disability in violation of the ADA and the New York State Human Rights Law (NYSHRL), by refusing to provide what he deemed to be a more effective accommodation, i.e., that all intranet videos be captioned and that all audio files have transcripts, and (b) failed to engage in the requisite interactive process with him regarding the accommodation.⁸

IBM moved for summary judgment, arguing that it already provided reasonable accommodations and that it need not take the extra steps requested by Noll. In 2013, District Court Judge Harold Baer held that, without more, an accommodation for deafness cannot be rendered ineffective by the need to divide visual attention. The court concluded that the accommodations with which he had been provided had allowed Noll to perform the essential functions of his position, and that IBM had satisfied its legal obligations to provide a reasonable accommodation under the ADA (and the NYSHRL).⁹ The court also rejected Noll's argument that IBM failed to engage in the interactive process required under the ADA, holding that such a claim cannot be maintained where there was no failure by the employer to provide a reasonable accommodation.¹⁰

Second Circuit Affirms

Noll appealed to the Second Circuit, arguing that the District Court had ignored evidence in the record that created a genuine dispute concerning the effectiveness of IBM's accommodations, and that an employer's failure to engage in the interactive process is sufficient to establish a claim of disability discrimination, even if the employer made reasonable accommodations.

The Second Circuit noted that Noll conceded that IBM provided him with transcripts and ASL interpreters, but he argued that those accommodations were unreasonable. The court did not doubt that the need to split visual focus was a disadvantage that likely tired or annoyed Noll, but, nevertheless, the court held that, in this case, the disadvantage did not render IBM's accommodations ineffective. According to ADA regulations, "reasonable accommodation" is defined as including "the provision of qualified readers or interpreters."¹¹ Interpreters are a common form of reasonable accommodation.

The court further noted that Noll conceded that the ASL interpreters were effective for live business meetings and that he did not explain why an accommodation that was effective as to live business meetings was ineffective as to watching intranet videos. At the summary judgment stage, Noll was required to adduce evidence of a decisive difference, but he failed to do so.

The Second Circuit affirmed the District Court's finding that the accommodations offered by IBM were reasonable. The court held that it did not need to consider IBM's alternative argument that the accommodation sought by Noll was unreasonable.

As to Noll's argument that IBM failed to engage in the interactive process with him, a disabled individual who was in need of an accommodation, the Second Circuit held that the ADA did not impose liability for an employer's failure to explore alternative accommodations when the accommodations provided by the employer to the employee were "plainly reasonable." The point of engaging in the interactive process is to discover a means by which an employee's disability could be accommodated; the interactive process is not required when reasonable accommodation has already been achieved. The court, therefore, affirmed (with one dissent) the District Court's grant of summary judgment for IBM.

Aftermath of ‘Noll’

As *Noll* was decided quite recently, there has not yet been that much opportunity for courts to apply and interpret it. As discussed below, the court’s analysis and holding in the decision are instructive and beneficial for courts with respect to the issue of the reasonableness of accommodations, as it provides guidance for assessing the reasonableness of accommodations required by employers for their employees who have disabilities.

In *Gallagher v. Town of Fairfield*,¹² the plaintiff, a public school art teacher, developed respiratory and immune system problems and was diagnosed with multiple myeloma. As an exception to the usual school policy prohibiting teachers from bringing in their own appliances, plaintiff was permitted two personal air cleaners and a personal refrigerator in the art room, due to her severe allergies. However, her allergies led to a series of medical leaves and ultimately prevented her from returning to work for a significant time period. Eventually, the school district terminated her employment, and she brought an action in federal court in Connecticut asserting claims under, inter alia, the ADA that her employer failed to provide reasonable accommodations.

The District Court cited the Second Circuit’s decision in *Noll* for the proposition that, “[a] reasonable accommodation is, quite simply, one that enables an employee to perform the essential functions of his or her position, and employers are not required to provide a perfect accommodation or the very accommodation most strongly preferred by the employee.”¹³ Gallagher then proceeded to quote *Noll* again for the proposition that, “[a]lthough the reasonableness of an employer’s accommodation is a ‘fact-specific’ question that often must be resolved by a factfinder, it is equally true that in a case such as this, in which the employer has already taken (or offered) measures to accommodate the disability, the employer is entitled to summary judgment if, on the undisputed record, the existing accommodation is plainly reasonable.”¹⁴

The District Court granted summary judgment to the defendant concluding that plaintiff had not provided sufficient evidence for a jury to conclude that defendant failed to provide reasonable accommodations with regard to its maintenance of air cleaners.

In October 2015, the Second Circuit revisited its decision in *Noll* in the case of *Dean v. University*¹⁵ which, inter alia, addressed the issue of whether, under the ADA, summary judgment was properly granted by the District Court where a student (plaintiff Dean) alleged that he had been dismissed from the defendants’ M.D. program because the defendants did not grant the accommodation Dean requested for his mental health condition and failed to provide a reasonable alternative to show that Dean’s proposed modification was unreasonable.

While Dean was not an employment case, the Second Circuit cited *Noll* for the proposition that in determining the reasonableness of an accommodation under the ADA for a disabled person, while the accommodation need not be perfect, it must still be one that is effective. The Second Circuit, in remanding the issue to the District Court, found that “contrary to the district court’s conclusion, Dean offered evidence to establish that he was not treated in an evenhanded manner with respect to similarly situated students.”¹⁶

Conclusion

The Second Circuit's decision in *Noll* is significant in that it provides a framework in which there is a reasonable limitation placed on the degree of accommodation required by employers for their employees who have disabilities. Therefore, employers and employees should consider the Second Circuit's decision in *Noll* when dealing with accommodation claims under the ADA.

Endnotes:

1. *Noll v. International Business Machines*, 787 F.3d 89 (2d Cir. 2015).
2. 42 U.S.C. §12101.
3. 42 U.S.C. §12112(b)(5)(A).
4. *See* 29 C.F.R. §1630.2(o)(1)(ii), (iii).
5. The Code of Federal Regulations provides the following non-exhaustive list of conditions which constitute a disability: Deafness, blindness, an intellectual disability (formerly termed mental retardation), partially or completely missing limbs or mobility impairments requiring the use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, Human Immunodeficiency Virus (HIV) infection, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia. 29 C.F.R. §1630.2(j)(3)(iii).
6. 42 U.S.C.A. §12112(b)(5)(A). The New York State Human Rights Law (NYSHRL) has the identical requirements to establish such a claim. N.Y. Exec. L. §296 (3)(a); *Noll*, 2013 WL 5339159, at fn. 1 (“The standards for the denial of reasonable accommodation under the NYSHRL parallel the standards under federal law, so the court considers these claims together”).
7. *Noll v. International Business Machines*, 2013 WL 5339159, at *3 (S.D.N.Y. Sept. 24, 2013).
8. *Noll*, 2013 WL 5339159, at *3, 5.
9. *Noll*, 2013 WL 5339159, at *4.
10. *Noll*, 2013 WL 5339159, at *5.
11. *See* 29 C.F.R. §1630.2(o)(2)(ii).
12. *Gallagher v. Town of Fairfield*, 2015 WL 3453342 (Dist. Ct. Conn. May 29, 2015).
13. *Gallagher*, 2015 WL 3453342, at *9, quoting *Noll*, 2015 WL 2402518, at *3 (internal quotations omitted).

14. *Gallagher*, 2015 WL 3453342 at *9, quoting *Noll*, 2015 WL 2402518, at *3 (internal quotations omitted).
15. *Dean v. University at Buffalo School of Medicine and Biomedical Sciences*, 804 F.3d 178 (2d Cir. 2015).
16. *Dean*, 804 F.3d at 189.

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