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Duty To Accommodate Not Limited To Problems At Work

In April 2010, the Court of Appeals for the Third Circuit issued a decision in [Colwell v. Rite Aid Corporation](#) which revived the employee's failure to accommodate a disability claim under the Americans with Disabilities Act (ADA). This case illustrates that whether an employer has a legal obligation to provide a reasonable accommodation for a qualified individual with a disability may turn on how the question of the need for accommodation is framed.

Under the ADA, once an employer has sufficient information to know that the employee has a mental or physical impairment which substantially limits a major life activity, and either that:

- the employee has the desire for a workplace accommodation, or
- enough information to cause a reasonable employer to make appropriate inquiries about the possible need for such an accommodation,

an employer must engage in sufficient communications with the employee to determine whether there is an accommodation the employer can make which would enable the employee to perform the essential functions of his or her job without causing the employer undue hardship.

The question before the Court of Appeals in *Colwell v. Rite Aid Corporation* was whether the trial court was correct to have dismissed Colwell's failure to accommodate a disability claim, or it should have let a jury decide that claim. Colwell, a cashier for Rite Aid, typically worked from 5 p.m. to 9 p.m. Shortly after beginning employment, she was diagnosed with an eye condition which ultimately led to blindness in one eye. She was always able to fully perform her job responsibilities once she got to work, and missed no work because of her eye condition except for treatment during one month. Once she lost vision in one eye, she advised her supervisor that her vision loss made it dangerous and difficult for her to drive at night. Colwell subsequently presented her supervisor with a doctor's note stating "I recommend [that] ... Colwell not drive at night." Rite Aid did not dispute that public transportation was not an option or that there were no taxis. When Rite Aid advised Colwell that it would not assign her only day shifts, she sought the help of her union. Colwell subsequently became frustrated and quit. The parties disputed whether discussions about her request for accommodation had ended by the time Colwell quit. Following her resignation, Colwell filed suit against Rite Aid alleging, among other claims, failure to accommodate her disability under the ADA.

At the trial court level, the court dismissed her failure to accommodate claim because it found Colwell did not need any accommodation to perform her job once she got to work, and Rite Aid had no duty to accommodate Colwell in her commute to work. The trial court also stated that "imputing a duty to accommodate Colwell was tantamount to 'mak [ing] an employer responsible

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for how an employee gets to work, a situation which expands the employer's responsibility beyond the ADA's intent'."

The Court of Appeals reversed the trial court's dismissal, and sent the case back to the lower court. Rather than seeing the issue of accommodation as one related to Colwell's *commute*, the Court of Appeals viewed the issue as whether Rite Aid had any duty to accommodate Colwell's request for a *shift change*. Having thus framed the issue, the Court of Appeals found the requested accommodation – to work only during daylight hours – was entirely within the employer's control and within the realm of possible accommodations contemplated by the ADA and regulations thereunder. In so ruling, the court stated, "we therefore hold that under the circumstances, the ADA can obligate an employer to accommodate an employee's disability-related difficulties in getting to work, if reasonable." The court further stated that its decision does not make employers responsible for *how* an employee gets to work. It then sent the case back to the trial court for a jury to decide whether a shift change was a reasonable accommodation under the circumstances, or whether Rite Aid could establish that the requested accommodation would impose an undue hardship on its business.

Bottom Line: The duty to provide a reasonable accommodation of a disability under the ADA (and most state laws) is not limited only to problems an employee faces in performing assigned work or once the employee arrives at work. Problems an employee faces in getting to work may also be covered. Most commonly, such problems involve issues of workplace accessibility to those with mobility impairments. Also, in evaluating whether there is a duty to provide a reasonable accommodation, employers should consider whether there is more than one way to characterize the nature of the accommodation requested or needed.

For more information regarding disability discrimination laws and the duty to accommodate, please contact [Laura Kipnis](#).

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"Reasonable Break Time" Required For Nursing Mothers

Employers must provide "reasonable break time" for a *non-exempt* employee to express breast milk for her nursing child for one year after the child's birth – each time such employee has need to express the milk – according to a provision (Section 4207) in the newly enacted [health care reform law](#).

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- **Place Other than Bathroom Must be Provided** – In addition, employers must provide a place – other than a bathroom – that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.
- **The Breaks Need Not be Paid** – An employer is not required to compensate an employee receiving reasonable break time to express breast milk under the new law for any work time spent for such purpose.
- **Exception for Small Employers** – An employer that employs less than 50 employees is not subject to the new law if such requirements would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature or structure of the employer's business.
- **Only Applies to Non-Exempt Employees** – The new law was added at the end of Section 7 of the Fair Labor Standards Act, and thus only applies to *non-exempt* and hourly paid employees. Employees who are exempt from the overtime pay provisions under Section 13 of the FLSA are not covered by the new federal law.

However, employees may be covered by state law:

- **Does Not Preempt State Law** – These new requirements do not preempt a state law that provides greater protections to employees than the protections provided under the new federal law. According to the [National Conference of State Legislatures](#), 24 states, the District of Columbia and Puerto Rico have laws related to breastfeeding in the workplace (Arkansas, California, Colorado, Connecticut, Georgia, Hawaii, Illinois, Indiana, Maine, Minnesota, Mississippi, Montana, New Mexico, New York, North Dakota, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, Vermont, Virginia, Washington and Wyoming).

Bottom Line: The new federal law requiring reasonable break time for nursing mothers took effect on March 23, 2010, (when the health care reform law was signed into law by President Obama). The U.S. Department of Labor is expected to issue guidance on the new requirements soon, including what constitutes a “reasonable break time” and a suitable “place” to express breast milk.

For additional information on this topic or the health care reform bills in general, please contact [Tom Dowling](#), [Sam Wilkerson](#), or [Rick Connors](#).

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HIRE Act: New Tax Incentives to Hire the Unemployed

Two new tax benefits designed to encourage businesses to hire and retain unemployed workers are part of a \$15 billion jobs bill – the Hiring Incentives to Restore Employment (HIRE) Act – that was passed by Congress and signed into law on March 18, 2010.

- **Payroll Tax Incentive** – Under the [HIRE Act](#), companies who hire *certain* unemployed workers this year may qualify for a 6.2 percent% payroll tax incentive, in effect exempting them from the *employer's* share of Social Security tax on wages paid to these workers after March 18, 2010. However, in order for the business to qualify for the tax incentive, the new hire:
 1. Must begin employment after February 3, 2010, and before January 1, 2011;
 2. Must have been unemployed for 60 consecutive days before beginning work or, alternatively, must have worked fewer than a total of 40 hours for someone else during the 60-day period before beginning work;
 3. Must sign an [Employee Affidavit](#) (IRS Form W-11, which is to be retained by the employer), certifying under penalties of perjury that the employee was unemployed (for the period described above);
 4. Must not be related to the employer; and
 5. Must not be employed to replace another employee – unless such other employee separated from employment voluntarily or for cause. However, an employer may apply the payroll tax exemption to wages paid to a rehired worker who is otherwise a qualified employee.

An employer may also apply the payroll tax incentive to wages paid to a recent graduate who has been in school for some or all of the 60 days preceding the start of employment, provided the employee otherwise meets the requirements of a qualified employee (described above).

Businesses may claim the special payroll tax exemption for wages paid to qualifying employees from March 19, 2010, through December 31, 2010. The exemption can be [claimed](#) on IRS Form 941, Employer's Quarterly Federal Tax Return, beginning with the 2nd quarter of 2010.

- **New Hire Retention Credit** – In addition, for each "qualified employee" retained for at least 52 consecutive weeks, businesses will also be eligible for a new hire retention credit of 6.2

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percent of wages paid to the qualified employee during the 52-week period, up to a maximum of \$1,000. The wages for such employment during the last 26 weeks of such period must equal at least 80 percent of such wages for the first 26 weeks of such period. The new hire retention credit can be claimed on the employer's 2011 income tax return.

Bottom Line: Employers who have seen signs of recovery from the recession, but have been hesitant to fill vacant positions or expand may find the benefits of this Act rewarding. One caveat is that businesses should not change their hiring practices based solely upon this Act.

For more information regarding the HIRE Act, please contact [Rick Connors](#).

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Workers Compensation Law In Kansas: Overturning Precedent

Since the spring of 2007, the Kansas Supreme Court and Kansas Court of Appeals have issued three rulings which have wreaked havoc upon workers' compensation claims and the principle of *stare decisis*. This article will briefly summarize those revolutionary decisions with particular emphasis on [Tyler v. Goodyear Tire & Rubber Co.](#), decided in late February 2010 by the Kansas Court of Appeals.

Casco: The first ruling was [Casco v. Armour Swift-Eckrich](#), decided in March 2007, in which the Kansas Supreme Court eradicated more than 50 years of case precedent that had broadly applied the parallel injury rule. This decision eliminated the practice of treating a parallel injury as a general bodily injury benefit and, instead, required an analysis of the underlying injuries to determine if a scheduled injury occurred, which results in a much lower award. The court found support for this holding by relying upon the specific language of the Kansas Workers Compensation Act, which the court held distinguished between a permanent *total* disability and a permanent *partial* disability, the latter of which typically results in a scheduled injury award. Ultimately, the Kansas Supreme Court held that case precedent, and specifically the decision in *Honn v. Elliott*, did not properly analyze the language of the Act and, instead, created a procedural short cut for the employee to receive a much greater award under the general body determination. As such, the court remanded the matter back to the administrative law judge (ALJ) to determine if sufficient evidence of a permanent total injury existed to uphold the award as a general body disability.

While many anticipated the legislature would step forward to address this decision, it has remained in place. Instead, the courts have continued to chip away at the Act's language to bring to the forefront additional statutory language that is contradictory to case precedent.

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Bergstrom: The second decision, which created bad law for employers, was handed down by the Kansas Supreme Court in the fall of 2009. In [Bergstrom v. Sprears Manufacturing Co.](#), the Kansas Supreme Court overturned 15 years of case law when it eliminated a good faith effort by the injured employee to accept accommodations or find alternate employment. Kansas courts had long imposed a good faith showing by the employee in order to receive work disability benefits and, absent such a showing, the courts were allowed more discretion in determining the post-injury wage award. The Kansas Supreme Court once again looked to the Act's language to hold that the clear and unambiguous language of the Act made no reference to a "good faith" showing and, as such, it would not read something into the statute that does not exist. The court further stated, "[a] history of incorrectly decided cases does not compel the Supreme Court to disregard plain statutory language and to perpetuate incorrect analysis of workers compensation statutes. The court is not inexorably bound by precedent, and it will reject rules that were originally erroneous or are no longer sound." Under this holding, an injured employee may elect whether to accept an accommodation or find alternate employment and, a failure to do so, may in fact increase the employee's workers compensation award.

Tyler: The most recent decision affecting workers compensation laws was handed down in late February 2010 by the Kansas Court of Appeals. The Kansas Court of Appeals, following the course set by the Kansas Supreme Court in the above cases, held that a nexus between the employee's wage loss and an injury need not be established in order for the employee to be entitled to work disability. This holding was based upon the plain language of the statute which fails to impose such a requirement. The Court of Appeals' decision focused on general foundational points established by the Supreme Court when issuing a ruling under the Act, including: (1) "judicial notions regarding the legislature's intent in the enactment of K.S.A. 44-510e(a) are not favored;" and (2) "judicial blacksmithing will be rejected even if such judicial interpretations have been judicially implied to further the perceived legislative intent." In reaching this decision, the Court of Appeals overruled the Workers Compensation Board (Board) which had held that, while a nexus is not required by the statutory language, prior decisions imputing such a nexus should be upheld and the Board's ruling supports the general purpose of the Workers Compensation Act to compensate workers for their injuries.

In this case, the injured employee, Tyler, received treatment and was returned to work in September 2007 under the company's workers' compensation policy. In July 2008, as part of a new union contract, Tyler's wages were reduced when a new shift was added at the facility which reduced his workweek from seven days to five days and he also received less overtime. In January 2008, Tyler filed a claim for workers' compensation. The ALJ found that under the express language of the Act a nexus requirement is not mandated between the wage loss and the injury and, because Tyler suffered wage loss greater than 10 percent, he was entitled to work disability compensation. Upon appeal to the board, this award was overturned and Tyler was

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limited to permanent partial disability compensation. As set forth above, the Kansas Court of Appeals overruled the Board's decision and reinstated the ALJ's award of work disability. As a result, Tyler received compensation in the amount of \$83,187.09 versus the Board's award of \$13,031.34.

Bottom Line: The Kansas courts are clearly sounding a call to action for Kansas legislators to tackle the statutory language within the Kansas Workers Compensation Act. Kansas courts will no longer sit back and interpret the Act in a way that meets with the general underlying purpose. In the meantime, employers need to closely monitor their workers' compensation claims to ensure they are cognizant of these recent decisions when analyzing their liability.

For more information regarding Kansas employment laws, please contact [Mindy McPheeters](#).

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Inside Washington

New Laws, Regulations and Agency Guidance

COBRA . . . On April 16, 2010, President Obama signed into law a revised version of the [Continuing Extension Act](#) (the Act). The Act extends eligibility for the COBRA premium subsidy through May 31, 2010. Premium subsidies will continue to last for as long as 15 months. . . On March 25, 2010, the [Equal Access to COBRA Act of 2010](#) was introduced and has been referred to committee. The Bill would expand COBRA benefits to same-sex domestic partners.

DOL . . . The Wage and Hour Division of the DOL has revised its long-standing practice of providing Opinion Letters on fact-specific issues interpreting the Fair Labor Standards Act (FLSA). Instead, the agency will provide [Administrative Interpretations](#), which, according to the DOL, will "provide meaningful and comprehensive guidance and compliance assistance to the broadest number of employers and employees." If an employer submits a request for an opinion letter, the DOL may elect to respond "by providing references to statutes, regulations, interpretations and cases that are relevant to the specific request but without an analysis of the specific facts presented. In addition, requests for opinion letters will be retained for purposes of the Administrator's ongoing assessment of what issues might need further interpretive guidance." . . . The first step taken by the DOL in this new direction was to issue an Administrative Interpretation that employees who hold the position of a [mortgage loan officer](#) typically will not qualify for the administrative employee exemption under section 13(a)(1) of the FLSA. This new finding is contradictory to a [2006 Opinion Letter](#) that has since been withdrawn by the DOL.

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EEOC . . . The EEOC finally reached its [five commissioner level](#) not seen since August 2008 with the swearing in of Victoria Lipnic as a Commissioner on April 20, 2010. President Obama has also appointed Jacqueline Berrien, formerly with the NAACP Legal and Education Fund as Chair, and Chair Feldblum as a Commissioner during his term. . . . The EEOC again focused on its [E-Race initiative](#) by posting new materials highlighting its commitment to eliminating race and color discrimination in the workplace. Through this initiative, the EEOC intends to "identify issues, criteria and barriers that contribute to race and color discrimination, explore strategies to improve the administrative processing and the litigation of race and color discrimination claims, and enhance public awareness of race and color discrimination." The time frame for the EEOC to reach its detailed [E-Race goals and objectives](#) is from 2008 through 2013.

Sex Discrimination/Equal Pay. . . April 20, 2010, was [Equal Pay Day](#) for women. Recognizing that "women earn, on average, 77 cents for every dollar that men earn," Equal Pay Day is "the date on which a woman worker's earnings are equivalent to a man's average earnings for the previous year (the wage gap is even greater for women of color and women with disabilities)." . . . A recent article in HR Magazine reported that this pay inequity may begin from the inception of a woman's employment. A study cited by the article found that women, on average, earned \$4,600 less in their first job and this pay disparity remained in place and even grew as men moved through the ranks sooner and had higher salary growth. . . . Perhaps in honor of Equal Pay Day, on April 26, 2010, the Ninth Circuit Court of Appeals issued a long awaited [ruling](#) finding that a class of potentially 1 million female Wal-Mart employees may move forward with the largest gender discrimination class action in the history of the United States. Employers nationwide should be concerned with this class action precedent.

For more information regarding "Inside Washington," please contact [Mindy McPheeters](#).