United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
March 17, 2023
Lyle W. Cayce
Clerk

No. 17-10539

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff—Appellant,

versus

METHODIST HOSPITALS OF DALLAS, *doing business as* METHODIST HEALTH SYSTEM,

Defendant—Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:15-CV-3104

Before RICHMAN, *Chief Judge*, and SOUTHWICK and WILLETT, *Circuit Judges*.

PRISCILLA RICHMAN, *Chief Judge*:

The Equal Employment Opportunity Commission (EEOC) sued Methodist Hospitals of Dallas (Methodist) for allegedly violating the Americans with Disabilities Act (ADA). The EEOC asserts that Methodist's categorical policy of hiring the most qualified candidate violates the ADA when a qualified disabled employee requests reassignment to a vacant role, even if he or she is not the most qualified applicant. The EEOC also alleges that Methodist failed to reasonably accommodate Adrianna

Cook, a disabled employee, who was not reassigned to a vacant position for which she applied. The district court granted Methodist's motion for summary judgment on both claims. The EEOC appeals, arguing that the Supreme Court's ruling in *US Airways, Inc. v. Barnett*[1] requires Methodist to make exceptions to its most-qualified-applicant policy and that Cook was entitled to a reasonable accommodation under the ADA. We vacate the judgment of the district court as to Methodist's most-qualified-applicant policy and remand for further proceedings consistent with this opinion. We affirm the judgment as to the EEOC's reasonable accommodations claim involving Cook.

I

Methodist is a regional network of hospitals with over 7,500 full-time employees. In 2012, Methodist had no detailed policy concerning the ADA, nor did Methodist provide ADA training to its employees. Accordingly, there was no formalized process for assisting disabled employees. If injured employees could not return to work, they could request short-term disability benefits and leave under the Family Medical Leave Act (FMLA), administered by third parties Lincoln Financial Group and the Reed Group, respectively. If an employee's disability required permanent reassignment, the employee was to compete for job openings pursuant to Methodist's policy to hire "the most qualified applicant available" for every vacancy.

For vacant positions, Methodist's human resources department (HR) reviewed all applications, eliminated those that did not meet the requisite qualifications, and forwarded the remaining applications to the hiring manager. The hiring manager made the final selection, but generally did not input any notes regarding the applicants, simply writing the word "[o]ffer" beside the name of the candidate he or she found most qualified.

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[1] 535 U.S. 391 (2002).

In 2008, Methodist hired Adrianna Cook as a patient care technician (PCT). On March 7, 2012, Cook injured her back on the job while turning a patient. Methodist assisted Cook in obtaining medical care. Over the next month, Cook saw multiple physicians who notified Methodist when Cook was unable to work and when she could work in a light-duty role. When Cook was able to work on light duty, Methodist assigned her to a temporary position at the pharmacy. Then, after unsuccessfully attempting to return to her job as a PCT, Cook's physicians certified that she was physically unable to work for several months.

With this documentation, Cook applied for and received FMLA leave through Methodist's third-party administrator, Reed Group. From April 23rd to July 15th, Cook submitted five requests for FMLA leave. Methodist was notified of each request, and the Reed Group approved each one. During this period, Methodist did not maintain significant contact with Cook, as she had not provided a medical release authorizing her to return to work, which Methodist's FMLA Policy required.

While on FMLA leave, Cook repeatedly asked her supervisor for accommodations or assistance with the more strenuous tasks required of a PCT. Cook's supervisor set up a call between Cook and an HR employee who offered to "guid[e]" Cook in seeking other work. Cook later reached out again to her supervisor, who contacted the facility's HR director. The HR director did not speak to Cook directly but spoke to Cook's supervisor and suggested there was nothing Methodist could do for Cook and that she should "just resign." Cook's supervisor then relayed the message that Cook should resign.

On July 2nd, Cook applied for a vacant scheduling coordinator position in the surgery department on Methodist's job bank. The position required that Cook be able to anticipate and assess potential scheduling and staffing problems; perform basic mathematical calculations; type at least thirty words per minute; read, write, and speak English; and communicate

effectively via telephone. She also had to be well-versed in medical terminology and have more than two years of related work experience. In her affidavit, Cook attested that she would not have needed an accommodation to perform this job. A Methodist employee acknowledged that Cook met the minimum qualifications for the position, and her application was forwarded to the hiring manager. The hiring manager selected another candidate, and Methodist notified Cook of its decision.

Meanwhile, on July 9th, a benefit specialist from Lincoln Financial Group emailed Methodist to inquire whether Methodist could accommodate Cook and her lifting and bending restrictions. On July 12th, Cook's physician sent a letter to Methodist stating that Cook would be in chronic pain and "is unable physically to return to the type of work involved in patient care at the hospital. This is a permanent restriction." On August 3rd, Methodist HR personnel, in response to the Lincoln Financial Group email, began discussing Cook's need for accommodations. Methodist decided that Cook should take personal (rather than FMLA) leave so that it could fill her PCT position. Methodist did not contact Cook to discuss her situation before making this decision.

On August 7th, Methodist sent Cook a letter offering her six months of unpaid personal leave with no guarantee of reemployment. The letter instructed Cook that, to begin her personal leave, she must submit a medical report certifying she was unable to return to work. Without this certification, Methodist would assume Cook resigned. Further, the letter clarified that if Cook could return to work in the six-month period but her PCT position had been filled, she would have one month to apply for and secure a different position within the hospital. Otherwise, she would be administratively terminated. Cook did not respond to the letter, later explaining that she believed that she was able to work in a clerical position, so she "did not want to try to get such a letter from [her] doctor." In mid-September, Methodist sent Cook another letter noting her failure to respond and informing her that

she was terminated. Cook appealed, stating that she was still in pain and would like to continue receiving employee benefits for her injury. Methodist responded on October 9th by giving Cook a second opportunity to apply for personal leave under the same conditions. Cook again failed to respond and was terminated.

The EEOC brought suit, alleging that Methodist's most-qualified-applicant policy violates the ADA because Methodist cannot categorically refuse to reassign disabled employees to a vacant position for which they are qualified. Requiring disabled employees to compete for jobs pursuant to Methodist's established policy, the EEOC argued, is not a reasonable accommodation. The EEOC also alleged that Methodist unlawfully refused to reassign Cook to the scheduling coordinator position after Cook could no longer perform the essential functions of a PCT due to her disability.

Methodist moved for summary judgment on both claims. The district court granted summary judgment but only as applied to Cook. The EEOC then filed a motion to alter or amend the court's judgment in part because the court did not address the EEOC's broader pattern or practice claim against Methodist. The district court issued a second opinion analyzing this broader claim and again granted summary judgment to Methodist. The district court recognized a circuit split after *Barnett*. Regardless, it held that because Methodist selects the most qualified applicant for every vacant position, it need not mandatorily reassign disabled employees. Competition with other applicants was sufficient to satisfy the ADA. The EEOC appeals both orders.

II

The EEOC asserts that Methodist's most-qualified-applicant hiring policy is not a reasonable accommodation and thus violates the ADA because the policy categorically declines to reassign disabled employees to vacant positions for which they are qualified. The district court dismissed this claim at the summary judgment stage because "[t]he EEOC has not demonstrated

that Methodist's policy of requiring disabled employees to compete with non-disabled applicants to hire the best candidate runs afoul of the ADA."

We review a district court's grant of summary judgment de novo,[2] drawing all reasonable inferences in favor of the non-moving party.[3] Summary judgment is required "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."[4] "[A] fact is genuinely in dispute only if a reasonable jury could return a verdict for the nonmoving party."[5]

Under the ADA, an employer may not "discriminate against a qualified individual on the basis of disability in regard to job application procedures[;] the hiring, advancement, or discharge of employees[;] employee compensation[;] job training[;] and other terms, conditions, and privileges of employment."[6] Discrimination on the basis of disability includes "not making *reasonable accommodations* to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the [employer's business]."[7] The ADA specifies that "'reasonable accommodation[s]' may include . . . job restructuring, part-time or modified

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[2] *EEOC v. Rite Way Serv., Inc.*, 819 F.3d 235, 239 (5th Cir. 2016) (citing *Davis v. Fort Bend Cnty.*, 765 F.3d 480, 484 (5th Cir. 2014)).

[3] *Ion v. Chevron USA, Inc.*, 731 F.3d 379, 389 (5th Cir. 2013) (citing *Vaughn v. Woodforest Bank*, 665 F.3d 632, 635 (5th Cir. 2011)).

[4] FED. R. CIV. P. 56(a).

[5] *Fordoche, Inc. v. Texaco, Inc.*, 463 F.3d 388, 392 (5th Cir. 2006) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

[6] 42 U.S.C. § 12112(a).

[7] *Id.* § 12112(b)(5)(A) (emphasis added).

work schedules, reassignment to a vacant position . . . and other similar accommodations for individuals with disabilities."[8]

A

The Supreme Court addressed the potential reasonable accommodation of "reassignment to a vacant position" in *Barnett*.[9] The Court was presented with the question of whether "the [ADA] requires an employer to reassign a disabled employee to a position as a 'reasonable accommodation' even though another employee is entitled to hold the position under the employer's bona fide and established seniority system."[10] The Court held that reassignment is not a reasonable accommodation when an employer has an established seniority system.[11]

In doing so, the Court set out a two-step test for determining whether an accommodation is reasonable.[12] First, the "plaintiff/employee (to defeat a defendant/employer's motion for summary judgment) need only show that an 'accommodation' seems reasonable on its face, i.e., ordinarily or in the run of cases."[13] If the plaintiff shows that a requested accommodation is reasonable in the run of cases, "the defendant/employer then must show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances."[14] If the plaintiff cannot demonstrate that a requested accommodation is reasonable in the run of cases, he or she "nonetheless remains free to show that special circumstances warrant a finding that" although "the ADA may not trump in the run of

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[8] *Id.* § 12111(9).

[9] 535 U.S. 391 (2002).

[10] *Id.* at 395-96 (alteration in original).

[11] *Id.* at 403.

[12] *Id.* at 401-02, 405.

[13] *Id.* at 401 (emphasis and citations omitted).

[14] *Id.* at 402 (citations omitted).

cases[], the requested 'accommodation' is 'reasonable' on the particular facts."[15]

The Supreme Court applied this framework, and held on step one that "it would not be reasonable in the run of cases that the assignment in question trump the rules of a seniority system."[16] It explained that while "normally such a request [for reassignment] would be reasonable within the meaning of the statute," the seniority system precludes reassignment from being an otherwise reasonable accommodation.[17] To support its holding, the Supreme Court highlighted the recognized "importance of seniority to employee-management relations,"[18] and described some of the benefits of a seniority system, including job security, predictable advancement, an element of due process, fairness, and employee investment in their company.[19] The Court then proceeded to step two and remanded for a determination as to whether the employee could show special circumstances explaining "why, in the particular case, an exception to the employer's seniority policy can constitute a 'reasonable accommodation' even though in the ordinary case it cannot."[20]

B

Applying the first step of *Barnett*, the district court held that mandatory reassignment in violation of Methodist's most-qualified-applicant policy is not reasonable in the run of cases. We agree. The level of preferential treatment that the EEOC asks for would compromise the hospital's interest in providing excellent and affordable care to its patients

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[15] *Id.* at 405.

[16] *Id.* at 403.

[17] *Id.* (citing 42 U.S.C. § 12111(9)).

[18] *Id.*

[19] *Id.* at 404.

[20] *Id.* at 405-06.

and would be unfair to the employer's other employees.[21] All but one of our sister circuits that have ruled on the issue have held the same.

First, in *Huber v. Wal-Mart Stores, Inc.*,[22] the Eighth Circuit concluded that "the ADA is not an affirmative action statute and does not require an employer to reassign a qualified disabled employee to a vacant position when such a reassignment would violate a legitimate nondiscriminatory policy of the employer to hire the most qualified candidate."[23] Then, in *EEOC v. St. Joseph's Hospital, Inc.*[24]—the case on which the district court relied—the Eleventh Circuit held "that the ADA does not require reassignment without competition for, or preferential treatment of, the disabled" and does not require affirmative action.[25] It "only requires [that] an employer allow a disabled person to compete equally with the rest of the world for a vacant position."[26] More specifically, the Eleventh Circuit emphasized that "[i]n the case of hospitals, . . . the well-being and even the lives of patients can depend on having the best-qualified personnel. Undermining a hospital's best-qualified hiring or transfer policy imposes substantial costs on the hospital and potentially on patients."[27]

Last, the Fourth Circuit held in *Elledge v. Lowe's Home Centers, LLC*[28] that preferential treatment must be extended only as necessary to provide disabled employees "with the *same* opportunities as their non-disabled

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[21] *See id.* at 404.

[22] 486 F.3d 480 (8th Cir. 2007), *cert. granted*, 552 U.S. 1074 (2007), *and cert. dismissed*, 552 U.S. 1136 (2008).

[23] *Id.* at 483 (citing *Turco v. Hoechst Celanese Corp.*, 101 F.3d 1090, 1094 (5th Cir. 1996)).

[24] 842 F.3d 1333 (11th Cir. 2016).

[25] *Id.* at 1345-47.

[26] *Id.* at 1346.

[27] *Id.*

[28] 979 F.3d 1004 (4th Cir. 2020).

colleagues."[29] Preferential reassignment improperly "recasts the ADA—a shield meant to guard disabled employees from unjust discrimination—into a sword that may be used to upend entirely reasonable, disability-neutral hiring policies and the equally reasonable expectations of other workers."[30] "Just as the[] principles [of equality of opportunity for disabled employees and stability in employee expectations] jointly justified the Court in upholding the integrity of the seniority-based hiring system at issue in *Barnett*, they justify upholding the integrity of Lowe's [best-qualified hiring system] as well," which is "on its face, disability neutral."[31]

We agree with our sister circuits. The EEOC's proposed course of action turns the shield of the ADA into a sword, casting "the equally reasonable expectations of other workers" to the side.[32] What's more, it "imposes substantial costs on the hospital and potentially on patients."[33] When the lives of patients are on the line, mandatory reassignment in violation of a best-qualified system is unreasonable in the run of cases.[34]

The EEOC attempts to distinguish best-qualified systems from seniority systems by arguing that best-qualified systems are more discretionary because the employer sets the minimum qualifications for the role. However, as we have explained above, Methodist's disability-neutral policy stabilizes employee expectations. "It invites, rewards, and protects

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[29] *Id.* at 1015 (emphasis in original) (first citing *US Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002); then citing *St. Joseph's Hosp.*, 842 F.3d at 1346-47; and then citing *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480, 483 (8th Cir. 2007)).

[30] *Id.*

[31] *Id.* at 1016.

[32] *See id.* at 1015.

[33] *St. Joseph's Hosp.*, 842 F.3d at 1346.

[34] *See Barnett*, 535 U.S. at 397; *Elledge*, 979 F.3d at 1016; *St. Joseph's Hosp.*, 842 F.3d at 1346.

the formation of settled expectations regarding hiring decisions."[35] "It recognizes that basic fairness in such a context rests atop an often-rickety three-legged stool, whose legs are the employer, the disabled employee, and—easiest to neglect—the other employees."[36] Further, "[s]uch discretion is . . . fundamental to the employer's freedom to run its business in an economically viable way."[37] Finally, a most-qualified-applicant "policy in a non-profit, acute care hospital promotes the prevention of infection, illness, and medical error. It advances the safety of hospital employees and the health of the . . . patients and communities they serve."

The Tenth Circuit held differently, and the Seventh Circuit has suggested in dicta that it might do the same. In *EEOC v. United Airlines, Inc.*,[38] the Seventh Circuit declined to rule on the issue, choosing to remand to the district court to determine whether "mandatory reassignment is ordinarily, in the run of cases, a reasonable accommodation."[39] Then, assuming the district court holds it is ordinarily reasonable, to determine "(under *Barnett* step two) if there are fact-specific considerations particular to [the employer's] employment system that would create an undue hardship and render mandatory reassignment unreasonable" in this case.[40] While the court did comment that equating a best-qualified selection policy with the seniority system in *Barnett* would swallow the *Barnett* rule,[41] that comment

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[35] *Elledge*, 979 F.3d at 1016.

[36] *Id.* at 1014.

[37] *Id.* (citing *St. Joseph's Hosp.*, 842 F.3d at 1346).

[38] 693 F.3d 760 (7th Cir. 2012), *cert. denied*, 569 U.S. 1004 (2013).

[39] *Id.* at 764.

[40] *Id.*

[41] *Id.* ("While employers may prefer to hire the best qualified applicant, the violation of a best-qualified selection policy does not involve the property-rights and administrative concerns (and resulting burdens) presented by the violation of a seniority policy.").

was dictum and is not binding on the Seventh Circuit and certainly not binding on this court.

In *Lincoln v. BNSF Railway Co.*,[42] the Tenth Circuit held that viewing a most-qualified-applicant policy as "an important employment policy comparable to a seniority system" like the one in *Barnett* "would effectively and improperly read 'reassignment to a vacant position' out of the ADA's definition of 'reasonable accommodation.'"[43] We disagree. Step two of the *Barnett* framework ensures that "reassignment to a vacant position" is not read out of the ADA's definition of reasonable accommodation. If mandatory reassignment is not reasonable in the run of cases under step one, it can still be reasonable on the particular facts under step two. The Tenth Circuit recognized this in *Lincoln* when it held that the employer's most-qualified-applicant policy would factor in when addressing step two of the *Barnett* framework.[44]

Considering the opinions of all our sister circuits, we agree with the district court that, under the first step of *Barnett*, mandatory reassignment in violation of Methodist's most-qualified-applicant policy is not reasonable in the run of cases. We need not and do not reach the question of whether *Barnett* abrogated *Daugherty v. City of El Paso*[45] because even assuming it did, Cook's requested accommodation would be unreasonable under step one of *Barnett*.

But the district court failed to address the second step of *Barnett*. Although the EEOC has not shown that the requested accommodation is reasonable in the run of cases, it "nonetheless remains free to show that special circumstances warrant a finding that" although "the ADA may not

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[42] 900 F.3d 1166 (10th Cir. 2018).

[43] *Id.* at 1205.

[44] *Id.* at 1205-06.

[45] 56 F.3d 695 (5th Cir. 1995).

trump in the run of cases[], the requested 'accommodation' is 'reasonable' on the particular facts."[46] Accordingly, we must vacate and remand the district court's grant of summary judgment as to this practice or pattern claim with instructions to apply the two-step *Barnett* framework in accordance with this opinion. The district court need not reconsider the first step of the *Barnett* framework on remand. Rather, the district court should focus on the second step, determining whether the EEOC can raise a genuine dispute of material fact as to whether there are special circumstances such that "in th[is] particular case, an exception to [Methodist's most-qualified-applicant] policy can constitute a 'reasonable accommodation' even though in the ordinary case it cannot."[47]

III

The EEOC also asserts that Methodist violated its duty under the ADA to make a reasonable accommodation by refusing to reassign Cook to the vacant scheduling coordinator position. The district court rejected this claim on three grounds: (1) Cook did not treat reassignment as an accommodation of last resort, as recommended in the EEOC's Guidance; (2) Cook was not qualified for the job and never provided a release; and (3) Cook was responsible for the breakdown of the interactive process. Drawing all reasonable inferences in the EEOC's favor, we assume without deciding that: (1) Cook could no longer perform the essential functions of a PCT due to her disability and (2) Cook was minimally qualified for the coordinator role. However, Cook caused a breakdown in the interactive process. Methodist was not required to reassign Cook as a reasonable

[46] *US Airways, Inc. v. Barnett*, 535 U.S. 391, 405 (2002).

[47] *Id.* at 405-06.

accommodation. As applied to the EEOC's claim regarding Cook, we affirm summary judgment.

"Under the ADA, once the employee presents a request for an accommodation, the employer is required to engage in [an] interactive process so that *together* they can determine what reasonable accommodations might be available."[48] "This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."[49] It requires both parties to exchange information to "craft a reasonable accommodation."[50] If the breakdown of the interactive process "is traceable to the employee and not the employer," the ADA is not violated.[51]

Cook met her initial burden when she requested accommodations soon after her injury in March 2012. So, Methodist was required to engage in an interactive process to reasonably accommodate Cook.[52] Methodist did so. But Cook caused a subsequent breakdown when she failed to respond to Methodist's letters offering her additional leave. Accordingly, the ADA is not violated and the EEOC cannot prevail on Cook's claim.

A

"[W]hen an employer's unwillingness to engage in a good faith interactive process leads to a failure to reasonably accommodate an

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[48] *EEOC v. LHC Grp., Inc.*, 773 F.3d 688, 699 (5th Cir. 2014) (alteration and emphasis in original) (quoting *EEOC v. Chevron Phillips Chem. Co.*, 570 F.3d 606, 622 (5th Cir. 2009)); *see also* 29 C.F.R. § 1630.2(o)(3) ("To determine the appropriate reasonable accommodation it may be necessary for the [employer] to initiate an informal, interactive process with the individual with a disability in need of the accommodation.").

[49] 29 C.F.R. § 1630.2(o)(3).

[50] *See Loulseged v. Akzo Nobel Inc.*, 178 F.3d 731, 735-36 (5th Cir. 1999).

[51] *Id.* at 736 (citations omitted); *see also Gordon v. Acosta Sales & Mktg., Inc.*, 622 F. App'x 426, 430 (5th Cir. 2015) (per curiam) (unpublished).

[52] *See supra* note 48 & accompanying text.

employee, the employer violates the ADA."[53] In *Cutrera v. Board of Supervisors of Louisiana State University*,[54] this court stated that an employer causes a breakdown in the interactive process when it "preemptively terminat[es] the employee before an accommodation can be considered or recommended."[55] However—unlike the employer in *Cutrera* who held one meeting, could not identify an immediately workable accommodation, and terminated the disabled employee[56]—Methodist worked with Cook for months. After Cook injured her back, Methodist helped arrange Cook's medical care and then accommodated her restrictions by placing her in a temporary, light-duty role in the pharmacy when her physicians permitted her to work. Once Cook's physicians stated that she was unable to work in any capacity, Cook sought FMLA leave from Methodist's third-party administrator. The administrator approved Cook's requests for FMLA leave five times between April and July of 2012 while keeping Methodist informed throughout. Approximately three weeks after FMLA leave terminated, HR internally discussed how to accommodate Cook and decided to offer her additional leave. On August 7th, Methodist sent Cook a letter offering her six months of unpaid personal leave, provided Cook would supply a medical report stating she was unable to return to work. If Cook was able to return to work during the six-month period, the letter offered her one month to apply for any open positions within the hospital. On October 9th, Methodist gave Cook a second opportunity to apply for personal leave under the same conditions. This evidence demonstrates that Methodist engaged in the interactive process over a six-month period, and only terminated Cook

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[53] *Loulseged*, 178 F.3d at 736 (citations omitted).

[54] 429 F.3d 108 (5th Cir. 2005).

[55] *Id.* at 113.

[56] *Id.* at 112-13.

following her failure to respond to two letters, two months apart, regarding Methodist's offer of additional, unpaid leave.

Methodist was not always immediately responsive to Cook's inquiries and, during her FMLA leave, HR did tell Cook (via her supervisor) that there was nothing her employer could do for her and that she should resign. But none of these actions terminated the interactive process. "A clear declaration by an employer that no reasonable accommodation will be forthcoming might indeed be seen as terminating the interactive process and removing any duty the employee had to speak up."[57] This occurs when "an employer creates an objectively reasonable perception that the process is clearly at an end."[58] Methodist should not have told Cook to resign. But that statement was made prior to Methodist's offer of additional personal leave and there was no indication the statement was a "final and unreviewable" decision regarding Cook's disability.[59] In fact, Cook continued to send medical reports and apply for vacant positions after the conversation occurred. No reasonable jury could find that Methodist's resignation comment created an objectively reasonable perception that the process was clearly at an end or that no reasonable accommodation would be forthcoming, for Methodist and Cook continued to engage in the interactive process after Methodist made the comment.

B

Methodist also did not create "an objectively reasonable perception that the process" was terminated when it offered Cook unpaid leave. Cook

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[57] *Loulseged*, 178 F.3d at 738 (citing *Bultemeyer v. Fort Wayne Cmty. Schs.*, 100 F.3d 1281, 1285 (7th Cir. 1996)).

[58] *Id.* at 739.

[59] *See id.* at 738-39 (holding that an employee terminated the interactive process because the employer's suggested accommodation was never described as a "final and unreviewable order," and the employer "never told her that further accommodation would be impossible").

asserts that the offer of unpaid leave was not an appropriate accommodation because Cook believed she could return to clerical work so she "did not want to try to get" the required letter "from [her] doctor" saying she "was unable to return to work." Yet Cook never shared this concern with Methodist. When a breakdown in the interactive process "is caused by the subjective spin the employee chooses to place on [an employer's statements], only the employee can prevent the process from collapsing."[60] Methodist was offering additional recovery time to an employee who was—to its knowledge—physically unable to return to work. Methodist could "hardly be expected to know that [Cook was] laboring under an unreasonable conviction that further discussion would clearly be futile."[61]

Moreover, we need not determine if Methodist's offer of unpaid leave was itself a reasonable accommodation because Cook withdrew from the process before the ultimate accommodation could be offered by Methodist. In *Loulseged v. Akzo Nobel Inc.*,[62] we affirmed the district court's grant of judgment as a matter of law when an employer "came up with a facially reasonable proposal to address one of" the disabled employee's physical restrictions, and the employee then quit.[63] The Fifth Circuit reasoned that the employer's proposal "would seem to be [a] quite reasonable *preliminary* step[] to take,"[64] and declined to consider if the employer's proposed accommodation

> would have been sufficient on [its] own to establish [the employer's] good faith participation in the interactive process, because [the employee's] decision to quit deprived us of the chance to know what further consultations [the employer]

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[60] *Id.* at 739.

[61] *Id.*

[62] 178 F.3d 731 (5th Cir. 1999).

[63] *Id.* at 736-37.

[64] *Id.* (emphasis in original).

> would have initiated, just as it deprived us of the opportunity to know exactly what accommodations would ultimately have been provided.[65]

Likewise, we need not determine if Methodist's offer of extended, unpaid leave would ultimately have been a reasonable accommodation because it was a reasonable preliminary step. Cook's decision to withdraw from the interactive process deprived this court of the opportunity to consider the employer's next steps, and ultimately what accommodation Methodist would have provided Cook in the short and long term.

Our decision in *Griffin v. United Parcel Service, Inc.*[66] further supports this conclusion. In *Griffin*, we affirmed summary judgment for an employer whose employee failed to provide relevant additional information about his illness and instead chose to retire.[67] If Cook was unwilling to take unpaid leave because she was able to work, she should have provided this information. If Cook thought that unpaid leave was an unreasonable accommodation, she should have informed Methodist. It is "impossible to judge" the reasonableness of a proposed accommodation when the employee causes a breakdown in the interactive process.[68] "One cannot negotiate with a brick wall."[69] While the EEOC attempts to portray Methodist as the brick wall, as HR did not speak with Cook for weeks before offering her personal leave, the record clearly indicates that Methodist engaged in the interactive process. Rather, Cook became the brick wall when she was unresponsive to Methodist's proposed accommodation. She did respond once to appeal her

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[65] *Id.*

[66] 661 F.3d 216 (5th Cir. 2011).

[67] *Id.* at 225.

[68] *Loulseged*, 178 F.3d at 734-35.

[69] *Id.* at 737.

termination. But when Methodist gave her another opportunity to apply for personal leave, Cook permanently ceased communications.

When "[n]othing in the record allows a reasonable inference that [the employer] clearly would not consider *other* possible accommodations if [the employee] brought them to its attention," this "lack of clear finality" is sufficient to hold that "no reasonable jury could find that [the employer] had ended the informal interactive process."[70] Methodist was engaged in the interactive process. After providing temporary, light-duty pharmacy work as a reasonable accommodation, and then accommodating Cook's FMLA leave, it offered additional leave as an accommodation. Even if these actions would not fulfill Methodist's ultimate duties under the ADA, Cook's failure to respond deprives us of "the opportunity to know exactly what accommodations would ultimately have been provided."[71] Accordingly, "[g]iven the lack of clear finality here, no reasonable jury could find that [Methodist] had ended the informal interactive process" prior to Cook's silence.[72]

At summary judgment, an employee's "unilateral withdrawal from the interactive process is fatal to [her] claim,"[73] so long as the employer "engage[d] in a good-faith, interactive process with [the employee] regarding [her] request for a reasonable accommodation."[74] Based on the evidence, no

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[70] *Id.* at 739-40 (emphasis in original).

[71] *Id.* at 737.

[72] *Id.* at 739-40.

[73] *Gordon v. Acosta Sales & Mktg., Inc.*, 622 F. App'x 426, 430 (5th Cir. 2015) (per curiam) (unpublished) (citations omitted); *see also Griffin v. United Parcel Serv., Inc.*, 661 F.3d 216, 225 (5th Cir. 2011) (holding that "[w]here an employee terminates the interactive process by voluntarily retiring . . . no reasonable juror could conclude that [the employer] was unwilling to, in good faith, participate in an interactive process to reasonably accommodate [the employee's] needs").

[74] *Griffin*, 661 F.3d at 225.

reasonable jury could find that Methodist was unwilling to participate in the interactive process. When Cook did not respond to either the August 7th letter or the follow-up letter after her appeal of her termination, she caused the breakdown of the interactive process. Thus, Methodist did not act unlawfully when it refused to reassign Cook to the vacant scheduling coordinator position.

* * *

For the foregoing reasons, we AFFIRM the grant of summary judgment as to the claim regarding Adrianna Cook, and we VACATE and REMAND the grant of summary judgment as to Methodist's most-qualified-applicant policy for further proceedings consistent with this opinion.