Viewing the Unseen: Requesting Accommodation for Non-Visible Disabilities Under the ADA After *Kelly v. Town of Abingdon*[*]

Many disabilities can be described as "non-visible," meaning that their symptoms are not immediately apparent to third-party observers. This lack of visibility can create additional hardship for those who have them, particularly in the workplace. In Kelly v. Town of Abingdon*, the Fourth Circuit introduced a new legal standard regarding the evaluation of an employee's request for accommodation under the Americans with Disabilities Act ("ADA")—one that depends on the employer's perception of the employee's disability. In doing so, the court imposed a heightened burden on employees with non-visible disabilities by requiring them to disclose and explain to their employers what would otherwise be obvious had their disabilities been visible. This not only requires more of employees with non-visible disabilities, it also increases the likelihood that a given accommodation request will be denied ADA protection. This Recent Development explains how judicial standards like this one can produce incongruous results for those with non-visible disabilities and explores what those with non-visible disabilities can do to avail themselves of ADA protection despite a potentially higher burden.*

INTRODUCTION

When asked to picture someone with a disability, one might envision wheelchairs, prosthetics, hearing aids, or some other visible indicator of a person's disability. This is the classic conception of disability; in fact, even today, the Bureau of Labor Statistics limits its definition of "people with a disability" to those with severe hearing, vision, or memory impairments, difficulty walking, and the like.[1] Of course, a modern understanding of disability contemplates far more than these traditional categories—as does the Americans with Disabilities Act ("ADA").[2] A disability may not be visibly apparent, may not manifest at all times, and may go entirely unnoticed by onlookers, and yet

1. Press Release, Bureau of Lab. Stat., U.S. Dep't of Lab., Persons with a Disability: Labor Force Characteristics—2023 (Feb. 22, 2024) (explaining that the Current Population Survey—the Census Bureau-collected survey on labor force demographics—determines whether an individual is disabled based only on whether they identify with deafness or serious difficulty hearing; blindness or serious difficulty seeing even when wearing glasses; serious difficulty concentrating, remembering, or making decisions because of a physical, mental, or emotional condition; serious difficulty walking or climbing stairs; serious difficulty dressing or bathing; or difficulty doing basic errands alone because of a physical, mental, or emotional condition).

2. *See* Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 3.2, 104 Stat. 327, 329–30 (codified as amended at 42 U.S.C. § 12102).

still "substantially limit . . . one or more major life activities."[3] This type of disability is commonly referred to as a "non-visible disability" ("NVD"), "non-apparent disability," or "invisible disability."[4] In fact, NVDs make up the majority of all disabilities.[5]

Despite the prevalence of NVDs, their "invisible" nature presents unique difficulties to those who have them. Because NVDs are not readily apparent, third parties commonly fail to perceive their effects, misattribute their effects to personal shortcomings, or otherwise greet them with skepticism instead of empathy.[6] This dynamic may often lead to increased difficulty for people with NVDs when advocating for themselves in their personal and professional lives.[7] In other words, the third-party dynamic can impose additional barriers on a person's ability to engage with the world as non-disabled people do, beyond those barriers which are inherent to their disabilities.

Such a dynamic played out in a recent Fourth Circuit case, *Kelly v. Town of Abingdon*.[8] There, the court set a new standard for the Fourth Circuit regarding ADA accommodation requests that entails evaluating "how a reasonable employer would view" the request "in the surrounding

3. *Id.*; *see also The Civil Rights of Students with Hidden Disabilities Under Section 504*, U.S. DEP'T OF EDUC. OFF. C.R. (Aug. 12, 2024), https://www.ed.gov/laws-and-policy/individuals-disabilities/section-504/hidden-disabilities [https://perma.cc/N7X7-MJHG] ("Hidden disabilities are physical or mental impairments that are not readily apparent to others. They include such conditions and diseases as specific learning disabilities, diabetes, epilepsy, and allergy.").

4. While these terms are used somewhat interchangeably in the literature, I prefer "non-visible disability" because it is the most descriptively accurate of the terms within the context of this Recent Development. "Non-apparent" may be interpreted overbroadly as it contemplates disabilities that can be perceived with some amount of scrutiny, whereas "invisible" may more narrowly connote only disabilities that cannot be perceived under any usual circumstances. It is worth noting that, while it is used, the term "hidden" is generally disfavored in this context, as it may imply that individuals with these disabilities intentionally conceal them. *See Living with Non-Visible Disabilities*, DISABILITY UNIT (Dec. 17, 2020), https://disabilityunit.blog.gov.uk/2020/12/17/living-with-non-visible-disabilities/ [https://perma.cc/FVW3-M984]; *"Non-Apparent Disability" vs. "Hidden" or "Invisible Disability"—Which Term Is Correct?*, DISABILITY:IN (Jan. 5, 2022), https://disabilityin.org/mental-health/non-apparent-disability-vs-hidden-or-invisible-disability-which-term-is-correct/ [https://perma.cc/99N9-FDAB]; Brenda Álvarez, *What to Know About Invisible Disabilities*, NAT'L EDUC. ASS'N (Aug. 18, 2021), https://www.nea.org/nea-today/all-news-articles/what-know-about-invisible-disabilities [https://perma.cc/2T2C-JYHU].

5. Drew Dakessian, *Non-Apparent Disabilities: When Your Disability Is Not Visible*, WORLD INST. ON DISABILITY (Nov. 9, 2022), https://wid.org/non-apparent-disabilities-when-your-disability-is-not-visible/ [https://perma.cc/YY3K-RW9Y]. Common NVDs include memory disorders, anxiety, depression, bipolar disorder, arthritis, diabetes, epilepsy, post-traumatic stress disorder, attention deficit disorders, traumatic brain injuries, and nerve disorders. *Id.*

6. *Id.*

7. *See* Matt Gonzales, *Supporting Invisible Disabilities in the Workplace*, SHRM (Oct. 27, 2023), https://www.shrm.org/topics-tools/news/all-things-work/invisible-disabilities [https://perma.cc/UDD6-W5TU (dark archive)] (describing several negative effects experienced by those with NVDs who advocate for themselves in the workplace, including stigmatization, exclusion, incivility, fear of retaliation, and misunderstanding).

8. 90 F.4th 158, 163 (4th Cir. 2024).

circumstances."[9] By framing the standard around the employer's perception, the court inadvertently introduced an additional barrier faced by those with NVDs into law. Against that backdrop, this Recent Development will analyze how the unique problems faced by those with NVDs manifest in ADA law, and it will provide a framework for how those with NVDs can minimize the impact of these additional burdens when seeking workplace accommodations.

This Recent Development will proceed in three parts. Part I will provide a brief overview of the ADA and the process for requesting accommodations under the law. Part II will summarize and explain the court's reasoning in *Kelly* and will explore the legal underpinnings of the holding. Finally, Part III will illustrate the unique burdens explicitly and implicitly imposed on those with NVDs by the *Kelly* decision and provide practical guidance for how employees with NVDs can overcome them.

I. ADA FRAMEWORK FOR ACCOMMODATING DISABILITIES

The ADA defines "disability" as "a physical or mental impairment that substantially limits one or more major life activities of [an] individual; a record of such an impairment; or being regarded as having such an impairment."[10] For ADA purposes, a substantial limitation is one that prevents or restricts a person from performing a major life activity "as compared to most people in the general population."[11] This requirement is "construed broadly in favor of expansive coverage" and "is not meant to be a demanding standard."[12] "Major life activities" include a broad range of tasks that an average person might engage in on a regular basis, such as hearing, walking, concentrating, and communicating.[13] Additionally, as of the 2008 ADA Amendments,[14] a "major life activity" includes "the operation of a major bodily function," regardless of whether an impairment of that bodily function substantially limits any major life activity.[15]

9. *See id.* at 167 (finding that an employee's request for accommodation, considering the surrounding circumstances, did not make clear that he was seeking assistance for a disability).

10. 42 U.S.C. § 12102(1)(A)–(C).

11. 29 C.F.R. § 1630.2(j)(1)(ii) (2023). Determining whether a limitation is substantial largely depends on an evaluation of the "condition, manner, or duration" under which a person can perform the major life activity. *Id.* § 1630.2(j)(4)(i)–(ii).

12. *Id.* § 1630.2(j)(1)(i).

13. 42 U.S.C. § 12102(2)(A) ("[M]ajor life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.").

14. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4(a), 122 Stat. 3553, 3555 (codified at 42 U.S.C. § 12102(2)(B)).

15. 42 U.S.C. § 12102(2)(B) (explaining that these major bodily functions "includ[e,] but [are] not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions").

The ADA provides various rights and protections to people with legally cognizable disabilities. The most pertinent of these for this Recent Development's purposes is the right to a reasonable accommodation from an employer. The ADA dictates that an employer's failure to make "reasonable accommodations to the known physical or mental limitations" of a qualified employee with a disability constitutes unlawful discrimination against that employee. This type of accommodation includes changes to a work environment or job duties that enable the individual to perform "essential functions" of that job, or those that allow the individual to enjoy the "benefits and privileges" of their employment equally to those without disabilities.[16] Common reasonable accommodations include increased accessibility to facilities and equipment, modified work schedules, reassignment to more suitable positions, provision of equipment or devices, modification of policies, and provision of readers or interpreters.[17]

To initiate the ADA accommodation process, an individual with a disability must "make an adequate request, thereby putting the employer on notice" of the need for an accommodation.[18] Because the law requires only that employers reasonably accommodate "the known physical or mental limitations" of an employee,[19] it is incumbent upon the employee to put the employer on notice through the accommodation request.[20] An accommodation request need not be formal, and need only provide the employer with enough information, under the circumstances, to know of both the disability and the desire for an accommodation.[21] Once the request has been made, the employer must initiate an "interactive process" with the employee through which the parties "should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."[22] Both parties must engage in the interactive process in good faith; an employee's

16. 29 C.F.R. § 1630.2(o)(1)(ii)–(iii) (defining "reasonable accommodation" as "[m]odifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position" or "[m]odifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities").

17. *Id.* § 1630.2(o)(2)(i)–(ii).

18. Wilson v. Dollar Gen. Corp., 717 F.3d 337, 347 (4th Cir. 2013) (quoting EEOC v. C.R. England, Inc., 644 F.3d 1028, 1049 (10th Cir. 2011)).

19. 42 U.S.C. § 12112(b)(5)(A).

20. *See* Lashley v. Spartanburg Methodist Coll., 66 F.4th 168, 179 (4th Cir. 2023).

21. *See* Allen v. Baltimore Cnty., 91 F. Supp. 3d 722, 733 (D. Md. 2015) (citing *Wilson*, 717 F.3d at 346–47).

22. 29 C.F.R. § 1630.2(o)(3) (2023); *see also Wilson*, 717 F.3d at 346–47 ("The duty to engage in an interactive process to identify a reasonable accommodation is generally triggered when an employee communicates to his employer his disability and his desire for an accommodation for that disability.").

failure to engage is fatal to a failure-to-accommodate claim,[23] and an employer's failure to engage establishes liability unless the employee cannot identify any possible reasonable accommodation for the disability.[24] In any case, once the employer is on notice, an employee may assert a claim of ADA discrimination if the employer fails to provide a reasonable accommodation, whether the employer participates in the interactive process or not.[25]

The ADA uses the same procedural framework and remedies as most other types of employment discrimination under Title VII of the Civil Rights Act of 1964.[26] Under this procedural framework, charges of discrimination, including failure to accommodate a disability, are to be filed with the Equal Employment Opportunity Commission ("EEOC") within 180 days of the employer's alleged offense.[27] Upon receipt of the charge, the EEOC notifies the employer and conducts an investigation into the allegations.[28] If the EEOC finds reasonable cause to believe the allegation has merit, it attempts to informally resolve the issue and thereafter has the option to file suit against the employer in court on behalf of the complainant.[29] Alternatively, the EEOC may find that there is "not reasonable cause to believe that the charge is true" and dismiss the charge,[30] or it may simply decline to take action on the charge within 180 days of filing.[31] In either case, the complainant is then entitled to a notice of right to sue, which permits them to commence a civil action against the employer within ninety days.[32]

23. *See Lashley*, 66 F.4th at 179 (holding that an employer had not violated the ADA by failing to accommodate an employee with a disability because the employee had a "communication breakdown" and failed to make an adequate accommodation request).

24. *See Wilson*, 717 F.3d at 347 ("[A]n employer who fails to engage in the interactive process will not be held liable if the employee cannot identify a reasonable accommodation that would have been possible.").

25. *See id.*

26. Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 253–66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17); 42 U.S.C. § 12209(5); *see* Fox v. Gen. Motors Corp., 247 F.3d 169, 176 (4th Cir. 2001) ("Because the ADA echoes and expressly refers to Title VII, and because the two statutes have the same purpose—the prohibition of illegal discrimination in employment—courts have routinely used Title VII precedent in ADA cases." (citing Miranda v. Wis. Power & Light Co., 91 F.3d 1011, 1017 (7th Cir.1996))).

27. 42 U.S.C. § 2000e-5(b), (e)(1). If a complainant first filed a case with a state or local equal employment agency, Title VII instructs that they should file with the EEOC within 300 days following the alleged unlawful practice or within thirty days from the end of the state or local agency proceeding, "whichever is earlier." *Id.* § 2000e–5(e)(1).

28. *Id.* § 2000e-5(b).

29. *Id.* § 2000e-5(b), (f)(1).

30. *Id.* § 2000e-5(b).

31. *Id.* § 2000e-5(f)(1).

32. *Id.* § 2000e-5(b), (f)(1).

II. FACTS AND REASONING IN *KELLY V. TOWN OF ABINGDON*

A. *Facts of the Case*

Gregory Kelly was the town manager of the Town of Abingdon from 2006 to 2018.[33] He had anxiety, depression, and high blood pressure.[34] Each of these conditions is a disability that may be covered under the ADA.[35] During the latter part of Kelly's tenure, the town government became a "caustic work environment" due to "political infighting."[36] Kelly alleged that the mayor and members of the town council engaged in a pattern of "unprofessional" and "outrageous behavior," including the humiliation, harassment, and strong-arming of town officials and staff members to "advance their political agendas."[37] Specifically, Kelly alleged that Mayor Wayne Craig harassed Kelly's staff and undermined his authority over them; that former Mayor Cathy Lowe had threatened to fire Kelly if he did not "appoint her personal friends to favorable positions"; and that Vice Mayor Rick Humphreys "berated" him in public meetings and "subjected him to drunken, belligerent, profane phone calls at odd hours of the night."[38]

As the work environment in the town government worsened, Kelly's health deteriorated to the point that "his disabilities became intolerable."[39] Kelly stated that he endured acute health effects resulting from the way his coworkers treated him, including "crippling anxiety," panic attacks, and blood pressure spikes that left him dizzy and disoriented.[40] These health effects were so severe that town employees "console[d] him" in his office after council meetings, bought him a blood pressure monitor, and encouraged him to seek medical attention.[41]

33. Kelly v. Town of Abingdon, 90 F.4th 158, 163–64 (4th Cir. 2024).

34. *Id.* at 163.

35. *See* 29 C.F.R. § 1630.2(h) (2023) (defining "[p]hysical or mental impairment" as "[a]ny physiological disorder or condition . . . affecting one or more body systems, such as . . . circulatory," or "[a]ny mental or psychological disorder, such as . . . emotional or mental illness"); *Depression, PTSD, & Other Mental Health Conditions in the Workplace: Your Legal Rights*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Dec. 12, 2016), https://www.eeoc.gov/laws/guidance/depression-ptsd-other-mental-health-conditions-workplace-your-legal-rights [https://perma.cc/2PUY-DAGV] ("If you have depression, post-traumatic stress disorder (PTSD), or another mental health condition, . . . you may have a legal right to get reasonable accommodations that can help you perform and keep your job." (emphasis omitted)).

36. *Kelly*, 90 F.4th at 163.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* ("[Kelly] maintains that he endured crippling anxiety, disorientation, insomnia, and hopelessness; his blood pressure spiked, he experienced dizzy spells, and he had panic attacks at work, disrupting his ability to perform basic tasks.").

41. *Id.* at 163–64.

Kelly filed charges of discrimination with the EEOC, which, he alleged, informed "all of the department heads" of his disabilities.[42] Additionally, through his attorneys, Kelly sent a letter to town authorities entitled "Accommodations Requests."[43] Though the letter referenced the ADA in its opening line, the letter was focused on changing "the daily office environment" through "mutual respect, clear communication, and . . . well-defined roles."[44] The letter contained twelve specific requests, some of which included

> compliance with the Code of Ethics; adherence to defined roles; an end to the incessant threats of termination; courtesy and care in communications; equal treatment for employees; improved gender diversity in hiring and management; an acknowledgment that Town Management is a team; and the development of written policies governing workplace conduct.[45]

The letter did not reference Kelly's specific disabilities, nor did it explain how the requests would alleviate his disabilities.[46]

After Kelly distributed the letter, the town's legal counsel responded months later with a single communication informing him that the town would engage in the interactive process to determine an "appropriate accommodation," but town officials thereafter "rebuffed [Kelly's] attempts to pursue an interactive process."[47] They instead "stepped up their harassment," increasing Kelly's workload, escalating threats of termination, continuing to publicly berate him, and ridiculing him over his various attempts to preserve his health.[48] Kelly resigned from his position on May 7, 2018, claiming constructive discharge.[49]

After resigning, Kelly filed another charge of discrimination with the EEOC and obtained a notice of right to sue.[50] He filed suit, asserting claims for discrimination, retaliation, failure to accommodate, and interference in violation of the ADA.[51] The district court granted a motion to dismiss the discrimination and interference claims and ultimately granted summary

42. *Id.* at 164 ("According to Kelly, 'all of the department heads' were aware of his EEOC charges, and 'his filings were a well-discussed subject matter at the office.' He also asserts that these charges informed the Town of his disabilities . . . .").

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 164–65.

51. *Id.* at 165. Kelly also filed a breach of contract claim for nine months of severance pay provided for in his employment contract, which hinged on his allegation of constructive discharge. *Id.* This claim is beyond the scope of this Recent Development and was not a part of Kelly's appeal. *See id.*

judgment to the town on the retaliation and accommodation claims.[52] In so deciding, the court ruled as a matter of law that Kelly's "Accommodations Requests" letter was insufficient as an accommodation request under the ADA, and could not serve as a predicate for either the accommodation or retaliation claim.[53] This determination of the district court formed the basis of Kelly's appeal.[54]

B. *The Fourth Circuit's Reasoning*

The Fourth Circuit in *Kelly* affirmed the lower court's determination that Kelly's letter was insufficient as an accommodation request under the ADA.[55] Though the court recognized that the burden of requesting an accommodation is quite low, it adopted standards from other circuits to find that "not every work-related request by a disabled employee constitutes a request for accommodation under the ADA."[56] The court held that the adequacy of an ADA accommodation request "depends on how a reasonable employer would view the employee's communication in the surrounding circumstances."[57] To serve as a predicate for the ADA accommodation process, "the communication must be 'sufficiently direct and specific,' providing notice that the employee needs a 'special accommodation' for a medical condition."[58]

Just as the phrases "reasonable accommodation" or "ADA" are not required to effectively request an accommodation under the ADA, simply using these terms, without more, is not enough to adequately inform an employer that the employee is seeking an accommodation.[59] The court held that the accommodation request is meant to "enable employers to differentiate between protected requests for accommodation and everyday workplace grievances."[60] Therefore, in the court's view, an accommodation request must contain "a logical bridge connecting the employee's disability to the workplace changes he requests" that "permit[s] the employer to infer that the request relates to the employee's disability."[61] Otherwise, employers may misinterpret an employee's request for an accommodation under the ADA as a simple request for workplace changes, or vice versa.[62]

52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.* at 172.
56. *Id.* at 167; *see infra* Section II.C (discussing these out-of-circuit cases in detail).
57. *Kelly*, 90 F.4th at 167 (first citing Kowitz v. Trinity Health, 839 F.3d 742, 747–48 (8th Cir. 2016); and then citing Conneen v. MBNA Am. Bank, N.A., 334 F.3d 318, 332 (3d Cir. 2003)).
58. *Id.* (quoting EEOC v. C.R. England, Inc., 644 F.3d 1028, 1049 (10th Cir. 2011)).
59. *Id.*
60. *Id.*
61. *Id.* at 167–68.
62. *See id.*

The court in *Kelly* found that the "Accommodations Requests" letter did not have the requisite "logical bridge."[63] Despite its title and reference to the ADA in its opening line, the letter failed as an ADA accommodation request because its "theme" was not apparently connected to alleviating anyone's disabilities.[64] The letter simply communicated an intent "to foster a well-running office based on the principles of mutual respect, clear communication, and . . . well-defined roles."[65] In the court's view, "[m]ost of the letter's suggestions . . . ha[d] no perceptible relation to Kelly's disabilities at all."[66] Therefore, its "substance undercut[] its label."[67] Despite the letter's framing and clear reference to the ADA, the court applied its "reasonable employer" test to find that in light of the toxicity of Kelly's work environment, the letter could be read "only as a list of grievances and suggestions" instead of a request related to Kelly's disabilities.[68] Consequently, despite the undisputed fact that everyone involved in the litigation was aware of Kelly's disabilities, and that it would have been "apparent why a more organized, less stressful working environment would alleviate [Kelly's] anxiety, depression, and high blood pressure," Kelly's letter could not serve as a basis for an ADA failure-to-accommodate claim.[69]

C. *How the Fourth Circuit Formulated This New Standard*

In *Kelly*, the Fourth Circuit constructed its new standard invoking "how a reasonable employer would view the employee's communication in the surrounding circumstances" on shaky ground.[70] The court relied upon two out-of-circuit cases to formulate this standard. First, in *Kowitz v. Trinity Health*,[71] the Eighth Circuit found that an employee's accommodation request may have been adequate to trigger the employer's duty to engage in the interactive process, even though it did not use language like "reasonable accommodation" or invoke the ADA because the employee had notified her supervisor that she needed to complete physical therapy after receiving corrective neck surgery before she could obtain a job-related certification.[72] The *Kowitz* court found that the adequacy of the employee's written notification that she required a delay in obtaining her certification was bolstered by her referring to "her surgery, prior leave, and ongoing pain," as well as her "prior communications about the

63. *See id.* at 168.
64. *See id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at 167 (first citing Kowitz v. Trinity Health, 839 F.3d 742, 747–48 (8th Cir. 2016); and then citing Conneen v. MBNA Am. Bank, N.A., 334 F.3d 318, 332 (3d Cir. 2003)).
71. 839 F.3d 742 (8th Cir. 2016).
72. *See id.* at 747–48.

disability" with her employer.[73] The *Kelly* court seemingly relied on the *Kowitz* court's use of phrases such as "under the circumstances" and "[v]iewed in context" to find support for its standard emphasizing "the surrounding circumstances" of an employee's communication.[74] Indeed, the Fourth Circuit cited this part of the *Kowitz* court's reasoning directly as support for its new standard.[75]

The second case on which the *Kelly* court relied for support, *Conneen v. MBNA America Bank, N.A.*,[76] came from the Third Circuit and similarly involved a claim that an employer failed to provide a reasonable accommodation for a disability.[77] Pertaining to the accommodation request, the *Kelly* court found support in the *Conneen* court's determination that "[c]ircumstances must at least be sufficient to cause a reasonable employer to make appropriate inquiries about the possible need for an accommodation."[78] The *Kelly* court also seems to have found support in the *Conneen* court's assertion that "[t]he quantum of information that will be required will . . . often depend on what the employer already knows."[79] Essentially, the *Conneen* court found that the plaintiff in the case had not provided her employer with adequate information to know that she required an accommodation, or that her ability to work was being affected by a disability, so her failure-to-accommodate claim necessarily failed.[80]

Although these cases articulate statements of law supportive of the *Kelly* standard, neither case adequately supports the normative underpinnings of what the Fourth Circuit held. In invoking the phrases later cited by the *Kelly* court, the *Kowitz* court intended to establish a basis for finding that a communication should reasonably be understood as an ADA accommodation request despite lacking specific language indicating it as such; the *Kowitz* distinguished its opinion from prior holdings that "an employer's duty to accommodate an employee is not triggered until the employee clearly requests an accommodation" by finding that the alleged accommodation requests were "significantly more ambiguous" in those cases.[81] The *Kelly* court, by contrast,

73. *Id.*

74. *Id.* at 748; *Kelly*, 90 F.4th at 167.

75. *See Kelly*, 90 F.4th at 167 (citing *Kowitz*, 839 F.3d at 747–48).

76. 334 F.3d 318 (3d Cir. 2003).

77. *See id.* at 325.

78. *Kelly*, 90 F.4th 167 (quoting *Conneen*, 334 F.3d at 332).

79. *Conneen*, 334 F.3d at 332.

80. *See id.*

81. Kowitz v. Trinity Health, 839 F.3d 742, 747 (10th Cir. 2016) (citing EEOC v. Prod. Fabricators, Inc., 763 F.3d 963, 968 (8th Cir. 2014)) (finding an inadequate request where the employee was "fine," never requested an accommodation, and did not seek evaluation for his condition until after his termination); Ballard v. Rubin, 284 F.3d 957, 962 (8th Cir. 2002) (finding no cognizable request where the employee specifically stated that he did not want an accommodation, while also stating that it was "appropriate" for him to consider his doctor's recommendations); Mole v. Buckhorn

adopted the *Kowitz* court's logic in foreclosing a finding of adequacy despite the explicit references to "accommodations" and the ADA in Kelly's letter.[82] In other words, the *Kowitz* court appeared to be attempting to lessen the burden of establishing adequacy while the *Kelly* court imposed a heightened burden. Though the *Kelly* court may not have been wrong to do so on the facts before it, its decision will likely make it harder for employees with disabilities in the Fourth Circuit to make an adequate request for accommodation, especially those with NVDs.

Similar to the *Kowitz* court, the *Conneen* court struck a more deliberate balance between the respective burdens imposed on employees and their employers than the Fourth Circuit did in *Kelly*. While the Third Circuit held that "circumstances must at least be sufficient to cause a reasonable employer to make appropriate inquiries about the possible need for an accommodation" and that the information that the employee must disclose to her employer "depend[s] on what the employer already knows,"[83] the court was careful to note that "circumstances will sometimes require '[t]he employer . . . to meet the employee half-way, and if it appears that the employee may need an accommodation but doesn't know how to ask for it, the employer should do what it can to help.'"[84] The *Kelly* court, by contrast, made no such qualification in its holding, and therefore took a more rigid stance than the out-of-circuit authorities on which it relied.[85]

III. WHAT THE *KELLY* STANDARD MEANS FOR THOSE WITH NON-VISIBLE DISABILITIES

A. *How the* Kelly *Court Burdened Employees with Non-Visible Disabilities*

The holding in *Kelly* is not particularly objectionable—on these facts, it may have been unclear from the town's perspective whether Kelly intended to request an accommodation for his disability under the ADA or to simply complain about his caustic work environment. However, there was certainly room for the court to decide differently. As the standard for invoking ADA protection is based on giving the employer notice of a desire for an ADA accommodation, a court could reasonably view the bare invocation of the ADA in the letter as sufficient to compel the town to engage in the interactive process with Kelly. Moreover, in deciding this case as it did, the Fourth Circuit

Rubber Prods., Inc., 165 F.3d 1212, 1216–17 (8th Cir. 1999) (finding no cognizable request where the employee told her supervisor that she was "feeling fine" and had been approved to return to work).

82. *See Kelly*, 90 F.4th at 167–68.

83. *Conneen*, 334 F.3d at 332.

84. *Id.* (quoting Bultemeyer v. Fort Wayne Cmty. Sch., 100 F.3d 1281, 1285 (7th Cir. 1996)).

85. *See Kelly*, 90 F.4th at 167–68.

interpreted caselaw and set new standards that stand as another barrier to those with NVDs who wish to request accommodations in the workplace.

In particular, the court determined that the adequacy of an accommodation request under the ADA "depends on how a reasonable employer would view the employee's communication in the surrounding circumstances."[86] The court explained that this test is intended to "enable employers to differentiate between protected requests for accommodation and everyday workplace grievances."[87] Of course, the threshold question for whether an accommodation request is adequate is whether it gives notice to the employer of the need for an accommodation.[88] By setting this standard, the Fourth Circuit articulated with more particularity what kind of notice is—and is not—sufficient.

By considering context that extends beyond what is apparent from the accommodation request itself, the court imposed a higher burden upon those with NVDs as opposed to their counterparts with visible disabilities. Clearly, if adequacy depends heavily on "the surrounding circumstances" of an accommodation request, those with NVDs will be disadvantaged under the law insofar as they cannot benefit from the manifestations of their disabilities as those with visible disabilities can. They may be more prone to giving an insufficient accommodation request to their employers because they would be required to articulate the effects of their disability that require accommodation, while employees with visible disabilities could rely on the physical manifestations alone. Moreover, employees with NVDs run a greater risk of inadequately explaining their disability and thereby failing to establish ADA protection. For example, the request of an employee who uses a wheelchair for a wheelchair-accessible work surface, without more, is very likely to be interpreted as an ADA-protected request for accommodation. Conversely, a very similar request for a seated workspace by an employee with arthritis might be insufficient simply because the employer may not be able to see the arthritic employee's symptoms the way that they can see that another employee uses a wheelchair.

The *Kelly* court explicitly endorsed a standard that perpetuates this unequal burden by proclaiming that "just as an employee need not 'formally invoke the magic words "reasonable accommodation,"' those magic words are not sufficient to trigger the employer's duty to pursue the ADA interactive process."[89] The court instead explained that "there must be a logical bridge connecting the employee's disability to the workplace changes he requests" in

86. *Id.* at 167.

87. *Id.*

88. *See* Wilson v. Dollar Gen. Corp., 717 F.3d 337, 347 (4th Cir. 2013).

89. *Kelly*, 90 F.4th at 167 (citation omitted) (quoting Foster v. Mountain Coal Co., 830 F.3d 1178, 1188 (10th Cir. 2016)).

order to trigger the employer's duty.[90] Again, this standard makes sense from the employer's perspective; it is another way to ensure that the employer has adequate notice that the request is related to a disability protected under the ADA.[91] But this standard also requires more of an employee with an NVD than one with a visible disability. To be sure, it is much easier to establish a "logical bridge" between a requested workplace change and an employee's disability if the disability and its effects are plainly visible to the employer. Using the same example as above, a reasonable employer would easily recognize that a request for lowered countertops in shared spaces in the workplace is logically connected to a disability requiring that the employee use a wheelchair, even if the employee does not explicitly invoke the ADA or use the term "accommodation." If the employee has an NVD, however, it is unlikely that the employer would know of the employee's disability without being explicitly told. Moreover, even if the employer was aware of the disability, it is not as likely that they would understand what kinds of requests are logically connected to that disability because the employer may not be able to observe or otherwise become familiar with the disability's symptoms that require accommodation. Consequently, under this standard, employees with NVDs may be required to make a much more detailed accommodation request—likely including disclosure of their disability, its relevant symptoms, and an explanation of how their requests will accommodate their needs—than a similarly situated employee with a visible disability would. And if they fail to make such a detailed request, they will be unable to enjoy ADA protection.

Thus, the *Kelly* standard, while seemingly innocuous at first blush, creates a dynamic where an employee's communication to his employer, clearly designated as an "accommodation request" and invoking the ADA, can still be found to be insufficient as a request for accommodation based essentially on how the employer views the substance of the request in context. It is more likely that an employer would misinterpret a request for accommodation as "grievances and suggestions," as was the case in *Kelly*,[92] if they have an inadequate understanding of the employee's disability. And it is much more likely that an NVD would be misunderstood or overlooked than a visible disability. Therefore, the *Kelly* standard is likely to operate as a barrier to success in failure-to-accommodate claims—one that will disproportionately impact claims brought by employees with NVDs.

90. *Id.* at 168.
91. *See id.* at 167.
92. *See id.* at 168.

B. *What Employees with Non-Visible Disabilities Should Do After* Kelly

Much can be said about what the *Kelly* court could have done differently to alleviate the burden on employees with NVDs. It could have looked to the qualifications made in the *Kowitz* and *Conneen* holdings to soften the legal standards that it endorsed. For instance, some version of *Conneen*'s "meet the employee half-way" directive could strike a more equitable balance between the employer's and employee's responsibilities—and get closer to the designedly light burden on employees contemplated by the ADA.[93] The court could have applied a presumption of adequate notice to communications that invoke the ADA or use the phrase "accommodation request" as the letter in *Kelly* did, though this may be so permissive as to overburden employers and the courts. In any event, there are surely workable legal standards that do not impose the burden on employees with NVDs that the *Kelly* standard does.

The more pertinent question post-*Kelly*, however, is what employees with NVDs and legal practitioners who represent them should do to ensure that their accommodation requests are adequate. Although the process of requesting an accommodation is not meant to be onerous and the ADA does not prescribe a formal process, the *Kelly* decision unfortunately requires employees with NVDs to be more disciplined in the requests they make and the information they disclose.[94] The Department of Labor's Office of Disability Employment Policy ("ODEP") has developed useful tools to help employees and employers navigate the accommodation process.[95] The Job Accommodation Network ("JAN"), an ODEP-funded technical assistance center focused on providing guidance on workplace accommodations, has developed resources that are particularly useful to employees making accommodations requests for an NVD.[96]

The JAN has developed nonmandatory sample forms for employers to use to ensure legal compliance throughout the accommodation process, including a Sample Reasonable Accommodation Request Form for Employers.[97] The form, though it is designed for use by employers, nonetheless provides a useful structure for employees to use independently, enabling them to identify precisely what accommodations they require and why.[98] This type of

93. Conneen v. MBNA Am. Bank, N.A., 334 F.3d 318, 332 (3d Cir. 2003); *see Kelly*, 90 F.4th at 166.

94. *See supra* Section III.A.

95. *See Accommodations*, OFF. DISABILITY EMP. POL'Y, https://www.dol.gov/agencies/odep/program-areas/employers/accommodations [https://perma.cc/QZD9-CA5L].

96. *Id.*

97. *See Sample Forms*, JOB ACCOMMODATION NETWORK, https://askjan.org/topics/Sample-Forms.cfm [https://perma.cc/6VC8-XY6Y].

98. *See Sample Reasonable Accommodation Request Form for Employers*, JOB ACCOMMODATION NETWORK, https://askjan.org/Forms/upload/raform.doc [https://perma.cc/SJL6-V4T3 (staff-uploaded archive)].

standardized structure can allow employees to portray their request in a way that would be more likely to put their employer on notice than would another type of communication, such as a conversation, informal email, or nonstandardized letter. Moreover, a formal, written accommodation request form would likely create clearer evidence of the request than these other types of communication, should the matter end up in court.

Of course, even this type of standardized communication cannot fully immunize an employee from the potential pitfalls of the *Kelly* standard. Employees must also be discerning in the information they choose to include in the request; the employee should explicitly relate any particular accommodation to a symptom or aspect of their disability and should refrain from including any requests that do not have an evident "logical nexus" with the disability. The *Kelly* court made clear that requests that relate to "everyday workplace grievances" can stand in opposition to an effective accommodation request, so it would be wise for employees to keep their personal requests and disability-related requests clearly separate from one another.[99] This may be more complicated than it sounds; because an ADA accommodation request can be informal and made through any form of adequate communication, an employee may be wise to sequester their accommodation request from any other request to their employer both temporally and in form so as to avoid any potential of their employer conflating an ADA-related request with an independent one. In any event, although the ADA does not mandate an onerous standard for making an accommodation request, employees with NVDs should nevertheless endeavor to make their requests deliberately and carefully to ensure that they are availing themselves of ADA protection.

CONCLUSION

People with NVDs already face significant burdens in the workplace simply because of how they are perceived by those around them.[100] While the Fourth Circuit in *Kelly* took steps to ensure fairness on behalf of employers receiving requests for accommodation, it likely inadvertently compounded the issues that employees with NVDs already face, and in some ways enshrined these burdens into law. There is certainly room for the law to develop in this area—subsequent decisions may clarify the kinds of circumstantial considerations an employer must take into account and potentially mitigate the issues faced by those with NVDs in particular. And there are strategies and resources that employees with NVDs can use to ensure they can enjoy ADA protection. However, as it stands now, the *Kelly* decision is an unfortunate imposition upon employees with disabilities, particularly those with NVDs.

99. Kelly v. Town of Abingdon, 90 F.4th 158, 167 (4th Cir. 2024).

100. *See supra* note 7 and accompanying text.

This case should ideally be viewed as a cautionary one; it is important for courts hearing ADA cases such as *Kelly* to bear in mind the unique challenges that different types of disabilities impose on those who have them and ensure that their decisions are sensitive to those challenges when issuing their opinions. The ADA is intended to be "construed broadly in favor of expansive coverage,"[101] so decisions such as *Kelly* which potentially curtail that coverage—even where curtailing coverage is appropriate—should take care to avoid any arbitrary or inadvertent imposition of barriers to coverage based solely on how a particular disability is viewed. Those with NVDs already frequently suffer in silence; their legal claims should not have to suffer that same fate.

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101. *See* 29 C.F.R. § 1630.2(j)(1)(i) (2023).

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