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AK&C Legal Perspectives

from Abrahams Kaslow & Cassman LLP

The Importance of Working with Employees to Determine Reasonable Accommodations under the Americans with Disabilities Act

by Ryan M. Kunhart

This article was written by Ryan Kunhart and published in the Fall edition of the Defense Research Institute (DRI) Governmental Liability Newsletter.

The Americans with Disabilities Act ("ADA") requires covered employers to provide effective reasonable accommodations to employees with disabilities. Employers are required to engage in an "interactive process" with employees to work together and determine effective reasonable accommodations. Cloe v. City of Indianapolis, 712 F.3d 1171 (7th Cir. 2013) reminds employers of their continuing obligation to remain engaged in the interactive process, even after an initial accommodation has been granted.

Cloe arose out of ADA claims against the City after Cloe was terminated for poor performance. Cloe was hired by the City in May 2007, as an Unsafe Buildings and Nuisance Abatement Project Manager. Cloe received positive performance reviews and several community outreach awards from City leaders.

In March 2008, Cloe was diagnosed with multiple sclerosis. Cloe's doctor initially ordered her to take time off, but in May 2008, her doctor lifted some restrictions and allowed her to work 3-4 days a week. Since Cloe's condition made it difficult to walk, among other things, her doctor requested that she be provided nearby parking. As discussed in detail below, after learning of the doctor's request, the City continously worked with Cloe in an attempt to accommodate the request for nearby parking.

In June 2008, Cloe began having problems with her supervisor. Cloe's supervisor ordered her not to attend a building sweep because she believed it was a risk to her health, but she still attended. Cloe was issued a written disciplinary act for insubordination for failing to comply with her supervisor's instructions. In late 2008, Cloe accepted a new position and was assigned a new supervisor, Michelle Winfield. In February 2009, Cloe received a written discipline for poor work performance and failure to perform an assigned duty.

On February 6, 2009, Cloe, Winfield and other individuals met to discuss Cloe's issues, including poor spelling, bad grammar, and incorrect addresses on demolition requests. A few days after the meeting, Winfield gave Cloe a written Memorandum of Understanding directing Cloe to double-check and read documents aloud, have a second person edit her work, and submit documents for review before sending them out.

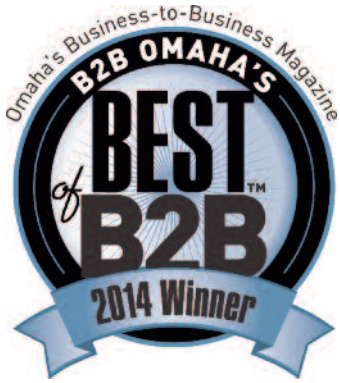
In late April 2009, Cloe met with Winfield and Winfield's supervisor, Janna Mays. During the meeting, Cloe told them she had to leave early because of a doctor's appointment and Winfield and Mays expressed anger that she was leaving early. One week later, Winfield disciplined Cloe for failing to schedule a demolition and attending the demolition contrary to orders. Winfield also signed a Performance Improvement Plan, stating that Cloe's performance was "below expectations", that she had "consistently turned in inaccurate work", and that she had been "dishonest and insubordinate." On June 11, 2009, Mays issued a Notice of Unacceptable Performance or Conduct, indicating that "requirements for satisfactory performance [by Cloe] have continued to be unmet" and recommended Cloe's termination. The City accepted the recommendation and terminated Cloe on June 29, 2009.

Cloe sued, alleging the City failed to accommodate her disability, discriminated against her because of her disability, and retaliated against her for requesting accommodations for her disability. The district court granted summary judgment in favor of the City, and Cloe appealed. On appeal, the Seventh Circuit affirmed the district court's judgment on Cloe's reasonable accommodation claims, but reversed on her discrimination and retaliation claim. While the Court's retaliation and discrimination analysis in Cloe provides helpful insight for employers, its analysis of Cloe's reasonable accommodation claim for closer parking reminds employers of their continuing obligation to remain engaged in the interactive process required under the ADA.

Reasonable Accommodation Analysis

The reasonableness of the City's actions was central to the Court's analysis of Cloe's contention that the City failed to grant her request for a nearby parking

(Continued on page 2.)



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Reasonable Accommodations Under the Americans with Disabilities Act *(Continued from page 1.)*

space within a reasonable amount of time. Cloe did not contend that the permanent parking pass she received in December 2008 for the underground lot immediately below the City-County building failed to meet her needs. Instead, she contended that the "winding path" the City took to get Cloe the permanent parking pass was unreasonable.

In analyzing Cloe's contention, the Court focused on the timeline of events leading up to Cloe receiving the permanent parking pass. When she began working for the City, she was assigned a parking spot two blocks away. In April 2008, Cloe mentioned to her supervisors that she was having trouble walking from the parking garage. The Court noted that the record did not indicate that at this point in time Cloe specifically requested an accommodation based on her trouble walking. Due to her troubles, Cloe began parking at her own expense in a lot catty-corner to the City-County Building.

On July 2, 2008, Cloe submitted a list of medical restrictions to the City, which indicated that "specified parking is preferred if possible", and that "if required to park [at] a distance, [Cloe] will walk back to the office at her own pace." After receiving the restrictions, the City assigned Cloe to a lot directly across the street from the City-County building. The Court found the record was unclear when Cloe received the pass for this lot, but it assumed she received the pass sometime in the weeks leading up to October 17, 2008.

On September 25, 2008, while she was waiting to receive this pass, Cloe submitted a doctor's note to the City stating Cloe could not walk long distances and she needed to park at the City-County building. E-mail exchanges followed on October 17, 2008, with Cloe thanking several City employees for working hard to get her a parking spot close to the building, but that there had been a misunderstanding and that the new spot was not working out because she frequently had to park on the far side of the lot and walk almost a full extra block to work. In response, the City offered to meet to discuss alternative accommodations.

On November 10, 2008, a visitor's parking placard for the underground lot immediately below the City-County building became available. Cloe was given the placard the following day, along with a special placard allowing her to park at nearby parking meters without paying. Despite the City's efforts, the visitor's lot and parking meters were often full, and Cloe brought this issue to the City's attention in November or December 2008. In early December 2008, a City employee left and Cloe received this employee's permanent underground parking spot.

On appeal, Cloe claimed there was no reason for the City not to have given her a permanent parking spot immediately. She claimed the delays showed that the City did not act reasonably to accommodate her disability.

The Reasonable Accommodation Process

The Court began its analysis by noting that reasonable accommodation "is a process, not a one-off event." From reviewing the timeline of events, the Court found the accommodation process began on July 2, 2008, when Cloe submitted the list of medical restrictions requesting a parking accommodation.

The Court noted that upon receiving an accommodation request, "an employer is not required to provide the exact accommodation request. Instead, 'the ADA obligates the employer to engage with the employee in an interactive process to determine the appropriate accommodation under the circumstances.'" Id. The Court noted the interactive process "brings the employee and employer together in cooperation to 'identify the employee's precise limitations and discuss accommodations which might enable the employee to continue working.'" Under the ADA, if the interactive process fails to lead to reasonable accommodation, responsibility lies with the party that caused the breakdown.

With this framework in mind, the Court found the interactive process did not break down. Instead, after the City was informed of Cloe's needs, it provided her with parking at a lot closer to the City-County building. After this did not work, Cloe received a pass to park directly underneath the City-County building and another pass to park at nearby meter parking. When this did not work, the City provided Cloe with a permanent underground parking spot once one opened up. The Court held, "This is exactly the sort of 'interactive process' that the ADA calls for."

While the Court noted in retrospect it would have clearly been easier to give Cloe a permanent underground parking pass at the outset, this only became clear in retrospect. "The City had no way of knowing that its other seemingly reasonable accommodations - a different lot, visitor, parking, street parking- would be insufficient. And, more importantly, once the City found out that its proposed accommodations were insufficient, it acted with reasonable speed to come up with new ones." Based on this, the Court affirmed summary judgment on this claim.

Insight for Employers

The Employer's Continuing Obligation. As Cloe makes clear, effective accommodations can change rapidly. If a previously granted accommodation is no longer effective, the employer will be required to re-engage in the interactive process and potentially provide a different accommodation. This obligation is continuing and in many cases is open-ended. Failure to continually engage in the interactive process in good faith or cause a breakdown in the process can result in liability.

Work with the Employee. It is likely the Cloe holding would have been different if the City would have become irritated every time Cloe requested a different accommodation. Instead, every time the City received a new request, it accommodated Cloe and provided her with closer parking until a permanent underground spot became available. The Seventh Circuit took note of the City's efforts and open line of communication with Cloe, and affirmed the granting of summary judgment.

Tenaska Closes $450 Million Financing for Second California Solar Project

Abrahams Kaslow & Cassman LLP assisted in the development and financing of the Tenaska Imperial Solar Energy Center West, a 150-megawatt (MW) photovoltaic solar electric generating plant to be constructed near El Centro, California. $450 million in commercial financing for the project closed on June 13, 2014. Construction on the plant will commence later this year with commercial operation expected in 2016. Electricity from the plant has been sold to San Diego Gas & Electric under a 25-year agreement. First Solar, Inc. is the engineering, procurement and construction contractor for the project. The facility will use First Solar's advanced thin-film photovoltaic (PV) modules with single-axis tracking to follow the sun for greater power generation. This is the second utility-scale solar project in the region developed by Tenaska. AK&C has assisted Tenaska on both projects. The lawyers involved in the negotiation and drafting of the engineering, procurement and construction agreements along with contracts for operation and maintenance of the plant were Randall C. Hanson, Nicholas T. Dafney, Jennifer L. Rattner and Kathryn A. Kotlik. John W. Herdzina and Thomas J. Malicki assisted Tenaska in closing the financing for the project.

Ethical Considerations for Lawyers Protecting the Client

by: Kathryn A. Kotlik

Attorneys have a set of rules which establish the principles and rules of conduct that attorneys shall at all times follow in fulfilling their professional responsibilities to their client. The lawyers' ethical code of conduct seeks, among other things, to protect the client.

Existing clients often ask us to defend their adult children in matters involving debt collection, shoplifting, driving under the influence, or other criminal cases, with our clients offering to foot the bill. We can accept payment from the parents, but the ethical code of conduct for lawyers generally prohibits us from discussing the facts and merits of the case with the parents outside the child's presence. Thus, when parents request information about their child's case, it puts us in a difficult position. Our confidentiality obligations run to the client, who, for that case, is the child and not the parents.

A lawyer is not only expected to maintain a client's confidentiality, but also to help safeguard a client's well-being. For example, if a lawyer is notified that an elderly client has stopped eating properly or seems confused and never leaves his house, what should the lawyer do? This scenario puts the lawyer in a difficult situation, as the client probably does not expect his lawyer to do much of anything and there may be confidentiality issues with respect to the client and his state of well-being. A lawyer, upon visiting the client and confirming he is unable to care for himself, may take reasonably necessary steps, including consulting with others or contacting an agency, as appropriate, to protect the client's well-being. In such a situation, our goal would be to ensure our client's safety without compromising our client's dignity, all in furtherance of our ethical obligations under the code.

If you have any questions, please contact one of our attorneys at 402-392-1250.

Are Your I-9s Ready for an Audit? *by Harvey B. Cooper*

The Department of Homeland Security ("DHS") has stepped up its audits and enforcement of the employer's requirement to verify the employment eligibility and identity of each employee at the time of hire. Instead of visiting the employer's workplace, DHS is conducting desk audits; i.e., sending letters to employers demanding that I-9s for current and terminated employees be mailed to DHS within three (3) days of receipt of the Notice of Inspection. By law, the I-9s must be produced within the three (3) days, although in our experience DHS will grant a short extension. 57% to 75% of I-9s typically have errors, are incomplete or missing. These errors can result in technical or substantive paperwork violations. Substantive paperwork violations can result in civil penalties up to $1,100 for each I-9, plus up to a 25% enhancement penalty, even if there is no evidence of knowingly hiring or retaining an unauthorized worker. Not only do employers risk serious penalties, but getting documents ready for the audit is time consuming. One of the best things an employer can do now is to conduct a self-audit of your I-9s. This will enable you to correct any technical or substantive errors. The correction of substantive errors, however, does not relieve the employer of the civil penalty, but may mitigate the amount of any penalty.

We are available to assist you in conducting self-audits or to assist you in responding to a DHS audit. If you are interested, please contact Harvey Cooper or Ryan Kunhart.

Estate Planning is for Everyone

by: Andrew P. Deaver

Estate planning is important for people in every stage of life. Unfortunately, many of us consider estate planning as something only for those more advanced in years or for those with more wealth. Regardless of our age or financial situation, estate planning is important. It should be thought of as a way to protect our families after we are gone, a way to protect ourselves while we are still here, and a way to express our love to the people we care about most.

A Will is the most commonly thought of estate planning tool. While the purposes of a Will can be many, the underlying objectives are always to protect the people you care about while attempting to avoid strife among those same people.

For example, by choosing the person who will have custody of and care for your minor child, you ensure that your child will continue to be raised in an environment that respects and honors your values, parenting style, and beliefs. Another example is that by setting out in writing how you want your assets to be divided upon your death, you help to avoid potential conflicts that could otherwise arise between your family members. Additionally, by choosing the person who will administer your estate, you ensure that a responsible, trustworthy person is in charge of making sure your child is cared for and your assets are distributed as you desire. This also helps prevent multiple people from struggling over who they think you would have wanted to handle estate related matters.

Additional estate planning tools can be used for your own protection. Regardless of your age or income, all people are susceptible to a sudden illness or an accident. With some relatively simple planning, you can be prepared when these situations arise. Estate planning allows you to appoint a person to make medical decisions on your behalf if you are unable. Having such a person appointed ahead of time can save precious moments in the event of a medical emergency. Additional planning allows you to appoint a person to make financial decisions on your behalf if you can no longer make such decisions because of mental incapacity. This planning can protect your assets from sitting idle or being neglected if you are unable to manage them. For example, it can allow someone else to follow up on an insurance claim for your house or make a car payment on your vehicle.

AK&C helps people from every walk of life protect their families and themselves through individualized estate plans. For more information, contact one of our estate planning attorneys at 402-392-1250.

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Attorneys in the Spotlight

Congratulations to Thomas J. Malicki, a partner with the firm, for completing the year long coursework to earn the designation Chartered Advisor in Philanthropy (CAP®).

The CAP® program provides professionals with the knowledge and tools needed to help clients reach their charitable giving objectives while also helping them meet their estate planning and wealth management goals.

Only 700 individuals have been awarded the CAP® designation since its inception in 2003.

Energy For Life

Our firm was a proud sponsor of the Energy for Life Walkathon held on Saturday, September 20, 2014 in support of the Omaha Chapter of the United Mitochondrial Disease Foundation. Attorney Nick Dafney's sister, Dana Ritterbush, was co-chair of the event and the firm walked in memory of her son, Jonah Ritterbush.

Engage Fashion Event

A big thank you to Stacie Mausbach, the owner of Gramercy and Garment District, for hosting our Engage fashion event. Thanks also to Megan Schense with Esoteric Velvet for giving fashion advice to the group. Pictured is Megan on the left, Kelli, a stylist at Gramercy, and Stacie.

Attorneys Jen Rattner and Katie Kotlik participated in the Hunger Run, a benefit for Catholic Charities' food pantries to help the needy through the summer months. Katie is a member of the Catholic Charities Junior Board.

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