EXPANSION OF ADA BY FINDING THAT AN EMPLOYER HAD IMPLIED KNOWLEDGE OF AN EMPLOYEE'S NEED FOR A REASONABLE ACCOMMODATION

Mr. Richard Fader of Ft. Lee, New Jersey asks: "Under the Americans with Disabilities Act (the **"ADA"**), if an employer has knowledge of the employee's medical condition and a reasonable basis for understanding that the employee is seeking a reasonable accommodation, the employer can be found liable for failure to provide such accommodation. Has that general rule been expanded in favor of the employee?" Your concerns are well placed Mr. Fader. Under a recent federal case arising from the State of North Dakota, it was found that if an employer is aware of the employee's inability to perform the essential functions of her work duties, such knowledge by the employer acted as a request for a reasonable accommodation, effectively dispensing with the employee's otherwise obligation under the ADA to ask for an accommodation to trigger the employer's obligations.

On October 17, 2016, the United States Court of Appeals, Eighth Circuit (covering the states of Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota and South Dakota), found in the case styled Kowitz v. Trinity Health, --- F.3d ----, 2016 WL 6068146 (2016), that where an employer is aware (or should reasonably be aware) of an employee's inability to perform certain work duties, such inability acts as a "request" for a reasonable accommodation under the ADA, effectively releasing the employee from the ADA's obligation upon the affected employee to request an accommodation to trigger the employer's ADA obligations.

The employee in the Kowitz case had taken a leave from work to undergo spinal surgery. Upon the employee's return to work, she advised her employer that she was temporarily unable to perform the essential functions of her work duties including the renewal of her CPR certification as required by her heath care employer. She requested, but was refused by her employer, an extension of time to renew her CPR certification until a later date when she was physically able to do so. The employee was thereafter terminated for her failure to perform the essential functions of her work duties. The employee filed a lawsuit, claiming that she was unlawfully terminated because of her disability. The employer's defense was that the employee was not entitled to any accommodation under the ADA because she had never asked for one, as required by the ADA.

The ADA prohibits employers from discriminating against employees because of disability. When a disabled employee requests an accommodation for her disability, the employer must engage in an interactive process with the employee to determine whether a reasonable accommodation is possible. An employee is responsible for initiating the interactive process by making her employer aware of the need for an accommodation. The employee must provide relevant details of her disability and, if not obvious, the reason that her disability requires an accommodation so that the employer can identify and propose potential options, but she need not use technical language to make the request or suggest what accommodation might be

appropriate. An employee requesting an accommodation is required only to provide the employer with enough information that, under the circumstances, the employer can be fairly said to know of both the disability and desire for an accommodation. This determination necessarily accounts for the employer's knowledge of the disability and the employee's prior communications about the disability, and is not limited to the precise words spoken by the employee at the time of the request. *42 U.S.C. § 12112(a)*.

The Eighth Circuit Court of Appeal found that the employer should have understood—or did understand—the employee's communications to be a request for an accommodation. The employer was aware of her specific condition, as well as the general nature of the limitations it placed on her. She referred to her surgery, prior leave, and ongoing pain in her written notification that she would be unable to complete the CPR certification without medical clearance and her Return to Work Form, completed less than two months before her termination, stated that she could not lift, carry, pull, or push more than ten pounds. Those temporary limitations prevented the employee from renewing her CPR certification. While the Return to Work Form did not explicitly say that she could not complete the physical component of CPR certification, there was no evidence produced in the lawsuit to show that she knew, at the time the form was completed, that she would be required to recertify by a date certain and before she was physically able to do so. Indeed, the evidence suggests that the certification requirement had not been rigorously enforced by the employer; rather, the employer required an updated CPR certification from employees only after realizing that several other employees had expired certifications.

Under the ADA, an employee is required only to provide her employer with enough information that, under the circumstances, the employer can be fairly said to know of both the disability and desire for an accommodation. This determination necessarily accounts for the employer's knowledge of the disability and the employee's prior communications about the disability, and is not limited to the precise words spoken by the employee at the time of the request. In this case, when the employee advised her employer that she would be unable to complete the physical requirements of her CPR certification until she had completed four months of physical therapy, she was not required to formally invoke the magic words "reasonable accommodation" to transform that notification into a request for accommodation. Viewed in context, the appellate court concluded that the employee's written notification that she would be unable to complete the CPR certification without medical clearance, and her statement that she required four months of physical therapy before completing the certification, could (and should) have been understood by her employer to constitute a request for a reasonable accommodation of her condition.

Importantly, this decision is generally limited to the states of Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota and South Dakota. However, it is not unreasonable to believe that over time its legal findings will spread across the United States and be adopted (if not expanded further) by other states. From a pro-active standpoint, if an employer knows (or should know) of an employee's medical condition and suspects that work problems result from the

condition, the employer should engage in the accommodation process regardless of whether the employee specifically requests assistance.

The contents of this column are not intended to be a complete summary of the legal issues discussed in this column. Rather, this column is intended to alert you to the broad impact of changes in the law or the means in which to comply with the law to reduce the risk of liability and claims. Because of the complexity of the law, it is recommended that all employers consult with experienced labor and employment counsel to ensure that all policies and practices are in compliance with applicable state and federal law. Please feel free to reach out to the author at jroth@TheRothLawFirm.com with any questions or comments.