PARTICIPATOR

March 2017

North Dakota Employer Learns That Request For Accommodation Need Not Be Explicit

The 8th Circuit recently held that an employee's request for a reasonable accommodation need not be explicit to trigger the employer's duty to accommodate under the Americans with Disabilities Act (ADA).

Background

Roberta Kowitz, a respiratory therapist and technician, requested and received leave under the Family and Medical Leave Act (FMLA) from her employer, Trinity Health, to have corrective neck surgery. Upon returning to work, she had multiple physical restrictions that prevented her from, among other things, lifting, carrying, pulling, or pushing more than 10 pounds.

Soon after Kowitz returned to work – and while her physical restrictions were still in place – Trinity required all employees in its cardiopulmonary department to provide updated copies of their basic life support (or CPR) certification, or submit a letter indicating why their certification was not up-to-date. To obtain CPR certification, employees had to pass a written exam and perform a physical demonstration of CPR.

Kowitz did not have an up-to-date CPR certification. Although she had passed the written test, she was unable to take the physical portion of the exam until she was cleared to do so by her physician. She provided her supervisors and Trinity's HR department a letter explaining that she would not be able to complete the physical exam until she received clearance from her physician and that she continued to experience pain and tightness in her neck from her surgery. At her next appointment, her physician advised her that she would have to complete at least four additional months of physical therapy before she could complete the physical portion of the CPR certification exam. Kowitz conveyed that information to her supervisors. The following day, Trinity terminated her employment because she was unable to perform CPR, an essential function of her position.

Kowitz sued Trinity and her supervisors in the U.S. District Court for the District of North Dakota, alleging, among other things, that she was unlawfully terminated on the basis of her disability. The district court granted summary judgment (dismissal without a trial) in favor of the defendants, concluding that Kowitz was not qualified to perform the essential functions of her position because she was not certified to provide CPR. Kowitz appealed.

8th Circuit's Decision

The 8th Circuit reversed the award of summary judgment in favor of the defendants, finding there was a genuine issue of material fact regarding whether Kowitz made a request for an accommodation that

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was sufficient to trigger Trinity's duty to engage in the interactive process of identifying a reasonable accommodation for her disability.

To establish a prima facie (minimally sufficient) case of disability discrimination under the ADA, an employee must show that she (1) has a disability within the meaning of the ADA, (2) is a qualified individual under the ADA, and (3) suffered an adverse employment action as a result of her disability. For an employee to be a qualified individual under the ADA, she must possess the requisite skill, education, experience, and training for her position and be able to perform the essential job functions with or without a reasonable accommodation.

Trinity argued that Kowitz was not a qualified individual under the ADA because performing CPR was an essential function of her position. While the 8th Circuit agreed that performing CPR was an essential function of her position, there remained questions of fact regarding whether she could have performed the function with an accommodation and, if so, whether Trinity failed to reasonably accommodate her. Kowitz argued that Trinity should have allowed her additional time to obtain certification or reassigned her to another position that did not require certification. The district court rejected that argument because Kowitz did not request an accommodation.

The 8th Circuit noted that the employee is responsible for initiating the interactive process to determine whether a reasonable accommodation is possible by making the employer aware of her need for an accommodation. To do that, the employee must provide relevant details about her disability and, if it's not obvious, the reason the disability requires an accommodation.

The 8th Circuit concluded that although Kowitz did not explicitly request an accommodation, she presented sufficient evidence to create a genuine issue of material fact regarding whether she implicitly asked for an accommodation. Notifying her supervisor that she would not be able to obtain the required CPR certification until she had completed physical therapy implied that an accommodation would be required until that time. The 8th Circuit found that a reasonable jury could conclude that she made Trinity aware of her need for an accommodation. An employee 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 [the] desire for an accommodation."

In a dissent, Judge Steven Colloton wrote that since Kowitz admitted she did not ask for an accommodation, she should not be allowed to claim that Trinity had failed to accommodate her. He opined, "The court conflates the employer's knowledge of an employee's disability with the requirement that an employee…make a clear request for accommodation." He continued by saying the majority's opinion was inconsistent with previous decisions that clearly stated that an employee must make it plain that she wants assistance or an accommodation, not just that she has a disability. Kowitz v. Trinity Health, 839 F.3d 742 (8th Cir., Oct. 17, 2016).

Takeaway for North Dakota Employers

This case gives rise to uncertainty regarding what information is required to satisfy the standard for an accommodation request. Employers should not wait for a disabled employee to make an explicit request for a reasonable accommodation – or use technical language – to begin the interactive process of determining whether a reasonable accommodation is possible. Rather, begin the process anytime an employee informs you that she is disabled and has a desire for an accommodation, even absent an explicit accommodation request.

RISK SERVICES

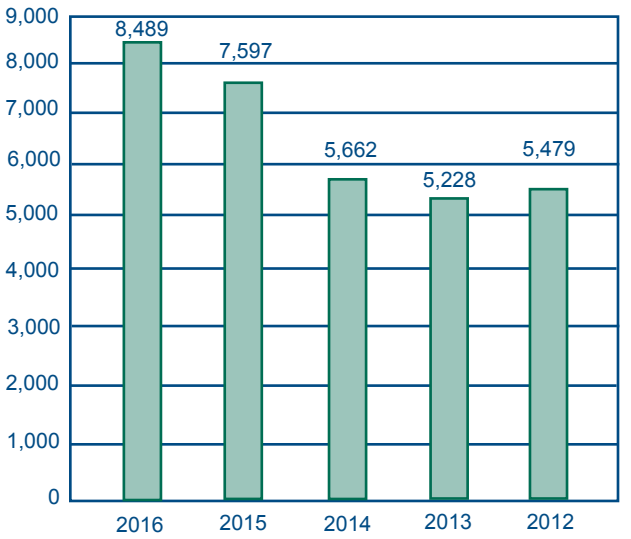
UNMANNED AIRCRAFT COVERAGE

As technology continues to play a growing role in the operations of North Dakota's political subdivisions, new exposures emerge. One such exposure is the use of an unmanned aircraft, commonly referred to as a drone. Drones can be used in a wide variety of ways and many times there are great advantages to the use of a drone versus another form of aircraft or not using aircraft at all. However, with the use of a drone comes additional liability and physical damage exposure.

Over the past few years, the NDIRF has been approached by its members to provide both Liability and Physical Damage coverage for the ownership and use of a drone. In general, the NDIRF will provide the coverage. Currently, the NDIRF Liability Memorandum of Coverage and the NDIRF Public Assets Memorandum of Coverage both contain exclusions for aircraft which, in the opinion of NDIRF staff, would apply to a drone. In order to provide the coverage, the NDIRF will endorse the Liability Memorandum of Coverage and/or the Public Assets Memorandum of Coverage to eliminate the applicable exclusions for the drone or drones specifically listed on the endorsements. The issuance of the endorsements is subject to underwriting approval and an additional contribution will be required. If a member of the NDIRF would like Liability and/or Physical Damage coverage for the ownership and use of a drone, please contact NDIRF underwriting at 800-421-1988 or underwriting@ndirf.com.

FINANCIAL INSIGHTS

LOSSES PAID (in thousands)



This graph represents losses paid by NDIRF over the past 5 years, including payments made to adjusters and attorneys assisting in the claims settlement process. The past 5 years are the highest paid loss years in NDIRF history, with 2016 being the highest. Since its inception in 1986, NDIRF has paid losses in excess of $110 million.

FROM THE CEO

LEGISLATIVE MATTERS

If it's February, and an odd-numbered year, legislative activity in North Dakota must be on the front burner – and indeed it is. Perhaps a better title would be "legislation matters." I encourage you to take advantage of the information provided by your state associations concerning issues or bills that may affect your political subdivision and lend your voice to the process if (or, more likely, when) asked. As North Dakota's legislative priorities have necessarily turned in 2017 from how to cope with burgeoning growth while saving some of the huge increases in revenue for a rainy day, to dealing with the rainy day, your input will matter.

As members know, the NDIRF is addressing our own version of the rainy day. Dramatic increases in claim loss the past two years have resulted, for the first time since inception of the NDIRF's conferment of benefits policy 23 years ago, in year-end financial results that do not meet our policy standard for returning excess funds to members. Fortunately, an increase in claim activity was recognized some years ago by the NDIRF as a possible outcome of explosive growth and steps were taken to ensure the continued strength of the Fund's surplus position. This allows the NDIRF to remain, as the opinion of our consulting actuaries again recently confirmed, in a very strong financial condition.

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SPRING CLEANING

Spring is almost here and the water's running, at least sporadically, as we experience the melt and thaw cycle. Sanders and snowplows will soon be removed from trucks and maintenance crews set out on a different mission – sealing cracks and filling craters in the blacktop. This effort also provides a good opportunity to straighten sign posts, repair or replace bad signs, repair washouts and deal with any other maintenance issues that have become apparent. This is the normal follow-up that comes after a winter of snow and ice, sand and salt, and heavy equipment all doing their share of damage to your roads and streets.

As you begin this season's maintenance campaign, remember to protect your workers and the driving public. As personnel head out onto the streets and highways, be sure they are equipped with personal protective equipment (PPE) such as reflective jackets, vests, hats or any other appropriate PPE. Remember, seat belts are PPE and everyone is required by law to use them.

Also ensure that an adequate number of temporary road construction signs are on hand for the job and that your employees know how and where to use them. Temporary construction signs must be set up on the roadways to let motorists know that there is maintenance work being done. Part VI of the Manual on Uniform Traffic Control Devices (MUTCD) is an excellent reference for determining how and where signing needs to be placed.

One activity that should be avoided is the setting up of construction signs weeks ahead of time. Conversely, road construction signs should be promptly removed after work is completed. The presence of road construction and speed reduction signs on streets where there is no maintenance work under way soon leads to the disregard of such signs by the motoring public, with potentially dangerous results.

Use of PPE and proper signing will help protect your employees from other drivers and protect the public from hazards created by street and road maintenance work.

Mark Your CALENDAR

May 2017
10: NDIRF Annual Meeting
Ramkota Inn, Bismarck
10: NDIRF Board of Directors Meeting