IN THE SUPREME COURT OF IOWA

NATALIE SLAUGHTER

Plaintiff

SUPREME COURT
CASE NO. 17-1732

VS.

POLK COUNTY
CASE NO. CVCV 051603

DES MOINES UNIVERSITY
COLLEGE OF OSTEOPATHIC
MEDICINE

Defendant

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
HONORABLE JUDGE JEFFREY FARRELL
Fifth Judicial District

APPELLANT'S FINAL BRIEF

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ROUTING STATEMENT

Pursuant to Iowa R. App. P. 6.903(2)(d) and Iowa R. App. P. 6.1101(2) this case should be retained for review by the Iowa Supreme Court, as this case:

a). Presents a substantial issue of first impression with respect to the Trial Court's finding that knowledge of a psycho-therapist obtained in the course of her employment by a University could not be imputed to her employer, by reason of the psycho-therapist privilege established in §622.10, Iowa Code.

b). Presents substantial questions of enunciating legal principals concerning the duties and responsibilities of an educational institution to engage in an interactive process to afford a student who is suffering from a mental disability with accommodations under the Iowa Civil Rights Act and the Americans with Disabilities Act as Amended.

STATEMENT OF THE CASE

This Appeal arises from the grant of a Summary Judgment by the Trial Court Judge, the Honorable Jeffrey Farrell in the District Court for Polk County on the Motion of the Defendant-Appellee Des Moines University, (hereinafter "DMU"), as well as the denial by the Trial Court of the Plaintiff-Appellant's (hereinafter "Slaughter") motion as to whether a claim of privilege by an employee of DMU, was admissable.

Ms. Slaughter filed a motion to determine the admissibility of the psycho-therapist privilege if claimed by an employee of DMU would defeat an imputation of knowledge of a student's mental health disability to the employer DMU. Both parties also filed Motions for Summary Judgment. The basis for Ms. Slaughter's motion was that DMU had failed to accommodate Slaughter when she was suffering from a mental health disability, which effected her academic performance. DMU filed a Motion for Summary Judgment alleging that DMU had accommodated Slaughter and she academically failed to perform, thus justifying her dismissal from the Osteopathic medicine program.

The Trial Court found that there was no dispute of material fact that DMU had, as a matter of law, accommodated Slaughter. Acccordingly, there was no lack of good faith by DMU in its treatment of Ms. Slaughter. Additionally, the Trial

Court found that the psycho-therapist privilege existed as a matter of law, was not waived by Ms. Slaughter, and by reason of the privilege, the knowledge of the therapist could not be imputed to her employer, DMU. Thereafter, a Notice of Appeal was filed.

STATEMENT OF FACTS

Natalie Slaughter, a graduate of the University of North Dakota, commenced her studies as a first year student in the College of Osteopathic Medicine at Des Moines University in August, 2015, having passed her National Boards and interview (App. pp. 171-175). She began to experience difficulty with her academics, even though she had signed her Technical Standards Certification, believing at that time, she could perform as asserted. (App. pp. 237, Depo Ex. 3). Of her own volition she went to Student Counseling Center, a department within the University which provided counseling services for students through its therapist employees, one of whom was Dr. Emily Sanders. (App. pp. 245, Depo. Ex. 23). Ms. Slaughter also sought assistance through another department – the Center for Academic Success and Enrichment (CASE). At the same time and throughout the academic year, Shelly Oren, a faculty member at DMU was assigned to be Ms. Slaughter's faculty adviser. She frequently met with Ms. Slaughter because of academic difficulties she was having with her course studies.

During September, October and November of 2014, Ms. Slaughter was in a depressive state (App. pp. 209-210). Dr. Sanders believed that, by reason of confidentiality she was unable to speak to any of Ms. Slaughter's professors or

her faculty advisor. (App. pp. 211-213). Also, Dr. Sanders believed she could not, for the same reason, go to CASE and speak with them or request Ms. Slaughter's records. (App. pp. 217). Dr. Sanders believed this, even though she knew depression was a disability which impacted detrimentally upon Ms. Slaughter's life and ability to function in daily life, including academic performance. (App. pp. 214-215). Shelly Oren also believed that she could not talk to Dr. Sanders, the administration or other faculty because of confidentiality. (App. pp. 223). Ms. Slaughter also utilized tutors and other resources, but her depression continued.

As the first semester progressed the administration was well aware that Ms. Slaughter was struggling with academics because DMU had a committee established to track students and their academic performance. This committee was called the Academic Progress Committee (APC) and was chaired by Dr. Donald Matz. The Associate Dean, Dr. John Canby was an ex-officio member of the committee.

In November, Ms. Slaughter was summoned to appear before the committee to discuss her status, since by that time she had failed Biochemistry. On December 16, 2014 she met with the committee and was accompanied by her faculty advisor, Shelly Oren. Following the meeting that afternoon, Ms.

Slaughter and Ms. Oren met and Ms. Slaughter told Ms. Oren she had been in a state of depression that semester. Ms. Oren told Ms. Slaughter to advise the committee of her condition. Ms. Slaughter wrote an e-mail to Dr. Matz for which he thanked Ms. Slaughter. (App. pp. 242-243, Depo. Ex. 14-15). On December 19, 2014, Dr. Matz met with Ms. Slaughter and she was given notice that she was being placed on Academic Probation. (App. pp. 244, Depo. Ex. 16). She was also required to meet with Dr. Canby and develop an action plan, done in January, 2015. Thus, as of December 17, 2014, no fewer than three (3) employees of DMU were aware of Ms. Slaughter's disability - a mental health impairment. No interactive process was thereafter undertaken to determine if accommodation(s) could be made to assist Ms. Slaughter with her disability so as to provide her with opportunity equal to that of her non-disabled peers to achieve academic success in the upcoming semester and throughout her career at DMU.

In August, 2014, DMU had revised its Accommodation policy to permit faculty and administration to discuss among themselves as well as third parties on a need to know basis, a student's disabilities. Neither Dr. Sanders nor Ms. Oren took advantage of the revised policy, each believing that confidentiality prohibited communication. (App. pp. 252, Depo. Ex. 54).

Dr. Matz never shared the e-mail from Ms. Slaughter with the Associate

Dean, Dr. John Canby, as evidenced by Dr. Canby's testimony at deposition. When presented with her e-mail at the time of his deposition, Dr. Canby testified he had never seen it. (App. pp. 231). Though Dr. Matz was well aware that Dr. Canby was to meet with Ms. Slaughter to devise an "action plan" after the first of the calendar year 2015, he did not tell Dr. Canby about Ms. Slaughter's depression. Dr. Canby testified that if he had seen the letter or known of Ms. Slaughter's condition, he would not have dismissed her, and he would likely have considered placing her on medical leave. (App. pp. 235-236).

Dr. Matz failed to comply with the policies of DMU regarding an accommodation nor did he do anything else to assist Ms. Slaughter, knowing full well her condition was the specific reason for her reluctance to participate in the Extended Pathway Program. She felt it would exacerbate her condition. *Ms. Slaughter at no time refused* to enter the Extended Pathways Program, but rather attempted to communicate about her depression with DMU, trying to engage them and find a way to move forward. Note should also be made that Ms. Slaughter was permitted to remediate her first semester failure of biochemistry, but because she failed a spring semester course in physiology she was dismissed in July, 2015. Her transcript, however, showed that she was progressing and achieving success. (App. pp. 255, Depo. Ex. 62).

Ms. Slaughter filed a complaint with the Iowa Civil Rights Commission. She subsequently requested and received a right to sue letter. A three (3) count petition was thereafter filed, alleging violations under the Iowa Civil Rights Act, Chapter 216. Count I alleged that DMU discriminated against Ms. Slaughter because of her mental health disability. Count II alleged that DMU had failed to accommodate her because of her disability and Count III alleged retaliation by DMU. At the time of the hearing on the respective motions, Ms. Slaughter abandoned and dismissed her discrimination claim, which was subsumed in her failure to accommodate claim, as well as her claim of retaliation. (App. pp. 140-142). Thus the only remaining count was the failure to accommodate Ms. Slaughter because of her mental health disability. Hearing was held on September 29, 2017 and on October 6, 2017 the Trial Court sustained DMU's motion for summary judgment on the dismissed discrimination and retaliation claim as well as the claim for DMU's failure to accommodate Ms. Slaughter. The court also held that the psycho–therapist privilege applied to Dr. Sander's and thus there was no imputed knowledge to DMU concerning Ms. Slaughter's disability. The knowledge of Ms. Shelley Oren and Dr. Matz being imputed to DMU was not addressed by the Trial Court. Ms. Slaughter timely filed her Notice of Appeal.

I.

THE TRIAL COURT ERRED IN FINDING THERE WERE NO MATERIAL DISPUTED FACTS THAT DES MOINES UNIVERSITY ACCOMMODATED THE APPELLANT'S MENTAL HEALTH DISABILITY.

SCOPE OF REVIEW AND PRESERVATION OF ERROR.

Summary Judgment cases are reviewed for corrections of error at law. *Stevens v. Iowa Newspapers, Inc.*, 728 N.W. 2d 823 (Iowa 2007); *Carr v. Bankers Trust Co.,* 546 N.W. 2d 901 (Iowa 1996).

Error was preserved by the Trial Court's grant of the Motion for Summary Judgment for Des Moines University and the denial of the Ms.Slaughter's Motion for Summary Judgment.

ARGUMENT

General issues of material fact were present which precluded the Court from dismissing, via summary judgment, Ms. Slaughter's claim as to whether DMU failed to accommodate her mental health disability. Evidence was present which would have permitted a jury to return a verdict in her favor, *Anderson v. Liberty Lobby, Inc.,* 477 U.S.242, 106 S.Ct. 2505, (1986); *Barrera v. Nickolas,* 683 N.W. 2d 111 (Iowa 2004).

The Trial Court, in its ruling, found that DMU "did not dispute that plaintiff requested accommodations." (App. 142). Regardless, the Court then makes a finding that: 1). "throughout her communications with Oren [faculty advisor], Dr. Martz and Dr. Danby (*sic)*, plaintiff did not request any accommodation"; 2). Plaintiff could not shift all responsibility for developing a reasonable accommodation to DMU; and 3). a reasonable fact finder could not find that DMU failed to act in good fact when engaging in an interactive process to accommodate the plaintiff. (App. 144-145). Additionally, the Trial Court found that Ms. Slaughter's requested accommodations, which would likely have permitted her to satisfy DMU's academic standards were NOT reasonable, (App.147) which is clearly a finding of fact. Reasonableness turns on the ease, cost and difficulty (constituting undue hardship) for the University to provide accommodation(s) which would serve to meet the student's needs. There was no examination of reasonability nor any assertion made by DMU based on these facts. It is Ms. Slaughter's position that this was the Trial Court venturing in error into the role of fact finder. In doing so, the Trial Court further erred in its finding that no disputes of material fact existed as to the question of whether DMU engaged in the interactive process necessary to arrive at the accommodation(s) designed to meet the needs of the student's disability. Clearly, this was an issue about which the

jury could have found otherwise.

Before consideration of the interactive process requirements is undertaken, the issue of "disability" needs to be addressed. The adoption in 2009 of the ADA Amendment Act (ADAAA) changed the focus of the rules of construction making it easier to establish the existence of a disability. Thus the focus became - did a discriminatory act take place as opposed to the earlier practice and emphasis on - is there a disability?

29 CFR 1630.2(g) defines "disability" and establishes three (3) prongs under which a disability is established. The regulation states:

> "1630.2(g) *Definition of "Disability":* (1) In general. Disability means, with respect to an individual –
> (i) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
> (ii) a record of such an impairment; or
> (iii) Being regarded as having such an impairment as described in paragraph (i) of this section.

The rules then proceed to define a "physical or mental impairment" as: "(2) any mental or psychological disorder, such as....emotional or mental illness." 29 CFR 1630.2(h)(2).

In keeping with the Congressional intent of ***not*** focusing on disability, the regulations set forth rules of construction for the determination of whether the impairment "substantially limits" a major life activity. 29 CFR 1630.2(j)(i)-(ix).

Thereafter the regulations specifically set out impairments which will be found to "substantially impair". 29 CFR 1630.2(j) (3) states:

> (3) *Predictable assessments* - (I). The principles set forth in paragraphs (j)(1)(I) through (ix) of this section are intended to provide for more generous coverage and application of the ADA's prohibition on discrimination through a framework that is predictable, consistent, and workable for all individuals and entities with rights and responsibilities under the ADA as amended.
> (ii) Applying the principles set forth in paragraphs (j)(l)(I) through (ix) of this section, the individualized assessment of some types of impairments will, in virtually all cases, result in a determination of coverage under paragraphs (g)(1)(I) (the "actual disability" prong) or (g)(1)(ii) (the "record of" prong) of this section. Given their inherent nature, these types of impairments will, as a factual matter, virtually always be found to impose a substantial limitation on a major life activity. Therefore, with respect to these types of impairments, the necessary individualized assessment should be particularly simple and straight forward.
> (iii) For example, applying the principles set forth in paragraphs (j)(l)(I) through (ix) of this section, it should be easily concluded that the following types of impairment will, at a minimum, substantially limit the major life activities indicated:...***....and major depressive disorder, bipolar disorder, post-traumatic stress disorder, and schizophrenia substantially limit brain function. The types of impairments described in this section may substantially limit additional major life activities not explicitly listed above.

The current ADAAA recognizes a major depressive state as a disability. Dr. Sanders testified depression impairs daily life and academics. (App. 214-215). As an employee of DMU providing Ms. Slaughter mental health services weekly, Dr. Sanders knew not only that Ms. Slaughter was disabled, but that she was having

academic problems as a result.

The Defendant did not dispute that Ms. Slaughter was disabled during her academic year at DMU. Rather the fighting issue was whether there was a failure to accommodate her as a student with a disability.[1]

The Trial Court properly recognized the procedure a post-secondary educational institution has to follow in a ADAAA claim, when quoting from *Palmer College of Chiropractic v. Davenport Civil Rights Comm'n,* 850 N.W.2d 326, 337, which stated:

> "That obligation requires an individualized and extensive inquiry - an institution must carefully consider each disabled student's particular limitations and analyze whether and how it might accommodate that student in a way that would allow the student to complete the school's program without lowering academic standards."

This is known as the engagement in an "interactive process". The failure to engage in an interactive process is shown by: (1) the employee had a disability known to the employer (educational institution regarded the same as an employer by reason of the Rehabilitation Act), *Wong v. Regents of Univ. of Cal.* 192 F. 3d 807 (9th Cir. 1999); (2) accommodation(s) or assistance was requested; (3) the

[1] Though a disparate treatment claim was initially plead, it was abandoned by the time the parties arrived at the summary judgment stage. (App. 140-141). Though abandoned, the trial court still undertook to rule on it and it appears to Ms. Slaughter that the trial court's ruling on this claim may well have influenced its decision on the failure to accommodate claim.

employer did not make a good faith effort to assist the employee in seeking accommodation(s); and, (4) the employee could have been reasonably accommodated, but for the employer's lack of good faith, *Craven v. Blue Cross Blue Shield,* 214 F. 3d 1011 (8th Cir. 2000). As stated in 29 CFR, Pt. 30 App. at page 403:

> "If an employee with a *known disability* is having difficulty performing his or her job, an employer may inquire whether the employee is in need of a reasonable accommodation. In general, however, it is the responsibility of the individual with a disability to inform the employer than an accommodation is needed." (emphasis supplied).

The interactive process involves both the employer and the individual with a disability. Once Ms. Slaughter's disability became known, whether it be DMU's employee, Dr. Sanders' knowledge, or at a higher level, the chairperson of the APC committee, Dr. Matz's, knowledge, (App. 251, Depo Ex.48), DMU had a duty to initiate the process, even without a request. *Walstead v. Woodbury County,* (ND, Ia 2000), 113 F. Supp. 3d 1318. (Employee had difficulty reading, writing and concentrating and this was known to the employer and throughout the company).

A person who is disabled, particularly with a mental illness need not use the magic words, "I want/need an accommodation". *See Bultemeyer v. Ft. Wayne*

Community Schs., 100 F 3d 1281, 1284-85 (7th Cir, 1996):

"The employer has 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 of it can to help. The employer must make a reasonable effort to *determine the appropriate accommodation*. (Emphasis supplied). The appropriate reasonable accommodation is best determined through a flexible interactive process that involves both the employer and the employee with the disability."

See also, *Kowitz v. Trinity Health*, (8th Cir, 2016), 839 F. 3d 742 ("...she need not use technical language to make the request or suggest what accommodations might be appropriate. This is in keeping with the logic of the interactive process which is intended to be informal and flexible.")

Furthermore, DMU, as did FWCS in *Bultemeyer,* 100 F.3d, 1281, 1286, failed to inquire of either Ms. Slaughter or her therapist, what was needed to make accommodation(s) work for her. In fact, Ms. Sanders could have requested an accommodation for Ms. Slaughter (irrespective of the question of privilege to be addressed in Division II) per the EEOC Compliance Manual, Enforcement Guidance for psychiatric disabilities, 20-21, which states:

> "18. May someone other than an employee request a reasonable accommodation on behalf of an individual with a disability?
> Yes, a family member, friend, health professional or other representative may request a reasonable accommodation...."

Ms. Slaughter's claim of discrimination was based on the ADA provision

which defines "discrimination" as the failure to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability, unless it can be shown that said provision would cause undue hardship on the business or employer. 42 USCS § 12112(b)(5)(A). The first step, once a disability was known, was to engage in an "interactive process", which is set forth in 29 CFR Pt. 1630. App at p. 403:

> "When an individual with a disability had requested a reasonable accommodation to assist in the performance of a job, the employer, using a problem solving approach should:
> (1) Analyze the particular job involved and determine its purpose and essential functions;
> (2) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those disabilities could be overcome with a reasonable accommodation;
> (3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and
> (4) Consider the preferences of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and employer.
> ***
> This process requires the individual assessment of both the particular job at issue and the specific physical or mental limitations of the particular individual in need of reasonable accommodation."

Ms. Slaughter was never engaged in any interactive process. Dr. Sanders never informed her supervisor, administration or faculty of Ms. Slaughter's need for

assistance, though as stated, sharing information is permitted under the EEOC Guidelines. Thus the interactive process was never engaged in by employees of DMU even though they were aware of the disability and the impact it was having on Ms. Slaughter's daily life and academics.

Clearly, Ms. Slaughter was asking for assistance/accommodation(s) - she sought out CASE; she utilized tutors; she sought out therapy; and finally, she tells the Chair of the APC committee (Dr. Matz) that she is suffering from depression (App. p. 242, Depo. Ex. 14). The reply from the Chairperson is - "thanks for the E-mail, the committee wants you to succeed" - but neither the Dean or the Committee is ever informed of her depression/disability. (App. pp. 234-236). It is impossible for the APC, the Dean or anyone else in administration to "engage in the interactive process" when Ms. Slaughter's "disclosure" is not shared.[2]

Genuine disputes of material facts existed as to the "good faith" of DMU. The only "sit down" DMU had with Ms. Slaughter after the APC meeting and disclosure to Dr. Matz was the meeting with Dr. Matz on December 19, 2014. During that meeting Ms. Slaughter was formally placed on academic probation.

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[2]Even Dr. Matz's affidavit in DMU's appendix, (p. 80) does not acknowledge that Ms. Slaughter disclosed to him she was suffering from depression during the first semester or that she believed her depression would only be worsened, if she entered into the extended pathways program.

No discussion of her disability occurred. Subsequently, on January 7, 2015, she met with Dr. Canby to develop an "action plan" per the directions of the APC. This meeting did not arise from any interactive process to determine reasonable accommodation(s). (App. p. 253, Depo. Ex. 55). Dr. Canby could not have engaged in any interactive process because he was totally unaware of her disability.

The Trial Court found that the question presented to it was whether DMU engaged in a process with Ms. Slaughter that would allow the parties to discover reasonable accommodations that would allow her to succeed with course work. (App. p. 143). The Court further found that it was *immaterial* whether the process and its actions were characterized as efforts to accommodate her disability or efforts to improve her academic performance. However, such a finding ignores the requirement of an "interactive process" - i.e., consultation and interaction with each other, student and DMU employees, to address the disability.

Though the Trial Court recognized the interaction, "the process is a two-way street", it found that Ms. Slaughter shifted the responsibility to DMU (App. p. 120), finding that "DMU officials constantly communicated with plaintiff and sought methods to help her improve her academic performance". Though a finding of fact by the Court, the test is not whether the "methods" were to help her

academically, but whether the methods were formulated to accommodate her disability after consulting with her, which never took place pursuant to the ADAAA as set forth in 29 CFR, Pt. 1630, *op.cit*. And the issue as to whether the "accommodations", found by the Court to have been granted by DMU were reasonable, was disputed. The question concerning whether the accommodations were designed and informed by Ms.Slaughter's disability was neither asked nor answered by the Trial Court. The case of *Taylor v. Phoenixville School Dist.* 184 F. 3d 296 (3rd Cir. 1999) (pre- ADAAA involving mental illness) is on point. Therein, the Court stated with respect to the nature of the accommodations:

> ADA's regulations, make clear that the purpose or the interactive process is to determine the appropriate accommodations: This process should identify the precise limitations resulting from the disability and the potential accommodations that could overcome those limitations (citation). Therefore, it would make little sense to insist that the employee must have arrived at the end product of the interactive process before the employer has a duty to participate in that process... The employer must make a reasonably effort to determine the appropriate accommodations. (Emphasis supplied).

In the case of *Redding v. Nova Southeastern Univ. Inc. (DC. SDFla. 2016),* 165 F. Supp. 3d 1274, under a ADAAA filing, the University claimed it had provided a student reasonable accommodations and its decision was entitled to deference as an academic decision, thus providing no dispute of material fact and entitling it to summary judgment. The Court disagreed finding that disputes of

material fact were present as to whether the accommodations which were given were reasonable. In so holding, the Redding Court stated, 165 F. Supp.3d 1274, 1297:

> "But for an accommodation to be reasonable it must be related to the accommodated persons' disability. Allen vs. Constr. Servs, Ltd, 214 F 3d 978, 982 (8th Cir, 2000). Redding's condition caused frequent, unexpected examination absences. Extra time and bathroom breaks do not appear to relate to ameliorating the issue and Nova fails to explain any causation.
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> ****
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> Taking the facts in the light most favorable to Redding, the accommodations ultimately granted to her were "standard" accommodations ultimately given to her without regard to her specific disability. And Nova's corporate representative even admitted that all student's are entitled to bathroom breaks so this was not an accommodation at all. Accordingly, Nova fails to establish the absence of a factual dispute as to whether the accommodations it granted were reasonable."

DMU claims that it accommodated Ms. Slaughter by offering CASE, Student Counseling Services, individualized study support, free counseling services, etc. However, these were University-wide resources that were available to any student, whether disabled or not. Not one of the services or resources which were continually listed over and over again in Dr. Matz's e-mails to Ms. Slaughter and Shelley Oren were jointly arrived at, specifically thought out, prepared and implemented, or actually addressed Ms. Slaughter's disability. In fact as previously stated, Ms. Slaughter pursued the resources on her own. Then in December, 2014, DMU through the APC committee unilaterally determined

what was to occur with Ms. Slaughter. (See, *Bultemeyer v. Ft. Wayne Comty Sch.,* 100 F. 3d 1285, 1284. (7th Cir. 1996).

If an interactive process is not undertaken, it is evidence of bad faith and thus the issue of bad faith is one for the jury precluding summary judgment. As stated in *Cravens vs. Blue Cross Blue, Shield,* (8th Cir., 2000) 214 F. 3d 1011, 1021:

> "...for purposes of summary judgment, the failure of an employer to engage in an interactive process is prima facie evidence that the employer may be acting in bad faith. Under these circumstances, we feel a factual question exists as to whether the employer has attempt to provide reasonable accommodation as required by the ADA."

DIVISION II

THE TRIAL COURT ERRED IN FINDING THAT THE KNOWLEDGE OF AN EMPLOYEE OF THE APPELLEE UNIVERSITY COULD NOT BE IMPUTED TO THE UNIVERSITY BECAUSE OF THE PSYCHO-THERAPIST PRIVILEGE.

SCOPE OF REVIEW AND PRESERVATION OF ERROR.

Summary Judgment cases are reviewed for corrections of error at law. *Stevens v. Iowa Newspapers, Inc.*, 728 N.W. 2d 823 (Iowa 2007); *Carr v. Bankers Trust Co.,* 546 N.W. 2d 901 (Iowa 1996).

Error was preserved by the Trial Court's finding that the psycho-therapist privilege was admissible and the knowledge of the therapist could not be imputed to DMU.

ARGUMENT

There was no dispute of fact that Dr. Sanders and Shelly Oren were employees of DMU. (App. pp. 200-202; 219-220). Dr. Sanders was employed in the University's Student Health Center as a therapist and Ms. Oren as a professor and faculty advisor. As such, their involvement with Ms. Slaughter is within the scope of employment, *Riniker v. Wilson*, 623 N.W. 2d 220 (Ia. Ct. App. 2000); *Vlotho v. Hardin County,* 509 N.W. 2d 350, (Ia 1993). (servant's conduct is within the scope of his employment if it is of the kind which he is employed to perform, occurs substantially within the authorized limits of time and space, and is actuated, at least in part, by a purpose to serve the master). Therefore, the knowledge about Ms. Slaughter which is gained by the employees is imputed to the employer, DMU. As stated in *Hammons Hotel, Inc. V. Acon Window System,* (8th Cir. 2005), 394 F. 3d 607:

> "It has long been held in Iowa that where information is imparted to an employee, acting within the scope of his employment, the knowledge of the employee is imputed to the employer under

> principles of agency law. *See Gensburg v. Field, 104 Iowa 599, 74 N.W. 3, 4-5 (Iowa 1898); Briney v. Tri-State Mutual Grain Dealers Fire Ins. Co., 254 Iowa 673, 117 N.W. 2d 889, 894 (Iowa 1962); See also, Restatement (Second) of Agency, §§ 19(3), 272 & cmt c, illust. 6"* "

Because Dr. Sanders knew that Ms. Slaughter was in a depressive state and thus disabled per Dr. Sanders own testimony, and Shelly Oren knew Ms. Slaughter was suffering from depression during the first semester of 2014, DMU must know the same. Ms. Slaughter was a disabled student. However, the Trial Court concluded that their knowledge, particularly that of Dr. Sanders could not be imputed to the University because the psycho-therapist privilege existed.

Ms. Slaughter filed a motion, pursuant to Rule 5.104(a), Iowa Rules of Evidence, to determine whether an employee of DMU could claim a privilege as a defense to imputed knowledge of Ms. Slaughter's disability, thus permitting DMU to avoid required engagement in the interactive process for accommodation(s) purposes. Ms. Slaughter posited that no privilege was available to Ms. Sanders.

The Trial Court found that the privilege afforded by virtue of § 622.10, Iowa Code, prohibited Dr. Sanders from "sharing any knowledge she had of plaintiff's mental health condition. (App. p. 111). The Trial Court stated that Chapter 228, Iowa Code, namely § 228.3, prohibited disclosure of mental health information. In so ruling, the Court broadly construed the two statutes to prohibit

Dr. Sanders from even disclosing the fact that a student at Des Moines University was being seen by her in a theraputic setting. As such, the court focused on Dr. Sanders as a treatment provider rather than on the issue of whether the psycho-therapist privilege was even available and/or applicable under § 622.10. Additionally, by focusing on the status of Dr. Sanders as opposed to information and knowledge she possessed, the court misconstrued § 228.5, Iowa Code.

The psycho-therapist privilege is purely statutory, arising in a litigation setting. *Chung v. Legacy Corp.*, 548 N.W. 2d 147 (Iowa 1996); *Harder v. Anderson,* 764 N.W.2d 534 (Iowa 2009). The privilege is limited to the testimonial disclosure of confidential information.[3] The privilege applies only to testimony. *McMaster v. Iowa Bd. of Psychology Examiners,* 509 N.W.2d 754, (Iowa 1993); *Chidester v. Needles*, 353 N.W.2d 849 (Iowa 1984). As stated in *State v. Heemstra*, 721 N.W.2d 549, (Iowa, 2006):

> "Privilege does not prohibit a physician in a non-testimonial setting from disclosing any confidential communications. Only the physician's ethical obligation prohibits the physician from making the disclosure without the patient's consent." [4]

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[3]Though confidential information may be obtained through the discovery process by reason of rules of civil procedure, discovery is still in a litigation setting

[4]Ethical obligations were not addressed by the trial court nor argued by DMU as a basis for denying imputation of knowledge by reason of confidentiality.

Further, the privilege is one which belongs to the patient – not the therapist. *State v. Knight*, 204 Iowa 819, 216 N.W.104 (Iowa, 1927). Dr. Sanders could not unilaterally invoke the privilege as a "defense" to her failure to disclose to other university administration. That failure resulted in the failure of the accommodation interactive process (or even its initiation) to begin. Neither can the privilege be used by DMU to avoid the imputation of Dr. Sanders' knowledge of Ms. Slaughter's disability to the university.

Clearly, the information held by Dr. Sanders was disclosable to the appropriate personnel at DMU. The application of the testimonial privilege does not arise in this dispute. Accordingly, the psycho-therapist privilege under § 622.10 was inapplicable and thus the Trial Court erred in granting admissibility under that Iowa Code Section.

Though Dr. Sanders was a treatment provider, she was an employee of DMU and thus not the same status as a private provider, though the Trial Court found the status Dr. Sanders' equivalent to a private provider with respect to the testimonial privilege. The distinction is important in that Chapter 228, Iowa Code, when applied to these facts, prohibits the privilege as being used as a bar to disclosure by Dr. Sanders to communicate and disclose her knowledge of Ms. Slaughter's disability to DMU. This is due to the fact that Chapter 228, Iowa Code

relates to the non-testimonial litigation setting concerning mental health information and its confidentiality.

Section 228.1(5) defines what is mental health information: "oral, written, or recorded information which indicates the identity of an individual receiving professional services and which relates to the disgnosis, course, or treatment of the individual's mental or emotional condition." (emphasis supplied). This information is confidential, per the language of § 228.2, Iowa Code, 2015, *except for the enumerated sections permitting dissemination* of the information.[5]

The Trial Court found that any information known to Dr. Sanders could not be disclosed to anyone at DMU, for she would have potentially been subject to suit by reason of *Doe v. Cent. Iowa Health Sys.,* 766 N.W.2d 787 (Iowa 2009).[6] However, *Doe* does not address the point at issue in this case as the dispute in the case at bar is not whether there is a private cause of action for disclosure. The Court found the provisions of § 228.5 were inapplicable because the language of the statute only permitted disclosure within Dr. Sander's department and not to any other departments of the university. (App. p. 111).

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[5] § 228.2(1), Iowa Code, 2015. "Except as specifically authorized in section 228.3, 228.5, 228.6, 228.7 or 228.8, a mental health professional....shall not disclose or permit the disclosure of mental health information."

[6]. In *Doe*, the court assumed without deciding under the facts of the case, that Chapter 228 permitted a private cause of action for unauthorized disclosure, 766 N.W. 2d 787 at 792.

However, it is the position of Ms. Slaughter, that the Trial Court read § 228.5 too narrowly. Said section provides in subsection 4 that:

> "Mental health information relating to an individual may be disclosed to other providers of professional services or their employees or agents if and to the extent necessary to facilitate the provision of administrative and professional services to the individual.

Ms. Slaughter was being treated by Dr. Sanders for her depression, which was recognized by Dr. Sanders as affecting her academics and, indeed, all facets of her life. (App. pp. 214-217). Thus, as part of the treatment services to be rendered to Ms. Slaughter, accommodations would have to be considered through and made through the interactive process. According to DMU's policy this would have to be initiated by administrative interaction with and utilization of the *accommodation specialists* (also called *education specialists* by DMU) specifically employed by DMU for this purpose, but employed in a different department of the university than the department in which Dr. Sanders was employed. Therefore, any action exercising DMU's accommodation policy would require "to the extent necessary to facilitate the provision of administrative services..." (228.5(4)). This would at a minimum require the disclosure of Ms. Slaughter's name and diagnosis - possibly no more, but certainly no less.

It must also be remembered, that the entire setting of this matter was

confined to the university setting and took place within the "walls" of DMU. All of the players were employees or agents. In fact, this was recognized by the University in their own accommodation policy, which was revised and approved in August, 2014. (App. 252, Depo. Ex. 54). The policy revision recognizes that its employees may well know about a student's disability and the need for accommodation(s). If this information is known by an employee then the general information about such may be shared intra-university. This was not a matter which would have required that mental health information be disseminated to "outsiders". With respect to mental health records, DMU's policy is in accord with § 228.5, Iowa Code, 2015.

To hold otherwise, as did the Trial Court in finding that the information known to Dr. Sanders could not be shared and was not, therefore, imputed to the University, failed to recognize that the University offered services and employees and agents to its students to assist them and was a single "unit" of education and health services, both physical and behavioral as well as educational counseling. For DMU to provide the offered administrative and professional services to their students in compliance with their own policy, *information had to be shared*. Section 228.5(4) provided for such disclosure.

Ms. Slaughter would point out that though the Court ruled on her

Discrimination Claim (disparate treatment) - she told the court at the time of the hearing on Summary Judgment that the said Count would be dismissed and was not being pursued. (App. pp. 140-141). Therefore, Ms. Slaughter does not address the Trial Court's ruling on this issue.

CONCLUSION

The Trial Court erred in dismissing the Petition finding that no disputed facts existed as to whether DMU had in good faith accommodated Ms. Slaughter as a student with a mental health disability. The Court further erred in finding that the psycho-therapist privilege prohibited Ms. Slaughter's therapist, an employee of DMU, from disclosing any information re Ms. Slaughter and that the knowledge of the therapist would not be imputed to her employer, DMU. By reason of the error of said findings the Trial Court's ruling should be reversed as to the Summary Judgment and privilege admissibility, thereby remanding the case to the District Court for trial.

REQUEST FOR ORAL ARGUMENT

Appellant desires to be heard on all issues raised herein.

Respectfully submitted,

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The undersigned hereby certifies that the foregoing Proof Brief and Argument was duly filed with the Clerk of the Iowa Supreme Court by EDMS, on the 9th day of January, 2018.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

This Brief complies with the type-volume limitations of Iowa R. App. P. 6.903(1)(g)(1) because this Brief contains 6416 words, excluding the parts of the Brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

This Brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because the Brief has been prepared in a proportionally spaced typeface using Word Perfect in size 14 Times New Roman.

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