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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 REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes & Regulations

Other

STATEMENT OF THE FACTS

With respect to DMU's Statement of the Facts, Ms. Slaughter does dispute the University's inclusion of when Ms. Slaughter first attended the University or that a form letter (App. p. 239, Ex. 7) was sent to her with respect to academic performance. However, Ms. Slaughter does not accept or concede that the facts are that there was: an "initiation of the interactive process"; that assistance was given to her to "overcome her particular limitations; and, that she [Ms. Slaughter] declined the accommodation. These circumstances are the fighting issues presented by this Appeal.

ARGUMENT

I.

THE TRIAL COURT DID NOT PROPERLY GRANT A SUMMARY JUDGMENT, FOR THE UNIVERSITY DID NOT ENGAGE IN AN INTERACTIVE PROCESS OR PROVIDE REASONABLE ACOMMODATIONS FOR THE APPELLANT'S DISABILITY.

Interestingly, the position taken and pursued by the Appellee, DMU, posits the undertaking to provide reasonable accommodations *before* a disability was known. On August 25, 2014, per Exhibit 7, (App. P.239), DMU sent a form letter offering assistance (Appellee's Brief, p. 5). But it was not until September 3, 2014

that Ms. Slaughter first went to the Student Counseling Center (App. p. 240, Ex. 8) and on September 9, 2014 she first saw Dr. Emily Sanders (App. p.245, Ex. 23). Thus, it is difficult to perceive how the interactive process regarding accommodations for a disability could be undertaken by DMU when the "disability" was as of yet unknown to them.

Further, DMU overlooks and ignores that under the ADA, "accommodation" is a term of art, a legal term with a technical meaning which is set forth in the statutory language of the law. Per the EEOC guidelines:

> " (1) The term reasonable accommodation means:
> (i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or
>
> ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or
>
> (iii) Modifications 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.
>
> (2) Reasonable accommodation may include but is not limited to:
>
> (i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
>
> (ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials,

or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.

3. To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."

29 C.F.R. § 1630.2(o)

Given the EEOC definition as set forth *supra*, it should be obvious that the use of the term "accommodation" as utilized in DMU's argument that it did provide accommodations, is a misapplication of the technical legal context of the word "accommodation". Clearly, DMU is substituting the common garden variety usage[1] for the actual legal term as set forth in

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[1]. Accommodation as defined in The Merriam-Webster Dictionary, Merriam-Webster, n.d. Web. 9 Mar. 2018.) is:

1: something supplied for convenience or to satisfy a need: such as
a: lodging, food, and services or traveling space and related services -- usually used in plural
- tourist *accommodations* on the boat
- overnight *accommodations*

b: a public conveyance (such as a train) that stops at all or nearly all points
c: loan
2: the act of accommodating someone or something: the state of being accommodated: such as
a: the providing of what is needed or desired for convenience
- changed his schedule for theaccommodationof his clients

b: adaptation, adjustment
- an *accommodation* to temporary conditions

c: a reconciliation of differences: settlement
- Negotiators felt that an *accommodation* with the union was possible.

the statute.

Thus, we should now be able to clearly see and apprehend the difference and move forward, with DMU's understanding and acquiescence that, when a term of art is utilized in the construction of statutory language, one must utilize and apply it using its technical legal meaning as a term of art.

Once we have established that "accommodation" will be understood as a term of art as it is defined by the EEOC, we are enabled to consider what the technical legal term "interactive process" actually means when utilized in the statutory language of the law in question.

When an employee requests an accommodation for a disability, the employer's mandatory obligation to engage in the interactive process is triggered. Humphrey v. Memorial Hospital Ass'n,, 239 F.3d 1128, 1138 (9th Cir. 2001); U.S. EEOC v.UPS Supply Chain Solutions, 620 F.3d 1103 (9th Cir.2010); Zivkovic v, Southern California Edison Co. 302 F.3d 1080 (9th Cir. 2002). This process "requires: (1) direct communication between the employer and employee to explore in good faith the possible accommodations; (2) consideration of the employee's request; and (3) offering an accommodation that is reasonable and effective." UPS Supply Chain, 620 F.3d at 1110-11; Zivkovic, 302 F.3d at 1089;

see also Ludovico v. Kaiser Permanente, 57 F. Supp. 3d 1176, (DC ND Cal. 2014) .

Next, DMU proceeds to allege that Ms. Slaughter's notice of disability to the University is not adequate to put them on notice of her disability, or of her desire for accommodation. This cannot reflect the actual circumstances. Dr. Sanders had knowledge from September of 2014 forward. Ms. Oren and Dr. Matz had knowledge in December of 2014. The definitive answer to the question of *when* DMU had knowledge may have to take into consideration Ms. Slaughter's argument in connection with privilege, confidentiality and imputation of knowledge which will be laid out in the next section. However, in relation to Ms. Slaughter's position that DMU was clearly on notice, it is necessary to again go to the EEOC's manual and see what is required. Per regulation what triggers DMU's duty to engage in the interactive process and what is required to allow DMU to assert engagement in said process?

In point of fact, the EEOC manual makes very clear that the notice to the employer/university does not have to be in writing, or even made by the student herself. She is not required to formally invoke the specific magical words "reasonable accommodation". Rather, the notice must provide the university with knowledge of both the disability, and the student's desire for assistance, i.e.,

accommodation for the disability. The manual continues further to provide explanation of "what matters" under the ADA. It is not the formalisms about the manner of the request that matters, but whether the student or their representative provides the university with enough information that, under the circumstances, the university can fairly be said to know of both the disability and desire for an accommodation. This was a question in dispute and for the fact finder to determine - not the Court.

Ms. Slaughter's use of the phrase "sit down", cited and characterized by DMU as unsupported, was clearly not meant to be a technical legal term of art, nor was it used as such. It is a phrase not found in the statutory or regulatory language of the law. Instead, it was meant to convey the need for both parties, student and DMU, to "communicate" and "gather information" as a process involving both parties in said direct communication and information gathering. (DMU Brief, pp. 5-6).

DMU's statement of "undisputed" facts (DMU Brief, pp. 5-8) are certainly disputed, as they are not facts and not reflective of the reality of what actually occurred. DMU never "contacted" Ms. Slaughter offering assistance via CASE, other than sending form letters generated by computer whenever students' grades fell below a predetermined point (App. p. 239, Ex. 7). Nor did they offer her

assistance via the Student Counseling Service. Ms. Slaughter sought out counseling on her own through the counseling service, and did avail herself of the service on a weekly basis the entire time she was a student at DMU. This was done on the Ms. Slaughter's own initiative, as was her visit to CASE. She was not offered any help by CASE with the exception of a tutor referral which Ms. Slaughter did utilize. Even though examination of the University services as to the "education" or "accommodation" specialists they employ were said to be located at CASE, there was no mention of any such services during Ms. Slaughter's visits. This is true even though Ms. Slaughter disclosed information during her interview at CASE (App. p.240, Ex. 8) that should have reasonably provoked a response in a trained professional's mind as to the possibility of a student having a disability and thus a need for assistance. Ms. Slaughter would hardly be filling out forms, interviewing with CASE, and participating in weekly counseling sessions and frequent tutoring sessions if she had not been interested in getting help with her disability and improving her performance at DMU.

DMU attempts to maintain that Dr. Sanders could not utter the words 'disability' or 'accommodation'. But in fact it was her job to do so. Dr. Sanders appears to not have been conversant in what actions she should and could take to help Ms. Slaughter. Dr. Sanders, was fully aware by her own testimony in

deposition, that Ms. Slaughter suffered from disability that interfered with all her major life activities and for which she needed assistance. Dr. Sanders knew that Ms. Slaughter's course work was suffering. (App. pp 213-214,) It becomes clear in an examination of the record that Dr. Sanders was not aware of DMU's policy on collaboration regarding students who might need accommodation (App. p. 252, Ex. 54). Dr. Sanders never suggested anything about Ms. Slaughter engaging in communication and information sharing with anyone that could help identify what accommodations might be available to help. Yet Ms. Slaughter discussed on several occasions with her therapist her inability to sleep, her extreme anxiety, her deepening depression and her ongoing difficulties with her ability to concentrate in order to improve her grades. She talked about her need for breaks, to study at her own pace, to be allowed to view videos of classes rather than attend all classes. There were a number of other possible accommodations Ms. Slaughter felt would be helpful, but there was no one with whom to discuss possible accommodations.

The assistance provided by Dr. Matz can hardly be categorized as "assistance". He had his secretary prepare and send form letters, generated by computer which were triggered by grades received by the students, to outline their shortcomings and then list, over and over again, the same set of resources available to all students who desired to utilize them to improve performance.

(App. p. 239, Ex. 7). DMU insists that sending the form letters out to students, including but not limited to Ms. Slaugter, who were not performing at adequate levels was the beginning of the "interactive process". Evidently, DMU believes that because a form letter lists the same resources over and over, that qualifies as "interactive". The five-year Extended Pathway Program was an additional resource that went unmentioned until the December APC Meeting. This was the first time Ms. Slaughter learned of the program and it was not explained in its entirety. Thus Ms. Slaughter was unsure of how it worked. If an actual interactive process had taken place, she would have known what the Extended Pathways program was, how it worked, what it was designed to do, etc. This was not an accommodation provided or offered to Ms. Slaughter as a reasonable accommodation for her disability. It is a program offered to any student who fails two courses and has nothing whatever to do with disability.

Ms. Slaughter utilized all resources listed in her form letters with the exception of the Extended Pathways program. She discussed in her letter to Dr. Matz subsequent to the December 2014 APC meeting, her disability, that she felt this program would exacerbate her depression and anxiety, and why she felt that way (App. p. 242, Ex. 14). The form letters never varied in any significant way in connection with any other avenues of assistance. The words disability and/or

accommodation were never used by anyone identified as someone who could help, either verbally or in writing. Ms. Slaughter was never involved in a meeting in which her disability was discussed, asked what her ideas about accommodations might be, what she felt might be helpful, what DMU thought might be appropriate accommodations, etc. There was no interactive process undertaken by DMU at any point.

DMU insists they acted in good faith, engaging in an interactive process, providing accommodations specifically created and designed to meet Ms. Slaughter's needs so that she could access the medical program on an equal footing with her non-disabled peers. However, the ADA's regulations make clear that the purpose of the interactive processs ***is*** to determine the ***appropriate*** accommodations: "This process should identify the precise limitations resulting from the disability and the potential reasonable accommodations that could overcome those limitations."29 C.F.R. § 1630.2(o)(3). The EEOC's interpretive guidelines squarely place some of the burden on the employer by stating that "the employer must make a reasonable effort to determine the appropriate accommodation." 29 C.F.R. Pt. 1630, App. § 1630.9 at 359. Additionally, the guidelines provide that once a qualified individual with a disability (Ms. Slaughter) has requested provision of a reasonable accommodation, the employer

(here the University) must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the disabled employee. 29 C.F.R. Pt. 1630, App. § 1630.9.

In this case, the action taken by DMU after direct verbal and written disclosure by Ms. Slaughter of her disability to both Ms. Oren and Dr. Matz in December of 2014, the same form letters were generated. Ms. Slaughter continued to see her therapist weekly, who was fully cognizant of Ms. Slaughter's disability from the beginning of counseling in August of 2014. By December of 2014, no fewer than three individuals were fully aware and notified of Ms. Slaughter's disability; Dr. Sanders, Dr. Matz and Ms. Oren. DMU failed to engage Ms. Slaughter in the interactive process of accommodations, and confining itself to issuing form letters documenting her failures to measure up. See Taylor v. Phoenixville Sch. Dist., 184 F.3d 296 (3d Cir. 1999).

II.

AS AN EMPLOYEE OF DES MOINES UNIVERSITY, DR. SANDER'S KNOWLEDGE OF MS. SLAUGHTER'S DISABILITY CAN BE IMPUTED TO THE UNIVERSITY WITHOUT A VIOLATION OF CHAPTER 228, IOWA CODE.

The issue of "accommodation" has been addressed in the prior division and will not be again discussed at this juncture.

Des Moines University (DMU) complicates the issue of knowledge of an employee being imputed to the employer by arguing that the information gleaned from Ms. Slaughter during the counseling sessions cannot be imputed. That is not the issue! The information received by Dr. Sanders and its admissibility was never an issue before the court. (App. pp. 58-59) The issue before the Court was: is Dr. Sanders' *knowledge* that Ms. Slaughter was disabled by reason of a mental health condition imputed to DMU for purposes of the commencement of the interactive process for accommodations under the ADAAA.

Additionally, the motion for the determination of admissibility was not whether Dr. Sanders knowledge and information was to be divulged, but rather could the "psycho-therapist privilege" be claimed by DMU to avoid the imputation of knowledge of Ms. Slaughter's *disability.* (App. pp. 154-160).

DMU claims that the University's policies and procedures with respect to Client Rights, Responsibilities and Informed Consent (App. p. 249, Ex. 26), signed by Ms. Slaughter, prohibited the disclosure and that such is in accord with Iowa Code § 228.2(1). (DMU Brief, p. 14). However, an examination of Exhibit 26 shows that the material which could not be disclosed was that of "*personal*

information". With respect to the disclosure under Chapter 228, Iowa Code, one needs only to look at the definition of Mental Health Information to see that knowledge of a person's disability is not Mental Health Information. Section 228.1(5) means: ".....information which indicates the identity of an individual....and which relates to the diagnosis, course or treatment of the individual's mental or emotional condition."

Dr, Sanders knew that a student (Ms. Slaughter) was suffering from a mental health condition which was disabling. She also knew that the disabling condition was impacting her academic performance. She obtained this information in the course of her employment. Under the University's own policies, (App. p. 252, Ex. 54), this information could be shared: "General information about a student's disability.....may be shared with other DMU officials...." Why was this necessary? Why the need to share information? To commence the interactive process leading to reasonable accommodations!

DMU asserts in its argument that Section 228.5(4) is also inappropos because "professional services as defined within the section are "diagnostic or treatment services for a mental or emotional condition...." and *only* services provided by a mental health professional qualify. Importantly`, here again the question is not the treatment services or diagnosis provided by the mental health

professional which is at issue, rather is the knowledge of what Dr. Sanders learned, imputed, particularly in light of Ex. 54 (App. p. 252) which also refers to the University's Accommodation Specialists. How could accommodation specialists seek to provide any student with disability accommodations, without the knowledge of their existence?

There is no question that some communications may well be privileged from disclosure, but there is no communication of *facts* generated from the imputation of Dr. Sanders knowledge that Ms. Slaughter was disabled. Though Restatement (Third) of Agency, §5.03(b) (2006) recognizes privileges and confidences, the present case is not one in which confidential facts are, by reason of Dr. Sanders employment, being alleged to have been imputed to DMU. It is her knowledge of Ms. Slaughter's "disability" which is imputed to DMU, which clearly triggers the need for an engagement in the interactive process with Ms.Slaughter.

CONCLUSION

For the reasons stated above, the Summary Judgment granted by the Trial Court should be reversed and the case remanded for trial.

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 12th day of March, 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 3084 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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