

IN THE SUPREME COURT OF IOWA

Supreme Court Case No. 17-1732
Polk County Case No. CVCV051603

NATALIE SLAUGHTER,

Plaintiff-Appellant,

v.

DES MOINES UNIVERSITY COLLEGE OF
OSTEOPATHIC MEDICINE

Defendant-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
HONORABLE JUDGE JEFFREY FARRELL

FINAL BRIEF OF DEFENDANT-APPELLEE
DES MOINES UNIVERSITY COLLEGE OF
OSTEOPATHIC MEDICINE

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. WHETHER THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT DISMISSING SLAUGHTER'S CLAIM THAT DMU FAILED TO PROVIDE HER WITH REASONABLE ACCOMMODATION

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Iowa Code § 228.2(1)

Iowa Code § 622.10(1) (2017)

Cemen Tech, Inc., v. Three D Indus., L.L.C., 753 N.W.2d 1, 5 (Iowa 2008)

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Halpern v. Wake Forest University Health Sciences, 669 F.3d 454, 464 (4th Cir. 2012) (citing *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 401-402 (2002))

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Wong v. Regents of Univ. of Cal., 192 F.3d 807, 826 (9th Cir. 1999)

II. WHETHER THE DISTRICT COURT PROPERLY RULED THAT A DMU STAFF PSYCHOLOGIST'S KNOWLEDGE OF SLAUGHTER'S MENTAL HEALTH INFORMATION COULD NOT BE IMPUTED TO DMU

Iowa Code § 228.1(8) (2017)

Iowa Code § 228.2

Iowa Code § 228.2(1)

Iowa Code § 228.5(4)

Iowa Code § 622.10

Farnsworth v. Hazlett, 197 Iowa 1367, 199 N.W. 410, 412 (1924)

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RESTATEMENT (SECOND) OF AGENCY § 281 cmt. a (1958)

RESTATEMENT (THIRD) OF AGENCY § 5.03(b) (2006)

ROUTING STATEMENT

DMU does not object to Appellant Slaughter's Routing Statement.

STATEMENT OF THE CASE

Plaintiff-Appellant Natalie Slaughter (“Slaughter”), a former student in the Doctor of Osteopathic Medicine program at Des Moines University (“DMU”), sued DMU under the Iowa Civil Rights Act claiming discrimination on the basis of disability, failure to accommodate her disability, and retaliation. (App. 4-15). DMU moved for summary judgment on all claims. (App. 39). Slaughter resisted the motion for summary judgment and filed a Motion to Determine Admissibility and for Partial Summary Judgment. (App. 55-62).

A hearing on all motions was conducted before the Honorable Jeffrey Farrell on September 29, 2017. At the hearing, Slaughter withdrew her claim of discrimination on the basis of disability, and asked the court to either dismiss or grant summary judgment on the claim. (App. 140, Ll.13-25). On October 6, 2017, the district court granted summary judgment to DMU on all claims. (App. 125). With respect to Slaughter’s Motion on Admissibility, the district court ruled that the mental health information privilege applied to the facts of the case pursuant to Iowa Code § 228.2(1). Slaughter had not waived the privilege, and therefore the knowledge of the DMU Psychologist providing psychological counseling to Slaughter could not be imputed to DMU. (App. 112). On October 27, 2017, Slaughter filed her Notice of Appeal. (App. 127-128).

STATEMENT OF FACTS

In recognition that the Court must view the record in the light most favorable to the nonmoving party, for purposes of this appeal, DMU does not dispute Slaughter's Statement of Facts, with the following exceptions:

1. Slaughter first attended DMU in August 2014. (App. 173).
2. By letter dated August 25, 2014, Dr. Don Matz, Chair of the Academic Progress Committee ("APC"), advised Slaughter to use the services of the Student Counseling Services for psychological and emotional support services. This was the initiation of the interactive process by DMU. (App. 176-177; App. 239).
3. Dr. Matz individually met with Slaughter early in Fall Term 2014 and also on December 19, 2014 to assist her in overcoming her particular limitations. (App. 185-186, 189).
4. When the APC offered the accommodation of enrollment in the 5-year Extended Pathways to Success Program in December 2014, Slaughter declined the accommodation. (App. 190-194; App. 242).
5. Slaughter's GPA was 2.53 for Fall 2014 Term and 1.88 for Spring 2015 Term. She was not academically progressing and achieving success. (App. 255).

ARGUMENT

I. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT DISMISSING SLAUGHTER'S CLAIM THAT DMU FAILED TO PROVIDE HER WITH REASONABLE ACCOMMODATION

The district court properly determined that Des Moines University reasonably accommodated Slaughter's disability.

A. Preservation of Error

Des Moines University agrees that Slaughter preserved error on the issue appealed.

B. Scope of Review

Des Moines University agrees that appellate review of the district court's decision is for corrections of errors at law.

C. Analysis

Appellant Slaughter argues that genuine issues of material facts precluded the district court from finding that DMU engaged in an interactive process and provided reasonable accommodation to her.

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3). A factual issue is material only if "the dispute is over facts that might affect the outcome of the suit." *Peak v. Adams*, 799 N.W.2d 535, 542 (Iowa 2011) (citations omitted). "An issue of fact is 'genuine' if the

evidence is such that a reasonable finder of fact could return a verdict or decision for the nonmoving party.” *Parish v. Jumpking, Inc.*, 719 N.W.2d 540, 543 (Iowa 2006). “Speculation is insufficient to create a genuine issue of material fact.” *Cemen Tech, Inc., v. Three D Indus., L.L.C.*, 753 N.W.2d 1, 5 (Iowa 2008). The nonmoving party “must set forth specific facts showing the existence of a genuine issue for trial.” *Hlubek v. Pelecky*, 701 N.W.2d 93, 95 (Iowa 2005) (citing Iowa R. Civ. P. 1981(5)). This Court’s review is limited to whether a genuine dispute concerning a material fact exists and, if not, whether the district court correctly applied the law. *Homan v. Branstad*, 887 N.W.2d 153, 164 (Iowa 2016).

1. The Undisputed Facts Demonstrate that DMU Initiated an Interactive Process with Slaughter

Appellant Slaughter argues there are genuine issues of fact that preclude the district court’s finding that DMU engaged in an interactive process with her regarding reasonable accommodation of her particular limitations. Slaughter asserts that even though she did not formally request accommodation, DMU had a duty to initiate the interactive process and failed to do so. Slaughter Brief p. 14.

The interactive process is informal and flexible. *E.E.O.C. v. Product Fabricators, Inc.*, 763 F.3d 963, 971 (8th Cir. 2014). Participation in the interactive process includes actions such as communicating to gather information,

analyzing whether and how a student might be accommodated, and suggesting possible accommodations. See *Palmer Coll. of Chiropractic v. Davenport Civil Rights Comm'n*, 850 N.W.2d 326, 337 (Iowa 2014). Slaughter provides no authority for her suggestion that a “sit down” meeting must occur to properly engage in the interactive process.

To determine whether DMU failed to engage in the interactive process, Slaughter must establish a genuine issue with respect to one of the following facts: (1) whether DMU knew of her disability; (2) whether Slaughter requested accommodations or assistance; (3) whether DMU did not in good faith assist her in seeking accommodations; and (4) whether Slaughter could have been reasonably accommodated but for DMU’s lack of good faith. See *Koester v. YMCA of St. Louis*, 855 F.3d 908, 912 (8th Cir. 2017); *Kallail v. Alliant Energy Corp. Servs., Inc.*, 691 F.3d 925, 933 (8th Cir. 2012). The only issue in this appeal is whether DMU did not in good faith assist Slaughter in seeking accommodations.

The facts are undisputed that when Slaughter first experienced academic difficulties in August 2014, DMU contacted Slaughter and offered her assistance through the Center for Academic Support and Enrichment (“CASE”), Student Counseling Services, her course directors, and her faculty advisor. (App. 176-177; App. 239). Subsequently, DMU provided Slaughter with one-on-one tutoring and study strategies, advice from the Academic

Progress Committee (“APC”), and weekly psychotherapy at no cost. (App. 178-184; App. 240). DMU also offered to allow Slaughter to enroll in the 5-year Extended Pathways to Success Program (“EPSP”). (App. 190-194; App. 242). In addition, Dr. Don Matz, Chair of the APC met individually with Slaughter during the Fall Term 2014 and on December 19, 2014, to assist her in overcoming her particular limitations. (App. 185-186, 189). Further, Dr. Craig Canby, Associate Dean of Academic Curriculum and Medical Programs, individually met with Slaughter on January 7, 2015 to consult with her and prepare an action plan for her. (App. 235-236). Based on these undisputed material facts, no reasonable fact finder could return a verdict or decision that DMU failed to assist Slaughter in good faith in seeking reasonable accommodations. *See Koester*, 855 F.3d at 912; *Mershon v. St. Louis University*, 442 F.3d 1069, 1077 (8th Cir. 2006) (affirming summary judgment for university on failure to accommodate claim, where plaintiff’s “academic record [was] replete with defendants’ efforts to accommodate him in his academic endeavors,” and noting that university was not required to provide every requested accommodation); *Kallail*, 691 F.3d at 933 (plaintiff failed to show defendant did not engage in interactive process, where defendant reasonably accommodated plaintiff by offering her alternate position).

Slaughter has presented no evidence upon which a reasonable finder of fact could decide that DMU did not in good faith assist her in seeking

accommodations. Slaughter does not dispute any of the DMU actions to accommodate her set forth in the prior paragraph. Instead, Slaughter argues that Dr. Emily Sanders, the DMU Psychologist who was providing psychotherapy to Slaughter, should have requested accommodations on behalf of Slaughter even though Slaughter did not request Dr. Sanders to do so, and did not consent to the disclosure of her mental health information by Dr. Sanders. It would have been a violation of Iowa law and Dr. Sanders' ethical obligations to disclose Slaughter's mental health information without Slaughter's consent. *See* Iowa Code § 228.2(1) and § 622.10(1) (2017).

The undisputed facts show that even though Slaughter did not make a formal request for accommodation in August 2014 when she first experienced academic difficulty, DMU initiated the interactive process by providing Slaughter with the services of CASE and Student Counseling, by providing counseling from DMU course directors and Slaughter's academic advisor, and by providing Slaughter with psychotherapy with Dr. Sanders at no cost. When Slaughter failed her biochemistry course, the Academic Progress Committee met with her and discussed possible courses of action. One accommodation offered by the APC was the 5-year Extended Pathways to Success Program. This Court has recognized that programs such as the EPSP that change the length of time permitted for the completion of degree requirements are reasonable accommodations. *See Palmer*, 850 N.W.2d at 335. Thus, the

undisputed facts show that DMU engaged in good faith in an interactive process with Slaughter regarding reasonable accommodations. Further, as a matter of law, the accommodations offered Slaughter by DMU were reasonable. For these reasons, the district court's decision should be affirmed.

2. The Accommodations Provided by DMU Were Reasonable and Related to Slaughter's Disability

Slaughter argues that the accommodations DMU provided to her were not reasonable because the accommodations were also available to other students. Slaughter Brief p. 20. The obligation to reasonably accommodate a student "requires an individualized and extensive inquiry" and should consider the student's "particular limitations" and analyze whether and how the institution "might accommodate that student in a way that would allow the student to complete the school's program without lowering academic standards." *Palmer*, 850 N.W.2d at 337 (quoting *Wong v. Regents of Univ. of Cal.*, 192 F.3d 807, 826 (9th Cir. 1999)). It is undisputed that beginning in August 2014, DMU referred Slaughter to the Student Counseling Center. Slaughter informed the Counseling Center that she had trouble sleeping, had high anxiety, and that she had previously been diagnosed with depression and anxiety. The Student Counseling Center then provided Slaughter weekly psychotherapy counseling with Dr. Emily Sanders at no cost. (App. 178-180; App. 240). The provision of psychotherapy counseling to assist Slaughter with

her high anxiety and depression specifically addressed the particular limitations Slaughter identified, and thus is a reasonable accommodation. *See Palmer*, 850 N.W.2d at 337. Even though other students might also receive psychotherapy counseling, by providing such counseling to Slaughter to specifically address her condition, DMU directly accommodated Slaughter's particular limitations. Psychotherapy counseling is not provided every student, but only those students who request it and demonstrate a need for the services. (App. 201).

Similarly, in August 2014, DMU referred Slaughter to CASE to assist her with her academic difficulties. Although Slaughter denied that she had a physical or learning disability, she met with a counselor and discussed ways in which to deal with her high anxiety and trouble sleeping to improve her academic performance. CASE provided accommodations to Slaughter including electronic resources, counseling regarding time management, and individual tutoring. (Slaughter Dep. p. 51, Ll. 4-23). Again, even though other students might receive these same accommodations, Slaughter was provided the accommodations in response to her individual request and the accommodations were directed to Slaughter's particular limitations. Therefore, the accommodations were reasonable. *See Palmer*, 850 N.W.2d at 337.

Perhaps most significantly, after Slaughter met with the Academic Progress Committee in December 2014, the APC recommended that Slaughter enroll in the 5-year Extended Pathways to Success Program. Again, even

though other students might be offered enrollment in the EPSP, the recommendation by the APC that Slaughter enroll in the 5-year program was a result of an individualized assessment of Slaughter's particular limitations and was a specific accommodation that would allow Slaughter to complete her education without lowering academic standards. This Court has specifically recognized that changes in the length of time permitted for the completion of degree requirements are a reasonable accommodation. *See Palmer*, 850 N.W.2d at 335. Whether other students might receive the same accommodation is not determinative of whether DMU made an individualized assessment of Slaughter's particular limitations and offered accommodations designed in a way that would allow Slaughter to complete her education. The district court correctly found that DMU offered reasonable accommodations to Slaughter, and the court's decision should be affirmed.

3. The Accommodation Requested by Slaughter But Not Provided by DMU Was Not Reasonable

The only accommodation requested by Slaughter that DMU did not grant was to allow Slaughter to take elective courses while she was on academic probation. Slaughter offered only her own speculation as to how taking electives would assist her with her academic difficulties. Summary judgment may be appropriate if a plaintiff fails to present evidence from which a jury may infer that the accommodation is reasonable on its face. *See Hlubek*, 701 N.W.2d

at 95; Halpern v. Wake Forest University Health Sciences, 669 F.3d 454, 464 (4th Cir. 2012) (citing *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 401-402 (2002)).

Because Slaughter has presented no evidence from which a jury may infer that taking elective classes would assist her with meeting DMU's academic standards, the district court correctly determined that taking elective classes was not a reasonable accommodation, and the court's decision should be affirmed.

II. A DES MOINES UNIVERSITY STAFF PSYCHOLOGIST'S KNOWLEDGE OF SLAUGHTER'S MENTAL HEALTH INFORMATION CANNOT BE IMPUTED TO DMU

The district court properly ruled that a Des Moines University Staff Psychologist's knowledge of Slaughter's mental health information cannot be imputed to DMU.

A. Preservation of Error

Des Moines University agrees that Slaughter preserved error on the issue appealed.

B. Scope of Review

Des Moines University agrees that appellate review of the district court's decision is for corrections of errors at law.

C. Analysis

The district court ruled that mental health information about Slaughter gained by a DMU Staff Psychologist who was providing psychotherapy services to Slaughter could not be imputed to DMU because it was part of a mental

health professional – patient relationship protected from disclosure by Iowa Code § 228.2 and Iowa Code § 622.10. (App. 111-112). The district court found further that Slaughter had not waived or otherwise consented to the disclosure of the information. (App. 110). Slaughter now argues that because the DMU Staff Psychologist, Dr. Emily Sanders, did not disclose Slaughter’s mental health information to Slaughter’s instructors or other DMU employees, DMU failed to reasonably accommodate Slaughter.¹ This argument fails for the following two reasons.

1. Even Though Dr. Sanders Did Not Disclose Slaughter’s Mental Health Information, DMU Provided Reasonable Accommodations to Slaughter

The undisputed facts show that even though Dr. Sanders did not disclose Slaughter’s mental health information to Slaughter’s instructors or other employees of DMU, DMU began the interactive process to consider reasonable accommodations for Slaughter when Slaughter first failed an exam in August 2014. DMU did not wait for Slaughter to specifically request an accommodation. Rather, once Slaughter began to experience academic

¹ Slaughter also states that Shelley Oren, Slaughter’s faculty advisor, had knowledge that Slaughter experienced depression and did not disclose the information to other DMU employees. However, Slaughter first told Oren of her depression on December 16, 2014, immediately following the APC meeting regarding Slaughter’s poor academic performance. Oren advised Slaughter to inform Dr. Matz, Chair of the APC. Slaughter followed Oren’s advice and informed Matz of her depression by email dated December 17, 2014. (App. 224-229; App. 251).

difficulties, DMU sought Slaughter out and offered her accommodations through CASE, Student Counseling Services, her course directors and faculty advisor. (App. 176-178; App. 239); *see Kowitz v. Trinity Health*, 839 F.3d 742, 746 (8th Cir. 2016) (employee not required to request accommodation “in so many words”). After DMU began offering accommodations to Slaughter in August 2014, Slaughter requested, and DMU provided, individualized study support and one-on-one tutoring through CASE, free weekly psychotherapy sessions through the Student Counseling Center, and one-on-one advice and academic assistance from the APC and her faculty advisor. (App. 176-183; App. 239, 240). Dr. Sanders first gained knowledge of Slaughter’s mental health information on September 3, 2014. (App. 205).

These undisputed facts demonstrate that DMU initiated the interactive process before Dr. Sanders had knowledge of Slaughter’s mental health information. Thus, the fact that Dr. Sanders did not disclose Slaughter’s mental health information to Slaughter’s instructors or other employees of DMU in no way delayed or diminished DMU’s timely, reasonable accommodation of Slaughter. Because DMU reasonably accommodated Slaughter even though Dr. Sanders did not disclose Slaughter’s mental health information to other DMU employees, the district court’s ruling should be affirmed.

2. As a Mental Health Professional, Dr. Sanders’ Knowledge of Slaughter’s Mental Health Information Cannot be Imputed to DMU

Because the proper application of the general rule that the knowledge of employees is imputed to their employer requires that Dr. Sanders’ knowledge of Slaughter’s mental health condition not be imputed to DMU, the district court should be affirmed. “[A] corporation is charged with knowledge received by its officer or agent who is acting in the course of his employment and within the scope of his authority.” *Roblin Constr. Co. v. Lakes, Inc.*, 252 N.W.2d 403, 405 (Iowa 1977). The scope of Dr. Sanders’ authority while employed by DMU was to provide psychological services to students. (App. 207; App. 247). The essential functions of Dr. Sanders’ job required her to follow Student Counseling Center policies and procedures consistent with state mental health laws and ethical guidelines. *Id.* The policies and procedures of the Student Counseling Center included a statement of Client Rights, Responsibilities and Informed Consent, which Slaughter acknowledged and signed. (App. 208; App. 249). One client right is “To know that personal information cannot be disclosed to anyone, except for professional consultation or supervision, without your specific permission.” *Id.* This client right is consistent with Iowa Code § 228.2(1), which generally provides that a mental health professional “shall not disclose or permit the disclosure of mental health information.” Thus, the confidentiality policies of the Student Counseling Center and the

prohibition of disclosure of mental health information set forth in Iowa Code § 228.2(1) circumscribe Dr. Sanders' employment responsibilities such that it was not within the scope of her employment to disclose Slaughter's mental health information to other DMU employees without Slaughter's consent. It is undisputed that Slaughter did not consent to the disclosure of her mental health information by Dr. Sanders. (App. 217). Because it was not within Dr. Sanders' scope of employment to disclose Slaughter's mental health information, her knowledge cannot be imputed to DMU. *See Hendricks v. Great Plains Supply Co.*, 609 N.W.2d 486, 494 (Iowa 2000) (insurer not bound by statement of claim investigator with no authority to adjust claim).

Slaughter argues that Iowa Code § 228.5(4) authorizes Dr. Sanders to disclose mental health information to other DMU employees for purposes of reasonable accommodation. Slaughter Brief p. 27. Iowa Code § 228.5(4) states in full as follows:

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.

Section 228.5(4) authorizes disclosure of mental health information only “to other providers of professional services or their employees or agents”

“Professional services” are defined as “diagnostic or treatment services for a mental or emotional condition provided by a mental health professional.”

Iowa Code § 228.1(8) (2017). Thus, DMU employees who were not employed by a mental health professional were not employees or agents of providers of professional services, and the exception provided by Section 228.5(4) did not permit Dr. Sanders to disclose Slaughter’s mental health information to other DMU employees.

An additional exception to the general rule imputing an employee’s knowledge to their employer is recognized when the employee owes a duty to another not to communicate facts that have come to the employee’s knowledge. Specifically, when the employee’s knowledge comes from a privileged source, and is therefore not legally or properly to be disclosed, knowledge is not imputed to the employer. *See Farnsworth v. Hazlett*, 197 Iowa 1367, 199 N.W. 410, 412 (1924) (attorney is not required to disclose to one client the privileged communications of another client). As explained in the Restatement (Third) of Agency:

“[A]n exception to the general rule as to the imputation of the agent’s knowledge to the principal is that where the agent owes a duty to another not to communicate facts that have come to his or her knowledge, the law will not impute knowledge thereof to the principal.

Restatement (Third) of Agency § 5.03(b) (2006). This rule “applies to confidences given to physicians in jurisdictions in which physicians are privileged or required not to reveal confidences.” Restatement (Second) of Agency § 281 cmt. a (1958); *see Reinninger v. Prestige Fabricators, Inc.*, 523 S.E.2d

720, 725 (N.C. Ct. App. 1999) (doctor has ethical obligation to withhold confidential communications of patients and thus his knowledge of diagnosis and treatment of patients not imputed to employer). Dr. Sanders cannot legally or ethically disclose Slaughter's mental health information without the consent of Slaughter. *See* Iowa Code § 228.2 and Iowa Code §622.10. It is undisputed Slaughter did not provide such consent. Therefore, Dr. Sanders' knowledge cannot be imputed to DMU because Dr. Sanders had a legal and ethical duty to not disclose Slaughter's mental health information. For this reason, the district court's ruling that Dr. Sanders' knowledge of Slaughter's mental health information cannot be imputed to DMU should be affirmed.

CONCLUSION

For the reasons stated above, the district court should be affirmed in all respects.

STATEMENT REGARDING ORAL ARGUMENT

Appellee Des Moines University requests to be heard in oral argument.

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Kelly R. Baier

Cost Certificate

I, the undersigned, hereby certify that the true cost of producing the necessary copies of the foregoing Final Brief of Appellee was \$N/A and that the amount has been paid in full by Appellee.

/s/ Kelly R. Baier
Kelly R. Baier