



Defense Strategy: Interactive Process Can Be Used To Defeat ADA Claims

Insights

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Most employers are well aware that the Americans with Disabilities Act (ADA) requires them to engage in an “interactive process” with employees or applicants who indicate they have a disability and may require some type of reasonable accommodation. However, engaging in that process can often be time-consuming, requiring repeated communications with employees or applicants, their medical providers, and possibly other medical providers.

Because of these hurdles, there is a tendency to want to streamline the process. However, a recent case in the 6th Circuit Court of Appeals demonstrates that following the interactive process can effectively shield an employer from liability; you should pay attention to the case and learn by example (*Swank v. CareSource Management Group Co.*).

Position Change Leads To Termination

Katherina Swank, a registered nurse suffering from rheumatoid arthritis, worked for CareSource, an organization that provides managed healthcare services to Medicaid recipients. Swank initially worked as a Case Manager, a position that allowed her to conduct her duties entirely by telephone. After she was diagnosed with rheumatoid arthritis in 2008 or 2009, CareSource allowed her to work from home. However, a few years later, the requirements of her position changed drastically.

In 2011, CareSource entered into an agreement with the Ohio Department of Job and Family Services (ODJFS) to provide managed healthcare services in Ohio. The agreement required CareSource to change its healthcare plan so it could begin providing a “high-touch, community-based model.” Part of that mandate required that CareSource employees meet face-to-face with certain high-risk members on at least a quarterly basis.

As a result of the new requirement, CareSource eliminated all Case Manager positions and created a new position called RN Case Manager – High Risk (CMHR). Although a CMHR could delegate some of the face-to-face visits to social workers, patient navigators, and other employees, the CMHR was required to conduct the face-to-face visit personally when it involved a duty that was within the scope of an RN license.

Due to the elimination of the Case Manager position, CareSource offered Swank a CMHR position. However, Swank advised CareSource that the position would be hazardous to her health, stating that her immune system would be compromised by entering environments where she would be in

contact with high-risk patients. She also indicated that her condition would not allow her to handle the driving requirements of the position.

In response, CareSource suggested she make a formal request for reasonable accommodation, and waived the driving requirements while determining whether it could provide a reasonable accommodation. In written documentation provided by Swank and her healthcare provider, she indicated she could not perform the essential functions of the position with or without an accommodation. As a result, CareSource advised Swank that there were no other available positions for which she was qualified, and terminated her employment.

Employer Wins Lawsuit And Appeal Due To Interactive Process

In 2013, Swank filed a federal lawsuit against CareSource alleging a claim of disability discrimination under the ADA and related state laws, and the employer eventually asked the court to dismiss the case before trial. In response, Swank argued that she was “otherwise qualified” for the CMHR position without accommodation, but the court noted the various instances during the interactive process where Swank specifically indicated that she required accommodation to perform the job.

Swank next argued that driving was not an essential function of the CMHR position. However, the court noted that the job description specifically stated that driving was a physical requirement of the position. In addition, the court pointed out that Swank acknowledged that CMHRs were required to conduct face-to-face visits and might have to be mobile up to 50% of the time on the job.

The court also rejected Swank’s argument that CareSource discriminated against her by denying her accommodation request. The court said that an employer is not required to assign other employees to perform the essential job functions that a disabled employee cannot perform. Finally, the court noted that Swank did not ask for any other accommodations during the interactive process, concluding that a plaintiff may not base a claim on the failure to provide unrequested accommodations.

In an August 17, 2016 decision, the 6th Circuit Court of Appeals (which hears cases arising from federal courts in Ohio, Kentucky, Tennessee, and Michigan) agreed with the lower court’s analysis. In doing so, the appeals court relied on various statements regarding Swank’s condition that were provided by both Swank’s medical provider and Swank herself. In agreeing that driving was an essential function, the court looked to the various factors set forth in Equal Employment Opportunity Commission (EEOC) regulations, including the written job description, the amount of time spent performing the function, and the consequences of not requiring performance of the function.

At the appeal stage, Swank attempted to argue that CareSource did not engage in the interactive process. However, in addition to pointing out CareSource’s various actions, the court also noted that Swank failed to propose a reasonable alternative accommodation that would have addressed her stated driving limitations. In addition, the court relied heavily upon the various communications that

occurred between Swank and CareSource during their review of her request for accommodation and concluded that an effective interactive process took place.

What Can Employers Learn?

In this case, CareSource was able to defeat Swank's claims because of its efforts from the time she first raised the issue of the need for an accommodation through the time it ultimately terminated her employment. Rather than ignoring Swank's situation, the employer recommended she request a reasonable accommodation.

The employer then obtained information from both Swank and her healthcare provider regarding her condition and her ability to perform the essential functions of the job. It engaged in multiple communications with her, both written and verbal. That information not only allowed the employer to make an informed decision regarding her situation, but it proved extremely useful in defending against the various assertions made by her attorney in the subsequent lawsuit.

By engaging in a thoughtful and thorough interactive process with Swank, her employer successfully defended itself in the lawsuit. Indeed, following CareSource's example with an employee will demonstrate the sincerity of your efforts, and may result in an employee choosing to accept your determination without resorting to litigation.

Working through the interactive process with a disabled employee or applicant might seem tedious and time-consuming, but it will enable you to determine ways to get productive value from your workers. As the foregoing case demonstrates, it could also allow you to avoid liability should a lawsuit result.

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