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REASONABLE ACCOMMODATION

Step in time: Even the government makes missteps

by Brinton Wilkins

As children, many of us grew up listening to Dick Van Dyke in Mary Poppins as he bounced around the rooftops of London with "a broom for the shaft and a brush for the flue." According to his character, Bert, you "never need a reason, never need a rhyme" to "kick your knees up" and "step in time." While that may be wonderful advice if you ever find yourself on the rooftops of London, it's not great counsel for someone considering legal action. As the following case shows, even the government—with its cadre of attorneys—can sometimes get caught flat-footed. Read on to see how the government stumbled and what employers can do to "step in time."

Getting off on the wrong foot

Tricore Reference Laboratories hired Rhonda Wagoner-Alison as a clinical lab assistant II (CLA II). Among other things, as a CLA II, she worked as a phlebotomist and registered patients. She admitted that walking and standing for up to two-thirds of each day were essential functions of her job.

In February 2006, Wagoner-Alison had surgery on her left foot. After using her allotted leave under the Family and Medical Leave Act (FMLA), she returned to work and by June was working full-time performing all her duties as a CLA II.

Wagoner-Alison had surgery on her right foot on May 18, 2007. She again took FMLA leave. But by the time that leave ran out, her doctor informed Tricore that she could not return to work until August 20 and then only to a light-duty job that would not require her to stand or walk. Tricore granted her leave through August 20.

When she returned to work, because of restrictions on her ability to walk or stand for extended periods of time, Wagoner-Alison wasn't able to perform the essential functions of a CLA II. Nevertheless, without changing her pay or benefits, Tricore returned her to the CLA II job.

Instead of returning Wagoner-Alison to full CLA II responsibilities, however, Tricore assigned her to perform only patient registration. In so doing, the company committed to trying the new arrangement for 30 days. Shortly after the 30-day trial period ended, Tricore terminated Wagoner-Alison because of a number of errors she committed that the company believed seriously threatened patient security.

EEOC steps on toes

At this point, the Equal Employment Opportunity Commission (EEOC) cut in and filed a lawsuit claiming that Tricore hadn't reasonably accommodated Wagoner-Alison in violation of the Americans with Disabilities Act (ADA).

When the trial court ruled in Tricore's favor, dismissing the case without a trial, the EEOC appealed to the U.S. 10th Circuit Court of Appeals (whose rulings apply to all Utah employers). Unfortunately for the EEOC, the 10th Circuit didn't like its arguments any more than the trial court had.

How Tricore danced through the ADA

According to the 10th Circuit, the ADA forbids employers from discriminating against only "qualified individuals"—i.e., employees who with or without a reasonable accommodation can fulfill the essential functions of their jobs. Although it agreed that Wagoner-Alison was disabled, the 10th Circuit decided that she wasn't a "qualified individual." The undisputed evidence showed that standing and walking for up to two-thirds of the day were essential parts of being a CLA II. Even the EEOC admitted that they were essential functions and that Wagoner-Alison couldn't perform them.

Because she couldn't perform those functions with or without a reasonable accommodation, Wagoner-Alison wasn't a qualified individual. Thus, the court

decided that it was legal for Tricore to terminate her on the basis of her patient registration errors.

Although it wasn't necessary to the court's analysis, the 10th Circuit recognized that Tricore *had* worked to accommodate Wagoner-Alison. The company had essentially created an entirely new position for her by allowing her to retain her CLA II benefits and pay while requiring her to perform only patient registration work. In other words, the court recognized that Tricore had gone above and beyond providing a reasonable accommodation and shouldn't be punished for doing so.

Finally, because the facts clearly showed that Wagoner-Alison couldn't perform a CLA II's essential functions—a fact that the EEOC admitted—the 10th Circuit decided that the EEOC's lawsuit was frivolous and ordered the agency to pay Tricore's attorneys' fees. *EEOC v. Tricore Reference Laboratories*, 2012 WL 3518580 (10th Cir., 2012).

Lessons learned

Sometimes the laws that employers must follow may feel like those complicated footstep charts that beginning dancers use when learning how to waltz. And there is some truth to that. But as Tricore showed, if employers simply try their best to work with and accommodate disabled employees, the dangers of making missteps are greatly reduced. Although Tricore's willingness to create a new position for Wagoner-Alison wasn't legally required and wasn't technically part of the legal analysis, its efforts in that regard caught the court's eye and most likely influenced the decision in its favor.

In short, the more sensitive an employer is to its employees' legally protected needs, the more likely it is that any government action against the employer will be out of step with the law, which is enough to make anyone want to shout, "Supercalifragilisticexpialidocious!"

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