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Employer's Judgment and Job Description Defeat Failure To Accommodate Claim

On January 14, 2021, the United States Court of Appeals for the Seventh Circuit decided a failure-to-accommodate claim in favor of the employer because Conners, the former employee, failed to establish that she could perform the essential functions of her position with or without an accommodation. *Conners v. Wilkie*, 984 F.3d 1255 (7th Cir. 2021). The defendant, Robert Wilkie, is the Secretary of the U.S. Department of Veterans Affairs and was sued in his official capacity. The Seventh Circuit reached its holding after analyzing the former employee's extensive physical restrictions and the employer's detailed job description and judgment about whether a job function was "essential," notwithstanding the fact that Conners's immediate supervisor had restructured her licensed practical nurse (LPN) responsibilities such that almost all essential job functions were eliminated. This case reinforces the importance of detailed and accurate job descriptions and deference to employer's judgment about essential job functions and that a temporary accommodation to eliminate/reallocate an essential function does not automatically convert those duties to a nonessential function.

Background

Conners began her employment in 2006 as an LPN at a healthcare center operated by the VA. Per the LPN job description, her duties included "treating and observing patients, administering immunizations, supervising corpsmen who helped with immunizations, managing the front desk, teaching classes, and filling out paperwork," as well as responding to medical emergencies. 984 F.3d at 1257. The job description also required her to "have the physical ability to perform job-related duties which require lifting, standing, bending, transferring, stooping, stretching, walking, pushing, or pulling without assistance from another patient care provider." *Id.* Conners performed these duties until she was hit by a car while off duty in October 2011.

As a result of the accident, Conners suffered extensive injuries, which rendered her unable to work until April 30, 2012. 984 F.3d at 1258. She returned for one day (with physical restrictions) before needing additional surgery, which rendered her unable to work until June 2012. While Conners was released to full-time work in June 2012, she had many physical restrictions that rendered her unable to treat and observe patients, give immunizations, manage the front desk, or respond to medical emergencies. Unbeknownst to the VA's accommodation coordinator, Conners's immediate supervisor eliminated all job duties except teaching and completing paperwork. The immediate supervisor's accommodations continued until March 2013. *Id.*

In March 2013, the VA's accommodation coordinator directed Conners to fill out a formal accommodation request in connection with her disability. She requested five specific accommodations:

1. a private office, which she said was necessary for her post-traumatic stress disorder and chronic pain;
2. the option to elevate her leg for 15-to-20-minute intervals every 1 to 2 hours;



3. a footstool;
4. no standing for more than 10 to 15 minutes at one time; and
5. a walking limitation of no more than 25 yards except when necessary. *Id.*

The VA determined that it could provide a footstool but not the other requested accommodations because a major part of an LPN's responsibilities involved seeing patients and administering and supervising immunizations, which required standing and walking. Notably, even teaching classes would require her to walk more than 25 yards at times. Conners filed an internal failure-to-accommodate complaint. *Id.*

In June 2013, the VA notified Conners of the conclusion that she was unable to perform the essential functions of her LPN position. This notice included the possibility of reassignment to an open position that fit her qualifications and physical limitations, and Conners was asked to fill out a standard form. In response, Conners stated that 90 percent of her LPN job was clerical or supervisory and that she would consider only a transfer to Arizona for a suitable position. She also disagreed with the VA's statement that if a suitable position could not be found, it had no further obligation to accommodate her. 984 F.3d at 1258 – 1259.

It seems that Conners continued in her LPN role in some modified capacity that met her physical limitations. In October 2013, Conners submitted another reassignment request listing Hot Springs, Arkansas, as the only location she would be willing to relocate to; all other information was the same. The VA explored possible reassignment to an LPN position in Arkansas or Arizona, but none were compatible with her requested accommodations. 984 F.3d at 1259.

In November 2013, Conners was notified that there were no available LPN positions that could accommodate physical restrictions and was given three options: (1) reassignment to different jobs compatible to her qualifications and limitations; (2) medical-disability retirement; or (3) termination. Conners refused to take no for an answer, responding "I am going to continue my duties in my current position with reasonable accommodations. I am gainfully employed as a nurse with my reasonable accommodations." *Id.* The VA informed Conners that this was not an option because there are professional and physical responsibilities that were not being met. The three options were again presented to Conners. After she declined to pursue the first two options, the VA terminated her employment in January 2014. *Id.*

Following her termination, Conners filed another internal complaint alleging discrimination, retaliation, and hostile work environment. The VA dismissed her complaints. Thereafter, she filed a lawsuit against VA Secretary Wilkie, alleging that the VA violated the Rehabilitation Act of 1973, Pub.L. No. 93-112, 87 Stat. 355, by failing to reasonably accommodate her disability, retaliating against her, and subjecting her to a hostile environment. See 29 U.S.C. §794. Cross-motions for summary judgment were filed on the failure-to-accommodate claim, and the VA moved for summary judgment on the other claims. (Conners did not address the retaliation and hostile environment claims, so they were deemed abandoned by the district court.) The district court ruled in favor of the VA on the failure-to-accommodate claim, finding that "Conners had not offered any evidence that she was a 'qualified individual with a disability,' " which is an essential element of the claim. Conners appealed. 984 F.3d at 1260.

The Seventh Circuit's Decision

Generally, an employer covered by the Americans with Disabilities Act of 1990, Pub.L. No. 101-336, 104 Stat. 327, or the Rehabilitation Act has a duty to make reasonable accommodations of a qualified applicant or employee with a disability, unless such would cause an undue hardship on business operations. The duty to reasonably accommodate an employee with disabilities may require a reassignment to a vacant position. 42 U.S.C. §12111(9)(B).

The elements of a claim for failure to accommodate an employee's disability are (1) the employee was a qualified individual with a disability; (2) the employer was aware of the disability; and (3) the employer failed to reasonably accommodate the disability. *Conners, supra*, 984 F.3d at 1261, citing *Scheidler v. Indiana*, 914 F.3d 535, 541 (7th Cir. 2019). A qualified individual is defined as

an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job. 42 U.S.C. §12111(8).

Here, Conners had the basic prerequisites for the position as an LPN. As such, the only question was whether she could perform the essential functions of the LPN position with or without accommodations when the VA made its decision to let her go. 984 F.3d at 1261. After reviewing the evidence, including the LPN job description, the Seventh Circuit determined that Conners could not perform the essential functions of the position with or without accommodations.

In affirming the summary judgment ruling in favor of the VA, the Seventh Circuit found that Conners's physical limitations prevented her from performing most of the responsibilities set forth in the VA's LPN job description. Specifically, the restrictions on her ability to walk more than 25 yards at a time made it impossible to treat and observe patients, respond to medical emergencies, give immunizations, or manage the front desk. More generally, Conners's restrictions were incompatible with the physical requirements (*e.g.*, lifting, standing, bending, transferring, stooping, stretching, walking, pushing, or pulling without assistance) outlined in the job description. *Id.* Consistent with existing precedent, the Seventh Circuit presumed that the VA's determination that these functions and responsibilities were essential for the LPN position, and no rebuttal evidence was offered to the contrary. 984 F.3d at 1261 – 1262. *See Gratzl v. Office of Chief Judges of 12th, 18th, 19th & 22nd Judicial Circuits*, 601 F.3d 674, 679 (7th Cir. 2010).

The Seventh Circuit rejected Conners's argument that her ability to perform a reduced set of duties (teaching and paperwork) somehow saved her claim. 984 F.3d at 1262. It is clear that "[a]n employer need not create a new job or strip a current job of its principal duties to accommodate a disabled employee." *Id.*, quoting *Gratzl, supra*, 601 F.3d at 680. This is not changed by the fact that Conners's immediate supervisor eliminated many of these duties for a period. The unperformed duties are still essential functions, and Conners was not able to perform them. 984 F.3d at 1262.

Next, since Conners offered no evidence that she could perform the essential functions of any vacant position at the VA, a reasonable jury could not conclude that the VA discriminated against her by failing to reassign her. *Id.*

Finally, the Seventh Circuit rejected Conners's claim that the VA failed to engage in the interactive process to identify reasonable accommodations for her disability for two reasons: (1) since she was not qualified to perform her job with accommodations, the interactive process was irrelevant; and (2) mere failure to engage in the process cannot give rise to a claim for relief. While the Seventh Circuit rejected on these grounds, the background facts would appear to establish that the VA engaged in the interactive process with Conners and that she did not participate in good faith given her response that she would just keep continue teaching and completing paperwork. *Id.*

Given the undisputed evidence and existing precedent, it is surprising that the district court's decision was appealed. However, it is a good decision to reinforce how critical it can be to have a detailed and well-written job description and deference given to an employer's judgment on essential job duties. It

also reinforces that temporarily eliminating an essential job duty does not necessarily mean that it is not still an essential function. However, employers should use caution in doing so because you never have to reallocate an essential function. Also, doing so may impact an employer's defenses if it was done for one employee with a disability but not another or, depending on the length of the reallocation, call into question whether the duty was truly essential.

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