ADA's Interactive Process May Require Plaintiff to Identify Open Position for Transfer

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As defined under the Americans with Disabilities Act (ADA), the term “discriminate” includes an employer's failure to make reasonable accommodations to the limitations of a disabled employee. Reasonable accommodation may include reassignment to a vacant position within the company. The 10th U.S. Circuit court of Appeals recently held that a disabled employee could not support her failure-to-accommodate claim under the ADA, because she did not present evidence of any specific vacant positions to which she could have been transferred. Iverson v. City of Shawnee, Kansas, 10th Cir., No. 08-3264, June 17, 2009.

Michelle Iverson, a police officer with the City of Shawnee, Kansas, suffered a back injury while on duty in 2005. After undergoing surgery for her condition, Iverson was unable to pass a re-qualification test to return to her position as a police officer. She then requested accommodation in the form of a transfer to an open assignment with the City as a detective or non-officer, but was told that there were no jobs available. Iverson filed suit, claiming that she “could have performed numerous positions within the [City] with or without reasonable accommodation.” However, she did not specifically identify any position for which she believed herself to be qualified. Based on that failure, the lower court entered summary judgment in favor of the City. That decision was upheld on appeal to the Tenth Circuit.

For an employee to establish a prima facie case in a failure-to-accommodate claim, the employee must show that she is disabled, that accommodation within the existing job cannot reasonably be accomplished, that she has asked for reassignment to a vacant position, that she is qualified (with or without reasonable accommodation) to perform one or more vacant jobs, and that she has suffered injury because the employer did not offer reassignment to any appropriate vacant position. The Tenth Circuit held that these criteria assume that the burden is on the employee to specifically identify the vacant position or positions for which she believes herself to be qualified. Without such information, the employee cannot subsequently claim that the company’s failure to engage in the interactive process has caused an injury because there is no actual evidence that the interactive process would have likely produced a reasonable accommodation.

In Iverson’s case, she alleged generally that she “could have performed numerous positions within the [City] with or without accommodation,” and, in fact, argued that she could have performed positions as “detective, records technician, police dispatcher, and clerical or administrative positions within the City.” However, she failed to identify any specific position as available at the time that she was requesting reassignment. That failure led the Court to hold in favor of the City.
While this decision is limited to the Tenth Circuit, the court's rationale is clear: an employee alleging that her employer failed adequately participate in the ADA’s interactive process will lose on summary judgment if she fails to show that a reasonable accommodation was possible and that the process would have led to such accommodation. This case does not create an excuse for employers' non-participation in a search for reasonable accommodation of a disability. However, it does point out at least instance in which the employee's failure to provide sufficient input into the process can keep a case from going forward to a jury.