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Help Me, Help You: Eighth Circuit Diminishes Notice Requirement for Employees Seeking an ADA Accommodation

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NOTE

Help Me, Help You: Eighth Circuit Diminishes Notice Requirement for Employees Seeking an ADA Accommodation

Kowitz v. Trinity Health, 839 F.3d 742 (8th Cir. 2016)

Rachel S. Kim[*]

I. INTRODUCTION

The purpose of Title I of the American with Disabilities Act ("ADA") is to remove barriers individuals with disabilities face in the workplace.[1] In addition to prohibiting employers from discriminating against individuals with disabilities, the ADA also mandates an affirmative duty on employers to provide reasonable accommodations to disabled employees who need assistance in performing their jobs.[2] Employers and employees share the responsibility of identifying an accommodation; they should work together through what is called an "interactive process" to find an accommodation that assists the employee in successfully performing his or her job and does not place an undue burden on the employer.[3]

The ADA statute,[4] legislative history,[5] Equal Employment Opportunity Commission ("EEOC") guidance,[6] and Eighth Circuit precedent[7] indicate that an employee seeking an accommodation must first request his or her need for an accommodation before the employer's duty to engage in the interactive process is triggered. The Eighth Circuit, however, has not consistently held a uni-

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1. *See* Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2012).
2. *Id.* § 12112(b).
3. 29 C.F.R. § 1630.2(o)(3) (2017).
4. *Id.* § 1630.2.
5. H.R. REP. NO. 101-485, at 65 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 348.
6. 29 C.F.R. app. § 1630 (2017).
7. Fjellestad v. Pizza Hut of Am., Inc., 188 F.3d 944, 952 (8th Cir. 1999).

form rule regarding what information an employer must have before it is obligated to engage in the interactive process.[8] In some cases, the Eighth Circuit has strictly required employees to clearly request an accommodation before any duty of the employer is triggered.[9] In other cases, the Eighth Circuit has held as long as the employee provided enough information, combined with what the employer already knew about the employee's limitations, the employer is sufficiently put on notice for the need for an accommodation.[10] The Eighth Circuit took the latter approach in *Kowitz v. Trinity Health*.[11]

This Note argues that the Eighth Circuit's holding creates uncertainty for both employers and employees. When deciding whether an employer has failed to engage in the interactive process, the Eighth Circuit should look to whether the employee clearly requested a need for an accommodation, rather than examining the totality of knowledge the employer had on hand. Requiring employees to clearly request an accommodation puts employers on notice and thus *helps* employers better *help* employees with disabilities. Part II of this Note provides the facts and holding of *Kowitz*. Part III examines the legal background surrounding *Kowitz*. Part IV reviews the instant decision of the court. Part V explains why employees should be required to clearly request a desire for an accommodation, as well as provides guidance for employers moving forward. Part VI concludes this Note.

II. FACTS AND HOLDING

In March of 2007, Roberta Kowitz began employment at Trinity Health.[12] Trinity Health is a non-profit, integrated healthcare system that provides a variety of healthcare services to people in North Dakota and surrounding areas.[13] Kowitz was initially hired as a respiratory therapist in the cardiopulmonary department but later assumed duties as a lead technician in the blood gas laboratory.[14] Her direct supervisor was Douglas Reinertson, and Reinertson's direct supervisor was Mark Waldera.[15]

Kowitz suffered from cervical spinal stenosis, a degenerative disease of the spine.[16] This spinal disease required her to have corrective neck surgery.[17]

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8. Craig A. Sullivan, *The ADA's Interactive Process*, 57 J. Mo. B. 116, 118–19 (2001).

9. *See* Kowitz v. Trinity Health, 839 F.3d 742, 747 (8th Cir. 2016); *see also* Mole v. Buckhorn Rubber Prods., Inc., 165 F.3d 1212, 1218 (8th Cir. 1999).

10. Cannice v. Norwest Bank Iowa N.A., 189 F.3d 723, 727 (8th Cir. 1999).

11. *Kowitz*, 839 F.3d 742.

12. *Id.* at 744.

13. *About Trinity Health*, TRINITY HEALTH, http://trinityhealth.org/about (last visited May 29, 2018).

14. *Kowitz*, 839 F.3d at 744.

15. *Id.*

16. *Id.*

17. *Id.*

Kowitz requested leave under the Family and Medical Leave Act[18] ("FMLA") from July 27, 2010, through September 10, 2010.[19] Trinity Health granted her request.[20] On September 7, 2010, Kowitz's physician recommended she not return to work until October 18, 2010.[21] Kowitz thus requested an extension of leave through October 19, 2010.[22] Trinity granted the extension.[23] With the extension, Kowitz had exhausted the remainder of her FMLA leave.[24]

When Kowitz returned to work, she provided Trinity with a Return to Work Form, outlining her physical limitations.[25] In addition, she told Reinertson that she would be unable to work full twelve-hour shifts until approved to do so by her physician.[26] Reinertson assigned Kowitz to work eight-hour shifts instead but told her that Trinity would not be able to reduce her shifts indefinitely.[27]

On November 19, 2010, Trinity Health announced that all cardiopulmonary department employees were required to provide updated copies of their basic life support ("BLS") certifications by November 26, 2010.[28] A BLS certification renewal "required taking a written examination and performing a physical demonstration of CPR."[29] On November 30, 2010, Kowitz informed Reinertson that she would be unable to perform a physical demonstration of CPR until cleared to do so by her physician.[30]

On December 2, 2010, Kowitz called Reinertson to inform him that her physician instructed she complete, at minimum, four months of physical therapy before she could complete the physical portion of the BLS examination.[31] The next day, Kowitz was terminated for not being able to perform BLS.[32]

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18. *See* Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 (2012).

19. *Kowitz*, 839 F.3d at 744.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* (Kowitz's Return to Work Form stated that "up until November 29, 2010, Kowitz would be restricted to working eight-hour shifts, and lifting, carrying, pulling, or pushing no more than ten pounds, among other restrictions.").

26. *Id.*

27. *Id.*

28. *Id*. (Reinertson posted a memorandum that stated, "If you are not up to date on your BLS you will need to submit a letter indicating why you are not up to date and the date you are scheduled to take the BLS class.").

29. *Id.*

30. *Id*. at 744–45 (Kowitz submitted a letter to Reinertson informing him that she would not be able to do the physical part of BLS until she had clearance from her doctor.).

31. *Id.* at 745.

32. *Id.*

Kowitz subsequently brought suit against Trinity Health, Reinertson, and Waldera under the ADA[33] and the North Dakota Human Rights Act[34] ("NDHRA"), alleging that they discriminated against her when they terminated her employment and failed to accommodate her disability.[35]

Kowitz asserted that Trinity failed to accommodate her because Trinity should have allowed her additional time to complete her BLS certification or reassigned her to another position that did not require the certification.[36] Trinity argued that "Kowitz was not a qualified individual under the ADA, because performing BLS was an essential function of both of her positions."[37] Furthermore, Trinity contended that Kowitz never requested an accommodation.[38]

The district court agreed with Trinity and granted summary judgment, holding that Kowitz was not qualified to perform the essential functions of either of her positions.[39] In addition, the district court concluded that because Kowitz produced no evidence that she ever requested an accommodation for her inability to perform BLS, Trinity was under no obligation to allow her additional time to complete her BLS certification or to reassign her to another position that did not require the certification.[40] Kowitz appealed to the Eighth Circuit.[41]

The Eighth Circuit reversed the district court's grant of summary judgment and held that: (1) BLS certification was an essential function of Kowitz's positions and (2) a genuine issue of material fact existed as to whether Kowitz requested an accommodation.[42] The court noted that although Kowitz did not explicitly request an accommodation, she did notify her supervisors that she would not be able to obtain certification until completing physical therapy and Trinity was aware of her disability and her general limitations.[43] The Eighth Circuit concluded that where an employee provides enough information that under the circumstances the employer can fairly be said to know of the disability and desire for an accommodation, a genuine issue of material fact exists as to whether that employee requested an accommodation sufficient to trigger the employer's duty to engage in the interactive process of identifying a reasonable accommodation.[44]

33. *See* Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(a) (2012).
34. *See* N.D. CENT. CODE ANN. § 14-02.4-03.1 (West 2018).
35. *Kowitz*, 839 F.3d at 745.
36. *Id.* at 746.
37. *Id*. at 745.
38. *Id.* at 746.
39. *Id.* at 745.
40. *Id.* at 746.
41. *Id.* at 744.
42. *Id.* at 746, 748.
43. *Id.* at 747.
44. *Id.* at 748.

III. LEGAL BACKGROUND

The ADA is "among the most wide-ranging civil rights statutes that were passed in the 20th century."[45] Not only does the ADA prohibit discrimination based on disability, but it mandates affirmative duties for employers to make necessary changes in operations so that disabled individuals enjoy the same rights as others.[46] *Kowitz v. Trinity Health* deals with this unique concept of the ADA. To gain a better understanding of the legal background of *Kowitz*, Section A of this Part provides an overview of the ADA and the reasonable accommodation requirement, Section B explores the legislative history and EEOC guidance regarding the reasonable accommodation and interactive process concepts, and Section C examines Eighth Circuit case law.

A. Overview of the ADA and Reasonable Accommodation Requirement

Nearly a quarter-century after passage of the Civil Rights Act of 1964,[47] Congress began discussing the possible extension of civil rights protection to individuals with disabilities.[48] ADA legislation swiftly passed both the House and Senate, and it was signed into law by President George H.W. Bush on July 26, 1990.[49] The ADA's stated purpose is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[50]

The statute notes that, due to the lack of antidiscrimination laws, people with disabilities have been precluded from being able to fully thrive in the workplace and beyond because of discrimination.[51] Title I of the ADA specifically prohibits employers from discriminating against individuals with disabilities.[52] Employers with more than fifteen employees are subject to Title I

45. PETER A. SUSSER, DISABILITY DISCRIMINATION AND THE WORKPLACE 2 (2005).

46. *Id.*

47. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

48. SUSSER, *supra* note 45, at 7.

49. *Id.* at 12.

50. Americans with Disabilities Act of 1990, 42 U.S.C. § 12101(b)(1) (2012).

51. *Id.* § 12101.

52. *See id.* § 12112 (2012).

> The term "disability" means, with respect to an individual –
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> (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
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> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

requirements.[53] In general, employers may not discriminate against an individual on the basis of disability in regards to "job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[54] The elements a plaintiff must show to prevail on a claim under Title I of the ADA are: (1) she is disabled within the meaning of the statute; (2) she is qualified to perform the essential functions of the job, with or without reasonable accommodation; and (3) she suffered an adverse employment action due to her disability.[55]

Furthermore, Title I requires employers to make reasonable accommodations to disabled individuals that need assistance to successfully perform their jobs.[56] The nature of the reasonable accommodation obligation is as follows: employers are obligated to provide reasonable accommodations that allow otherwise qualified individuals to perform the essential functions of their jobs so long as such accommodation does not create an "undue hardship"[57] for the employer.[58] That obligation extends to all aspects of employment, such as hiring, discharge, and advancement.[59] The reasonable accommodation requirement is arguably the most unique concept of the ADA.[60] While other federal antidiscrimination statutes focus on equal treatment of individuals based on race, sex, and age,[61] the ADA goes further by placing an affirmative duty on employers to identify and provide reasonable accommodations to individuals with disabilities.[62] Although employers are obligated to reasonably accommodate religious beliefs and practices as required by the Civil Rights Act of 1964,[63] the ADA creates requirements that are far more reaching.[64]

Because employers are only obligated to accommodate a "qualified individual with a disability,"[65] the first inquiry is whether the individual-employee is "qualified." Under the ADA, for a person to be a qualified individual, she

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Id. § 12102 (2012).

53. *Id.* § 12111(5)(A).

54. *Id.* § 12112(a).

55. Wenzel v. Mo.-Am. Water Co., 404 F.3d 1038, 1040 (8th Cir. 2005).

56. § 12112(b)(5)(A).

57. The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the facts set forth in subparagraph (B). *Id.* § 12111(10)(A).

58. *See id.* § 12112(b)(5)(A); *id.* § 12111(8).

59. *Id.* § 12112(a).

60. SUSSER, *supra* note 45, at 2, 12, 21.

61. *See* 42 U.S.C. § 2000e-2 (2012); *see also* 42 U.S.C. § 2000e(j) (2012) (Except for religion, employers not required to accommodate protected individuals under Title VII or the ADEA.).

62. SUSSER, *supra* note 45, at 2.

63. § 2000e(j).

64. SUSSER, *supra* note 45, at 21 ("[T]he ADA impose[s] an affirmative duty on employers to provide special and unique treatment to disabled individuals.").

65. Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(b)(5)(A) (2012).

must (1) possess the requisite skill, education, and other job-related requirements for the position and (2) be able to perform the essential functions of the position desired or held, with or without reasonable accommodation.[66] Essential functions are "the fundamental job duties of the employment position the individual with a disability holds or desires."[67]

The determination of whether a function is essential requires consideration of: (1) "'whether the employer actually requires employees in the position to perform the functions that the employer asserts are essential'" and (2) "'whether removing the function would fundamentally alter that position.'"[68] The inquiry is fact-specific and requires evaluating several factors, such as how much time the employee spends performing the function, the employer's judgment as to which functions are essential, and written job descriptions prepared before advertising or interviewing applicants for the job.[69] If an employee is unable to perform an essential job function, then she is not a "qualified individual" and is therefore disqualified from ADA protection.[70]

Furthermore, the ADA only requires an employer to make accommodations for *known* limitations of an otherwise qualified individual with a disability.[71] Therefore, an employee must notify his or her employer that he or she needs or desires an accommodation.[72] After an employee requests a need for an accommodation, the ADA requires the employer to:

> initiate an informal, interactive process with the individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.[73]

The regulations allude to employers having an obligation to engage in an "interactive process"; however, it is unclear what this interactive process should look like. Courts have relied on the legislative histories of the ADA and EEOC regulations for guidance.[74]

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66. Kowitz v. Trinity Health, 839 F.3d 742, 745 (8th Cir. 2016); *see also* 29 C.F.R. § 1630.2(m) (2017).

67. § 1630.2(n)(1).

68. SUSSER, *supra* note 45, at 778–79 (quoting 29 C.F.R. app. 1630 (2003)).

69. § 1630.2(n).

70. *See* § 12112(b)(5)(A).

71. *See id.*

72. SUSSER, *supra* note 45, at 23.

73. § 1630.2(o)(3).

74. The EEOC "is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 or older), disability or genetic information." *Overview*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/eeoc/ (last visited May 30, 2018).

B. Legislative History and EEOC Regulations Regarding the Interactive Process

The legislative history of the ADA reveals that Congress intended employers and employees to engage in the interactive process in which possible accommodations are identified to provide an equal opportunity for an individual with a disability.[75] Congress specified that this process is triggered only after the employee requests an accommodation, given that "people with disabilities may have a lifetime of experience identifying ways to accomplish tasks differently in many different circumstances" and, therefore, "will know exactly what accommodation."[76] Congress indicated that there are times when neither the employer nor employee knows what the appropriate accommodation is because the employer is not familiar enough with the individual's disability and the employee is not familiar enough with the job in question.[77] Therefore, the employer should initiate an informal, four-step interactive process to identify and provide an appropriate accommodation.[78]

The first step requires an employer to "identify barriers to equal opportunity."[79] This step may include identifying and distinguishing between essential and nonessential tasks of the relevant position and consulting with the employee to identify the abilities and limitations of the individual.[80] The second step is to search for and evaluate potential accommodations.[81] The employer may have to consult with the disabled employee.[82] After identifying possible accommodations, the third step is to determine the reasonableness of such accommodations.[83] Factors to consider when determining the reasonableness of potential accommodations include effectiveness, reliability, and timeliness.[84] The fourth and final step is to provide the accommodation that is "most appropriate for the employee and the employer and that does not impose an undue hardship on the employer's operation or to permit the employee to provide his or her own accommodation if it does impose an undue hardship."[85]

The EEOC Appendix to the ADA provides guidance regarding the process of determining an appropriately reasonable accommodation, consistent with legislative intent. The Appendix states that "it may be necessary for the employer to initiate a more defined problem solving process, such as the step-

75. H.R. REP. NO. 101-485, at 65 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 348.
76. *Id.* at 65–66.
77. *Id.* at 66.
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*

by-step process described above, as part of its reasonable effort to identify the appropriate reasonable accommodation."[86] The EEOC suggests a four-step problem-solving approach, like the one suggested in the House report. When an employee requests an accommodation, an employer should:

> (1) Analyze the particular job involved and determine its purpose and essential functions;
>
> (2) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation;
>
> (3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and
>
> (4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.[87]

Unlike the House report, the EEOC does not indicate whether employers are always required to engage in the interactive process, as the EEOC suggests "*it may* be necessary for the employer."[88] Furthermore, if employers are required to participate in the interactive process, the employer's liability for failure to participate remains uncertain.

C. Eighth Circuit Case Law

1. Prima Facie Case of Failure to Participate in Interactive Process

After the EEOC released its interpretive guidelines, it was still unclear whether employers were required to engage in the interactive process.[89] Most courts have indicated that employers are required to engage in the interactive process with qualified individuals,[90] while some courts have held there is no

86. 29 C.F.R. app. § 1630 (2017).

87. *Id.*

88. *Id.* (emphasis added).

89. *Compare* 29 C.F.R. § 1630.2(o)(3) (2017) ("To determine the appropriate reasonable accommodation *it may be necessary* for the covered entity to initiate an informal, interactive process . . . ." (emphasis added)), *with* 29 C.F.R. app. § 1630 ("[T]he employer *must* make a reasonable effort to determine the appropriate accommodation." (emphasis added)).

90. *See, e.g.*, Humphrey v. Memorial Hosps. Ass'n, 239 F.3d 1128, 1137 (9th Cir. 2001); Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 312 (3rd Cir. 1999); Taylor v.

per se liability under the ADA if an employer fails to engage in the interactive process.[91] The Eighth Circuit took a middle-ground approach in *Fjellestad v. Pizza Hut of America, Inc*.[92] In this case, the Eighth Circuit agreed with other circuits that held there is no per se liability if an employer fails to engage in the interactive process;[93] however, for summary judgment purposes, "the failure of an employer to engage in an interactive process to determine whether reasonable accommodations are possible is prima facie evidence that the employer may be acting in bad faith."[94]

The Eighth Circuit ruled that an employer will not be held liable if no reasonable accommodation is possible but "a factual question exists as to whether the employer has attempted to provide reasonable accommodation as required by the ADA."[95] The Eighth Circuit followed the Third Circuit's analysis illustrated in *Taylor v. Phoenixville School District*.[96] Once an employee requests an accommodation, the employer's duty to engage in the interactive process is triggered.[97] An employee arguing her employer failed to participate in the interactive process must demonstrate the following:

> 1) the employer knew about the employee's disability; 2) the employee requested accommodations or assistance for his or her disability; 3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and 4) the employee could have been reasonably accommodated but for the employer's lack of good faith.[98]

2. Request for Accommodation

The Eighth Circuit has repeatedly held that the employee is responsible for requesting an accommodation before the employer is required to provide accommodation or engage in the interactive process.[99] While it is clear that the

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Principal Fin. Grp., Inc., 93 F.3d 155, 165 (5th Cir. 1996) (noting that "the responsibility for fashioning a reasonable accommodation is shared between the employee and employer").

91. *See, e.g.*, Beck v. Univ. of Wis. Bd. of Regents, 75 F.3d 1130, 1135 (7th Cir. 1996); *Taylor*, 93 F.3d at 165.

92. *See* Fjellestad v. Pizza Hut of Am., Inc., 188 F.3d 944 (8th Cir. 1999).

93. *Id.* at 952.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* (quoting Taylor v. Phoenixville Sch. Dist., 174 F.3d 142, 165 (3d Cir.), *vacated,* 184 F.3d 296 (1999)).

99. *See id.* ("The guidelines set forth the predicate requirement that when the disabled individual requests accommodation, it becomes necessary to initiate the interactive process."); EEOC. v. Convergys Customer Mgmt. Grp., Inc., 491 F.3d 790, 795 (8th Cir. 2007) ("A disabled employee must initiate the accommodation-seeking process by making his employer aware of the need for an accommodation."); Wallin v.

employee is responsible for requesting an accommodation,[100] it is unclear as to what information the employer must have before its duty to engage in the interactive process is triggered.

In *Fjellestad*, the Eighth Circuit stated that "notice must merely make it clear to the employer that the employee wants assistance for his or her disability."[101] However, the same year the Eighth Circuit decided *Fjellestad*, the court also decided *Mole v. Buckhorn*, where it held that a general request for accommodation was insufficient, as "only [the employee] could accurately identify the need for accommodations specific to her job and workplace."[102] Furthermore, employees "cannot expect the employer to read [her] mind and know [she] secretly wanted a particular accommodation and [then] sue the employer for not providing it."[103]

In some cases, the Eighth Circuit has analyzed the sufficiency of the employer's knowledge based on the "totality of the knowledge" the employer had at hand.[104] The "totality of knowledge" approach examines not only what the employee stated at the time he or she requested an accommodation but also what the employer already knew about the employee.[105] In *Cannice v. Norwest Bank Iowa*, the Eighth Circuit considered what prior communications the employee had with his employer and other instances in which the employer was aware of the employee's disability and need for an accommodation.[106] On the contrary, in *EEOC v. Product Fabricators*, the Eighth Circuit rejected the plaintiff's failure to accommodate claim because the plaintiff failed to show

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Minn. Dep't of Corr., 153 F.3d 681, 689 (8th Cir. 1998) ("In general, it is the responsibility of the individual with a disability to inform the employer that an accommodation is needed." (internal quotation marks omitted) (quoting 29 C.F.R. app. § 1630.9 (1992))); Cannice v. Norwest Bank Iowa N.A., 189 F.3d 723, 727 (8th Cir. 1999) ("In order to be entitled to an accommodation, the employee must inform the employer that an accommodation is needed.").

100. Ballard v. Rubin, 284 F.3d 957, 961–62 (quoting *Taylor*, 174 F.3d at 159).

> The EEOC's manual makes clear . . . that while the notice does not have to be in writing, be made by the employee, or formally invoke the magic words 'reasonable accommodation,' the notice nonetheless must make clear that the employee wants assistance for his or her disability.

Id. (quoting *Taylor*, 174 F.3d at 158–59).

101. *Fjellestad*, 188 F.3d at 952 n.5. Plaintiff clearly requested: "I request that I be reasonably accommodated." *Id.* at 952.

102. Mole v. Buckhorn Rubber Prods., Inc., 165 F.3d 1212, 1218 (8th Cir. 1999).

103. *Id.* (alterations in original) (internal quotation marks omitted) (quoting Ferry v. Roosevelt Bank, 883 F. Supp. 435, 441 (E.D. Mo. 1995)).

104. Sullivan*, supra* note 8, at 118.

105. *Id.*

106. *Id.* at 119; *see also* Cannice v. Norwest Bank Iowa N.A., 189 F.3d 723, 727 (8th Cir. 1999).

that he specifically requested an accommodation.[107] Like in *Cannice*, the employer was already aware the employee had a disability because the employee had received workers' compensation for injury and disability, and the employee had notified his supervisor that his shoulder "was causing him pain" and he might have to take off for surgery.[108] But the Eighth Circuit came out with the opposite holding. Based on the circuit's precedent, there is no uniform rule regarding what information an employer must have before its obligation to engage in the interactive process is triggered.

IV. INSTANT DECISION

A. Majority Opinion

The Eighth Circuit reversed the district court's decision and remanded for further proceeding. Judge Jane Kelly, writing for the majority, reasoned that Kowitz provided enough information to show that under the circumstances Trinity knew of the disability and desire for an accommodation.[109] The district court concluded that (1) Kowitz was not qualified to perform the essential functions of her job, and (2) Trinity Health had no duty to reassign Kowitz to an alternative position.[110] Kowitz appealed the district court's grant of summary judgment in favor of Trinity Health.[111]

1. Essential Function

The Eighth Circuit held that there was no genuine issue of material fact as to whether BLS certification was an essential function of Kowitz's position based on the following: Kowitz's job description for lead technician stated that BLS certification is required, testimony stating that respiratory therapists were expected to perform BLS, and every respiratory therapist except for Kowitz was certified by the November 26, 2010 deadline.[112] After determining BLS certification was an essential function of Kowitz's position, the Eighth Circuit discussed the main issue of the case – whether Kowitz could perform this essential job function with an accommodation and, if so, whether Trinity failed to reasonably accommodate her.[113]

107. EEOC v. Prod. Fabricators, Inc., 763 F.3d 963, 967–68, 971 (8th Cir. 2014).
108. *Id.* at 968.
109. Kowitz v. Trinity Health, 839 F.3d 742, 748 (8th Cir. 2016).
110. *Id.* at 745.
111. *Id.* at 744.
112. *Id*. at 745–46.
113. *Id.* at 746.

2. Request for a Reasonable Accommodation

The majority found that there was sufficient evidence to preclude summary judgment as to whether Kowitz requested a reasonable accommodation.[114] Kowitz told her supervisor in writing that she was unable to fulfill the physical portion of the BLS examination.[115] In addition, Kowitz called her supervisor and left a voicemail informing him that she had to complete at least four months of physical therapy before she could obtain the certification.[116] Furthermore, the court determined there were other facts that revealed that Trinity should have understood Kowitz's communications to be a request for a reasonable accommodation.[117]

According to the court, her notification to her supervisor stating that she would have to complete physical therapy "*implied* that an accommodation would be required until then."[118] The court noted that other cases where the Eighth Circuit held an employer's duty to accommodate an employee is not triggered until the employee clearly requests an accommodation were much more "ambiguous."[119]

The Eighth Circuit stated that Kowitz was only required to "provide[] the employer with enough information that, under the circumstances, the employer can be fairly said to know of both the disability and desire for an accommodation."[120] This includes the "employer's knowledge of the disability and the employee's prior communications about the disability, and is not limited to the precise words spoken by the employee at the time of the request."[121]

According to the majority, because Kowitz made Trinity Health aware that she could not perform BLS until she completed physical therapy and Trinity Health was already aware of her disability and the general nature of her limitations, a genuine issue of material fact existed as to whether Kowitz requested an accommodation sufficient to trigger Trinity Health's duty to engage in the interactive process of identifying a reasonable accommodation.

B. Dissenting Opinion

In his dissenting opinion, Judge Steven M. Colloton stated he would affirm the judgment of the district court.[122] Judge Colloton contended that the

114. *Id.* at 747.

115. *Id.*

116. *Id.*

117. *Id.* (discussing that Trinity should have been aware of Kowitz's need for accommodation based on her prior FMLA leave, the information in her Return to Work Form, and comments to her supervisor indicating she was still experiencing neck pain).

118. *Id.* (emphasis added).

119. *Id.*

120. *Id*. at 748 (alteration in original) (quoting Ballard v. Rubin, 284 F.3d 957, 962 (8th Cir. 2002)).

121. *Id.*

122. *Id.* (Colloton, J., dissenting).

majority's decision "conflates the employer's knowledge of an employee's disability with the requirement that an employee must make a clear request for accommodation."[123]

Judge Colloton argued that Kowitz's claim for failure to accommodate fails because she did not clearly request an accommodation.[124] She merely notified Trinity that she could not complete the physical portion of the BLS examination until she completed at least four months of physical therapy.[125] While such a notification "can be said in some sense to have made her employer 'aware of the need for an accommodation,'" the court has never held that "notifying the employer of a disability is an 'implied' request . . . sufficient to trigger an employer's duty to engage in the interactive process," according to Judge Colloton.[126]

Judge Colloton pointed out that the law requires employees to clearly notify their employers that they desire an accommodation.[127] By eliminating the predicate requirement to initiate the interactive process, Judge Colloton asserted the majority decision creates great uncertainty for employers and employees.[128] Judge Colloton concluded that because Kowitz never clearly requested an accommodation, there was no genuine issue of fact concerning whether Kowitz requested an accommodation.[129]

V. COMMENT

The Eighth Circuit's holding diminishes what the court has commonly called the "predicate requirement," or the requirement that employees clearly notify their employers that they desire accommodation. Rather than considering whether Kowitz requested an accommodation, the court examined the "totality of knowledge" Trinity had on hand.[130] Because the "totality of knowledge" approach creates great uncertainty and is not in the best interest of both employers and employees, this Note argues that when deciding whether an employer failed to engage in the interactive process, courts should examine whether the employee clearly requested a need for an accommodation, rather than analyzing the totality of knowledge the employer had on hand. Section A of this Part explains why this rule is illogical and analyzes the burdens this rule will have on employers and employees. Given the current ambiguity of the law, Section B of this Part provides guidance to employers moving forward.

123. *Id.* at 750.

124. *Id.* at 749 (To prove an employer failed to make a reasonable accommodation, an employee must show "(1) that the employer knew about her disability, and (2) that she requested an accommodation or assistance for her disability.").

125. *Id.* at 748–49.

126. *Id*. at 750.

127. *Id.*

128. *Id.*

129. *See id.*

130. *See id.* at 748.

Specifically, Section B reviews Trinity's mistakes so employers can avoid falling into similar pitfalls in the future.

A. Employees Should Clearly Request a Need for an Accommodation

An employee should not be allowed to prevail on an accommodation claim where an employee only notified his or her employer of the disability because it does not give the employer proper notice of a need for an accommodation. The totality of knowledge approach taken by the Eighth Circuit "conflates the employer's knowledge of an employee's disability with the requirement that an employee must make a clear request for accommodation."[131] Employers will be uncertain when their obligation to engage in the interactive process is triggered, as any knowledge of disability may trigger that obligation.[132] This is problematic because any employee who notifies his or her employer that he or she cannot work because of a disability can be said to have made the employer "aware of the need for an accommodation."[133] Furthermore, as noted above, the ADA is unique compared to other federal antidiscrimination statutes because it not only focuses on equal treatment of individuals with protected characteristics but also places an affirmative duty on employers to identify and provide reasonable accommodations. Further obligating employers to assume when an accommodation is needed is an enormous and unreasonable burden.

On the other hand, it is not overly burdensome to require employees seeking an accommodation to clearly request such accommodation because employees with disabilities possess the most information regarding their disabilities and limitations. Kowitz alleged that she desired to be moved to a different position but she never made this request known.[134] There was no way for Trinity to know that Kowitz desired to be transferred, yet the Eighth Circuit held that a reasonable jury could find that Trinity understood Kowitz's communications to be a request for accommodation, thus triggering Trinity's duty to engage in the interactive process.[135]

When enacting the ADA, Congress noted that, compared to employers, employees are in a better position to request accommodations because individuals with disabilities usually have a "lifetime of experience identifying ways to accomplish tasks differently in many different circumstances."[136] Although an employee is not required to request any specific accommodation, he or she will typically know "exactly what accommodation he or she will need to perform

131. *Id.* at 750.

132. *Id.*

133. *Id.*

134. *Id.* at 749–50; Brief of Appellees Trinity Health, Doughlas Reinerston, & Mark Waldera at 21–22, *Kowitz*, 839 F.3d 742 (No. 15-1584).

135. *See Kowitz*, 839 F.3d at 747.

136. H.R. REP. NO. 101-485, at 65–66 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 348.

successfully in a particular job."[137] Congress further noted that the employee's suggested accommodation is often simpler and less expensive than any accommodation the employer may have devised.[138]

It would not have been an onerous burden on Kowitz to require her to clearly request her desired accommodation. Consistent with legislative findings, Kowitz was in the best position to disclose that she desired an accommodation, and in this case, she was in the best position to disclose exactly what accommodation she desired. An employee who already knows that he or she desires a specific accommodation should not wait for his or her employer to identify the accommodation. The majority's holding seems to be at odds with the concerns raised in *Mole* – an employee cannot "expect the employer to read [her] mind and know [she] secretly wanted a particular accommodation and [then] sue the employer for not providing it."[139]

An employer's duty to identify an accommodation should not be triggered until an employee has clearly requested a need for accommodation, but there are some policy arguments for why the full burden should not be placed on the employee. One argument against placing the full burden on employees to disclose is that employers are likely to be "repeat players";[140] therefore, it would not be burdensome to expect employers to identify when an employee needs an accommodation. While employers are typically familiar with the ADA and accommodation process, expecting employers to assume when an accommodation is needed is still burdensome. The ADA specifically contends that it is inappropriate for employers to provide accommodation in the absence of request.[141] It would be inconsistent with that prohibition to require employers to "anticipate all the problems that a disability may create on the job and spontaneously accommodate them."[142]

This Note does not claim that it would have been *wrong* for Trinity to begin identifying accommodation possibilities for Kowitz, rather an employer's duty to identify an accommodation should not be triggered until the employee has clearly requested a need for an accommodation. As the dissenting opinion indicated, it is inappropriate to "impose a rule based on how a be-

137. *Id.* at 66.

138. *Id.*

139. Mole v. Buckhorn Rubber Prods., Inc., 165 F.3d 1212, 1218 (8th Cir. 1999) (alterations in original) (quoting Ferry v. Roosevelt Bank, 883 F. Supp. 435, 441 (E.D. Mo. 1995)).

140. The term "repeat players" is typically used in an employment arbitration context. But in this case, employers would be considered "repeat players" because most employers are familiar with complying with the ADA.

141. SUSSER, *supra* note 45, at 785–86.

142. Sullivan, *supra* note 8, at 119 (quoting Loulseged v. Akzo Nobel, Inc., 178 F.3d 731, 736 (5th Cir. 1999)).

neficent employer would treat an employee who notifies the employer of a disability, even if some employers might well take it upon themselves to initiate the interactive process without a request from the employee."[143]

A second reason against placing the full burden on employees is that even if employees are in the better position to disclose, some employees – specifically individuals with mental disabilities – may be hesitant or unable to disclose. While a valid concern, Congress addressed the problem. The general rule is that employers should not make disability-related inquires as to whether an employee requires a reasonable accommodation.[144] However, an exception to this rule is made when the employer: (1) knows that the employee has a disability; (2) knows, or has reason to know, that the employee is experiencing workplace problems because of the disability; and (3) knows, or has reason to know, that the disability prevents the employee from requesting an accommodation.[145] If the preceding elements are met, the employer should initiate the interactive process without being asked by the employee.[146] Because the law addresses the concern regarding individuals unable to disclose, employees should clearly request a need for an accommodation before the employer's duty to engage in the interactive process is triggered.

Requiring employees to unequivocally request accommodations to trigger the interactive process does not eliminate employers' affirmative duty to identify and provide accommodations, nor does it in any way nullify the interactive process. Employers always hold the duty to initiate the interactive process. Employees should be the ones to put employers on notice as employees are in the best position to disclose. The more clearly an employee communicates his or her request, the more likely employers are to recognize the employee's need or desire for an ADA accommodation. The nature of the interactive process is a "help me, help you" process. Employers can better "help" employees with disabilities when employees clearly request accommodations.

B. Guidance for Employers

Kowitz provides important lessons to employers regarding their responsibilities to identify and provide accommodations. First, employers should be cautious if they already know of an employee's disability due to the employee taking FMLA leave. Second, timing of the employer's knowledge of the em-

143. Kowitz v. Trinity Health, 839 F.3d 742, 750 (8th Cir. 2016) (Colloton, J., dissenting).

144. SUSSER, *supra* note 45, at 790.

145. *Id.*

146. U.S. EQUAL EMP. OPPORTUNITY COMM'N, 915.002, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT (2002).

ployee's disability and request for accommodation is critical. Trinity was already aware of Kowitz's disability, as she had previously taken FMLA leave and provided information of her limitations in her Return to Work form.[147]

The first lesson of *Kowitz* is that employers should be cautious if they have knowledge of an employee's disability due to the employee taking FMLA leave. The EEOC has provided guidance stating that if an employee requests leave for a reason related or possibility related to a disability, the employer should consider both a request for FMLA and ADA accommodation.[148] Employers should analyze employees' rights under each statute separately when determining the appropriate action to take.[149] The EEOC further provides that employers should be "sensitive that apparently routine conversations might trigger the ADA's duty to accommodate, especially if the employer already has information concerning the employee's medical conditions from records provided to it pursuant to . . . the FMLA, or otherwise."[150]

The importance of this guidance is illustrated in *Kowitz* – although Kowitz had exhausted her FMLA leave, Trinity still had a duty under the ADA to provide her with a reasonable accommodation.[151] Trinity was too quick to terminate Kowitz and had failed to determine her rights under the ADA. Moving forward, employers should be cautious when employees request leave or have already requested leave and should carefully analyze employees' rights under each statute separately.

The second lesson of *Kowitz* is that the timing of the employer's knowledge of the employee's disability and request for accommodation is critical. Perhaps the most damaging fact for Trinity was that it terminated Kowitz only one day after receiving her voicemail stating that she needed to complete more physical therapy before she could obtain BLS certification.[152] Although

147. *Kowitz*, 839 F.3d at 747.

148. Sullivan, *supra* note 8, at 119.

149. *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the American with Disabilities Act,* EEOC (Oct. 17, 2002), https://www.eeoc.gov/policy/docs/accommodation.html [hereinafter *Enforcement Guidance*].

150. Sullivan*, supra* note 8, at 119.

151. *Enforcement Guidance*, *supra* note 148. See Example A:

> An employee with an ADA disability needs 13 weeks of leave for treatment related to the disability. The employee is eligible under the FMLA for 12 weeks of leave (the maximum available), so this period of leave constitutes both FMLA leave and a reasonable accommodation. Under the FMLA, the employer could deny the employee the thirteenth week of leave. But, because the employee is also covered under the ADA, the employer cannot deny the request for the thirteenth week of leave unless it can show undue hardship. The employer may consider the impact on its operations caused by the initial 12-week absence, along with other undue hardship factors.

Id.

152. *Kowitz*, 839 F.3d at 745.

the Eighth Circuit has rejected situations where the employee's requests for accommodation occur after adverse action was already taken,[153] the Eighth Circuit has found that an ADA violation exists if the employee notifies his or her employer of the need for accommodation and the employer subsequently takes adverse action – such as discharge or discipline – that an accommodation might have prevented.[154]

Employers considering terminating, disciplining, or taking any adverse action against an employee after that employee has requested an accommodation or has been made aware of the employee's disability should not act adversely without consulting with a human resource representative or an attorney. Furthermore, employers should learn from the mistake of Trinity and not wait for employees to make specific requests for accommodation. Employers should engage in good faith communication about whether there is an accommodation possible that would enable the employee to continue doing his or her job.

VI. CONCLUSION

The ultimate consequence of an employer failing to engage in the interactive process is that the employer may fail to discover an appropriate accommodation for the employee's disability. The Eighth Circuit's holding seems "employee friendly" as it gives employee-plaintiffs legal leverage in failure-to-accommodate claims.[155] The holding, however, does not necessarily make it more likely that employers will engage in the interactive process. By reducing employees' obligation to communicate their accommodation needs, it is less likely that employers will recognize employees' needs for accommodation.

The lack of clarity in the law could negatively impact employees with disabilities in the long run. As Judge Colloton stated, "Employers and employees rely on predictability to make efficient decisions and to avoid costly and burdensome litigation."[156] For now, employers should be cautious if they already know of an employee's disability or the general nature of an employee's limitations and should not wait for an employee to specifically request an accommodation before engaging in the interactive process.

153. *See* Sullivan, *supra* note 8, at 119.

154. *Id.* (citing Hill v. Kan. City Area Transp. Auth., 181 F.3d 891 (8th Cir. 1999)).

155. Because rather than having to prove he or she requested an accommodation, an employee only must show that he or she provided "enough information that, under the circumstances, the employer can be fairly said to know of both the disability and desire for an accommodation." *Kowitz*, 839 F.3d at 748 (quoting Ballard v. Rubin, 284 F.3d 957, 962 (8th Cir. 2002)).

156. *Id.* at 750 (Colloton, J., dissenting).