



Silence is Not Golden
(In the Interactive Process for Reasonable Accommodation)
A Review of Yinger v. Postal Presort, Tenth Circuit Court of Appeals
June 8, 2017

The Tenth Circuit Court of Appeals issued its decision in *Yinger v. Postal Presort, Inc.* (PPI), No. 16-3239, on June 8 2017. The decision discusses the employer’s responsibility to engage in the interactive process for reasonable accommodation of a disability. Kansas is in the Tenth Circuit, which makes the Court of Appeals decision applicable to Kansas employers, employees, and applicants. A link to the the Court’s decision is below.

Some important points from the Court’s decision follow:

- Page 1: Employee Yinger underwent a procedure to replace the battery in his pacemaker in late 2012. PPI granted Yinger 12 weeks of unpaid leave under the Family Medical Act, which was due to expire on April 17, 2013. Yinger developed an infection and on March 11, 2013 informed PPI’s human resource professional that Yinger’s doctor anticipated he would return to work one week late on April 23, 2013. The HR professional informed PPI’s president of her conversation with Yinger, but PPI’s president declined at that time to provide a response to Yinger’s request for additional leave, preferring to “deal with that when the time comes”. Yinger did not return to work on April 17th, his original return-to-work date.
- Page 2: On April 18th, PPI’s HR professional e-mailed PPI’s President asking how to handle the situation and noted that she had not received a doctor’s note or written extension request. The HR professional suggested consultation with an attorney “to see how best to terminate without retribution”. PPI’s president responded, “Silence until the end of the month, then just send him the obligatory COBRA information.” On April 23rd, Yinger’s doctor released him to work without restriction. While at the doctor’s office, Yinger received a call from the HR professional who told him that he would not be returning to work for PPI.
- Page 3: The Court of Appeals determined that evidence, viewed in Yinger’s favor, show he had a disability within the meaning of the ADAAA and demonstrated that he notified PPI of his need for a facially reasonable accommodation. The Appeals Court discusses that, under the ADAAA, the determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures, and that temporary impairments can qualify as a disability under the ADAAA. The Court also points out that “the negative side effects of...burdens associated with following a particular treatment regimen...may be considered when determining whether an individual’s impairment substantially limits a major life activity”.

The Appeals Court reminds us that to trigger the ADAAA’s [and the Kansas Act Against Discrimination’s] protections, the employee’s accommodation request must make clear the employee wants assistance for his or her disability, the request need not be in writing, and the request does not need to use any magic words, such as “reasonable accommodation”. The Appeals Court determined that Yinger’s conversation

with the HR professional on March 11th regarding an extra week of unpaid leave to recover from his heart-related infection constituted an adequate request for a reasonable accommodation.

In this case, the defendant employer’s failure to engage in the interactive process speaks louder than the provided testimony, i.e. PPI failed to hold open Yinger’s position, PPI “took no stance, nor made any response” to Yinger’s request for additional leave, employer representatives blamed Yinger for his termination by failing to return to work after the expiration of his FMLA, the absence of evidence suggesting that Yinger was informed that PPI had decided to extend his leave, and internal e-mails indicating company officials had decided to terminate Yinger prior to April 23rd. **The Court highlights that the employer failed to participate in the interactive process to determine reasonable accommodations, and did not proceed in a “reasonable interactive manner” and engage in “good-faith communications”.** The Court cites the record that the employer delayed and failed to respond to Yinger’s request for additional leave, never initiated any further communications, and the HR professional was directed to remain silent and communicate nothing to Yinger regarding his leave request.

“..failure by the employer to initiate or participate in an informal dialogue with the individual after receiving a request for reasonable accommodation could result in liability for failure to provide a reasonable accommodation”—U.S. Equal Employment Opportunity Commission

- Page 4 and Footnote 5: The Court also touches on undue hardship, the employer’s defense to granting a disability accommodation request. The ADAAA defines “undue hardship” as “an action requiring significant difficulty or expense”. Specific factors to be considered include: “(i) the nature and cost of the accommodation needed . . . ; (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; . . . (iii) the overall financial resources of the covered entity; . . . and (iv) the type of operation or operations of the covered entity.” Contrary to the employer’s assertion that reinstating Yinger after the expiration of his leave period was an undue hardship, the Appeals Court concluded that the employer’s “shifting and inconsistent explanations for not holding open Yinger’s job create a genuine issue of fact as to PPI’s undue hardship defense.”

There is additional analysis regarding retaliation, but it is in regards to retaliation for reporting OSHA violations, not asking for a reasonable accommodation for a disability under federal or state anti-discrimination laws.

Link to Learning More About the Interactive Process: [Human Resources: Employment Law’s Clark Kent \(How You Can Be a Superhero, Too!\) \(Reasonable Care and Interactive Process\)](#)

Google Scholar Link to: [Yinger v. POSTAL PRESORT, INC., No. 16-3239 \(10th Cir. June 8, 2017\).](#)