Memories fade, documentation does not

By Gordy Van

Employment liability is a challenging exposure for Members peppered with many decision points that can affect the later claim result. In this eleven year litigated claim, fellow officers had complained that a police officer was not following safety protocols, appeared to be having memory issues and seemed unable to make decisions in a fast paced police environment. The officer denied having any problems with job performance, denied any disability and did not request accommodation for any real or perceived disability. After a fitness for duty evaluation, the officer was terminated since the officer was determined permanently unfit for duty. The medical examination found mental impairments that were incompatible with the high stress atmosphere and decisions that must be made by a police officer. Because the officer denied any disability and only wanted to be a police officer, the City did not engage in an interactive process to find if the officer may have been qualified for other employment with the City and did not make the officer aware of other openings for which they may have been qualified. The City also was downsizing its workforce through a Reduction in Force (RIF) across many City departments. The union did not grieve the termination.

Following termination, the officer went to a different doctor who found the officer fit for duty. This evaluation was not disclosed to the City until after litigation was filed almost three years after termination. The lawsuit alleged violation of the Washington State Law Against Discrimination, asserting the City wrongfully perceived the officer as suffering a disability and a failure to accommodate if the officer was disabled. Prior to filing the lawsuit, the officer had filed a complaint with the Equal Employment Opportunity Commission (EEOC), which found that the preponderance of medical evidence indicated that because of a medical condition, the officer was unable to perform the essential functions of a police officer, with or without a reasonable accommodation, due to the public safety and law enforcement aspects of the job.

The case languished for several years due to inactivity on the part of the plaintiff. Mediation was attempted, but was unsuccessful. The case was dismissed twice for failure to prosecute on the part of the plaintiff and the plaintiff successfully moved to have the case reopened. The City then moved for summary judgment, which was granted and the case was dismissed. The plaintiff appealed and there was a danger that the favorable judgment we had previously received would be reversed. During the pendency of the case, some of the City fact witnesses were retired or unavailable. We re-engaged in settlement negotiations and finally settled the claim. From the date of termination, it was almost eleven years before the case resolved.

This case reinforces the importance of engaging in a documented interactive process for disability accommodation when an employee is being terminated due to a disability or perceived disability, even if the employee denies being disabled. If an employee refuses to engage in the interactive process or refuses to consider other positions for which they may be qualified this should be documented but the employer needs to offer the process.

From a lawsuit standpoint, it is sometimes a strategy to not push litigation forward as the plaintiff may lose interest in the lawsuit at some point or agree to resolve it for a number that is acceptable to the defendant. However, witnesses and experts favorable to the employer may become unavailable for a variety of reasons, memories may fade or recollections change. That was one of the things we encountered in this case and which led to the decision to ultimately resolve the lawsuit.