Court Clarifies When Employer Accommodation Obligation Occurs

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The Wisconsin Fair Employment Act (WFEA) prohibits covered employers, including all Wisconsin public school districts and technical colleges, from discriminating against employees based on disability. Failing or refusing to reasonably accommodate an individual with a known disability is a form of disability discrimination. Disabilities are not always obvious, and it can be tricky to recognize when employees are making requests for accommodations.

Employees are not required to use "magic words" to put employers on notice that they may need to consider granting an accommodation, and a recent decision from the Wisconsin Court of Appeals addresses how much notice an employer must receive from an employee before initiating the reasonable accommodation process. This decision interpreted the state WFEA and did not address how the issue might be treated under the federal Americans with Disabilities Act (ADA), although many of the same principles apply.

CASE BACKGROUND

In *Wingra Redi-Mix Inc., v. LIRC*, the Court held that the employer violated the WFEA by repeatedly refusing to even consider accommodating a truck driver who was complaining about pain he had while performing his job duties. Scott Gilbertson drove truck for Wingra Redi-Mix Inc., delivering ready-mix concrete to construction sites. He began working for Wingra in June 2011, and his job required him to be in a vehicle for long hours each day. Wingra assigned employees a specific truck, and Gilbertson's assigned vehicle was an older "glider" model that lacked shock absorption. Wingra also had "non-glider" trucks in its fleet which were newer and

more comfortable to drive. Wingra's fleet contained 65 trucks, only 9 of which were gliders.

By the late fall of 2012, Gilbertson was experiencing low back pain and fatigue, which he attributed to the effects of driving the rougher-riding glider truck. In June 2013, he requested a meeting with his manager regarding his pain. Wingra lacked a written disability policy and did not provide training to its managers on how to handle disability accommodation requests. When Gilbertson asked one of his managers about filing a worker's compensation claim, he was cautioned that if it was determined that his work was not causing his medical issues, worker's compensation insurance may not cover his medical bills. Gilbertson did not have health insurance of his own. As a result, he opted not to file a claim or see a doctor.

Later that summer, Gilbertson asked if he could be reassigned to a non-glider truck. The dispatcher initially told him that he would be allowed to switch to the non-glider truck when the registration on his current truck expired, but that decision was overridden by a higher-level manager. The higher-level manager cited the company's policy against allowing truck reassignment and the lack of evidence regarding Gilbertson's claimed condition (even though a manager previously cautioned Gilbertson from seeing a doctor, which might have provided that evidence to upper management).

Gilbertson was upset and wrote a derogatory statement about the manager who denied his request for a non-glider truck. That manager learned of this and stated: "I know [Gilbertson] wants a different truck, but as far as I'm concerned, f*** it. He can haul concrete in a wheelbarrow. I don't care how badly [Gilbertson's] hurt, he'll drive [his assigned truck] until h*** freezes over."

By fall 2013, Gilbertson's condition deteriorated, and he felt it was impossible for him to continue working. Gilbertson placed his truck key and timecard on a manager's desk, and said that he "never wanted to quit," but he was "just asking for help" so that he could "operate [his truck] safely]." He filed a complaint of disability discrimination with the Wisconsin Equal Rights Division (ERD) in February 2014.

Gilbertson was diagnosed in July 2014 with "chronic lower back pain due to multilevel degenerative disc disease, right sciatic radiculopathy and right foot drop, and right sacroiliac joint dysfunction." Four years later, in 2017, a spine specialist opined that Gilbertson suffered from several permanent physical impairments and assigned Gilbertson a 10 percent permanent partial disability rating. The specialist opined that switching Gilbertson to a non-glider truck would have allowed him to continue working.

THE DECISION

This case has a long procedural history. An ERD investigator initially found no probable cause that discrimination occurred. After a hearing on the issue of probable cause, an Administrative Law Judge (ALJ) affirmed that finding. The Labor and Industry Review Commission (LIRC) reversed the ALJ's decision and ordered a hearing on the merits. After the hearing on the merits, an ERD ALJ found that Gilbertson was disabled, that Wingra failed to accommodate his disability, and that reassigning Gilbertson a new truck would not have imposed an undue hardship. However, the ALJ determined that because Wingra did not know during the term of Gilbertson's employment whether his condition was a permanent disability, Gilbertson had not established that Wingra violated the WFEA.

Gilbertson appealed this decision, and the matter came before the Wisconsin Court of Appeals. The Court found that the WFEA does not require an individual to have a formal disability diagnosis to qualify as an individual with a disability. While the Court agreed with Wingra that the language of WFEA does require an employer to have some level of knowledge about an employee's disability, the Court disagreed that employees must initially provide medical evidence of a diagnosed disability at the time of the accommodation request to trigger the employer's obligation to consider the request. The Court reasoned that one stated purpose of the WFEA is to encourage and foster to the fullest extent practicable the employment of all properly qualified individuals, and ambiguous provisions in the WFEA shall be liberally construed to accomplish that purpose.

The Court did make an unexpected comment and questioned whether the WFEA requires employers to engage in the "interactive process" with an employee following receipt of a disability accommodation request (as is required under the ADA). While this language might suggest that Wisconsin courts may someday chart a course different than under the ADA, employers should continue to engage in the interactive process.

Conclusion

If an employer has sufficient facts that would reasonably lead the employer to recognize that an employee has a disability, then the courts will consider that sufficient to place the employer "on notice" of the employee's status as an individual with a disability under the WFEA. Since Gilbertson had consistently expressed concerns about his pain and had made numerous attempts to request accommodations, the Court found that Wingra was on notice of Gilbertson's status as an individual with a disability. Wingra could have required Gilbertson to provide medical verification of his condition, but it did not do so, and then the company refused to entertain Gilbertson's accommodation request in part due to the very lack

of medical verification it failed to request. Accordingly, Wingra violated the WFEA by failing to grant Gilbertson an accommodation.

The *Wingra* case contains helpful reminders for employers that receive complaints from employees regarding medical issues or physical or mental conditions. Employers should not unilaterally deny an accommodation request because it is not **initially** accompanied by medical proof of the condition. Rather, once an employer is on notice of a potential medical condition, the employer can require medical proof of the condition and its effect on the employee's ability to successfully perform their job duties, along with input from the employee's health care provider about what accommodations might be available that could enable the employee to successfully perform their job duties.

Dealing with possible disabilities and accommodations is a difficult area for employers. We encourage employers to reach out to the authors of this article or any member of the Boardman Clark School Law Practice Group with any questions about their legal obligations in this area.

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