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Wisconsin Disability Accommodation Law Evolves

Wisconsin law provides some protections against adverse employment actions for employees who have disabling illnesses or conditions that affect their work. A recent Wisconsin Court of Appeals case demonstrates that employers must act in good faith when employees request disability accommodations in the workplace.

Suppose that an employee named Charlie works at ABC Co. as a receptionist. Lately, Charlie has been increasingly stressed at work and has been experiencing what he believes are mild panic attacks. Charlie has tried to hide his symptoms at work because he is afraid of being stereotyped or terminated. Charlie can sense when a panic attack is coming and knows that taking short breaks in a quiet, dark room can alleviate the worst effects.

Over time, Charlie experiences panic attacks somewhat regularly at work and when he feels them coming on, he leaves his post to take unscheduled 10-minute breaks throughout the day without telling his supervisor, Rebecca. Rebecca begins noticing Charlie's frequent absences and has asked informally several times why Charlie is gone from his desk during the day. When asked, Charlie mentions that he needs the breaks because he is "incredibly stressed out" and plans to see a doctor to figure out what has been going on or whether he "should be on medication or something." Rebecca is unsure what he means by these statements and does not press the issue further with him.

After Charlie calls in sick on several Mondays and has more days when he takes unannounced breaks, higher-level managers at ABC Co. instruct Rebecca to terminate Charlie's employment, which she does. Charlie feels blindsided by this decision because he had previously told Rebecca that he was feeling stressed out and planned to seek medical help. Charlie files a disability discrimination complaint with the Wisconsin Equal Rights Division (ERD), and now ABC Co. and its insurer are mired in expensive litigation.

Scenarios such as this are not uncommon in workplaces, and they can pose significant legal risk to employers under applicable disability laws. A recent case concerning disability accommodation under Wisconsin state law demonstrates that employers must act in good faith when employees request accommodations in the workplace, regardless of whether an employee submits medical proof of a qualifying condition at the time of the accommodation request.

Federal & Wisconsin Disability Discrimination Statutes

For Wisconsin employers, two primary statutes prohibit disability discrimination in public and private employment: the federal Americans with Disabilities Act (ADA)[1] and the Wisconsin Fair Employment Act (WFEA).[2] Although there are other laws to be aware of, such as local ordinances, the Rehabilitation Act of 1973,[3] and the Genetic Information Nondiscrimination Act,[4] the ADA and the WFEA are the primary focus of this article.

The ADA. The ADA comprises four "titles" or "chapters," which ban disability discrimination in different respects. Title I addresses disability discrimination in employment and applies to public and private employers with at least 15 employees. The 15-employee threshold is satisfied if there are at least that many employees — regardless of full-time or part-time status — for every working day during at least 20 calendar weeks in the same calendar year as, or in the calendar year prior to when, the alleged discrimination occurred.[5]

The WFEA. By contrast, the WFEA has broader coverage. It applies to employers with at least one employee who works in Wisconsin, subject to very narrow exceptions. It also applies to the Wisconsin state government and agencies as well as all local governments.[6] The ADA and the WFEA require that covered employers provide reasonable accommodations for employees with known disabilities and prohibit adverse employment actions against employees on the basis of a disabling condition.[7] The Wisconsin Supreme Court has explained that

to be liable for intentional discrimination, an employer must be aware that an individual possesses a disabling condition.[8]

Duty to Accommodate under the ADA and the WFEA

Both state and federal law require covered employers to reasonably accommodate known disabilities unless doing so would cause an undue hardship or pose a direct threat. Although the statutes use similar language, the scope of the duty to accommodate is different. One significant difference is that the duty to accommodate under the WFEA is generally broader than it is under the ADA.[9] The ADA uses an "essential functions" analysis, and generally an employer is only required to provide reasonable accommodations if those accommodations will allow the disabled employee to perform the essential functions of the job. Federal regulations define *essential functions* as "the fundamental job duties of the employment position the individual with a disability holds or desires."[10]

The Wisconsin Supreme Court in *Crystal Lake Cheese Factory v. Labor & Industry Review Commission* clarified that the WFEA does not include an essential functions analysis. Rather, the test under the WFEA is whether a proposed accommodation will allow the employee to adequately perform the job as a whole. Certain types of accommodations that are not required by the ADA – such as eliminating a core job responsibility or modifying a full-time position into a part-time role – might be required as reasonable accommodations in appropriate circumstances under the WFEA.[11] This is a key reason why ADA decisions are of somewhat limited value to interpreting the WFEA and why employers covered by both the ADA and the WFEA must always analyze whether an accommodation is owed under either statute or both statutes.[12]

Reasonable Accommodation Process & Recent Case Law

How employers and employees arrive at a reasonable accommodation is referred to as the "interactive process." The interactive process, expressly recognized in the ADA, is an exchange of information about the employee's condition, limitations, and possible accommodations. The success of the interactive process often depends on the employer and the employee working in good faith to find a compromise that does not unduly burden the employer and that allows the employee to perform the job successfully. This process need not be formalistic so long as it is effective. Employers bear no obligation to automatically grant an employee's *preferred* accommodation if another effective accommodation exists.

The *Wingra Redi-Mix* decision is also notable because it clarifies that employers cannot lawfully refuse to engage in an interactive discussion with an employee about an accommodation request based on the fact that the employee has not submitted medical proof of a disabling condition at the time of the accommodation request.

In 2023, the Wisconsin Court of Appeals released its decision in *Wingra Redi-Mix v. Labor & Industry Review Commission*. The decision is notable for a few reasons. Perhaps surprisingly, the court went out of its way to observe that

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the "black letter" of the WFEA does not mandate parties to engage in an "interactive process."[13] This might be somewhat of an academic point because as a practical matter, employers generally are at greater legal risk if they refuse to work cooperatively with an employee to identify reasonable accommodations.

The *Wingra Redi-Mix* decision is also notable because it clarifies that employers cannot lawfully refuse to engage in an interactive discussion with an employee about an accommodation request based on the fact that the employee has not submitted medical proof of a disabling condition at the time of the accommodation request.

***Wingra Redi-Mix* Facts.** Scott Gilbertson, a Wingra Redi-Mix Inc. (Wingra) employee, delivered ready-mix concrete to construction sites. Wingra assigned trucks to its drivers, and Gilbertson was assigned an older "glider" model that lacked shock absorption. Wingra also had newer trucks that were more comfortable to drive. Of the 65 trucks in Wingra's fleet, only nine were the older models.

Gilbertson began experiencing low back pain and fatigue, which he attributed to the effects of driving the older-model truck. Gilbertson asked his manager about filing a worker's compensation claim for his issues, but he was cautioned that worker's compensation insurance might not cover the health-care provider's appointment if Gilbertson's job with Wingra was not determined to be the cause of his health problems. Gilbertson did not have health insurance and therefore did not see a physician or file for worker's compensation.

A few months later, Gilbertson requested to be reassigned to a newer, non-glider truck. Wingra's dispatcher initially approved the request and told Gilbertson that he would be allowed to switch when the registration on his current truck expired. That decision was overridden by a higher-level manager, who cited the company's policy against allowing truck reassignment and the lack of evidence regarding Gilbertson's claimed condition.

Gilbertson became upset and wrote a derogatory statement about the higher-level manager. Upon learning of Gilbertson's remarks, the manager wrote in an email: "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."

Gilbertson's condition became so bad that he felt unable to continue working, and he quit. Gilbertson was later diagnosed with degenerative disc disease and other serious issues. A spine specialist opined that switching Gilbertson to a non-glider truck would have allowed him to continue working. Gilbertson filed a complaint of disability discrimination with the ERD against Wingra, and the matter eventually reached the Wisconsin Court of Appeals.

Court of Appeals' Reasoning. The court held that the WFEA does not require an individual to have a formal diagnosis of a disability to qualify as an individual with a disability. While the court agreed with Wingra that the language of the 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. In this case, Gilbertson had shared sufficient medical information to trigger Wingra's obligation to explore his need for accommodation.

Practical Considerations After *Wingra Redi-Mix*

The *Wingra Redi-Mix Inc.* decision is instructive with regard to the scenario involving Charlie and similar situations.

ALSO OF INTEREST

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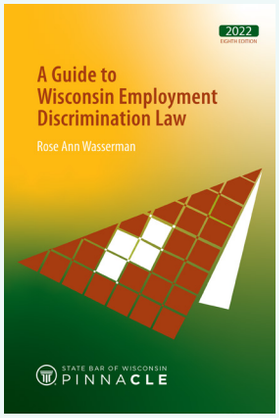

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Charlie was terminated after he informed his manager that he needed several breaks because he was stressed and that he planned to seek medical help. Instead of ignoring Charlie's disclosure, ABC Co. should have engaged in good faith with Charlie to understand whether he was seeking an accommodation and to gather information on whether Charlie had a medical condition that qualified as a disability. By being proactive and initiating the interactive process, ABC Co. would have reduced the risk of Charlie successfully arguing that the company ignored his condition, failed to explore reasonable accommodations, and unlawfully proceeded with termination.

It can be difficult even for sophisticated employers and trained supervisors to recognize whether an employee is asking for an accommodation or merely "venting" and making generalized statements. Charlie's statements to Rebecca were somewhat vague and could have signaled that he was merely having a bad day. In such circumstances, it is often helpful to suggest that the employee contact someone in the employer's human resources department or another appropriate staff member if the employee is seeking an accommodation and to document the suggestion.

Conclusion

Disability law under the ADA and the WFEA is among the most challenging areas of employment law, and it is easy for unwary individuals to wade into troublesome situations. One thing is clear: The reasonable accommodation process requires good faith, clear and open communication, and consistent follow-through with the parties' respective obligations. **WL**

ENDNOTES

[1]42 U.S.C. § 12112(a).
[2]Wis. Stat. § 111.322(1).
[3]29 U.S.C. § 701.
[4]42 U.S.C. § 2000ff-1.
[5]42 U.S.C. § 12111(5)(A).
[6]Wis. Stat. § 111.32(6)(a).
[7]Wis. Stat. § 111.34(1)(b).
[8]*Wisconsin Bell Inc. v. Labor & Indus. Rev. Comm'n*, 2018 WI 76, ¶ 53, 384 Wis. 2d 771, 920 N.W.2d 928 ("There is no substantial evidence that Wisconsin Bell knew that Mr. Carlson's disability caused this conduct. Therefore, Wisconsin Bell did not discriminate against Mr. Carlson 'because of' his disability in violation of Wis. Stat. § 111.322.").
[9]The ADA might require employers to accommodate conditions that the WFEA does not, including impairments that are temporary. *Burge-Milner v. Department of Veterans Affairs*, ERD Case No. CR200901313 (LIRC, Nov. 11, 2015) ("The WFEA only covers permanent impairments.").
[10]29 C.F.R. 1630.2(n)(1).
[11]*Crystal Lake Cheese Factory v. Labor & Indus. Rev. Comm'n*, 2003 WI 106, ¶ 52, 264 Wis. 2d 200, 664 N.W.2d 651.
[12]*Id.* ¶ 46.
[13]*Wingra Redi-Mix Inc. v. Labor & Indus. Rev. Comm'n*, 2023 WI App 34, ¶ 100, 408 Wis. 2d 563, 993 N.W.2d 715 ("The parties in this case appear to assume that the interactive process has already been incorporated into Wisconsin law, and none of the parties has developed an argument regarding whether we should adopt it. It is not necessary to adopt the interactive process to resolve the questions of Wisconsin law at issue here, and we decline to do so today, especially without input on that topic from the parties."). **WL**