State of Wisconsin

Labor and Industry Review Commission

Frederick Oldenburg Complainant **Triangle Tool Corporation** Respondent ERD Case No. CR201400272 EEOC Case No. 26G201400482C	**Fair Employment Decision**[1] **Dated and Mailed:** February 28, 2018

The decision of the administrative law judge (copy attached) is **affirmed**, subject to modifications. Accordingly, the commission issues the following:

Order

1. *Time within which respondent must comply with Order.* The respondent shall comply with all of the terms of this Order within 30 days of the date on which this decision becomes final. This decision will become final if it is not timely appealed, or, if it is timely appealed, it will become final if it is affirmed by a reviewing court and the decision of that court is not timely appealed.

2. That the respondent shall cease and desist from discriminating against the complainant because of disability.

3. That the respondent shall immediately offer the complainant reinstatement to a position substantially equivalent to the position he held prior to his discharge. This offer shall be in writing and shall be tendered by the respondent or an authorized agent. It shall provide reasonable notice of the time and place at which the complainant is to appear for work and shall allow the complainant a reasonable time to respond. Upon the complainant's acceptance of such position, the respondent shall afford the complainant all seniority and benefits, if any, to which

[1] **Appeal Rights:** See the green enclosure for the time limit and procedures for obtaining judicial review of this decision. If you seek judicial review, you **must** name the Labor and Industry Review Commission as a respondent in the petition for judicial review.

Appeal rights and answers to frequently asked questions about appealing a fair employment decision to circuit court are also available on the commission's website http://lirc.wisconsin.gov.

he would be entitled but for the respondent's unlawful discrimination, including sick leave and vacation credits.

4. That the respondent shall make the complainant whole for all losses in pay the complainant suffered by reason of its unlawful conduct by paying the complainant the sum he would have earned as an employee from April 8, 2013, until such time as the complainant resumes employment with the respondent or would resume such employment but for his refusal of a valid offer of a substantially equivalent position. The back pay for the period shall be computed on a calendar quarterly basis with an offset for any interim earnings during each calendar quarter. Any unemployment compensation or welfare benefits received by the complainant during the above period shall not reduce the amount of back pay otherwise allowable, but shall be withheld by the respondent and paid to the Unemployment Insurance Reserve Fund or the applicable welfare agency. Additionally the amount payable to the complainant after all statutory setoffs have been deducted shall be increased by interest at the rate of 12 percent simple. For each calendar quarter, interest on the net amount of back pay due (i.e., the amount of back pay due after set-off) shall be computed from the last day of each such calendar quarter to the day of payment. Pending any and all appeals from this Order, the total back pay will be the total of all such amounts.

5. That the respondent shall pay to the complainant reasonable attorney's fees and costs incurred representing the complainant in this matter up until the issuance of the administrative law judge's decision, in the amount of $46,763.11, and for the proceedings before the commission, in the amount of $10,172.50, for a total amount of $56,935.61. A check in that amount shall be made payable jointly to the complainant and his attorney, Monica Murphy, and delivered to Ms. Murphy at Disability Rights Wisconsin.

6. That within 30 days of the date on which this decision becomes final, the respondent shall file with the commission a Compliance Report detailing the specific actions it has taken to comply with this Order. The Compliance Report shall be prepared using the "Compliance Report" form which has been provided with this decision. The respondent shall submit a copy of the Compliance Report to the complainant at the same time that it is submitted to the commission. Within 10 days from the date the copy of the Compliance Report is submitted to the complainant, the complainant shall file with the commission and serve on the respondent a response to the Compliance Report.

Notwithstanding any other actions a respondent may take in compliance with this Order, a failure to timely submit the Compliance Report required by this paragraph is a separate and distinct violation of this Order. The statutes provide that every day during which an employer fails to observe and comply with any order of the commission shall constitute a separate and distinct violation of the order and that,

for each such violation, the employer shall forfeit not less than $10 nor more than $100 for each offense. *See*, Wis. Stat. §§ 111.395, 103.005(11) and (12).

By the Commission:

/s/
Georgia E. Maxwell, Chairperson

/s/
Laurie R. McCallum, Commissioner

/s/
David B. Falstad, Commissioner

Procedural Posture

This case is before the commission to consider the complainant's allegation that the respondent discriminated against him based upon disability, in violation of the Wisconsin Fair Employment Act (hereinafter "Act"). An administrative law judge for the Equal Rights Division of the Department of Workforce Development held a hearing and issued a decision finding that discrimination occurred. A timely petition for commission review was filed by the respondent.

The commission has considered the petition and the positions of the parties, and it has reviewed the evidence submitted at the hearing. Based on its review, the commission agrees with the decision of the administrative law judge, and it adopts the findings and conclusion in that decision as its own, subject to the following:

Modifications

1. The second and third sentences in paragraph 12 of the administrative law judge's FINDINGS OF FACT are deleted and the following is substituted therefor:

> "Neuropsychology reports indicate that during the same time period the complainant told his doctor that he was experiencing memory problems that adversely affected his everyday functions, such as grocery shopping and playing cards."

2. The second sentence in paragraph 18 of the administrative law judge's FINDINGS OF FACT is deleted.

3. In the last sentence in paragraph 19 of the administrative law judge's FINDINGS OF FACT the phrase "He did believe" is deleted and the phrase "He did not believe" is substituted therefor.

4. The administrative law judge's Order is deleted and is replaced with the Order set forth on pages 1 through 3 of this decision.

Memorandum Opinion

In its petition for commission review the respondent makes essentially three arguments in favor of reversal. First, the respondent argues that it could not have acted out of discriminatory animus based on the complainant's disability because it made the decision to discharge the complainant before it became aware of his disability; second, it argues that the complainant's performance deficiencies were not caused by his disability; and third, it argues that the complainant did not establish that a reasonable accommodation was available. The commission has considered these arguments, but finds them unpersuasive.

The record contains no competent evidence to support the respondent's assertion that it decided to discharge the complainant before learning of his disability. In the month or so preceding his discharge the respondent notified the complainant that he needed to work faster and with more accuracy. However, it never told the complainant that his job was in jeopardy, notwithstanding the fact that the respondent's own handbook contemplates that warnings be given prior to discharge. Nor is there any contemporaneous documentation showing that a decision to discharge the complainant had been made before the respondent learned of the disability. To the contrary, the respondent's own notes, prepared by Mark Pitzen, the engineering manager, indicate that Mr. Pitzen made the decision to discharge the complainant on Friday, April 5, 2013, the same day on which the complainant presented his doctor's note notifying Mr. Pitzen that he had a disability and requesting accommodations. The timing of the discharge, coming just one work day after the receipt of that letter, without prior warning or any documentation to suggest that the respondent had already made a decision to discharge the complainant, suggests that discriminatory animus may indeed have played a role in the discharge.

The commission need not decide the case on that basis, however, as there is significant evidence to indicate that the performance deficiencies which the respondent contended were the reason for the complainant's discharge were caused by a disability for which the respondent refused to provide a reasonable accommodation. At the hearing the respondent identified several performance deficiencies which led to the complainant's discharge: the complainant was completing his work too slowly, his work lacked accuracy, and the drawings he was submitting were missing required dimensions and notes. The respondent argued, however, that the complainant's performance problems were not caused by a

disability; it contended that the complainant had mastered its software and had the ability to do the work, but was simply choosing not to do the job well because he did not want to work for the respondent. Those assertions are not supported by the record. To begin with, while the complainant testified that he was not happy working for the respondent and wanted to return to his former employer, no evidence was presented to suggest that the complainant was not genuinely attempting to perform the job to the best of his abilities. The respondent specifically acknowledged that the complainant was not busy looking at his phone, chatting with co-workers or otherwise wasting time, and there is no evidence to indicate that he was deliberately failing to do a good job. To the contrary, as the administrative law judge noted in her decision, the fact that the complainant went to his doctor to request an accommodation letter supports a finding that he was attempting to succeed at the job and hoping to remain employed. The commission is therefore satisfied that the complainant's failure in good job performance was caused by something other than a choice to not do the job well or an unwillingness to learn the job.

In addition, the commission finds little support for the respondent's assertions that the complainant had mastered the software needed to do the job and that his disability did not interfere with his ability to perform that task. While the complainant may have successfully completed his computer training, he testified credibly that he was not using Unigraphics as quickly or as well as he could have at the time he was discharged. In support of that testimony, doctor's notes indicate that on March 4, 2013, a month prior to the discharge, the complainant told Dr. Rehkemper that he was using new software at work and was finding it challenging. Even the respondent's own witness, Mark Pitzen, seemed to agree this was the case; Mr. Pitzen testified that shortly before the discharge the complainant told him he thought he was improving with the software, but Pitzen responded he did not see that happening. Given the circumstances, the commission concludes that the complainant had not, in fact, mastered the software used on the job at the time of his discharge. Moreover, because the medical evidence presented at the hearing indicates that the complainant's traumatic brain injury affected his ability to learn new information, it appears that the complainant's failure to effectively use the respondent's software can be reasonably attributed to his disability.

In making the argument that the complainant's disability did not affect his ability to learn the respondent's software and that he was, in fact, proficient with the new software, the respondent seeks to isolate the complainant's failure to provide accurate specifications and notes on his designs from his job performance as a whole--including his use of software--and to characterize that failure as a wholly separate matter that cannot be explained by his disability. To this end, the respondent points out that the complainant understood that he needed to include specifications and notes in his drawings, that this aspect of his job was not "new" to him (and therefore unaffected by his difficulty learning new tasks), and that his

doctors did not testify that his disability prevented him from performing that element of the job. However, the commission is not persuaded either that the task of producing accurate drawings which included required specifications can be separated from the complainant's overall job performance or that the absence of specifications on the drawings is accurately viewed as the sole reason for the discharge. The respondent spoke to the complainant on several occasions about the speed with which he performed his work. At the hearing the complainant explained that he did not regard the drawings he submitted as being "shop ready," and was under the impression that he was to submit his drawings at whatever stage they were at for review by the respondent. It stands to reason that, because the complainant was not working at the speed the respondent required, his designs were not completed in the time frame the respondent expected them to be. Expert medical testimony provided at the hearing established that the complainant's disability caused him to work slowly, made it hard for him to learn new material and to keep track of details, and resulted in diminished insight into his own limitations. Given those facts, it is hard to conclude that the effects of the complainant's disability were not related to the quality of the work he was producing at a job he had held for just three months--which involved working with new software and designing a type of mold with which he was unfamiliar--or to the fact that the work was not completed as quickly as the respondent would have liked. Under all the circumstances, the commission is satisfied that the complainant adequately established that the performance deficiencies which resulted in his discharge were related to his disability.

Having concluded that the complainant's disability was related to his ability to adequately perform the job, the next question to decide is whether the respondent refused to provide him with a reasonable accommodation that would have enabled him to remain employed. On his last full day of work the complainant notified the respondent that he had a disability and requested an accommodation. That request should have triggered the beginning of an "interactive process" between the complainant and the respondent. Once an employee requests an accommodation, the employer has an obligation to engage in an "interactive process" aimed at determining the precise job-related limitations imposed by a disability and how those limitations could be overcome with a reasonable accommodation. *See*, *Smith v. Wisconsin Bell*, ERD Case No. CR200800434 (LIRC April 19, 2012); *Castro v. County of Milwaukee Sheriff's Department*, ERD Case No. CR200800720 (LIRC Dec. 20, 2011). The Act includes a duty to gather sufficient information from the employee and from qualified experts, as needed, to determine what accommodations are necessary. *Keller v. UW-Milwaukee*, No. 90-0140-PC-ER, (March 19, 1993). The law envisions a flexible, interactive process by which the employer and employee determine the appropriate reasonable accommodation, *Rehling v. City of Chicago*, 207 F.3d 1009 (7th Cir. 2000), and "a party that fails to communicate by

way of initiation or response, may. . . be acting in bad faith." *Beck v. UW-Madison*, 75 F.3d 1130, 1135 (7th Cir. 1996).[2]

The respondent in this case clearly failed in its duty to engage in the interactive process. The complainant provided the respondent with a letter from his doctor explaining what his disability was and suggesting some possible accommodations that may be helpful. The letter advised the respondent that it could contact the complainant's doctor directly if it had questions. When the complainant gave the letter to the respondent he indicated that he would like to discuss it. However, the respondent's engineering manager, who by his own admission is not a disability expert and has no knowledge of how a brain injury might affect an individual's ability to learn or process information, made a unilateral decision to terminate the complainant's employment immediately, without contacting the complainant's doctor and without engaging in any discussion with the complainant about his accommodation request. When the complainant asked if there was anything he could say to change the respondent's mind, he was simply told, "no."

A conclusion that the respondent failed to engage in the interactive process does not end the inquiry, however. The commission has held that the failure to engage in an interactive process does not, on its own, constitute a violation of the law. Rather, the question is whether the complainant has shown that, if the respondent had engaged in the process, together they could have identified a reasonable accommodation. *Gamroth v. Wisconsin Department of Corrections*, ERD Case Nos. CR200303157, CR200303158, and CR200303159 (LIRC Oct. 20, 2006). Relying on *Gamroth*, the respondent argues that the complainant did not establish that a reasonable accommodation would have been possible if it had been willing to engage in the interactive process with him. It maintains instead that the accommodations the complainant was requesting had already been provided and/or would not have effectively assisted him to perform the job. In making this argument, the respondent looks at each requested accommodation separately, and focuses on how the accommodation would affect the specific problem of missing dimensions and notes in the drawings the complainant was submitting.

First, the respondent contends that the complainant's request for more time to learn the software was not a reasonable accommodation, since the complainant had already mastered the software, and because his performance deficiencies were not related to his use of the software but were due to errors and omissions in his finished prints. The respondent points out that the complainant testified that if a design had missing dimensions, this was not a software issue, but was related to a lack of attention to detail. This argument is not persuasive. As discussed above, it was not established that the complainant was proficient with the new software and,

[2] While *Rehling* and *Beck* involve an application of the Americans With Disabilities Act, the "interactive process" analysis is similar under both the Americans With Disabilities Act and the Wisconsin Fair Employment Act.

to the contrary, the evidence indicates that he continued to struggle with the software at the time he was discharged. While the complainant's lack of facility with the software may not have been directly responsible for the missing dimensions in his drawings, given the fact that the respondent continually complained about the slow speed at which the complainant worked, and considering that the incomplete drawings were at least partially the result of that slow speed, it cannot be said that this matter played no role in the performance deficiencies that lead to his discharge or that providing him with additional time to learn the software would not have been an effective accommodation.

Next, regarding the complainant's request for written reference materials and work instructions, the respondent indicates that the reference materials that were given to the complainant were sufficient to do the job, that the "help" menu the complainant requested was confusing, and that written instructions would not have helped the complainant, since the best way to learn was by doing it himself. The respondent further argues that the complainant admitted that reference materials would not have fixed his failure to include dimensions in his prints. Again, the commission disagrees. The complainant testified that having independent information about commands (the "help" menu) would have given him the ability to finish the jobs sooner. He also testified that, although he had access to old designs for reference, these had limited value to him, and, further, that the "mold list" the respondent provided him for reference was not sufficient for him to track the items he needed to remember when making his designs. While better reference materials would not necessarily have resolved the complainant's failure to include dimensions in his prints, they may well have enabled to him to produce completed drawings in a more timely fashion.

Turning to the complainant's request for a note taker, the respondent contends that there were no meetings at Triangle that would require a note taker and that the complainant never attended customer meetings. It also states that the complainant admitted a note taker would not remedy the fact that his prints were missing dimensions. This argument fails. The complainant's testimony indicates that he needed a note taker not just at customer meetings, but in situations including one-on-one meetings with his trainers. The complainant testified that when the respondent was explaining the problems with his prints, he was trying to both listen and remember what was said for later reference. The requested accommodation of having someone write down notes when the complainant met with his trainer, which the complainant could refer to later on while focusing on what was being said verbally, appears to be an accommodation aimed at improving both the speed of his work and the accuracy of his product. It should also be noted that when the complainant resumed work with his former employer after his injury it provided him the accommodation of a note taker at meetings, and this accommodation continued when he returned to that employer after leaving his job with the respondent. Consequently, the commission can see no basis to dismiss this

requested accommodation as one that was unneeded or that would have been ineffective.

Finally, with respect to the request for "environmental and mental organization strategies," the respondent testified that it was already giving the complainant environmental organization strategies by providing him with proper training tools. However, as Dr. Rehkemper and Dr. Hammeke testified at the hearing, the term "environmental organization strategies" does not refer to "training tools," but to calendars, lists, cues, and the like. The only such item the respondent contended it was already giving the complainant was the mold list, which the complainant testified was not sufficient to track what he needed to remember to perform the job, and did not include details.

In general, while the respondent insists that it already provided the accommodations the complainant requested, or that what he asked for would not be effective, it is not at all clear that this was the case. The complainant believed that additional or different written information (including everything from command menus, to meeting notes, to organizational cues) would have been more helpful than what the respondent was giving him and, without engaging in any discussion with the complainant, the respondent had no reasonable basis to decide the complainant was incorrect. The complainant and his doctors were in a better position to understand what type of tools the complainant needed than was Mr. Pitzen, who testified that he disagreed with the complainant that written instructions might be better than watching someone do something. While direct observation might well be the most effective learning method for Mr. Pitzen and other employees he has supervised, this wisdom does not necessarily apply to an individual struggling with a traumatic brain injury.

The respondent is correct in pointing out that no one accommodation proposed by the complainant clearly and completely resolves his performance issues. However, the respondent's arguments with respect to the efficacy of each proposed accommodation only serve to highlight the purpose and importance of the interactive process. Not every person with a disability knows exactly what type of accommodation will work best for him or her. Unlike an employee who uses a wheelchair and requires a ramp to enter the building or an employee with diabetes who may need flexibility in break times so he can test his blood sugar, figuring out the appropriate accommodation for an individual with a mental disability can be more challenging and might require some trial and error. The concept of the interactive process contemplates not just that the complainant will approach the respondent with an accommodation request that can be readily accepted or rejected, but that a discussion will take place regarding the complainant's needs and how they can potentially be accommodated in the work place. Had the respondent been willing to talk to the complainant, together they may have been able to identify an accommodation that would have enabled him to work with better speed and

accuracy. As the administrative law judge noted in her decision, the complainant was able to work in other employment since sustaining the brain injury, and there is no reason to believe that with the right assistance he could not have managed to do the job at hand.

Finally, it should be noted that the Act contemplates that employers will try accommodations to see if they are workable and that they will exercise a degree of "clemency and forbearance" when dealing with an individual whose disabilities interfere with job performance, at least while the interactive process of exploring the possibility of accommodation proceeds. *Castro v. County of Milwaukee*, ERD Case No. CR200800720 (LIRC Dec. 20, 2011), citing *Target Stores v. LIRC*, 217 Wis. 2d 1, 16-17, 576 N.W.2d 545 (Ct. App. 1998). "Nothing in the statutory language indicates that a reasonable accommodation must immediately remove the difficulty caused by the hardship." *Target*, at 16. It is not clear why the respondent could not, at minimum, have given the complainant extra time to effectively master the job once it learned that he had a brain injury that affected his performance.

The goal of the Act is to foster to the fullest extent practicable the employment of individuals with disabilities, and the statute is to be liberally constructed to achieve that goal. *See*, Wis. Stat. § 111.31(3). The complainant had 30 years experience as a designer and managed to work for other employers effectively. His doctor identified some accommodations that would have made it easier for him to do his job notwithstanding his disability, and discussions with the respondent entered into in good faith would in all likelihood have assisted him to identify others. However, the respondent refused to consider any accommodation for the complainant, opting instead to summarily terminate his employment. Under all the facts and circumstances, the commission agrees with the administrative law judge that there is sufficient evidence to warrant a conclusion that the respondent discriminated against the complainant based upon his disability, in violation of the Act.

Attorney's fees

The complainant is entitled to reasonable attorney's fees and costs incurred responding to the petition for commission review. *Fields v. Cardinal TG Co.*, ERD Case No. 199702574 (LIRC Feb. 16, 2001). The complainant has requested a total of $10,172.50, representing 31.3 hours of work at an hourly rate of $325. A fee statement provided by the complainant's attorney indicates that she spent 20.4 hours reviewing the administrative law judge's decision and the respondent's brief, conducting research, and drafting the complainant's initial brief, and that she then spent another 10.9 hours on tasks related to the preparation of her reply brief. These tasks and amounts of time expended appear to be reasonable, and the respondent has not made any argument to the contrary. The respondent has also not challenged the complainant's attorney's requested hourly rate of $325, which was supported by affidavits from other practitioners in the area and which the

administrative law judge has determined to be reasonable. The commission has therefore modified the decision to include an additional award of $10,172.50 in conjunction with responding to the petition for review.

cc: Attorney Monica Murphy
Attorney Robert J. Simandl