State of Wisconsin

Labor and Industry Review Commission

Connie Staudinger Complainant **County of Manitowoc** Respondent ERD Case No. CR201203521 EEOC Case No. 864201255215C	**Fair Employment Decision**[1] **Dated and Mailed:** December 11, 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 make the complainant whole for all losses in pay and benefits the complainant suffered by reason of its unlawful conduct by paying the complainant the sum she would have earned as an employee from May 31, 2012, until such time as her employment would have ended by layoff on December 31,

[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.

2012, along with the value of all retirement and other benefits she would have received had she been laid off on that date. 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.

4. 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 $28,952, and for the proceedings before the commission, in the amount of $6,213, for a total of $35,165. A check in that amount shall be made payable jointly to the complainant and her attorney, Sandra G. Radtke, and delivered to Ms. Radtke.

5. 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 her 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. The respondent has filed a timely petition for commission review.

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 conclusions in that decision as its own, except that it makes the following:

Modification

The administrative law judge's Order is deleted and is replaced with the Order set forth on pages 1 and 2 of this decision.

Memorandum Opinion

Did the complainant establish that she is an individual with a disability?

The complainant's initial burden in a disability discrimination case is to establish that she is an individual with a disability, within the meaning of the Act. Wis. Stat. § 111.32(8) defines an individual with a disability as one who (a) has a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work, (b) has a record of such an impairment, or (c) is perceived as having such an impairment. An "impairment" for purposes of the Act is a real or perceived lessening or deterioration or damage to the normal bodily function or bodily condition, or the absence of such bodily function or condition. *City of La*

Crosse Police and Fire Comm. v. LIRC, 139 Wis. 2d 740, 407 N.W.2d 510 (1987). The test to determine whether an impairment makes achievement unusually difficult is concerned with the question of whether there is a substantial limitation on life's normal functions or on a major life activity. By contrast, the "limits the capacity to work" test refers to the particular job in question. Further, the inquiry concerning the effect of an impairment is not about mere difficulty, but about unusual difficulty. *AMC v. LIRC*, 119 Wis. 2d 706, 350 N.W.2d 120 (1984).

The administrative law judge found that the complainant met her burden of establishing that she is an individual with a disability, and the commission agrees. The complainant testified that she suffers from poor balance and that this is a permanent condition. She explained that after she sustained a work injury in 2009 she went to physical therapy where, among other things, she worked on her balance. The complainant presented notes from her physician, Dr. Michael Hiebert, that support her testimony regarding her balance issues and that indicate the problem appears to be related to the injury she sustained in 2009. She also presented a report prepared by an independent medical examiner (IME), Dr. William Moore, which, while not agreeing that the complainant's balance issues were related to the 2009 injury, supports her testimony and her doctor's conclusion that she, indeed, suffers from balance issues. Notably, the IME report references medical records that were not presented at the hearing, but that indicate the complainant was treated for balance issues in September of 2009, shortly after she sustained the work injury. In addition, the complainant presented physical therapy notes which indicate that, as of 2016, she continued to be treated for issues related to balance and dizziness. The complainant testified, and her doctor agreed, that her balance problem prevented her from performing work up on a step stool or ladder, as required by the respondent. Given these facts, it seems clear that the complainant met her burden of establishing that she has an impairment (poor balance), that the impairment is not a temporary condition from which she could be expected to recover, and that the impairment limited her capacity to perform her job.

In the brief in support of its petition for review the respondent argues that the complainant failed to establish she has a disability, within the meaning of the Act. The respondent raises a variety of arguments in support of this contention. First, the respondent contends that the complainant did not present testimony from a treating physician and relied on records. It maintains that none of the records presented by the complainant can be considered competent medical evidence because 1) some of the records were not in the respondent's possession prior to the discharge, 2) the 2016 physical therapy records the complainant provided do not establish permanency, 3) the physical therapy records are not relevant and are inadmissible hearsay, 4) the IME report did not confirm that the complainant had a balance issue and noted that someone could feign poor balance, and 5) Dr. Hiebert's June 13 letter, when placed in context, is not competent medical evidence because

his May 23 letter contained an admission that it was beyond the scope of his practice to provide a job-related evaluation. The respondent further states that the complainant did not produce medical records that documented a diagnosed or confirmed balance issue as a result of her 2009 injury and did not include an opinion regarding a healing plateau or permanency of the balance condition. The respondent maintains that Dr. Hiebert was speculating in his report as to what information the worker's compensation doctor had when he discharged the complainant without medical restrictions in 2009, and contends that the fact there were no restrictions meant the complainant had no balance issues. The respondent states that Dr. Hiebert's written reports were confusing and that the complainant should have presented testimony from him at the hearing so that he could answer questions and clear up doubt. The respondent also notes that because Dr. Hiebert's reports were so confusing, it requested the ability to communicate directly with him, but the complainant refused to cooperate by failing to sign the authorization. It states that, given the confusion created by the complainant and Dr. Hiebert, it had a right to question his opinions and that, for all these reasons, the complainant failed to sustain her burden of proving that she had a disability.

The commission has considered these arguments, but does not find them persuasive. The complainant was not required to bring Dr. Hiebert to the hearing, and could prove her case through her own testimony and competent medical evidence. The complainant offered credible testimony about her own symptoms and when they began. The complainant supported her testimony with notes from her treating physician in which he expressed his opinion 1) that the complainant had balance issues, 2) that he believed those issues were related to her worker's compensation injury, and 3) that they prevented her from climbing ladders and step stools at work. Although Dr. Hiebert indicated that job evaluations were beyond the scope of his practice, that did not mean that he was unable to provide a medical opinion that the complainant was experiencing dizziness and poor balance and that she was advised to avoid climbing ladders. Dr. Moore's opinion also supported the complainant's testimony regarding her balance issues. Although Dr. Moore's report included a gratuitous statement that he recognized someone could feign a balance issue, Dr. Moore did not state that he believed the complainant was doing so, and his report referenced physical therapy notes going back to 2009 which indicate the complainant was being treated for balance at that time and which support a conclusion that the complainant's balance issues were a real medical problem and not feigned.

With respect to the 2016 physical therapy notes, hearsay evidence is admissible at proceedings before the Division, and the respondent has not explained why it considers the 2016 physical therapy notes to be less reliable than other medical evidence provided at the hearing. The physical therapy notes are certainly relevant to the issue at hand, since evidence that the complainant was still treating for the same condition in 2016 supports a finding that the balance condition was

permanent. That said, it is worth noting that the 2016 notes are not necessary to a finding of permanency, since there is adequate other evidence--notably, the complainant's testimony and the references in the IME report--establishing that the complainant experienced dizziness and balance issues for several years leading up to her discharge.

Finally, the respondent's focus on what it knew and when it knew it is a distraction that is not relevant to the inquiry. While the respondent's knowledge of the complainant's disability may go to intent, for purposes of establishing that the complainant is an individual with a disability within the meaning of the Act, it does not matter what the respondent knew or when it knew it. Nor does it matter that the complainant cooperated or did not cooperate with the respondent's efforts to obtain additional information--while that may go to the question of who was responsible for the breakdown of the interactive process, it is, again, not relevant to an inquiry as to whether the complainant established that she is an individual with a disability under the law. Similarly, as the administrative law judge explained in his decision, the question of whether or not the complainant's balance problems were caused by the worker's compensation injury is beside the point, and the fact that Dr. Hiebert and Dr. Moore disagree about causation does not change the essential fact that the complainant suffers from long term dizziness and poor balance.

Proof of a disability for purposes of the Act is not meant to be onerous; the complainant simply needs to establish that she has an impairment that substantially limits life's normal functions or limits her capacity to perform her job. The law does not require that a doctor who provides a supporting medical opinion be an expert in the area, nor is it necessary to provide detailed information regarding the etiology and progression of that condition. For purposes of the Act, the question to resolve is whether the individual has a permanent medical condition (as opposed to a short term illness or injury) and whether that condition makes it difficult to perform some aspect of the job such that an accommodation is necessary. The commission is satisfied that the complainant met her burden in this case.

Did the respondent refuse to provide a reasonable accommodation for the complainant's disability?

Having concluded that the complainant established she is an individual with a disability, the administrative law judge found that the complainant took reasonable measures to notify the employer that she had a disability and what accommodation she needed, and that the respondent violated the Act by failing to provide that accommodation for her. The commission agrees with that conclusion.

The evidence presented at the hearing clearly established that the complainant could have been accommodated had the respondent been satisfied that she had a

disability, and the respondent does not argue otherwise in its brief to the commission.[2] Rather, the respondent's contention is that the complainant did not have a disability requiring accommodation and, alternatively, that if she did, she is responsible for the breakdown of the interactive process because she refused to sign the authorization form allowing it to speak with her doctor and thereby thwarted the respondent's efforts to accommodate her. These arguments are without merit.

At the hearing Jason Jost, the jail administrator, testified that he did not tell the complainant she needed to prove she had a disability, but, rather, told her that if she had restrictions he needed to see that from a doctor. The complainant then presented the respondent with a doctor's excuse, which the respondent rejected. However, rather than explaining to the complainant why it considered the excuse inadequate or what additional information it required, the respondent instead presented her with an authorization form to sign so that it could speak to her doctor. The form specified that the complainant was not required to sign it and that her signature was voluntary, and the respondent never told the complainant that failure to sign the medical release would jeopardize her ability to receive an accommodation. While the complainant did not sign the form, she did provide two additional written excuses from her doctor, each containing more detail than the last, and notified the respondent that if there was more it required she was prepared to obtain it. The respondent did not reply to the complainant's written inquiries about what information it wanted her doctor to provide, and it never sat down with the complainant to discuss the situation or explain why it questioned her accommodation request. Given these facts, the commission concludes that the respondent is the party most responsible for the breakdown of the interactive process.

The commission notes that the respondent's arguments throughout this process reflect a misunderstanding of its obligations under the Wisconsin Fair Employment Act. The respondent demanded that the complainant's doctor explain what accommodation she required that would enable her to perform the filing in the nurse's office, thus effectively ruling out the possibility of either having someone else perform that task or moving the filing cabinets to a different location where they would not need to be stacked so high (which the respondent later did, when it adopted an unused bathroom as an auxiliary file room). The respondent cited the Americans with Disabilities Act (ADA) in its correspondence to the complainant and appeared unaware of the fact that the Wisconsin statute has different requirements, both with respect to establishing a disability and with regard to the type of accommodations that must be considered. While the ADA does not require

[2] The complainant testified that her supervisor, Joy Brixius, and RN Dawn Schuette both told her that they could handle the top shelf filing. Sharon Cornils, the respondent's personnel director, agreed that there would have been options to accommodate the complainant. In fact, Ms. Cornils testified that, if the complainant had a restriction related to her disability, the respondent would have been able to accommodate her "absolutely."

that an employer offer an accommodation that would permit the employee to avoid performing an essential job function, under Wisconsin's law there is no accommodation that need not be considered, including a modification of job duties or restructuring of the job. *See*, *Crystal Lake Cheese Factory v. LIRC and Catlin*, 2003 WI 106, 664 N.W.2d 651. The respondent also appears to be operating under the incorrect assumption that the causation tests that apply under worker's compensation law also apply to claims of discrimination under the Act. Ms. Cornils was troubled by the complainant's contention that her balance issues were related to her worker's compensation injury, even though this was not reflected in the documents related to the worker's compensation claim, and even though her worker's compensation file was closed and she had been returned to work without restrictions. However, the fact that the worker's compensation file was closed did not mean that the complainant had no disability related to her worker's compensation injury. More to the point, the complainant need not establish the etiology of her impairment in order to be eligible for the protections of the Act, and the fact that the respondent did not think the complainant's balance problem was caused by her work injury did not justify it in ignoring her request for a reasonable accommodation.

Was the complainant discharged because of her disability?

The respondent argues that the complainant was not discharged because of a disability. Rather, it contends that her employment was terminated because she failed to request unpaid leave and because she failed to provide legitimate information requested by the employer to evaluate her disability leave. This argument fails. As indicated above, the complainant established that she did provide sufficient information to the respondent for it to evaluate her request for an accommodation, but the respondent refused to provide the requested accommodation and told the complainant there was no work for her unless she could get a doctor to say it was okay for her to climb the step stool. Although the respondent apparently suggests that by failing to sign the medical release the complainant engaged in actions inconsistent with continuing employment and caused the end of the employment relationship, the respondent never told the complainant that she needed to provide any specific information or be terminated, nor did it tell her that if she provided that information it would consider accommodating her. Finally, while it may have been theoretically possible for the complainant to extend her employment by taking an unpaid leave of absence, there would have been no point in her doing so where neither the job assignment nor the complainant's limitations were temporary and where the complainant had no reason to believe that a leave of absence would enable her to remain employed.

In its brief the respondent also makes an argument that the complainant has failed to prove pretext. However, the complainant did not need to prove pretext where it is undisputed that the respondent refused to provide her with an accommodation

and that this was the reason her employment ended. Because the complainant established that the employment relationship ended at the behest of the respondent and that the termination was based upon her disability, she has met her burden of establishing that the respondent discharged her in violation of the Act.

Newly discovered evidence argument

In its brief to the commission the respondent argues that, in the event the commission does not outright reverse the decision and find no discrimination, it should set aside the decision and remand for a new hearing on the basis of newly discovered evidence. The respondent explains that when the complainant's attorney submitted her billing statements it noticed that the complainant had consulted with her attorney in May and June of 2012, prior to the end of her employment with the respondent, a fact which the respondent believes would establish that the complainant did not enter into the interactive process in good faith. The respondent maintains that consideration of the billing statements would cast doubt on the complainant's testimony that she did not know what more she could have done to convince the respondent to provide her with an accommodation, since the statements would show that the complainant had an attorney and could have had her attorney contact the respondent. This argument is without merit. For the commission to reopen a matter based on newly discovered evidence, the respondent must show that it is reasonably probable that a different result would be reached if the evidence were considered. *Racine Education Association v. Racine Unified School District*, ERD Case No. 8650279 (LIRC Aug. 11, 1989), citing *Naden v. Johnson*, 61 Wis. 2d 384 (1973). Consideration of the evidence the respondent seeks to present would not result in a different decision. The complainant had the right to consult an attorney, and the fact that she did so does not mean that she was not attempting in good faith to provide the respondent with the information it sought so that it would consider accommodating her disability or that she was otherwise responsible for the breakdown of the interactive process. The commission can see no reason to believe that, had the respondent's newly discovered evidence been known to the administrative law judge, it would have had any bearing on the outcome of the case, and the commission declines to reopen the matter on that basis.

Back pay argument

In her brief to the commission the complainant argues that the administrative law judge erred in cutting off her back pay in December of 2012, and contends that it was not established her job would have been eliminated. The complainant acknowledges that she did not file a petition for review of the administrative law judge's remedial order, but states that the commission may take up all aspects of the administrative law judge's decision and asks that the commission review the back pay order notwithstanding her failure to file an appeal. The commission declines to do so. While a timely petition for review by any party does give the

commission the authority to review any and all aspects of a decision below, the commission has repeatedly stated that, as a general rule, it will not exercise that authority to address issues that were not expressly or implicitly raised by a petition for review. *Carlson v. Wisconsin Bell, Inc.*, ERD Case No. CR201102363 (LIRC Feb. 19, 2015); *Dude v. Thompson*, ERD Case No. 8951523 (LIRC Nov. 16, 1990); *Neuman v. Hawk of Wisconsin, Inc.*, ERD Case No. 9130945 (LIRC Mar. 12, 1993); *Crosby v. Intertractor America Corporation*, ERD Case No. 8851622 (LIRC May 21, 1993). Although the commission has occasionally made an exception to its general practice, it has done so where the review of the issue brought to the commission by a timely petition inevitably led the commission to inquire into the issue that was not raised in a petition. *Valentin v. Clear Lake Ambulance Service*, ERD Case No. 8902551 (LIRC Feb. 26, 1992); *Mattocks v. Village of Balsam Lake*, ERD Case No. CR201100355(Sep. 14, 2014). That is not the case here--the commission's review of the issue of whether the respondent is liable for a violation of the Act does not inevitably lead to consideration of the question of what the complainant's remedy should be, and resolving the former issue does not require the commission to also resolve the latter. If the complainant wanted to make an argument about her back pay it was incumbent upon her to file her own petition for commission review. She did not do so, and cannot now piggyback her argument onto the respondent's petition.

Attorney fees

The complainant has requested compensation for 9.5 hours spent preparing her response to the respondent's petition for commission review, and an additional 8.25 hours spent writing her reply brief. At an hourly rate of $350, which the administrative law judge determined to be reasonable, this amounts to a total of $6,213 in attorney's fees related to the petition for review. In its reply brief, the respondent specifically indicated that it did not have any objection to the complainant's fee request submitted with her initial brief, should she prevail. Although the respondent did not comment on the subsequent fee request relating to the brief in reply, it has not raised any objection to it, and the commission can see no reason to question the reasonableness of that request. The complainant's attorney spent a total of 17.75 hours on the petition for commission review, including reviewing the transcript and respondent's briefs, conducting research, drafting the brief-in-chief and reply brief, and drafting her fee request. This is certainly a reasonable expenditure of time and well within the limits that the commission has approved in other cases before it. Consequently, the commission has modified the order to include the additional $6,213 requested by the complainant's attorney to compensate her for her work with respect to the petition for review.

cc: Sandra G. Radtke
Mary E. Nelson