State of Wisconsin

Labor and Industry Review Commission

Samuel E. Ison, Complainant **School District of Crandon**, Respondent ERD Case No. CR201604345 EEOC Case No. 26G201700176C	**Fair Employment Decision**[1] **Dated and Mailed:** September 28, 2020 isonsa_rsd.docx:103

The decision of the administrative law judge is **affirmed**. Accordingly, the complainant's complaint is dismissed.

By the Commission:

/s/
Michael H. Gillick, Chairperson

/s/
David B. Falstad, Commissioner

/s/
Georgia E. Maxwell, Commissioner

[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

Procedural Posture

This case is before the commission to consider the complainant's allegation that the respondent failed to reasonably accommodate a disability, and that it terminated the complainant's employment because of his disability, all in violation of the Wisconsin Fair Employment Act (hereinafter the "Act"). An administrative law judge for the Equal Rights Division of the Department of Workforce Development held a hearing and issued a decision. The complainant 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.

Memorandum Opinion

The complainant was a janitor for the school district beginning in 2010. In 2015, he was diagnosed with degenerative disc disease and was scheduled for back surgery on November 23, 2015. Prior to the surgery, the complainant talked with the school's business manager to coordinate his benefit coverage. Because the respondent uses a calendar year basis for calculating Family and Medical Leave Act (FMLA) leave, the complainant received full coverage, including the last part of 2015 as well as the first 12 weeks of 2016. The complainant was approved for long term disability insurance coverage and was able to use accrued personal leave during the 60-day waiting period.

On February 1, 2016, the respondent sent a letter to the complainant telling him that the district could fire him if he did not return by March 25, 2016, and that the district's insurance benefits would end on March 25, 2016 if the complainant was unable to return to work by then, at which time he could elect COBRA coverage at his own expense in order to maintain health insurance coverage. The letter reminded the complainant that he had been using his banked personal leave to pay for his share of the health insurance premiums and noted:

> Once you run out of PTO, you have the option to write the district a monthly check or allow the district to deduct extra money from your checks when you return to work to make-up for missed payments.

The letter asked the complainant to be in contact: "Please notify us of any changes in your plans. … we will want to act timely if you decide not to return on time or at all. It is also important that you keep us updated on your progress and any potential release dates to be available to come back to work as these dates help us plan."

On February 19, 2016, the complainant dropped off a letter from his doctor at the school district. The note stated that the complainant was unable to return to work at that time and would be re-evaluated in April.

According to the respondent, the complainant met with the district superintendent, Doug Kryder, sometime in February or March, during which Kryder told the complainant that he would need to make a plan for paying for his own health insurance after his FMLA leave expired. The complainant does not recall this meeting.

The district terminated the complainant's employment on April 19, 2016. The termination letter stated in part:

> As of March 28, 2016, you have exhausted all of your FMLA time for the 2016 calendar year. Through your conversation with Dr. Kryder and notes received from your physician, the administration and board of education are regretfully choosing to terminate your employment with the district due to the unknown circumstances that surround your personal health. Understand that this was a difficult decision and it was not arrived at easily because of your sound history with the district. (Emphasis added.)

Accommodation: indefinite medical leave

The respondent's policy, contained in the employee handbook, provides up to one-year of unpaid leave of absence for the birth or adoption of a child, medical leave, or military leave. The medical leave of absence provision includes FMLA leave and subsequent medical leave that is not required under any law. The complainant never requested an extended unpaid leave of absence and the district did not offer one. The complainant's surgery was on November, 23, 2015. He remained unable to work from the date of the surgery through at least the date of the hearing in this case, December 12, 2017.

In his petition for commission review, the complainant identifies the issue as whether the district "had an obligation to notify the complainant that it could provide him with a one-year leave from work when it did not know when the complainant may be able to return to work." (Emphasis added.) The complainant's first argument turns on whether an employer must offer an accommodation even when one is not requested. In some situations, it must. An employer refuses to reasonably accommodate when it declines "to do something that is either requested or required by law." *Crivello v. Target Stores*, ERD Case No. 9252123 (LIRC Aug. 14, 1996), affirmed sub nom *Target Stores v. LIRC*, 217 Wis.2d 1, 576 N.W.2d 545 (Ct. App. 1998). An employer cannot be expected to intuit the need for an accommodation where the existence of the employee's disability is neither evident nor disclosed. "However, in some cases the facts are such that the employer is aware of the employe's handicap and knows what type of accommodation the employe requires. Under those circumstances, it is reasonable to expect the employer to offer the accommodation even in the absence of a specific request from the employe." *Id.*

In this case, the employee's disability was obvious. The employer acknowledged that the employee was disabled, and the employer had knowledge that the one-year leave of absence was available. However, because an extended leave of absence was not a reasonable accommodation in this case, the employer was not obligated to offer it to the employee. The commission has previously discussed leave of absence as a reasonable accommodation:

> …while there is no requirement that an employer hold a job open indefinitely for an absent employe, there is also no *per se* rule that a leave of absence need not be considered as a potential accommodation. The question of whether a leave of absence is a reasonable accommodation will depend upon the specific facts in each individual case. For instance, a reasonable accommodation does not include keeping a job open for an employe who has been unable to work for an extended period of time and for whom there is no foreseeable return to work date. *Passer v. DOC* (Wis. Personnel Comm., September 18, 1992). However, a medical leave of absence might be considered a reasonable accommodation where there is some reason to believe that the leave of absence will assist the employe in achieving recovery and will ultimately result in the employe's ability to return to work. (Emphasis added.)

Janocik v. Heiser Chevrolet, ERD Case No. 9350310 (LIRC Nov. 21, 1994).

Holding open a job for a disabled employee who is out of work on a medical leave of absence can be a reasonable accommodation in some circumstances. However, an employer cannot reasonably be expected to hold a job open indefinitely when there is no indication the employee will ever be able to return to work. *Lewandowski v. Galland Henning Nopak, Inc.*, ERD Case No. 199603884 (LIRC Jan. 28, 1999). In this case, there was no foreseeable return to work date for the complainant. He had already been off work for approximately five months and did not know when he would be able to return at the time the respondent terminated his employment. The respondent asked the complainant to make a plan for paying his own health insurance premiums if the leave continued, and the complainant did not do so. The respondent's obligation to provide a particular accommodation is predicated, in part, on the information available to it at the time the decision is made. In this case, the complainant had not provided any information to the respondent that might have led it to believe that a long-term leave of absence could have resulted in his ability to return to work. Without that information, the leave of absence was not a reasonable accommodation, and the failure of the respondent to offer it was not a violation of the Act.

Accommodation: termination under more favorable circumstances

In his brief to the commission, the complainant argues that, "The District failed to reasonably accommodate Ison's disability by failing to terminate him under a more favorable status of medical leave. This also would have provided three months of insurance." This argument fails.

"In general, an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities." *See, Alamilla v. City of Milwaukee*, ERD Case No. CR201002749 (LIRC June 28, 2013). Because the purpose of an accommodation is to allow the employee to return to work, an accommodation of termination under a more favorable status cannot be considered a reasonable accommodation.

Judicial notice of employer's insurance policy

After the close of evidence, the claimant argued to the administrative law judge that he should be permitted to offer into evidence, by way of "judicial notice," the respondent's employee benefit plan document. The complainant argues that the document shows that the respondent would only have needed to pay for the employee's health insurance for three months, not for a year or more as argued by the employer. The administrative law judge rejected the attempted late submission and the argument was renewed to the commission.

In *Northwestern Insulation v. LIRC*, 147 Wis. 2d 72, 432 N.W.2d 620 (Ct. App. 1988) and again in *Amsoil, Inc. v. LIRC*, 173 Wis. 2d 154, 496 N.W.2d 150 (Ct. App. 1992), the courts have held that § 102.18(3), Wis. Stats., prevents the commission from considering on review any evidence not considered by the administrative law judge. The court of appeals addressed the argument that the commission has a power comparable to that of judicial notice and rejected it. The commission cannot simply take judicial notice of this belated document.

Further, remand for admission of the document would be unwarranted because the respondent adequately accommodated the complainant's disability by approving the leave that it did and was not required to accommodate the complainant with an extended leave of absence. Even if there were no insurance premiums at issue, an extended leave of absence where there was no reason to believe that the leave would result in the complainant being able to return to work would not have been a reasonable accommodation. For these reasons, the document, even if admitted, would not change the result.

The complainant has failed to establish by a preponderance of the evidence that the respondent violated the Act by refusing to reasonably accommodate a disability or by terminating his employment because of a disability. The complaint is, therefore, dismissed.

cc: Robert Kennedy, Jr., Attorney for Complainant
Lori Lubinsky, Attorney for Respondent

This decision has been appealed to Circuit Court.