State of Wisconsin

Labor and Industry Review Commission

Scott R. Gilbertson, Complainant **Wingra Redi-Mix, Inc.**, Respondent ERD Case Nos. CR201400424 and CR201700698 EEOC Case Nos. 26G201400544C and 26G201700622C	**Fair Employment Decision**[1] **Dated and Mailed:** December 10, 2020 gilbesc_err.doc:164

The decision of the administrative law judge is **affirmed in part** and **reversed in part**. 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 based upon his disability.

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[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.

3. That the respondent shall offer the complainant reinstatement to a position substantially equivalent to the position he held prior to his discharge. This offer shall be tendered by the respondent or an authorized agent and shall allow the complainant a reasonable time to respond. Upon the complainant's acceptance of such position, the respondent shall afford him all seniority and benefits, if any, to which 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 amount he would have earned as an employee, including pension, health insurance and other benefits, from October 23, 2013, the date of discharge, 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 insurance 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 Compensation Reserve Fund or the applicable welfare agency. Additionally, the amount payable to the complainant after all statutory set-offs 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 in the amount of $162,125 and costs in the amount of $12,510, for fees and costs associated with these proceedings in the total amount of $174,635. A check in that amount shall be made payable jointly to the complainant and Attorney David M. Potteiger and delivered to Mr. Potteiger.

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/
Michael H. Gillick, Chairperson

/s/
David B. Falstad, Commissioner

/s/
Georgia E. Maxwell, Commissioner

Procedural Posture

This case is before the commission to consider the complainant's allegation that the respondent discriminated against him based upon a disability, in violation of the Wisconsin Fair Employment Act. An administrative law judge for the Equal Rights Division (hereinafter "ERD") of the Department of Workforce Development held a hearing and issued a decision finding that no discrimination occurred. The complainant 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 makes the following:

Findings of Fact

1. The respondent, Wingra Redi-Mix, Inc. (hereinafter "respondent"), is a business that mixes and delivers concrete to the construction community in Dane County. The respondent's president and owner is Robert Shea.

2. The complainant, Scott Gilbertson (hereinafter "complainant"), began working for the respondent as a cement truck driver in June of 2011. The complainant's primary job duty was to deliver concrete to commercial and residential contractors. The work was seasonal, beginning in about late February and tapering off in mid-November. During the winter season the complainant was on call and only worked sporadically. However, during the rest of the year he worked 50 to 60 hours a week.

3. The respondent's practice is to assign drivers to a single truck. The complainant was assigned to Truck 56. Truck 56 was a "glider" truck--a used truck that had been refurbished and rebuilt. The respondent's glider trucks have cable operated gas pedals and foot brakes, while the "non-glider" trucks have electronic gas pedals and "Jake Brakes," which take less physical effort to operate. In addition, glider trucks do not have shock absorbers, whereas the non-glider trucks do. The non-glider trucks provide a much smoother ride than the glider trucks.

4. The complainant's truck had three chutes for pouring cement that were attached to the truck, with three additional extension chutes that could be added. Each chute was three to four feet long and weighed about 50 to 70 pounds. Newer chutes were lighter weight while older ones tended to be heavier. The truck also had a ladder that reached from the driver's door to a platform eight to ten feet off the ground which the driver would climb to rinse off concrete residue.

5. During the complainant's employment the respondent had between 50 and 65 trucks in its fleet, only nine of which were gliders. The respondent had more trucks than it had drivers, and a portion of the fleet was not in use.

6. The complainant began experiencing back pain and fatigue towards the end of the 2012 season. The pain came back early in the 2013 season and gradually worsened; after about a month and a half the complainant was experiencing daily back pain. As the season progressed, he had pain that radiated down his right leg and ankle. At times the complainant felt like someone was jabbing him with a knife and the pain was so bad that he yelled out loud and cursed. By June of 2013 the complainant was extremely sore and fatigued and had a hard time keeping up with certain work tasks that needed to be done quickly. Towards the later part of the year the complainant began to feel that he was unsafe operating his truck. At that point he was taking 12 to 16 ibuprofen tablets a day.

7. In addition to the problems the complainant experienced at work, he also had difficulties with his activities at home. The complainant found it hard to go up or down stairs or to stand for a long period of time. Sitting in a chair for a long time would cause numbness. His sleep was negatively affected, he was unable to lift groceries without difficulty, and he could no longer do yard work.

8. During the complainant's employment the respondent had no written policy or procedure in place regarding disability accommodations and provided no training or guidance to employees on how to make such a request.

9. In June of 2013, the complainant notified Amber Femrite, the respondent's dispatch manager, that he was experiencing pain and wanted to file a worker's compensation claim. Shortly thereafter the complainant talked to Greg Sundby, the respondent's safety and human resource manager. The complainant told Sundby that

he was having difficulty driving his assigned truck and was having back and leg problems that were getting progressively worse. The complainant put Sundby on notice that he was considering filing a worker's compensation claim. Sundby told the complainant that it might be hard to prove the truck was causing his problems and cautioned that he might be stuck with medical bills, since he had no health insurance. The complainant decided not to file a worker's compensation claim because he was concerned about medical expenses.

10. During the summer of 2013 the complainant asked Amber Femrite if he could be assigned a different truck that was not a glider truck. Femrite had the complainant consult with another driver to identify a truck he would like to use. The complainant suggested that he be transferred to Truck 51, a non-glider truck that was not currently in service. Femrite indicated that when the registration expired on Truck 56 the complainant would be able to transfer to Truck 51.

11. Around the same time, Andy Balch, the operations manager, talked to Robert Shea, the respondent's owner, and told him that the complainant was complaining about foot pain and ankle soreness that he attributed to pressing the tight accelerator pedal in Truck 56, and that he had been asked to be placed in a different truck.

12. On September 11, 2013, the complainant heard that, in fact, he was not going to be getting a new truck and sent the following e-mail to Amber Femrite:

> Hi Amber,
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> . . . It was discussed between us that you would not renew 56 or other glider and register 51 at the end of September, which is when 56 expires, this way you were not adding an extra truck to the fleet. I'm pretty sure if what Kris said is the case, why its not going to take place.
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> A couple months ago I spoke with Greg Sundby about my ongoing extreme soreness, as mentioned above. The hours I work weekly and the fact is no secret the gliders are rough riding/operating compared to others, and is contributing to my body pains. I have wanted to see my doctor, but still have no insurance at this time, and could be the simple solution.
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> I'm asking you to reconsider.

13. An hour later the complainant received a reply from Amber Femrite indicating that, per Andy Balch, he would remain in Truck 56.

14. That evening the complainant sent an e-mail to his union steward, Chuck Wichern, with a copy to Robert Shea, the owner of the company. In his email the complainant stated, in part:

> I do feel Andy [Balch] is now discriminating based on all the reason [sic] we have discussed in the past months. Body soreness has been brought to the attention of our Safety and HR personal [sic] months ago, plans were made by management (Amber) to move me into a 51 (non-glider.) Many are well aware of the ride difference and health/body problems the gliders create, when running long weekly hours as we do, including Greg Sundby (discussion I had in the shop with him today, regarding my e-mail message sent to Amber.) Some have been moved to non-gliders for the same reason.

15. After learning that Andy Balch had overridden Amber Femrite's decision to put him in a non-glider truck, the complainant altered a saying that was written on his hard hat from "Don't be a Dick" to "Don't be an Andy." Balch was upset and told one of the respondent's other employees, Philip Woerpel, to tell the complainant to take the saying off of his hard hat. Balch told Woerpel that he knew the complainant wanted a different truck but that as far as he was concerned, "fuck it, he can haul concrete in a wheelbarrow." Balch went on to state that he did not care how badly the complainant was hurt, he would continue driving Truck 56 "until hell freezes over."

16. On September 30, 2013, the complainant met with Robert Shea and Andy Balch to discuss various personal issues between the complainant and Balch, including the matter of the hard hat. The complainant asked whether he could have union representation at the meeting, but the respondent replied that this was not needed. During the meeting the complainant mentioned that he was having problems driving his truck due to medical issues. Shea stated that he did not know what the complainant's condition was, but that he needed him to drive Truck 56 because of the respondent's financial investments in that truck.

17. After the meeting with Mr. Shea the complainant spoke with Chris Hassler, the shop manager, and Roger Husom, a mechanic, about his problems with the truck. Hassler and Husom suggested removing one of the return springs on the throttle cable in order to return the gas pedal back to the idle position. Husom modified the truck accordingly.

18. The complainant later had a conversation with Greg Sundby in which Sundby indicated that he did not agree with the respondent's decision not to transfer the complainant to a different truck. During this conversation the complainant told Sundby that Husom had removed one of the springs on the truck. The complainant

mentioned that this modification could create a safety issue. Sundby shrugged and walked away.

19. The complainant was never informed that the removal of the springs was in violation of company policy or that he was not permitted to modify the truck in that manner.

20. On October 22, 2013, the complainant was struggling to get a pour job done and was experiencing a lot of pain. He went back to the base and placed his keys, fuel card and timecard on Mr. Sundby's desk. Sundby told the complainant he was a great driver and a great employee and that he would hate to see him make a life changing decision. He indicated he did not want the complainant to quit. The complainant stated that he did not want to quit but was asking for help. Sundby stated he would try to get a hold of Shea and see what he could do to get the complainant into a non-glider truck. He returned the complainant's keys and fuel card to him and told the complainant to talk to Todd Strand, one of the dispatchers, and let him know that he was going home because he was in pain. The complainant did so.

21. The complainant was scheduled to work at 7:30 a.m. the following day, October 23, 2013, but did not report. The complainant called Greg Sundby at about 9:30 a.m. to see if Sundby had talked to Shea about moving him to a non-glider truck. The complainant told Sundby that if he could not be moved to a new truck he would have to file a worker's compensation claim in order to get medical documentation of the issues surrounding the truck.

22. That afternoon the complainant sent an e-mail to Greg Sundby, stating in relevant part:

> To recap what has been discussed on l0/22 and 10/23/13. I turned my keys for truck 56, fuel and time card into you after working only 2 hours. We discussed the reason, my body [sic] accumulative body soreness, and no efforts of getting me into a non-glider. We also discussed what was said in my meeting with Bob Shea recently, Bob indicated he wants to keep me in the glider, due to the great deal of resources he has invested, ignoring my well-being and safety of others. You mentioned you don't have approval to do so, but you would work on it, and also handed me all items back. . . telling me not to quit and to take some time to think about it. (I agreed) Then you would see if you can get me into 51 or other non-glider truck, but it might take a couple days to get approval, since Bob is out of town. I mentioned this morning I'm willing to come to work today, if you can put me into 22 or other non-glider that is not being used, until 51 or other can be assigned to me, you again indicated you don't have approval to do so. We both agreed it makes sense to try this first as planned by Amber to aid in my accumulative condition. If

> this is not considered, I will need to move forward as discussed and file a Workman's injury claim to seek medical attention (which may be needed anyway, if after operating a non-glider for a period of time doesn't aid in recovery.)

23. After receiving the complainant's e-mail, Greg Sundby sent the following e-mail to Robert Shea:

> Sorry to bother you on vacation. Mr. Gilbertson was told NOT to send e-mail messages anymore. Evidently that did not register with him. As badly as we need drivers, my decision would be to call him back and say that he is absolutely NOT getting a new truck, and that based on my conversation with him yesterday, we are accepting his resignation. I'm a little taken back by the threats. We can address the worker's compensation issue as it unfolds. P.S I did not AGREE to anything with him. He is not at work today, and I would like to resolve this before he has a change of heart.

24. Robert Shea accepted Greg Sundby's recommendation with respect to Truck 51 and informed Sundby that he was accepting the complainant's resignation. Sundby then called the complainant and told him that he was not going to be assigned a non-glider truck and that he had to drive Truck 56. Sundby also informed him that he was accepting his resignation and that he would provide the complainant with written confirmation that his employment had ended. The complainant responded that he was not quitting.

25. On October 24, 2013, on which the complainant was not scheduled to work, he sent the following email to Greg Sundby:

> Hi Greg,
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> We spoke on the phone around eight am today, as planned (result of BJ denying the use of a non-glider truck.) I am patiently waiting for you to provide an authorization number from the company's insurance provider, so I can seek medical attention. The company is failing to provide a better work environment, help aid in my recovery and denying me of work hours. Again, we both agreed trying a non-glider makes sense. I have not refused to work at any point since speaking with you on Tuesday (see previous email message sent yesterday, which you acknowledged this am on the phone.) I have only ask [sic] for a better work environment to aid in my body condition.
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> I will not sign my resignation papers, that have been prepared for me, per Bob. Which you informed me of this morning, and only after I

> mentioned I need to file a Workman's Comp Injury Claim as planned if a non-glider was not an option.
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> Once again, I am available to work, if you can place me in a non-glider to aid in my recovery, and will only seek medical attention if my condition doesn't improve over time.

26. The complainant did not voluntarily resign his employment with the respondent. The respondent terminated the complainant's employment on October 23, 2013, rather than provide him with the accommodation he had requested.

27. Reassigning the complainant to Truck 51 or a different non-glider truck was a reasonable accommodation that would have permitted the complainant to remain employed as a cement truck driver. The respondent could have provided that accommodation without hardship to its business.

28. In February of 2014 the complainant filed a complaint with the department alleging that he was discriminated against based upon a disability. The respondent was served with a copy of the complaint.

29. After the separation the complainant saw a doctor for the first time. The complainant was initially seen by his primary care physician, Dr. Karen Reed, on or about October 28, 2013. In July of 2014, the complainant sought medical treatment from Dr. Jeffrey Wilder, a chiropractor. The complainant treated with Dr. Wilder for about five months. Dr. Wilder diagnosed the complainant as suffering from chronic mechanical lower back pain due to multilevel degenerative disc disease. He assigned the complainant a 7% permanent partial disability rating and issued a set of job restrictions.

30. In 2017 the complainant began seeing Dr. Jared Greenberg, a spine specialist. Dr. Greenberg made a variety of diagnoses, including but not limited to, chronic pain syndrome, centralized pain syndrome, multi-level lumbar degenerative disc disease/stenosis, and lumbar radiculitis. Dr. Greenberg assigned the complainant a permanent partial disability rating of 10%. He opined that the complainant's disability began in 2013, during his employment for the respondent, and indicated that he believed the complainant would be able to perform his job for the respondent if assigned to a different vehicle. Dr. Greenberg did not provide the complainant with any work restrictions.

31. At the time of his separation from the respondent the complainant was making $18 an hour, with overtime paid at time and a half. In addition, the respondent was contributing $281.70 a week to the complainant's pension fund.

32. The complainant made a search for work. The complainant looked for jobs through newspapers ads and on Craigslist. He also talked to friends and family to see if they knew of any job openings. In addition, the complainant worked with the Department of Vocational Rehabilitation beginning in January of 2015 and continuing through June of 2017.

33. The complainant reapplied for work with the respondent multiple times. In February of 2014 the respondent posted an opening for a driver. The complainant applied but was not offered the job. However, in June of 2014 the respondent offered the complainant a different position, driving a lowboy truck. A lowboy is a semi with a lower loading bed than a normal trailer designed for loading heavy equipment. The complainant turned down that job offer because he had no experience with the job and did not believe he was qualified for the position and because he lacked a hazmat endorsement. Although the respondent was advertising for a cement truck driver position at the time, and the complainant had applied for the position, it did not offer that job to the complainant.

34. In January of 2015 the complainant again applied for a cement truck driver with job with the respondent but was not hired. At the time the complainant applied for the job he notified the respondent that he had a variety of work restrictions. The complainant indicated that he was restricted to 8-hour work days, could lift no more than 50 pounds no more than twice per hour, required frequent posture changes, was to avoid mechanical vibrations, and was to avoid climbing ladders or working on roofs or elevated locations.

35. In February of 2017 the complainant applied for a cement truck driver job with the respondent but was not hired. The complainant did not supply any medical restrictions at that time.

36. The complainant also applied for non-driver jobs with the respondent, including jobs working as a batch man and as a mechanic. A batch man is responsible for the concrete mix that gets loaded into the truck. It is not a physically demanding job, and the complainant would have been qualified for it. However, he was not offered the position. The complainant had mechanic experience and had been offered mechanic work during his previous employment for the respondent but was not offered the mechanic job he applied for.

37. The complainant accepted a job with a different employer and began working in April of 2018.

Conclusions of Law

1. The complainant is an individual with a disability, within the meaning of the Wisconsin Fair Employment Act (hereinafter "Act").

2. The respondent discriminated against the complainant by refusing to reasonably accommodate his disability, within the meaning of the Act.

3. The respondent discriminated against the complainant by discharging him on the basis of disability, within the meaning of the Act.

4. The respondent did not discriminate against the complainant by refusing to hire him based upon his disability, within the meaning of the Act.

5. The complainant filed a complaint under the Act.

6. The respondent did not discriminate against the complainant by refusing to hire him in retaliation for having filed a complaint under the Act.

Memorandum Opinion

The complainant brought this action under the Wisconsin Fair Employment Act (hereinafter "Act"), alleging that the respondent denied him a reasonable accommodation for his disability and terminated his employment based upon his disability. In a subsequently filed complaint, the complainant alleged that the respondent discriminated against him by refusing to hire him for the position of cement truck driver based upon his disability and/or in retaliation for his having filed a prior discrimination complaint.

To prove disability discrimination, a complainant must first establish that he or she is disabled, within the meaning of the Act. Section 111.32(8) of the Act defines the term "individual with a disability" as an individual 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. The complainant in this case established through reliable medical evidence that he has a variety of impairments related to the spine, including but not limited to degenerative disc disease, a permanent disabling condition. The complainant's disability interferes with his ability to perform everyday functions, like sitting and standing, and it limited his capacity to work for the respondent. Although the complainant's condition was not diagnosed until after he separated from the respondent in October of 2013, the statute does not require a contemporaneous diagnosis in order for the complainant to establish that he has a disability. Here, the complainant demonstrated not only that he currently has a disability, but that he had that disability at the time he worked for the respondent. The commission is therefore satisfied that the complainant has met his initial burden of establishing that he is an individual with a disability, within the meaning of the Act.

The next question to resolve is whether the complainant established that a reasonable accommodation was available that would have enabled him to perform the job-related responsibilities of his employment for the respondent,

notwithstanding his disability. *See*, *Hutchinson Technology, Inc. v. Labor and Industry Review Commission*, 273 Wis. 2d 393, 682 N.W.2d 343 (2004); *Target Stores v. LIRC*, 217 Wis. 2d 1, 576 N.W.2d 545 (1998). Again, the commission is satisfied that the complainant met his burden in this regard. The complainant testified that the truck he was driving was causing him leg and back pain, because it lacked shock absorbers and had a braking mechanism that required a great deal of physical exertion to operate. The complainant indicated that he believed assignment to a non-glider truck would be a reasonable accommodation for his disability. He testified that he had an opportunity to drive a non-glider truck, and that it was a much smoother ride and less painful. The respondent did not dispute this and acknowledged that the glider truck was a rougher ride than the truck the complainant was requesting. The complainant's physician, Dr. Greenberg, testified that he believed an ergonomic change in the complainant's vehicle could have alleviated his pain symptoms such that the complainant would have been able to perform work as a driver.

The question to decide, then, is whether the respondent violated the Act by failing to provide the complainant with the accommodation he sought. The respondent contends that it did not, maintaining that it was unaware the complainant had a disability and therefore had no obligation to provide him with an accommodation, even if a reasonable accommodation was available. The commission has considered this argument but does not find it persuasive.

The statute provides that discrimination because of disability includes refusing to reasonably accommodate an employee's or prospective employee's disability unless the employer can demonstrate that the accommodation would pose a hardship on the employer's business. Wis. Stat. § 111.34(1)(b). Nothing in the Act requires an employee to use any specific legal terminology or 'magic words' in order to request an accommodation,[2] and the Act has been interpreted as avoiding a formulistic approach

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[2] In considering what an employee must do in order to request a reasonable accommodation, it is helpful to refer to ADA (Americans with Disabilities Act) guidelines. Although the ADA differs from the Wisconsin Fair Employment Act in some meaningful respects, the requirement to provide reasonable accommodations and the process by which accommodations are requested is similar under both statutes. The *EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, contains a section entitled "Requesting Reasonable Accommodation," which includes the following:

1. How must an individual request a reasonable accommodation?

   When an individual decides to request accommodation, the individual or his/her representative must let the employer know that s/he needs an adjustment or change at work for a reason related to a medical condition. To request accommodation, an individual may use "plain English" and need not mention the ADA or use the phrase "reasonable accommodation."(19)

   Example A: An employee tells her supervisor, "I'm having trouble getting to work at my scheduled starting time because of medical treatments I'm undergoing." This is a request for a reasonable accommodation.

in favor of an interactive process between the employer and employee in order to determine whether accommodations are appropriate and available. *See*, for example, *Staudinger v. County of Manitowoc*, ERD Case No. CR201203521 (LIRC Dec. 11, 2018); *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).

In this case, the complainant notified the respondent both verbally and by email that he wanted to be assigned a non-glider truck due to back, foot, and leg pain. The complainant had described his physical difficulties to the respondent on several occasions, and the respondent was well aware of the fact that the truck the complainant was assigned to drive was causing him pain. The complainant also sent

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> A request for reasonable accommodation is the first step in an informal, interactive process between the individual and the employer. In some instances, before addressing the merits of the accommodation request, the employer needs to determine if the individual's medical condition meets the ADA definition of "disability," [FN deleted] a prerequisite for the individual to be entitled to a reasonable accommodation.
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> . . .
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> If an individual's disability or need for reasonable accommodation is not obvious, and s/he refuses to provide the reasonable documentation requested by the employer, then s/he is not entitled to reasonable accommodation. On the other hand, failure by the employer to initiate or participate in an informal dialogue with the individual after receiving a request for reasonable accommodation could result in liability for failure to provide a reasonable accommodation. *See Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 700, 8 AD Cas. (BNA) 875, 887 (7th Cir. 1998).
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> Footnote 19: See, e.g., *Schmidt v. Safeway Inc.*, 864 F. Supp. 991, 997, 3 AD Cas. (BNA) 1141, 1146-47 (D. Or. 1994) ("statute does not require the plaintiff to speak any magic words. . . The employee need not mention the ADA or even the term 'accommodation.'"). See also *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 694, 8 AD Cas. (BNA) 875, 882 (7th Cir. 1998)("[a] request as straightforward as asking for continued employment is a sufficient request for accommodation"); *Bultemeyer v. Ft. Wayne Community Schs.*, 100 F.3d 1281, 1285, 6 AD Cas. (BNA) 67, 71 (7th Cir. 1996)(an employee with a known psychiatric disability requested reasonable accommodation by stating that he could not do a particular job and by submitting a note from his psychiatrist); *McGinnis v. Wonder Chemical Co.*, 5 AD Cas. (BNA) 219 (E.D. Pa. 1995)(employer on notice that accommodation had been requested because: (1) employee told supervisor that his pain prevented him from working and (2) employee had requested leave under the Family and Medical Leave Act). . .

EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Number 915.002, October 17, 2002.

the respondent's owner, Robert Shea, a copy of an email to his union representative, Chuck Wichern, in which the complainant indicated that he had brought his pain issues to the attention of respondent's human resources department and that he believed Andy Balch, the acting operations manager, was discriminating against him. This email, together with the other information provided by the complainant, should have put the respondent on notice that the complainant was making a disability accommodation request.

If the respondent doubted that the condition for which the complainant was seeking accommodation constituted a disability, it had the right to ask him to supply medical documentation to support the request. However, the commission and courts have consistently held that the employer is expected to engage in an interactive process and may not simply deny a request for an accommodation without further discussion. *See*, *Oldenburg v. Triangle Tool Corporation*, ERD Case No. CR201400272 (LIRC Feb. 28, 2018), and cases cited therein.

But that is exactly what happened here. Robert Shea, the respondent's owner, testified that he knew the complainant was complaining about physical issues associated with driving the truck, but stated that he did not know if those issues made it impossible for him to drive the truck, and did not know whether they were temporary or permanent. Nonetheless, Shea never asked the complainant any questions regarding the specifics of his condition and did not request that he supply additional information or medical records. Although the respondent now contends that it was the complainant's responsibility to provide medical information and documentation, and that it was understood he needed to do so, the respondent had no written policies or protocols in place for providing accommodations for employees claiming to be disabled and provided no training to employees on how to request accommodations. The Act contemplates an interactive process, and it would be unfair to place the burden entirely on the employee to provide information to the employer, particularly where, as here, he was given no guidance in the matter, was never told what information to provide, and was not advised that his employer considered what he had provided to be inadequate. Simply put, the complainant acted appropriately in requesting an accommodation and explaining why he needed it. If the respondent wanted more information, it would have been within its rights to request that the complainant present medical documentation establishing a disability and supporting the need for the accommodation. However, it was not justified in completely ignoring the request.

In its brief to the commission the respondent argues that, since it did not know the complainant had a disability, it could not have had the intent to discriminate against him on that basis. However, a conclusion that an employer denied an employee's request for a reasonable accommodation does not require a finding of discriminatory motivation or intent; it is an affirmative expectation under the statute that employers will provide reasonable accommodations if they can do so without hardship, and the

employer's lack of deliberate intent to discriminate does not provide a defense. In arguing to the contrary, the respondent relies on the Wisconsin Supreme Court's decision in *Wisconsin Bell v. LIRC*, 382 Wis. 2d 624, 655 (2018), in which the Court stated that "the inquiry under § 111.34(2)(a) does not commence until after there is a conclusion that the employer engaged in intentional discrimination pursuant to Wis. Stat. § 111.322." The commission does not find this argument persuasive. In *Wisconsin Bell*, the Court held that the commission could not apply the so-called "inference method" to find intentional discrimination when an employee was discharged based upon conduct that was caused by a disability. The Court did not address the issue of failure to accommodate (the inquiry under Wis. Stat. § 111.34(1)(b)), because the employee had not requested an accommodation prior to his discharge.

Further, while intent to discriminate might require knowledge of the disability, in this case the respondent's reliance on such lack of knowledge is questionable. The respondent clearly had the information that would have led it to discover the complainant had a disability had it not foreclosed further discussion by immediately and categorically denying the complainant's request for accommodation. The complainant did not request a new truck simply because he preferred it--he told the respondent that he was requesting reassignment to help him deal with ongoing back and leg pain. The complainant's statement that he had continuing pain when driving the truck should have triggered an inquiry as to whether he was requesting a disability accommodation. The mere fact that the complainant did not use the word "disability" does not relieve the respondent of its obligations under the statute.

Finally, although discriminatory intent is not a necessary component of an accommodation case, the commission notes that the record in this case contains no evidence to suggest that the respondent denied the complainant the accommodation he requested based upon a belief that he did not have a disability. It is clear that Shea was unwilling to consider providing an accommodation to the complainant, whether or not he demonstrated that he had a disability. In a meeting with Shea and Andy Balch, the operations manager, Shea told the complainant, "I don't know what your condition is," but then immediately pivoted to talking about the respondent's business needs, stating that the respondent had a great deal of investment in the truck the complainant was assigned to drive and needed to have it on the road. At the hearing Shea confirmed this--he testified that the only reason the complainant was not assigned to a new truck was because the respondent has a policy of not changing truck assignments.

Having concluded that the respondent denied the complainant a reasonable accommodation for his disability, the next question to resolve is whether providing the accommodation would have created a hardship for its business. This resolution of this question is straightforward: the respondent conceded that the requested accommodation would not present a hardship in this case.

The second issue presented in this case is whether the complainant was discharged because of his disability. The administrative law judge found that the complainant was discharged but concluded that the respondent could not have discriminated against the complainant with respect to termination because it did not know he had a disability. The commission disagrees with this analysis.

The complainant requested an accommodation that was denied. The complainant testified that he was experiencing a lot of pain and realized that if the respondent was not going to accommodate him he "had no choice but to force the issue that I needed help." Therefore, the complainant went to Greg Sundby, the safety manager, and turned in his keys. Sundby told the complainant he was a great employee and that Sundby did not want him to quit. Sundby further stated that he did not agree with Mr. Shea's decision not to transfer the complainant to a different vehicle and that he would talk to Shea about it. The complainant was told to talk to one of the dispatchers and let him know he was going home for the day because of pain. The complainant did so. The following day, when the complainant had heard nothing from Sundby about reassignment to a new truck, he sent Sundby an email. In his email the complainant made reference to "accumulative body soreness" and stated that if he was not assigned a new truck he would need to file a worker's compensation claim so he could seek medical attention. After receiving that email, Sundby emailed Shea and told him that he wanted to let the complainant know he was not getting a new truck and that the respondent was accepting his resignation. In his email, Sundby mentioned that the complainant had been directed not to send email messages regarding his physical condition anymore and that he regarded the complainant's reference to filing a worker's compensation claim as a "threat." Sundby later told the complainant that he would not be accommodated and that the respondent was accepting his decision to voluntarily resign. The complainant responded with an email indicating that he was not resigning and that he would be filing a worker's compensation claim.

Although the complainant had initially indicated an intention to resign, the respondent did not accept his resignation and the complainant rescinded it. It was the respondent who made the decision not to allow the complainant to return to work. Given these facts, the commission believes that the separation is best characterized as a discharge, not a quit. However, under either scenario, it was the respondent's unwillingness to provide a disability accommodation that was the reason for the separation. Had the respondent offered the complainant an accommodation, he would not have tendered his resignation and would, in all likelihood, still be working for the respondent. Moreover, the respondent's refusal to allow the complainant to return to work after he rescinded his resignation stemmed from its frustration with the complainant's insistence on being transferred to a new truck and his "threat" to file a worker's compensation claim for his injuries. The respondent's unwillingness to provide a disability accommodation was the proximate cause of the separation,

thereby warranting a conclusion that the complainant was discharged--constructively or otherwise--because of his disability. Where the respondent refused to provide the complainant with an accommodation, and this was the reason his employment ended, the complainant established that the respondent discharged him in violation of the Act. *See*, *Staudinger v. County of Manitowoc*, ERD Case No. CR201203521 (LIRC Dec. 11, 2018).

The final issue in this case is whether the respondent violated the Act by refusing to re-hire the complainant for a driver position he applied for in February of 2017 based upon his disability and/or in retaliation for having filed a prior complaint. In her decision, the administrative law judge found that the respondent could not have discriminated based upon disability because it was not aware of the complainant's disability at that time. However, not only had the complainant requested an accommodation from the respondent in 2013, at which time he presented enough information to put the respondent on notice that he might have a disability, he filed a complaint against the respondent in February of 2014, in which he alleged that he was discriminated against based upon a disability. Consequently, it seems clear that the respondent was aware of the complainant's disability at the time it refused the complainant's request for re-employment in 2017.

That said, the commission does not believe the evidence warrants a conclusion that the respondent's refusal to hire the complainant was the result of discrimination. The complainant did not develop the record on this issue, and there is no evidence indicating why the respondent decided not to hire the complainant for the position or, indeed, whether it filled the job at all. The commission additionally notes that the respondent offered the complainant a job as a lowboy driver in June of 2014, at which time it clearly knew about his disability and was also aware that he had filed a discrimination complaint against it. However, neither of these factors prevented the respondent from offering the complainant a job. Because the commission sees no reason to assume that the respondent's decision not to offer the complainant a driver job was a matter of disability discrimination or retaliation for his having filed a discrimination complaint, that allegation is dismissed.[3]

Remedies

A. Reinstatement and back pay

Reinstatement with back pay is the presumed remedy in a discharge case, and the discriminating employer bears the burden of establishing through clear and convincing evidence that such remedy should not be awarded. *See*, *Zunker v. RTS*

[3] It is questionable whether a failure to rehire the complainant for the same position from which he has alleged a discriminatory termination would be considered a separate act of discrimination, and the potential remedy is wholly subsumed by the remedy awarded in conjunction with the original allegation.

Distributors, ERD Case No. CR201004089 (LIRC June 16, 2014). Uncertainties about remedy are resolved against the discriminating employer. *Nunn v. Dollar General*, ERD Case No. CR200402731 (LIRC March 14, 2008); *Fields v. Cardinal TG Co.,* ERD Case No. 199702574 (LIRC Feb. 16 2001); *Knight v. Wal-Mart Stores East LP*, ERD Case No. CR200600021 (LIRC Oct. 11, 2012)(the respondent has the burden of establishing that reinstatement is not an appropriate remedy, and any doubts on this point should be resolved in favor of the wronged employee).

The respondent in this case contends that the complainant failed to mitigate his damages because he refused a job it offered him. However, the commission does not believe that the respondent has met its burden of establishing that the complainant failed to make a satisfactory effort to mitigate his damages. The complainant established that after losing his job with the respondent he searched for work, and the respondent introduced no evidence to suggest that there was a reasonable likelihood the complainant would have found comparable work sooner had he exercised greater diligence. While the complainant did turn down a job offer with the respondent, the complainant explained that the job was one for which he had no experience and lacked the requisite safety certification. The complainant notified the respondent at the time the offer was made that he did not believe he was qualified for the job, and the respondent did not express any disagreement with that contention. At the hearing the respondent did not offer anything to contradict the complainant's assertions about his qualifications except to state that it believed he was qualified to operate the lowboy. In addition, it is noteworthy that the complainant had applied for a different job that he was unquestionably qualified for but was not offered that job. Although a failure to accept suitable replacement employment can serve to cut off the entitlement to back pay, given the complainant's testimony that he did not satisfy the requirements of the job, and considering the fact that the respondent did not offer him the position he had applied for and for which he was clearly qualified, the commission does not find that the complainant was required to accept the lowboy position by means of mitigation or that his failure to do so should serve to cut off his back pay.

The respondent also argues that the complainant is not entitled to damages after January 29, 2015, because work restrictions he supplied when he applied for work at that time render him unable to return to work for it as a cement truck driver. The commission has considered this argument but does not find it persuasive. The restrictions the complainant supplied in 2015 were issued by Dr. Wilder, the complainant's chiropractor. The complainant stopped seeing Dr. Wilder in January of 2015. Thereafter, the complainant began seeing a spinal medicine doctor, Dr. Greenberg. Dr. Greenberg did not provide the complainant with any work restrictions and testified that he believed an ergonomic change in the vehicle he was driving would enable the complainant to perform the job. Given the foregoing, it is not clear how long the restrictions assigned by Dr. Wilder remained in effect. Moreover, even assuming that the restrictions are permanent, and that the

complainant is limited in the amount of weight he can lift and with respect to his ability to climb ladders, the respondent is still obligated to attempt to offer reasonable accommodations that would allow the complainant to return to work, notwithstanding any medical restrictions he may have. It was not established that the complainant has any medical restrictions that would prevent him from performing the job of cement truck driver with or without reasonable accommodations.[4] Indeed, in his second complaint of discrimination, filed in March of 2017, the complainant stated that he was fully capable of performing the cement truck driver job with accommodations. Therefore, the commission concludes that the complainant's entitlement to back pay and reinstatement is unaffected by the January 2015 work restrictions.[5]

B. Attorney's fees

The complainant is entitled to payment of his reasonable attorney's fees incurred in pursuing this matter. *Fields v. Cardinal TG Co.,* ERD Case No. 199702574 (LIRC Feb. 16, 2001). In calculating reasonable attorney fees, the most useful starting point is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This figure is commonly referred to as the "lodestar" figure. *Hensley v. Eckerhardt*, 461 U.S. 424, 31 FEP Cases 1169 (1983). The complainant's attorneys have requested reimbursement in the amount of $206,862 for their fees and costs associated with this litigation.

Reasonable hourly rates: A reasonable fee is calculated according to the prevailing market rates in the relevant community. It is anticipated that, along with the fee petition, the attorney requesting payment will submit affidavits from other attorneys in the locality establishing that the requested rates are in line with those prevailing in the community for similar services for lawyers of comparable skill, experience and reputation. An hourly rate determined based on such affidavits is normally deemed to be reasonable. *Roytek v. Hutchinson Technology*, ERD Case No. 199903917 (LIRC Feb. 15, 2005).

Three attorneys worked on this case: Attorney Scott Luzi, Attorney David Potteiger, and Attorney Kelly Temeyer. Luzi and Potteiger are partners at the firm of Walcheske & Luzi, LLC, and Temeyer is a senior associate at the same firm. From

[4] A reasonable accommodation might include restructuring the physical demands of the job. *Crystal Lake Cheese Factory v. LIRC and Catlin*, 2003 WI 106, 664 N.W.2d 651; *Fields v. Cardinal TG Co.*, ERD Case No. 199702574 (LIRC Feb. 16, 2001).

[5] The commission notes that in its answer to the complaint filed in August of 2018, the respondent raised an additional defense to remedy; it contended that the complainant engaged in misconduct during his employment by altering the gas pedal on his truck and that this was not discovered until after the complainant applied for the job in 2017. However, these assertions are not supported by the evidence in the record, nor were they raised by the respondent in its brief to the commission.

January through September of 2017 Luzi charged $300 an hour. In October of 2017 his rate increased to $350, and in June of 2019 his rate increased to $400. In an affidavit, Luzi states that he was admitted to the bar in 2010 and that most of his work has involved representing employees in employment matters, particularly with respect to wages and hours. Luzi states that he has represented hundreds of individuals in employment law matters, including discrimination, harassment and retaliation cases and has litigated before the Equal Rights Division, the commission, and in state and federal court. Luzi began working with the complainant in June of 2017 and entered into a contingency fee arrangement. To date, Luzi has not received any compensation for his work on this matter.

Attorney Potteiger started working at Walcheske & Luzi, LLC in March of 2018 as a partner and charged $350 an hour. In June of 2019 his rate also increased to $400 an hour. In affidavits, Potteiger states that he was admitted to the bar in 2007 and spent 13 years as a litigator before joining the Walcheske firm. Like Luzi, Potteiger has represented hundreds of individuals in employment law matters, including discrimination, harassment and retaliation cases, and has litigated before the Equal Rights Division, the commission, and in state and federal court.

Attorney Temeyer performed work on the case from October of 2017 through January of 2018, during which time she charged $300 an hour. Although the complainant did not present an affidavit from Temeyer, he presented evidence that in March of 2018 a circuit court judge entered judgment in favor of one of Temeyer's clients in an employment discrimination case and awarded her hourly fees in the amount of $300.[6]

In support of their fee request, the complainant's attorneys have submitted affidavits from two practitioners, Attorneys Summer Murshid and Robert Mihelich, both of whom practice law in the greater Milwaukee area, the same locality where the complainant's attorneys' law practice is located. Murshid was admitted to the bar in 2009, and is a shareholder at Hawks & Quindel, whose practice is devoted to employment law. She charges an hourly rate of $400. Mihelich was admitted to the bar in 1993 and owns his own practice, which is devoted in large part to employment-related matters. Mihelich charges an hourly rate of $450. In their affidavits, both Murshid and Mihelich state that based upon their experience and knowledge of the market, the complainant's attorneys' hourly rates are reasonable.

The respondent's attorney disagrees, and argues that the requested hourly fees are too high. The respondent first contends that Attorney Potteiger's stated hourly rate is not commensurate with his experience. In support of this argument, the respondent points out that Potteiger began working for the current law firm in 2018, and that prior to that time he worked for a firm that, according to its website, provides legal services to lenders, mortgage servicers, insurance companies and the like, but

[6] *See*, *Weber v. LIRC and Vapin USA-WI, LLC*, No. 2017-CV-98, (Wis. Cir. Ct. Marinette Cnty. Mar. 16, 2018)(Order regarding attorney's fees and costs dated Apr. 3, 2018).

does not offer any services in the areas of labor or employment litigation. The respondent maintains that Potteiger's work in the area of employment law did not begin until 2018. The respondent suggests that Potteiger's fee should be $300 an hour, similar to Attorney Temeyer. Although the respondent does not make any specific argument regarding Attorney Luzi's fees, it suggests that his hourly rate be reduced as well, to $300 through September 30, 2017, $333 through May 31, 2019, and then $369 beginning on June 1, 2019. The respondent does not explain how it arrived at those numbers.

The commission believes that the hourly rates requested by the complainant's attorneys are reasonable. The complainant's attorneys provided supporting affidavits attesting to the reasonableness of their fees and, as stated above, an hourly rate determined based on affidavits from other practitioners in the locality is normally deemed to be reasonable. Further, the commission has experience reviewing attorney fee requests, and the hourly fees charged by the complainant's attorneys do not seem out of line for experienced attorneys practicing in the Milwaukee metropolitan area.

With respect to the argument that Attorney Potteiger does not have sufficient employment law experience to justify his fees, the commission notes that the respondent's contentions in this regard are speculative, based upon an assumption that Potteiger performed no employment related work before joining the Walcheske firm in 2018. Even presuming--without deciding--that this was the case, Potteiger indicates that prior to joining his current employment law firm he was in charge of the litigation section at Bass & Moglowsky, S.C., and had significant experience with pre-trial litigation and discovery. Those skills, even if not specifically related to employment law, would seem to warrant the hourly rates charged.

The respondent's second argument regarding the complainant's hourly rates is that the complainant's attorneys should not be able to recover attorney rates for what it classifies as "non-legal" work, such as drafting a damages spreadsheet, drafting and submitting a notice of appearance, communicating with a process server, and preparing documents and exhibits for hearing. The respondent contends that these items should be billed at a paralegal or legal secretary rate. The commission does not find this argument compelling. To begin with, it is not clear that the tasks identified by the respondent are necessarily clerical/non-legal in nature. Preparing exhibits for the hearing and drafting a statement of damages are certainly tasks that are appropriately performed by an attorney. And while it might be true that a paralegal or legal secretary could submit a notice of appearance or communicate with a process server, there is no requirement that the complainant's attorney use the services of these individuals or that the failure to do so requires reimbursement at a lower rate.

The commission has considered and rejected similar arguments in prior decisions. Most recently, in *Hill v. Stanton*, ERD Case No. CR201103151 (LIRC Sept. 26, 2014), the commission awarded fees at the attorney's hourly rate, noting that the respondent

had not cited to any legal authority for the proposition that fees could be reduced on a "failure to delegate" basis. The commission also observed that the complainant's attorney worked for a small firm that did not employ any junior associates or law clerks and whose only paralegal was used exclusively in support on Worker's Compensation matters. Consequently, the commission held that there was no basis for granting the reduction. *See*, *also*, *Kraemer v. County of Milwaukee*, ERD Case No. CR200800323 (LIRC Oct. 11, 2012)(rejecting an argument that tasks performed by counsel that are not strictly legal in nature cannot be included in the attorney bill).

Does the 2020 hourly rate apply to the entire proceeding?: Having concluded that the requested hourly rates are reasonable, a secondary question arises as to whether the entire attorney fee award should be calculated at the most recent hourly rate or whether the complainant's attorneys should be compensated at the various rates they were billing throughout the course of their representation. The complainant's attorneys are requesting reimbursement at the current hourly rate, while the respondent's attorneys are arguing against that approach.

The commission has in some prior cases awarded the most recent (and therefore highest) hourly rate for all of the work performed in order to compensate for the delay in the payment of attorney's fees. *See*, *for example*, *Neuman v. Hawk of Wisconsin, Inc.*, ERD Case No. 9130945 (LIRC Mar. 12, 1993). More recently, the commission awarded fees at the most recent amount billed, stating:

> In considering the question of what the appropriate hourly rate at which to calculate the fees in this matter should be, the commission notes that the complainant's attorneys have requested the same hourly rate throughout the entire duration of this lengthy litigation. An argument could certainly be made that the hourly fees that are deemed reasonable in 2018 would not have been considered reasonable when this litigation began in 2006. However, the respondent has been given an opportunity to object to the complainant's fee request but has not made this argument and has raised no challenge to the hourly rates proposed by the complainant's attorneys at any point in the process. Moreover, the commission recognizes that it may be appropriate to award more recent hourly rates to work performed earlier as a way of compensating the complainant's attorneys for the delay in receiving compensation. *See*, *Olson v. Phillips Plating*, ERD Case No. 8630829 (LIRC Feb. 11, 1992); *Watkins v. Milwaukee County*, ERD Case No. 7200640 (LIRC July 3, 1985)(awarding interest on the money the complainant paid in legal fees). Under all the circumstances, the commission is satisfied that the current hourly rate may reasonably be applied to the entire litigation.

Smith v. State of WI DWD, ERD Case No. CR2000602582 (LIRC Jan. 4, 2019).

In *Olson v. Phillips Plating*, cited in *Smith*, above, the commission noted that in ordinary cases resolved in a year or two, it will make little difference whether historic or current rates applied since the price levels will vary only slightly from those prevailing when the litigation first got under way, but that current rates can overcompensate and provide plaintiffs a considerable windfall where the average billing rates grow much faster than inflation.

In the instant case, the respondent argues that awarding fees at the current rate of $400 an hour would, in fact, result in a windfall. It maintains that the complainant's attorneys have not provided documentation to support the increase in their rates, which the respondent describes as "dramatic." Upon consideration, the commission is inclined to agree. The complainant's attorneys have been involved in this litigation for three years, during which time Attorney Potteiger's fees increased roughly 15 percent, from $350 to $400 an hour, and Attorney Luzi's fees increased approximately 33 percent, from $300 to $400 an hour. While the commission does not question the reasonableness of the hourly fees charged, the fee increases are in excess of what can be justified by the normal rate of inflation for attorney's fees during that time and appear to be related to other factors. On this point, Potteiger explained in an affidavit that he believed his initial rate of $350 an hour was not commensurate with prevailing market rates and that, therefore, the firm raised its rates to reflect current market rates. Luzi has not provided any explanation for the increases in his fees, but the commission presumes that a 33 percent fee increase over a three-year prior was also related to factors other than inflation; Luzi's $350 hourly rate was raised to $400 an hour at the same time that Potteiger's fees were increased. The commission also notes that the increase to $400 an hour occurred just four months prior to the end of the litigation and that the vast majority of the work was performed when the attorneys' hourly rates were considerably lower. Given these circumstances, the commission believes that it would be most reasonable and equitable to award attorney's fees at the rates charged at the time the work was performed rather than at the most recent rate.

Amount of time reasonably expended: For purposes of determining the "lodestar" figure, the attorney fee applicant bears the burden of documenting the appropriate hours expended. Counsel should at least identify the general subject matter of time expenditures. *Olson v. Phillips Plating*, ERD Case No. 8630829 (LIRC Feb. 11, 1992).

The complainant began this matter *pro se*. He filed his own complaint and represented himself during an unsuccessful attempt at mediation. Only after mediation failed and the matter was turned over to an equal rights officer to conduct an investigation did the complainant retain an attorney. That attorney, Timothy Edwards, represented the complainant at the probable cause hearing and until the complainant received a no probable cause decision from the administrative law judge. The complainant then filed his own appeal to the commission and drafted his own brief without benefit of counsel. The commission found probable cause and remanded

for a hearing on the merits. At this point the complainant's current attorneys entered the picture. They began their representation of the complainant in June of 2017.

The complainant's attorneys contend that they have spent 494.9 litigating this matter: Attorney Luzi spent 114.8 hours, Attorney Potteiger spent 339 hours, and Attorney Temeyer spent 42.8 hours. They have submitted a detailed billing statement setting forth their billable activity.

The respondent has argued that the time spent on this litigation is excessive and recommends a number of specific reductions:

1) The respondent notes that, upon taking the case, Attorney Luzi spent 24 hours reviewing the case file, plus 2.9 hours reviewing the probable cause hearing and taking notes. The respondent argues that this is excessive.

The respondent has not provided any alternative amount of time that it believes would be more reasonable than the amount charged and, upon review of the billing statement, the commission is not inclined to order a lesser amount. The complainant's attorneys became involved in this case after the probable cause hearing was completed. In order to get up to speed, they had to review the complaint, the amended complaint, and the initial determination, as well as pre-hearing discovery, consisting of interrogatories, requests to admit, depositions, and medical records. The transcript from the probable cause hearing was 284 pages in length with 32 exhibits. The commission does not believe that the time charged was excessive in order to review and take notes on the material referenced above.

2) The respondent also points out that Attorney Potteiger spent 69.6 hours in hearing preparation and that Attorney Luzi spent another 25.3 hours in hearing preparation. The respondent contends that this is excessive and duplicative.

Again, the respondent has not suggested a specific number of hours that would have been more reasonably spent on hearing preparation, and the commission is not convinced that the amount of preparation time was excessive. The hearing lasted two days and included nine witnesses, three of whom were medical witnesses. Hearing preparation included drafting questions for the witnesses, including expert testimony outlines, reviewing exhibits and discovery responses, and prepping the complainant for the hearing. The commission sees no reason to believe that the complainant's attorneys duplicated their efforts or that the time spent on this enterprise was excessive.

3) The respondent points out that Attorney Potteiger spent 29.6 hours and Attorney Luzi spent 1.2 hours on a 14-page responsive brief to the commission, excluding the time spent arguing the unsuccessful failure to rehire and retaliation questions. The respondent maintains that this was excessive. As above, the respondent has not explained how much time it believes would have been reasonable, and the commission

does not think 30 hours is necessarily excessive for preparing the complainant's responsive brief.

4) Next, the respondent points out that both Attorney Potteiger and Attorney Luzi attended the merits hearing even though only one, Potteiger, did the questioning. It further points out that on the second day of hearing Luzi did not even note his appearance on the record. The respondent contends that there is no reason to pay second chair. The commission agrees. The complainant's attorneys submitted an unsolicited reply brief, in which they responded to several of the respondent's arguments for fee reduction but provided no explanation as to why the second chair was needed at the hearing or what role Luzi played. Given that, the commission finds no basis to compensate the complainant's attorneys for the time spent by Luzi accompanying Potteiger to the hearing. This results in a reduction of 22 hours at Luzi's rate in effect at the time ($350 an hour).

The respondent further maintains that the time Attorney Luzi spent preparing for and attending the hearing should not be compensable. Here, the commission disagrees. Billing notes supplied by the complainant's attorneys indicate that Luzi reviewed files, discovery responses, and exhibits, helped draft expert testimony outlines and witness questions, and that he met with the complainant to help prepare for the hearing. All of those tasks appear to be necessary and compensable, whether or not Luzi personally attended the hearing.

5) The respondent also points out that Attorney Luzi charged for drive time to and from Johnson Creek two times on October 3, 2017. It maintains that the complainant's attorney is attempting to recover twice for the same activity and that this should be disallowed.

The commission agrees, and further notes that there are three separate occasions, October 3, 2017 being only one of them, when the complainant's attorneys traveled from their offices in Brookfield to meet with the complainant in Johnson Creek. (It is not clear why these meetings take place in Johnson Creek, as the complainant resides in Verona.) Absent any explanation as to why it was necessary to meet with the complainant in Johnson Creek, rather than at the attorney's office in Brookfield, this travel time seems unnecessary and is disallowed. This results in a reduction of 5.2 at Attorney Luzi's rate in effect at the time ($350 an hour) and 1.2 hours at Attorney Temeyer's $300 hourly rate.[7]

[7] For reference, the following travel expenses are disallowed:

9/12/2017	Scott S. Luzi	Drive time to and from Johnson Creek, WI (from W&L Office in Brookfield, WI) for meeting with client	1.20
10/3/2017	Scott S. Luzi	Drive time to and from Johnson Creek, WI (from W&L office in Brookfield, WI)	1.20

6) Finally, although this was not identified by the respondent, the commission notes that the complainant's attorneys billed for time spent summarizing the complainant's Unemployment Insurance appeal (.8 hours on March 22, 2018), as well as for time spent reviewing an NLRB settlement (.1 hours on June 15, 2018). The commission has traditionally disallowed time spent on matters outside of the case that is before the Equal Rights Division. *See*, *Fields v. Cardinal TG Co.,* ERD Case No. 199702574 (LIRC Feb. 16, 2001). This results in a reduction of .9 hours at Attorney Potteiger's rate in effect at the time ($350 an hour).

Partial success reduction: The complainant prevailed on his reasonable accommodation and discharge claims, but not on his failure to re-hire claims. Where a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole multiplied by a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith. *Hensley v. Eckerhardt*, 461 U.S. 424, 436 (1983). In determining a fee award the most critical factor is the degree of success obtained. *Id.* There is no precise rule or formula for making this determination. An attempt may be made to identify specific hours that should be eliminated, or the award may simply be reduced to account for the limited success. 461 U.S. at pp. 436-437.

In this case, the complainant's attorneys maintain that they recorded their hours spent on the failure to re-hire claim (in the amount of 53.40 hours) separately and that they are not seeking reimbursement of those amounts. The commission notes that the complainant's attorneys have not supplied a separate billing statement showing their work on the unsuccessful claim, and the commission is unable to independently review the billing records associated with that claim. However, the respondent has not raised any objection to the manner in which counsel has handled the billing for the unsuccessful claim, and given the extremely limited amount of new evidence associated with the failure to rehire claim, the commission finds the complainant's attorneys' contention that it added only 53 hours to the total litigation

		for meeting with client	
10/3/2017	Scott S. Luzi	Meeting with client (and drive time to Johnson Creek, WI)	1.20 (2.20 requested)
10/3/2017	Kelly L. Temeyer	Meeting with client (and drive time to Johnson Creek, WI)	1.20 (2.20 requested)
3/16/2018	Scott S. Luzi	Travel time to and from Johnson Creek, WI and W&L office in Brookfield, WI for meeting with client	1.60

to be reasonable and believable. For these reasons, no further partial success reduction is ordered.

Total Fees: After deleting the items that are disallowed, per the discussion above, and adjusting the attorneys' hourly rates to reflect the rates contemporaneously charged rather than the most current hourly rates, the commission concludes that the complainant is entitled to a total of $162,125 in reasonable attorney's fees.[8]

C. Costs

"Make whole" relief includes reimbursement for costs reasonably incurred in pursuing the litigation. In this case, the complainant's attorneys incurred significant costs, including the cost of deposition transcripts, medical records, hearing transcripts, copying exhibits, witness fees, service charges, parking and mileage, for a total of $10,318. The complainant's attorneys are also seeking $2,192 in costs that the complainant expended prior to retaining an attorney. The complainant paid a witness fee and ordered a transcript.

The respondent has not challenged the complainant's costs, and the commission sees nothing in the bill of costs that should not be compensable. It, therefore, orders payment of $12,510.47 in costs associated with this matter.

NOTE: Prior to reversing, the commission consulted with the administrative law judge who held the hearing in order to obtain her impressions of the demeanor of the witnesses. The only demeanor impression the administrative law judge had to offer was with respect to Andy Balch, who the administrative law judge indicated was not straightforward or direct in his testimony. The commission's reversal does not hinge on a differing assessment of Mr. Balch's credibility. The commission reverses because it believes the respondent had enough information to understand that the complainant was requesting a disability accommodation and that it had an obligation to provide a reasonable accommodation that would have enabled him to remain employed.

[8] The breakdown of those fees is as follows:

Attorney Potteiger: 273.5 hours @ $350 = $95,725; 64.6 hours @ $400 = $25,840
Attorney Luzi: 45.7 hours @ $300 = $13,710; 36.6 hours @ $350 = $12,810; 5.1 hours @ $400 = $2,040
Attorney Temeyer: 40 hours @ $300 = $12,000

cc: David M. Potteiger
Scott S. Luzi
Ruth M. Bauman
Katie D. Triska

Editor's Note: Appealed to Circuit Court. Affirmed, October 12, 2021. Appealed to Court of Appeals. Affirmed, *Wingra Redi-Mix Inc. v. LIRC and Gilbertson,* 2023 WI App 34, 408 Wis. 2d 563, 993 N.W.2d 715. Petition for Supreme Court review denied May 21, 2024.