

State of Wisconsin



Labor and Industry Review Commission

<p><b>Irby Alexander</b>, Complainant</p> <p><b>County of Milwaukee</b>, Respondent</p> <p>ERD Case No. CR201901017 EEOC Case No. 26G201900765C</p>	<p><b>Fair Employment Decision<sup>1</sup></b></p> <p><b>Dated and Mailed:</b></p> <p>May 8, 2024</p> <hr/> <p>alexirb_err.doc:103</p>
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The decision of the administrative law judge 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 based upon his disability.
3. 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

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<sup>1</sup> **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>.

insurance and other benefits, from April 12, 2019 until May 18, 2019. 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.

4. That the respondent shall pay to the complainant reasonable attorney's fees and costs incurred in pursuing this matter in the total amount of \$27,638.34. A check in that amount shall be made payable jointly to the complainant and his 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 the 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/  
\_\_\_\_\_  
Georgia E. Maxwell, Commissioner

### **Procedural Posture**

This case is before the commission to consider the complainant's allegation that the respondent violated the Wisconsin Fair Employment Act ("WFEA") by discriminating against him in terms or conditions of employment because of his disability, refusing to reasonably accommodate his disability, and terminating his employment because of his disability. An administrative law judge ("ALJ") for the Equal Rights Division ("ERD") of the Department of Workforce Development held a hearing and issued a decision. The ALJ found that the respondent had discriminated against the complainant by refusing to reasonably accommodate his disability, but dismissed the complainant's complaint that his employment was terminated because of his disability, finding instead that the complainant had quit. The ALJ did not address the complainant's assertion that he was constructively discharged, finding that constructive discharge had not been properly pled. The complainant and respondent each filed a timely petition for commission review. The complainant seeks review of the finding that he was not discharged in violation of the WFEA, while the respondent seeks review of the conclusion that it violated the WFEA by failing to accommodate the complainant's disability.

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:

### **Modifications**

1. Paragraphs 84 and 85 of the ALJ's FINDINGS OF FACT are deleted, and paragraphs 86 and 87 are renumbered accordingly.
2. Paragraph 6 of the ALJ's CONCLUSIONS OF LAW is deleted and the following paragraph is substituted therefor:

The Complainant has failed to prove by a preponderance of the evidence that the Respondent violated the WFEA by terminating the employment of the Complainant, either directly or by constructive discharge, because of his heart condition disability.

3. Paragraph 7 of the ALJ's CONCLUSIONS OF LAW is deleted.
4. The ALJ's ORDER is deleted and is replaced with the Order contained on pages 1 through 3 of this decision.

5. The second and third paragraphs of the section entitled, “Termination and Constructive Discharge” on page 26 of the ALJ’s MEMORANDUM OPINION are deleted and the following paragraphs are substituted therefor:

Alternatively, the complainant asserts that the respondent’s recommendation of termination resulted in his constructive discharge. The evidence presented, however, does not support a finding that the complainant was constructively discharged. Although the complainant believed that the Personnel Review Board was likely to uphold the recommendation, the evidence offered at hearing did not establish that the Personnel Review Board hearing process was a sham or that his termination was a foregone conclusion. The complainant also argued that he believed his retirement benefits might be affected if his employment was terminated. However, he did not establish by a preponderance of the evidence that this was the case.

The complainant did not establish that the respondent terminated his employment or that he was constructively discharged. Accordingly, the complainant’s claim that he was separated from employment in violation of the WFEA is dismissed.

#### **Memorandum Opinion**

The complainant worked as a corrections officer at the Milwaukee County House of Corrections beginning in 2000. His duties included supervising, safeguarding and restraining inmates. To maintain the necessary level of continuous staffing, the respondent has a policy that requires corrections officers to work mandatory overtime and that sets out the process for determining which officer will be assigned to which shift. The policy also provides a number of ways that an officer may get out of working an assigned mandatory overtime shift, including by finding someone to cover the shift, by using sick leave, and by performing training for new officers. The respondent’s policy defines overtime as work in excess of 40 hours per week. Mandatory overtime sometimes occurs on a day that an officer is already working, by extending his or her shift, causing the officer to work longer than eight hours on that day. At other times, it occurs on a day that the officer was scheduled to have off, in which case the officer would work overtime without working more than eight hours in a day.

In 2002, the complainant began using intermittent federal Family and Medical Leave Act (FMLA) leave for a colon condition. Beginning in 2015, the respondent used a third-party agency to process its FMLA claims. Through that process, the complainant was approved for up to 480 hours of intermittent FMLA leave per year through 2019 for his colon condition, which he could access by calling in to report the

use of intermittent leave and then completing the required paperwork for the outside agency.

In May of 2018, the complainant suffered a heart attack and underwent surgery. The respondent's outside agency approved FMLA leave for the complainant for two weeks following the heart attack. The agency also approved intermittent FMLA leave due to the complainant's heart condition from May 29, 2018 through September 1, 2018. The FMLA leave allowed the complainant to work a reduced schedule that did not include working mandatory overtime that would result in him working more than eight hours in a single day. He was still expected to work overtime when asked to do so on a day that he was not already scheduled to work.

As September approached, knowing that he was close to exhausting his available FMLA leave, the complainant requested that the eight-hour workday limitation be extended for an additional two months, as an accommodation under the WFEA for his heart condition. At the respondent's request, the complainant submitted medical documentation to substantiate his need for this leave. The respondent initially denied the complainant's request on the basis that granting a permanent accommodation of this nature would pose an undue hardship. The respondent suggested that the complainant be placed, instead, in the respondent's job relocation program. The complainant had previously explored other jobs with the county, with the help of human resources, and it had appeared at that time that there were no other jobs available for which he was qualified that offered the same pay and benefits.

On October 4, 2018, the complainant submitted a note from his cardiologist which stated, "For 2 months, should work only 8 hours per day." The respondent agreed to extend the accommodation for a two-month period, through December 18, 2018. Prior to the expiration of the temporary accommodation, the complainant talked to the respondent's Program Manager for Leave Administration and Compliance, Susan Chase, about extending his accommodation due to his heart condition. On December 13, 2018, Chase sent a letter to the complainant asking him to submit medical documentation supporting his need to limit his workdays to eight hours. The letter included a message from Chase to the complainant's cardiologist that stated, in part,

"the position that Mr. Alexander holds is Correctional Officer. His physical presence is an essential function of his position and Correction Officers must be present until their relief officer arrives. Accommodations are made on a case by case basis, however it is clear that this is a very difficult request to extend beyond what has already been done."

The letter requested that the doctor answer two questions, to which he replied as follows:

The department will consider the request but would like your medical opinion as to:

- 1) Whether such an extension would allow Mr. Alexander to resume the essential functions of his position upon his return—including mandated overtime when necessary in the coming months?

*Answer: Yes, but he is not able to do mandatory overtime*

- 2) How much additional time is necessary?

*Answer: 12 months*

In January of 2019, the outside FMLA administrator approved the complainant's 2019 FMLA leave for his colon condition. On January 23, 2019, a captain with the respondent's internal affairs division sent an email to the County's corporation counsel inquiring about the complainant's leave status, as he was still listed as having a 40 hour a week restriction in place. The corporation counsel forwarded the captain's message to Chase who replied that the complainant continued to have intermittent FMLA leave but that his disability accommodation had ended on December 18, 2018.

The County never relayed to the complainant its decision to deny his disability accommodation request. After December 18, 2018, consistent with the accommodation he had requested, the complainant was not assigned work in excess of eight hours per day. Accordingly, the complainant believed that his accommodation request had been approved to continue.

On March 9, 2019, the complainant received a notice that he was to work four hours of additional overtime on March 12, 2019, a day on which he was already scheduled to work eight hours. Working overtime on that day would put him in violation of his medical restriction due to his heart condition. The complainant refused to sign the notice and explained that he had a disability accommodation in place.

On March 13, 2019, the complainant sent an email to Chase, requesting that she explain to the complainant's supervisors that he had an approved disability accommodation. In her reply, Chase acknowledged receipt of the complainant's medical documentation but stated that the accommodation request was denied because the respondent could not remove "essential job functions as an ADA

accommodation.”<sup>2</sup> She said that the complainant had been approved for 480 hours of FMLA leave and that he should use that for his “serious health condition.”

On March 26, 2019, the complainant was again given a mandatory overtime notice. This one was for a day on which he was not already scheduled to work, which meant he would not have to work longer than eight hours. He signed that notice and agreed to the overtime. However, he did not work overtime on that day because he called in sick.

On March 31, 2019, the complainant was given another mandatory overtime notice for a day on which he was already scheduled to work eight hours. The complainant refused to sign the notice or work that overtime shift because it conflicted with his restriction. The complainant was then put on paid suspension, pending an internal affairs investigation. On April 4, 2019, Lieutenant Gerry Wolf, Internal Affairs Investigator for the respondent, issued a report which found that the complainant had violated the respondent’s insubordination and overtime policies. The respondent’s investigation did not address the complainant’s need for an accommodation or the respondent’s ability to craft an accommodation that would work for the complainant without causing a hardship for the respondent. The ALJ found that the respondent had discriminated against the complainant by refusing to reasonably accommodate his disability, but dismissed the complainant’s complaint that his employment was terminated because of his disability, finding instead that the complainant had quit.

On April 5, 2019, an attorney for the complainant sent a letter to Chase to clarify the complainant’s restrictions. In the letter, the attorney explained that the complainant could work overtime as long as it was on a day when he was not already working eight hours. The attorney asked Chase to review the accommodation request quickly, given that the complainant was facing discipline. The respondent never responded to that request.

On April 10, 2019, Lieutenant Wolf notified the complainant that the internal affairs investigation had sustained the finding that the complainant had committed rule violations. A hearing was held before Superintendent Hefermann, who concluded that the complainant’s employment should be terminated effective immediately. On April 12, 2019, Hefermann’s written findings were provided to the complainant in a document entitled, “NOTICE OF HEARING (DISCHARGES).” The notice informed the complainant that he was suspended without pay from duty until a hearing before the Milwaukee County Personnel Review Board (“PRB”).

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<sup>2</sup> The instant case does not involve an interpretation of the Americans with Disabilities Act (hereinafter “ADA”), but of the Wisconsin Fair Employment Act, which contains no reference to “essential job functions.” See, *Leroy L. Fields, Jr., v. Cardinal TG Co*, ERD Case No. 199702574 (LIRC Feb. 21, 2001).

Prior to 2013, the sheriff's office handled charges before the PRB, and those charges were sometimes rejected by the PRB. In 2013, the respondent created an internal affairs division, and between that time and the date of the hearing in this case the PRB did not reject any termination charges brought before it.

On April 12, 2019, the complainant filed a complaint with the ERD asserting discrimination based on disability, refusal to accommodate a disability, and termination as a result of disability. In his statement of discrimination, the complainant stated, in relevant part:

“On or about March 31 - suspended with pay pending I.A. investigation. I was suspended for attendance work rules and 2 insubordination (2 cases).

“On 2/11/2019 I was terminated effective immediately pending PRB review.”

The complainant did not attend the April 23, 2019, PRB hearing, believing that if he were to attend and the termination was upheld by the PRB, he would lose certain retirement benefits. Instead, the complainant retired from the County, effective May 18, 2019.

On November 15, 2019, an ERD equal rights officer found probable cause to believe that the respondent had violated the WFEA on all three grounds alleged in the complaint, including termination of the complainant because of disability. The case was certified to a hearing on the merits and both parties presented evidence on all issues, including the alleged termination.

Refusal to reasonably accommodate a disability:

In a refusal to accommodate case, a complainant must first establish that he or she has a disability, within the meaning of the WFEA. In this case, the parties have stipulated that the complainant has a heart condition which constitutes such a disability. Next, the complainant must establish that the disability prevented him from adequately undertaking the job-related responsibilities of the job such that an accommodation was necessary. In this case, the evidence established that the complainant's disability prevented him from working in excess of eight hours a day, thereby interfering with his ability to perform assigned overtime. Finally, the complainant's burden is to establish 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). In this case, there is no doubt that a reasonable accommodation

existed. The reasonable accommodation was a waiver of overtime assignments on days in which the complainant was already scheduled to work a full shift. The complainant did not require a waiver from working all overtime and, in fact, when he was assigned to work overtime on a day that he was not already scheduled to work, he signed the overtime mandate notice, indicating his acceptance of responsibility to work that assigned overtime shift. The complainant's only requirement relative to his heart condition was that he not work more than eight hours in a day.

The complainant having established that a reasonable accommodation existed, the burden then shifts to the respondent. The WFEA 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). The respondent has not demonstrated that granting the requested accommodation would cause hardship. The respondent provided the requested accommodation on a temporary basis for more than six months, first providing the accommodation explicitly by granting the request, and later tacitly by continuing to not assign the complainant overtime on days that he had already worked a full shift, even after the expiration of the originally granted temporary accommodation. The evidence in this case does not establish that the respondent suffered harm during the time that the accommodation was temporarily in effect, or that extending it as a permanent accommodation would cause hardship.

The respondent argues that its provision of a temporary disability accommodation should absolve it of liability for its later refusal to extend the accommodation. Had the trial period shown the accommodation to be unworkable, that argument would be persuasive. However, during the period that the respondent accommodated the complainant, it did not suffer hardship as a result. Rather, the temporary accommodation period in this case established that the requested accommodation was not burdensome to the respondent. The respondent does not meet its burden of proof on hardship where, as here, it provided a disability accommodation on a temporary basis and was "unable to point to significant evidence in the record that demonstrates hardship in this particular situation, rather than speculation or theoretical complaints." *Hutchinson Technology, Inc. v. Labor and Industry Review Commission*, 273 Wis. 2d 393, 682 N.W.2d 343 (2004). As in *Hutchinson*, the respondent in this case accommodated the complainant's disability for several months without any significant difficulties and did not introduce persuasive evidence that allowing the complainant to continue to work a modified schedule would cause hardship to its business. Although the respondent argued before the ALJ that extending the temporary accommodation would cause it hardship, it did not articulate any concrete basis for this allegation, and it did not reiterate this assertion in its brief to the commission. Without a showing that the temporary accommodation

would have caused hardship if it was continued, the respondent's refusal to extend the accommodation was in violation of the WFEA.

The respondent argues that it is not a violation of the WFEA to refuse to accommodate a disability, unless the refusal to accommodate was itself based on animus toward the complainant because of his disability. This understanding of the law is incorrect. The WFEA provides that a refusal to provide a reasonable accommodation is an act of employment discrimination:

(1) Employment discrimination because of disability includes, but is not limited to:

...

(b) 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 program, enterprise or business.

Wis. Stat., § 111.34(1)(b).

Animus is not a required element in a refusal to accommodate claim. "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." *Gilbertson v. Wingra Redi-Mix, Inc.* ERD Case Nos. CR201400424 and CR201700698 (LIRC Dec. 10, 2020).

The respondent also argues that the complainant should have used FMLA leave as an accommodation under the WFEA. However, the complainant's request for a disability accommodation under the WFEA invoked rights under that law that are different from the leave available under the FMLA. At the time of his request for an accommodation for his heart condition, the complainant was already approved for intermittent FMLA leave for a different health concern. Requiring him to use FMLA leave to cover the times when he was unable to work overtime hours would not have been a reasonable accommodation because it would have required that he further draw down his available leave as a condition of remaining employed. *See, Satorius v. State of Wis. Dept. of Corrections*, ERD Case No. CR201301969 (LIRC Jan. 31, 2017).

Consideration of the constructive discharge claim:

In his complaint, filed while charges were still pending against him before the PRB, the complainant alleged that his employment had been terminated in violation of the WFEA. While the complainant did not specifically allege that his discharge amounted to a constructive discharge, a claim of constructive discharge is a type of termination

of employment and need not be pled separately. The equal rights officer for the ERD found probable cause to believe that the complainant had been discharged in violation of the WFEA, and at the hearing in this case, both parties presented evidence regarding the circumstances of the complainant's separation from employment with the respondent. That the complainant was pursuing a theory of constructive discharge was clear both before and during the hearing. Thus, both termination of employment by the respondent and constructive discharge are properly before the commission in this case.

Termination of employment by the respondent:

The complainant argues that the discharge was complete when the respondent informed him of its decision to terminate, subject only to the appeal process before the PRB. The commission has held in unemployment cases that quitting in anticipation of a discharge may be considered an involuntary discharge, where the availability of a subsequent hearing was shown to be simply *pro forma*. See, e.g., *Stahlman v. Whitnall School District*, UI Hearing No. 06002990MD (LIRC, Jan. 11, 2007). However, the complainant has made no such showing in this case.

The evidence introduced at the hearing established that, prior to 2013, the PRB sometimes overturned the recommendation to terminate an employee's employment following a final hearing before the Board, but that after changes to the process in 2013, the Board did not reject any recommended terminations. However, the commission is unconvinced that this fact alone is sufficient to establish that there was no realistic possibility the complainant would have retained his employment after the date of the PRB hearing. The complainant did not offer any evidence regarding how many discharges were appealed to the PRB after 2013. Without this information, it is not possible to draw any conclusions regarding the futility of an appeal to the PRB. Although there may be situations where a recommendation for discharge could be considered a termination because the evidence establishes that a recommendation, once made, is final, this is not that case. The evidence in this case is insufficient to support a finding that the mere filing of Charges for Discharge constituted a termination. Accordingly, the complainant's complaint that his employment was directly terminated by the respondent is dismissed.

Constructive discharge:

A finding of constructive discharge contemplates "working conditions so difficult or unpleasant that a reasonable person confronted with them would feel compelled to resign." *Cole v. Northland College*, ERD Case No. 199802086 (LIRC March 19, 2001), citing *Bourque v. Powell Electrical Mfg. Co.*, 617 F.2d 61 (5th Cir. 1980). In this case, the complainant asserts, without persuasive evidence, that if he had not quit, and if the PRB had terminated his employment, he would have received a reduced retirement pension as a result. He contends that his resignation therefore amounted to a constructive discharge. This argument fails for two reasons. First, as discussed

above, the complainant failed to establish that the hearing before the PRB was simply *pro forma* and that the employer would have terminated his employment, had he not quit. Second, the complainant failed to establish that his retirement benefits would have been reduced as a result of the termination, had that event happened.

The working conditions faced by the complainant were not so unpleasant as to be intolerable. The complainant was on leave at the time he resigned, and had he not resigned, he would have had the opportunity to present his version of the situation to the PRB. Under the circumstances, a reasonable person would have remained employed and awaited the final decision of the PRB. Accordingly, the complainant's complaint that his resignation amounted to a constructive discharge in violation of the WFEA is dismissed.

Attorney fees:

Following a hearing before the ALJ, the complainant's attorney requested approval of attorney fees in the total amount of \$30,532.50. The respondent did not object to the number of hours or the hourly rate requested by Attorney Radtke, but suggested that the total award should be reduced by 50% due to partial recovery. Following the reasoning in prior LIRC cases, the ALJ instead reduced the requested fees by 33% and awarded a total of \$20,456.78. In its petition to the commission, the respondent has renewed its request for a 50% reduction in fees, but it has not developed this argument and has not explained why the 33% reduction arrived at by the administrative law judge was not appropriate. The commission therefore declines to further reduce the amount of fees awarded by the ALJ for work extending through the date of the hearing.

The complainant's attorney has requested an additional \$10,718.75 for her work before the commission in this case. The commission finds that the hourly rate requested by the complainant's attorney and the number of hours for which the complainant's attorney requests reimbursement are reasonable, and it agrees with the ALJ's analysis on the partial recovery in this case. Therefore, the commission reduces the complainant's fee request by 33% and awards \$7,181.56 for work before the commission, for a total of \$27,638.34 in attorney fees and costs associate with litigating this matter.

MARILYN TOWNSEND, Commissioner (concurring):

I write separately because, although I concur with the majority's findings and conclusions that discrimination occurred, I would order the respondent to comply with the commission's Order within 60 days of the date the commission's decision is issued. This would provide the respondent with sufficient time to comply with the commission's order, but would not unduly delay relief for the complainant, whom the commission has found was the victim of discrimination. Under such an order, if the respondent chose to seek judicial review, and sought a stay pursuant to Wis. Stat. § 227.54, the parties would have the opportunity to be heard as to whether a stay was appropriate, and the circuit court would have wide discretion to decide whether to issue a stay and to determine the conditions upon which a stay would be granted.

/s/

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Marilyn Townsend, Commissioner

cc: Sandra Radtke, attorney for the complainant  
Kathryn West, attorney for the respondent