State of Wisconsin

Labor and Industry Review Commission

Keith Martin, Complainant **Milwaukee Board of School Directors**, Respondent ERD Case No. CR201801853 EEOC Case No. 443201801423C	**Fair Employment Decision**[1] **Dated and Mailed:** June 6, 2024 martike_err.doc:111

The decision of the administrative law judge is **reversed**. Accordingly, the commission issued 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 on the basis of disability.

3. That the respondent, if it has not already done so, shall offer the complainant instatement 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

[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.

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 the date the respondent discharged the complainant until such time as the complainant resumes employment with the respondent or would have resumed 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 during each calendar quarter for any interim earnings from work the complainant would not have performed had he remained employed with the respondent. 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 and costs incurred in pursuing this matter in the total amount of $58,840. A check in that amount shall be made payable jointly to the complainant and his attorney, Laura Lindner, and delivered to Ms. Lindner.

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/

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 his disability, in violation of the Wisconsin Fair Employment Act (hereafter "Act"). An administrative law judge for the Equal Rights Division of the Department of Workforce Development held a hearing and issued a decision finding that no discrimination occurred. The complainant filed a timely petition for commission review.

The commission has considered the petition and the positions of the parties, and it has reviewed the evidence submitted at the hearing. Based on its review, the commission makes the following:

Findings of Fact

1. Keith Martin (hereinafter "complainant") is an individual who suffers from generalized anxiety disorder.

2. The complainant has a history of treatment for anxiety, insomnia, and depression. His mental health issues began in the early 1990s when he was robbed at gunpoint while working as a teller. He sought treatment including therapy and medications. His symptoms recurred in or around 2002. He again sought treatment. His primary care physician, Dr. Schwind, referred the complainant to a psychiatrist, Dr. Centena, who provided treatment which included medication and referrals to other providers for therapy.

3. The complainant began working for the Milwaukee Board of School Directors (hereinafter "respondent") as a paraprofessional in 2004. At that time, he was under treatment with Dr. Centena, but his symptoms were under control.

4. The complainant's work day for the respondent was from 7:25 a.m. to 1:55 p.m. Monday through Friday, approximately 30 hours per week.

5. For the 2015-2016 school year, the complainant was assigned to work in a classroom of primary students (3 to 5 years of age) with behavioral disorders.

6. The complainant continued to work in the primary classroom with students with behavioral disorders in the 2016-2017 school year. The classroom teacher put the complainant in charge of the two most difficult students in the class while he taught the remaining five students.

7. The complainant's stress level increased during the 2016-2017 school year, and he began to experience symptoms of anxiety including difficulty sleeping. He used his paid time off to decompress and recoup in an attempt to keep his anxiety symptoms from getting worse.

8. On Friday April 28, 2017, the complainant met with Mr. Hayes and Dr. Coke, two assistant principals for the respondent. Mr. Hayes informed the complainant he would be moved to a different classroom beginning the following Monday, May 1, approximately 5 weeks before the end of the school year. In the new room, he would be working with students in grades 4 through 6 with behavior disorders. The classroom teacher in that room was a long-term substitute. The complainant was concerned about moving to the new room because he did not know the students in the room. He was aware that children like structure and familiarity and that it takes time to build a rapport with them. He was concerned about being put into the new room with students with behavioral issues with so little time left in the year. The complainant asked that this assignment change be reconsidered. He also informed Mr. Hayes and Dr. Coke that he was not sleeping.

9. The complainant did not sleep well over the weekend as he was concerned about what would happen on Monday. He felt the new assignment was not a good fit for him.

10. On May 1, 2017, the complainant reported for work as usual. He met the two students he had primarily worked with that year at the bus stop, walked them to breakfast, and then gathered the full class and walked them to their classroom, all in accordance with his usual practice. In the classroom, he met the individual who was to be his replacement in that room. The complainant was feeling stress and "in turmoil."

11. The complainant went to talk to the school's principal, Ms. Corona, and Mr. Hayes about his concerns regarding being moved to the new classroom. Ms. Corona informed him that he was needed in the new room. The complainant refused the assignment and said that he would not go into the new room. He informed Ms. Corona and

Mr. Hayes he was not sleeping well, was feeling stress and anxiety, was overwhelmed, and could not take the new assignment. The conversation with the respondent exacerbated the complainant's symptoms; his heart and thoughts were racing. Because of the complainant's mental health history, he recognized the symptoms he was experiencing and knew he could not handle the new assignment. He informed Ms. Corona that he needed to leave and "would take some time off under stress disability." She agreed he should leave the school at that time.

12. The complainant left the school, went home, and called Dr. Centena, the psychiatrist he had seen previously, but learned that Dr. Centena had recently passed away. The complainant then called Dr. Schwind, his primary care doctor, and made an appointment for the following day.

13. On May 2, 2017, the complainant called the respondent at approximately 4:30 a.m. and left a voicemail informing it he would not be at work that day. He went to his appointment with Dr. Schwind and discussed his anxiety with the doctor. The doctor agreed a leave from work was appropriate and recommended a two week leave. However, the doctor acknowledged that the complainant's mental health issues were not within his area of expertise and referred him to a behavioral health specialist, nurse practitioner Bradley Smith, who would be able to form a plan to get his anxiety under control. Because Mr. Smith did not have an available appointment until May 30, 2017, Dr. Schwind extended the complainant's leave until that date. Dr. Schwind did not prescribe any medication to help with the complainant's anxiety on May 2.

14. On May 3, 2017, at approximately 9:00 a.m., the complainant called the respondent and left a voicemail informing it he would not be at work that day. He also indicated he had obtained a doctor's note excusing him from work from May 1, 2017 through May 30, 2017 and informed the respondent that he would send that note to it in the mail. On May 4, 2017 the complainant mailed the doctor's note to the respondent.

15. During the month of May, the complainant continued to suffer from anxiety, had difficulty sleeping, and was not able to perform the functions of his job with the respondent.

16. During the complainant's employment, the respondent had a policy that required staff members to call in each day they would be absent unless they were on an approved leave. The complainant was aware of this policy.

17. When an employee requested a disability related job accommodation, the respondent's typical practice was to handle the request internally in its Employee Rights Division. In 2017, the Employee Rights Administration manager, Mr. Gorton, handled such requests directly with the requesting employee. Mr. Gorton was not

involved in the complainant's request for leave and the respondent did not consider whether it should grant the complainant's request for leave using its internal disability accommodation process.

18. On May 9, 2017, Ms. Speaks, an employment relations specialist for the respondent, sent the complainant a letter indicating he was absent without leave beginning May 2, 2017. (The letter stated that the complainant had not contacted the respondent since May 1. However, he had called in to report absences on May 2 and May 3.) The letter provided that the complainant was not allowed to report to work until Ms. Speaks indicated otherwise. It directed the complainant to provide a written explanation regarding why he had not followed the respondent's call in procedures and to provide medical documentation verifying that his absences were medically necessary by May 24, 2017.

19. The complainant called Ms. Speaks and asked her if she had received the medical excuse he had already mailed in. She indicated she had received it, but that she still needed the complainant to provide an explanation as to why he was absent and why he had failed to call in each day he was absent. She did not request additional medical documentation.

20. The complainant sent Ms. Speaks a letter on May 21, 2017 in response to her May 9 letter. In his letter, he explained the events of May 1, 2017 and informed Ms. Speaks that he had told Ms. Corona and Mr. Hayes that he "needed time off under stress disability." The complainant explained that he was experiencing anxiety and not sleeping well and that he had called in on May 2 and May 3, at which time he indicated his physician had provided him with a medical excuse to miss work through May 30. He further explained he would be seeing a licensed therapist on May 30 for additional treatment.

21. On May 25, 2017, the respondent sent the complainant a letter thanking him for the service he provided in the 2016-2017 school year and indicating it intended to continue to employ him in the same role in the 2017-2018 school year.

22. On May 30, 2017, the complainant saw nurse practitioner Bradley Smith, who diagnosed him with generalized anxiety disorder and prescribed medication to help control his anxiety. Mr. Smith also provided a work excuse for the complainant through June 13, 2017, the last day of the school year for students.

23. In June 2017, the complainant spoke with Ms. Speaks by phone. Ms. Speaks informed him that, if he applied for a leave of absence through the respondent's third-party leave provider, CareWorks, she would rescind her May 9 letter directing the complainant not to report to work until she directed otherwise and requiring him to submit a written explanation for his failure to follow the respondent's call in procedures and to provide medical documentation verifying that his absences were

medically necessary. Ms. Speaks did not provide a deadline by which the complainant was required to complete the application for a leave of absence. Ms. Speaks provided the complainant with the web address for CareWorks' website.

24. The complainant attempted to complete the leave application on CareWorks' website but was unable to do so. The CareWorks website required that he enter a validation code, but the complainant had not been provided with a validation code. The complainant reached out to Jackie Newton, a CareWorks supervisor, by email on June 8, 2017, stating that he could not submit information and needed a validation code. He received no response from Ms. Newton. He emailed her again on June 12 re-iterating that he was waiting on a validation code and could not complete the process of entering information into CareWorks and provided her with his email and phone number. Ms. Newton responded by email on June 13 asking if he had received the validation code. The complainant did not see this email, however, as it went into his junk mail. He never received a validation code and the leave application was never completed.

25. On July 13, 2017, Ms. Speaks sent the complainant a letter discharging him. In the letter Ms. Speaks asserted that the complainant's written response to her May 9 letter did not provide an adequate explanation as to why the complainant failed to communicate his absences and follow proper call-in procedures. The letter also referenced the agreement between the complainant and Ms. Speaks that her May 9 letter would be rescinded if the complainant filed for an approved leave of absence through the Employee Rights Administration Department. Ms. Speaks noted that the complainant had not yet submitted any request for a leave of absence and that she did not find that the complainant was incapacitated or otherwise unable to communicate his absences to the respondent. Therefore, Ms. Speaks found that the complainant had abandoned his job, and that his employment was terminated effective May 2, 2017. After receiving this letter, the complainant called Ms. Speaks, but she declined to have a substantive conversation with him.

26. The time off and medication prescribed on May 30, 2017 helped the complainant get his anxiety under control. He would have been able to return to work at the beginning of the 2017-2018 school year.

27. Granting the complainant a leave of absence was a reasonable accommodation that would have permitted the complainant to remain employed. The respondent could have provided that accommodation without hardship to its business.

28. The complainant had other employment in addition to his work for the respondent. Since 2001 he worked as a package handler for UPS from 7:45 p.m. to 10:45 p.m., approximately 15 hours per week. The complainant also managed rental properties. The complainant continued managing properties and working for UPS after he was discharged from his position with the respondent.

Conclusions of Law

1. The complainant is an individual with a disability, within the meaning of the Act.

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

Memorandum Opinion

To prove disability discrimination a complainant typically must first establish that he is disabled within the meaning of the Act. Here, the parties stipulated that the complainant was an individual with a disability as defined by the Act during the time period at issue. The complainant presented evidence of a long history of treatment for anxiety, including evidence of treatment sought in 2017, after his discharge, at which time he was diagnosed with generalized anxiety disorder. Based on this evidence, combined with the stipulation of the parties that the complainant has a disability, the commission concludes that the complainant is a person with a disability within the meaning of the Act and that his disability is generalized anxiety disorder.

The complainant's disability was reasonably related to his ability to adequately perform the job-related responsibilities of his employment such that an accommodation was necessary. The complainant was temporarily unable to perform the duties of a paraprofessional, in any classroom, due to the severity of his anxiety symptoms following his conversation with Principal Corona and Mr. Hayes on May 1. He immediately sought medical treatment, and both his primary care physician and his behavioral health specialist, nurse practitioner Bradley Smith, agreed that his mental health condition made a temporary leave of absence necessary. The complainant continued to be unable to perform his job-related responsibilities until his anxiety symptoms were brought under control with the aid of medication prescribed by Mr. Smith.

Having concluded that the complainant's disability was related to his ability to adequately perform the job, the next question to decide is whether the respondent refused to provide him with a reasonable accommodation that would have enabled him to remain employed. The complainant requested a leave of absence from work while he pursued treatment for his anxiety. A temporary leave of absence, particularly to pursue medical treatment, can be a reasonable accommodation if it would allow an employee to perform his or her job-related functions in the future. *See Target Stores v. LIRC,* 217 Wis. 2d 1, 18-19, 576 N.W.2d 545 (Ct. App. 1998). Here, the complainant's medical providers indicated a temporary leave was necessary to bring the complainant's symptoms under control and, indeed, after taking time off the complainant was well enough to resume work at the beginning of the 2017-2018 school year. The commission therefore concludes that a leave of absence would have been a reasonable accommodation in this case.

The respondent argues that it could not have refused to accommodate the complainant's disability because it was unaware he was disabled at the time he requested a leave or at the time he was discharged. The commission has considered this argument, but does not find it persuasive. While it is true that an employer cannot refuse to accommodate an employee's disability if it is unaware that the employee has a disability, *Wingra Redi-Mix Inc. v. LIRC*, 2023 WI App 34, ¶76, 408 Wis. 2d 563, 993 N.W.2d 715, an employer that receives a request for an accommodation and has information sufficient to reasonably lead it to recognize that the employee has a physical or mental impairment which makes achievement unusually difficult or limits the employee's capacity to work, and that the limitation might be permanent, is on notice that it has a duty of reasonable accommodation under the Act. *Id.* at ¶ 96. If the employer questions whether it has a duty of reasonable accommodation under the Act, it has the right to ask for additional information, including medical information, to confirm the employee's disability. *Id. at* ¶¶ 96-97.

Here, the complainant testified, without rebuttal, that he informed the respondent on May 1, 2017 that he was suffering from anxiety and needed to take time off under "stress disability." Indeed, Principal Corona's notes, entered into evidence by the respondent, reflect that the complainant indicated he would "file for a stress related disability claim and will not be returning." A few days later the complainant informed the respondent that he had seen a doctor and had a doctor's note excusing him from work through May 30, a copy of which he provided to the respondent. In a May 21 letter to the respondent the complainant reiterated his request for a leave, again specifically using the term "disability," and informed the respondent that he had an appointment scheduled with a licensed therapist.

Nothing in the Act requires an employee to use any specific legal terminology or 'magic words' in order to request an accommodation, *Gilbertson v. Wingra Redi-Mix, Inc.*, ERD Case Nos. CR201400424, CR201700698 (LIRC Dec. 10, 2020) (aff'd in *Wingra Redi-Mix,* 2023 WI App 34), nor did the respondent provide any evidence that it had a specific process for the filing of a disability accommodation request that the complainant failed to follow. The complainant's actions as described above were sufficient to put the respondent on notice that the complainant was requesting a disability accommodation. Indeed, Ms. Corona's contemporaneous note shows that she understood the complainant's statements on May 1 were related to a "disability claim."

If the respondent was uncertain as to whether the complainant's condition amounted to a disability that it was required to accommodate, it had a right to ask for additional information. *Wingra Redi-Mix,* 2023 WI App 34, ¶ 97. However, after receiving the note from the complainant's doctor that indicated he needed a leave of absence through May 30 and would see a specialist on that day, the respondent did not ask for any further medical documentation. Its failure to ask for additional information

does not excuse it from its duty to provide a reasonable accommodation to the complainant.

Having received the complainant's request for "stress disability leave," which amounted to a request for a disability accommodation, the respondent did not follow its usual practice of handling such a request internally through its Employee Rights Division. It was not shown that Mr. Gorton, the respondent's Employee Rights Administration Manager, who was responsible for handling such requests in 2017, spoke to the complainant or otherwise evaluated his leave request. The complainant notified the respondent that he was unable to report to work from May 2 through the end of the school year due to his mental health condition. However, rather than requesting additional information to determine whether it was required to accommodate the complainant or engaging in discussions about what accommodations would be reasonable, the respondent treated the complainant's absences as a disciplinary matter.

Through its disciplinary process, the respondent eventually offered the complainant an opportunity to apply for a leave of absence, effective May 1, 2017, which would have allowed the complainant to continue his employment with the respondent in the next school year. However, in order to obtain the leave the complainant was required to enter information into a third-party leave provider's website, which required him to supply a "validation code" that he had requested but not been provided. Because the complainant did not have a validation code, he was unable to file his information using the CareWorks website, and the administrative step of entering information into CareWorks to obtain a leave of absence was never completed. Had the respondent followed its disability accommodation practice, Mr. Gorton would have determined whether a leave was appropriate in consultation with the complainant rather than outsourcing the leave process to CareWorks. The respondent failed to follow its own process regarding disability accommodations. While a failure to follow its internal process does not in and of itself constitute a violation of the Act, the respondent's failure to do so in this case created a situation in which the complainant's request for a reasonable accommodation was not granted.

In arriving at this conclusion, the commission notes that a violation of the Act due to a refusal to accommodate does not require a finding of discriminatory motive or intent. *Wingra Redi-Mix,* 2023 WI App 34, ¶¶ 71-82. Here, the respondent was on notice that the complainant had a condition that was likely to be considered a disability under the Act, and the complainant made a clear request for a specific disability accommodation. The respondent's failure to provide that accommodation – which it could have done without hardship[2] – constitutes a violation of the Act.

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[2] The respondent did not argue that providing a leave of absence to the complainant would have posed a hardship for its program, enterprise, or business. There is also no evidence that the requested leave would have posed a hardship for the respondent. In fact, the respondent purported to offer the complainant a leave of absence.

The final question to decide is what remedy the complainant is entitled to based upon the respondent's refusal of a reasonable accommodation. When the respondent realized in July of 2017 that the complainant had not submitted the required documentation to CareWorks to apply for a leave of absence, it summarily discharged him. Thus the failure to provide the accommodation directly resulted in the termination of the complainant's employment. When a refusal to accommodate an employee's disability is followed by an adverse employment action, back pay is available as a remedy if it is necessary to make the employee whole. *Wingra Redi-Mix,* 2023 WI App 34, ¶ 52. It is clear in this case that, had the respondent actually provided the requested accommodation, the employment relationship would have continued. Given the circumstances, the commission concludes that backpay is necessary to make the complainant whole.

In its petition the respondent argues that the complainant failed to mitigate his damages after he was terminated from employment with the respondent because he did not diligently seek other work. The respondent has the burden of proving a failure to mitigate and must show, not only that the complainant failed to exercise reasonable diligence to mitigate his damages, but also that there was a reasonable likelihood the complainant might have found comparable work by exercising reasonable diligence. *See Goldsworthy v. Elite Marble Co*., ERD Case No. 200205097 (LIRC Oct. 15, 2004). Here, the complainant provided evidence that his employment opportunities were limited by his schedule, which included other part-time work and the management of rental properties (all of which he was engaged in prior to his termination from employment with the respondent). While the complainant's work search efforts were therefore somewhat minimal, the respondent offered no evidence to establish that there was a reasonable likelihood the complainant might have found comparable work by exercising greater diligence. It has therefore failed to meet its burden with respect to this affirmative defense.

Attorney's fees

The complainant's attorney has requested an award of $59,600 for attorney's fees incurred for her work in conjunction with this matter. This fee request is based on an hourly rate of $400, and the respondent has not contested the reasonableness of that hourly rate. Based on its experience and past practice, the commission finds the requested rate to be reasonable because it is in line with the rates prevailing in the community for similar services for lawyers of comparable skill, experience, and reputation.

The respondent argues, however, that the attorney fee award requested by the complainant should be reduced by $760 because 1.9 hours of the complainant's attorney's time was attributed to work on claims that were dismissed. The

commission notes that, according to attorney Lindner's description of her time, those 1.9 hours were not entirely devoted to work on the dismissed claims; some portion was related to her work on preparing medical evidence, drafting a letter related to required disclosures, and discussing discovery requests with the complainant. However, because the fee request submitted by the complainant's attorney contains no information regarding the portion of time devoted to the dismissed claims versus the time that may have been compensable, the commission finds it reasonable to reduce the fee award as requested by the respondent. Subtracting the $760 fee associated with the 1.9 hours identified by the respondent, the resulting fee award is $58,840.

NOTE: The commission consulted with the administrative law judge who held the hearing to obtain his impressions as to the credibility of the witnesses, based on their demeanor, which were a factor in his decision. However, the administrative law judge had no demeanor impressions to impart.

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/

Marilyn Townsend, Commissioner

cc: Attorney Laura Lindner
Attorney Robin Pederson
Attorney Katherine Headley
Attorney Tearman Spencer