

State of Wisconsin



Labor and Industry Review Commission

Kimberly M. Richards, Complainant

Fair Employment Decision<sup>1</sup>

Milwaukee Transport  
Services, Inc., Respondent

Dated and Mailed:

ERD Case No. CR201800861  
EEOC Case No. 26G201800685C

January 31, 2025  
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The decision of the administrative law judge is **affirmed**. Accordingly, the commission issues the following:

**Order**

1. That the respondent shall cease and desist from discriminating against the complainant on the basis of disability.
2. 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, including pension, health insurance and other benefits, that she would have earned as an employee in the respondent's call center working 20 hours per week from November 16, 2017, the date she was released by her physician to return to part-time work, to May 15, 2018, when she was no longer able to work for the respondent in any capacity.

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

<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>.

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.

3. That the respondent shall pay to the complainant reasonable attorney's fees incurred in pursuing this matter in the total amount of \$41,865.00. A check in that amount shall be made payable jointly to the complainant and her attorney's law firm, Radtke Law Office, LLC, S.C., and delivered to that firm.

4. That within 60 days of the date this Order is issued, the respondent shall comply with all terms of this Order and file with the commission a Compliance Report detailing the specific actions it has taken to comply with this Order. Pursuant to Wis. Stat. 227.54, the institution of a proceeding for judicial review shall not stay enforcement of the commission decision unless a stay is ordered by the reviewing court. The commission will not pursue enforcement while a motion for such a stay is pending.

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/

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Michael H. Gillick, Chairperson

/s/

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Georgia E. Maxwell, Commissioner

/s/

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Marilyn Townsend, Commissioner

## Procedural Posture

This case is before the commission to consider the complainant's allegation that the respondent discriminated against the complainant on the basis of disability, in violation of the Wisconsin Fair Employment Act (hereinafter "Act"). An administrative law judge for the Equal Rights Division of the Department of Workforce Development held a hearing and issued a decision that found that the respondent had discriminated against the complainant on the basis of disability and that awarded back pay. The complainant and the respondent each filed a timely petition for commission review of that decision.

The commission has considered the petitions and the positions of the parties, and it has reviewed the evidence submitted at the hearing. Based on its review, the commission agrees with the decision of the administrative law judge, and it adopts the findings and conclusions in that decision as its own.

## Memorandum Opinion

### 1. The administrative law judge's decision and the position of parties

The administrative law judge concluded that the complainant is an individual with a disability and that the respondent discriminated against her by failing to reasonably accommodate her disability and then by terminating her employment. Specifically, the administrative law judge concluded that the medical evidence was sufficient to establish that the complainant was an individual with a disability. She went on to conclude that the respondent unreasonably failed to engage in an interactive process<sup>2</sup> regarding a proposed accommodation of placing the complainant in the respondent's call center, and that the respondent failed to prove that placing the complainant in the call center would have imposed a hardship on the respondent's operations. She awarded back pay from November 16, 2017 (the date that Zeba Sami, M.D., released the complainant to return to work at the call center) to May 15, 2018 (the date that Terese Jaeckle, APNA, opined that the complainant could not work in any capacity).

On appeal, the respondent asserts that the administrative law judge erred both in concluding that the complainant provided sufficient evidence—at least prior to her discharge—that she was an individual with a disability, and in concluding that work in the respondent's call center was a reasonable accommodation. For its part, the complainant argues that the administrative law judge should have awarded a greater period of back pay.

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<sup>2</sup> The Court of Appeals has described the "interactive process," a concept rooted in federal cases discussing accommodation under the Americans with Disabilities Act, as an "informal give-and-take exchange of information so that it can be determined whether an accommodation is needed and what accommodation would enable a disabled employee to continue working," noting that the commission has referred to the process when interpreting and applying the Wisconsin Fair Employment Act. *Wingra Redi-Mix v. LIRC*, 2023 WI App 34, ¶¶99-100, 408 Wis. 2d 563, 993 N.W.2d 715.

## 2. Analysis as a refusal to reasonably accommodate

In *Wingra Redi-Mix v. LIRC*, 2023 WI App 34, ¶¶47-50, 408 Wis. 2d 563, 993 N.W.2d 715, the Court of Appeals observed that discrimination claims based on disability implicate two separate provisions of the Fair Employment Act:

(1) Wis. Stat. § 111.322(1), which prohibits disparate treatment (including termination of employment) because of disability, and

(2) Wis. Stat. § 111.34(1)(b), which defines “employment discrimination because of disability” to include “[r]efusing to reasonably accommodate an employee’s ... disability....

In this case, the complainant’s complaint raises both provisions as bases for discrimination.

In *Wingra*, the Court of Appeals went on to state that when the refusal to accommodate precedes the termination, the action is analyzed on a refusal to accommodate theory, *id.*, 408 Wis. 2d 563, ¶52, describing the burden of proof as follows:

the employee has the initial burden to prove that the employee is an “individual with a disability”...; that the employer took one of the actions enumerated in Wis. Stat. § 111.322(1); and that a reasonable accommodation was available that the employer refused to provide. ... If the employee proves the above elements, the burden shift to the employer to prove ... that making an accommodation would pose a hardship on the employer’s business; or that, even with reasonable accommodation, the employee would be unable to undertake the job-related responsibilities of their employment.

*Id.*, ¶53 (citations omitted).

In this case, the complainant requested an accommodation before the respondent terminated her employment. The president of the complainant’s labor union, James Macon wrote a letter to the respondent that requested light duty on the complainant’s behalf in August 2017. On October 11, 2017, Dr. Sami, the complainant’s personal physician, wrote a note releasing the complainant to call center work as of November 16, 2017. The credible evidence in the record establishes that both of these documents were transmitted to the respondent shortly after they were written. Upon receipt of these letters, the respondent

terminated the complainant's employment by letter dated November 13, 2017.<sup>3</sup> Thus, the commission will analyze this case as a failure to accommodate case.<sup>4</sup>

### 3. Proof of disability during employment

The respondent also argues that the complainant did not prove that, during her employment with the respondent, she was an individual with a disability. Citing *Wisconsin Bell v. LIRC*, ¶44, 382 Wis. 2d 624, 914 N.W.2d 1, the respondent argues the analysis of whether she is a person with a disability should be based on medical information actually known to the respondent during the period of employment. The respondent goes on to assert that “the record is clear that while employed, [the complainant] did not provide to [the respondent] any medical documentation that established a disability.” The respondent asserts that the documentation that the complainant provided in 2016 and 2017, prior to the termination decision, did not mention a diagnosis or “the existence, nature, extent, and permanence of impairment.” The respondent further asserts that the medical information it did have, the report of Calvin Langmade, Psy.D. (an examiner retained by the respondent's worker's compensation insurer), indicated that the complainant was capable of returning to work as a bus driver. The respondent further contends that the administrative law judge erred by considering post-termination medical documentation in determining whether the complainant was an individual with a disability.

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<sup>3</sup> The return to work date of November 16, 2017 was three days after the discharge date given in the respondent's November 13, 2017 letter terminating the complainant's employment. However, forbearing from discharging the complainant for those three days would have constituted a reasonable accommodation on a temporary basis, *Target v. LIRC*, 217 Wis. 2d at 18, especially given the protracted grievance process that followed the November 13, 2017 discharge. Further, where, as here, the complainant has previously requested an accommodation and the respondent instead discharges the complainant rather than engage in the “interactive process,” the discharge can be viewed as a final refusal of the accommodation request.

<sup>4</sup> Even under a disparate treatment analysis based on the discharge, the commission would still affirm the administrative law judge's decision. The respondent contends that it discharged the complainant because she failed to provide requested medical information and because she did not respond to a request for a meeting made in a letter dated September 27, 2017. However, the complainant had provided a substantial amount of medical information from Dr. Sami, including the October 2017 release to restricted duty as of November 2017, before the discharge. Further, the respondent's benefits manager and witness, Kathi Miller, testified that she did not meet with the complainant to discuss restrictions as anticipated in her September 27 letter because she received Dr. Sami's September 11, 2017 letter stating that the doctor would see the complainant the following month. T.228. That is, Miller's testimony seems to be that Dr. Sami's September 11 note was responsive to the request for information in Miller's own September 27 letter. Thus, the reason for the discharge articulated by the respondent—the alleged failures to provide requested information and to attend a requested meeting—is contradicted by other evidence in the record, leading the commission to conclude the articulated reason was a pretext for discrimination. *See Kannenberg v. LIRC*, 213 Wis. 2d 373, 395, 571 N.W.2d 165 (Ct. App. 1997).

An employee must prove that he or she had a disability while he or she is employed by the employer. *Wingra*, 408 Wis. 2d 563, ¶63. However, the Court of Appeals has rejected the argument an employee can only make that showing with a confirmed diagnosis while employed, noting that the unambiguous language of the statute imposes no such requirement. *Id.*, ¶64. The Court went on to distinguish between medical evidence presented at the contested case hearing (which is required for an employee to meet his or her initial burden), and medical evidence presented to the employer during employment (which is not required). *Id.*, ¶65. Reiterating that an employee need not provide medical evidence of a disability from a medical professional in order to put an employer on notice of its duty to accommodate, the Court concluded that “it is sufficient if the factual information known by the employer would reasonably lead the employer to recognize that the employee likely has a disability.” *Id.*, ¶96.

The record establishes that the respondent had sufficient factual information that should have led it to recognize that the complainant likely was a person with a disability. On April 16, 2022, Dr. Sami reported that the complainant was under her care and unable to work. In his August 19, 2016 report, Dr. Langmade summarized Dr. Sami’s diagnoses of the complainant as including post-traumatic stress disorder and depression. Dr. Langmade himself diagnosed an anxiety disorder, a depressive disorder, and post-traumatic stress disorder as a pre-existing condition. The complainant and Dr. Sami had completed her disability application for The Hartford insurance company prior to the discharge, and credible evidence in the record establishes that that the application was transmitted to the respondent in October 2017. On October 18, 2017, Dr. Sami stated in a treatment note that the complainant was under her care, and would be able to return to work in limited duty in the call center on November 16, 2017, and that document, too, was provided to the respondent prior to the discharge.

The respondent asserts that Dr. Langmade’s opinion that the complainant could return to bus driving work overcomes the conclusion that the complainant provided sufficient evidence to the respondent to lead it to conclude she likely had a disability; that is, that she likely had an impairment that limited the capacity to work or made achievement unusually difficult. *See Wingra*, 408 Wis. 563, ¶¶57, 58 (discussing Wis. Stat. § 111.32(8)). Of course, Dr. Langmade also diagnosed both post-traumatic stress and depression, adding that the treatment the complainant had received up to the date of his examination was reasonable. Dr. Langmade’s opinion thus appears to be that the complainant has an impairment, but not one that limits her capacity to work.

However, the commission does not credit Dr. Langmade’s opinion that the complainant was able to return to full duty driving a bus by August 2016. Dr. Langmade bases that opinion in part on his belief that the complainant was malingering and on the surveillance video showing the complainant driving her

personal vehicle. However, the complainant worked five years as a bus driver for the respondent, and before that as a school bus driver, prior to witnessing a person being shot on her bus. No other medical provider has diagnosed or suggested malingering. The commission cannot credit the notion that the complainant suddenly began malingering coincidentally with seeing a person shot on her bus. And, as the complainant herself reasonably observed, driving a personal vehicle to run personal errands is entirely different from working a full shift driving a much larger city bus.

Moreover, in giving his November 2016 supplemental opinion that the complainant could return to bus driving, Dr. Langmade did not address the effects of Klonopin (Clonazepam). The complainant's use of Klonopin was verified in Dr. Sami's October 2016 note that was provided to the respondent before it sought Dr. Langmade's supplemental opinion. Klonopin is a controlled substance,<sup>5</sup> and the complainant testified, credibly, it made her drowsy. While the respondent may have chosen to rely on Dr. Langmade's opinion and declined to enter into the interactive process for determining whether accommodation was possible, it took "the risk that, in a claim that follows, LIRC will find that the information known to the employer was sufficient such that the employer should have recognized that the employee had a disability and was entitled to a reasonable accommodation." *Wingra*, 408 Wis. 2d 563, ¶97.

#### 4. The availability of a reasonable accommodation

A "reasonable accommodation" is one that effectively enables the disabled individual to perform the job-related responsibilities of his or her employment. *Target Stores v. LIRC*, 217 Wis. 2d 1, 17, 576 N.W.2d 545 (1998). However, a reasonable accommodation is not limited to that which would allow the employee to perform all of his or her job duties. A change in job duties may be a reasonable accommodation in a given circumstance. *Crystal Lake Cheese Factory v. LIRC*, 2003 WI 106, ¶52, 264 Wis. 2d 200, 664 N.W.2d 651. See also *Fields v. Cardinal TG Co.*, ERD Case No. 199702574 (LIRC Feb. 16, 2001); *Austin v. Walgreen Co.*, ERD Case No. 200800261 (LIRC June 30, 2011). Thus, an employer in some situations may not insist that the employee perform all the functions of her job. *Crystal Lake Cheese Factory*, 264 Wis. 2d 200, ¶52. However, if an employer offers an accommodation which effectively eliminates the conflict between the disabled employee's abilities and the job requirements, and which reasonably preserves the affected employee's employment status, the accommodation requirement has been satisfied. *Norton v. City of Kenosha*, ERD Case No. 9052433 (LIRC Mar. 16, 1994).

The respondent asserts that the call center position was not a reasonable accommodation because it did not fit the restrictions set by Dr. Sami in December

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<sup>5</sup> <https://www.drugs.com/medical-answers/clonazepam-controlled-substance-3571444/>

2017: that the complainant work in a quiet environment, away from loud noise and distractions. However, Dr. Sami herself released the complainant to the call center work, establishing that she believed the work met the complainant's restrictions. Noise and distraction levels are subjective, and it is not difficult to believe that working at a call center, even dealing with customer complaints, would be less noisy, distracting, and stressful than driving a Milwaukee city bus. Further, the complainant had at least some experience with some aspects of the call center work, and she felt she could perform it. Notably, the respondent's November 13, 2017 termination letter did not state that call center work was not available or was not reasonable as an accommodation, even though it had received Dr. Sami's October 18, 2017 treatment note suggesting that work as an accommodation. Given all the circumstances, the commission concludes that the complainant has met her initial burden of proving that a reasonable accommodation—an assignment to call center work—was available, but the respondent refused to provide it.

Thus, the burden shifts to the respondent to prove that making an accommodation would pose a hardship on its enterprise or business or that, even with reasonable accommodation, the complainant would be unable to undertake the job-related responsibilities of her employment. *Wingra*, 408 Wis. 2d 563, ¶53. On this point, the respondent first argues that it could not provide the call center work because the work was covered under a different collective bargaining agreement with a different union. However, this assertion is undercut by the fact that the respondent's own witness testified that one of the call center positions went to an outside candidate who was not employed by the respondent.

This leaves the respondent's defense that, despite the complainant's experience in some aspects of the call center job, the call center position description required two years of prior call center experience and, further, that the position would not work because it was full-time and the complainant could only work part-time. However, those are both merely assertions. The respondent presented no evidence establishing that allowing the complainant to work part-time initially would pose a hardship to its enterprise or business. Nor did it explain why waiving the claimed "requirement" of two years of prior experience for a current employee who had at least some related call center experience would impose a hardship; it did not, for example, introduce evidence establishing that all persons placed in the job—whether transferring union members or new hires off the street—had two years prior call center experience, much less evidence explaining why such experience was critical to job performance.

In sum, the complainant has established that she was a person with a disability and that a reasonable accommodation existed that would have allowed her to return to work. The respondent has not shown that the accommodation would pose a hardship to its business or that, even with reasonable accommodation, the

complainant would be unable to undertake the job-related responsibilities of the employment.

#### 5. The amount of back pay

The administrative law judge limited the back pay award to the periods when the complainant was released to work, albeit subject to accommodation. That limitation is consistent with previous commission decisions holding that an employee is not entitled to back pay after he or she has removed him or herself from the labor market, *Robertson v. Family Dollar Stores Inc.*, ERD Case No. CR200300021 (LIRC Oct. 14, 2005), and that an employee is not entitled to back pay during a period in which he or she is entirely unable to work due to medical problems, *Knight v. Wal-Mart Stores East LP*, ERD Case No. 200600021 (LIRC Oct. 11, 2012). The complainant, however, argues that the period for which back pay is awarded should be increased.

Specifically, the complainant argues that she should be entitled to back pay before November 16, 2017 (when she was first released to work by Dr. Sami) because “the Respondent engaged in conduct that kept Ms. Richards from an earlier return to work date.” The complainant asserts, too, that the back pay should have continued after May 15, 2018 (when Ms. Jaeckle took the complainant off work completely) because cutting off back pay on that date “ignores the fact that had Ms. Richards properly been returned to work, her depression and anxiety symptoms may well have abated.”

However, these arguments are speculative. There is no report from a doctor releasing the complainant to work any sooner than November 16, 2017, other than Dr. Langmade’s August 2016 report and November 2016 supplemental report which the commission does not credit. Dr. Sami credibly opined that the complainant was not stable for work in April 2016, and she did not specifically revise that opinion until her note of October 18, 2017, which released the complainant for work the next month. Even when Dr. Sami did issue a note releasing the complainant to work in October 2017, it was not an immediate release. Nor is there an opinion from Ms. Jaeckle, Dr. Sami, or any other treating practitioner to support the conclusion that the complainant would have been able to continue working after May 15, 2018, or that a timely return to work would have prevented the further deterioration in her condition that prevented her from working after that date. Absent such evidence, the record contains no basis to increase the back pay award.

#### 6. Offsets

The respondent, in its reply brief addressing the increased back pay arguments, asserts that it is entitled to offsets, not only in the additional periods of back pay that the complainant seeks in his brief, but also for the 6-month period in which the

administrative law judge did award back pay. The respondent identifies several sources of income that it asserts supports an offset: (1) worker's compensation temporary total disability paid before October 2017; (2) social security disability insurance (SSDI) paid after May 2018; (3) the Hartford disability, apparently paid while the complainant was released to work; and (4) a lump sum paid in settlement of her worker's compensation claim.

Wisconsin Stat. § 111.39(4)(c) provides in relevant part:

If, after hearing, the examiner finds that the respondent has engaged in discrimination, unfair honesty testing or unfair genetic testing, the examiner shall make written findings and order such action by the respondent as will effectuate the purpose of this subchapter, with or without back pay. ... Back pay liability may not accrue from a date more than 2 years prior to the filing of a complaint with the department. *Interim earnings or amounts earnable with reasonable diligence* by the person discriminated against or subjected to unfair honesty testing or unfair genetic testing *shall operate to reduce back pay otherwise allowable. Amounts received by the person discriminated against or subject to the unfair honesty testing or unfair genetic testing as unemployment benefits or welfare payments shall not reduce the back pay otherwise allowable, but shall be withheld from the person discriminated against or subject to unfair honesty testing or unfair genetic testing and immediately paid to the unemployment reserve fund or, in the case of a welfare payment, to the welfare agency making the payment.*

It has not been shown that the SSDI or worker's compensation payments were made during the period in which back pay is awarded. Consequently, there is no support for offsets based on those payments. In any event, the statutory term "interim earnings" does not include any of the disability-related payments the complainant received, but instead is limited to actual wages earned in employment. The commission has previously equated "interim earnings" in Wis. Stat. § 111.39(4)(c) with "temporary wages earned, while the complainant waited to find substitute employment for the job he lost." *Smith v. Wisconsin Bell Inc. (AT&T)*, ERD Case No. CR200800434 (LIRC Apr. 19, 2012). *See also U.S. Paper Converters v. LIRC*, 208 Wis. 2d 523, 525, 561 N.W.2d 756 (Ct. App. 1997) (noting that back pay was reduced by "actual earnings from other employment").

The conclusion that "interim earnings" should be limited to wages earned in employment is also consistent with the last sentence in Wis. Stat. § 111.39(4)(c) that provides that amounts paid in unemployment insurance benefits are not credited against back pay, but withheld and paid to the unemployment insurance reserve fund. If the Legislature intended that a similar special rule apply to SSDI, workers

compensation payments or settlements, or private disability insurance, it could have so provided; it did not.

## 7. Attorney fees

The administrative law judge did not award attorney fees to the complainant's attorney as part of her order. Instead, she directed the parties to attempt to reach agreement on the fees and, failing that, she retained jurisdiction for further proceedings regarding fees. As the administrative reviewing authority, the commission has the same authority as the Department of Workforce Development and its administrative law judges to award fees for representation in proceedings before administrative law judges under the Act. *Kelm v. Watertown Public Library*, ERD Case No. 8001610 (LIRC July 19, 1985). The commission therefore directed the complainant's attorney to submit a fee request covering the entire course of her representation of the complainant.

The complainant's attorney has requested a total of \$41,865 for her work on this matter, amounting to 86.20 hours at an hourly rate of \$375 for work done through December 31, 2022, and 23.85 hours at an hourly rate of \$400 for work done thereafter. She has also submitted affidavits from other practitioners in support of those hourly rates. She has not requested reimbursement for any costs associated with this matter. The respondent has informed the commission that it has no objection to the amount that the complainant's attorney claims in fee. After reviewing the fee request and the file, the commission concludes that the complainant's attorney has met her burden of proving that her fee request is reasonable, and it has awarded the amount requested.

cc: Attorney Sandra G. Radtke  
Attorney Mary E. Nelson