Beyond the Diagnosis: Navigating Disability Accommodation in the Workplace - Insights from *Wingra Redi-Mix v. LIRC*

Labor & Employment Law Update

By Laurie Meyer on November 8, 2023

The Wisconsin Fair Employment Act (WFEA) prohibits covered employers from discriminating against employees based on disability and requires that employers reasonably accommodate an individual with a known disability. Of course, not all disabilities are "known" – they may not be obvious or observable to an employer and they may not be clearly disclosed by the employee. So when does the duty to accommodate on the part of the employer trigger? What of the employee who complains of physical ailments and requests an accommodation but does not submit documentation from his or her physician?

In *Wingra Redi-Mix Inc. v. Labor and Industry Review Commission*, the Wisconsin Court of Appeals recently held that a formal diagnosis at the time of an employee's request for accommodation is not required to raise the protections of the WFEA.

In *Wingra*, Scott Gilbertson worked as a cement truck driver for Wingra Redi-Mix, delivering ready-mix concrete to commercial and residential construction sites – a job that required him to sit for long hours in a truck. Gilbertson, like other Wingra drivers, was assigned a specific, older "glider" truck that lacked more modern shock absorption. Wingra had other "non-glider" trucks in its fleet that were generally less physically demanding and more comfortable to drive.

In the fall of 2012, Gilbertson began experiencing low back and leg pain and fatigue, which he attributed at least in part to driving the older "glider" truck. In 2013, he spoke to his managers and told them about his back pain. (Notably, Wingra had no written policy or procedure regarding disability accommodation requests.) Gilbertson spoke to Wingra's safety and human resources manager about filing a worker's compensation claim, who told him that such a claim may be denied because it would be difficult to prove that his pain was caused by driving the glider truck. Because he lacked health insurance, the manager told him that he'd "hate to get [Gilbertson] stuck with medical bills."

Several weeks later, Gilbertson spoke to the dispatch manager about reassignment to a non-glider truck, but the request was denied due to a company policy that prohibited truck reassignments. Upon learning this, Gilbertson sent an email to the dispatch manager, repeating his belief that a non-glider truck might relieve his pain.

A few weeks later, after struggling to work due to pain, Gilbertson went into the office and placed his timecard, fuel card, and keys on a manager's desk. When questioned about making "a life changing decision" to quit his job, Gilbertson said that he did not wish to quit, but was "just asking for help" so that he could "operate [his truck] safely." Gilbertson was encouraged not to quit. The next day, Gilbertson sent a lengthy email to management about his pain and repeated his request for another truck. Management called Gilbertson and told him that he would not be reassigned a different truck and that the company was "accepting his resignation."

Immediately following his separation from Wingra, Gilbertson saw a doctor for the first time to address his pain. In the months thereafter, he was diagnosed with chronic lower back pain due to multilevel degenerative disc disease, right sciatic radiculopathy, and right sacroiliac joint disfunction. He then – you guessed it – filed a disability discrimination claim against his former employer.

It was undisputed that Gilbertson never saw a doctor during his employment with Wingra and thus had not been diagnosed by any medical professional with a disability; it was also undisputed that Wingra never asked him to see a doctor, nor did it otherwise seek medical evidence about the cause of his pain. Wingra did not advise Gilbertson that the company found that the information about his pain was inadequate. Wingra argued in the discrimination case that it had not been obligated to accommodate Gilbertson, since Gilbertson had not been diagnosed with any disability at the time of his request.

After Gilbertson's discrimination claim made it to the Wisconsin Court of Appeals, the court held that an employer may not ignore or deny an employee's accommodation request simply because it is not provided with a diagnosis of the health condition for which the employee requests accommodation. The court found that Wingra had engaged in disability discrimination in violation of the WFEA, reasoning that Wingra's management had received sufficient information to know that Gilbertson likely met the definition of an individual with a disability. Even though Gilbertson did not obtain a medical diagnosis of any medical condition until after his termination, the court found that such a formal diagnosis was not required for the WFEA to apply. Importantly, the court clarified that an employer may seek additional medical information from an employee to substantiate a health condition in order to determine whether the condition constitutes a disability requiring accommodation. However, Wingra did not seek such information, but simply refused Gilbertson's requests.

What are the lessons for employers from the *Wingra* case? Does an employer need to grant ***every*** request for accommodation simply because an employee has made one? No. At the same time, the employer should not unilaterally deny such a request simply because the employee has not provided formal medical documentation diagnosing a condition. Rather, in such a scenario, the employer should start the "interactive process" early, even absent a formal diagnosis. It should communicate with the employee about the need for the employee to seek and provide documentation substantiating the condition – and document that communication in writing. The employer may consider requesting additional information from the health care provider about what accommodations, if any, the provider would recommend. Once in possession of this information, the employer should carefully consider what reasonable accommodations are available that would not present an undue hardship to the employer.

Of course, every situation is different and these questions can be complicated. Employers should address any questions about this process to experienced employment counsel.