Employer Accommodation Obligations Differ Under Federal and State Law

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Two recent cases serve to highlight important differences between the obligations employers face under federal and Wisconsin disability discrimination laws. Wisconsin employers need to be cautious and take those differences into account when making employment decisions.

In *Severson v. Heartland Woodcraft, Inc.*, a case decided September 20, 2017, by the 7th Circuit of the U.S. Court of Appeals (which includes Wisconsin), the federal court held that a multi-month leave of absence is beyond the scope of a reasonable accommodation under the Americans with Disabilities Act (ADA). Some of the other federal circuits have held to the contrary.

There was no dispute that Severson had a disability, but the possible accommodations identified by Severson were determined by the Company to be unavailable or unreasonable. The primary focus of the case was on whether a multi-month leave following the expiration of Severson's FMLA leave was a reasonable accommodation within the meaning of the ADA. The Court pointed out that the ADA says a "'reasonable accommodation' is one that allows the disabled employee to 'perform the essential functions of the employment position.'" The Court went on to explain that "if the proposed accommodation does not make it possible for the employee to perform his job, then the employee is not a 'qualified individual' as that term is defined in the ADA."

The Court held that a "long term leave of absence cannot be a reasonable accommodation" because ". . . an extended leave of absence does not give a disabled individual the means to work; it excuses his not working." The Court pointed out that "a medical leave spanning multiple months does not permit the employee to perform the essential functions of his job," adding that "long term medical leave is the domain of the FMLA . . ."

The EEOC submitted a brief in which it argued a long term medical leave of absence should qualify as a reasonable accommodation as long as it is not for an indefinite period. The Court rejected the EEOC's argument, stating that such a requirement would transform the ADA into a medical leave statute which is not consistent with the "reasonable accommodation" analysis.

The *Severson* Court did leave open the possibility that brief periods of leave could be a reasonable accommodation for intermittent conditions or where a short term leave for a few weeks might be granted, more akin to a modified work schedule for a temporary period. The Court distinguished this from a long term leave, which would not permit the employee to perform the job for a significant period.

Meanwhile, in *Wisconsin Bell, Inc. v. LIRC*, decided on March 28, 2017, the Wisconsin Court of Appeals found that the Wisconsin Fair Employment Act (WFEA) was violated by Wisconsin Bell when it terminated the employment of a customer service representative who claimed his disability caused him to hang up on customers. This case is now pending before the Wisconsin Supreme Court.

While the *Wisconsin Bell* case did not deal with the multi-month leave issue presented in Severson, in analyzing the issues the Court of Appeals noted that, while it is true Wisconsin courts "may look to federal law for guidance" in analyzing the WFEA, the Wisconsin courts are not bound by federal decisions and, moreover, Wisconsin has " 'established its own scheme for dealing with employment discrimination' based on disability and, as such, we interpret the WFEA 'in accordance with [the Wisconsin] legislature's intention rather than with the intention of other jurisdictions.'"

That position is consistent with the position taken by the Wisconsin Labor and Industry Review Commission (LIRC) in other disability cases. For example, LIRC has long stated "The Wisconsin Fair Employment Act differs from the Americans with Disabilities Act in many significant respects. Under the WFEA there is no limit to the type of accommodation an employer may be expected to provide, so long as the accommodation requested is a reasonable one that can be provided without hardship to the employer's business. What is reasonable will depend on the specific facts in each individual case." (*Waldera v. CESA 11*, ERD No. 199901079, 10/31/02).

Wisconsin employers need to keep this caution in mind when applying the 7th Circuit's decision to fact patterns presented to the employer. The federal ADA analysis is only part of the equation and Wisconsin's broader accommodation obligations under the WFEA need to be considered as well. This may result in a decision to grant some limited period of leave beyond FMLA, so long as it does not present a provable hardship to the employer.