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Whether an Employer Has a Duty to Accommodate is a Question for Which There is No Simple Answer

By Gregory M. Wesley, Esq.

One of the more common pieces of advice offered by employment attorneys to their clients is "Be consistent." And for good reason - consistent application of company policy is an important part of the rubric attorneys use when defending employers against discrimination claims. Consistency also makes life easier, for each situation can be handled similarly to the one before it. Yet, an over-emphasis on consistency at the expense of a case-by-case determination of the proper course of action should be avoided, particularly when the situation involves an accommodation request by an employee, for, as many multi-state employers are aware, state laws may be different - and seemingly inconsistent - when it comes to the modification of an employee's duties.

For example, in Wisconsin, the state Supreme Court has interpreted the Wisconsin Fair Employment Act (WFEA) much more broadly than federal courts have interpreted the Americans with Disabilities Act (ADA). In *Crystal Lake Cheese Factory v. LIRC*, 2003 WI 106, 264 Wis.2d 200, 664 N.W.2d 651, all four employees in one of the factory's departments were cross-trained and required to be capable of performing each other's jobs. One of those employees was injured in a non-work related car accident and was confined to a wheelchair. As a result, she could no longer perform all of the functions in her department. When she was not allowed to return to work, she complained to the Equal Rights Division (the state equivalent of the EEOC).

The case wound its way through the administrative agency and

court process, and ultimately, the Wisconsin Supreme Court ruled in the employee's favor, rejecting the factory's argument that the WFEA's reasonable accommodation provision does not require it to create a new position for a disabled employee. The court wrote, "The other employees could divide among themselves those physical tasks Catlin is now unable to do, and she could focus just on the many job responsibilities that she can do." *Crystal Lake*, 264 Wis.2d at 240.

Given this legal background, it might seem reasonable to assume that Wisconsin courts would mandate that an employer make similar accommodations when the employee is not disabled, but returns after being injured in a work related accident. But that assumption would be wrong.

On July 12, the Wisconsin Supreme Court held that the unreasonable refusal to rehire section of the state's worker's compensation law, Wis. Stats. s. 102.35(3), contains no accommodation requirement comparable to that in the Wisconsin Fair Employment Act. In the case, *DeBoer Transportation, Inc. v. Swenson*, No. 2009AP564 (Wis.Sup.Ct., July 12, 2011), the employee, a truck driver who worked night shifts, was injured at work and missed significant time from work as a result, which was indisputably covered under worker's compensation. The employer had a policy that, whenever a worker returns to work after a significant leave, he must undergo reorientation that included a training drive with an instructor, which could last from a few days to weeks.

The employee, who cared for his elderly, terminally ill father during the day, refused to undergo the training drive because it would have required him to be gone during the day and unable to care for his father (the employee argued that nursing care during the reorientation was too costly). The employee was terminated, and he sued under the "refusal to rehire" provision of the state's worker's compensation law.

The case wound its way through the administrative agency and court process, but ultimately, the Wisconsin Supreme Court ruled in the employer's favor, holding that the worker's compensation law contains no accommodation provision requiring the modification of legitimate, long-standing safety rules. The Court held, "[the statute] does not contain a requirement that employers change their legitimate and universally applied business policies to meet the personal obligations of their employees. We note [however] that there are instances in Wisconsin employment statutes where employers are required to make certain modifications. Particularly, 'accommodation' comes into play under Wisconsin's employment discrimination statutes." Citing the opinion in *Crystal Lake*, the court held that it has no application in a refusal to rehire claim under the worker's compensation law.

Each state's laws are different, but these two Wisconsin cases demonstrate that the law governing the modification of job responsibilities to accommodate a given employee's needs cannot be discerned through intuition. An intuitive employer might expect that it must be more accommodating to employees after work related injuries than after non-work related injuries. But that expectation

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might not be correct. In situations like this, where law and intuition may diverge, employers are encouraged to consult with their legal counsel about the proper course of action, lest their intuition lead to liability.

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