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Wisconsin Labor and Industry Review Commission Decision Highlights Differences between State and Federal Law for Showing Existence of a Disability

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On June 28, 2013, the Wisconsin Labor and Industry Review Commission (LIRC or Commission) affirmed the decision of an administrative law judge (ALJ) that a complainant with Type II Diabetes who receives Social Security Disability benefits should lose her failure to accommodate claim because she was not disabled or regarded as disabled under the Wisconsin Fair Employment Act (WFEA). Perhaps more significantly, the LIRC decision reveals several significant distinctions between the WFEA and the Americans with Disabilities Amendments Act of 2008 (ADAAA) with regard to defining disability.

In the case of ***Lynn M. Alamilla v. City of Milwaukee***, ERD Case No. CR 201002749 (LIRC June 28, 2013), the complainant, a job applicant, alleged the respondent failed to accommodate her during a pre-employment typing test. The ALJ focused on whether the complainant had shown she was disabled under the WFEA in the context of her failure to accommodate claim. There was no dispute that the complainant had been diagnosed with diabetes, took insulin daily, and received Social Security Disability benefits. The complainant described trouble doing household chores, poor balance, foot swelling, blurred vision, pain, cramps, and tingling and numbness in her extremities.

In affirming the ALJ's decision, the Commission described why each piece of the complainant's evidence did notequate to a finding of disability. Notably, the Commission explained that under the WFEA "a diagnosis does not establish a disability" because the complainant still must make an individualized showing that the nature of her condition was "severe enough to substantially limit a major life activity or limit the capacity to work." Because of the individualized showing required, the Commission noted that diabetes may or may not be a disability under the WFEA. This is significant because the ADAAA and its implementing regulations now list diabetes as an impairment that should easily be found to substantially limit a major life activity. *See* 29 CFR § 1630.2(j)(3). The Commission's finding that the complainant failed to show sufficient medical evidence tying her symptoms to her diabetes confirms the WFEA requires a higher burden for proving the existence of a disability than the ADAAA.

In another distinction, the Commission considered and rejected the complainant's argument that the

respondent must have perceived her as being disabled because it believed she needed an accommodation. To proceed with a “perceived disability” theory under the WFEA, the complainant has to show that the employer perceived her to have a permanent impairment that would substantially limit a major life activity or her capacity to perform the job.

The Commission’s analysis breaks from federal law in two significant ways. First, the ADAAA removed a cause of action for failure to accommodate under a “regarded as” theory from the ADA. Thus, under federal law, a court would have rejected a “regarded as” theory in the context of failure to accommodate claims. Second, the ADAAA eliminated the requirement that an employee, or applicant, must show that her employer believed her to have a disability that substantially limited a major life activity. Instead, a plaintiff proceeding under federal law need only show that she was discriminated against due to an actual or perceived mental or physical impairment, without regard for whether the perceived impairment would substantially limit a major life activity.

In summary, the Commission’s finding signifies that Wisconsin complainants still may pursue failure to accommodate claims under a “perceived as” theory of disability, but in general, the burden to prove one is “perceived as” disabled is more stringent under the WFEA than the ADAAA. Proving the existence of particular types of disabilities remains more challenging for complainants under the WFEA than under federal law.

While the nuances between state and federal disability laws can be dizzying, Wisconsin employers should be mindful that they are subject to multiple standards for and definitions of disability in an employment context.

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