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**Wisconsin Court of Appeals Undermines the Application and Administration of No Fault Attendance Policies**

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Accommodating employees with disabilities under the Wisconsin Fair Employment Act (“WFEA”) remains a significant challenge to employers in the aftermath of the Wisconsin Supreme Court’s decisions in *Crystal Lake Cheese Factory v. LIRC*, 2003 WI 106, 264 Wis. 2d 200, 664 N.W.2d 651 and *Hutchinson Technology Inc. v. LIRC*, 2004 WI 90, 267 Wis. 2d 961, 682 N.W.2d 343. There is unfortunately no relief in sight. A recent decision from the Wisconsin Court of Appeals in *Geen v. Stoughton Trailers*, Case No. 1004AP1550 (Ct. App. 7/26/06) held that Wisconsin employers that utilize a no-fault attendance policy must ensure that absences caused by a disability are not counted under the no-fault attendance policy, or risk running afoul of the WFEA.

Under the Company’s no-fault attendance policy, an employee who accumulated more than six (6) points was subject to termination. Certain absences, including medical leaves under the Family and Medical Leave Act, were not counted under the Company’s policy. Geen had accumulated four and one half (4½) points under the no-fault policy when he was absent from work on several occasions due to a migraine headache condition. Although he was given the opportunity to provide medical documentation within the 15-day deadline to substantiate that his absences would be FMLA qualifying, he failed to provide adequate medical documentation and, as a result, his employment was terminated for accumulating six and one half (6½) points under the policy.

Geen filed a complaint with the State of Wisconsin Equal Rights Division alleging that the Company discriminated against him in violation of the WFEA by terminating his employment and failing to reasonably accommodate his disability. The Company conceded that Geen’s medical condition constituted a disability under the WFEA, but contended that it did not terminate his

employment because of his disability in violation of the WFEA and that it reasonably accommodated his disability by allowing him the opportunity to provide medical documentation so that his absences would be FMLA qualifying.

The case went through a long and complicated procedural course, which culminated in the recent decision by the Wisconsin Court of Appeals. In the underlying decision from the Labor and Industry Review Commission, LIRC held that the employer had violated the WFEA by terminating Geen “because of” his disability and that a reasonable accommodation would have been “clemency and forbearance” while the employee was dealing with the effects of his disability.

On appeal, the Company argued, among other things, that LIRC’s interpretation of the WFEA would effectively prevent employers from counting any illness against an employee under a no-fault attendance policy. The court disagreed, noting that an employer may continue to apply its no-fault attendance policy, as long as the policy does not result in an adverse employment action being taken because of an employee’s disability. In other words, an employer may continue to count medical absences against an employee under its no-fault system so long as the illness or medical condition that caused the absence does not rise to the level of a disability under the WFEA.

The Company also asserted that it adequately accommodated Geen’s disability by providing him with the opportunity to provide a properly completed FMLA medical certification form. While Geen did not submit the required certification within 15 days (as allowed by the federal and state FMLA), the court noted that at the time of Geen’s discharge, it knew Geen’s medical evaluation was still pending. The court therefore rejected the Company’s argument and held that the Company was required to give the employee “clemency and forbearance” until the full extent of Geen’s disability and the Company’s duty to accommodate could be determined.

This decision highlights the significant burden of accommodating disabled employees under the WFEA and undermines the benefits of a no-fault attendance policy. The purpose of a no-fault attendance program is generally to promote and ensure consistency and to ease the administrative burden of determining when to discipline an employee for excessive absenteeism. While most such policies allow for certain excused absences (i.e., FMLA, worker’s compensation, jury/witness duty, military leave, holiday, vacations), Wisconsin employers are now also required to excuse absences that are caused by a disability under the WFEA, which it defines more broadly than under the Americans with Disabilities Act (i.e., a “physical or mental impairment that makes achievement unusually difficult or limits the capacity to work”) This holding will significantly increase the burden of administering a no-fault attendance policy and will require employers to determine the cause of each

and every absence to ensure that the absence was not caused by a medical condition that would qualify as a disability under the WFEA.

In addition, employers must also exercise “clemency and forbearance,” as a reasonable accommodation, before taking action for absenteeism caused by a disabling (or potentially disabling) condition when they know an employee’s medical evaluation is pending. The appellate court in *Geen* provided little guidance as to how long an employer must wait before taking action based on disability-related absences. It held only that 15 days – the typical time period within which employers are permitted to request medical certifications under the federal and Wisconsin FMLA – was not sufficient. Thus, in cases where an absence could be related to a disability (as defined broadly by the WFEA) employers should not automatically take disciplinary action based on the absence after the 15-day certification period expires if they have reason to believe the employee is still undergoing medical evaluation or is still in the process of obtaining medical documentation related to the absence. Doing so will risk liability for disability discrimination and/or failure to accommodate under the WFEA.

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