

WASHINGTON CASE UPDATE

Washington Applies the Federal Burden Shifting Framework to Disability Discrimination Claims Under WLAD

From the desk of John Kreutzer: What does a plaintiff need to prove to establish employment disability discrimination under the Washington Law Against Discrimination? To what extent must employers accommodate their employee's disabilities under the WLAD? Division Two of the Washington Court of Appeals recently explored disability discrimination in the employment setting in a case that involved an employee's chronic migraine headaches.

Claims Pointer: To succeed on a claim for disparate treatment, an employee can either offer direct evidence of the employer's discriminatory intent or they can raise an inference of discrimination by satisfying the *McDonnell Douglas* burden shifting test and illustrating that explanations offered by the employer are, in fact, a pretext. While reasonable accommodations for an employee's disability are required by law, the requirement does not extend to modification of a position's essential functions.

Atkinson v. Les Schwab Tire Centers of Washington, Inc., 44326-1-II, 2014 WL 1746110 (Wash. Ct. App. April 29, 2014) (unpublished)

Peter Atkinson (Atkinson) filed a WLAD (Ch. 49.60 RCW) disability discrimination suit against his former employer, Les Schwab Tire Centers of Washington, Inc. (Les Schwab), after Les Schwab ended Atkinson's employment. Atkinson claimed that Les Schwab failed to make reasonable accommodations for his medical condition, chronic migraine headaches, and later terminated his employment because of the headaches. In contrast, Les Schwab argued that Atkinson's termination was due to Atkinson's poor work performance. Les Schwab moved for summary judgment on the grounds that Atkinson had failed to meet the evidentiary burden required to establish his discrimination claims for disparate treatment and failure to provide reasonable accommodation. The trial court granted Les Schwab's motion and Atkinson appealed.

Over the course of his 13 year employment with Les Schwab, Atkinson climbed the ranks from sales and service associate to second assistant manager to first assistant manager. Each promotion included greater responsibilities, extended work hours, and increased compensation. The added responsibilities and hours also increased the frequency of Atkinson's headaches. While Atkinson felt that he could perform his work functions the majority of the time, he would occasionally need to sit in the break room for an extended period of time, leave early, or miss work entirely. Other times, he would attempt to work through the migraine symptoms, admittedly at a lesser capacity.

Atkinson became concerned about his future

employment with Les Schwab after his manager, Rory Cox (Cox), allegedly told Atkinson to get his migraines under control or begin looking for work elsewhere. Atkinson brought this concern to the corporate office and Atkinson was informed soon after that his medical condition would not affect his mobility within the company. This exchange, in Atkinson's opinion, began the deterioration of his professional relationship with Cox, which ultimately ended with Atkinson's termination. According to Atkinson, Cox wanted to get back at Atkinson for going above his head.

Despite Atkinson's promotions, issues with his performance were repeatedly noted. Indeed, after interviewing for a manager position for which Cox recommended Atkinson, members of the review panel met with Atkinson to discuss the reasons why he had not been promoted: negative feedback elicited in the peer review portion, as well as the need for increased physical output and improved communication. In the year following, Atkinson received a number of poor performance reviews. When his performance did not improve satisfactorily, Atkinson's employment was terminated.

Employees attempting to defeat an employer's motion for summary judgment must establish "specific and material facts" to support each element of a *prima facie* case. In regard to a disparate treatment claim, the employee can either offer direct evidence of the employer's discriminatory intent or can employ the *McDonnell Douglas* burden shifting test to infer discrimination. Under the *McDonnell Douglas* test, an employee must present evidence that (1) he belongs to a protected class; (2) he was treated less favorably in the terms or conditions of his employment than a similarly situated, non-protected employee; and (3)

case in point...



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he and the non-protected “comparator” were doing substantially the same work. If the employee is able to establish the *McDonnell Douglas* elements, the burden shifts to the defendant to produce a nondiscriminatory explanation for the adverse employment action. Then, it is up to the employee to show that the defendant’s stated reason for the adverse action was a pretext.

In the instant case, Atkinson’s claims failed under both the direct evidence and the *McDonnell Douglas* tests. Atkinson did not provide sufficient evidence that the discriminatory motive was a substantial factor in his termination. Likewise, Atkinson did not demonstrate that Les Schwab’s articulated reasons for termination, in particular Atkinson’s poor performance, were pretext. His reasonable accommodations claim meets a similar fate.

To succeed on a failure to reasonably accommodate a disability claim, the employee must establish, among other things, that he or she was qualified to perform the essential functions of the job in question, with or without reasonable accommodation. Employers, however, are not required to alter the essential functions of a position in an effort to make accommodations. To accommodate his headaches, Atkinson wanted to work less hours and have less responsibility, while retaining his salary and position as first assistant manager. Those accommodations would have required Les Schwab to alter the essential functions of the job. As such, the trial court did not err in granting summary judgment in favor of Les Schwab against of Atkinson’s disability discrimination and failure to accommodate claims.

NOTE: This opinion has not been published. It is provided to demonstrate how the court approaches the issues involved in the case. It cannot be cited as authority to a court of law.



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