

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

HARVEY EDMONSON,	)	NO. 60419-8-I
	)	
Appellant,	)	DIVISION ONE
	)	
v.	)	
	)	UNPUBLISHED OPINION
AMERICAN BUILDING	)	
MAINTENANCE COMPANY, dba	)	
ABM JANITORIAL SERVICES, and	)	
AMERICAN BUILDING	)	
MAINTENANCE CO.-WEST,	)	
a foreign corporation,	)	
	)	
Respondents.	)	
	)	FILED: July 7, 2008

Leach, J. — Harvey Edmonson was terminated from his job as a night janitor for sleeping on the job. He sued his employer for disability discrimination under the Washington Law Against Discrimination (WLAD), chapter 49.60 RCW. The superior court granted summary judgment to the employer. We affirm.

**Background**

Harvey Edmonson worked as a janitor for American Building Maintenance Co. (ABM) for approximately 13 years. While at work cleaning the Washington Athletic Club (WAC) on April 14, 2004, Edmonson accidentally cut his thumb on a razor blade

used to scrape shower stalls. A coworker drove him to the emergency room at Harborview Medical Center, where he was treated for a laceration to his left thumb. He was discharged at about 4:00 a.m. the next day, but returned later that morning to obtain pain medication. He was prescribed Naproxen (500 mg) and Tylenol 3 with codeine. A doctor wrote him a note instructing him to avoid exposing his hand to water for 72 hours, which he gave to his supervisor, Sean Brooks. He returned to work the following evening.

Edmonson sought medical care for this injury at least two more times. On April 28, 2004, he went to the Harborview Urgent Care Clinic. He told the nurse practitioner there that he did not care for Tylenol 3 because it made him drowsy at work. She prescribed him Keflex to prevent infection and ibuprofen for pain. On May 7, 2004, he obtained a prescription for ibuprofen and a note for his employer, which read:

Patient can resume regular activity as tolerable. Avoid water and cleaning chemicals until wound healed completely. Wear protective gloves at work. Return to clinic if noticed increased redness and swelling.

There is no evidence that Edmonson received additional medical treatment between May 7, 2004, and the day he was fired.

At approximately 3:30 in the afternoon on Friday, May 28, 2004, Edmonson claims to have taken a pill containing codeine to relieve pain from the work injury to his thumb.<sup>1</sup> He went to his cleaning job at the WAC at 9:30 p.m. He was the only

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<sup>1</sup> Although Edmonson's counsel, at oral argument, represented that Edmonson took medication at work the day he fell asleep, he did not testify that he had done so and he concedes in his brief that he took the medication at 3:30 p.m.

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employee assigned to clean the fifth floor. One to two hours into his shift, he suddenly began to feel dizzy, so he sat down. Early Saturday morning at the end of the shift,

Edmonson's supervisor, Eferem Ayana, was doing his rounds. He found Edmonson asleep in a chair and became upset because Edmonson had not finished any of his work. He informed Edmonson that he would have to report the incident to their manager, Sean Brook. ABM company rules expressly prohibit sleeping during work hours, and this rule is published in the employee handbook. In addition, the union contract allows the employer to "discharge without warning in cases of . . . sleeping on the job." Edmonson testified that he was aware of this policy. Edmonson told Ayana that the medicine he had taken for his thumb caused him to fall asleep, but Ayana insisted that he needed to report Edmonson's violation of the rules regardless of the reason Edmonson had fallen asleep.

Ayana informed Brook that he found Edmonson sleeping on the job. Edmonson again explained that the medicine he was taking for his thumb injury made him become drowsy and fall asleep. Brook typed Ayana's report of the incident and also left a phone message for Joy Miguel, a human resources coordinator. Miguel received Brook's phone message the following Monday, May 31, 2004. That day, Edmonson met with Miguel and Flo Turcotte, another human resources coordinator. He explained that he had been taking medication that made him fall asleep. Miguel asked Edmonson to provide medical documentation stating the effects of the medication he was taking. She also reviewed his personnel file and contacted the company's Labor and Industries agent, Katie. From her conversation with Katie, Miguel understood that Edmonson had been prescribed 10 tablets containing codeine when he injured his thumb, but that he was not on any prescribed medication the night he fell asleep on the job.

Miguel and Trucotte decided to terminate Edmonson for violating the union contract and company policy by sleeping on the job. In an effort to regain his job after the termination, Edmonson provided additional medical documentation including a letter from his physician, Dr. Anderson. Regarding Edmonson's drowsiness Dr. Anderson wrote,

It is my strong medical opinion that if Mr. Edmonson was terminated for being asleep anytime before 05/07/04 that this would not be appropriate. He states he told his supervisor that he was taking a narcotic (which can certainly make him sedated), and was still told to return to work. Since I do not know the date he was terminated, I am hopeful that if he was found asleep prior to this, that his supervisor be reprimanded in allowing him to work on a job knowing that he was on a sedating medication. If Mr. Edmonson was terminated after 05/07/04 when he was cleared for work per the Harborview emergency room, then that would be a different story.

None of the documentation established a medical reason for Edmonson falling asleep on May 28, 2004. Edmonson filed a grievance through his union on June 7, 2004. Charles Jones, ABM's human resources director, reviewed the decision to terminate Edmonson. Jones upheld the termination decision because Edmonson failed to provide medical documentation that showed he was being treated with medication that caused drowsiness on May 28, 2004.

Edmonson filed this suit against ABM for disability discrimination, wrongful discharge, infliction of emotional distress, and breach of the duty of good faith and fair dealing. The trial court granted summary judgment to ABM, dismissing all of Edmonson's claims with prejudice, and denied reconsideration. Edmonson concedes that his claims for infliction of emotional distress and breach of the duty of good faith

and fair dealing are contingent upon the viability of his discrimination claim.

#### Discussion

When reviewing an order granting summary judgment, an appellate court conducts the same inquiry as the trial court.<sup>2</sup> Summary judgment will be affirmed where the “pleadings, depositions, affidavits, and admissions, viewed in a light most favorable to the nonmoving party, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.”<sup>3</sup>

The Washington Law Against Discrimination makes it an unfair practice for an employer to discharge, refuse to hire, or discriminate in compensation based on a person’s sensory, mental, or physical disability.<sup>4</sup> Two causes of action, failure to accommodate and disparate treatment, are available to a disabled employee under RCW 49.60.180.<sup>5</sup> Here, Edmonson alleges both causes of action: that ABM failed to accommodate a condition caused by a temporary disability and that ABM terminated him because of a disability. He also alleges that he was terminated in retaliation for filing a workers’ compensation claim.

#### Disparate Treatment – Unlawful Termination

To establish a prima facie case of disparate treatment based on disability, Edmonson must show that he (1) belongs to a protected class (disabled), (2) suffered an adverse employment action, (3) was doing satisfactory work, and (4) was treated

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<sup>2</sup> Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 144, 94 P.3d 930 (2004).

<sup>3</sup> Riehl, 152 Wn.2d at 144 (quoting Pulcino v. Federal Express Corp., 141 Wn.2d 629, 639, 9 P.3d 787 (2000)).

<sup>4</sup> RCW 49.60.010, .180

<sup>5</sup> Riehl, 152 Wn.2d at 145.

differently than someone not in the protected class.<sup>6</sup> Edmonson fails to establish a prima facie case because he does not demonstrate that ABM treated him differently from someone not in the protected class. ABM has a strict policy that prohibits sleeping on the job, and the union contract authorizes immediate termination for violation of that policy. He presents no evidence that ABM failed to terminate another employee for sleeping on the job or treated him differently from any other employee.

Even assuming Edmonson had established a prima facie case, ABM still is entitled to judgment as a matter of law because it established a legitimate nondiscriminatory explanation for its action, which Edmonson failed to show was pretextual. Once a plaintiff establishes a prima facie case of discrimination, the evidentiary burden shifts to the employer to rebut the presumption of discrimination.<sup>7</sup> If the employer can show a nondiscriminatory explanation for its action, the presumption is removed and the burden of production shifts back to the plaintiff, who must then present evidence sufficient to disbelieve the employer's explanation.<sup>8</sup> If the plaintiff cannot show evidence that the employer's reason was pretextual, the employer is entitled to judgment as a matter of law.<sup>9</sup>

Here, ABM showed that it terminated Edmonson for sleeping on the job. Because this was a legitimate nondiscriminatory explanation, the burden shifted back

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<sup>6</sup> Kirby v. City of Tacoma, 124 Wn. App. 454, 468, 98 P.3d 827 (2004).

<sup>7</sup> Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 180-81, 23 P.3d 440 (2001) (adopting protocol from McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)).

<sup>8</sup> Hill, 144 Wn.2d at 182.

<sup>9</sup> Hill, 144 Wn.2d at 182.

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to Edmonson to show pretext. It is undisputed that sleeping on the job warrants immediate termination according to the union contract and company policy. Edmonson

admitted that he was aware of this policy. ABM investigated the circumstances of Edmonson's termination. He had returned to work the day after the injury occurred, with the restriction that his hand could not be exposed to water. He was given a medical release to work on May 7, 2004, which gave no notice of limitations related to sedating medications. He fell asleep on the job approximately three weeks after that medical release and provided no medical documentation that the treatment for his injured thumb was medically related to his falling asleep on May 28, 2004.

Because Edmonson has produced no evidence from which a reasonable jury could infer either that he was treated differently from someone not in a protected class or that ABM's decision was motivated by intent to discriminate, we affirm summary judgment in favor of ABM.<sup>10</sup>

#### Failure to Accommodate

A prima facie case for failure to accommodate consists of four elements:

(1) the employee had a sensory, mental, or physical abnormality that substantially limited his or her ability to perform the job; (2) the employee was qualified to perform the essential functions of the job in question; (3) the employee gave the employer notice of the abnormality and its accompanying substantial limitations; and (4) upon notice, the employer failed to affirmatively adopt measures that were available to the employer and medically necessary to accommodate the abnormality.<sup>[11]</sup>

ABM argues that Edmonson's claim fails because he did not have a disability that substantially limited his ability to perform his job as a janitor, that he failed to notify ABM of his disability and accompanying substantial limitations, and that

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<sup>10</sup> See Kuyper v. Dep't of Wildlife, 79 Wn. App. 732, 739, 904 P.2d 793 (1995).

<sup>11</sup> Riehl, 152 Wn.2d at 145-46 (quoting Hill, 144 Wn.2d at 192-93).

accommodation was not medically necessary.

We must first determine whether Edmonson presented evidence of a disability that required reasonable accommodation. Edmonson argues, as he did below, that he had a qualifying disability under RCW 49.60.040. The version of this statute in effect when he was terminated did not define “disability.”<sup>12</sup> The legislature added this definition as an amendment to the WLAD effective July 22, 2007.<sup>13</sup> On appeal, ABM argues that the doctrine of separation of powers precludes application of the 2007 amendments to causes of action occurring before the issuance of McClarty v. Totem Electric<sup>14</sup> and requires application of the definition adopted in that case, despite specific legislative intent that the act apply retroactively.<sup>15</sup> This issue is currently pending review by our Supreme Court in Hale v. Wellpinit School District No. 49.<sup>16</sup> Because Edmonson did not have a qualifying disability under either definition, we affirm summary judgment without deciding which definition properly applies.

On summary judgment before the trial court, the parties relied solely on the definition of “disability” set forth in RCW 49.60.040(25). In arguing that he had a disability, Edmonson cites the first part of the definition in subsections (25)(a), (b), and (c). However, subsections (25)(d) and (e) establish additional requirements that must be met for an impairment to qualify for reasonable accommodation. RCW 49.60.040(25) provides in part:

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<sup>12</sup> Former RCW 49.60.040 (2002).

<sup>13</sup> Laws of 2007, ch. 317, § 2.

<sup>14</sup> 157 Wn.2d 214, 137 P.3d 844 (2006).

<sup>15</sup> Laws of 2007, ch. 317, § 3.

<sup>16</sup> No. 80771-0 (filed October 16, 2007, review granted April 9, 2008).

(d) Only for the purposes of qualifying for reasonable accommodation in employment, an impairment must be known or shown through an interactive process to exist in fact and:

(i) The impairment must have a substantially limiting effect upon the individual's ability to perform his or her job, the individual's ability to apply or be considered for a job, or the individual's access to equal benefits, privileges, or terms or conditions of employment; or

(ii) The employee must have put the employer on notice of the existence of an impairment, and medical documentation must establish a reasonable likelihood that engaging in job functions without an accommodation would aggravate the impairment to the extent that it would create a substantially limiting effect.

(e) For purposes of (d) of this subsection, a limitation is not substantial if it has only a trivial effect.<sup>[17]</sup>

Assuming that an impairment (Edmonson's thumb injury) was known to exist in fact, Edmonson fails to meet the requirements of either (25)(d)(i) or (ii).

Where an impairment is known or shown through an interactive process to exist, the employee is entitled to reasonable accommodation if the impairment has a substantially limiting effect on the employee's ability to perform his or her job.<sup>18</sup>

Edmonson testified that during the six week period before the night he fell asleep at work, the medications he was taking for his thumb had not affected his ability to do his job. He knew that the Tylenol 3 made him drowsy and he had alternative medication available. He was given a medical work release on May 7, 2004, and worked his shifts without event until May 28, 2004. Thus, we conclude that Edmonson failed to present any evidence that an impairment had "a substantially limiting effect" on his ability to perform his job.

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<sup>17</sup> RCW 49.60.040(25)(d), (e).

<sup>18</sup> RCW 49.60.040(25)(d)(i).

Where the impairment does not have a substantially limiting effect on the employee's ability to do his or her job, the employee must show under subsection (25)(d)(ii) that he or she put the employer on notice of the impairment, and "medical documentation must establish a reasonable likelihood that engaging in job functions without an accommodation would aggravate the impairment to the extent that it would create a substantially limiting effect."<sup>19</sup> Edmonson did not provide medical documentation that established any likelihood that engaging in job functions without an accommodation—here, being allowed to take sedating medication and sleep on the job—would aggravate his thumb injury.

If the doctrine of separation of powers precludes application of the WLAD definition, Edmonson's claim still fails. He does not have a qualifying disability under the definition of disability set forth in the federal ADA, which was adopted by our Supreme Court in McClarty. The court held that a plaintiff has a disability if he "(1) has a physical or mental impairment that substantially limits one or more of his major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment."<sup>20</sup> "Major life activities" are "those activities that are of central importance to daily life."<sup>21</sup> There is no evidence in the record that Edmonson's injury or the treatment for the injury substantially limited any of his major life activities.

Even if Edmonson had a qualifying disability, his claims fail because he did not

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<sup>19</sup> RCW 49.60.040(25)(d)(ii).

<sup>20</sup> McClarty, 157 Wn.2d at 228.

<sup>21</sup> McClarty, 157 Wn.2d at 229 (quoting Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 197, 122 S. Ct. 681, 151 L. Ed. 2d 615 (2002)).

notify ABM of any substantial limitations requiring accommodation. Edmonson argues that he provided sufficient notice to his employer by telling his supervisor and human resources staff that the reason he had fallen asleep was due to medication he was taking for his injury. However, the medical documentation Edmonson provided did not support this explanation. The record establishes that Edmonson was not being treated with sedating medication after May 7, 2004, and that he did not believe he needed accommodation.

Finally, Edmonson's claim fails because accommodation was not medically necessary. In Lindblad v. Boeing Co.,<sup>22</sup> we held that the plaintiff failed to establish a prima facie case of failure to accommodate because he failed to show that his disability required accommodation. Lindblad was susceptible to migraine headaches. He treated the headaches by taking ibuprofen, which he routinely carried with him on the job.<sup>23</sup> At approximately 10:30 p.m. during an evening shift, he was found sleeping in his car.<sup>24</sup> Boeing terminated him for this violation of company policy.<sup>25</sup> At his deposition, he testified that he had gone to his car to get ibuprofen because he felt a migraine coming on and had forgotten to carry the ibuprofen with him.<sup>26</sup> There was no evidence that Lindblad's condition required accommodation. Boeing did not prevent Lindblad from carrying his ibuprofen with him, and the only reason he did not have it with him was that he had forgotten it.<sup>27</sup>

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<sup>22</sup> 108 Wn. App. 198, 31 P.3d 1 (2001).

<sup>23</sup> Lindblad, 108 Wn. App. at 204.

<sup>24</sup> Lindblad, 108 Wn. App. at 200-01.

<sup>25</sup> Lindblad, 108 Wn. App. at 201.

<sup>26</sup> Lindblad, 108 Wn. App. at 204.

Similarly, our Supreme Court In Riehl v. Foodmaker, Inc.,<sup>28</sup> held that an employee must show a medical nexus between his disability and a need for accommodation. Riehl suffered from depression and posttraumatic stress disorder and was temporarily restricted to six-hour workdays.<sup>29</sup> His employer accommodated his disability by paying his full salary, allowing him to leave early, and allowing him to take work home.<sup>30</sup> After several months, he returned to working eight-hour days and appeared fully recovered, except that he still had to attend doctor appointments.<sup>31</sup> As a result of a time study it conducted, the employer decided to combine Riehl's position and another position.<sup>32</sup> The employer hired the other employee for the combined position and fired Riehl.<sup>33</sup> The court held that Riehl's lack of accommodation claim failed because he did not offer proof that further accommodation was medically necessary.<sup>34</sup>

Here, Edmonson returned to work after his injury, with the restriction that his hand could not be exposed to water. The record establishes that Edmonson no longer needed to take sedating pain medication for his thumb injury after May 7, 2004. He offered no proof that the Tylenol 3 was medically necessary to treat his injury on May 28, 2004. There is no medical nexus between his injury and his request for

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<sup>27</sup> Lindblad, 108 Wn. App. at 204-05.

<sup>28</sup> Riehl, 152 Wn.2d at 142-43.

<sup>29</sup> Riehl, 152 Wn.2d at 143.

<sup>30</sup> Riehl, 152 Wn.2d at 143.

<sup>31</sup> Riehl, 152 Wn.2d at 143.

<sup>32</sup> Riehl, 152 Wn.2d at 143.

<sup>33</sup> Riehl, 152 Wn.2d at 143.

<sup>34</sup> Riehl, 152 Wn.2d at 148-49.

accommodation. Viewing the evidence in the light most favorable to Edmonson, there is no issue of genuine fact material to his claim for failure to accommodate.

### Retaliation

Edmonson alleges that ABM unlawfully fired him in retaliation for filing an industrial injury claim. To demonstrate a prima facie case for retaliation, a plaintiff must show (1) that he or she exercised the statutory right to pursue workers' benefits under Title 51 RCW or communicated to the employer an intent to do so or exercised any other right under Title 51 RCW; (2) that he or she was discharged; and (3) that there is a causal connection between the exercise of the legal right and the discharge.<sup>35</sup>

Since motive is often difficult to prove, the employee may rely on circumstantial evidence.<sup>36</sup> A plaintiff can satisfy the third element if he can show that he filed a claim, the employer had knowledge of the claim, and the plaintiff was discharged.<sup>37</sup> The plaintiff need not show that his exercise of workers' compensation benefits was the sole reason for the discharge, but merely that it was a substantial factor in the employer's decision to discharge him.<sup>38</sup> If the plaintiff presents a prima facie case, the burden shifts to the employer to show a legitimate, nonpretextual, nonretaliatory reason for the discharge.<sup>39</sup> If the employer produces such evidence, the burden shifts back to the plaintiff to show that the employer's reason is pretextual.<sup>40</sup>

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<sup>35</sup> Wilmot v. Kaiser Aluminum & Chem. Corp., 118 Wn.2d 46, 68-69, 821 P.2d 18 (1991).

<sup>36</sup> Wilmot, 118 Wn.2d at 69.

<sup>37</sup> Wilmot, 118 Wn.2d at 69.

<sup>38</sup> Wilmot, 118 Wn.2d at 73.

<sup>39</sup> Wilmot, 118 Wn.2d at 70.

<sup>40</sup> Wilmot, 118 Wn.2d at 70.

In Anica v. Wal-Mart Stores, Inc.,<sup>41</sup> the plaintiff argued that Wal-Mart discharged her in retaliation for filing a workers' compensation claim. However, Wal-Mart discharged her because she failed to produce social security documentation five months after her employer requested it.<sup>42</sup> She also claimed that the timing of her discharge was evidence of a retaliatory motive.<sup>43</sup> This court held that her termination three months after her filing of a claim was not evidence of retaliation.<sup>44</sup>

Here, ABM demonstrated that it terminated Edmonson for falling asleep on the job, a violation warranting discharge under the company policy and union contract. Because ABM's reason is legitimate and not pretext, Edmonson must show that retaliation was a substantial factor in his discharge. The record does not support this argument. After Edmonson was injured, he worked for ABM for six weeks. He received workers' compensation benefits for medical treatment during that time. He was terminated only after he fell asleep on the job in clear violation of company policy. ABM gave Edmonson an opportunity to provide a medical justification for falling asleep, which he failed to do. It reviewed its initial decision to terminate him, but in light of his failure to provide medical documentation, it upheld the termination. There is no evidence that retaliation was a substantial factor in Edmonson's discharge.

Affirmed.

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<sup>41</sup> 120 Wn. App. 481, 84 P.3d 1231 (2004).

<sup>42</sup> Anica, 120 Wn. App. at 493.

<sup>43</sup> Anica, 120 Wn. App. at 493.

<sup>44</sup> Anica, 120 Wn. App. at 493-94.

*Seach, J.*

WE CONCUR:

*Dwyer, A.C.J.*

*Appelwick, J.*