2006 WI APP 157

COURT OF APPEALS OF WISCONSIN
PUBLISHED OPINION

Case No.: 2004AP1550

Complete Title of Case:

STOUGHTON TRAILERS, INC.,

PETITIONER-APPELLANT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION AND DOUGLAS SCOTT GEEN,

RESPONDENTS-RESPONDENTS.

Opinion Filed:	July 27, 2006
Submitted on Briefs:	December 16, 2004

JUDGES:  Concurred:  Dissented:	Lundsten, P.J., Vergeront and Higginbotham, JJ.

Appellant ATTORNEYS:	On behalf of the petitioner-appellant, the cause was submitted on t of *Amy O. Bruchs, Farrah N.W. Rifelj and Christine Cooney Mans* *Michael Best & Friedrich LLP*, Madison.
Respondent ATTORNEYS:	On behalf of the respondents-respondents, the cause was submitte briefs of *David C. Rice*, assistant attorney general, and *Peggy A.* *Lautenschlager*, attorney general, and *Christopher J. Blythe* of *La* *Cates, S.C.*, Madison.

2006 W

COURT OF APPEALS
DECISION
DATED AND FILED

July 27, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

Appeal No. **2004AP1550** **Cir. Ct. No. 2003CV3(**

STATE OF WISCONSIN **IN COURT OF APPEAL**

STOUGHTON TRAILERS, INC.,

PETITIONER-APPELLANT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION AND DOUGLAS SCOTT GEEN,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court f MICHAEL N. NOWAKOWSKI, Judge. *Affirmed*.

Before Lundsten, P.J., Vergeront and Higginbotl

¶1 HIGGINBOTH the second appeal of this case. In the first appeal we reversed the Labor an Commission's decision that Stoughton Trailers, Inc., Douglas Geen's emplo accommodated Geen's disability, and remanded the case to LIRC to ansv

�(1) whether on the present facts Stoughton [Trailers] terminated Geen's emp his disability; and (2) whether the [Family Medical Leave Act (FMLA)] or thereunder affect [Stoughton Trailers'] claim that it reasonably accommodated and if so, how.'' *Geen v. LIRC*, 2002 WI App 269, ¶36, 258 Wis. 2d 498, 654

¶2 After remand that Stoughton Trailers had violated WIS. STAT. § 111.321 (2003-04)[1] of Employment Act (WFEA) by terminating Geen's employment "because of" the meaning of WIS. STAT. §§ 111.322 and 111.34, and by refusing to reasor his disability within the meaning of § 111.34(1)(a).' The circuit court determination.' Stoughton Trailers appeals.' We conclude that LIRC's Stoughton Trailers violated the WFEA by terminating Geen's employment beca is based on a reasonable interpretation of the statute and comports with its pu Trailers fails to convince us that its interpretation of the statute is more reas conclude that LIRC properly exercised its discretion in ordering Geen's rem conclude that LIRC's determination that Stoughton Trailers failed to reason Geen's disability was a reasonable application of the WFEA and an interpretatio clear meaning.' Accordingly, we affirm.

FACTS

¶3 The finding LIRC's September 11, 2003 decision, described more in depth in ***Geen***, 258 Wis are not disputed.' We repeat in this section only the most pertinent findings f appeal.

¶4 Geen worke Trailers, a manufacturer of semi-trailers, for approximately eight years, until Stou him on January 31, 1997, for exceeding the allowed number of absences unde

employees are assigned "occurrences" for absences, subject to limited ex "[a]bsences meeting State and Federal Family and Medical Leave [FMLA] law he was fired, by Stoughton Trailers" count, Geen had accrued 6.5 occurrences that raised his point tally from 5.5 to 6.5, putting him over the allowed limit, period of time from January 24 (a Friday) through January 28, 1997 (a Tuesday absent due to migraine headaches."

"5 When Geen re January 29, Tammy Droessler, Stoughton Trailers" human resources administ standard letter reminding Geen that he was required to bring in a release-for-wor his absence qualify as a medical leave, Geen needed to provide medical docu physician detailing a reason for his absence and an expected date of return; and FMLA leave, he needed to" complete a Department of Labor medical certifi letter instructed Geen to submit the documentation within fifteen calendar days o the minimum time the FMLA requires employers to give employees t certification." *See* 29 C.F.R. " 825.305(b).

"6 On January Droessler a note from the physician who treated him, Dr. M. A. Hansen, stating evaluated for migraines." In response, Geen was reminded that he needed an a the doctor stating that he could return to work without restrictions.

"7 Geen return office on January 31, 1997, and obtained a note indicating he was released restrictions." This release also indicated Geen had been unable to work on Jan However, the note did not address Geen"s absence or work capabilities on Janua the note to Droessler the same day, but was then informed he was being fired b documentation did not excuse him for January 24, causing him to accrue an occu and putting his total occurrences at 6.5."

¶8 At the time h indicated that his doctor needed additional time to evaluate him before he cc medical documentation.¶ In response, Geen was informed about his options f Attendance Review Board.¶ Geen consequently filed an appeal, which the revie rejected.¶

PROCEDURAL BACKGROUND

¶9 Geen filed complaint with the Department of Workforce Development, Equal Rights Div Stoughton Trailers discriminated against him on the basis of disability in violatic *See* ***Geen***, 258 Wis. 2d 498, ¶10. ¶An administrative law judge ruled that (1) G as defined by the WFEA; (2) Geen¶s employment was terminated, ¶in pa disability¶; and (3) Stoughton Trailers failed to reasonably accommodate Geen¶ ¶Stoughton Trailers appealed to LIRC.¶ ***Id.***, ¶11.¶ LIRC reversed the ALJ¶ that Stoughton Trailers did not refuse to reasonably accommodate Geen¶s disab LIRC did not determine whether Stoughton Trailers terminated Geen¶s emp of¶ his disability.[2] ¶

¶10 Geen ap decision to the circuit court, which reversed LIRC.[3]¶ ***Id.***, ¶13.¶ Stoughton this court.¶ ***Id.***, ¶14.¶ Concluding that LIRC had not resolved the issue o termination was ¶because of¶ disability, and that LIRC should have considere the FMLA to Geen¶s case, we modified the circuit court¶s reversal order, remand to clarify two points: whether Stoughton Trailers terminated Geen¶s er of his disability and whether Stoughton Trailers¶ possible violation of the FML enacted thereunder affected Stoughton Trailers¶ claims that it reasonably acco disability.¶ ***Id.***, ¶¶2, 36.

¶11 On remand, l
mixed motive test, concluded that Stoughton Trailers fired Geen in part because
by his disability, in violation of the WFEA. *Geen v. Stoughton Trailers, In*
199700618 (LIRC, September 11, 2003). LIRC additionally concluded that
failed to reasonably accommodate Geen's disability as required by the WFEA
him the time required by the FMLA to certify and document his medical condi
him. *Id.* LIRC issued a cease and desist order, ordered Stoughton Trai
reinstatement with back benefits, and awarded him back pay and reasonable and
and costs. *Id.*

¶12 Stoughton
judicial review of LIRC's September 11, 2003 decision. The circuit court affirm
aspects of LIRC's decision.[4] Stoughton Trailers appeals.

ANALYSIS

¶13 The W
discrimination in employment "because of" disability. WIS. STAT. §§ 1
111.34. Following our past decisions interpreting WIS. STAT. § 111.34, includ
our analysis by noting that Geen's disability discrimination claim involves three

> First, Geen must establish that he has a disability within the meani
> Wisconsin's fair employment law. Second, Geen must prove that Stou
> [Trailers] terminated him because of his disability. Third, if Geen proves
> two elements, the burden then shifts to Stoughton [Trailers] to justi
> termination. Stoughton [Trailers] may do so by proving that Ge
> disability is "reasonably related" to his ability to do his job *and* that
> (1) Stoughton [Trailers] reasonably accommodated Geen's disability p
> his termination; or (2) any accommodation would have posed a hardship
> business.

Geen, 258 Wis. 2d 498, ¶15 (citations omitted).

¶14 As we obse

disability was reasonably related to Geen's ability to do his job. *Id.*, Stoughton Trailers does not claim that a reasonable accommodation of Geen would have imposed a hardship on its business. *Id.* Thus, we consider only two issues: (1) whether Stoughton Trailers terminated Geen's employment because of his disability and, if so, (2) whether Stoughton Trailers reasonably accommodated Geen's disability before termination.

I. STANDARD OF REVIEW

¶15 This appeal is from a circuit court decision affirming an administrative agency's decision. We review the agency's decision, not the circuit court's, and the scope of our review is the same as the circuit court's. *Target Stores v. LIRC*, 217 Wis. 2d 1, 11, 576 N.W.2d 545 (Ct. App. 1998). Stoughton Trailers does not challenge LIRC's findings of fact, conceding that the agency's findings accurately describe the sequence of events. Therefore, our review is limited to the interpretation and application of WIS. STAT. §§ 111.321,[5] 111.322(1),[6] and 111.34(2)(b),[7] a question of law.[8] Although we ordinarily review such questions of law de novo, we review agency decisions increasing degrees of deference, from due weight to great weight, depending on the agency's expertise in areas of the law that it has most frequently addressed. *Barron v. LIRC*, 213 Wis. 2d 373, 384-85, 571 N.W.2d 165 (Ct. App. 1997).

¶16 An agency's interpretation is entitled to great weight when the legislature has charged it with the duty of administering the statute, when the agency has extensive experience and expertise in interpreting and applying the statute at issue, when its interpretation is a longstanding one, and when the agency's interpretation will provide uniformity and consistency in the statute's application. *Hutchinson Technology, Inc. v. LIRC*, 2004 WI 90, ¶22, 273 Wis. 2d 394, 682 N.W.2d 343. Under the great weight standard, we uphold an agency's interpretation as long as it is reasonable and not contrary to

meaning, even if we find a different interpretation more reasonable. ***UFE*** Wis. 2d 274, 287, 548 N.W.2d 57 (1996).

¶17 We apply a deference due weight when the agency has some experience in the area, bu the expertise which necessarily places it in a better position to make judgm interpretation of the statute than a court. ***Id.*** at 286.

> The deference allowed an administrative agency under due weight is n much based upon its knowledge or skill as it is on the fact that the legis has charged the agency with the enforcement of the statute in question. Si such situations the agency has had at least one opportunity to analyze the and formulate a position, a court will not overturn a reasonable agency de that comports with the purpose of the statute unless the court determine there is a more reasonable interpretation available.

Id. at 286-87.

¶18 We apply the de novo in those situations when the issue before the agency is clearly one of first impr agency's position on an issue has been so inconsistent so as to provide no real g 285 (citations omitted).

¶19 Stoughton T we should not accord any deference to LIRC's decision, but should review it decision was inconsistent with previous agency decisions. Geen and LIRC coun give LIRC's decision great weight, due to the agency's extensive experienc interpreting and applying the WFEA. LIRC alternatively proposes that becaus remand differs to some degree from two previous decisions addressing simil appropriately accord due weight deference.

¶20 For the reaso we apply the due weight standard of review to LIRC's because of disabi

also conclude that the great weight standard of review is appropriate for L accommodation decision. We address the appropriate standard of review for each

¶21 Regarding th Geen's employment was terminated "because of" his disability within tl WFEA, we recognized in ***Geen*** that the question is one of law, which we appro addressed without remanding to LIRC, but we nonetheless remanded the issue to Wis. 2d 498, ¶35." We explained that we did so because the legal question " value and policy judgments, and its resolution by the commission will commission's expertise in matters relating to employment, and from its experi and administering the WFEA." ***Id.*** For the same reasons"because the ques involves policy implications, and because LIRC offers expertise and experience i of the WFEA's "because of disability" language"we reject Stoughton Traile only de novo review applies." However, because LIRC concedes that it took a approach here than in previous cases addressing somewhat similar issues, ***Trailers, Inc.***, ERD Case No. 199700618 (LIRC, September 11, 2003), we con discrimination decision is entitled to due weight rather than great weight deferenc

¶22 Regarding standard of review for LIRC's interpretation and application of the WF accommodation requirement, we conclude that LIRC's determination is entitl deference." In ***Target Stores***, we explained why great weight consideration LIRC's interpretations of the WFEA's reasonable accommodation requirement

> First, LIRC is charged with adjudicating appeals from the hearing exami decision on complaints under the WFEA, § 111.39(5), STATS., which in complaints under § 111.322, STATS., for handicap discrimination." S § 111.34(1), STATS., was enacted in 1981 and LIRC has deve experience and expertise in interpreting this section. Third, by according deference to these determinations, we will promote greater uniformit consistency than if we did not do so." Fourth, this determination is inter with factual determinations. Fifth, this determination involves value and

Target Stores, 217 Wis. 2d at 13 (citations omitted).[illegible] We see no good reason
traditional great weight standard of deference for LIRC[illegible]s reasonable accomm
Stoughton Trailers contends that LIRC[illegible]s reasonable accommodation determina
with its previous reasonable accommodation decisions, but fails to explain how th
from the case at hand.[illegible] Stoughton Trailers also fails to explain why we sh
established case law setting forth our standard of review of LIRC[illegible]s reasonal
decisions.[illegible] We therefore reject Stoughton Trailers[illegible] assertion that we shoul
standard of review, rather than great weight, to LIRC[illegible]s September 11,
accommodation determination.[illegible]

II. DISCRIMINATION [illegible]BECAUSE OF[illegible] DISABILITY

[illegible]23[illegible] Stoughton Tr
LIRC erred in determining that Stoughton Trailers discriminated against Geen
disability by discharging him under a [illegible]no fault[illegible] attendance policy for abs
disability.[illegible] In support of this contention Stoughton Trailers argues that: (1) LI
inconsistent with previous LIRC decisions addressing the application of [illegible]no
policies to disabled employees; (2) LIRC erred by applying the mixed motive te
v. LIRC, 186 Wis. 2d 603, 608-11, 522 N.W.2d 234 (Ct. App. 1994), to the fact
the approach LIRC took in Geen[illegible]s case were applied to[illegible] other cases invo
attendance policies, it would prevent employers from being able to discharge em
and (4) LIRC ordered the wrong remedy.[illegible]

[illegible]24[illegible] Applying
standard, we hold that LIRC[illegible]s determination that Stoughton Trailers discriminat
terminating his employment because of his disability is based on a reasonable int
STAT. [illegible] 111.321, 111.322(1), and 111.34, and that Stoughton Trailers has fa
that its interpretation of these statutes is more reasonable.[illegible] We consider
Trailers[illegible] arguments in turn.

A. ﷺNo Faultﷺ Attendance Policy Precedents

ﷺ25ﷺﷺﷺ

ability to perform the work because of the employee's disability.[] LIRC ex
reasoning of the administrative law judge in [***Gordon***], that it was not disabilit
apply minimum uniform attendance requirements to persons whose disabilities
miss work, was thus in the nature of dicta.[] ***Geen v. Stoughton Trailers, I***
199700618 (LIRC, September 11, 2003). LIRC explained that ***Gee***'s pa
Gordon and the "no fault" policy issue was similarly just dicta, concluding
neither ***Gordon*** nor ***Gee*** was the question determinative of the outcome of the c
neither case was the question addressed with the depth appropriate to its importan
finds those cases less than persuasive.[] ***Id.***

¶29 LIRC furthe
current commission viewed the issue differently than the commissions that decid
because of the intervening ***Hoell*** decision by our court which necessarily affe
Concluding that it was not bound by these past decisions, LIRC explained that

> to the extent that ***Gordon*** and ***Gee*** hold that a discharge is not "becaus
> disability where it is in part because of absences that are caused b
> disability, those decisions are arguably inconsistent with and have thus b
> some extent supplanted by the 1994 decision of the Court of Appe
> ***Hoell***.

Id.

¶30 We conclu
reading of ***Gordon*** and ***Gee*** is not unreasonable. Neither case resolved, no
dicta, whether an employer discriminates against an employee "because of d
applies a "no fault" attendance policy to fire employees whose absenc
disability. We agree with LIRC that in both ***Gordon*** and ***Gee*** this issue wa
holdings. We also agree with LIRC that the adoption of the mixed motive test
more in depth below, may have affected the viability of the commission's decis
Gee, to the extent that either case addressed the issue. For these reasons we

provided a satisfactory explanation for any inconsistency between its approac
decisions to the issue of applying "no fault" attendance policies to absences cau

B. Mixed Motive Test

"31 Stoughton Tra
that LIRC erred by applying the mixed motive test to the facts of this case.[9] "
mixed motive test applies only when animus or discriminatory intent is at issu
according to Stoughton Trailers, because LIRC expressly found that Stoughto
"motivated by bias against Geen because of his disability" in its first decision,
Trailers, ERD Case No. 199700618 (LIRC, August 31, 2000), and because LIR
finding of intentional discrimination in its second decision, which is before
LIRC"s application of the mixed motive test was in error. "This argument is wi

"32 The mixed m
applied to discrimination claims under the WFEA in ***Hoell.*** " We explained in ***H***
motive test applies where "the adverse employment decision resulted from a m
business reasons and prohibited discriminatory motives."" ***Hoell***, 186 Wis. 2
Price Waterhouse v. Hopkins, 490 U.S. 228, 247 (1989)." The ***Hoell*** cc
employee"s request for leave due to pregnancy was a motivating factor for
Applying the mixed motive test, we consequently concluded that she was fi
pregnancy, without engaging in any analysis of the employer"s intent or frame
the disability." ***Hoell***, 186 Wis. 2d at 613, 615." In adopting the mixed motiv
concluded that it was appropriate to apply the test in cases brought under th
611.""

"33 Turning to St
argument, we observe that it points to no legal authority standing for the prop
Wisconsin law, a complainant alleging discrimination in part "because of" di

decision. Stoughton Trailers misapprehends the mixed motive test in assert where discriminatory intent is at issue; as we explained above, the mixed motive the record contains evidence showing an employer was motivated by prohibited factors in taking an adverse employment action against an employee. ***Id.*** at 608 discriminatory intent is not part of the analytical paradigm of the mixed motive tes

34 In support o the mixed motive test adopted in ***Hoell*** is a test of discriminatory *intent*, (i.e actual frame of mind) as opposed to motivating *factors* (such as disability or pre Trailers cites ***Department of Employment Relations v. WERC***, 122 Wis. 2d N.W.2d 660 (1985), and ***Abioye v. Sundstrand Corp.***, 164 F.3d 364, 369 (7th Cir. not WFEA cases. ***Employment Relations*** concerned a claim for unfair labor pr STAT. 111.84. ***Employment Relations***, 122 Wis. 2d at 138. ***Abioye*** concer under Title VII of the Civil Rights Act of 1964 and the Age Discrimination in E ***Abioye***, 164 F.3d at 366. The WFEA and its disability discrimination provisio analytical framework than do these other statutes. These cases do not persuad Trailers interpretation of the mixed motive test is more reasonable than LIRC

35 We also obs application of the ***Hoell*** mixed motive standard to cases involving no fault enforced against disabled employees comports with the purpose of W discrimination provisions, namely to encourage and foster the employmen disabilities, ***McMullen v. LIRC***, 148 Wis. 2d 270, 275, 434 N.W.2d 830 (Ct. A facilitate the performance of their job-related responsibilities, ***Geen***, 258 Wis. 2 therefore conclude LIRCs construction and application of the WFEA in this reg and consistent with the WFEAs clear meaning and purpose, and that Stought persuaded us that its view of the mixed motive standard is more reasonable.

¶36 Stoughton T
that LIRC's interpretation of the WFEA would effectively prevent employers
illness against an employee under its "no fault" attendance policy. We disagr

¶37 LIRC's u
motive test in this context does not prevent an employer from applying its "no
policy to an employee who is absent for reasons not related to a disability. N
related to a person's disability; indeed, simply because a person may be ill d
mean that illness is a disability within the meaning of the statute. Similarly, just
person is absent does not mean the absence is necessarily due to the person's c
reasonable accommodation requirements. An employer may continue to app
attendance policy as long as the policy does not result in an adverse employ
because of an employee's disability and as long as the policy is otherwise
law.¶¶

D. Appropriate Remedy Determination

¶38 Finally, S
contends that, even if ***Hoell*** applies to this case, LIRC ordered the wrong re
Trailers appears to argue that under ***Hoell***, LIRC's discretion in awarding
limited to attorney's fees and a cease and desist order. Stoughton Trailers misr

¶39 In ***Hoell*** w
remedies are appropriate under various scenarios in mixed motive cases. Wh
terminated in part because of an impermissible motivating factor and in par
motivating factors, and where the termination would not have occurred in
impermissible motivating factor, LIRC has discretion to award some or all of the
a cease and desist order, reinstatement, attorney's fees, back pay, and/or int
Wis. 2d at 609-10. This is such a case. Here, LIRC concluded that Geen was

disability.[illegible] LIRC also expressly concluded that the discharge would not hav Geen[illegible]s last two absences, which were caused by his disability.[illegible] LIRC apparer it was appropriate to award Geen the full scope of remedies ***Hoell*** indicated i circumstances.[illegible] Stoughton Trailers has not persuaded us that LIRC impro discretion by making this award.[illegible]

III. REASONABLE ACCOMMODATION

[illegible]40[illegible] WISCONSI provides in part:

> **(1)** Employment discrimination because of disability includes, but limited to:
>
> [illegible].
>
> (b) Refusing to reasonably accommodate an employee[illegible] prospective employee[illegible]s disability unless the employer can demonstra the accommodation would pose a hardship on the employer[illegible]s pr enterprise or business.

As we noted, Stoughton Trailers does not contend that accommodating Geen[illegible] pose a hardship on it.[illegible] Therefore, the only issue we consider here is determination that Stoughton Trailers discriminated against Geen by fail accommodate his disability was reasonable.[illegible] Applying the great weight standar LIRC reasonably interpreted and applied [illegible] 111.34(1)(b) when it concluded that failed to reasonably accommodate Geen[illegible]s disability.

[illegible]41[illegible] The reasonal statute, WIS. STAT. [illegible] 111.34(1)(b), is a remedial statute designed to addre discrimination against disabled persons.[illegible] ***McMullen***, 148 Wis. 2d at 275.[illegible] broadly construed to effectuate its remedial purpose.[illegible] ***Id.***[illegible] The legislative int the reasonable accommodation statute is to encourage and foster, to the greatest the employment of all properly qualified individuals regardless of disability,

�42 Stoughton LIRC erred by concluding that it did not reasonably accommodate Geen's disability by permitting him to submit a proper FMLA medical certification form.[11] LIRC rejected this argument, concluding that Stoughton Trailers "did not fully comply with the FMLA in its dealings with Geen in that regard." We indicated in ***Geen*** that Stoughton Trailers may have violated the FMLA and we therefore remanded to conclusively determine whether that was the case, and if so, to consider that violation in the context of the WFEA to determine whether Stoughton Trailers reasonably accommodated Geen's disability. *Geen*, 258 Wis. 2d 498, ¶¶31-32, 36. Here, however, we need not address the parties' dispute over whether LIRC's interpretation of the FMLA is correct.[12] LIRC also concluded that, even if Stoughton Trailers complied with the FMLA, Stoughton Trailers failed to reasonably accommodate Geen's disability by failing to exercise "clemency and forbearance," as that term is defined and applied in ***Target Stores***. We now consider this alternative reason for LIRC's conclusion that Stoughton Trailers did not reasonably accommodate Geen's disability.¶¶

¶44 Stoughton Trailers argues that LIRC erred by concluding that Stoughton Trailers failed to reasonably accommodate Geen by granting him the reasonable accommodation of "clemency and forbearance." Stoughton Trailers argues that, whether or not Geen was properly afforded the opportunity to cure any deficiencies in his medical certification, Stoughton Trailers also failed to reasonably accommodate Geen because Geen did not give his doctors the opportunity to determine the extent of his medical restrictions and possible necessary treatment options. Stoughton Trailers contends LIRC was selecting a reasonable accommodation, which, under Wisconsin law, it lacks the authority to do. Stoughton Trailers argues that, if an employer offers a reasonable accommodation, LIRC may not penalize the employer for offering a different reasonable accommodation than the one LIRC or the employee

is not such a case. Rather, the reasonable accommodation issue in this case mi
Stores.

45 In ***Target St***
LIRC reasonably interpreted WIS. STAT. 111.34(1)(b) when it determined tl
decision to discharge an employee for sleeping at work, despite its knowledge th
caused by the disability of sleep apnea, that the employee was being evaluated by
new medical treatment was forthcoming, violated the WFEA. ***Target Stores***,
19. Target claimed to have offered reasonable accommodations, but LIRC conc
provide the necessary clemency and forbearance of waiting to see if the nev
constituted a refusal to reasonably accommodate the employee s disability. ***Id.***

46 In this case,
not choose one reasonable accommodation over another; applying the rule i
clemency and forbearance, LIRC concluded here that

> Stoughton should have extended to him the reasonable accommodati
> clemency and forbearance, temporarily tolerating the absences whicl
> being caused by his disability, while the medical intervention whic
> already begun was allowed to take its course and to potentially resol
> problem of those absences.

47 It is reasonable for LIRC to conclude that,
knows the employee s medical evaluation is pending, as in this case, an emplo
clemency and forbearance in reasonably accommodating an employee
immediately discharging that employee until the full extent of the disability,
accommodations the employer should provide, can be determined. This is cor
Stores and it is consistent with the purpose of the statute. Therefore, unde
deference standard of review, we affirm LIRC s conclusion that Stoughto
reasonably accommodate Geen s disability.

CONCLUSION

¶48 We conclu determination that Stoughton Trailers violated the WFEA by terminating Ge because of his disability is based on a reasonable interpretation of WIS. ST 111.322(1) and 111.34, and also comports with the purpose of the statute. Since fails to offer a more reasonable interpretation of these statutes, we consequent because of decision under the due weight standard of review. We also c properly exercised its discretion in applying *Hoell*s mixed motive test to fa Geens remedy. We further conclude, applying the great weight standard of reasonably interpreted and applied the WFEA by determining that Stoughtor reasonably accommodate Geens disability. We therefore affirm the circuit c respects affirming LIRCs decision.

By the Court. Order affirmed.

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] While LIRC did state in its Conclusion of Law No. 6 that "Respondent did not discriminate against Complainant because of disability," it did not address the narrower question of whether Geen's *termination* was "because of" disability." *See* ***Geen v. LIRC***, 2002 WI App 269, ¶¶2, 17, 33-34, n.8, 258 Wis. 2d 498, 654 N.W.2d 1."

[3] The court reversed LIRC's conclusions that Stoughton Trailers did not discriminate against Geen because of disability and that Stoughton Trailers did not refuse to reasonably accommodate Geen's disability, while affirming its conclusions that Geen was disabled and that the disability was reasonably related to his ability to perform job-related responsibilities." *See* ***Geen***, 258 Wis. 2d 269, ¶¶12-13.

[4] However, the circuit court reversed and remanded on the issue of attorney's fees." The circuit court's order reducing the attorney's fees is not part of this appeal."

[5] Listing the categories protected from discrimination under the WFEA, including disability.

[6] Making it illegal to engage in certain actions, including terminating a person's employment, on the basis of disability or other protected category.

[7] WISCONSIN STAT. " 111.34(1)(b) provides that discrimination because of disability includes "[r]efusing to reasonably accommodate an employee's or prospective employee's disability unless the employer can demonstrate that the accommodation would pose a hardship on the employer's program, enterprise or business."" Section 111.34(2)(a) further explains that "[n]otwithstanding s. 111.322, it is not employment discrimination because of disability to [terminate a person's employment] ... if the disability is reasonably related to the individual's ability to adequately undertake the job-related responsibilities of that individual's employment, membership or licensure."

[8] While an employer's motivation is a question of ultimate fact, ***Hoell v. LIRC***, 186 Wis. 2d 603, 614, 522 N.W.2d 234 (Ct. App. 1994), the question of whether termination "because of" disability includes terminations because of disability-related absences is a question of law, though mixed with policy and value judgments." ***Geen***, 258 Wis. 2d 498, ¶35."

[9] Stoughton Trailers also argues LIRC should not have even considered whether the mixed motive test applied to these facts; it asserts that Geen first raised this argument before the circuit court on appeal of LIRC's August 31, 2000 decision, thereby waiving the argument here." That appeal is not before us." Moreover, Geen raised the issue before LIRC after remand. Thus the issue is properly before us in this appeal."

[10] Stoughton Trailers appears to use the terms "animus" and "discriminatory intent" interchangeably." For purposes of this discussion, we use the term "intent."

[11]Stoughton Trailers also challenges several of our conclusions in ***Geen*** regarding the construction and application of the FMLA." Specifically, Stoughton Trailers argues that we erred in construing and applying 29 C.F.R. " 825.305(b) (requiring employers to give employees at least fifteen calendar days to submit a medical certification form from the date when an employee receives notice that such documentation is required), 29 C.F.R. " 825.203(a) and other statutes governing intermittent leave, and 29 C.F.R. " 825.305(d) (requiring an employer to give an employee a reasonable opportunity to cure any inadequacies in a medical certification form)." We considered and

rejected these same arguments in ***Geen***.[?] We are bound by that decision.[?] *See* ***Cook v. Cook***, 208 Wis. 2d 166, [?]55, 560 N.W.2d 246 (1997).

[12] If a decision on one point is dispositive, we need not address other issues raised.[?] ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938).[?]