

# Employer Lessons From NJ Justices' Disability Claim Ruling

By **Howard Wexler, Ephraim Pierre and Bill Varade** (July 13, 2021)

In *Richter v. Oakland Board of Education*,<sup>[1]</sup> the New Jersey Supreme Court held in June that to establish a prima facie case of failure to accommodate a disability under the New Jersey Law Against Discrimination, or LAD, a plaintiff need not plead an adverse employment action such as a termination or demotion.

An employer's inaction, silence or inadequate response to a reasonable accommodation request is sufficient.

Further, the court held that a plaintiff who recovers under New Jersey's Workers' Compensation Act for workplace injuries is not barred by the WCA's exclusive remedy provision from bringing claims under the LAD for damages and injuries related to workplace discrimination, and thus permits recovery without the showing of an intentional wrong.

By clarifying the elements of a failure-to-accommodate claim, the court not only eliminated a potential defense for employers, but also reinforced the importance of meaningfully engaging in an interactive process whenever an employer receives an accommodation request.

The court also removed a potential bar to recovery under the LAD for plaintiffs who successfully recover under the WCA for workplace bodily injuries related to claims of discrimination.

This decision continues the court's expansion of the LAD's protections based on the statute's legislative intent to eradicate workplace discrimination.

## Background

According to the facts in the opinion, the plaintiff, Mary Richter, was a teacher for the Oakland Board of Education.

During the 2012-13 school year, Richter was scheduled for a 1:05 p.m. lunch break on certain days during the first academic quarter.

Richter is a Type 1 diabetic. Believing that her blood sugar would run dangerously low on these days, Richter requested an earlier lunch break from Gregg Desiderio, the principal.

Despite pursuing several conversations for an accommodation, Desiderio did not engage Richter beyond telling her that he would "look into it."

Ultimately, Desiderio advised her that he could not change her schedule.

Richter was scheduled for an earlier lunch break for the second academic quarter without issue. Nevertheless, Richter was again scheduled for a 1:05 p.m. lunch break in the third academic quarter.

Richter, upon receiving her schedule, immediately approached Desiderio and again



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requested an earlier lunch break.

Desiderio acknowledged the mistake, but failed to change Richter's schedule.

Instead, he told Richter to sit and have a snack if she did not feel well before lunch break. Richter asked for these instructions in writing, but Desiderio declined.

On March 5, 2013, Richter's blood sugar dropped. She suffered a seizure and fainted in front of her students.

This, of course, occurred on a day when she had a late lunch break. She hit her head on a lab table and the floor, causing excessive bleeding.

Richter was hospitalized with serious injuries. This was the first time that Richter's low blood sugar caused her to faint while at work.

After the incident, Richter filed a claim under the WCA for her workplace injuries, and received just over \$28,700 for her medical expenses and temporary disability.

Two years later, in March 2015, Richter brought a claim for failure to accommodate under the LAD against the board of education as well as Desiderio, individually and in his capacity as the principal, for failure to accommodate her preexisting diabetic condition.

After two summary judgment motions and appeals, the matter came before the New Jersey Supreme Court.

### **No Adverse Action Is Required for Failure-to-Accommodate Claims Under the LAD**

Before the court, the defendants argued that a prima facie case of failure to accommodate under the LAD required a plaintiff to plead an adverse employment action beyond an employer's alleged failure to accommodate.

Richter, on the other hand, argued that an adverse employment action was not a necessary element of a failure-to-accommodate claim under the LAD.

The importance of this issue resulted in amicus curiae briefs filed by the New Jersey Association for Justice, or NJAJ, National Employment Lawyers Association of New Jersey, and the New Jersey Attorney General's Office.

All three amici advanced Richter's arguments. The NEJA and attorney general went further, arguing that an employer's failure to accommodate, by itself, could constitute an adverse employment action.

In considering these arguments, the court began its analysis by surveying the prima facie requirements used in failure-to-accommodate cases in the state and federal courts.

In particular, two of its prior decisions aided the court.

In 2010's *Victor v. State of New Jersey*, in a nonbinding section of its ruling, the court noted that the LAD may allow plaintiffs to bring a failure-to-accommodate claim against an employer who failed to engage in an interactive process.[2]

Similarly, in *Royster v. New Jersey State Police*, the court in 2017 recited the elements of a

failure-to-accommodate claim under the LAD, which did not include an adverse employment action.[3]

In each of these two cases, however, an adverse employment action had clearly occurred.

The court also found that federal courts interpreting the Americans with Disabilities Act have held that an adverse employment action is not an element of a failure-to-accommodate claim under the ADA, and otherwise have held that refusing to make a reasonable accommodation, in and of itself, may constitute an adverse employment action.

Again, however, an adverse employment action occurred in each of the federal cases examined by the court.

Ultimately, the court decided to resolve the argument in favor of the LAD's broad legislative intent to eradicate workplace discrimination, holding that an adverse employment action is not a required element of a failure-to-accommodate claim.

The court determined that the defendants' failure to provide Richter with an accommodation for her diabetic condition was sufficient to sustain Richter's failure-to-accommodate claim under the LAD.

The court explained that the wrongful act in a failure-to-accommodate claim is the employer's failure to perform its duty of providing a reasonable accommodation.

The court reasoned that requiring an adverse employment action would allow an employer to escape liability by simply refusing to accommodate an employee's disability but taking no further adverse employment action while the employee presumably suffered.

Such a result would violate the LAD's broad remedial purpose, per the court. Accordingly, the court held that an employer's "inaction, silence, or inadequate response to a reasonable accommodation request is an omission that can give rise to a cause of action" under the LAD.

### **A Successful Claim Under the WCA Does Not Bar a Plaintiff's Claim Under the LAD**

New Jersey's high court also sought to harmonize the LAD with the WCA.

The WCA provides employees with prompt relief for medical expenses for workplace injuries.

Under the WCA's exclusive remedy provision, an employee who recovers for workplace injuries under the WCA cannot further recover for the same injuries at common law, unless the injuries resulted from an intentional act.

The question before the court was whether Richter's failure-to-accommodate claim under the LAD was barred under the exclusive remedy provision of the WCA because she had already recovered workers' compensation benefits.

Richter argued that the LAD's broad remedial purpose of compensating victims of discrimination meant that her claim was exempt from the WCA's exclusive remedy provision.

In their amicus briefs, the NJAJ and NELA further argued that subjecting LAD damages to the WCA's intentional wrong provision would negate the LAD's legislative purpose of rooting

out both intentional and unintentional discrimination.

The defendants argued that because Richter's claim for benefits under the WCA was successful, she could not also recover under the LAD for her injuries.

They further argued that their failure to accommodate her condition was unintentional, and her LAD claim could not proceed under the intentional wrong exception to the WCA.

Rutgers University and the New Jersey Municipal Excess Liability Fund submitted amicus briefs supporting the defendants' position.

Rutgers argued that Richter's claim should be barred unless it fit under the intentional wrong exception, and that to hold otherwise would lead to unpredictability and unfairness for employees who sustain similar injuries under different circumstances.

MELF further argued that excluding LAD claims from the WCA's exclusive remedy position would lead to increased litigation.

The court found none of these arguments in favor of the defendants persuasive.

The court explained that the LAD and the WCA serve dovetailing but different purposes. The LAD serves a broad remedial purpose to root out workplace discrimination, while the WCA compensates employees for medical expenses resulting from workplace injuries.

Because the LAD was amended in 1990 to allow punitive damages and common law remedies for prevailing plaintiffs, the court reasoned that the damages available under the LAD were intended to supplement other existing remedies, such as those under the WCA.

As a result, the court held that the laws could coexist and permit recovery under both for different corresponding injuries.

The court explained that Richter's pursuit of a failure-to-accommodate claim for a preexisting disability "is not at cross purposes with the WCA's prompt and sure remedies for medical expenses and 'personal injury.'"

Accordingly, the court held that the WCA's exclusive remedy provision did not attach to Richter's LAD claim regardless of whether defendants acted intentionally.

### **Employer Takeaways**

The court's decision resolved any ambiguity as to whether an adverse employment action is a required element of a failure-to-accommodate claim under the LAD.

This eliminates a potential defense to a failure-to-accommodate claim where a plaintiff fails to plead an adverse employment action.

The court specifically held that an employer's "inaction, silence, or inadequate response to a reasonable accommodation request" is enough to support a failure-to-accommodate claim under the LAD.

Notably, the court did not precisely define what would constitute an inadequate response to an accommodation request.

By leaving this issue open, the onus is on employers to engage in a proactive interactive process. Employers should be prepared to explain the reasoning behind their action when responding to an employee's request for accommodation.

Additionally, by harmonizing the WCA and LAD, the court removed a potential bar to recovery under the LAD for plaintiffs who successfully recover under the WCA for workplace bodily injuries because the statutes address two different harms with two different remedies.

Accordingly, where a workplace injury is accompanied by alleged discrimination, employers can expect to face claims under both the WCA and LAD, even if the injury did not occur because of an intentional wrong.

The Richter decision continues the court's trend of pursuing the full extent of the LAD's legislative intent to eradicate workplace discrimination.

The court has continued to broaden the protections available under the LAD. The LAD is a broad remedial statute, but exactly how broad remains to be seen as we await the New Jersey Supreme Court's next decision interpreting the statute.

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[1] *Mary Richter v. Oakland Board of Education et al.*, (083273), A-23-19 (N.J. 2021).

[2] *Victor v. State*, 203 N.J. 383, 421 (N.J. 2010).

[3] *Royster v. State Police*, 227 N.J. 482, 500 (N.J. 2017).