

Washington Court Addresses Employee Sensitivity to Environmental Factors

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All employers are aware that they cannot discriminate against employees or applicants because of a disability. What employers often do not know is that disability law also requires that they reasonably accommodate employees or applicants with disabilities. That means that employers must take affirmative steps to permit an employee to perform the essential functions of a job. This was recently addressed in *Frisino v. Seattle School District*, 160 Wn. App. 765 (2011).

In *Frisino*, a schoolteacher had exhibited respiratory sensitivity to several environmental factors in her workplace, claiming that she was sensitive to airborne toxins, dust, mold and other irritants in the school. The school district attempted several accommodations, including providing air filters, ordering janitors to mop her classroom twice a week, and moving her to different classrooms. The accommodations did not remedy her problems and she left on medical leave. She transferred to a new school, but noticed mold and other environmental problems on the first day. The school offered her a portable room, which she rejected. The county department of health investigated and found no mold growth, and the air sampling tests showed lower fungal structure concentrations than the outside areas. Her classroom was found to be dry, as were the other ones in the high school. She again left work complaining of respiratory illness and went on medical leave. Shortly thereafter, the school hired an industrial hygiene and toxicology consultant who found that the high school building was generally safe for all students and only a danger to those who had the most severe forms of immuno-compromise. In response, the high school removed the visible mold over winter break and removed the ceiling tiles and searched for additional mold during the summer break. The school district then informed the teacher of its

efforts and asked that she return to work. She refused because her classroom had not been “completely remediated” and she wanted a newer environment with good ventilation and free of fragrances. She demanded transfer to a different site that was mold free. Because the school was unable to provide a mold-free environment, the teacher’s physician did not release her to return to work at her current high school. The high school terminated her.

The trial court dismissed the teacher’s claim because the duty to reasonably accommodate a disability does not require an employer to reassign an employee to a position that is already occupied, create a new position, or eliminate or reassign essential job functions. On appeal, the *Frisino* court reversed, finding that it was a question for the jury to decide whether the school district had reasonably accommodated the teacher’s chemical sensitivity. Although recognizing that the employer could select the accommodation when there are multiple potential modes of accommodation, the *Frisino* court held that the employer could not stand on a mode if (1) it was not adequate and (2) there were other modes that could accommodate the employee that would not constitute an undue hardship on the employer. The *Frisino* court held that the school district would not be liable if the cleanup of the high school had effectively removed the cause of her respiratory illness. Because the cleanup had not been effective, the school district was required to undertake additional efforts to accommodate her, such as a transfer, or to argue that any additional accommodation would have been an undue hardship. Although recognizing that the cleanup of the mold addressed some of the teacher’s sensitivities, she had others, rendering the school district’s accommodation as not effective, and because the duty to accommodate is continuing, the school district needed to test other modes of accommodation to address the chemical sensitivities (unless such modes were creating undue hardship).

The primary take-away from *Frisino* is that employers will be required to engage in “trial and error” accommodation. Although long established precedent has held that employers are not required to institute the employee’s demanded accommodation, the *Frisino* court makes it clear that if the employer’s chosen accommodation does not alleviate the substantial limitation caused by the condition, the employer will be held liable for failing to accommodate the disability, unless it can prove that the employee’s requested accommodation will cause an undue burden. That issue – undue burden – can be difficult to establish with the jury, who may perceive that an employer has unlimited resources and abilities to accommodate employees’ various disabilities. In the *Frisino* case, the school district went out of its way to fix the air quality, remove any mold in the buildings, and retain a third party to inspect the premises, which efforts were found not enough for purposes of summary judgment. The *Frisino* court has raised the bar for employers.