

**INTEROFFICE COMMUNICATION  
COUNTY OF MILWAUKEE**

DATE: June 19, 2015

TO: Marina Dimitrijevic, Chairwoman, County Board of Supervisors

FROM: Mark A. Grady, Deputy Corporation Counsel *MAG*

SUBJECT: James Gibson & Tamara Rohr v. Milwaukee County et al.  
Case No. 12-CV-657 (U.S. District Court)

I request that this matter be referred to the Committee on Judiciary, Safety and General Services for approval of a settlement.

James Gibson and Tamara Rohr were Correction Officers with the Sheriff's Office. Both individuals suffered from medical conditions that required them to take significant leave from work. They allege that they suffered retaliatory actions due to taking FML leave and that they were not accommodated as required by law for their disabilities.

James Gibson

Gibson was hired in 2008. He was given a Temporary Appointment to a Higher Classification (TAHC) to a Lieutenant C.O. position in July of 2011. The TAHC was extended through January 19, 2012. In mid-November 2011, he began to miss work due to a medical condition and took FMLA leave until January 2, 2012 when he returned with a restriction to work no more than 8 hours per day. The Sheriff's Office initially failed to notice the restriction. On January 9, 2012, Gibson pointed out his restriction to management. He was then informed that he could not work with that restriction. He took additional FMLA leave from January 10, 2012 to February 16, 2012. The Sheriff's Office also extended his TAHC, although the extension was not authorized by the Board under the ordinance.

On February 17, 2012, he returned to work without restrictions. On March 7, 2012, he fell down stairs at work due to effects of his medical condition. On March 8, 2012, his doctor reinstated his 8 hour work restriction. He was required to take additional FMLA leave. On April 14, 2012, he returned to work without restrictions. On April 18, 2012, the Sheriff's Office again extended his TAHC, but without Board approval. Gibson's supervisor told him that day that it was being documented that he had three unexcused absences from November to March. Gibson indicated that those were dates he was on FMLA leave. A few hours later, he was told that his TAHC was being terminated, which

occurred on April 20, 2012. In November of 2012, he was transferred from the HOC in Franklin to the Jail. In January of 2013, he left county employment for employment with a private security company.

Gibson alleges that the termination of his TAHC and his transfer to the Jail was done in retaliation for his FMLA use. The Sheriff's Office alleges that his TAHC was terminated due to the fact that its extension beyond January 19, 2012 was contrary to ordinance and because Gibson's performance as a Lieutenant was unacceptable. Gibson presented evidence that some TAHCs had extended longer than the 180 days set forth in the ordinance.

The County moved for summary judgment to dismiss these claims. On March 5, 2015, Judge Adelman issued a decision on the County's motion. Judge Adelman ruled that these allegations could not be dismissed on a motion and that a jury trial is required to resolve the dispute.

Gibson also alleged that he was denied an accommodation of his 8 hour restriction. Judge Adelman assumed for the purpose of the County's motion for summary judgment that Gibson suffered from a disability under the ADA. However, Judge Adelman found that the ability to work more than 8 hours a day is an essential function of a corrections officer position and therefore the Sheriff was not required to waive that ability. Judge Adelman therefore dismissed the ADA claim.

Gibson alleges a wage loss due to not receiving the \$5.11 per hour higher wage rate for the Lieutenant position during the denial of his continued TAHC after April 20, 2012. Gibson alleges that his back wage claim, with a claim for double damages under the FMLA, amounts to approximately \$46,000. Gibson also sought pension service credit. He has 4.94363 years of credit; 5 years are required to vest in a deferred pension. He is also allowed to recover his attorneys' fees if successful on his FMLA claim.

#### Tamara Rohr

Rohr was hired in 2008. She used FMLA leave during her employment. In January of 2012, she used FMLA for surgery. Her FMLA use was initially denied, but was subsequently approved after she filed a claim with the Department of Workforce Development. For about a year prior to her use of FMLA leave in early 2012, Rohr had been assigned to clerical positions that had involved little or no contact with inmates. In April of 2012, after she had begun seeking FMLA leave, she was assigned to a housing unit where she was required to have contact with inmates. On May 1, 2012, her doctor gave her a restriction from working in an assignment where she had contact with new inmates to the facility. The Sheriff's Office informed her that it could not accommodate that restriction. The Office interpreted her request as a request for temporary light duty. The Sheriff's policy provided that light duty is only provided to employees who are

pregnant or who suffer on-the-job injuries. Thereafter, she was given some assignments that accommodated her restriction, but for much of May, June and July, most of her assignments did not. On July 12, 2012, she was told she would not be scheduled for work, but two weeks later, she was given a light duty assignment in communications. She worked there until January 23, 2013. At that point, her doctor indicated that her restriction would continue for at least another year. The Sheriff's Office then removed her from the schedule. She used FMLA and civil service leaves until June of 2013.

She was then referred to the Job Relocation Program administered by the Office for Persons with Disabilities to try to identify other county jobs that would permanently accommodate her restriction. She was given a test in October of 2013 for a dispatch position in Communications, but failed the test. She was given an opportunity to take a test for a Clerical Assistant I position in December of 2013, but she was unavailable. That position was held for her until March of 2014, but she failed to respond. Job Relocation Program services were terminated at that point. She remains on the County payroll, but not on any approved leave of absence. She has not paid the monthly employee portion of the health insurance premium since 2013, totaling \$2649.60.

Rohr alleges that she should have been given her light duties on a permanent basis as an accommodation. However, Judge Adelman agreed with the County that the Sheriff was not required to accommodate her disability by creating or assigning her to a light duty position on a permanent basis. On the other hand, Judge Adelman did rule that the County was required to provide her with temporary light duty as a temporary accommodation for her disability. He found that the Sheriff's refusal to do so from May of 2012 until July of 2012 and after June of 2013 was in violation of the ADA. He also ruled that the County will be able to attempt to show at trial that her damages should end when she stopped cooperating with the Job Relocation Program (for example, when she declined to take the second test in December of 2013).

Rohr also alleged that her FMLA rights were violated. Judge Adelman stated that it is unclear whether she has any damages for that claim different than those for her ADA claim, so he would leave those claims for later resolution at trial, if necessary.

Rohr claims lost wages for approximately two and a half years in the amount of \$107,514. If she establishes an FMLA violation, she could double those damages, to a total of as much as \$215,000. Rohr also seeks pension service credit in connection with her claim for back wages; she currently has 4.79848 years of service credit in the system. She also claims attorneys' fees that are recoverable on her ADA and FMLA claims.

Her attorney has documented claimed incurred fees to Rohr and Gibson of over \$306,000 (at a rate of \$265 per hour).

## Mediation

Following receipt of Judge Adelman's decision, the parties were asked to participate in mediation with U.S. Magistrate Judge Goodstein on June 9, 2015. The County and Sheriff's Office believe that Judge Adelman's decision with respect to Rohr's ADA claim could be questioned on appeal. The Sheriff's Office opposes a settlement and would prefer to appeal that decision. However, in order to do so, the defendants would be required to go through a trial, then appeal. If successful on appeal on that ADA issue, another trial would likely occur. Unless the County completely defeated all claims by the plaintiffs (stated differently, if they recovered any dollar amount on their claims), they potentially would be entitled to recover all of their attorneys' fees – those incurred so far and those they would incur for the rest of the litigation. In the estimation of our office, of outside counsel and of the County Mutual, the risk of continuing the litigation and substantially increasing the exposure to increasing attorneys' fees for the plaintiffs (in addition to the continuing defense counsel fees) outweighs the advantages of a trial and an appeal.

During mediation the parties reached a settlement, subject to approval by the County and the County's insurer. The County will pay Gibson \$11,000 in wages and it will give him 0.05637 years of pension service credit (he will then have 5.0 years of credit). The County will pay Rohr \$70,000 in wages and it will give her 1.20152 years of pension service credit (she will then have 6.0 years of credit). The County will give her a neutral reference and will waive its claim for unpaid health insurance premiums (\$2649.60 as of May). The County's insurer will pay \$80,000 in attorneys' fees on each claim, for a total of \$160,000. The insurer's payment will be applied to the County's deductible. Both plaintiffs will dismiss the suit and sign complete releases.

The Office of Corporation Counsel and the Litigation Manager for the Wisconsin County Mutual Insurance Corporation both participated in the mediation with the County's outside counsel (the Sheriff's Office attended) and recommend approval of the settlement.

cc: Shanin Brown  
Erica Hayden  
Kelly Bablitch  
Raisa Koltun  
Inspector Edward Bailey