

**State of Wisconsin
Labor and Industry Review Commission**

Dawn Waldvogel, Complainant

Fair Employment Decision¹

**DC Everest Area School District,
Respondent**

Dated and Mailed:

ERD Case No. CR201302128
EEOC Case No. 26G201301227C

March 22, 2019

The decision of the administrative law judge is **affirmed**, subject to **modification**. Accordingly, the complainant's complaint of discrimination is dismissed.

By the Commission:

/s/

David B. Falstad, Chairperson

/s/

Georgia E. Maxwell, Commissioner

/s/

Michael H. Gillick, Commissioner

¹ **Appeal Rights:** See the green enclosure for the time limit and procedures for obtaining judicial review of this decision. If you seek judicial review, you must name the Labor and Industry Review Commission as a respondent in the petition for judicial review. Appeal rights and answers to frequently asked questions about appealing a fair employment decision to circuit court are also available on the commission's website <http://lirc.wisconsin.gov>.

Procedural Posture

This case is before the commission to consider the complainant's allegations that the respondent discriminated against her based upon her age, sex, and because she opposed a discriminatory practice under the Wisconsin Fair Employment Act (hereinafter "Act"). An administrative law judge for the Equal Rights Division of the Department of Workforce Development held a hearing and issued a decision finding no probable cause to believe that discrimination occurred. The complainant filed a timely petition for the commission review.

The commission has considered the petition and the positions of the parties, and it has reviewed the evidence submitted at the hearing. Based on its review, the commission agrees with the decision of the administrative law judge, and it adopts the findings and conclusions in that decision as its own, except that it makes the following:

Modifications

1. The second and third full paragraphs on page 25 of the administrative law judge's decision (under the heading "Age and Sex Discrimination claims") are deleted.
2. The first sentence in the fourth full paragraph on page 25 of the administrative law judge's decision is deleted and the following sentence is substituted therefor:

"Although the complainant contends that she was treated less favorably than two younger male employees, Don Abel and Erik Beitzel, their situations were not comparable to the complainant's and different discipline was warranted."

Memorandum Opinion

This case presents the question of whether the complainant established probable cause to believe that the respondent discriminated against her with respect to the terms and conditions of her employment and/or terminated her employment because of her age, sex, or opposition to a discriminatory practice under the Act.

Age discrimination

In her decision, the administrative law judge focused on the question of whether the complainant established that her comparators were under age 40. However, in order to prove age discrimination it was not necessary for the complainant to establish that she was treated less favorably than individuals who were not in the protected age group. Rather, the complainant's task was simply to demonstrate that she was treated less favorably than other employees because of her age. The fact that the individuals to whom the complainant compares herself may have also been in the protected age group does not defeat her claim of age discrimination

where there was a significant age difference between the complainant and those employees whom she claims were treated more favorably. *See, Felsman v. Northwest Airlines*, ERD Case No. 9351759 (LIRC June 6, 1996); *Butler v. UW Madison School of Education*, ERD Case No. CR201403276 (LIRC July 31, 2017). The weakness in the complainant's case is not her failure to conclusively demonstrate that her comparators were under age 40, but, rather, her failure to prove she was treated less favorably than they were under similar circumstances or that the respondent took her age into account in any of the decisions it made involving her employment. The evidence presented at the hearing indicated that the complainant had difficulty working with members of her team and getting along with some of her students and their parents, and that she engaged in contentious communications with the respondent. The commission is satisfied that it was those behaviors, and not her age, which caused the respondent to take disciplinary action against the complainant and ultimately to terminate her employment.

In her petition for commission review the complainant makes essentially three arguments in support of her claim that she established probable cause to believe she was discriminated against based upon her age. First, the complainant contends that she established she was treated less favorably than younger employees who engaged in more serious misconduct. Second, the complainant maintains that the respondent's notes indicate an intent to discharge her based upon her age. Third, the complainant argues that she showed she was replaced by a younger individual, Kate Wollersheim. The commission has considered each of these arguments, but does not find them persuasive.

It was not established that the complainant's comparators, Don Abel and Eric Beitzel, engaged in comparable conduct yet were accorded more favorable treatment than the complainant. Abel made inappropriate and unacceptable comments on two occasions. When Principal Nye learned of the matter he discussed it with Abel and included a comment about the conduct in Abel's annual evaluation, noting that it could not continue. The behavior did not occur again.² Similarly, Beitzel engaged in inappropriate conduct towards students on two occasions, was disciplined, and corrected his behavior thereafter. While the complainant's objectionable conduct may have been less overtly inappropriate or offensive, it was not limited to a few isolated instances, as was the case for Abel and Beitzel, but amounted to a sustained and pervasive failure to maintain the types of positive relationships with other staff members, students, parents, and the administration that are needed in order to be an effective educator in a public school. Moreover, while Abel and Beitzel demonstrated a willingness to improve their conduct, the complainant was consistently defensive and resistant to change. Given the unique circumstances, the commission sees no age discrimination in the respondent's differing handling of

² Although the complainant contends that Abel engaged in continued misconduct beyond what is reflected in the findings of fact, the record did not establish that Nye was made aware of additional misconduct on the part of Abel for which he chose not to discipline him.

the disciplinary situations involving these employees nor any reason to believe that, had Abel or Beitzel engaged in conduct similar to that of the complainant, they would have been subject to lesser disciplinary consequences.

The complainant's second argument, that Principal Nye's notes demonstrate an intent to discriminate based upon age, is similarly unpersuasive. Principal Nye wrote a comment in his May 9, 2012 meeting notes stating, "55 window as a mutual out OR Resignation agreement" with a large question mark next to it, which the complainant maintains is proof that the respondent intended an age-based termination of the complainant's employment. The commission agrees with the complainant that the comment is troubling, and that, when taken in isolation, it might be read as suggesting that an age-based termination of the complainant's employment was in the offing. The commission also agrees that Nye's explanation for writing the comment--that he was merely recording what someone else at the meeting said and that it was not something he would be involved with--was not wholly persuasive. However, the fact remains that the complainant was not discharged until a year later, during which time the respondent made extensive efforts to work with the complainant to improve in the various performance areas with which it was, reasonably and understandably, dissatisfied. The record as a whole does not suggest a plan or scheme to discharge the complainant because of her age, but indicates that the complainant's discharge was the culmination of a lengthy, but ultimately unsuccessful, process of attempting to assist the complainant in improving her effectiveness as a teacher and staff member.

Finally, regarding the argument that the complainant was replaced by Ms. Wollersheim, an individual whom the complainant believes to be under 40 years of age, that fact does not lead the commission to conclude that the respondent deliberately discharged the complainant in order to replace her with a younger person. The record contains no evidence to suggest that Ms. Wollersheim was selected for any reason other than that the respondent believed she was the best candidate, and the commission sees no basis to conclude that Ms. Wollersheim's age entered into the decision.

Sex Discrimination

The complainant's arguments with respect to her allegations of sex discrimination are similar to those raised with regard to age: the complainant contends that Mr. Abel and Mr. Beitzel engaged in more severe misconduct than she did but were treated more favorably because they are male. However, for the same reasons discussed above, the commission does not find Abel and Beitzel's conduct to be comparable to the complainant's and it is satisfied that the respondent's explanation for its actions was not a pretext for discrimination.

Retaliation

The complainant argues that it is undisputed she did not receive a single formal reprimand during her first 25 years of teaching and that it was not until after she sent an email to Principal Nye expressing her opinion that he may be discriminating on the basis of age that she received her first formal reprimand. The complainant also contends that Principal Nye admitted he was offended by the complainant's comments suggesting he was discriminating based upon age. She contends that his actions against her thereafter were motivated by retaliatory animus.

The commission has considered these arguments but does not find them persuasive. Even prior to Principal Nye's tenure at the school, the complainant's former principal noted that the complainant had sent emails that were critical of school programs and teachers which the principal characterized as "uninformed and destructive," and that she was concerned about the complainant's relationships with her teaching team and other specialists at the school. The former principal also indicated that she believed the complainant needed to work on being cooperative and willing to accept input and ideas from others. After Principal Nye took over, but before the complainant raised any allegations of age discrimination, he gave the complainant two performance evaluations which referenced the need to work towards effective, professional and positive communication. It is clear from the foregoing that the respondent's dissatisfaction with the complainant's job performance began prior to her actions in notifying Principal Nye that she believed she was being discriminated against. Further, while it may be true that Nye was offended by the complainant's statements that she believed he discriminated against older employees, that does not necessarily mean he was likely to retaliate against the complainant for having made such statements and, indeed, there is no evidence to suggest that Nye took any adverse action against the complainant because of those remarks. As indicated above, the evidence reveals that the respondent began working with the complainant to improve her performance prior to her having engaged in any protected activity, and the commission can see no reason to believe that future disciplinary actions or the complainant's ultimate termination from employment were undertaken in retaliation for her protected conduct.

Conclusion

The commission notes, in closing, that the complainant has devoted much of her brief to an argument that she made out a *prima facie* showing of discrimination and has suggested that she should prevail on that basis. However, the commission has consistently held that once the respondent has articulated a legitimate nondiscriminatory reason for the discharge or other action alleged to be discriminatory, the question of whether the complainant has established a *prima*

facie case becomes moot. See, *Trudell v. Bellin Memorial Hospital*, ERD Case No. CR201303060 (LIRC June 29, 2016), and cases cited therein. Because the respondent presented legitimate nondiscriminatory reasons for its actions, the question of whether the complainant established a *prima facie* case is no longer relevant and the burden of proof reverts to the complainant to show that the respondent's reasons are a pretext for discrimination. *Naill v. Western Wisconsin Technical College*, ERD Case No. 199404088 (LIRC Feb. 12, 1999). The complainant's evidence does not indicate that the respondent's proffered explanations for its actions were a pretext for discrimination based upon her age or sex or in retaliation for her protected conduct, and the commission agrees with the administrative law judge that the complainant failed to establish probable cause to believe that she was discriminated against in the manner alleged. The administrative law judge's decision has been modified to remove the section which erroneously suggests that the complainant needed to prove she had comparators who were under age 40 in order to prevail. That minor modification notwithstanding, the administrative law judge's decision is affirmed.

cc: Corey Mehlos
Thomas Cabush