

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

Jane Gabrielson, Complainant

Fair Employment Decision

Wauwatosa School District, Respondent

ERD Case No. CR201502807
EEOC Case No. 26G201600068C

Dated and Mailed:
April 5, 2019

The decision of the administrative law judge is **set aside** and this matter is **remanded** to the Division for continued proceedings before an administrative law judge and, after the presentation of all the evidence by the parties, the issuance of a new decision on the complainant's complaint of discrimination.

By the Commission:

/s/

David B. Falstad, Chairperson

/s/

Michael H. Gillick, Commissioner

Procedural History

The complainant brought this action under the Wisconsin Fair Employment Act (hereinafter “Act”), alleging, among other things, that the respondent discriminated against her in compensation based upon her age.¹ A hearing was held before an administrative law judge from the Equal Rights Division of the Department of Workforce Development on April 25, 2018. On September 28, 2018 the administrative law judge issued a decision dismissing the complaint for lack of probable cause. The complainant has filed a timely petition for commission review of that decision.

Memorandum Opinion

Summary of the facts and testimony presented at hearing

The complainant, whose date of birth is August 21, 1958, began working for the respondent as a guidance counselor at Wauwatosa West High School beginning in August of 1995. She was reassigned to Wauwatosa East High School in 2012.

During the entire course of her employment, the complainant was a member of a labor union and her wages were subject to a collective bargaining agreement. Prior to the passage of Act 10 in 2011, teacher pay was based upon the level of college education attained, along with the years of service. There were four steps to the pay scale. Because the complainant had an advanced degree and a significant number of years of service, she was at the top of the pay scale.

After Act 10 was passed the respondent was able to introduce a completely new pay plan. The new pay plan, which went into effect at the beginning of the 2014-2015 academic year, consisted of four pay levels, described below:

- Level 1 of the pay plan was for new teachers with an initial educator’s license. This level primarily applied to employees who had been educators for five years or less.
- Level 2 was for teachers with a professional educator’s license who were meeting acceptable performance expectations.
- Level 3 was for high achieving employees who demonstrated a commitment to professional development.
- Level 4 was similar to Level 2, in that it was for employees who met their standards but were not outstanding, and who had a salary that was above the Level 2 salary range.

¹ All other allegations have been dismissed. The only allegation remaining at hearing, and which is before the commission, is the claim that the complainant was denied a salary increase because of her age.

The level that employees were striving to get to was Level 3, which offered the highest pay scale, as well as higher status.

Unlike the original pay plan that was negotiated between the employer and the union, and which provided for raises based solely upon objective standards of education and years of experience, the new pay plan was largely subjective. The respondent has a document entitled "Teacher Career Ladder Handbook," which explains the new pay plan. According to the Handbook, teachers who are rated "distinguished" on four out of six enumerated performance standards--"Professional Knowledge," "Instructional Planning," "Instructional Delivery," "Assessment For and Of Learning," "Learning Environment," and "Professionalism"--and who are rated at least "effective" on the remaining two, will be considered "distinguished." In addition, the teacher must demonstrate "leadership" as described in the "Effective Teacher" rubric contained in the Handbook, which list a variety of traits that effective teachers must possess, sorted into categories entitled "Overall Instructional Evaluation," "Reflective Practitioner," "Professionalism" and "Leadership." The Handbook also contains a rubric entitled "Effective Educator," which includes the same categories and many of the same criteria as listed in the "Effective Teacher" rubric.

During the 2013-2014 academic year the principal of Wauwatosa East High School, Nick Hughes, met with each staff member at Wauwatosa East individually and informed them as to what pay scale they had been placed at. When the complainant met with Mr. Hughes, he told her she was going to be at Level 4. The complainant was 56 years old at the time.

The complainant had never been given a formal performance evaluation during her three years at Wauwatosa East. She was not included in any discussion regarding where she should be placed and was not given an opportunity to advocate for her own placement. Although the "Teacher Career Ladder Handbook" provides an opportunity to appeal a negative determination, the Handbook specifies that no appeal can be filed during the first year of the plan.

At the hearing the complainant presented testimony showing how she satisfied the various criteria set forth in the respondent's career ladder rubric to be considered a Level 3 educator.² The complainant's testimony was primarily focused on the third category in the rubric, "Professionalism." The complainant stated that she "communicates to strengthen relationships with families and the broader community," one of the stated criteria, by being the founder of an outside scholarship foundation and sitting on the board of that foundation. With regard to the criteria "acts with integrity and models ethical behaviors," the complainant

² The complainant's testimony was focused on the standards contained in the "Effective Educator" rubric. No evidence was presented at the hearing explaining the difference between the "Effective Educator" and "Effective Teacher" rubrics or when each should be used.

noted that she prides herself on maintaining confidentiality and professional integrity, including not communicating with any students or their friends using social media. The complainant further testified that she is an advocate for her students in every respect, from their social and emotional needs to assisting with outside referrals. With respect to the criteria “researches and collaborates to design lessons and learning opportunities,” the complainant testified that she works with special education teachers and has written classroom curriculum. The complainant stated that she routinely “engages families in reciprocal relationships to foster student learning,” another of the standards included in the “professionalism” category, and demonstrates that she is “committed to learn and grow as a professional” by attending workshops and receiving training in areas such as eating disorders, AODA, and suicide prevention. The complainant stated that she has been on over 300 college campuses and has connected with a lot of admissions officers. She is currently one of eight guidance counselors to serve on the UW-Madison Counseling Committee for Admissions.

With respect to the first category in the rubric, “Overall Instructional Evaluation,” the complainant stated that she works successfully with students at different levels and in an equitable way and that she serves as a resource and is sought out by administration, parents, students, and colleagues for her expertise.³ The complainant did not offer testimony specifically addressing the criteria listed under “Leadership,” but claimed that younger staff members were selectively chosen for committee assignments, and indicated that she believed her involvement in certain committees and boards would have made her more likely to be placed at Level 3.⁴ The complainant offered no testimony specifically regarding the remaining category on the rubric, “Effective Educator.”

The complainant brought two witnesses to the hearing to testify about her work performance. The first witness, Kathleen Ericksen, worked at Wauwatosa West High School as an administrative assistant in the guidance department when the complainant was the director of guidance. Ms. Ericksen testified that the complainant took her under her wing and mentored her, developed a peer mentors’ group that students were eager to join, and started the Wauwatosa West scholarship foundation. Ms. Ericksen stated that she believed the complainant was an outstanding guidance counselor and director, a strong leader, and that other counselors looked up to her. She testified that the complainant was a very strong communicator with positive relationships to families and students and with the community (and was someone who would buy gift cards and groceries for needy

³ The complainant did not specifically address how she met the first and second criteria in the “Overall Instructional Evaluation” category. However, those criteria are related to classroom instruction and do not appear to be applicable to the complainant’s job as guidance counselor.

⁴ Although Nick Hughes, the principal of Wauwatosa East, was not called as a witness at the hearing, during the complainant’s testimony Mr. Hughes stipulated that he was the individual who picked people for the building leadership team.

families) and, further, that she demonstrated integrity with respect to racial matters. According to Ms. Ericksen, the complainant was the most active guidance counselor at Wauwatosa West, who jumped in when others were busy and never denied a student. Ms. Ericksen indicated that the last time she worked directly with the complainant was during the 2011-2012 school year, and that she had no personal knowledge of the complainant's job performance at Wauwatosa East.

The complainant's second witness, Mary Pat Foley, worked as an educational aide at an alternative program. Ms. Foley testified that the complainant was a counselor for some of the students in that program, and was also the guidance counselor for Ms. Foley's three sons, including being the coordinator for a peer mentor group that two of her sons were involved in. Ms. Foley testified that in the late 1990's she was considering becoming a school counselor, and the complainant was a good resource. Ms. Foley ultimately went to school and became a school counselor, after which the complainant helped her put together her resume and get ready for interviews. In the 1999-2000 school year Ms. Foley was hired to work at Wauwatosa East as a counselor and worked with the complainant as a fellow counselor when the complainant was transferred to that school in 2012. Ms. Foley stated that, although the complainant was the "newbie" in an established department, she had a wealth of experience and knowledge that others relied on. Even being in a new school, the complainant was the first to take on new kids and the first to volunteer her expertise with special education, watching out for those with special needs. In addition, the complainant had a rich history with many of the college representatives who came for college visits and worked to create a new website. Ms. Foley testified that she is familiar with the rubric the respondent used to place teachers at different salary levels and testified that, knowing the complainant's level of professionalism and leadership, and all she was capable of, she assumed the complainant would be ranked at Level 3.⁵

In addition to the two witnesses referenced above, the complainant brought her union representative, Ted Kraig, the regional director for Wisconsin Education Association Council, Region 7, to testify about the new pay scales. Mr. Kraig stated that the union thought the criteria for the new salary levels were not fair or objective, but, rather, were arbitrary and subject to discrimination. Therefore, the union made a decision to examine the pay system and see how it applied to people based on gender, age, and the level of school where they worked (elementary versus high school) During the summer of 2015, Mr. Kraig created a spreadsheet showing

⁵ When salary levels were assigned, Ms. Foley, who was approximately 60 years old, was also placed at Level 4. Ms. Foley testified that she not been in the district as long as the complainant but was still kind of "shocked" that she was not a Level 3. Ms. Foley did not appeal her Level 4 rating, nor did she talk to the principal about her ranking. When asked if she believed the Level 4 rating was based on her age, Ms. Foley responded, "It could have been." The following school year, at which time Ms. Foley was 62 years old, her rating was changed to Level 3.

the ages, genders, and schools of the various employees, which showed the following percentages of employees in the district who were at Level 3:

- 35.2 percent of teachers ages 30-39 were at Level 3.
- 42.1 percent of teachers ages 40-49 were at Level 3.
- 20.5 percent of teachers over age 50 were at Level 3.

Employees in their 20s generally did not have enough experience to be rated at Levels 3 or 4, and only 12.5 percent of those individuals were rated Level 3.

Mr. Kraig testified that he has worked as a union representative for 22 years, has worked with spreadsheets frequently and that it is standard practice to prepare spreadsheets regarding employees and then to run correlations. Mr. Kraig emphasized that, for purposes of this hearing, he was presenting the numbers but not attempting to draw any conclusions from them. However, the administrative law judge rejected the spreadsheet on the ground that one would need to be a statistician in order to know if the information was statistically significant and that Mr. Kraig was not an expert statistician.

Mr. Kraig testified that he was party to meetings with district administrators regarding the pay scale and did not see anything to suggest that the administration was requiring point-by-point consideration of the qualifications of the criteria in the charts contained in the “Teacher Career Ladder Handbook.” Mr. Kraig further testified that he represented an employee who was appealing her rating and that the respondent never provided her with point-by-point criteria showing her why it had rated her as a Level 4, rather than a Level 3.

Because the complainant was placed at Level 4, her salary increase was limited to 2.05 percent. Individuals at Level 3 who worked at Wauwatosa East High School received salary increases of anywhere from 5 to 15 percent, with the average salary increase being about 6.5 percent. In addition, employees at Level 3 received a \$500 annual stipend. The complainant estimated that being placed at Level 4 rather than Level 3 cost her a minimum of \$6000 per year.

Discussion

After presenting the evidence summarized above, the complainant rested her case. However, rather than presenting its own evidence, the respondent moved for dismissal. It did so on the ground that the complainant had failed to present relevant evidence showing that she was discriminated against in compensation based upon her age. The administrative law judge granted the motion to dismiss and the hearing was closed without presentation of any evidence by the respondent.

This case was before the administrative law judge, and is now before the commission, on probable cause. The complainant's burden in a probable cause proceeding is a lesser one than in a case on the merits; the burden of proof at a probable cause hearing has been described as "low." *See, Boldt v. LIRC*, 173 Wis. 2d 469, 496 N.W.2d 676 (Ct. App. 1992).

To prove that the complainant was discriminated against based upon her age the complainant must establish that she is in the protected age group, that an adverse employment action was taken, and that the relevant circumstances give rise to an inference of discrimination. *Bedynek-Stumm v. County of Dane*, ERD Case No. CR200100053 (LIRC Oct. 10, 2003); *Keene v. Menard, Inc.*, ERD Case, No. CR200501284 (LIRC May 8, 2008). The burden of establishing a *prima facie* case is not intended to be onerous, and the policy served by the requirement is simply to eliminate the most common non-discriminatory reasons for an adverse employment decision. *Foust v. City of Oshkosh Police Dept.*, ERD Case No. 9200216 (LIRC April 9, 1998).

The complainant submitted sufficient *prima facie* evidence in this case to satisfy her initial burden and to require the respondent to go forward by presenting an articulation of a legitimate nondiscriminatory reason for its actions. The complainant established that she was in the protected age group (56 years old) and that she did not receive the highest salary increase, but was given only an average Level 4 increase. The complainant testified that she believed she was performing her job at a level that would warrant being rated at Level 3, and provided testimony establishing how she met most, if not all, of the standards contained in the respondent's "Effective Educator" rubric. The complainant also brought witnesses to support her opinion about her job performance. These witnesses were able to speak to the complainant's leadership, connections with the community, and other attributes in satisfaction of the standards contained in the rubric. The complainant further established that the criteria regarding salary increases were subjective and brought a witness, her union representative, who testified that in other cases the respondent did not attempt to undertake a point-by-point analysis of the employee's eligibility for Level 3 raises. The complainant established that she had never been given a performance review in her most recent assignment, and testified that she believed she had been kept off important committees because of her age by the same individual who was responsible for making the salary decision. Finally, had the complainant been allowed to present it, she would have provided evidence showing that a smaller proportion of employees in their 50s were rated Level 3 than employees in their 30s or 40s.⁶

⁶ The evidence in question was excluded on the ground that Mr. Kraig, the complainant's union representative, was not an expert statistician. However, Mr. Kraig testified that he was simply presenting data and was not attempting to draw any conclusions from it. No expert was required for the complainant to submit a chart showing what percentage of employees of various ages were paid at the different salary levels, and the commission believes that the evidence should have come into the record.

Once a *prima facie* case has been established, the respondent must articulate a legitimate, nondiscriminatory reason for its actions. If the respondent carries its burden of production, the complainant then must show that the respondent's asserted reasons were in fact a pretext for retaliatory conduct. *Monroe v. Birds Eye Foods Inc.*, ERD Case No. CR200304303 (LIRC March 31, 2010). Here--because the administrative law judge granted the respondent's motion to dismiss the complaint before it could do so--the respondent never articulated a legitimate non-discriminatory reason for its actions.

The commission has frequently advised administrative law judges against dismissing a complaint without hearing the entire case:

“A dismissal at the close of the complainant's case-in-chief contemplates a circumstance in which it is clear that, whether or not the respondent introduces any evidence on its behalf, there is simply no way in which the complainant can reasonably prevail. The commission is of the view that, in all but the clearest and most unambiguous of circumstances, the best practice is to require the respondent to go forward with its case so that the fact-finder may consider all of the relevant evidence. . . .”

Roberge v. Department of Agriculture, Trade and Consumer Protection, ERD Case No. CR200303360 (LIRC May 31, 2005). In *Cappelletti v. Ocean Spray Cranberries, Inc.* (LIRC, Feb. 25, 2008) the commission explained:

“Often a respondent has a strong defense which could be presented expeditiously and without unduly prolonging the hearing, yet it opts to request a dismissal on the mistaken belief that such a resolution best serves its interests. The respondent may be better off taking the time to put on its evidence than run the risk that a higher level decision-maker will disagree with the administrative law judge's conclusion that the complainant failed to meet his evidentiary burden, as has happened here. As this case illustrates, granting the request for dismissal does nobody any favors--the parties must undergo a second probable cause hearing, the administrative law judge who sought to shorten the process must now hold an additional hearing, and the commission is unable to finally resolve the case before it, because the record is incomplete. For these reasons, the commission strongly recommends that mid-hearing dismissals be granted only after careful consideration and in the most narrow of circumstances.”

Because the record made at the hearing in this matter established a *prima facie* case of age discrimination, dismissal of the complaint at the close of the complainant's case was inappropriate. Instead, once the respondent offered its motion to dismiss, the administrative law judge should have advised it that it had the option of either putting in its case or resting. As the respondent was not given

those options, the commission considers it necessary to remand this matter for further proceedings. *See, Combs v. Service First Staffing*, ERD Case No. 200802710 (LIRC July 18, 2011); *Dieterich v. Lindengrove, Inc.* (LIRC Dec. 29, 2008).⁷

cc: John Leppanen
Aaron Graf

⁷ Although a finding in the complainant's favor will generally result when the *prima facie* case of discrimination is not rebutted by the articulation of a non-discriminatory reason, *see, Foust v. City of Oshkosh Police Dept.*, ERD Case No. 9200216 (LIRC April 9, 1998), in cases such as this, where the administrative law judge has improvidently dismissed the complaint prior to the respondent's either putting on its case or resting, the commission's practice is not to reverse and find discrimination, but rather to remand the matter so that the hearing may be completed and a new decision issued based upon all of the evidence.