

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

James Kates, Complainant

Fair Employment Decision¹

State of Wisconsin - ETF, Respondent
801 West Badger Road
P.O. Box 7931
Madison, WI 53707-7931

Dated and Mailed:

ERD Case No. CR201600273
EEOC Case No. 26G201600425C

May 17, 2019

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

By the Commission:

/s/

Michael H. Gillick, Chairperson

/s/

David B. Falstad, Commissioner

/s/

Georgia E. Maxwell, Commissioner

Procedural Posture

This case is before the commission to consider the complainant's allegation that the respondent discriminated against him based upon his age, in violation of the Wisconsin Fair Employment Act (hereinafter "Act"). An administrative law judge for the Equal Rights Division of the Department of Workforce Development held a

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>.

hearing and issued a decision finding no probable cause to believe that discrimination occurred. The complainant filed a timely petition for 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.

Memorandum Opinion

The question presented in this case is whether the respondent discriminated against the complainant in compensation based upon his age. The administrative law judge concluded that it did not, and the commission agrees. The evidence presented at the hearing established that the complainant's supervisor recommended the complainant for an equity retention pay increase, known as a DERA, and that he was approved for such increase. Three other employees, including two who were older than the complainant, were also recommended and approved for similar pay increases. However, before the complainant was notified about the pay increase, he accepted a promotion to an ombudsman position in a different unit, at a rate of pay that was higher than his rate of pay in his former position, even including the proposed DERA.² Because the complainant was soon to receive a salary increase greater than the amount of the DERA, and because the purpose of the DERA was retention within the classification, but the complainant was moving into a new classification, the respondent withdrew its request that the complainant be given a DERA. These facts do not support a finding of age discrimination. The respondent clearly intended to provide the complainant with a DERA, but rescinded it only after it learned that he would be receiving a larger salary increase for transferring to a different job. The complainant's age was not a factor in this decision.

In his petition the complainant contends that the administrative law judge ignored testimony provided by Stacey Meyer indicating that she should have changed the date on an official document. The commission assumes the complainant is referring to Ms. Meyer's testimony that she should have changed the date on the January 5, 2016 letters notifying employees of the DERAs, since she did not distribute them until the following week. It is not entirely clear why the complainant considers this testimony to be significant. Ms. Meyers credibly explained that she drafted the letters on January 5 but did not distribute them immediately because she was not able to get them routed and approved for signatures until the following week. There is no evidence to suggest that Ms. Meyers deliberately delayed in providing

² The complainant's pay in his original job title was \$24.27 an hour. The DERA would have amounted to \$1.36 an hour and would have brought the complainant's salary up to \$25.63 an hour. The ombudsman position paid \$26 an hour.

the complainant with notice of the DERA until after he had already accepted the new job, nor any reason to believe that her failure to distribute the letters on January 5 bore any relationship to the ages of the recipients.

The complainant also argues that the administrative law judge ignored testimony by Pam Licht that contradicted two of the written documents in evidence. The complainant has not elaborated upon this assertion, however, and has not explained what testimony he believes was contradicted by written documents or why he considers this fact significant. The commission has reviewed the entire record, including Ms. Licht's testimony, but sees no reason to disagree with the administrative law judge's findings and conclusions.

Finally, the complainant states that the respondent responded falsely to interrogatories submitted during discovery in which it denied that two younger, less experienced employees were hired at salaries higher than five individuals whom the complainant contends were "targeted for age discrimination." The complainant states that open records requests show that these two younger employees were hired at higher salaries and that the five older employees were later given smaller raises than their younger counterparts in the same position. This argument fails. To begin with, no issues related to pre-hearing discovery or open records requests were raised at the hearing, and there is no basis to conclude that the respondent deliberately falsified or withheld any relevant information. The evidence adduced at the hearing, upon which the commission bases its review, did establish that two younger employees were hired at slightly higher salaries than some older employees. However, this fact has no bearing on the question of whether the complainant was denied a salary increase or otherwise discriminated against in salary based upon his age. Witness testimony at the hearing indicated that external market forces may influence the starting salaries of new employees and that, as a result, these employees may come in to the job at rates that are very close to those of existing employees. The trust funds bureau director referred to this phenomenon as "wage compression," and indicated that one of the ways the respondent attempts to address it is through giving employees equity increases and market adjustments. The complainant was, in fact, slated to receive an equity increase and would have been given one had he not accepted a different position. In addition, the complainant may have also been eligible for a market adjustment had he remained in the job. The fact that he accepted a transfer to a new job before he could be considered for a market adjustment or receive the DERA is unfortunate, but it is not discrimination.

For the reasons set forth above, the commission agrees with the administrative law judge that the complainant failed to demonstrate probable cause to believe that he was discriminated against in the manner alleged. The dismissal of the complaint is, therefore, affirmed.

cc: Attorney Richard Rice
Attorney Rachel Bachhuber