State of Wisconsin
Labor and Industry Review Commission

Samantha J. Peterson, Complainant **Alter Trading Corp., d/b/a Alter Metal & Recycling**, Respondent 2080 Spindt Road Waupaca, WI 54981 ERD Case No. CR201602690 EEOC Case No. 26G201601241C	**Fair Employment Decision**[1] **Dated and Mailed:** June 27, 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/
Michael H. Gillick, Chairperson

/s/
David B. Falstad, Commissioner

/s/
Georgia E. Maxwell, 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 allegation that the respondent discriminated against her based upon her sex, 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 hearing and issued a decision finding that no discrimination occurred. The complainant filed a timely petition for commission review of that decision.

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 last sentence in paragraph 9 of the administrative law judge's FINDINGS OF FACT is deleted and the following is substituted therefor:

> "One of the methods by which the respondent trained employees to recognize different types of metals was by having them sort materials on the shaker table."

2. Paragraph 16 of the administrative law judge's FINDINGS OF FACT is deleted.

3. Paragraph 39 of the administrative law judge's FINDINGS OF FACT is deleted.

4. Paragraphs 41 through 43 of the administrative law judge's FINDINGS OF FACT are deleted and the following paragraphs are substituted therefor:

> "On April 11, 2016, the complainant was informed that the respondent could not accommodate her restrictions and that her employment was terminated.
>
> "The decision to terminate the complainant's employment was made by Peggy Malmstadt, along with Sarah Barbian, the human resources director, and Jim Logerquist, the vice president of human resources. These individuals did not consult with the facilities manager or yard supervisor prior to deciding to terminate the complainant's employment."

5. Paragraphs 44 through 48 of the administrative law judge's FINDINGS OF FACT are deleted.

6. The FINDINGS OF FACT are renumbered in accordance with these modifications.

7. The administrative law judge's CONCLUSIONS OF LAW are deleted and the following CONCLUSIONS OF LAW are substituted therefor:

> "The complainant failed to demonstrate that the respondent discriminated against her in the terms and conditions of her employment or by terminating her employment because of her sex, in violation of the Act."

Memorandum Opinion

The issue in this case is whether the respondent discriminated against the complainant in the terms and conditions of her employment or terminated her employment based upon her sex.[2] The administrative law judge concluded that the complainant failed to establish she was discriminated against in the manner alleged. In her brief to the commission the complainant makes essentially two arguments in support of reversal. First, the complainant maintains that the respondent failed to reasonably accommodate her pregnancy-related work restrictions. Second, she maintains that the respondent's purported legitimate non-discriminatory reason for terminating her employment was a pretext for discrimination. The commission has considered the complainant's arguments, but does not find them persuasive, for the reasons explained below.

The complainant requested that she be allowed to avoid working at the "shaker table" during her pregnancy, a request that was supported by notes from her personal physician. The commission disagrees with the administrative law judge that working at the shaker table was an essential aspect of the complainant's training such that no accommodation was available, and it has modified the administrative law judge's decision to delete such findings. Based upon this record, the commission is satisfied that the respondent could have provided the complainant with accommodations, had it chosen to do so, and there is no reason to believe that an accommodation would have presented a hardship for it. However, the respondent's failure to offer a reasonable accommodation does not require a finding of discrimination in this case, since pregnancy is considered a short term condition and not a permanent disability that would trigger the accommodation requirements set forth in the Act. Indeed, all that is required is that a pregnant employee be treated the same as other employees with non-pregnancy related short term disabilities. *See*, *Slife v. Mt. Morris Mutual Insurance Co.*, ERD Case No. CR200300282 (LIRC Nov. 3, 2005). "Under the Wisconsin Fair Employment Act it is not unlawful per se to treat medical conditions related to pregnancy poorly or

[2] Employment discrimination because of sex includes discriminating against any woman on the basis of pregnancy, childbirth, maternity leave or related medical conditions by engaging any of the actions prohibited under Wis. Stat. § 111.322. *See*, Wis. Stat. § 111.36(1)(c).

callously, as was done here. It is only unlawful to treat medical conditions related to pregnancy differently from medical conditions related to other causes." *Michno v. Pizza Hut*, ERD Case No. 199555637 (LIRC Aug. 11, 1998), citing *Lane v. Uniroyal Tire Co.*, ERD Case No. 8402101 (LIRC April 26, 1988)(the question of whether a pregnancy-related disability is treated differently from other temporary disabilities requires a conventional disparate treatment analysis).

Given the foregoing, the question to determine is whether the respondent would have accommodated the complainant if she had had the same short term restriction but was not pregnant. Upon reviewing this record, the commission does not believe the evidence supports a finding that the respondent would have accommodated a non-pregnant employee under similar circumstances. Peggy Malmstadt, the regional human resources manager, testified that a non-pregnant employee with the same restrictions would not be accommodated, and the complainant offered nothing to disprove this claim. The record does not contain any comparative evidence with respect to how individual employees with other short term disabilities were treated, and it does not appear that any other employee asked for the type of accommodation the complainant needed--the request to not have to work at a specific task or job assignment had apparently never come up before. While the respondent did testify that it has accommodated other employees with temporary injuries by providing a leave of absence, and indicated that there was an individual who had a wrist injury and was permitted to take a leave of absence, the evidence does not indicate what job this individual worked in, how long his leave of absence lasted, or whether the employee affirmatively requested the leave or whether the respondent offered it to him. Thus, there is insufficient evidence to allow a comparison between the treatment of the complainant and this other employee and no basis to conclude that the complainant would have been granted a leave of absence from the job but for the fact that her short term disability was related to pregnancy.

In her brief to the commission the complainant makes an argument that the respondent chose to treat short term accommodation requests the same as long term disability accommodation requests and that it failed to follow its own policy by not engaging in an individualized assessment of the complainant's ability to perform the job duties. The commission does not find this argument persuasive. While it may be true that the respondent had a policy of analyzing short term accommodation requests the same way as it did long term requests, this did not create a new legal obligation by which the respondent can be bound for purposes of the Act. As stated above, the statute does not require pregnancy accommodation, and disparate treatment must be established in order for the complainant to prevail. No evidence of disparate treatment was presented here.

Concluding that disparate treatment was not established, a questions remains as to whether there is any other reason to believe that the respondent's decision to deny

the complainant's accommodation request and terminate her employment was motivated by bias against her based upon her pregnancy. The complainant claims that there is. She states that the respondent's explanations for the discharge are contradictory; the respondent contended both that it discharged the complainant because she could not perform her job without working at the shaker table and that it discharged the complainant because it could not get clear restrictions from her doctor. The complainant maintains that, if the explanations given for terminating her employment are found to be false, one could reasonably conclude that the explanation is a pretext for discrimination.

The complainant's arguments on this point are not without some validity. The commission agrees that the two explanations offered by the respondent are inconsistent, and it does not find either one particularly compelling. It is not at all clear that the complainant could not adequately perform the job or receive needed job training without working at the shaker table; the complainant had operated the crane for almost two months before being required to work the shaker table, and her supervisor indicated that the reason she was sent there was to fill in for a sick employee. Moreover, the commission is satisfied that the complainant did supply the respondent with the medical information it requested, and the respondent could not explain what additional information it believed was required.

As the complainant accurately points out in her brief, disbelief of an employer's proffered nondiscriminatory reason for an employment action permits the trier-of-fact to infer the ultimate fact of intentional discrimination without additional proof. *Thompson v. Century Cable Television Inc.*, ERD Case No. 199601523 (LIRC June 7, 1999)(where the respondent subjected employees of different races to differing levels of discipline for the same infractions and could not offer any compelling explanation for its actions, the commission concluded that race was a motivating factor). However, while rejection of an employer's explanation for its actions permits an inference of discriminatory motive, it does not *require* that the commission draw such inference. *See*, *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 62 FEP Cases 96, 100 (1993). In a discrimination case, the complainant bears the ultimate burden of persuading the trier-of-fact that a factor such as pregnancy was a motivating factor in the employment decision. *Kovalic v. DEC International*, 186 Wis. 2d 162, 168, 469 N.W.2d 224 (Ct. App. 1991); *Hoell v. Narada Productions*, ERD Case No. 8952746 (LIRC Dec. 18, 1992). In *Hoell*, the complainant's testimony that her supervisor told her the employer's president was "shocked" and "not very happy" about her pregnancy, that upon being denied a raise she was again told the president was unhappy with her pregnancy and concerned she would not come back to work, and that, upon terminating her employment her supervisor asked, "after all what did you expect," satisfied the complainant's burden of persuasion and led the commission to conclude that pregnancy was a motivating factor in the discharge decision.

Here, although the commission does not find the respondent's explanation for its actions to be entirely convincing, the complainant failed to meet her ultimate burden of persuading it that her pregnancy was a motivating factor. The decision not to accommodate the complainant's restrictions and to terminate her employment was made by Peggy Malmstadt, in consultation with two other human resources administrators. The record contains no evidence of bias on the part of these individuals. Indeed, when the complainant notified the respondent that she was pregnant and asked for maternity leave--which occurred prior to any issue arising with respect to working at the shaker table--she was told that, even though the respondent was not required to offer her FMLA leave, it would nonetheless be willing to give her short term disability leave she could use as maternity leave. Malmstadt testified that she had no problem with the complainant taking short term disability leave in the fall, and, unlike in the *Hoell* case, cited above, there is nothing to suggest that any of the individuals involved in the adverse decisions were unhappy that the complainant would be taking a maternity leave or were otherwise motivated to discriminate against the complainant as a result of her pregnancy. While the respondent's unwillingness to work with the complainant and find some way to keep her employed in spite of her inability to work at the shaker table could be described as unnecessarily rigid or unfair, the commission is unpersuaded that it was the product of discriminatory animus. Consequently, the dismissal of the complaint is affirmed.

cc: Attorneys Danielle M. Schroder and Amanda M. Kuklinski
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