

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

Mary G Boyd, Complainant

Fair Employment Decision¹

**Goodwill Industries of Southeastern
Wisconsin, Inc., Respondent**

Dated and Mailed:

ERD Case No. CR201503186
EEOC Case No. 443201600039C

September 27, 2019
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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

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 race, 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 no probable cause to believe that discrimination occurred. The complainant has 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 issue presented in this case is whether the complainant's race was a factor in the respondent's decision to issue a disciplinary "Decision Day" to her in May of 2015 and then, in October of 2015, to terminate her employment as a delivery driver for Meals on Wheels. The administrative law judge found that no discrimination was established. The complainant's petition contains a variety of arguments in support of reversal, none of which the commission finds persuasive.

First, the complainant argues, with respect to the disciplinary matter, that there was no proof she was insubordinate or disrespectful to Barbara Miller or Kara Grennier. She maintains that Ms. Grennier testified she did not threaten her physically or verbally. The complainant's argument is without merit. The respondent did not contend that the complainant threatened anyone physically or verbally, and the complainant was not disciplined for that reason. Instead, the respondent's testimony was that the complainant engaged in insubordinate behavior (including, among other things, refusing to bring coolers and hot bags with her on a delivery) over the course of several days, and that it gave her a Decision Day based upon that conduct. While the complainant disputed having engaged in insubordinate behavior, she presented no evidence warranting a conclusion that the respondent did not act based upon a reasonable, good faith belief that she had, indeed, engaged in the unsatisfactory conduct, nor any evidence to suggest that her race played a role in the disciplinary decision. Indeed, the complainant's only evidence of discrimination with respect to the Decision Day is her testimony that a Caucasian employee, Kathy (last name unknown), engaged in more extreme conduct than she did, but was not disciplined. However, the complainant had no personal knowledge about the alleged incident or incidents involving this employee and presented no other witness who could testify about Kathy's conduct or explain what, if any, discipline this individual received as a result. Consequently, it is not possible to make any findings of fact with respect to that matter, nor can it form the

basis for a conclusion that the complainant was subjected to disparate discipline based on her race.

Turning to the discharge decision, the complainant contends that there is no proof that she willfully decided not to provide Ms. Reed with a meal, nor any proof that she told the dispatcher she would not deliver a meal had one been available or offered. This argument is unpersuasive. It is undisputed that the complainant did not deliver a meal to Ms. Reed and that she did not call the respondent to notify it that she was short a meal and had not made the delivery, although it was the respondent's protocol to do so. Further, it was established that the dispatcher, Sandy Schicker, told Ms. Grennier that when she contacted the complainant to find out why the meal had not been delivered² the complainant informed her that her route was done and she would not be going out again. Ms. Grennier's decision to recommend discharging the complainant was not shown to be based upon anything other than a good faith, nondiscriminatory belief that the complainant had engaged in the wilful neglect of a frail, elderly person.

The complainant also argues that, although Ms. Montgomery is African-American, she did not initiate the disciplinary action and was not responsible for the complainant's discharge. This argument fails. Both Ms. Grennier and Ms. Montgomery testified that Ms. Montgomery had a role in the decision to terminate the complainant's employment. Ms. Grennier also testified that race was not a factor in the decision, as did Ms. Montgomery, who indicated that she had never met the complainant and was unaware of her race. It should be further noted that, although it appears that Ms. Montgomery was not involved in the prior discipline (the Decision Day), the respondent testified that one of the individuals involved in the disciplinary process, Tiffany Castagno, is also African American. While this fact does not compel a finding that race discrimination did not occur, it does tend to render such a conclusion less likely.

Finally, the complainant argues that one of her key witnesses, Myron Lee, has moved to Arizona but that she was not allowed to submit an affidavit from him or call him by telephone. However, the complainant did not provide a witness list prior to the hearing, as required by rule, even though the administrative law judge's scheduling order specifically advised her of this requirement. Consequently, the respondent had no notice that the complainant intended to call Mr. Lee as a witness until the day of the hearing. Further, as the administrative law judge explained at the hearing, arrangements to take a witness' testimony by telephone must be made in advance, and the complainant made no request to do so prior to the hearing. With respect to the "affidavit"--which the complainant described at the hearing as a "letter"--a written statement is mere hearsay and cannot substitute for the

² Ms. Schicker called the complainant at home after receiving a call from Ms. Reed stating that she had not received a meal and had not heard from the complainant.

testimony of a witness; among other problems, there is no way in which the opposing party can question the witness regarding any of the assertions contained in the written statement. Thus, the administrative law judge correctly ruled that the document would not be considered.

The complainant had the burden of introducing sufficient evidence to warrant a conclusion that there is probable cause to believe that discrimination occurred. The commission agrees with the administrative law judge that the complainant did not meet that burden in this case. Accordingly, the dismissal of the complaint is affirmed.

cc: Attorney Bethany McCurdy