

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

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**Tina Gruss**  
Complainant

**County of Dane**  
210 Martin Luther King Jr. Blvd  
Madison, WI 53703  
Respondent

ERD Case Nos. CR201601925  
                                  CR201601926  
EEOC Case No. 26G201601092C

**Fair Employment Decision<sup>1</sup>**

**Dated and Mailed:**

August 13, 2019  
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The decision of the administrative law judge is **affirmed**. Accordingly, the complaints in this matter are dismissed.

By the Commission:

/s/  
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Michael H. Gillick, Chairperson

/s/  
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David B. Falstad, Commissioner

/s/  
\_\_\_\_\_  
Georgia E. Maxwell, Commissioner

**Procedural Posture**

ERD Case No. CR201601925 is before the commission to consider the complainant's allegations that the respondent violated the Wisconsin Fair Employment Act by: a) discharging the complainant because of disability; b) discriminating against and discharging the complainant because she opposed a discriminatory practice or filed

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<sup>1</sup> **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>.

a prior discrimination complaint with the Equal Rights Division (ERD); and c) discriminating against and discharging the complainant because she filed, or the respondent believed she filed or would file, a complaint under the Wisconsin Family and Medical Leave Act (WFMLA).

ERD Case No. CR201601926 is before the commission to consider the complainant's allegation that the respondent violated the Wisconsin Health Care Worker Protection Act (WHCWPA) by taking disciplinary action against the complainant because she in good faith reported, or was believed to have reported, information under that Act.

In both cases, an investigator for the ERD found no probable cause to believe the respondent violated the WFEA or the WHCWPA in any respect. The complainant appealed and a consolidated hearing on both complaints was held before an administrative law judge for the ERD.

The administrative law judge issued a decision dismissing the complaints. 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.

### **Memorandum Opinion**

#### Procedural issues

At the outset of the hearing, the complainant maintained that she did not receive notice of the respondent's exhibits and list of witnesses in a timely manner. The rule requires parties to mail witness lists and exhibits to the opposing parties "no later than the tenth day prior to hearing." Wis. Admin. Rule § DWD 218.17. Compliance with this requirement is complete upon the mailing of the document, not its receipt by the opposing party. *Borum v. Allstate Ins. Co.*, ERD Case No. 199903542 (LIRC Oct. 9, 2001). The respondent mailed its disclosure to the complainant on April 20, 2018, ten days before the hearing date of May 1, 2018, and therefore complied with the rule. (Ex. C-17).

The complainant also claimed it was unfair that the respondent offered into evidence, and the administrative law judge accepted, the deposition of Bintou Cole, one of the complainant's supervisors. The deposition had been taken by the complainant's attorney at the time (who had ceased representing her prior to hearing). The witness died before the hearing took place. The deposition was admissible because Cole was unavailable at the time of hearing (Wis. Stat. §

908.04), and because her prior testimony was given under oath at a deposition taken by the complainant's attorney (Wis. Stat. § 908.045).

Also, the complainant wanted a postponement of the hearing because she was unaware that Cole had died, but the respondent had no duty to inform her of this prior to making the disclosure ten days before hearing.

### The complainant's arguments for a discriminatory motive

#### Under the WFEA

The complainant proposed several discriminatory motives for the actions taken by the respondent against her, the main action being the termination of her employment. First, she alleged disability discrimination. At some point within the first few years of the complainant's employment she informed management at the nursing home that she had asthma, and requested certain accommodations because of her condition, namely, that she be exempted from going up and down stairs to respond to situations, and that she be allowed to use a nebulizer at work. These requests were granted. There is no evidence that the complainant linked any other requests for accommodation to her asthma. The nursing home moved to a new location in 2011 that did not have stairs, making the first accommodation moot. The respondent did not ask for medical documentation concerning the complainant's requests before it granted her accommodations; it accepted her assertions about asthma at face value. At hearing, the complainant presented no medical proof of her asthma or how it affected her, as required under the WFEA (see *Doepke-Kline v. LIRC*, 2005 WI App 209, 287 Wis. 2d 337, 704 N.W.2d 605; *Erickson v. LIRC*, 2005 WI App 208, 287 Wis. 2d 204, 704 N.W.2d 398), and therefore could only prevail on a disability claim if she could show that the respondent perceived her as having asthma and perceived it to be a disability. The complainant did not prove this. The evidence indicates that the respondent was willing to grant the complainant's accommodation requests because they were minimal, not because the respondent formed a perception about the nature and extent of her asthma. Finally, there was no credible evidence that anyone with managerial authority harbored any animus against her for reporting that she had asthma. Considering the above, the complainant's disability claim is not supported by the evidence.

In addition to disability discrimination, the complainant also argued that the respondent's firing of her, and treating her adversely by disciplining her, were acts of retaliation for having opposed some discriminatory practice, having filed previous discrimination complaints or WFMLA complaints, or because the respondent thought she might file another WFMLA complaint.

The complainant had filed three previous complaints. In April 2010 she alleged a violation of her rights under the WFMLA (ERD Case No. CR201001143). This case

was dismissed by a Preliminary Determination by an ALJ and was not appealed. In August 2010 she alleged that the employer had discriminated against her based on her alleged asthma disability (ERD Case No. CR201003025). This case was dismissed by an Initial Determination of No Probable Cause and was not appealed. In October 2013 she alleged another violation of her rights under the WFMLA (ERD Case No. CR201302809). This case was also dismissed by an Initial Determination of No Probable Cause and was not appealed. This last dismissal was in December 2013.

The complainant provided nothing in evidence to suggest that these prior complaints, or other oppositional conduct under the WFEA, had been the motive for any disciplinary actions taken against her by the respondent. As to any alleged retaliation based on her family or medical leave requests, or prior WFMLA complaints, all the complainant's requests for leave after her 2013 complaint were granted. And because her requests for leave were granted, there was no reason for the respondent to believe that she might file another WFMLA complaint. As to any alleged retaliatory discipline, the complainant was suspended for three days in October 2013 because of an incident that happened in September 2013. The discipline was not retaliatory; it was based on the respondent's investigative findings that the complainant had engaged in insubordination and inappropriate and aggressive communication with her supervisor. (See Findings of Fact 12 and 13 in the decision of the administrative law judge.) As to alleged retaliatory discharge, in addition to the respondent's having produced evidence of a non-discriminatory reason for firing her that was not refuted by the complainant,<sup>2</sup> the length of time between the complainant's last complaint and the date of her discharge, nearly two years, makes it difficult to conclude that any of her prior complaints served as a motivation for her discharge.

### Under the WHCWPA

The complainant also argued that the employer violated the Wisconsin Health Care Worker Protection Act (WHCWPA), Wis. Stat. § 146.997. The WHCWPA prohibits a health care facility from taking disciplinary action against a health care worker

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<sup>2</sup> The facts that led to the complainant's discharge are comprehensively set out in Findings of Fact 16 through 25 of the administrative law judge's decision and need not be repeated here. The decision to terminate the complainant's employment was a group decision of management based on an evaluation of the statements of the complainant compared to the statements of the employees involved in, or witness to, altercations with the complainant. The statements on which the employer relied were not hearsay statements, because they were offered to show the employer's motivation in firing the complainant to be non-discriminatory. The employer's decision-making process, including its decision to believe the statements of multiple witnesses over the complainant's denials, was fair and reasonable, not discriminatory. See [Vandever v. Brown County](#), ERD Case No. 9020864 (LIRC June 28, 1993).

because that worker in good faith has reported "information" under the Act to an officer or director of the health care facility, or to a supervisory employee who is in a position to take corrective action. For the protection to attach, the information reported must be such that would lead a reasonable person to believe that the facility violated a state law or rule or a federal law or regulation, or some clinical or ethical standard. In this case, the information that might qualify for protection under the WHCWPA would be the complainant's reported concern to Heller, the director of nursing, that allowing staff to do charting outside the charting room violated the Health Insurance Portability and Accountability Act of 1996 (HIPAA). It is not necessary to consider whether a reasonable person would believe that this practice violated HIPAA because there is no evidence that the complainant's concern about this practice caused any negative reaction from the respondent. The evidence shows that when the complainant brought up the subject, Heller simply explained that staff who did charting outside the charting room were directed to secure their records in the charting room or in locked drawers in the kitchen whenever they were called away to do some other task. There is no evidence that Heller was motivated to discharge the complainant because of her HIPAA concern. The respondent's unrefuted non-discriminatory reason for discharging the complainant (see footnote 2 above) served as a sufficient defense to the complainant's discharge claims under both the WFEA and the WHCWPA.

The commission affirms the dismissal of these complaints.

cc: Carlos Pastrana