State of Wisconsin
Labor and Industry Review Commission

Edwin A. Gallardo Complainant **Accurate Specialties, Inc.** Respondent ERD Case No. CR201501205 EEOC Case No. 26G201500826C	**Fair Employment Decision**[1] **Dated and Mailed:** September 6, 2019 gallaed_rsd.doc:107

The decision of the administrative law judge is **affirmed in part** and **set aside and remanded in part.** Accordingly, it is ordered:

1. With respect to the claims that the respondent violated the Wisconsin Fair Employment Act (WFEA) by discriminating against the complainant in the termination of his employment and in the terms or conditions of employment (other than compensation) because of race, color, national origin or ancestry, the decision of the administrative law judge is affirmed, and the claims are dismissed.

2. With respect to the claim that the respondent violated the WFEA by discharging or otherwise discriminating against the complainant because he opposed a discriminatory practice under the WFEA, the decision of the administrative law judge is affirmed, and the claim is dismissed.

3. With respect to the claim that the respondent violated the WFEA by discriminating against the complainant in compensation because of race, color, national origin or ancestry, the decision of the administrative law judge is set aside, and the case is remanded to the Equal Rights Division for a hearing on whether probable cause exists to support that claim.

[1] **Appeal Rights**: Because this decision does not conclusively determine all substantial rights of the parties, and the cause is retained for further agency action, it is not subject to judicial review at this time. *Kimberly Area School District v. LIRC*, 2005 WI App 262, 288 Wis. 2d 542, 707 N.W.2d 872. When all issues have been conclusively determined in the agency, judicial review of this decision may be sought. 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.

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 allegations that the respondent violated the WFEA by discriminating against him in the termination of his employment and in the terms and conditions of employment, including compensation, because of his race, color, national origin or ancestry, and by discharging him or otherwise discriminating against him because he opposed a discriminatory practice under the WFEA. In an Initial Determination by the investigative unit of the Equal Rights Division (ERD) of the Department of Workforce Development, no probable cause was found to believe the complainant's allegations. On appeal by the complainant to the ERD's hearing and mediation section, an administrative law judge dismissed the complainant's claim of discrimination in compensation prior to hearing. After an evidentiary hearing on the complainant's remaining claims, the administrative law judge dismissed them. 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 sets aside the administrative law judge's pre-hearing dismissal of the complainant's claim of discrimination in compensation and remands that issue for a hearing on probable cause, and agrees with the decision of the administrative law judge on the remaining claims, and adopts as its own the findings and conclusions of the administrative law judge with respect to those claims. Therefore, the commission makes the following modifications in the decision of the administrative law judge:

Modifications

1. In the seventh paragraph on page two of the decision (beginning "On May 24, 2017…"), delete everything following the first sentence of that paragraph.

2. In the Conclusions of Law on page seven of the decision, delete Conclusion of Law number three.

3. The Order of the administrative law judge is deleted and replaced with the Order of the commission stated above.

Memorandum Opinion

The Compensation Claim

In his petition for commission review, the complainant argued that the dismissal of his claim of discrimination in compensation was erroneous because the administrative law judge failed to apply federal law, specifically the Lilly Ledbetter Act.[2] The commission, following the state court precedents of *Abbyland Processing v. LIRC*, 206 Wis. 2d 309 (Ct. App. 1996) and *Rice Lake Harley Davidson v. LIRC*, 2014 WI App 104, 357 Wis. 2d 621, 855 N.W.2d 882, not the Lilly Ledbetter Act, concludes that the administrative law judge's dismissal of the complainant's compensation claim for untimeliness was erroneous, and that the issue should be remanded for an evidentiary hearing on probable cause.

The allegations of the complaint having to do with the compensation claim were that: 1) the complainant is Puerto Rican; 2) he worked as a foundry laborer in the shipping and receiving department and was paid $16.47 per hour; 3) he worked in that department with a white co-worker named John Lemanski; 4) Lemanski was paid $22.00 per hour for performing essentially the same work as the complainant; and 5) the respondent discriminated against the complainant in pay because of his race, color, national origin or ancestry.

The administrative law judge's dismissal of this claim occurred after the first day of hearing, March 28, 2017, and before the second day of hearing, June 20, 2017. Between those dates, the administrative law judge informed the parties that he had doubts about the timeliness of the claim of discrimination in compensation and asked for written arguments from the parties on that issue. On May 24, 2017, the administrative law judge dismissed the compensation claim for being untimely filed.

Under Wis. Stat.§ 111.321, discrimination in compensation because of any protected category is prohibited. In addition to that general prohibition, there is a special provision in the WFEA defining discrimination in compensation on the basis of sex as including discrimination "in compensation paid for equal or substantially similar work." Wis. Stat. § 111.36(1)(a). This language tracked the language of the federal Equal Pay Act,[3] which specifically addressed discrimination in pay because of sex. The commission, noting the similarity in language between § 111.36(1)(a) and the Equal Pay Act, interpreted it as intending to import the Equal Pay Act's special allocation of burdens of proof into cases alleging sex discrimination in compensation. This is explained by the commission in *Sahr v. Tastee Bakery*, ERD Case No. 8800838 (LIRC Jan. 22, 1991):

> Discrimination in pay because of sex – In evaluating complaints of sex discrimination in pay under the Wisconsin Fair Employment Act, the

[2] Lilly Ledbetter Fair Pay Act of 2009, Pub. L. 111-2, 123 Stat. 5.
[3] Pub. L. 88-38, 77 Stat. 56.

> Commission looks to the analysis which is followed under the federal Equal Pay Act. *Anderson v. City of Sheboygan Health Department,* (LIRC, August 20, 1987). This analysis involves the question of whether employes of different sexes are paid differently for equal work on jobs the performance of which requires equal skill, effort, and responsibility and which are performed under similar working conditions. It recognizes four defenses which will negate liability if proven by the employer: that the differential payments are made pursuant to a seniority system, a merit system, or a system which measures earnings by quantity of production or "any other factor other than sex." It has been recognized that this analytical method essentially establishes a type of strict liability in which there need not be proof of intent to discriminate. *Strecker v. Grand Forks County Social Services Board,* 640 F.2d 96,99, 24 FEP 1019 (8th Cir. 1980).
>
> However, it is appropriate to also follow the conventional analysis of the issue of discrimination, in which certain evidence (a prima facie case) is considered to raise an inference that there was intentional discrimination, the respondent can then articulate a nondiscriminatory reason for the pay differential, and the complainant can then attempt to demonstrate that the articulated reason is pretextual. Direct evidence of the presence of a discriminatory motive can also be considered as relevant. The intent of the employer, as demonstrated by any relevant evidence, is the central focus.

The conventional analysis referred to above is the analysis that governs compensation claims based on **any** protected class. See, e.g., *Johnson v. Menominee Indian School District,* ERD Case No. CR200101097 (LIRC Nov. 28, 2003). The administrative law judge concluded that the complainant's compensation claim, since it was based on national origin/ancestry, not sex, did not qualify for the "Equal Pay Act analysis," and had to follow the conventional analysis. The commission agrees with that assessment.

In applying the conventional analysis, the administrative law judge correctly noted that some allegedly discriminatory act had to have occurred within 300 days of the filing of the complaint.[4] The administrative law judge then erred by stating that the complaint did not include a claim that the decision to pay Lemanski more than the complainant was discriminatory, and by stating that even if it had, the employer's compensation **decision** had to be made within 300 days of the filing of the complaint for the claim to be timely. Lemanski was hired in November 2013, so apparently the decision setting his compensation occurred more than 300 days prior to the filing of the amended complaint.

First, a fair reading of the complaint is that it did include a claim that the alleged pay discrepancy between Lemanski and the complainant was based on a discriminatory decision by the respondent – the allegations summarized above state such a claim. Based on the investigation and the Initial Determination of the Equal Rights Officer, it appears that the parties understood that such a claim was being made.

[4] In this case, to be timely the alleged discriminatory act had to occur on or after October 21, 2014, 300 days prior to the August 17, 2015 filing of the complainant's amended complaint alleging discrimination in compensation.

Second, requiring the employer's **decision** to pay Lemanski more than the complainant to have been made within 300 days of the filing of the complaint runs counter to *Abbyland Processing v. LIRC,* 206 Wis. 2d 309 (Ct. App. 1996). In *Abbyland,* the complainant alleged discrimination in compensation based on sex and marital status, claiming that she was not being paid comparably to a male employee for comparable work. The difference in pay began more than 300 days prior to the filing of the complaint but continued into the period within 300 days of the filing of the complaint. The timely ***act*** of discrimination, according to the court, was the act of ***paying*** the complainant less than her counterpart within the statutory limitations period. Under *Abbyland,* salary discrimination is considered a new discriminatory act with each paycheck:

> Salary discrimination is an ongoing matter and can be challenged if the result of the discrimination occurs both within and outside the statute of limitations. In this case, [the complainant] was entitled to challenge the salary paid during the relevant period of time, May 11 – May 17, 1991, which is that period within the 300-day statute of limitations.

Abbyland, supra, at 316. For the complainant in *Abbyland* to succeed, of course, she still had to prove that the pay discrepancy was motivated by improper considerations of gender and marital status. The main holding of *Abbyland* was that evidence of an employer's state of mind dating from **before** the beginning of the statutory filing period can be relevant to his state of mind with respect to compensation paid **within** the filing period. The evidence of discriminatory intent in *Abbyland* was compelling. Prior to the statutory period, the employer's president, when directly told that the complainant was not being paid comparably to a male employee, stated that "'that snatch' did not need to make that much, that her husband was earning a sufficient salary so she did not need additional compensation and that [the complainant] was 'a good heifer or a good cow and she would produce but we don't have to give her any more.'" *Abbyland, supra,* at 314. This was convincing evidence that the pay discrepancy within the statutory period was a product of sex and marital status discrimination. Years later, in *Rice Lake Harley Davidson v. LIRC,* 2014 WI App 104, 357 Wis. 2d 621, 855 N.W.2d 882, the court of appeals reaffirmed the reasoning of *Abbyland*:

> Rice Lake Harley argued LIRC misinterpreted *Abbyland.* According to Rice Lake Harley, *Abbyland* actually held that "the setting of discriminatory compensation must be made within the 300 day statute of limitations.…We disagree. In *Abbyland,* the decision to pay Forster less based on her sex and marital status was clearly made more than 300 days before she filed her complaint, as evidenced by the company president's statements. Nonetheless, Forster's complaint was timely because she actually received a discriminatory payment within the 300-day limitations period. The *Abbyland* court specifically stated salary discrimination is actionable "if the *result* of the discrimination occurs both within and outside the statute of limitations." *Abbyland,* 206 Wis. 2d at 316 (emphasis added). The *result* of compensation discrimination is *payment* pursuant to a discriminatory compensation decision.

Rice Lake Harley Davidson v. LIRC, 2014 WI App 104, ¶ 35, 357 Wis. 2d 621, 645, 855 N.W.2d 882.

Application of this method of determining timeliness was not an aspect of the Equal Pay Act that could be ignored if the basis of the alleged discrimination was a category other than sex. *Abbyland* itself proves otherwise. The court did not derive its holding on timeliness from the Equal Pay Act. It analyzed the case as a discriminatory intent case. Also, the complainant alleged marital status discrimination in addition to sex discrimination, and the court made no distinction between the two in applying the continuing violation theory. Marital status is a separate protected category; it is not a sub-category of sex discrimination. If the timeliness analysis for compensation claims can be applied to marital status discrimination in pay, there is no reason under the WFEA for not applying it to other protected categories besides sex in pay discrimination cases.

The complainant fairly stated a claim of discrimination in compensation on the basis of race, color national origin or ancestry, in which the result of an allegedly discriminatory intent was to pay the complainant less than Lemanski for comparable work within the 300-day period prior to the filing of the complaint, that is, on and after October 21, 2014. The claim is therefore timely. The evidence of discriminatory intent as a cause for the pay discrepancy presented in the first day of hearing was limited, but because the administrative law judge dismissed the compensation claim after the first day, he cut off the opportunity for the complainant to present more evidence of discriminatory intent. This requires a set-aside and a remand for a probable cause hearing on the compensation claim.

The claim of discrimination in terms and conditions (other than compensation)

The complainant testified at hearing that in 2011 the complainant's supervisor, Bob Rogers, called the complainant "the foundry bitch" and after that started calling him "honey" and "sweetie." (Tr., 149). This alleged name-calling best fits a claim of discriminatory harassment (see, e.g., *Valentin v. Clear Lake Ambulance Service*, ERD Case No. 8902551 (LIRC Feb. 26, 1992)), but the complainant did not present evidence sufficient to show probable cause. To show probable cause of employer-inflicted harassment, a complainant must present credible evidence to support the belief that he was subjected to some adverse, unwelcome conduct or comments from someone in management based on his being in a protected category. *Valentin, supra; Saltikaros v. Charter Wire Corporation*, ERD Case Nos. 8652598 & 8651682 (LIRC July 31, 1989). Here, no firsthand witness corroborated the complainant's testimony that Rogers called him foundry bitch, honey or sweetie, Rogers denied the accusation, and witness William Kesy testified that he never heard Rogers call anyone a foundry bitch or other such names. Second, the complainant himself did not include Rogers' alleged name-calling in his complaint or amended complaints[5] and testified that he experienced no discrimination in the workplace from 2010 to April 2015 (Tr., 121), casting doubt on whether the name-calling happened, or, if it did, how adverse or unwelcome it was. Third, the alleged names themselves

[5] The complainant argued in his petition for commission review that it was a mistake for the administrative law judge to rely on the allegations (or lack of allegations) in the complainant's complaint and amended complaints in making judgments about the complainant's credibility. However, inconsistencies between the complainant's testimony and the allegations of the complaint were explored at hearing, and the complainant had an opportunity to explain them. Under these circumstances, those inconsistencies can properly be considered to weaken the credibility of the complainant's testimony. See *Hopson v. Actuant Corp.*, ERD Case No. CR201003477 (LIRC May 8, 2014).

(foundry bitch, honey, sweetie) do not suggest that they were motivated by the complainant's race, color, national origin or ancestry, and no contextual evidence was offered to raise that suggestion. The complainant has not made a probable cause showing that Rogers harassed him because of his race, color, national origin or ancestry.

The complainant also testified that his co-worker, Lemanski, made racially derogatory statements. In order to hold an employer liable in a claim of co-worker-inflicted harassment, the complainant must show that the unwelcome and derogatory comments or conduct created a hostile or abusive work environment because of the complainant's membership in a protected class, and that the employer knew or should have known about them but failed to take reasonable action to prevent the harassing behavior. *Crear v. LIRC,* 114 Wis. 2d 537, 542, 339 N.W.2d 350 (Ct. App. 1983). There are two separate allegations of racially derogatory statements by Lemanski. First, the complainant testified that in April 2015 Lemanski used the word "nigger" several times in his presence, causing the complainant to get upset and complain to human resources manager Sheryl Kelliher about it. Kelliher testified that the complainant complained that Lemanski made an inappropriate remark about a news report that an African-American had been shot, but she denied that the complainant accused Lemanski of using the word nigger (Tr., 259). At the time, Kelliher questioned Lemanski about the complainant's accusation and believed Lemanski's denial that he made an inappropriate comment. (Tr., 261). Lemanski also denied the accusation in testimony at the hearing. The evidence does not show probable cause to believe that Lemanski used the word nigger in the complainant's presence; nor does it show probable cause to believe, assuming that he made some inappropriate remark about African-Americans, that the remark created a hostile or abusive work environment for the complainant based on the **complainant's** race, color, national origin or ancestry; nor does it show probable cause to believe that the employer knew or had reason to know that Lemanski had created a hostile or abusive work environment for the complainant because of the complainant's race, color, national origin or ancestry.[6]

The complainant also testified that Lemanski called him a "stupid spic." According to the complainant, on April 13, 2015 Rogers asked him to tell Lemanski that he (Lemanski) had to start doing "salvaging duties," which he had not done before, and that when the complainant relayed this to Lemanski, Lemanski replied "I don't have to listen to you, you stupid spic." The complainant acknowledged that this comment came "out of nowhere." They were not having a heated discussion, and they had had a cordial working relationship, without any problems between them. (Tr., 123-25). The complainant testified that he immediately complained to Rogers that Lemanski had called him a stupid spic, and that Rogers said he would "take care of it." (Tr., 40).

The complainant's testimony was disputed. Lemanski testified to a conversation with the complainant in which the complainant told him to do salvaging, but denied

[6] The complainant also alleged that after he complained about Lemanski his forklift was vandalized twice – once it was wrapped in tape that had to be cut off, and once he discovered a razor blade half-embedded in the seat of the forklift. He never determined who had done this, and although he testified that he reported these incidents to his lead person, Enrique Valez, he did not present evidence that management was aware of them. His testimony about these incidents does not add to his claim of harassment by Lemanski.

calling the complainant a stupid spic, or saying anything other than that he would check with Rogers about whether he had to do salvaging work. For his part, Rogers denied that he ever told the complainant to tell Lemanski what to do -- Rogers testified that he would have told Lemanski himself if he wanted Lemanski to do salvaging. (Tr., 452-53).[7] Rogers also denied that the complainant ever reported to him that Lemanski had called him a stupid spic. (Tr., 454). The evidence, then, that the derogatory name-calling occurred is uncorroborated and disputed, as is the evidence that the complainant complained to management about it. Given the complainant's credibility problems, discussed below, the commission concludes that the evidence does not support the complainant on this allegation. In addition, even if the commission were to conclude that the incident of April 13th happened as described by the complainant, a single isolated incident of name-calling does not necessarily constitute unlawful, co-worker-inflicted harassment because of race, color or national origin. *Valentin, supra* ("It is also well established as a matter of law that the occasional and sporadic use of racial slurs, albeit deplorable, may still not rise to the level of a violation of law."); *Omowaye v. Wisconsin Built*, ERD Case No. CR201002241 (LIRC Apr. 30, 2013); *Clark v. Plastocon, Inc.*, ERD Case No. CR199703663 (LIRC Apr. 11, 2003). Given the complainant's acknowledgement that he and Lemanski had a cordial relationship until then, and that the alleged comment came out of nowhere, the comment, if made, may not have reached the level of creating a hostile or abusive work environment by itself.

Termination claims

The complainant's employment was terminated on May 4, 2015. His claim that his firing was in violation of the WFEA alleges two motivations – that it was based on his race, color, ancestry or national origin, or that it was in retaliation for his complaint that Lemanski had made racially derogatory statements. Whether either alleged motivation is believable depends to a large degree on the believability of the complainant's story that he had ongoing permission to leave work without clocking out, because the respondent articulated a non-discriminatory reason for terminating him, namely, that the complainant had no such permission, and that it discovered that he left work several days for a half-hour to an hour without notifying anyone and without clocking out, and then falsely told management that he had not done so.

The complainant's version of the arrangement

The complainant testified that when he was interviewed by Rogers for the job in August 2010, he told Rogers and human resources employee Eduardo Chanto that he could not accept the job because the hours, 4 a.m. to 2 p.m., interfered with his obligation to take his two children to school in the morning. He indicated that he

[7] In his petition for commission review, the complainant argued that the administrative law judge erred when he reasoned that it would have been a "deviation from normal supervisory practice" for Rogers to tell the complainant to give a directive to Lemanski, because that reasoning assumed that Lemanski had a higher-level position than the complainant (an assumption that the complainant contests, but was prevented from proving because of the dismissal of his compensation claim). The credibility of Rogers' testimony that he would not have told the complainant to tell Lemanski what to do, however, does not depend on assuming that Lemanski had a higher-level position, only that Rogers' practice was to give orders to non-management employees directly, not through another non-management employee.

would need more than an hour off work in the morning to do this. He testified that Rogers said he was willing to accommodate the complainant because he needed the complainant's Spanish-speaking ability, and told the complainant he could take his kids to school then come back to work and finish his shift. The complainant further testified that he decided on his own to punch in and out when he took his kids to school. Finally, he testified that in August 2012 he told Rogers as of that date that he only had to take one child to school, which would not take more than an hour, and that Rogers approved of his taking an hour off work without punching out to take his child to school, and that the hour would substitute for his paid half-hour lunch and two fifteen-minute breaks. No one else was given this sort of exemption from clocking in and out.

The respondent's version of the arrangement

The respondent disputed almost every detail of this alleged arrangement. Rogers testified that during the job interview the complainant said nothing about needing to take time off work for any reason. He testified that he did not need a Spanish interpreter at the time, in that most of the Spanish-speaking employees, including Chanto and the lead person in the foundry, Enrique Valez, were bilingual. Rogers further testified that about a month after the complainant was hired the complainant told Rogers for the first time that he needed to figure out a way to get his two kids to school because his wife had left him, and that Rogers agreed to allow the complainant to come to work, clock out later in the morning to take his kids to work, then return to work. The agreement included a requirement that the complainant punch in and out. Rogers further testified that in 2012 the complainant informed him that he no longer needed to take time off to get his kids to school, so the arrangement ended at that time. (Tr., 434).

Analysis – discrimination claim

Time records in evidence indicate that in September 2010 the complainant began punching out in the mornings and punching back in about an hour and a half later, and that this pattern continued, except during summer breaks and a few weeks here and there, until June 2012, after which his time cards showed no punch-outs during his work day.

The respondent had a handbook that included the following rules on time reporting:

> …
> 3. Each employee will be required to verify that the hours on his/her time record are accurate.
> 4. Employees are to record in and out times for unpaid lunch periods and any time they leave the Company premises, unless it is for official Company business (i.e. –taking an injured employee to the clinic.)
> 5. If an employee forgets to clock in or sign in or out, he/she must notify his/her supervisor immediately so the time may be accurately recorded for payroll.
> …
> 7. An employee who leaves the premises during paid working hours without permission of the supervisor will be considered to have voluntarily terminated his/her employment.

If the complainant's version of his arrangement to leave work without clocking out is correct, it was contrary to the respondent's written rules, and amounted to a

special privilege for the complainant granted to no one else. To make his argument that he was fired because of his race, color, ancestry or national origin, the complainant would have to reconcile the fact that Rogers hired him and gave him this special privilege knowing his membership in a protected class, then fired him because of that protected status. As the respondent stated in its brief to the commission (p. 18):

> Common sense dictates that if Mr. Rogers was biased against the Complainant based on his national origin, race, and/or color, he would not have hired him in the first place, much less provided him with an arrangement that had never been provided to any other employee at Accurate. To claim that Mr. Rogers later terminated Complainant because he was (still) Puerto Rican, Hispanic, and/or brown, is nonsensical.

The complainant has not shown probable cause to believe that his firing was motivated by his race, color, national origin or ancestry.

Analysis – retaliation claim

The complainant also argues that his firing was in retaliation for his having complained about Lemanski, because it was not until after April 13, 2015, the date he allegedly complained to Rogers that Lemanski had called him a stupid spic, that an investigation began into whether he was leaving work without clocking out.[8] Generally, to show unlawful retaliation under the WFEA, a complainant must show that he or she engaged in the protected activity of opposing some discriminatory practice, that he or she was then subject to an adverse employment action, and that there is a causal connection between the protected activity and the employment action. *Gephart v. Department of Corrections*, ERD Case Nos. CR200404656 & CR200501467 (LIRC Nov. 18, 2009). In order to establish a causal connection, it must be shown that the alleged retaliator was aware or had reason to be aware of the complainant's protected activity. *Froh v. Briggs & Stratton Corp.*, ERD Case No. 200101453 (LIRC Sep. 29, 2004). Here, as noted above, the complainant failed to establish that he reported the allegedly discriminatory remarks of Lemanski. In addition, since the respondent articulated a non-retaliatory reason for discharging the complainant, the burden was on the complainant to show that reason to be pretextual. The focus of such an inquiry is whether the respondent's stated reason for discharge was honest. *Ebner v. DuraTech*, ERD Case No. 200504645 (LIRC Apr. 23, 2009).

The respondent's story of what led to the complainant's termination went as follows: On several occasions in March and April 2015, Lemanski told a supervisor named John Blank that he thought the complainant was leaving work without clocking out. Blank sent an email to Rogers on April 17, 2015, while Rogers was on vacation, stating that the complainant had been seen leaving the building without clocking out. Rogers forwarded the email to Kelliher in human resources. On April 20, 2015, Kelliher asked the complainant if he had left work on April 17, 2015. He said he had not. Rogers returned on April 22, 2015, and he and Kelliher started reviewing video footage, showing that the complainant had indeed left work twice without clocking

[8] His other internal complaint, to Kelliher, about Lemanski's inappropriate language about African Americans, did not occur until after April 17th, when Kelliher had begun investigating the complainant's failure to clock out, so it could not have been the cause for the investigation.

out or in on April 17, 2015, once from 8:48 a.m. until 9:39 a.m., and again from 12:24 p.m. to 12:36 p.m. They reviewed video going back to April 10, 2015 and found two more occasions when the complainant left work without clocking out – on April 15, 2015 and April 20, 2015, both days when Rogers was on vacation. Rogers and Kelliher then met with the complainant to discuss these absences. Rogers directly asked the complainant whether he was leaving work without clocking out or without permission, and the complainant emphatically denied that he had done so. Kelliher asked him if he wanted to see the video of him leaving during the day, but he declined. The complainant said nothing in this meeting about having an arrangement to leave work without clocking out.

After the meeting, Rogers and Kelliher discussed what to do, and contacted the company president, Rick Craven. Rogers ultimately recommended that the complainant be fired for being untruthful when questioned about leaving the building without punching out or without permission. The complainant was called to a meeting with Rogers and Kelliher on May 4, 2015, where he was told he was being fired. At this meeting, for the first time, the complainant claimed that he had an agreement to leave work without clocking out. Rogers told the complainant that the agreement he had ended years ago because the complainant no longer needed to take his kids to school.

The respondent's explanation for firing the complainant was not shown to be dishonest. To the contrary, it was much more plausible than the complainant's story that the respondent for years permitted the complainant alone to ignore its own rules on clocking out when leaving work, but then falsely claimed that it had not given that permission, so that it could fabricate a reason to discharge the complainant, when the real reason was that the complainant had made a report to Rogers that Lemanski had called the complainant a stupid spic. The complainant has not shown probable cause to believe that the respondent violated the WFEA by retaliating against him for opposing a discriminatory practice.

The missing record of the first day of hearing

The complainant raised two other issues in his petition for review. The first had to do with the fact that the recording of the first day of hearing, March 28, 2017, was lost prior to the resumption of the hearing on June 20th.

Several days after the first day of hearing, but before the second day was scheduled, the administrative law judge discovered that the recording of the first day had disappeared. He proposed to the attorneys that he would provide a written summary of the testimony from his notes, and the attorneys could comment on any inaccuracies or omissions. The administrative law judge provided his summary. The respondent's attorney had no corrections to propose, but the complainant's attorney had quite a few. The administrative law judge then sent an email to the attorneys stating that he would not resolve the proposed corrections at that time, but his summary would include the proposed corrections separately. He also advised the parties that they were free to recall a witness from the first day of hearing if they wanted to. At the two remaining days of hearing, June 20 and 21, the complainant's attorney did not recall any witnesses from the first day of hearing. After the hearing concluded and briefs were submitted, the administrative law judge wrote a decision dismissing the complaint, and noted in his memorandum:

> Mr. Gallardo's case involved little more than his own testimony, and given the unbelievability of his testimony his case did not even establish even a suspicion that the legitimate reasons claimed by Accurate Specialties for its actions were pretext for discrimination or retaliation. Under the circumstances, resolving any issues regarding the record of the first day of hearing was not necessary.

Essentially, then, the administrative law judge decided that resolving the alleged inaccuracies was not necessary because the corrections/additions raised by the complainant's attorney would not have changed the outcome of the case.

Cases involving missing or defective recordings of hearings have come to the commission before, In *Clarke v. Plast-O-Con Inc.,* ERD Case No. 199703063, EEOC Case No. 26G971763 (LIRC Sept. 28, 1999), the tape recorder was broken at the hearing and the complainant's testimony was not written down or recorded. A synopsis was prepared largely from the ALJ's handwritten notes. Citing *Krenz v. Lauer's Food Market,* ERD Case No. 8802475, EEOC 26G890652 (LIRC Sept. 27, 1990) and *Saccomandi v. E. Pocus and Co., et. al.,* FHD Case No. 9051655, HUD Case No. 05-90-1092-1 (LIRC Sept. 9, 1993), the commission held that when there are specific reasons to believe the commission's review could be compromised by missing testimony, the commission has remanded for a new hearing. The commission in *Clarke* remanded for a new hearing in the matter. In *Krenz* and *Saccomandi,* the hearing was only partially recorded and still resulted in a remand for a new hearing. In *Schloemer v. Cupola House,* ERD Case No. CR200802575 (June 14, 2013), the commission found the audible portion of the record, supplemented with the ALJ's notes, was sufficient. The commission stated in *Schloemer* that the guiding principle of these cases was that "if the record, while incomplete, is nevertheless sufficient to allow the commission to fully evaluate the findings and conclusions of the ALJ, and does not deprive the parties of their due process rights to a fair hearing, it is not required a new hearing be held."

In this case the administrative law judge's summary of testimony of the first day, with the inclusion of the proposed corrections by the complainant's attorney, was sufficient to allow the commission to fairly evaluate the administrative law judge's findings and conclusions. The corrections/additions to the record offered by the complainant do little if anything to establish that the respondent's proffered reason for firing the complainant was a pretext for discrimination or retaliation, or to establish that the complainant was subjected to discriminatory harassment. Even if they were all accepted an affirmance of the administrative law judge's findings and conclusions would be appropriate.

The complainant's pre-hearing motion to compel

At a prehearing conference in this matter held on November 8, 2016, the administrative law judge issued a prehearing order. Regarding discovery, it provided that discovery would be closed as of February 1, 2017 and that any discovery motions had to be filed by February 17, 2017. The pre-hearing order also stated:

> The parties will comply with sec. 804.01(2)(e), Stats., concerning the exchange of electronic discovery. That is, the parties will confer with each other to discuss the exchange of any electronic discovery in compliance with sec. 804.01(2)(e), Stats.

The complainant filed a motion to compel discovery on February 8, 2017. In part, the motion sought to compel discovery of a significant amount of electronically stored information from the respondent, specifically emails and video footage from the respondent's security cameras. That same day, February 8th, the administrative law judge rejected the complainant's motion to compel, stating that the complainant's attorney had failed to comply with the above provision regarding electronically stored information. The administrative law judge also faulted the complainant's attorney for waiting until December 13, 2016 to serve discovery, when he could have commenced it on September 8, 2016 (when the case was certified for hearing). The administrative law judge closed by saying: "I am not postponing the hearing, and do not see a way for [complainant's attorney] to remedy the discovery problems explained."

On February 14, 2017, the complainant filed a second motion to compel so that it applied only to alleged deficiencies in the respondent's answers to the complainant's non-electronic discovery requests. The administrative law judge rejected this motion as well, stating that the complainant's attorney did not comply with the pre-hearing order and "waited until close to the last minute to issue his discovery." The respondent filed an objection to the complainant's second motion to compel on February 17, 2017, arguing that the complainant's discovery requests were overly broad, unduly burdensome and irrelevant. The administrative law judge, having already rejected the motion to compel three days earlier, did not address the respondent's arguments.

The administrative law judge's rejection of the second motion to compel is troubling. The motion was not untimely according to the administrative law judge's own prehearing order – the motion was filed on February 14, 2017, and the deadline set by the administrative law judge for filing discovery motions was February 17, 2017. It appears that the administrative law judge's rejection of the motion was based on his opinion that because the complainant's discovery was voluminous the complainant's attorney should have started discovery sooner than he did, to avoid having to ask the administrative law judge to resolve discovery disputes that might necessitate the postponement of the hearing.

In review of an administrative law judge's rulings on procedural and discovery issues the commission applies a deferential standard, under which it asks whether the ruling was a reasonable exercise of discretion or an abuse of discretion. See, *Silva v. City of Madison*, ERD Case No. 90002000 (LIRC Nov. 12, 1993). Under this standard, the question is whether the trial court (or agency) "examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." *Loy v. Bunderson*, 107 Wis.2d 400, 415, 320 N.W.2d 175 (1982); *Paytes v. Kost*, 167 Wis.2d 387, 393, 482 N.W.2d 130 (Ct. App. 1992) (cited by LIRC in Kutschenreuter and Schoenleber v. Roberts Trucking, Inc., ERD Case Nos. 200501465 & 200501422 (LIRC April 21, 2011). That did not occur here. Because the motion was filed prior to the administrative law judge's deadline for filing discovery motions, the administrative law judge should have considered the motion on its merits rather than rejecting it because the complainant's attorney did not serve discovery sooner than December 13, 2016. The administrative law judge's rejection of the motion leaves the impression that he simply did not want to go to the effort of deciding the motion on its merits.

However, a mistaken procedural ruling does not require a set-aside or a new hearing unless prejudice has resulted from a failure to apply principles of law

applicable to a situation. *Endeavor-Oxford Union Free High School District v. Walters*, 270 Wis. 561, 569, 72 N.W.2d 535 (1955). If an error by the trial forum was harmless, in that it did not affect substantial rights of a party, it is not grounds for reversal. *Martindale v. Ripp,* 2001 WI 113, ¶ 30, 246 Wis. 2d 67, 629 N.W.2d 698. For an error to affect the substantial rights of a party, there must be "a reasonable probability that the error contributed to the outcome of the action or proceeding." *Id.*, ¶ 32. See *Obasi v. Milwaukee School of Engineering*, ERD Case No. CR201003882 (LIRC Oct. 14, 2013).

Of the 18 discovery requests that were the subject of the complainant's second motion to compel (17 interrogatories and 1 request for production of documents), 12 of them (interrogatory nos. 24 through 32, 34 and 39, and request for production of documents no. 25) related to the complainant's discriminatory pay claim, which is being remanded for an evidentiary hearing. A remand makes the administrative law judge's treatment of the motion to compel moot with respect to those discovery requests.

The other six discovery requests went to the issue of whether the complainant's termination was discriminatory or retaliatory. For the most part, they sought information about the quality of the video evidence showing the complainant leaving work without clocking out or giving notice in April 2015. But at hearing the complainant did not dispute that he left work without clocking out or giving notice on the days in question, so answers to those interrogatories would not have changed the fact that the complainant left work without clocking out or giving notice on certain days. The complainant's contention, in fact, is that he routinely and blatantly left work without clocking out and without giving notice up until his discharge, and that management must have been aware of this and condoned it, until the complainant complained about discrimination, at which point they pretended not to know, so that they could use his leaving work as a pretext for firing him. Looking over the remaining six interrogatories that were the subject of the second motion to compel, the commission does not see any of them as calculated to produce evidence supporting that hypothesis, especially when considered with the benefit of now having an evidentiary record to look at, in which the credible evidence is that the complainant, when questioned more than once by management prior to his termination, denied that he left work at all on April 15, 2015, and denied that he left work in April 2015 without clocking out, without mentioning his supposed permission to do so until he was being discharged. It is simply not credible that the complainant, knowing that management was looking into his absences from work in April 2015, would respond to management's questions this way, if he truly believed he had ongoing permission to leave during the day without clocking out.

In summary, the administrative law judge's dismissal of the complainant's claim of discrimination in compensation is set aside and remanded to the ERD for a hearing on probable cause, and the remaining claims of the complaint are dismissed.

cc: Denise Greathouse