State of Wisconsin
Labor and Industry Review Commission

Annie M. Bates, Complainant **Care Partners Assisted Living, LLC**, Respondent 1858 Mirro Drive Manitowoc, WI 54220 ERD Case No. CR201604207 EEOC Case No. 26G201700120C	**Fair Employment Decision**[1] **Dated and Mailed:** September 27, 2019 batesan_rsd.doc:107

The decision of the administrative law judge is **modified,** and as modified, is **affirmed**. Accordingly, the complaint in this matter 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 allegations that the respondent violated the Wisconsin Fair Employment Act by discriminating against her in the terms and conditions of her employment and in the termination of her employment, because of race, pregnancy, childbirth, and maternity leave or related medical conditions, and to consider whether the complainant also alleged in her complaint some form of retaliation by the respondent for opposing a perceived discriminatory practice. An administrative law judge for the Equal Rights Division of the Department of Workforce Development held a hearing and issued a decision dismissing the complaint. 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, except that it modifies the decision as follows.

Modifications

1. After the first sentence of the Decision insert the following:

   > Although she did not indicate by checking a box on the complaint form that she was also alleging that the Respondent discriminated against her for opposing discrimination in the workplace, in section 5 of her complaint she made an allegation that in retaliation for complaining to management about being prevented from immediately returning to work from her pregnancy/maternity leave, her return to work was further delayed.

2. Delete the first sentence of Finding of Fact No. 34, and replace it with the following:

   > The Respondent prepared work schedules at least a week and one half in advance for an upcoming month.

3. After Finding of Fact No. 60, add the following Finding of Fact No. 61:

   > It is not probable that the Respondent retaliated against the Complainant for opposing a discriminatory practice.

4. After Conclusion of Law No. 7, add the following Conclusion of Law No. 8:

That the Complainant has not established probable cause to believe that the Respondent retaliated against the Complainant for opposing a discriminatory practice, in violation of the Wisconsin Fair Employment Act.

5. Delete the section of the Memorandum Opinion headed Retaliation Claims.

Memorandum Opinion

Alleged bias

In her petition for commission review, the complainant asserted that the administrative law judge was biased.

Decision-makers in state administrative hearings enjoy a presumption of honesty and integrity. A party seeking to prove bias or an impermissibly high risk of bias bears a heavy burden to overcome this presumption. *Cassetta v. Zales Jewelers*, ERD Case No. 200204189 (LIRC June 14, 2005). In order to disqualify an administrative law judge in an ERD proceeding for bias, a party must provide and establish an actual reason, documented in a supporting affidavit, for the judge's disqualification. *See Odya v. Captain Install, Inc.*, ERD Case No. 199705081 (LIRC May 19, 2000); Wisconsin Administrative Code § DWD 218.16. The complainant never filed a timely and sufficient affidavit asserting personal bias on the part of the administrative law judge or other reason for disqualification. She simply based her accusation of bias on the fact that she did not get the result she wanted in the hearing, despite presenting, in her opinion, plenty of evidence for her case. That is not a sufficient basis for a finding of bias. The commission has fully reviewed the record in this case and finds no hint of bias on the part of the administrative law judge against the complainant in the conduct of the hearing or in the decision.

Retaliation claim

In a brief to the commission, the complainant made a few additional arguments. The one requiring the most analysis was her argument that the investigation and hearing in the case were incomplete because they failed to address one her claims, namely, the claim that the respondent violated the WFEA by retaliating against her.

The complainant's original discrimination complaint form had only one checked box, race, as the reason for discrimination. An officer for the ERD, after reviewing the entire complaint, checked an additional box on her behalf, indicating that the complaint also alleged discrimination on the basis of pregnancy or maternity. No one, neither the complainant nor any ERD officer on her behalf, checked any of the

boxes indicating retaliation as a claim.[2] The complaint was accepted as alleging discrimination because of race and pregnancy/maternity, and served on the respondent. Throughout the investigative and hearing process in the ERD, the ERD did not address the issue of whether the respondent had retaliated against the complainant in violation of the WFEA.

The complainant argues that she *did* claim retaliation in the narrative portion of her complaint, which should have triggered an investigation even though she checked no box on the form indicating a cause of action for retaliation.

The commission has dealt with this issue before. In *Zahorik v. Karl Schmidt Unisia, Inc.,* ERD Case No. CR201104331 (June 18, 2005) an unrepresented complainant checked the box indicating that the reason for discrimination was her filing of a previous complaint with the ERD (a kind of retaliation claim – see footnote 2). She did not check the box indicating that her disability was also a reason she experienced discrimination, but in the narrative portion of the complaint form the complainant asserted facts that encompassed a claim of disability discrimination. The ERD did not add disability discrimination to the complainant's allegations, and the administrative law judge stated in her decision that she did not reach the issue because the complainant had not alleged disability discrimination in her complaint. The commission remanded the case for investigation by the ERD of the allegation of disability discrimination, stating:

> A complainant who was unrepresented when filling out her complaint form should not have that complaint read narrowly. *Hiegel v. LIRC*, 121 Wis. 2d 205, 35 N.W.2d 405 (Ct. App. 1984). In this case, the complainant filed her complaint without assistance from legal counsel and included a set of factual assertions that clearly encompassed an allegation of disability discrimination. The fact that the complainant did not check the proper box on the front of the form, which is not a statutory requirement for the filing of a complaint, is not a circumstance that should have prevented all of the allegations in her complaint from being investigated and resolved.

Unlike *Zahorik,* the commission does not view the narrative portion of the complainant's complaint in this case as *clearly* encompassing the "missing" claim of retaliation. The complainant used the word "retaliated" twice in the narrative portion of her complaint, in the following two passages:[3]

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[2] The complaint form provides a number of boxes for indicating retaliation as a basis, including one for opposing discrimination in the workplace, and several for having filed or assisted with a previous complaint.

[3] The reference in the passages to Lisa is to Lisa Schroeder; the reference to Amanda is to Amanda Baldwin.

> I went on maternity leave on 6-15-16 and tried returning to work on 7-1-16 and Lisa denied me coming back so I had to get regional manager involved to get my position and hours again. Lisa and assistant director Amanda discriminated against me and retaliated on my hours and position.
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> They both [Lisa and Amanda] retaliated against me and discriminated on me – by singling me out, called me black and lazy several times then fired me.

The complainant's use of the word retaliated does not by itself state a claim of retaliation. To state a claim of retaliation for opposing some alleged discriminatory practice at work (Wis. Stat. § 111.322(3)), a complainant must allege that she engaged in the protected activity of complaining to the employer about an alleged discriminatory practice; that she suffered an adverse action from the employer; and that a causal connection existed between the two. *Gephart v. DOC*, ERD Case Nos. CR200404656 and CR200501467 (Nov. 18, 2009).

The second-quoted passage above from the complaint is too vague to state a claim of retaliation. The adverse actions it lists are not alleged to be the consequence of any particular opposition that the complainant expressed to management. A few sentences after this passage the complainant states that she spoke to a manager about Lisa and Amanda "harassing me and discriminating against me," but that "nothing was done." That falls short of alleging that her lodging a discrimination complaint with management caused Lisa or Amanda to take adverse action against her.

The first-quoted passage above, however, could be read as an attempt to make a retaliation claim as well as a discrimination claim, because it seems to link the complainant's contact with the regional manager (which was an expression of opposition to Lisa's supposed denial to let her return to work), to a continued denial by Lisa and Amanda to assign work to her in July 2016, implying that the continued failure to give the complainant work hours in July was in retaliation for her contact with the regional manager.

Despite some uncertainty about whether this passage of the complaint states an allegation of retaliation, the commission accepts for purposes of this analysis that a reasonable interpretation of the passage was that Lisa and Amanda allegedly continued to refuse work hours to the complainant in July 2016 not only because of her race and pregnancy/maternity, but also in retaliation for the complainant's getting the regional manager involved in order to get back to work from her pregnancy/maternity leave.

The commission, however, does not reach the same result as in *Zahorik.* In *Zahorik,* the same evidence that exonerated the employer on the retaliation claim left open the question of whether the employer had instead discriminated because of disability, and actually raised some suspicion of the employer on that question:

> While Michael Windberg, the individual who made the decision to terminate the complainant's employment, was aware of the complainant's discrimination complaint, he did not decide to discharge the complainant until four months after the complaint was filed and no evidence was presented to connect his actions with the filing of the complaint. To the contrary, the evidence indicates that Mr. Windberg's decision to discharge the complainant was motivated by his belief that the complainant had submitted a doctor's excuse that was medically unnecessary and which, in his opinion, amounted to an attempt to avoid weekend work. This explanation, while potentially raising concerns about disability discrimination and reasonable accommodation, does constitute a reason for terminating the employment relationship that is unrelated to the complainant's protected conduct.

In *Zahorik,* then, a remand was warranted to investigate the potential of disability discrimination. Here, in contrast to *Zahorik*, the evidence defeating the allegation that the failure to return the complainant to work in July was motivated by race or pregnancy/maternity, also defeats the allegation that it was an act of retaliation. Evidence was introduced at hearing from both parties concerning the reason for the alleged delay in returning the complainant to work after her maternity leave. Based on that evidence the administrative law judge made the following supported findings of fact (as modified by the commission): 1) the complainant went on maternity leave in June, and did not inform management when she expected to return to work (Finding of Fact No. 22); 2) she requested that when she returned from maternity leave she be placed in a position on second shift rather than third shift, on which she was working until her leave (Finding of Fact No. 22); 3) management advised her that it might take some time to arrange for her return full-time on a different shift (Finding of Fact No. 23); 4) the complainant informed the respondent in early July that she was released to work (Finding of Fact No. 31); 5) by that time the respondent had already made work schedules for employees for the month of July (Finding of Fact No. 34); 6) it is the usual practice of the respondent to make work schedules at least a week and one half in advance of the upcoming month (Finding of Fact No. 34); and 7) the respondent scheduled the complainant to work second shift beginning August 2 (Finding of Fact No. 35). The evidence, therefore, supports not only a non-discriminatory reason, but also a non-retaliatory reason, for not scheduling the complainant until August. Given this record, a remand for investigation of an allegation that the delay in scheduling was retaliatory is not warranted.

Other arguments

In her brief to the commission, the complainant also argued that her co-workers called her black and lazy, and that this constituted harassment because of race and maternity/pregnancy.

As to being called lazy, and whether it demonstrated harassment based on her pregnancy, the administrative law judge accepted the complainant's testimony that some employees referred to her as being lazy (Finding of Fact 48), but the ALJ did not draw the conclusion that they did so because of her pregnancy. The ALJ did not accept the idea that calling a pregnant person lazy is necessarily motivated by the person's pregnancy, and she noted that no evidence was presented that anyone who called the complainant lazy did so because she was pregnant. The commission concurs with the ALJ. In her testimony the complainant suggested a non-discriminatory reason for being called lazy:

> Yeah, Amy was the director at the time, and this was – the first complaint I gave to her was Aril 15th, and the complaint was basically about the fact that my partners were claiming that I was being lazy and I wasn't doing my job initially. And, you know, I sent her text messages and stuff like that in regards to that, and we had a meeting a couple of days after that.
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> But this – the complaints was [sic] due to the fact that my boss, Amy, allowed me light duty, because I was seven-months pregnant. So she told me I didn't have to clean the bathrooms because she didn't want me working with the chemicals because they could possibly harm the baby. And my coworkers took that as I was being lazy and I didn't want to do my job and was telling me that I had to clean the restrooms.

(Tr., 13-14). In cross examination, the complainant elaborated a bit:

> I shared with her [Amy] that they [Autumn and Lisa] were calling me lazy on the job, and that basically Autumn was making negative statements about me and getting in my face about stuff, and that Lisa was telling me I needed to clean the restrooms, and I was explaining to her that I didn't have to clean the restrooms per Amy's request.

(Tr., 71).

It is consistent with this testimony to conclude that the individuals who called the complainant lazy were doing so because of her refusal to clean the restrooms, which

was a result not of her pregnancy, but of Amy Clefgin's choice to exempt her without a medical necessity to do so.

The complainant's assertion that she was called "black and lazy" or "the lazy black girl" did not stand up to scrutiny. The administrative law judge parsed the testimony of this assertion and arrived at the following set of supported observations and conclusions in her memorandum opinion, which the commission adopts:

> At different times during the hearing, the Complainant alleged that she was called "lazy" or the "lazy black girl" by her co-workers. While the credible evidence at hearing showed that the Complainant's co-workers called her "lazy", the evidence failed to support the Complainant's claim that she was referred to as the "lazy black girl."
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> The Complainant admitted at hearing that none of the Respondent's employees ever referred to her race or called her "lazy black girl" to her face. Rather, she testified that she heard Lisa Schroeder and Amanda Baldwin, at least six or seven times in April and May, tell her co-workers she was the "lazy black girl." That claim is not credible.
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> The Complainant testified that she complained to Ms. Clefgin in April 2016 about her co-workers' comments and the harassment she experienced from Lisa Schroeder. The Complainant admitted at hearing that she never mentioned to Ms. Clefgin that her co-workers referred to her as the "lazy black girl." The Complainant admitted she never mentioned anything about race to Ms. Clefgin. The Complainant only informed Ms. Clefgin that her co-workers called her lazy. Presumably, if the Complainant's co-workers had referred to her race and referred to her as the "lazy black girl," the Complainant would have said as much to Ms. Clefgin in April 2016.
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> Also, Cindra Hutchison testified at hearing on behalf of the Complainant. Ms. Hutchison was one of the Complainant's co-workers. She supported the Complainant's claim that co-workers called the Complainant lazy. However, Ms. Hutchison testified that she overheard co-workers talking about a lazy co-worker. When Ms. Hutchison asked the co-workers who they were talking about, they responded "the black girl on third shift." The credible evidence offered at hearing was that Ms. Schroeder and Ms. Baldwin told co-workers the Complainant was lazy. If co-workers asked Ms. Schroeder and Ms. Baldwin who they were talking about, they would then reply, "the black girl." While it may not have been appropriate to identify a co-worker by her race, it does not appear that any harassment the

Complainant experienced (being referred to as "lazy") was because of her race.

The complainant also argued to the commission that the respondent discriminated against her because of race by requiring her to be re-certified to administer medications when she returned to work on second shift. The evidence does not support this argument. The respondent did not require the complainant to be re-certified in the sense that she would have had to re-take a six-to-eight-hour class; it required her to be retrained internally, perhaps by shadowing another employee administering medications. As the administrative law judge explained, the complainant failed to show probable cause to believe that this requirement was imposed because of her race. The complainant rarely administered medications while she worked on third shift and would have a much greater responsibility to do so on second shift. The respondent offered this difference in responsibility as a non-discriminatory reason for the requirement. The complainant did not show that the same requirement was not imposed on non-African American employees who were similarly situated.

After reviewing the entire record of the hearing, and the arguments of the parties made in the hearing and on appeal to the commission, the commission affirms the decision of the administrative law judge with the modifications indicated above.

cc: Tony Renning