

State of Wisconsin



Labor and Industry Review Commission

**Mikhail Vaserman**  
Complainant

**Hayat Pharmacy**  
Respondent

ERD Case Nos. CR201602541 and  
CR201700767  
EEOC Case Nos. 26G201601196C and  
26G201700662C

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

**Dated and Mailed:**

January 10, 2020

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The decision of the administrative law judge is **set aside** and the matter is **remanded** to the Equal Rights Division for completion of the hearing before a different administrative law judge and pursuant to the directives provided in the commission's Memorandum Opinion.

By the Commission:

/s/

Michael H. Gillick, Chairperson

/s/

David B. Falstad, Commissioner

/s/

Georgia E. Maxwell, Commissioner

<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>.

### **Procedural Posture**

The complainant filed a complaint with the Equal Rights Division (hereinafter “Division”) of the Department of Workforce Development in which he alleged that the respondent discriminated against him in violation of the Wisconsin Fair Employment Act. On November 5, 2018, a hearing was held before an administrative law judge for the Division. During the course of the hearing the complainant comported himself in a disruptive manner and made offensive and derogatory comments to the respondent’s attorney and witnesses. Because of that behavior the administrative law judge called an end to the hearing before the complainant rested his case. The administrative law judge then issued a decision dismissing the complaint on the ground that the complainant failed to put on evidence in support of his complaint and as a sanction for the complainant’s unacceptable conduct at the hearing. The complainant has filed a timely petition for commission review of the administrative law judge’s decision.

### **Memorandum Opinion**

That the complainant engaged in unacceptable, inappropriate and disruptive conduct at the hearing does not appear to be in dispute. The question presented in this appeal is whether the complainant’s complaint was properly dismissed as a sanction for such conduct and, if not, how the administrative law judge should have proceeded given the circumstances.

The administrative law judge has a right to regulate the course of the hearing. Wis. Admin. Code § DWD 218.18(1); Wis. Stat. § 227.46 (e). However, the administrative law judge’s right to control the hearing does not extend to dismissal of a complaint as a sanction for disruptive or inappropriate behavior; due process concerns dictate that even a party engaging in such unacceptable conduct will have an opportunity to be heard and will receive a decision addressing the substance of his or her allegations. A recent circuit court decision issued in a case involving the same complainant is directly on point: In *Vaserman v. LIRC and DWD*, No. 17-CV-1306 (Wis. Cir. Ct. Milwaukee Cnty. Sept. 14, 2017), the court ruled that an administrative law judge exceeded his authority in dismissing an unemployment insurance appeal based upon the complainant’s obstreperous behavior at his unemployment hearing. The court expressed sympathy for the administrative law judge’s position but stated, “The fact that a petitioner is being disruptive, disrespectful, and borderline contemptuous does not mean that he can be deprived due process. A judicial officer may not dismiss a case merely because a party is being difficult or annoying.” For the foregoing reasons, the commission believes that the administrative law judge exceeded her authority by dismissing the complaint as a sanction for the complainant’s conduct in the hearing room and that the complainant must be afforded an opportunity to complete the hearing.

Although an administrative law judge may not dismiss a case based upon a party’s behavior in the hearing room, this does not mean anything goes. The administrative law judge is not required to permit a party to continually disrupt the hearing or to

harass other people, and when testimony or cross-examination devolves into disruptive or harassing conduct, the administrative law judge must have some recourse to address the situation. Keeping in mind the need to balance the competing considerations of providing due process for the complainant while respecting the rights of other individuals in the hearing room, the commission issues the following instructions to the administrative law judge upon remand:

The evidence the complainant presented at the November 5, 2018 hearing will remain in the record and need not be repeated at the continued hearing. However, the complainant should be given an opportunity to complete the presentation of his evidence by presenting any additional evidence that is relevant to his claim and that is not repetitive of evidence already presented. In the event the complainant is no longer providing testimony or documentary evidence that is relevant to his claim, he will be deemed to have rested his case; an administrative law judge may reasonably infer that a party engaging in disruptive or harassing conduct has completed his testimony and may move on to the next phase of the hearing.

Upon completion of the complainant's case-in-chief, the respondent shall be given an opportunity to present its case. In the event the complainant is unable to restrain himself from interruption during the presentation of the respondent's evidence, the administrative law judge may, after providing the complainant with a clear warning, direct him to leave the hearing room while the hearing continues until such time as he is able to comport himself appropriately.<sup>2</sup>

Both parties shall be afforded an opportunity for cross-examination of the other's witnesses. However, it should be noted that cross-examination that goes beyond the appropriate and relevant questioning of witnesses may be discontinued by the administrative law judge and the cross-examination deemed complete.

Finally, the commission notes that the administrative law judge has the option to arrange for security at the hearing if the administrative law judge considers it necessary.

The commission recognizes that conducting a hearing with an uncooperative and obstreperous party poses many challenges. However, the administrative law judge must attempt to obtain as full and complete a record as is reasonably possible so that a decision may be issued that addresses the merits of the complainant's case.

cc: Munjed A. Ahmed

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<sup>2</sup> While the complainant has a right to be present at his hearing, that right is not absolute. In fact, even a criminal defendant, who has a constitutional right under the confrontation clause to be present at every stage of his trial, may be removed from the courtroom while his trial continues until such time as he promises to discontinue disruptive conduct. *Illinois v. Allen*, 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353, 1970 U.S. LEXIS 55, 51 Ohio Op. 2d 163.