

State of Wisconsin



Labor and Industry Review Commission

Heather C. Heart
Complainant

UW—Superior
Respondent

ERD Case No. CR201202232

Fair Employment Decision¹

Dated and Mailed:

February 28, 2020

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The decision of the administrative law judge is **affirmed**. Accordingly, the 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 violated the Wisconsin Fair Employment Act by denying her a promotion because she had filed and pursued family medical leave and retaliation complaints with the state Equal Rights Division. An administrative law judge for the Equal Rights Division 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.

Memorandum Opinion

Factual Summary

The complainant, Heather Heart, was employed by UW-Superior (UWS) as Director of University Advancement. Her main responsibility was to raise money to support UWS programs, in coordination with the UW-Superior Foundation, a 501(c)(3) organization engaged in fundraising for UWS. The Foundation was run by a volunteer board of directors. Although Heart held the title of Chief Operating Officer for the Foundation, she was not employed by the Foundation; she was employed by UWS. She reported to the Assistant Chancellor for University Advancement.

In June 2011 the Assistant Chancellor for University Advancement resigned, and a vacancy was created for the position, which was renamed Vice Chancellor of University Advancement. Heart applied.

The Vice Chancellor was to report directly to the University Chancellor, and serve as the institutional officer providing leadership, development and management of a comprehensive advancement program. The Vice Chancellor would also serve as president and CEO of the Foundation.

Heart became one of four finalists for the job, and one of those four dropped out, leaving three – Paul Darnberg, Jeanne Thompson, and Heart. Darnberg and Thompson were from outside UWS.

The hiring decision for the Vice Chancellor position was made by one individual, the Chancellor of the University. That person, Renee Wachter, joined the University in early July 2011. She was new to UWS, having come from another university.

Wachter did not participate in the hiring process until it was down to the three finalists. She made her selection after having separate dinners with each of the three finalists, and hearing the results of reference checks for the top two finalists, Thompson and Heart. Wachter chose Thompson. A week later, Heart announced her resignation from employment at UWS.

Heart filed an ERD complaint claiming that Wachter had decided not to promote her into the vice chancellor position in retaliation for her filing and pursuing previous ERD complaints against UWS and the Foundation.² The ERD required her to file separate complaints against the two respondents. After investigation, the two cases proceeded to a joint hearing on the merits before an administrative law judge.³

The ALJ found in favor of the respondents.

Issues on appeal

On appeal, Heart is arguing that a prima facie case of retaliation has been shown by the direct method of proof. The elements of a case of retaliation by the direct method of proof are: (1) the complainant engaged in statutorily protected activity; (2) she suffered an adverse employment action; and (3) a causal connection exists between the two. *Kannenbergh v. LIRC*, 213 Wis. 2d 373, 571 N.W.2d 165 (Ct. App. 1997).

There is no dispute about elements (1) and (2). By the time Wachter chose Thompson over Heart, Heart had engaged in the protected activity of filing three ERD complaints against UWS and the Foundation, and testifying at a hearing in one of them; and clearly, her failure to get the promotion she sought was an adverse employment action.

As to the causation element, Heart argues that it has been satisfied by circumstantial evidence. Circumstantial evidence "consists of ambiguous statements, suspicious timing, discrimination against other employees and other pieces of evidence none conclusive in itself but together composing a convincing mosaic of discrimination..." *Gunty v. City of Waukesha*, ERD Case No. 200401540 (LIRC Mar. 31, 2010) quoting *Sylvester v. SOS Children's Villages Illinois, Inc*, 453 F.3d 900 (7th Cir. 2006) quoting *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 737 (7th Cir. 1994).

Heart argued that the strongest circumstantial evidence proving causation was the proximity in time between her protected activity and the adverse action. The denial of her bid for promotion happened in October 2011. The most recent protected activity she engaged in was her testimony at a hearing in June 2011 and her filing

² Wisconsin Statutes subsecs. 111.322(2m) and (3) make it an act of employment discrimination to discriminate against any individual because the individual has filed a complaint or attempted to enforce a right under (among other provisions) the Wisconsin Family and Medical Leave Act (Wis. Stat. §103.10), or to discriminate against any individual for filing a complaint or testifying in any proceeding under Wis. Stat. § 111.31-39.

³ The complaint against UW-S Foundation is ERD Case No. CR201303383. As to UWS, an investigator for the ERD found probable cause to believe it may have violated the WFEA; as to the Foundation, an investigator found no probable cause to believe a violation occurred. Heart appealed the no-probable-cause determination. The Foundation agreed to waive the no-probable-cause hearing and have a consolidated hearing on the merits for both respondents.

of a complaint on August 1, 2011. The following is a summary of Heart's protected activity prior to the decision not to promote her:

1. ERD Case 1, filed March 12, 2010, alleged that UWS and the Foundation interfered with her use of family/medical leave; no probable cause found; Heart appealed; **hearing on probable cause held July 14, 2011;**⁴
2. ERD Case 2, filed April 13, 2010, alleged whistleblower retaliation under Wis. Stats. §230.80 et. seq.; no probable cause found; complaint dismissed March 31, 2011.
3. ERD Case 3, **filed August 1, 2011**, against UWS and the Foundation, alleged that the Foundation discriminated/retaliated against Heart through Foundation board member John Berchild. The alleged act of retaliation was Berchild's telling Heart to drop the Foundation as a named party in the previously filed ERD complaints.

As authority for her proximity-in-time argument, Heart cites *Weir v. A.E. Moore*, ERD Case No. 7610007 (LIRC Feb. 20, 1980) (about three months between protected activity and discharge); *Potts v. Magna Publications, Inc.*, ERD Case No. 199701821 (Feb. 27, 2001) (about two weeks between protected activity and discharge); and *Frierson v. Ashea Industrial Systems*, ERD Case No. 8752356 LIRC Apr. 6, 1990) (approximately four months between protected activity and discharge).

This case, however, is unlike *Weir*, *Frierson* and *Potts* in that the adverse action in those cases was a discharge from employment, the timing of which was entirely up to the employer, whereas the adverse action here was a failure to get a promotion. The process for filling the vice chancellor position was triggered by the announced resignation in May 2011 of the person holding that position; a decision on hiring a replacement was probably going to happen within a few months' time of that event, regardless of how close in time it might have been to Heart's testifying in an ERD hearing or her filing of an ERD complaint. Proximity in time is not a persuasive indicator of a retaliatory motive when the alleged adverse action is taken on a schedule that is independent of the complainant's protected oppositional activity.⁵ As the ALJ stated in her memorandum opinion:

The timing of the hiring process was entirely unrelated to Complainant's previous complaints. It was necessary for the University

⁴ ALJ dismissed this complaint on May 30, 2013; the circuit court affirmed the ALJ on February 21, 2014. (As an FMLA case, it bypassed LIRC and went directly to circuit court on appeal).

⁵ If anything, with respect to the filing of a complaint on August 1st, Heart herself created the proximity in time between the filing and the decision on her promotion, by choosing to file the complaint when she was actively involved in seeking the vice chancellor job, for which a decision was forthcoming.

to fill this important position, Complainant chose to be an applicant for that position, and the application process occurred in the regular course of University business.

It is also noteworthy that in *Weir, Potts and Frierson*, proximity in time between the protected activity and the adverse action was not the sole support for causation. In *Weir*, the fact that the employee was discharged about three months after she complained about not receiving equal pay helped to show a retaliatory motive, but evidence of disparate treatment regarding her "excessive absenteeism" (the purported reason for discharge) compared to that of other employees was at least as compelling as the proximity-in-time evidence. In *Frierson*, the commission found sufficient evidence to support probable cause, based not only on proximity in time between the filing of a complaint and subsequent discharge, but also based on a supervisor's comment that the complainant would probably be discharged for filing a complaint. In *Potts*, the commission stated that a causal connection between oppositional activity and an adverse employment action may be inferred from the proximity between the activity and the alleged retaliation, but that the inference is not required. In addition, the commission noted that even if a causal connection were shown, it "only presents a rebuttable presumption that the Act has been violated. A respondent may rebut this presumption by articulating a legitimate, nonretaliatory reason for its actions, which then requires the complainant to establish that the proffered reason for the action was pretextual in order for the complainant to prevail." In *Potts*, the complainant failed to make that showing.

In contrast to *Weir, Potts and Frierson*, there is little evidence other than proximity in time to support a conclusion that the adverse action was caused by the protected activity, making it questionable that Heart has shown a prima facie case of retaliation. But because the respondents articulated a non-retaliatory reason for choosing Thompson over Heart, the question of whether a prima facie case has been made is moot, and the question becomes whether the complainant can show the respondents' reason was a pretext for retaliation. [*Naill v. Western Wisconsin Technical College*](#), ERD Case No. 199404088 & 199600370 (LIRC Feb. 12, 1999), *citing U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715, 31 FEP 609, 611 (1983); *Gentilli v. Badger Coaches*, ERD Case No. 8601411 (LIRC July 12, 1990), *affirmed*, *Gentilli v. LIRC*, 165 Wis. 2d 393, 478 N.W.2d 68 (Ct. App. 1991); *Puetz Motor Sales, Inc. v. LIRC*, 126 Wis. 2d 168, 172 (Ct. App. 1985).

The respondents' articulated non-retaliatory reason for choosing Thompson over Heart is summarized by the ALJ's Finding of Fact No. 30, which echoes Wachter's testimony as to why she chose Thompson:

Chancellor Wachter made the decision to hire Jeanne Thompson for the position of Vice Chancellor of University Advancement because she had a favorable impression of her at her dinner interview, and thought she would be a good fit for the position; Thompson's references were better

than Complainant's; and Thompson came from a private institution and had fundraising experience, and Wachter considered fundraising experience in the private sector to be a particularly valuable attribute.

A complainant may prove that a respondent's articulated reason for an adverse action was a pretext for retaliation by showing that the reason had no basis in fact, was insufficient to motivate the adverse employment action, or did not actually motivate the adverse employment action. *Sult v. Jerry's Enterprises, Inc.*, ERD Case No. CR200402534 (LIRC Feb. 8, 2008), citing *Davis v. Wis. Dept. of Corrections*, 445 F.3d 971, 977 (7th Cir. 2006).

Heart did not show pretext. She argued that Thompson was objectively less qualified than she was, but there was no comparative evidence presented to show this. While it is true that a direct comparison was hampered by the fact that the hiring records generated at the time of hire no longer existed because they were lost in a flood, still there was no effort made to show that Heart was objectively more qualified than Thompson. As the ALJ noted in her memorandum:

Complainant asserts that she was the most qualified person for the Vice Chancellor position. Although it is true that she was qualified for the position, she has not established that she was the most qualified person for the position. The successful applicant's resume was not provided, nor did she testify at the hearing. Complainant could have subpoenaed her to testify or taken her deposition and asked her to bring the resume she provided to Respondent at the time of her application. That would have gone some way to cure the dilemma of lost documents caused by the flood in June 2012.

Heart also argued that Wachter's testimony should not be believed because it was vague and inconsistent. As to vagueness, Heart pointed to the following testimony:

Q. And in terms of hiring Ms. Thompson into the vice chancellor position, you don't recall what information you relied upon in making the decision to hire her; is that correct?

A. I know that part of the decision was the impressions formed during the dinners that we had with the candidates. The candidates wouldn't be before me unless they were qualified. And so I have general halo recollections of the candidates and what it was that stood out, but if you're going to ask me about specific pieces of information I don't know what I can recall that.

(Tr., p. 73).

Wachter explained what she meant by "halo recollections":

It just means I don't remember specifics. I don't remember specific things talked about, I don't remember specific pieces of conversations, I don't remember specific interactions, but I remember sort of the general impression that the dinner or conversation left me with.

(Tr., p. 76).

Wachter's vagueness did not indicate pretext. It was understandable given that her testimony (and deposition at which she was similarly vague) took place almost seven years after the events she was trying to recall. It was also understandable because Wachter did not have documents to refresh her recollection, the official records of the employment search having been lost in a flood.

Heart's argument that Wachter was inconsistent was based on the contention that her reasons for selecting Thompson over her shifted over time, and so cannot be trusted. Heart cites an interrogatory answer from the employer that Thompson was selected over Heart because her "references were uniformly more positive than" Heart's, and contrasts that with the reasons Wachter gave at the hearing relating to "halo recollections." This interrogatory answer, however, is not part of the evidentiary record in this case. Apparently, it was part of Complainant's Exhibit 49, which was never moved into evidence. Besides, the interrogatory answer is not inconsistent with Wachter's testimony – Wachter testified that references were a major reason for her decision:

Q. And in terms of the other qualifications for the position, you had indicated that you relied heavily on Ms. Hanson's acknowledgement to you that Ms. Thompson had better references than Ms. Heart; is that correct?

A. That is correct.

(Tr., p. 69). Heart also suggests that Wachter's testimony at hearing to the effect that she was impressed with Thompson's experience in the private sector⁶ is suspect because it was a factor that she had not brought up when she was deposed about five months prior to the hearing. That is not correct. At her deposition, Wachter, in answer to how she formed her opinion about Thompson, stated:

I can remember when I met with Jeanne she had a terrific personality. I was impressed with the experience that she had garnered at

⁶ Wachter testified: "I recall being impressed with Jeanne, and I think one of the things that I remember that I was impressed with was the variety of the experience that she had, but also because she was coming from a private institution..." (Tr., p. 85).

Scholastica. One of the things that makes advancement candidates coming out of private institutions is that private institutions are usually much more regularized and sophisticated in their fundraising efforts because they've had to do it all along, whereas public institutions tend to be much newer at it.

(Complainant's Ex. 50, p. 31). Heart's arguments based on Wachter's alleged vagueness and inconsistency are not persuasive.

Heart also argued that a retaliatory motive was introduced into the hiring process through a Foundation board member, John Berchild. Her evidence that Berchild bore some animosity toward Heart because of her ERD complaints was her own August 1, 2011 ERD complaint, in which she alleged that Berchild confronted her about her pending complaints against the Foundation, and insisted that she drop the Foundation as a named party.

If Berchild disapproved of Heart's filing ERD complaints against the Foundation, there was no evidence that he communicated that to anyone. As to this case specifically, no evidence was presented that Berchild's alleged disapproval of Heart's complaints had any impact on Heart's bid to be vice chancellor. First, it was not established that Wachter, the decision-maker, was aware of Heart's August 1st complaint at the time she made her hiring decision. Second, although there was evidence that in the summer of 2011 Berchild and other Foundation board members attended a breakfast with Heart as part of the hiring process for the vice chancellor job, there was no evidence from anyone that Berchild spoke negatively about Heart with those who attended the breakfast, and more importantly, no evidence that any statements about Heart attributed to Berchild, negative or otherwise, ever found their way to Wachter.

Finally, it was not clear from the evidence that Wachter was aware of *any* of Heart's ERD complaints at the time she was considering her for the position. At some point she became aware of complaints by Heart, but her hazy memory of when she knew is understandable, since she was new to UWS in July 2011, and faced with what she described as a "fire hose" of information at the time. (Tr., p. 82). In any case, Wachter denied that anything other than her understanding of the references and her impressions from the dinners affected her decision-making. There is very little reason in the record to doubt this.

The ALJ's decision is affirmed.

cc: Colin Good
C. Wade Harrison