State of Wisconsin

Labor and Industry Review Commission

Kimberly A. Harris Complainant **Carter Communications, LLC** f/k/a Time Warner Cable Respondent ERD Case No. CR201601221 EEOC Case No. 26G201600721C	**Fair Employment Decision**[1] **Dated and Mailed:** March 13, 2020 harriki_rsd.doc:107

The decision of the administrative law judge is **affirmed, subject to the following modifications**. 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

The complainant, Kimberly A. Harris, filed a complaint with the Equal Rights Division of the Department of Workforce Development. She alleged that the respondent, Charter Communications, LLC, referred to herein as Time Warner Cable, or TWC, violated the Wisconsin Fair Employment Act (WFEA) by refusing to reasonably accommodate a disability, by terminating her employment because of disability, and by refusing to hire or employ her because of disability and conviction record. An investigator for the Equal Rights Division found no probable cause to believe that TWC had violated the WFEA. An administrative law judge for the Equal Rights Division held a hearing and issued a decision affirming the determination of no probable cause. Harris filed a timely petition for review by the commission.

The commission has considered Harris' petition[2] 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 makes the following:

Modifications

1. Delete the third paragraph of the Decision.

2. Delete Finding of Fact No. 31 and replace it with the following:

> On October 15, 2015, TWC received another extension request asking to return to work with the same restriction in hours (three hours of work per day), or in the alternative asking to extend the leave of absence until November 5, 2015.

3. Delete the last sentence of Finding of Fact No. 32.

4. Insert a Finding of Fact No. 32a, between Finding of Fact Nos. 32 and 33, reading as follows:

> TWC denied Harris' extension request of October 15, 2015.

5. In Finding of Fact No. 34, insert "it" between "extension" and "decided".

6. In Finding of Fact No. 41, delete "of".

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[2] Harris' petition included a statement that she had "new information/evidence." The commission gave Harris 30 days to submit a letter describing that evidence, along with an explanation for not having presented it at the hearing. Harris was then given a 30-day extension at her request. She failed to submit a response meeting the commission's requirement that it be postmarked by February 14, 2020.

7. In Finding of Fact No. 48, insert "she" immediately before "could".

8. Delete the second sentence of Conclusion of Law No. 3.

Memorandum Opinion

Facts and Issues

The complainant, Kimberly Harris, started working for Charter Communications (then known as Time Warner Cable, or TWC) in July 2014. Her job title was Direct Sales Representative (DSR), and her responsibility was to sell cable products and services through door-to-door presentations in an assigned territory.

TWC granted Harris leaves of absence during her tenure. First, it granted her a maternity leave from December 1, 2014 through February 15, 2015. Then, after Harris had returned to work for about a month, TWC granted her a leave of absence for a mental condition. The initial leave for this condition was from March 23, 2015 through June 30, 2015. TWC then granted Harris several extensions – to July 16th; to August 18th; to September 13th; and to October 8th. Harris' disability discrimination claim is based on her mental condition, which medical records in evidence described in a number of ways, including: unspecified anxiety disorder; major depressive disorder, single episode, severe; and depressive order, other. (Ex. C-7, p. 2). She claims that TWC refused to accommodate her disability and fired her from her DSR position because of her disability.

Evidence of the employer's knowledge of Harris' mental condition consists of the following:

(1) In early 2015, after returning from maternity leave, Harris told her supervisor Allison Balchan she could not stop crying, had not gotten any sleep the previous night, and did not think she could work that day. She said she told Balchan that she could not stand to look at her baby. Balchan let her go home that day. She returned to work the next day and told Balchan she was still having emotional problems, and had an "episode" in the field. At this time she had not yet been diagnosed. (Tr., pp. 149 – 151).

(2) In April or May 2015, in one of a number of conversations with the HR manager, Marianela Smale, Harris told Smale that she was diagnosed with a major depressive disorder, was on medication, and was told it could take more than a year to recover, to which Smale responded that Harris should stay on leave for now. (Tr., pp. 152 – 156).

(3) Three letters from Acacia Mental Health Clinic addressed "to whom it may concern." The first two, signed June 18, 2015 and July 22, 2015, are from an

> Advanced Psychiatric Nurse Practitioner, indicating that Harris was suffering from "a severe level of depression that makes it very difficult for her to work and attend to daily functions." Both letters recommended a four-week leave of absence in order to attend therapy and wait for medication to start taking effect. (Ex. C-8, pp. 71 and 72). The third letter, undated and unsigned, was apparently faxed to TWC on October 13, 2015. It indicated that Harris had shown mild improvement and that Harris expressed a desire to return to work, but the letter advised that accommodations of shortened hours or reduced demands may be necessary. (Ex. C-8).

Harris offered to return to work as of September 14th on a schedule of three hours per day, five days per week. TWC declined to put her back to work on the grounds that it did not offer part-time work in the DSR position as an accommodation, but it approved continuing Harris' leave until October 8th. On October 15th, TWC received another return-to-work proposal, this one through November 5, 2011, again offering to work three hours per day, five days per week. In the alternative, Harris requested another extension of her leave.

On October 20, 2015, TWC rejected the October 15th proposal and chose not to extend Harris' leave of absence beyond October 8th. In the October 20th letter TWC put Harris on notice: 1) that it was no longer going to hold her position for her because it needed to fill it in order to have the resources required to support its clients; and 2) that it considered her continuing requests for leave to be unreasonable.

The immediate effect of the October 20th letter was not termination from employment. Harris was off work without leave, but TWC informed her that if, before her job was filled by someone else, she was released to return to her DSR job she would be placed back in her job. On the other hand, if her DSR job were filled before she could return to work, TWC would place her in the next available job in the call center (the job title was Inside Sales and Retention Representative, a sales job that did not involve traveling door-to-door). Finally, TWC informed her that if she chose not to take the call center position she would "remain an active employee and eligible to apply for any other open position for 30 days" and that her employment would be terminated if she did not find a position within that time. (Ex. R-5, letter of October 20, 2015).

In December TWC considered Harris to be fit to perform the call center job. Harris applied for the call center position and had a phone interview on December 30th. Harris was not hired for the position because other candidates interviewed better.[3]

[3] Harris contended that she was offered a call center position but then it was rescinded. Her testimony on this point was not credible. More importantly, TWC's decision not to hire Harris for a call center position was never made part of Harris' ERD complaint. The ALJ's findings of fact no. 38

When that opportunity fell through, Smale informed Harris on January 11, 2016 that she would be considered again for a DSR position, and on January 29th she was offered the position contingent on a background check and drug screening. Harris considered herself able to return to her DSR position at this time.[4]

The background check revealed that Harris received a ticket for going 24 mph over the speed limit on September 13, 2016, and a ticket for going 16 mph over the speed limit on April 27, 2015. (Ex. R-7). According to TWC policy, in order to be eligible to fill jobs that require regular use of vehicle, employees must not have two or more "major violations" within the previous three years. A major violation includes a ticket for speeding 16 mph or more over the speed limit. (Ex. C-2). Because the DSR position required frequent driving, TWC did not allow Harris to return to work because of her two major traffic violations within the previous three years. (Ex. R-8). Harris claimed that TWC refused to hire Harris because of her conviction record.

TWC maintained a short-term disability benefit for its employees. The STD benefit was administered by a third party named Sedgwick. TWC decided whether to grant leaves of absences, and Sedgwick decided whether an employee was eligible for STD benefits while on leave. Harris applied for STD benefits during her leaves of absence. During her maternity leave (December 1, 2014 to February 15, 2015), Sedgwick approved STD (after a one-week elimination period) from December 8, 2014 to January 13, 2015, and denied STD from January 14, 2015 to February 15, 2015. During her leave for her mental condition (March 23, 2015 to October 8, 2015), Sedgwick approved STD (again, after a one-week elimination period) from March 30, 2015 to April 21, 2015, and denied it thereafter. Harris did not name Sedgwick as a respondent. She claimed that TWC influenced Sedgwick's decision to deny STD benefits.

Analysis

Disability discrimination

The evidentiary record does not show that Harris was an individual with a disability as defined in the WFEA.[5] First, the medical evidence does little more than state a diagnosis and broadly describe symptoms. It fails to show through credible and competent evidence how or to what degree Harris' symptoms make

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through 43, outlining Harris' attempt to get the call center job, are only relevant to show that TWC was acting in good faith to find a suitable job for Harris.

[4] In her complaint she stated: "…in December of 2015 I reached out to Marianela Smale. She had fedex me a letter telling me that I can reapply once I'm well so I did just that after talking to my psychologist and psychiatric care doctor in January of 2016 and was offer on 1/292016 my old job back as a DSR to start on 2/19/16."

[5] An individual with a disability is defined as someone who: (1) has a physical or mental impairment that makes achievement unusually difficult or limits the capacity to work; (2) has a record of such an impairment; or (3) is perceived as having such an impairment. Wis. Stat. § 111.32(8).

achievement unusually difficult or limit her capacity to perform the job in question. See *Rybicki v. DJ Convenience LLC,* ERD Case No. 200800018 (LIRC Aug. 20, 2010); *Schultz v. CNH Capital Corp.,* ERD Case No. 200300915 (LIRC May 8, 2006). Competent medical evidence is particularly important to show how a mental condition, the manifestations of which are often not understood by laypersons, affects an individual's ability to perform a job. See, for instance, the following from *Engelbert v. Humana, Inc.,* ERD Case No. CR200603223 (LIRC Sep. 28, 2010):

> The complainant testified that she was being treated for stress, anxiety and depression and was diagnosed with ADHD, anxiety and depression. Certified doctor's reports support this testimony. The complainant's evidence, which the respondent does not challenge, is sufficient to establish that she has an impairment or impairments. However, the complainant failed to describe how her impairments made achievement unusually difficult for her or limited her capacity to work. The complainant testified, generally, that her work for the respondent was complicated and she could not keep her focus, but did not explain how or whether these difficulties were related to her impairments.

There is no explanation in Harris' medical records explaining how her inability to do her door-to-door sales job was related to her mental impairment.

The second problem with Harris' medical evidence is that it does not show that her disability is permanent. For years now, the commission has consistently held that the WFEA only protects those with permanent impairments. See, for example, the following passage from *Rutherford v. Wackenhut Corp.,* ERD Case No. 200402916 (LIRC May 13, 2011):

> The commission has consistently found that the statute only covers permanent impairments, and not injuries of a transitory nature. *Erickson v. Quad Graphics, Inc.* (LIRC, May 25, 2004); *aff'd sub. nom Erickson v. LIRC*, 287 Wis. 2d 204, 704 N.W. 2d 398 (Ct. App. Wis. 2005). See, for example, *Terrell v. Pabst Brewing* (LIRC, March 4, 1981)(short-term illness such as bronchitis not considered a disability); *Wollenberg v. Webex, Inc*. (LIRC, Nov. 8, 1991) (temporary eye irritation caused by exposure to chemicals not a disability); *Falk v. WIPC*, LLC (LIRC, Dec. 18, 2003) ("back impairment due to slow recovery from surgery" not considered disability); *Hollett v. Sauk County Health Care Center* (LIRC, June 12, 2009) (no disability where complainant established she suffered knee and back strains and pain, but presented no evidence regarding the permanency of any impairment to her knee or back).

The commission's requirement that an impairment be permanent in order to be a protected disability has been upheld by the state court of appeals:

> For over twenty years, LIRC has interpreted the term "disability" within the WFEA to require a permanent impairment. Had our legislature considered this an inappropriate reading of the statute, it could have revised the language to include temporary impairments. We will not impose a new interpretation where our legislature has seen fit to let the statutory language, as applied by LIRC, stand…We conclude that LIRC properly interpreted Wis. Stat. § 111.32(8) to require Erickson to demonstrate a permanent impairment.

Erickson v. LIRC and Quad Graphics, 2005 WI App 208, ¶ 17, 287 Wis. 2d 204, 215, 704 N.W.2d 398.

There is nothing in Harris' medical evidence stating that her major depressive disorder is a permanent condition. In addition, Harris' own complaint undercuts the argument that her impairment permanently limited her ability to perform her job. She contended in the narrative portion of her complaint that in January 2016 (about 10 months after the onset of her symptoms), she talked with her psychologist and psychiatric care doctor, and decided she was well enough to return to work as a DSR. This record does not show that Harris met the permanency requirement in the WFEA's definition of disability. Finally, the evidentiary record does not show that TWC perceived Harris to have a disability as defined in the WFEA.

Refusal to accommodate

Having failed to prove that she is an individual with a disability, Harris cannot succeed on a claim of refusal to accommodate. An employer has a duty under the WFEA to reasonably accommodate an employee's disability unless it can demonstrate that the accommodation would pose a hardship to the employer's program, enterprise or business. Wis. Stat. § 111.34(1)(b) (emphasis added). The duty to accommodate, though, only arises if it is shown that the complainant in fact has a disability under the WFEA. See *Hendon v. Wis. Bell, Inc.,* ERD Case No. CR200902834 (LIRC Nov. 13, 2014), aff'd, *Hendon v. LIRC* (Mil. Co. Cir. Ct., Aug. 12, 2015). TWC did not have a duty to offer or accept an accommodation because Harris did not demonstrate that she was an individual with a disability.

Nevertheless, TWC showed its willingness to employ Harris despite her lengthy inability to perform her job, by offering her an opportunity to return to work either as a call center employee or a DSR. As it turned out, Harris declared that she had recovered, and TWC allowed her to interview for the call center job, and, that having fallen through, allowed her to return to her DSR job, subject to a background

check. TWC's actions demonstrated that it had no animus against Harris based on the leaves of absence she took due to her medical condition.

Conviction record

Harris was not allowed to return to her former job as a DSR, not because of her previous inability to work, but because she had two speeding tickets that were considered major violations under TWC's policy – 16 mph or more above the speed limit. An employer is permitted not to hire an individual because of a conviction record if the conviction(s) are substantially related to the circumstances of the job. Wis. Stat. § 111.335(1)(c)(1).

Here, it was clear that a substantial relationship existed. The question of a substantial relationship requires an assessment of whether the tendencies and inclinations to behave a certain way in a particular context are likely to reappear in a related context, based on the traits revealed by the convictions. The circumstances that foster criminal activity are important, for example, the opportunity for criminal behavior, the reaction to responsibility, or the character traits of the person. *County of Milwaukee v. LIRC,* 139 Wis. 2d 805, 824, 407 N.W.2d 908 (1987). The attorney for TWC made a clear connection between Harris' convictions and her job:

> The DSR position is a driving position in which employees work alone and unsupervised for the most part. Ms. Harris readily acknowledged as much during the hearing. (Hearing Tr. Vol. I at pp. 36-37). This alone would have given her a greater than usual opportunity and temptation to re-offend. Moreover, DSRs are expected to be timely and responsive in order to effectively manage appointments and not lose business. (*Id.* at p. 37). Accordingly, if Ms. Harris was at any point running late or otherwise in a hurry, she would have had additional motivation ant temptation to break the law and speed to get to her destination, like her speeding violations show she has a propensity to do.

(Hearing Brief of Respondent, p. 16). TWC has presented sufficient evidence of a substantial relationship between Harris' convictions for speeding and the circumstances of her DSR job.

The denial of short-term disability benefits

According to Harris' complaint, TWC improperly influenced its third-party administrator of its short-term disability plan, Sedgwick, to deny STD benefits, as part of its discrimination against her based on disability. This claim fails for the reasons raised by respondent's attorney in its hearing brief.

First, Harris' eligibility for STD benefits is governed by the federal Employment Retirement Security Income Act (ERISA), 29 USC § 1001 et seq. Documentation in evidence from Sedgwick (Ex. C-12, C-14, R-12) denying STD benefits to Harris provided appeal instructions pursuant to ERISA. ERISA contains a pre-emption provision, 29 USC § 1144(a), stating that it pre-empts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. A law "relates to" an employee benefit plan even if the law is not specifically designed to affect such plans, or the effect is only indirect. ***Ingersoll-Rand Co. v. Perry McClendon***, 498 U.S. 133, 111 S.Ct. 478 (1990), *citing* ***Pilot Life Insurance Co. v. Dedeaux*****,** 481 U.S. 41, 107 S.Ct. 1549 (1987). As the commission noted in *Reich v. Ladish co., Inc.,* ERD Case No. 199802467 (LIRC June 30, 1999):

> The express pre-emption provisions of ERISA are deliberately expansive, and designed to "establish pension plan regulation as exclusively a federal concern." ***Pilot Life***, *supra*., *quoting*, ***Allessi v. Raybestos-Manhattan, Inc.*****,** 451 U.S. 504 (1981)…

Reich involved a claim of retaliation under the WFEA in the respondent's denial of disability retirement benefits. The commission dismissed the complaint based on the determination that ERISA pre-empted the WFEA claim. Here, too, Harris' route to challenging the denial of her claim for STD benefits is exclusively through ERISA, not the WFEA.

Second, Harris' claims concerning the denial of STD benefits are untimely. Harris' complaint was filed on April 29, 2016. Acts of alleged discrimination occurring more than 300 days before the filing date are time-barred. Wis. Stat. § 111.39(1). The 300th day prior to the filing date is July 4, 2015. The denial letters from Sedgwick were sent to Harris in January and April 2015. Her claims regarding these denials, then, are untimely.

Third, Harris presented no evidence that the respondent, TWC, had any influence on Sedgwick's determination denying STD benefits. TWC's HR director, Marianela Smale, testified that Sedgwick made eligibility determinations for TWC and that TWC had no influence over them. Harris provided no evidence to rebut that testimony.

cc: Kimberly Harris
Warren E. Buliox