

State of Wisconsin



Labor and Industry Review Commission

Veronica King, Complainant

Fair Employment Decision¹

State of Wisconsin
Department of Corrections,
Respondent

Dated and Mailed:

ERD Case No. CR201604909 and
CR201701571

November 19, 2020
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The decision of the administrative law judge is **affirmed**. Accordingly, the complainant's complaints are 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 (the "Act"). The complainant filed two complaints. The first complaint alleged that the respondent violated the Act by discriminating against the complainant because of her disability, because she filed a discrimination complaint, and because she opposed discrimination in the workplace. A second complaint asserted that the respondent violated the Act by discriminating against her because of her race and disability and in retaliation for filing a previous discrimination complaint and opposing discrimination in the workplace.

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

Background

The complainant is a person with a disability. Specifically, she suffers from seronegative rheumatoid arthritis, osteoarthritis, bursitis, arthritic deformities of the feet, cold intolerance related to hypothyroidism and arthritis, and medication side-effects including fatigue. She was assigned limitations from both her own doctor and from an independent medical examiner ("IME") hired on behalf of the employer. The limitations at issue involved available working in a cold environment, travelling outdoors during cold weather, as well as limitations on filing, gripping, climbing and working overhead.

The complainant is African American. She asserts that she was discriminated against based on her race when her supervisor compared her work to something an orangutan could do. She filed an internal complaint about the comment and subsequently was put on a performance improvement plan which she attributes to retaliation based on having previously filed a complaint under the Act and on having opposed discrimination in the workplace.

The administrative law judge found no probable cause to believe that unlawful discrimination or retaliation occurred. The commission agrees.

Working in the cold

The complainant asserts that the respondent failed to accommodate her rheumatoid arthritis by requiring her to work in cold environments. The complainant was a social worker at the Racine Correctional Institution since December of 2013. She was diagnosed with rheumatoid arthritis that same year. In 2014, the complainant filed

a grievance due to being required to meet with inmates in an annex building. The annex building was used less frequently and was generally cold, which aggravated the complainant's rheumatoid arthritis. The grievance was dismissed when the respondent agreed to permit the complainant to meet with inmates in a location other than the annex during the cold months.

The Racine Correctional Institution is comprised of several housing units, including the Dane and Ozaukee units. These two units are separated by a yard approximately the length of a football field. The Ozaukee unit meeting rooms are cold. In December of 2015, the respondent assigned the complainant to cover some inmates who were housed in the Ozaukee unit. To get to the Ozaukee unit from the Dane unit, the complainant had to walk across the yard in the cold Wisconsin winter weather. Once there, the complainant would perform her work at a workstation that did not include ergonomic accommodations, in a chilly room. The complainant asserts that she was expected to meet with the Ozaukee inmates in the Ozaukee unit.

The respondent admits that the complainant did perform work at the Ozaukee unit and that the respondent was aware that she was doing so. However, the respondent considered the 2014 grievance to have addressed only the complainant's inability to work in a cold environment and the respondent did not consider the grievance to encompass walking outdoors to get to the work area. When the complainant was assigned to cover Ozaukee unit inmates in December 2015, she did not immediately assert that the Ozaukee unit was too cold to work in, or that walking to the unit violated her 2014 accommodation.

The complainant continued to treat for her various medical conditions and in January of 2016, the complainant's doctor completed an assessment and assigned several permanent limitations. None of the limitations identified at that time pertained to working in a cold environment. The complainant's doctor checked "does not apply" to the part of the form that would provide restrictions regarding workplace temperature. On January 10, 2016, the complainant submitted an accommodations request that included only lowering the height of the whiteboards she used, and the purchase of self-adhesive flip chart paper, both of which were geared at addressing the complainant's ability to reach overhead.

Shortly before April 1, 2016, the respondent prepared a draft document outlining job expectations for the complainant. The original draft included a requirement that the complainant "spend a minimum of two days per week on the [Ozaukee] unit." On April 1, the complainant and respondent met to discuss expectations. In response to concerns raised by the complainant about working on the Ozaukee unit, the respondent revised the initial draft to remove the expectation that the complainant work on the Ozaukee unit. Later that same day, the complainant sent an email to the respondent in which she asserted that having an inmate come to the Dane unit is difficult and that "being on the Ozaukee Unit at 12:30 PM each day eliminates this

struggle.” The respondent replied on April 15, 2016 that the Ozaukee duties would be transferred to another social worker.

After learning the complainant’s concerns, the respondent’s requirement that the complainant work on the Ozaukee unit lasted only one day before it was modified to provide that the complainant meet with Ozaukee inmates on the Dane unit. The complainant continued to meet with inmates on the Ozaukee unit because it was more convenient for her to do so. Only two weeks later, the respondent alerted the complainant that her Ozaukee duties would be taken over by a new social worker. The respondent did not refuse to accommodate the complainant by requiring her work on the Ozaukee unit.

Climbing

The complainant asserts that her climbing restriction was violated when she was required to go up stairs to the officer station on the Ozaukee unit. She also asserts that she was required to climb stairs in another building, though the respondent provided an elevator key to the complainant to allow her to avoid using the stairs while at work. The commission credits the IME opinion of Dr. Harris, who found that the complainant could in fact climb occasionally, specifically on stairs with railings. There is no evidence that the complainant told the respondent at the time that she believed that going up stairs violated her restrictions and asked for an accommodation. The respondent did not fail to accommodate the complainant with regard to climbing.

Filing and grasping

Because of her rheumatoid arthritis, the complainant’s ability to do filing was limited. She could file for no more than one hour per day and could handle files no more than two inches thick. She needed accommodations for obtaining files from overhead. The respondent reviewed filing limitations with the complainant to ensure that she would be able to work within these limitations. Records department employees were able to assist the complainant in retrieving overhead files. The respondent did not fail to accommodate the complainant’s limitations due to her grasping limitations.

Whiteboards

The complainant was restricted from performing overhead work. However, when she was facilitating groups, she was required to do presentations that involved the use of whiteboards which were too tall for her to use. On January 10, 2017, the complainant requested two accommodations: lowering the whiteboards in the group room and providing adhesive flip charts.

The complainant was out of work on medical leave from February 9, 2017 through March 20, 2017. After she returned, the respondent approved purchasing of the adhesive flip charts but, because they were expensive, it held off on purchasing them until the complainant had completed her teach-backs and been approved to lead the courses where she would need the adhesive papers. On April 18, 2017, the complainant's supervisor sent her a memo instructing her to facilitate certain groups beginning the week of April 24, 2017. The respondent ordered the adhesive paper requested by the complainant and it was shipped on May 5, 2017. In doing so, the respondent adequately accommodated the complainant's need for an accessible work surface at a lowered height.

Although there was some delay in getting the paper to the complainant, the complainant was out of work during much of the time period and was awaiting approval to facilitate these groups for another month. Once she was approved to facilitate, it was only 11 days until the paper was shipped to the facility. Moreover, the complainant had other options available to her during this period. A shorter easel was available which could have held a pad of paper, and the lower portion of the normal whiteboard was accessible to the complainant. Although not a perfect permanent solution, either would have been a reasonable stand-in until the adhesive paper arrived, neither of which the complainant elected to use.

In June, the respondent approved lowering of the whiteboard, although it was never actually lowered. However, given that the respondent did provide the requested adhesive paper, the respondent adequately accommodated the complainant's need for a lowered work surface for presentations during group.

Orangutan comment

The complainant is African American. On April 3, 2017, the complainant was completing teach-back training for facilitating groups. The complainant's supervisor, Christina Ettinger, called the complainant's colleague, Mary Conner-Menarak and asked Conner-Menarak to come to her office. When Conner-Menarak reported to Ettinger's office, Ettinger asked her how the complainant was doing in the teach-backs. Conner-Menarak responded that the complainant was doing well and was ready to facilitate groups. Ettinger replied that "an orangutan could do groups." Conner-Menarak was surprised but said nothing, initially.

Later, Conner-Menarak shared the remark with the complainant and reported it to management, who conducted an investigation. During that investigation, Conner-Menarak walked back her original allegation about the orangutan comment, stating that she only vaguely remembered Ettinger saying that, and that she would not swear to it. However, at hearing, Conner-Menarak testified credibly that Ettinger did in fact make the comment. Ettinger, for her part, denied having made the comment.

Based on its interview with Conner-Menarak, and Ettinger's denial, the respondent found that it could not substantiate the allegation and closed its investigation without action. The allegation made by Conner-Menarack to the respondent and again at hearing is credible and the commission affirms the administrative law judge's finding that the comment was in fact made.

Comparison of African American people to monkeys or other non-human primates is a historical racist trope that has long been used to degrade African American people. Although Conner-Menarak believed that Ettinger meant it as a "joke," the commission finds that the comment reflects Ettinger either intentionally degrading an African American employee, or at the very least, callously disregarding the racist overtones of the comment. Comments of this nature, if they happen with some frequency or are otherwise part of a pattern of racist, offensive, conduct can be an element in establishing a racially hostile work environment claim.

In this case, however, no evidence was presented that the comment was part of a pattern of racially hostile conduct. This single isolated incident, without more, is inadequate to establish a racially hostile work environment. For that reason, the commission finds that the complainant failed to establish that the respondent discriminated against her based on her race.

Retaliation

The complainant also asserted that she was discriminated against by being put on a performance improvement plan in retaliation for having filed a discrimination complaint and for opposing the orangutan comment made by Ettinger. However, witnesses for the respondent testified credibly that the performance improvement plan was put in place to address genuine performance shortcomings by the complainant. The complainant failed to establish probable cause to believe that the reasons offered were pretext for discrimination or retaliation.

For the foregoing reasons, the decision of the administrative law judge is affirmed, and the complainant's complaints are hereby dismissed.

cc: Attorney Eric Muellenbach

This decision was appealed to Circuit Court.