

State of Wisconsin



Labor and Industry Review Commission

Andrea M. Mussatto
Complainant

Acceptional Minds, LLC
Respondent

ERD Case No. CR201700499
EEOC Case No. 26G201700543C

Fair Employment Decision¹

Dated and Mailed:

April 29, 2021
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The decision of the administrative law judge is **affirmed**. Accordingly, the complainant's complaint is dismissed.

By the Commission:

/s/
Michael H. Gillick, Chairperson

/s/
Georgia E. Maxwell, Commissioner

/s/
Marilyn Townsend, 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 discriminated against her based upon her sex, in violation of the Wisconsin Fair Employment Act (hereinafter "Act"). An administrative law judge for the Equal Rights Division of the Department of Workforce Development held a hearing and issued a decision finding that no discrimination occurred. The complainant filed a timely petition for commission review of that decision.

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

The complainant's petition for commission review contains no argument, and although the complainant's attorney requested a briefing schedule, no brief was submitted. The commission therefore has no specific indication as to why the complainant believes she should prevail based upon this record. Notwithstanding this, the commission has reviewed the hearing record in order to determine whether the findings and conclusions made by the administrative law judge are supported. The commission concludes that they are, for the reasons discussed herein.

The complainant contended that she notified the respondent she was pregnant and was discharged shortly thereafter. She alleged that the discharge was because of her pregnancy. The respondent presented a legitimate, nondiscriminatory reason for the discharge: it explained that the decision to discharge the complainant was made by the respondent's owner, Becky Krisko, because Ms. Krisko believed the complainant lied on her application by failing to disclose a criminal conviction. At the hearing the complainant argued that the respondent's explanation was pretextual because her conviction record had been expunged and she was therefore not required to disclose it. The complainant maintained that the respondent did not conduct a background check until after she disclosed her pregnancy and that her supervisor told her the respondent's owner was concerned that a lengthy maternity leave would create difficulties for the clients she worked with.

The complainant is correct in her understanding that she need not disclose convictions that have been expunged from her record. In *Staten v. Holton Manor*, ERD Case No. CR201303113 (LIRC Jan. 30, 2018), the commission explained the effect of an expunged criminal record:

The Wisconsin expunction statute permits individuals who commit criminal offenses before age twenty-five to request expunction. Application of the statute requires a determination that the person will benefit and society will not be harmed by expunction of the offense from the offender's record. Wis. Stat. 973.015(2m)(g). The statute

contemplates that, once an offense has been expunged, all references to the defendant's name and identity will be obliterated from the record. *See*, 67 Atty. Gen. 301. The benefit of expungement allows certain offenders to wipe the slate clean of their offenses and to present themselves to the world--including future employers--unmarked by past wrongdoing. *State v. Hemp*, 353 Wis. 2d 146, 157 (Wis. Ct. App. 2014).

However, while it may be wrong or unfair to discharge an employee for failing to disclose an expunged record, the question to decide is whether the respondent's actions were undertaken because of the complainant's pregnancy. The commission agrees with the administrative law judge's conclusion that they were not.

At the hearing the respondent's owner testified that she understands what an expungement is, but that the question on the application was whether the complainant had ever been convicted. While this explanation may reflect a fundamental misunderstanding on the respondent's part of what it means to have a conviction expunged, if the respondent genuinely believed the complainant was lying on her application and acted on that belief--even if the belief was incorrect--then its actions were not discriminatory. *See*, *Kraemer v. County of Milwaukee*, ERD Case No. CR200800323 (LIRC Oct. 11, 2012), and cases cited therein.

The complainant has argued that the respondent's explanation is not believable and that it is a pretext for discrimination based upon her pregnancy. In support of that argument, she contends that the background check was only conducted after she disclosed her pregnancy to the respondent and after the respondent expressed concerns about her taking an extended maternity leave. However, the evidence does not support this theory. While the results of the background check were not known until after the complainant disclosed her pregnancy, the record indicates that the respondent routinely performs background checks and that the complainant was asked to submit conviction record information at the time she applied for the job. Krisko testified that the background check is not always completed before the respondent makes the job offer and elaborated that, because the respondent knew the complainant had recently had to pass a background check for school,² it regarded the matter as a formality.

Further, while the complainant testified that her supervisor told her Krisko was concerned about the effect of an extended maternity leave on the respondent's clients, Krisko stated that she could not recall having anything more than a passing discussion with the complainant's supervisor about the complainant's pregnancy. Krisko indicated that she has granted maternity leave to other employees and explained that the respondent asks employees to train a replacement before they

² On the background check document the complainant indicated that she had had a caregiver background check done in August of 2016 by "NWTC."

leave so that there are a couple of months “to foreshadow” for the kids. This testimony does not support a finding that Krisko was attempting to avoid granting maternity leave because she believed clients would suffer.

Finally, although Krisko told the complainant she was discharged for lying on her application, it is clear from her testimony that Krisko had additional reasons for the discharge. The complainant was still in her probationary period, having worked for the respondent less than two months. Krisko testified that she was not impressed with the complainant’s work performance and had been thinking about terminating her employment prior to receiving the results of the background check. Krisko provided details about her areas of dissatisfaction and stated that the fact that the complainant had lied on her background check was “the straw that broke the camel’s back.”

It is understandable that the complainant would question the respondent’s decision to discharge her for failing to disclose an expunged criminal record. However, for the reasons set forth above, the commission concludes that the respondent’s decision was not based upon the complainant’s pregnancy but was because it was unhappy with her work performance and genuinely believed the complainant had been dishonest on her application. The dismissal of the complaint is, therefore, affirmed.

cc: Attorney Scott S. Luzi
Attorney Josiah R. Stein