

State of Wisconsin



Labor and Industry Review Commission

Jennifer Potts, Complainant

Fair Employment Decision<sup>1</sup>

State of Wisconsin - Department of Health Services, Respondent

Dated and Mailed:

ERD Case Nos. CR201503072, CR201503082, CR201600395, and CR201601978

May 18, 2021  
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EEOC Case Nos. 26G201600145C, 443201501436C, 26G201600505C and 26G201600999C

The decision of the administrative law judge is **modified** and, as modified, is **affirmed**. Accordingly, the complainant's complaints are dismissed.

By the Commission:

/s/  
\_\_\_\_\_  
Michael H. Gillick, Chairperson

/s/  
\_\_\_\_\_  
Georgia E. Maxwell, Commissioner

/s/  
\_\_\_\_\_  
Marilyn Townsend, 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**

This case is before the commission to consider the complainant's allegation that the respondent discriminated against her 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.

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, except that it makes the following:

### **Modifications**

1. Paragraph 76 of the administrative law judge's FINDINGS OF FACT is deleted and the following is substituted therefor:

The complainant's diagnosed major depressive disorder and generalized anxiety disorder are mental impairments that limit her capacity to work.

2. Paragraphs 79 and 80 of the administrative law judge's FINDINGS OF FACT are deleted and the remaining paragraphs are renumbered accordingly.

3. Paragraphs 5 and 6 of the administrative law judge's CONCLUSIONS OF LAW are deleted and the following paragraph is substituted therefor:

The complainant established that she is an individual with a disability, within the meaning of the Wisconsin Fair Employment Act.

4. The remaining paragraphs of the administrative law judge's CONCLUSIONS OF LAW are renumbered accordingly.

5. The first sentence in the second full paragraph on page 19 of the administrative law judge's decision (in the Memorandum Opinion) is deleted and the following is substituted therefor:

Finally, in CR201601978, while the complainant established that she has a mental disability, she failed to establish that an additional leave of absence of six months to a year would be a reasonable accommodation.

## Memorandum Opinion

In her petition for commission review the complainant argues that, first and foremost, she opposes having her cases consolidated because each case contains separate facts. The complainant maintains that the administrative law judge and respondent's attorney decided to consolidate the cases over her objections, and that she was shut out of the process. She states that, although the administrative law judge's decision indicates that she agreed to the consolidation, at the prehearing conference she was vocal about not wanting the cases consolidated. The commission has considered this argument, but does not find it persuasive. The prehearing conference report prepared by the administrative law judge indicates that the complainant agreed to consolidate the four cases. A subsequent email from the complainant to the administrative law judge and opposing counsel indicates that she did not receive the scheduling order that was originally mailed to her and only received a copy later upon request to the hearing office. However, while the complainant disputed the timing of her receipt of the scheduling order, she did not dispute its contents and did not disagree with the decision to consolidate the four cases. The complainant also did not make any objection to the consolidation of her cases at the hearing, raising the matter for the first time in her petition for review.

In addition to the absence of any objection from the complainant to the consolidation of her cases, the commission can see no reason to believe that doing so resulted in any prejudice to the complainant's ability to present her case. Although the various complaints of discrimination involved some differing facts, there was a significant amount of overlap of facts and witnesses, and the commission agrees that consolidation was warranted and appropriate. The complainant had an opportunity to present her factual evidence at the hearing and each case was fully litigated. The complainant has not explained what additional information she would have presented or what different litigation strategy she would have employed had the cases been handled separately.

Next, the complainant argues that she was denied an opportunity to present expert medical evidence on her behalf. She states that she did not receive the scheduling order containing the 30-day deadline to designate any expert witnesses she intended to call in support of her complaints in time to do so and that the administrative law judge unfairly denied her request for an extension of time. The commission has some sympathy for this argument, as it questions the reasonableness or necessity of requiring the complainant to provide names of her expert witnesses more than six months in advance of the hearing date. However, even if the commission were to conclude that the administrative law judge's ruling on this issue was in error, any such error was harmless; the commission is satisfied that the evidence submitted by the complainant at the hearing was sufficient to establish that she is an individual with a disability, and no additional expert witness testimony was required. The complainant was diagnosed with major depressive disorder and generalized anxiety disorder, chronic impairments which, along with a separate medical condition, caused

her to miss a significant amount of work in 2015 and 2016 and which necessitated a leave of absence of at least six months beginning in the summer of 2016. Based on this evidence, the commission concludes that the complainant has a mental impairment that limits her capacity to work. Further, while the administrative law judge found that the respondent did not perceive the complainant as having such an impairment, the commission sees no reason to doubt that the respondent--who was aware of the complainant's diagnosis and inability to work and explored possible accommodations for her--perceived the complainant as having a disability. The commission has modified the administrative law judge's decision to reflect this analysis.

Turning to her accommodation request, in her petition the complainant maintains that the respondent is a cabinet level state agency with many resources to move employees into lower positions at will, but because she filed prior complaints those options were not considered for her. The commission does not find this argument persuasive. At the hearing the respondent's employment relations specialist, Stephanie Endres, testified that after concluding that the complainant could not be accommodated in her current position she considered whether the complainant could be placed in another job, but there was no position the respondent could hold open for six months or more. Although Ms. Endres was aware that the complainant had previously made a discrimination complaint, she testified that she did not consider that fact in making the determination that the complainant could not be accommodated and that her decision was based solely on the doctor's request that the complainant not have any interaction with other employees for six months. The administrative law judge found this testimony to be credible, and the commission agrees with that assessment. Finding a new job into which the complainant could be transferred while allowing her to remain on a leave of absence lasting six months or more was not shown to be a reasonable accommodation, nor was it one the respondent could provide without hardship.

The complainant's petition does not include any arguments directly concerning the other items covered at her hearing: the denial of tuition reimbursement, the issue involving her signature block, her inclusion at staff meetings, the alleged racially charged comment, or the respondent's failure to accommodate her disability by granting her a leave of absence from her existing job. However, based upon its review, the commission agrees with the administrative law judge that no discrimination was established with respect to those issues.

Finally, the commission notes that in her petition the complainant seeks to elaborate upon some of the administrative law judge's findings of fact with additional assertions that are not supported by evidence in the record and/or with the inclusion of her own analysis. However, the complainant has not identified any material errors in the decision and the commission's review of the record indicates that--with the exception of the items modified above--the findings of fact and conclusions of law made by the

administrative law judge are supported. The administrative law judge's dismissal of the complaint is, therefore, affirmed.

cc: Attorney Lara M. Herman

Editor's Note: This decision has been appealed to Circuit Court.