

State of Wisconsin



Labor and Industry Review Commission

<p>Anthony X. Ball, Complainant</p>	<p>Fair Employment Decision¹</p>
<p>A-1 Express Trucking, Inc., Respondent</p>	<p>Dated and Mailed:</p>
<p>ERD Case No. CR201700164</p>	<p>July 30, 2021 ballan_rsd.doc:103</p>

The decision of the administrative law judge is **affirmed** as modified herein. 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 him by terminating his employment because the respondent believed the complainant had filed, or would file, a complaint under Wisconsin's wage claim law, in violation of the Wisconsin Fair Employment Act (hereinafter, "the Act").

An administrative law judge for the Equal Rights Division of the Department of Workforce Development (hereinafter, "the department") held a hearing and issued a decision finding no probable cause to believe that discrimination had occurred. The complainant filed a petition for rehearing, which the administrative law judge denied. 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:

Modification

1. In paragraphs 29, 30, 35, and 36 of the administrative law judge's FINDINGS OF FACT, wherever the year "17" is referenced, "16" is substituted therefor.

Memorandum Opinion

Fact Summary

In November of 2014, the complainant, Anthony Ball (who is also known as "Chuck"), was hired as a fuel delivery driver for the respondent, a transportation company, A1 Express Trucking (hereinafter, "A1"). The complainant was supervised by Dwain Trowbridge, the registered agent of Ice Age Fuels, a separately incorporated company that had a business relationship with the respondent. Michael Hassemer was the fleet manager and dispatcher for A1. Jane Zwiefelhofer was the human resource and safety generalist for A1. Sandra Schmidt was the office manager.

At the time he was hired, the complainant agreed to waive coverage under the employer's health insurance plan. In lieu of providing health insurance, the employer agreed to pay the complainant approximately \$6,000 at his one-year work-anniversary, as reimbursement for costs associated with purchasing insurance through his wife's employer.

On March 11, 2016, the complainant inquired of Trowbridge by text message regarding the status of his reimbursement. Trowbridge stated that Schmidt was working on it, and the complainant replied that he wanted to be paid immediately. Three days later, the two texted again regarding the reimbursement.

On March 22, 2016, Ball sent several vulgar and threatening text messages to Trowbridge, who was on vacation in Mexico at the time. Ball called Trowbridge "an uncaring, incompetent, lying procrastinating prick." Ball demanded his reimbursement from Trowbridge, texting, "And I will deal w you when you get back! You should look forward to it!!!! That's my guarantee. Book it. More lies, more bullshit, more Dwain! Have a great vacation! Your coming back to Hell! You thought the last three weeks w A1 was bad? Haa, wait til you get back!"

Trowbridge responded by attempting to terminate Ball's employment, "As far as I'm concerned put the keys on the desk." Ball replied, "Did you just fire me? All the way from Mexico?" Trowbridge answered, "Yes. You can't talk to an employer like this. You are done." Notwithstanding that statement, the employment relationship continued.

On March 23, 2016, the complainant met with Schmidt and Hassemer to ask about the reimbursement. Zwiefelhofer had previously stated that she believed such reimbursements were no longer allowed under the Affordable Care Act. At the March 23, 2016, meeting, Hassemer gave Ball a raise of \$2.00 per hour, which was meant to roughly equate to the reimbursement amount that had been previously offered. Hassemer told Ball that he would have to seek the reimbursement from Trowbridge directly for the previous year.

On March 31, 2016, Ball sent more vulgar and threatening texts to Trowbridge. Trowbridge threatened to call the police. Ball replied with a string of texts which included, "I will bury you, your business ventures, your relationships with A1, any customers we have left, your stores, The Lodge, etc." and, "with every breath I take, I am on the warpath against you, by every legal and lawful means available!" and, "I should get a fucking bonus... but instead get screwed! Multiple times! So take your Grey Poupon my friend and shove it up your ass!"

On April 5, 2016, Trowbridge ask for Ball's end-of-month tickets. Ball replied with a long string of texts berating and insulting Trowbridge. Trowbridge replied, "Either drop the keys at the Chetek store or I'll meet you to take." Ball again acknowledged but refused to accept that his employment was being terminated, replying, "You lie, make promises and guarantees you never keep...but I get fired? How does that work!" Two more times that day, Trowbridge made clear that Ball was fired, texting "Ok let's meet. I'll be getting keys one way or the other!" and later, "That's it Chuck you have no choice. You're done!" During these text exchanges, Ball continued to use vulgar and offensive language directed at Trowbridge.

On April 8, 2016, Trowbridge texted Ball asking again to meet. Ball replied, "Bite me... like I said, no way I'm your little bitch!" At 11:31, Trowbridge replied "OK.... We need to meet for the keys." Trowbridge then called Hassemer and explained that he had already fired Ball and that he was feeling threatened. Trowbridge shared

Ball's text messages with Hassemer, who felt that the relationship was beyond repair. Hassemer reached out to Ball and eventually that day, the two spoke by telephone. During the telephone call, Hassemer told Ball that he was no longer working for A1 and that Ball should return the keys for the fuel truck. Hassemer also informed Ball during that call that A1 would be closing the fuel business. During the call, Ball did not allege that he had filed or would file a wage complaint with the department. After Hassemer's phone call with Ball, Hassemer explained to Zwiefelhofer that Trowbridge had previously fired Ball on April 5, 2016, and that he (Hassemer) had confirmed that decision to Ball because Hassemer believed that enough was enough. Later that evening, at 8:11 p.m., Trowbridge sent a text to Ball in which he asserted that he had contacted the department to inform it that he believed Ball was misstating the hours he claimed to have worked.

Ball did not turn in his keys as he was ordered to do on both April 5 and April 8, 2016. Instead, on Monday April 11, 2016, Ball drove the fuel truck and delivered fuel to his usual customers. At 12:17 p.m., Ball texted Trowbridge to report that he had allegedly been injured while delivering fuel. Trowbridge replied one minute later that he should not have been driving the truck, as he had already been fired. At 12:24 p.m., Trowbridge texted, "If the keys are not at the shop by 1, I am calling Barron Co. Sherriff." At 12:27 p.m., Ball texted that he had put the keys in the mail. Trowbridge replied at 12:28 p.m., "OK calling the Sheriff." Trowbridge then reported the incident to the sheriff's department at 12:31 p.m. The sheriff's department investigated the unauthorized taking of the vehicle. At 12:47 p.m., Ball threatened legal action, texting, "Pretty obvious A1 and yourself dealing in bad faith and lies... Why Mike or A1 would join in your lies and deceit are beyond me! All over \$5,000 and \$2.00 an hour... No more contact... We'll let the legal system sort it out."

Zwiefelhofer filed a First Report of Injury form with A1's worker's compensation insurance carrier. The carrier recommended to Zwiefelhofer that she confirm Ball's prior termination with a written letter to Ball, to avoid any confusion. Zwiefelhofer drafted a letter of termination late in the day on April 12, 2016. At Zwiefelhofer's request, Schmidt, the respondent's office manager, reviewed and revised the letter on April 13, 2016.

Ball filed a wage complaint against Ice Age Fuels with the department, on April 9, 2016, which was received by the department on April 13, 2016. Ice Age Fuels and A1 received a copy of the complaint on May 10, 2016.

Discrimination under the Act

The Wisconsin Fair Employment Act prohibits an employer from taking adverse employment action against an employee based on the employee's: 1) filing a complaint or attempting to enforce a right under any of a variety of statutory sections, including the wage payment act, Wis. Stat. § 109.07; or 2) testifying or assisting in any action or proceeding under any of those statutory sections. In addition, paragraph (d) of

§ 111.322(2m) prohibits an employer from taking an adverse employment action based on a belief that the individual engaged in or may engage in any of the protected acts set out in the statute. The complainant in this case asserted in his complaint that the respondent improperly fired him because it believed that he was going to file a wage and hour complaint.

This appeal addresses the administrative law judge's decision, which found no probable cause to believe that a violation of the Act had occurred. Under the Act, "probable cause" is defined as "a reasonable ground for belief, supported by facts and circumstances strong enough in themselves to warrant a prudent person to believe that a violation of the act probably has been or is being committed." Wis. Admin. Code § DWD 218.02(8). "[T]he complainant is required to establish more than a *prima facie* case in order to sustain his burden to show probable cause to believe that discrimination has occurred." *Braunschweig v. SSG Corp.*, ERD Case No. CR200400816 (LIRC Aug. 31, 2006). Probable cause "lies somewhere between preponderance of the evidence and suspicion." *Id.*

A *prima facie* case of retaliation under the Act may be established by showing that: (1) the complainant engaged in statutorily protected expression; (2) the complainant suffered an adverse action; and (3) there is a causal connection between his or her protected expression and the adverse action. If the complainant establishes a *prima facie* case of discrimination, the respondent may rebut the *prima facie* case by articulating a legitimate, non-discriminatory reason for the adverse action. Should the respondent meet its burden, the complainant then has the burden of proving that the respondent's proffered reasons are merely a pretext for discriminatory conduct. *Gunty v. City of Waukesha*, ERD Case No. 200401540 (LIRC Mar. 31, 2010).

In his petition for commission review, the complainant argues that the respondent did not terminate his employment because of insubordination. Rather, the complainant maintains that the respondent's actual motivation to terminate his employment was its belief that the complainant intended to file a wage claim. The credible evidence adduced at the hearing does not support this version of the facts.

The complainant in this case has failed to establish even a *prima facie* case. The facts and circumstances revealed in this case establish that the respondent terminated the complainant's employment because of the vulgar, bizarre, threatening, and escalating behavior toward his direct supervisor. The complainant's alleged protected activity came in the form of one of many threats contained in the complainant's March 31, 2016, string of messages, which included: "I will bury you, your business ventures, your relationships with A1, any customers we have left, your stores, The Lodge, etc." and, "with every breath I take, I am on the warpath against you, by every legal and lawful means available!" The commission construes the phrase "by every legal and lawful means available" to mean that the complainant intended to take legal action against the respondent, in the form of a wage claim. Thus, the statement is a

statutorily protected expression, the first prong of a *prima facie* case. The complainant was fired, and thus meets the second prong --adverse employment action. However, the complainant failed to establish the necessary third prong – causal connection between the protected action and the adverse employment action.

The complainant's employment was terminated because of his threatening, vulgar, and escalating behavior. His threat to file a wage complaint played no role in the respondent's decision to terminate the complainant's employment. The dismissal of the complainant's discrimination complaint is, therefore, affirmed.

Additional arguments of the petitioner

The commission has reviewed and considered all other arguments raised by the complainant and rejects them. Among those arguments, the complainant asserts that he should be afforded a new hearing because the respondent submitted an incomplete recording as part of its evidence. A review of the record, however, reveals that the administrative law judge explained to the complainant that he was permitted to submit additional portions of the recording in order to provide context. That he failed to do so does not render as inadmissible the portions of the recording used by the respondent.

The complainant argues that the administrative law judge made a number of factual errors in the decision with respect to the business relationship between Ice Age Fuels and A1 Express Trucking. However, the details of the business relationship between the two employing units have no bearing on the ultimate conclusion that no discrimination was established.

The complainant also objects to the administrative law judge's exclusion of certain of the complainant's exhibits. However, those exhibits were properly excluded as they were not relevant to the issues of the case.

cc: Agatha Raynor, Attorney for Respondent