

State of Wisconsin



Labor and Industry Review Commission

Laura Warner, Complainant

Fair Employment Decision<sup>1</sup>

Green Bay Area Public Schools,  
Respondent

Dated and Mailed:

ERD Case No. CR201604717  
EEOC Case No. 4432010601259C

December 10, 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

<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 based upon disability, 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 no probable cause to believe that discrimination occurred. The complainant has 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**

This appeal concerns the question of whether the complainant established probable cause to believe that the respondent refused to provide her with a reasonable accommodation for a disability and/or disciplined or discharged her based upon disability. The administrative law judge found that she did not, and the commission agrees.

The complainant's evidence of disability is minimal. She provided medical records indicating that she was diagnosed with ADHD, depression, and urinary incontinence. However, the records do not contain any information with respect to the extent or permanency of those impairments, nor do they provide any information as to how the diagnosed impairments affect the complainant's ability to perform major life activities or whether they limit her capacity to work. The complainant testified that ADHD makes it hard for her to focus and pay attention. She stated that she struggles with transitions and that it is "awful" for her to get up in the morning because of her depression, and indicated that these two impairments made it difficult for her to get to work on time. However, no medical evidence was presented with respect to the effect of either of these conditions, and the record contains nothing beyond the complainant's layperson's analysis of their effects on her. In *Wal-Mart v. LIRC and Schneider*, 2000 WI App 272, 240 Wis.2d 209, 621 N.W. 2d 633, the court of appeals held that expert testimony was necessary on the question of whether certain reactive or angry behaviors were caused by obsessive compulsive disorder, as this was not a matter "within the realm of the ordinary experience of mankind." Similarly, the effect of ADHD and depression on an individual's ability to complete tasks in a timely manner would appear to be the proper subject of expert medical evidence. At the very least, a finding that ADHD and depression caused the complainant to be late for work would require something more than the complainant's general and nonspecific testimony that the conditions

made it hard for her to focus and get up in the morning.<sup>2</sup> With respect to urinary incontinence--a matter arguably more susceptible to layperson's testimony than ADHD and depression--the complainant testified that she has no bladder control and indicated that this also sometimes made her late for work. The complainant did not offer any testimony regarding the frequency of this problem, nor did she explain why it was more likely to interfere with her ability to report to work on time in the morning than to happen at other points during the day.

The administrative law judge found the complainant's evidence insufficient to warrant a conclusion that she is an individual with a disability, within the meaning of the statute, and the commission is inclined to agree. However, the outcome of this case does not turn on that question, since, even if the complainant established that she has a disability, there is simply no evidence to suggest that she was discriminated against on that basis.

The complainant was chronically late for work, even after the respondent adjusted her work schedule to a later time in order to assist her in reporting on time. The complainant also frequently failed to notify the respondent when she was reporting late or sign in at the office, as instructed. The complainant provided the respondent with a variety of reasons for her tardiness including traffic, a morning workout class, stops at the store, and issues with her son. In only one instance did she mention incontinence as a cause of her tardiness, and she never told the respondent she was late because of depression or ADHD. The respondent had no reason to conclude that either the complainant's tardiness or her failure to provide notice were related to a disability, and no basis to understand that the complainant required a disability accommodation. Nor was it established that any reasonable accommodation would have been available. The complainant testified that she was incapable of reporting to work on time and that, no matter when her work day started, she would be late. The complainant also testified that she was unable to consistently provide notice to the administrative office on the days she was late. The complainant's suggested accommodation that she be allowed to report for work late on a frequent basis, and without providing notice to the respondent's administrative office, was not a reasonable one that would have allowed her to perform the job-related responsibilities of her employment.

Finally, the commission agrees with the administrative law judge's conclusion that the respondent's decision to discipline the complainant for her tardiness, and to ultimately terminate the employment relationship, was unrelated to disability. Although the complainant told the respondent that she suffered from bladder incontinence, and mentioned that she took medications for ADHD, it was not shown that the respondent perceived her as having a disability, nor is there any reason to

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<sup>2</sup> The commission notes that the complainant also offered the seemingly inconsistent testimony that she was capable of arriving on time to various events and that she is a "fully functional" adult. (Syn., at 11).

believe that it took adverse action against her on that basis. The evidence established that the respondent was genuinely dissatisfied with the complainant's attendance record for reasons unrelated to disability, and the commission can see no reason to believe that the respondent would have been any more lenient or accepting of her behavior had she not shared the limited medical information that she did. The commission, therefore, agrees with the administrative law judge that no discrimination was established.

In her petition for commission review the complainant makes a variety of arguments in support of reversal. The commission has considered the complainant's arguments, but does not find them persuasive.

The complainant argues that she disclosed health issues that affected her time management and organizational abilities and caused mornings to be a struggle for her and states that she repeatedly requested and was denied accommodation on the basis of disability. However, the complainant also makes the contrary argument that she was not comfortable sharing the personal and physical struggles she was experiencing and that she was made aware of the unwritten rule that employees should not let administration know they have a disability or issue. The evidence presented at the hearing suggests that, while the complainant may have mentioned her ADHD and incontinence issues to the respondent, she did not provide the respondent with information suggesting that either condition constituted a disability and did not request any type of workplace accommodation. The reasons the complainant provided for her tardiness were personal and not medical, giving the respondent no reason to believe that a disability accommodation was required. Even after warnings were given and the complainant was well aware that her failure to report to work on time was placing her job in jeopardy, she did not notify the respondent that her tardiness was caused by a health condition and did not provide it with any medical information or doctor's restrictions. Indeed, up until and including the very moment of her discharge, the complainant made no mention of the need for a disability accommodation; she refused to sign her discharge notice, but did not submit any response indicating that she had a disability and required accommodation.

The complainant also makes the argument that her arrival time was not affecting her performance. However, the respondent testified that it considered it important that staff arrive on time for the school day. The complainant's chronic tardiness made her late for staff meetings, some of which had already been pushed to a later start time in order to accommodate her. The respondent's unwillingness to tolerate late starts was not shown to be based on disability but was due to a genuine concern that staff members report to work on time. To the extent the complainant is arguing that allowing her to report late would have been a reasonable disability accommodation, the commission must disagree. While occasional flexibility in start time might be a reasonable accommodation--had the complainant made such a

request--the respondent was not required to allow the complainant to report late on a regular basis by way of disability accommodation.

In her petition the complainant also references a disparity in treatment regarding her class assignments. However, this issue was not raised in the complainant's complaint and was not addressed at the hearing, which focused solely on the complainant's allegations that the respondent failed to provide her with a disability accommodation and that it disciplined and ultimately discharged her based upon her attendance. Because the commission agrees with the administrative law judge that the complainant failed to demonstrate probable cause to believe she was discriminated against in the manner alleged, the dismissal of her complaint is affirmed.

cc: Attorney Jeremy Lange