State of Wisconsin

Labor and Industry Review Commission

Dejuan A. Garrison, Complainant **Neenah Foundry Co.**, Respondent ERD Case No. CR201702712 EEOC Case No. 26G201800026C	**Fair Employment Decision** **Dated and Mailed:** December 29, 2021 garride_err.doc:164

The decision of the administrative law judge is **reversed**. This matter is remanded to the Equal Rights Division for further proceedings before a different administrative law judge.

By the Commission:

/s/
Michael H. Gillick, Chairperson

/s/
Georgia E. Maxwell, Commissioner

/s/
Marilyn Townsend, Commissioner

Procedural Posture

This case is before the commission to consider the complainant's allegation that the respondent discriminated against him based upon his race and color, in violation of the Wisconsin Fair Employment 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 makes the following:

Findings of Fact

1. The respondent, Neenah Foundry (hereinafter "respondent"), is a Wisconsin company that produces products for industrial and municipal business sectors, including manhole covers, tree grates, and detectable warning plates, as well as parts for Class A trucks. The respondent has approximately 950 employees.

2. The complainant, Dejuan Garrison (hereinafter "complainant"), worked for the respondent as a chipper/grinder from August of 2013 through August of 2017, at which point he was discharged for poor attendance. The complainant's race is African-American and his color is black.

3. During the complainant's employment the respondent utilized a point system for attendance which resulted in a written warning when an employee accrued 4 points, a suspension at 6 points, and discharge at 8 points. Attendance points were cleared from an employee's record a year after they were accrued. The respondent kept track of its employees' attendance through an electronic monitoring system called Kronos. The Kronos system automatically alerted the respondent when an employee reached a point level that warranted a written warning, a suspension, or discharge.

4. On August 9, 2017, the complainant received a written warning because he had incurred 4 attendance points. On August 11, the complainant reached 6 attendance points and was issued a suspension. On Friday, August 18, the complainant reached 8 points, the level required for discharge. On August 19, the complainant was late for work and received a half point. He was then at 8.5 points. On August 20, two of the complainant's attendance points expired, bringing his point total down to 6.5 points.

5. On Tuesday, August 22, the respondent called the complainant into the human resources office and notified him he was being discharged for poor attendance. The complainant argued that he had only 6.5 attendance points, not have enough points to be discharged. The complainant was told that, although his

employment termination had not gone through the system until August 22, he was discharged based upon his attendance points on August 18, at which time he reached 8 points.

6. The complainant's union steward was present at the discharge meeting and asked if the complainant could be given a last chance agreement instead of employment termination. Penny Kohlman, the human resources manager, responded that she did not believe in last chance agreements.

7. During the discharge meeting the complainant also pointed out that there had been prior errors with respect to his point totals. On October 4, 2016, one attendance point expired, but this point was apparently not subtracted from his attendance record. The same occurred on March 22, 2017. The complainant noted these errors and asked if anything could be done about the points that were never deducted. The respondent told him no, that it was over and done.

8. One of the complainant's former co-workers, Samantha Bekx, received half an attendance point for being late on June 13, 2017, and reached 8 attendance points on June 29, 2017. Kohlman called Bekx into her office to ask why she was late on June 13, and Bekx explained that there had been a power outage and her phone died. Kohlman then adjusted Bekx' point balance to remove the half point, which brought her below the 8 point threshold for termination. Bekx's race is Caucasian and her color is white.

9. Thereafter Bekx received additional attendance points, some of which were related to absences that were covered by the Family and Medical Leave Act (FMLA). When Bekx brought this matter to the respondent's attention, it adjusted her attendance totals accordingly.

10. Between March and December of 2017, 8 white/Caucasian employees were discharged based upon having reached 8 attendance points. It is unknown whether any of these individuals received point total adjustments prior to their discharge, nor is it known whether other employees were granted leniency with respect to attendance points.

11. There is reason to believe that the complainant's race and color were motivating factors in his discharge.

Conclusions of Law

1. There is probable cause to believe that the respondent discriminated against the complainant based upon his race and color, in violation of the Wisconsin Fair Employment Act.

Memorandum Opinion

This case is before the commission on probable cause. The standard of proof at a probable cause hearing has been described as "low." *See*, *Boldt v. LIRC*, 173 Wis. 2d 469, 496 N.W.2d 676 (Ct. App. 1992). It is somewhere between preponderance and suspicion. *Hintz v. Flambeau Medical Center*, ERD Case No. 8710429 (LIRC Aug. 9, 1989). Based upon its review of the record in this case, the commission is satisfied that the complainant has submitted sufficient evidence to warrant a finding of probable cause and, thus, should be given an opportunity for a hearing on the merits of his complaint.

The complainant's prima facie case

In order to establish a *prima facie* case of discriminatory discharge, the complainant must show that: (1) he was a member of the protected group; (2) he was discharged; (3) he was qualified for the job, and (4) either he was replaced by someone not within the protected class or others not in the protected class were treated more favorably. *Puetz Motor Sales, Inc. v. LIRC*, 126 Wis. 2d 168, 173, 376 N.W.2d 372 (Ct. App. 1985). The complainant in this case made out a *prima facie* case of discrimination. He demonstrated that he is black/African-American, that he was discharged as soon as he reached eight points under the respondent's attendance point system, and that a white/Caucasian employee who reached eight points was not discharged, but instead had a half point removed from her record. The complainant further established that there were other irregularities in his point totals which the respondent refused to consider or address prior to discharging him.

The respondent's defense

The respondent provided several defenses at the hearing. First, it contended that it deducted points from Ms. Bekx's record because she notified it that she had received attendance points for days on which she took FMLA leave. The respondent argued that none of the complainant's absences were protected by FMLA, so his circumstances were not comparable to Bekx's. However, while there was evidence to suggest that at some point the respondent removed points from Bekx that had been erroneously assessed for absences covered by the FMLA, for purposes of establishing disparate treatment what is relevant is the respondent's decision to subtract a half point from Bekx when she was late for work due to a power outage, bringing her point total down below eight and enabling her to keep her job. Indeed, not only did the respondent remove a half point from Bekx's total, but Bekx testified that Penny Kohlman, the human resources manager, took the step of proactively calling her into the office to give her a chance to explain why she was late. By contrast, even when the complainant informed the respondent that there were errors in his attendance record because points that expired had never been subtracted from his total, the respondent was unwilling to discuss the situation and instead terminated the complainant's employment out of hand. The respondent did

not provide any explanation for the difference in treatment between the complainant and Bekx.

The respondent also argued that it could not have discriminated against the complainant because Ms. Kohlman was unaware of his race or color at the time she decided to discharge him. The commission does not find this persuasive. To begin with, whether or not Kohlman actually met the complainant at the time she made the discharge decision, his name, DeJuan, is a traditionally African-American name and likely put her on notice that he was a person of color. Even if that was not the case, the fact remains that Kohlman met with the complainant in person and knew what his race and color was at the time she made it clear to him that she would not consider correcting the errors on his attendance record that may have resulted in unwarranted points and that the point system would be rigidly applied in his case. Given the circumstances, the commission sees no reason to believe that the respondent was unaware of the complainant's race or color at the time the adverse employment decisions were made.

Finally, the respondent argued that eight white employees were discharged when they reached eight points. However, the record lacks evidence to indicate what, if any, grace these employees received over the course of their employment with the respondent with respect to attendance points, nor is there any evidence to show whether other employees who were not discharged received more favorable treatment regarding their attendance points. The respondent has almost 1000 employees, and the fact that eight were discharged over a nine-month period of time does not necessarily tell the story; the record is devoid of evidence that would put this information into context. In fact, not only does the record contain insufficient evidence with respect to the treatment of other employees to allow a conclusion that no disparate treatment occurred, but the commission's review of the matter indicates that the complainant was denied an opportunity to discover and present additional relevant evidence, as will be discussed in more detail below.

None of the defenses offered by the respondent at the hearing met its burden of producing a legitimate, non-discriminatory explanation for its actions. As stated above, the respondent contended that it did not know the complainant's race or color, that it discharged other white/Caucasian employees for having reached eight points, and that Ms. Bekx's situation was not comparable to the complainant's because her attendance record was adjusted due to FMLA absences. However, the respondent did not address the different treatment between the two employees with respect to forgiveness of points for occurrences that were not related to FMLA and did not rebut the complainant's evidence suggesting that he was treated less favorably than a white employee. The complainant's unrebutted *prima facie* case of discrimination is enough to warrant a finding of probable cause and to send this matter back for a hearing on the merits. *See*, *Nevels-Ealy v. County of Milwaukee*, ERD Case No. 200503213 (LIRC March 14, 2008), citing *Gunderson v. Bonded*

Spirits Corp., ERD Case No. 8351917 (LIRC July 17, 1986)(a finding of probable cause results where the respondent has offered no evidence at the hearing to rebut the complainant's *prima facie* case).

Evidentiary rulings

As set forth above, the commission concludes that the complainant established a *prima facie* case of discrimination that was not rebutted by the respondent with the presentation of a legitimate nondiscriminatory reason for its actions. For this reason, the commission finds that the complainant has met his burden of establishing probable cause and should be given an opportunity to present his case on the merits. In concluding that a new hearing is necessary, the commission also notes that the complainant was denied an opportunity to prepare for the hearing and to present all of the evidence available.

On April 23, 2018, the administrative law judge convened a pre-hearing conference with the parties in which the parties agreed to a hearing date of July 13 and the administrative law judge set a discovery deadline of June 13 and specified that witness and exhibit lists must be exchanged by July 3. The complainant appeared at the scheduling conference without a representative. Subsequent to the scheduling conference the complainant obtained non-attorney representation. On May 14, the complainant's representative emailed the administrative law judge to explain that he would be assisting the complainant. The representative explained that he was not a lawyer and asked whether he was required to send the respondent notice of intent to seek discovery. The administrative law judge responded that no notice was necessary and that the complainant could send his requests immediately. On May 30, the complainant's representative sent the respondent a discovery request. Among other things, the complainant's representative requested information about employees who accumulated eight or more attendance points but whose employment was not terminated and information about whether any of those employees were granted discretionary attendance point reductions. The respondent objected to the discovery request, noting that in the pre-hearing conference the administrative law judge had set a June 13 deadline for the completion of discovery. The respondent pointed out that, under Wis. Stat. § 804.08(1)(b), parties have 30 days in which to reply to discovery and that a June 13 deadline would not give the respondent the 30 days to which it was entitled.

On June 2, 2018, the complainant's representative sent a letter to the administrative law judge requesting an extension of the discovery period to June 29. In his request, the complainant's representative stated that the discovery period set by the administrative law judge was very short, that he had attempted to act promptly, and that he had been unaware of the 30-day response period. The complainant's representative indicated that he knew the administrative law judge

was permitted to extend the discovery period and that doing so would not affect the July 3 witness and exhibit list disclosure deadline nor delay the hearing date. The respondent's attorney responded to this letter with an email to the administrative law judge objecting to the extension. The respondent did not contend that it would be prejudiced by granting the extension. Rather, it asserted that the complainant had plenty of time to complete discovery and contended that the complainant's representative did not just recently become involved, having represented the complainant at his unemployment hearing and at other junctures with respect to the instant matter. On June 14, the administrative law judge sent the parties a letter denying the request for an extension of the discovery deadline. The administrative law judge indicated that the parties had agreed to complete the discovery process 30 days before the hearing and that extending the deadline would not leave enough time to resolve discovery disputes. The administrative law judge also indicated that the complainant could have begun the discovery process any time after the matter was certified to hearing on February 28, 2018. She stated that it would not be fair to extend the discovery deadline for one party's benefit.

In reviewing an administrative law judge's procedural rulings the commission asks whether the ruling was a reasonable exercise of discretion or an abuse of discretion. *Shi v. UW System Board of Regents*, ERD Case Nos. CR201101274 & CR201203088 (LIRC Sept. 11, 2015). Administrative law judges have a duty to assist unrepresented complainants in understanding and complying with the discovery process. *See*, *Duncan v. International Union of Operating Engineers Local 139*, ERD Case No. CR201002723 (LIRC Sept. 11, 2012). The commission believes that the administrative law judge should have done more to assist the complainant in understanding the discovery process in this case and that her refusal to grant the discovery extension requested by the complainant was not a proper use of her discretion. The pre-hearing conference was convened on April 23, 2018, and discovery had to be completed by June 13. Thus, in order to comply with the statutory requirement that a party be given 30 days in which to respond to discovery requests, the complainant would have had to serve his discovery requests on the respondent no later than May 13, only 20 days after the pre-hearing conference. This was apparently not explained at the prehearing conference, and although a follow-up letter did indicate that "you typically have 30 days from the date of service of [the discovery request] to serve your responses," it is clear that the complainant, a lay person, did not understand the import of that statement. The complainant's representative, who is not an attorney and did not become involved in the matter until sometime after that letter was sent, was also unaware of the 30-day rule and, although he emailed the administrative law judge on May 14 with questions about discovery, the administrative law judge made no mention of the 30-day rule and did not put the complainant's representative on notice that he would need to serve his discovery requests immediately in order to comply.

The complainant's representative asserted that he acted diligently to file his discovery request in a timely manner, and the commission sees no reason to believe this was not the case. As stated above, the complainant's representative is not an attorney and, per his letter to the administrative law judge, needed to research what he could ask for in discovery and figure out how to draft the request. The discovery requests were served well in advance of the hearing, and the complainant's representative credibly explained that he was unaware of the 30-day period required by statute for responding. As the complainant's representative pointed out in his request, the administrative law judge could have permitted a short extension of the discovery deadline without affecting the date of the hearing. While the administrative law judge correctly noted that this would leave limited time to respond to discovery objections, the commission does not believe that the potential difficulties associated with having a short window in which to resolve discovery disputes justified depriving an unrepresented complainant of an opportunity to gather evidence in support of his case.

In addition to the above, the commission notes that at the hearing the administrative law judge prevented the complainant from potentially introducing evidence of a second comparator. One of the complainant's witnesses was a union representative, Mike Zimmerman, whom the complainant attempted to question about the respondent's 2018 attendance policy. The respondent objected on the ground that the policy in question became effective after the complainant's termination, and was not the same policy under which the complainant was discharged. The complainant argued that he wanted to show a pattern of the respondent's selectively excusing attendance points for some people. The administrative law judge sustained the respondent's objection and would not allow the testimony. In his petition the complainant states that the only difference between the old attendance policy and the revised attendance policy is the number of points allowed under the policy. The complainant contends that he asked the administrative law judge to permit the testimony in order to show a pattern of granting leniency and states that he would have shown another white individual who received a courtesy attendance point reduction. The complainant should have been permitted to present that evidence.

The evidentiary and discovery rulings referenced above would provide a sufficient basis to set aside the administrative law judge's decision and remand for further proceedings. When combined with the fact that the complainant established a *prima facie* case of discrimination, and that the respondent did not offer a non-discriminatory explanation for its actions, the commission concludes that a new hearing on the merits of the case is warranted. This will give the complainant an opportunity to engage in the discovery that was denied him prior to the original hearing and to present all of the comparative evidence he has available. The complainant should be advised that the remand hearing is an entirely new hearing which does not incorporate the record from the probable cause hearing and that the

complainant's burden of proof at a hearing on the merits is higher than at a hearing on the issue of probable cause; the complainant will need to demonstrate by a preponderance of the evidence that he was discriminated against as alleged in order to prevail. *See*, *Hintz v. Flambeau Medical Center*, ERD Case No. 8710429 (LIRC Aug. 9, 1989).

cc: Attorney Christopher Johnson