**State of Wisconsin**

**Labor and Industry Review Commission**

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| **Cheryl A. Radtke**, Complainant<br><br>**Vaportek, Inc.**, Respondent<br><br>ERD Case No. CR201601894 | **Fair Employment Decision**[1]<br><br>**Dated and Mailed:**<br><br>December 30, 2022<br>radtkch_rsd.doc:164 |

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

[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 retaliated against her for engaging in conduct protected under 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 the complainant was discriminated against as alleged. 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

In the brief in support of her petition for commission review the complainant argues that an individual who has a concern about an employment right should take that concern to the employer before filing a complaint, and that this is the first step in an employee's attempt to enforce her rights. The complainant states that, if the request or demand is granted by the employer, the rights are enforced, and if the request is not granted the employee is likely to file a complaint. The complainant contends that she asserted her rights and vocalized her opposition to the respondent's illegal pay practices and was discharged mere hours later as a result. She argues that the only reasonable interpretation of these facts is that the respondent retaliated against her after she attempted to enforce her rights to overtime pay. The commission has considered the complainant's arguments, but does not find them persuasive.

The law protects the complainant from retaliation if she filed a complaint or attempted to enforce a right under Wis. Stat. § 103.02 (the statute pertaining to overtime pay) or because her employer believes she has engaged in or may engage in such activity. *See*, Wis. Stat. § 111.322(2m)(a) and (d). In this case it is undisputed that the complainant did not file a wage claim for her unpaid overtime prior to the termination of her employment. While the complainant suggests that she attempted to enforce a right by telling the respondent that she wanted to be paid for unpaid overtime hours, for purposes of the statute the phrase "attempt to enforce a right" refers to attempts to enforce a right by resort to a governmental agency and does not include informal self-help activities such as a complaining to the employer. *See*, *Roncaglione v. Peterson Builders, Inc.*, ERD Case No. 9111425 (LIRC Aug. 11, 1993)(whether the complainant was "retaliated against" for asking the employer for leave under the FMLA or for objecting in some informal fashion to the employer's denial of such leave is irrelevant because such actions are not within the scope of § 111.322(2m)). The complainant's actions in requesting that the respondent pay her for her unpaid overtime did not constitute an "attempt to enforce a right" that is covered by the statute.

To the extent the complainant is arguing that the respondent believed she may file a complaint or attempt to enforce a right under the statute, the commission can find no evidence in the record to support such a theory. In prior decisions involving this issue, in which the commission has found a violation of the statute in the absence of an explicit threat to file a complaint, the employee has given the employer some indication of his or her intention to file a wage claim, and it has been apparent from the facts that the employer believed the employee intended to take such action. *Jancik v. Advantage Learning Systems*, ERD Case No. CR200100941 (LIRC Sept. 16, 2005). Here, however, the complainant did not tell the respondent that she was considering filing a wage claim, that she had contacted an attorney, or even that she believed her legal rights had been violated. The respondent's witnesses testified that they did not believe the complainant was planning to file a wage claim, and the mere fact that the complainant told the respondent on one occasion that she wanted to be paid for her unpaid overtime hours does not, without more, lead the commission to conclude otherwise.[2]

For the reasons set forth above, the commission agrees with the administrative law judge that the complainant failed to demonstrate probable cause to believe she was discharged in retaliation for protected activity under Wis. Stat. § 111.322(2m). The dismissal of her complaint is, therefore, affirmed.

[2] The dissent indicates that the respondent's witness was not credible on the issue of whether the complainant was discharged and may well be incredible with regard to other aspects of her testimony. However, the majority's conclusion that the complainant was discharged was not based upon an assessment of credibility. The final conversation between the parties was subject to interpretation, and the majority does not specifically find that either party was untruthful in their testimony.

MARILYN TOWNSEND, Commissioner (dissenting):

I agree with the majority that the complainant did not meet her burden in a probable cause hearing to present sufficient credible evidence that the respondent violated section (a) of 111.322(2m), which protects an employee from retaliation who "files a complaint or attempts to enforce any right" under the wage and other laws.

However, unlike the majority, I would find that the complainant met her burden to demonstrate there was probable cause to find that the employer violated section (d) of 111.322(2m) that the respondent "believe[d]" that the complainant "may engage" in "attempts to enforce" her legal right to be paid for all the overtime hours she worked over a period of thirty plus years. The plain meaning of the word "may" as used in the statute simply means that that the employer believes that there is a "possibility" the employee may file a wage action against it, that it might happen, not that it believes she will or that she would file a claim. May, Black's Law Dictionary, 1172 (11th ed. 2019).

The majority's finding that the complainant did not tell the respondent "that she believed her legal rights had been violated" (p. 3 Opinion) is belied by the record. Only a few hours before she was suddenly discharged, the complainant told the respondent that she believed her legal rights to be paid her correct wages were being violated. The record reflects the following:

1. In a meeting on the morning of January 11, 2018, the respondent's general manager Schneider informed the complainant that the respondent intended to reduce her wages and change her job duties. The complainant reacted with anger and shock. She repeatedly said this is not right. She stated you cannot do this to me. She insisted that it was not legal to cut her wages, and at the same time demanded that she be paid for all the years of overtime she had worked without any compensation. It is evident that she was referencing as illegal not only the cut to her wages but the failure to pay her for years of overtime. There was no need for the complainant to again state that not paying her overtime was illegal as that had been established six months earlier when the new manager informed the complainant and the respondent that it was illegal to fail to pay overtime wages to its employees.

2. Within a few hours of the complainant's demand for all her unpaid overtime, the general manager called her into a meeting. The general manager informed her the respondent would pay her only a portion of her unpaid overtime which Schneider represented, was all that the law requires. The general manager then announced to the complainant that her services were no longer needed, and instructed

> her to turn in her key. (Tr. 37, 115). Neither the ALJ nor the Majority credit the testimony of the general manager nor the other Respondent witnesses who denied that complainant was discharged and instead claimed that she quit.

The commission does not require "magic words" in order to find cause to believe retaliation occurred. As was clear from *Brockmann v Abacus Bertz Insurance*, ERD Case No. 200801789 (LIRC May 31, 2012), (Aff'd, Dane Co. Cir. Ct., Case No. 12-CV-2596, January 9, 2013), each case depends on its particular facts and circumstances. This case has similarities to Brockmann in that there was a wage dispute, allegations of illegal wage practices, awareness by the employer of its questionable wage practices, and here (unlike in Brockmann) a discharge within hours of the complainant's demands that she be compensated for years of the employer's illegal pay practices. These facts permit, at least at this stage of the proceeding, an inference that the employer believed that the complainant "might" be planning on filing a wage claim, not a belief that she will do so.

Moreover, the majority's reliance on the testimony of the general manager who the opinion quotes as denying that she retaliated against the complainant is misplaced at this stage of the proceedings. (opinion 3). This witness has already been discredited on a key aspect of the case. Her insistence that she did not discharge the complainant was not credited. At a hearing on the merits, the complainant may well establish that this witness should not be credited on other aspects of her testimony, which could well impact the final decision.

As this commission has repeatedly stated, it will infer a discriminatory motive if the evidence from the complainant is sufficient to find that the proffered non-discriminatory reason for the separation is false. *Cole v. Greyhound Bus Lines*, ERD Case No. 200303930 (LIRC Sep. 16, 2005); *Mateski v. Nuto Farm Supply*, ERD Case No. CR200200727 (LIRC Feb. 15, 2005). In *Mateski*, the commission quotes with approval the United States Supreme Court's unanimous decision in *Reeves v. Sanderson Plumbing,* 530 U.S. 133, 147-148, 120 S. Ct. 2097 (2000). In that case Justice O'Conner wrote:

> "In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence of law that the factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt.' (Citations omitted) Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision (Citation omitted)."

Given the foregoing facts and circumstances, as well as the fact that the respondent's principal witness was not credited on a material fact, I would conclude that there is sufficient credible evidence to find that there is probable cause to find a violation occurred and refer this case to a hearing on the merits. At this point, for the purposes of a probable cause ruling there is no other reasonable explanation for this long-standing employee's sudden termination other than that the employer believed she "may engage" in "attempts to enforce" her legal right to seek complete damages to compensate her for the respondent's wage practices.

/s/

Marilyn Townsend, Commissioner

cc: Attorney William E. Morgan
Attorney Mitchell W. Quick

**Editor's Note: reversed *Radtke v. LIRC and Vaportek, Inc.*, No. 2023CV0032 (Wis. Cir. Ct. Jefferson Cnty. Jan. 15, 2024).**