State of Wisconsin

Labor and Industry Review Commission

Ariana M. Towns, Complainant **Holistic Home and Hospice**, Respondent ERD Case No. CR201801952	**Fair Employment Decision**[1] **Dated and Mailed:** February 8, 2023 townsar_err.doc:164

The decision of the administrative law judge is **reversed**. 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 History

The complainant filed a complaint of discrimination on July 12, 2018 with the Equal Rights Division (hereinafter "Division") of the Department of Workforce Development, in which she alleged that she was discharged based upon a disability, multiple sclerosis, in violation of the Wisconsin Fair Employment Act. On February 5, 2019, an equal rights officer for the Division issued an initial determination finding probable cause, and the matter was certified to a hearing on the merits. Along with the initial determination the department sent the parties a document entitled "Certification to Hearing" which stated, in part:

> If you wish to be represented by an attorney at the hearing and have not yet retained one, you should do so immediately. Please request that the attorney file a Notice of Retainer with the Hearing and Mediation Section at the address above. This will ensure that the attorney receives notice of the hearing and all other communications from the Division.

Neither party notified the Division that it was represented by counsel.

On April 10, 2019, the administrative law judge assigned to the case sent a scheduling order to the parties. The scheduling order indicated, among other things, that a witness and exhibit list was due at least 10 days prior to the hearing.

On August 21, 2019, the Division sent out a hearing notice advising the parties of an October 15, 2019 hearing. The hearing notice was accompanied by an information sheet which stated at the top:

> Please read this sheet carefully. It contains information about your rights and obligations in hearings before the Equal Rights Division.

The information sheet explained, among other things, that "Parties are expected to advise the Division as soon as they obtain an attorney." The information sheet also reiterated that the parties would need to submit their witness and exhibit lists no later than 10 days before the hearing.

Neither party provided the department with a notice of representation from an attorney or with a witness an exhibit list.

On October 8, 2019, a week before the hearing, the respondent sent an email to the administrative law judge requesting a postponement of the hearing date in order to retain counsel. The respondent explained that it had retained an attorney to represent it and just learned on October 7 that the attorney had passed away. The respondent submitted a copy of an obituary for Attorney JP Fernandes, which indicated that he died on July 16, 2019.

The administrative law judge sent the following response:

> Our office has no record of Attorney JP Fernandes ever appearing in this case. Given that he passed away three months ago, a request to postpone the hearing one week beforehand cannot be granted.

Both parties appeared at the hearing on October 15, 2019. The respondent appeared by its Director of Business Development, Clifford Taylor, but without any other witnesses. The respondent did not reiterate its request for a postponement at the hearing and the hearing proceeded.

Based on the evidence adduced at the hearing the administrative law judge found that the complainant was discriminated against because of a disability and ordered reinstatement and backpay. The respondent 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, Holistic Home and Hospice, (hereinafter "respondent"), is a business that provides personal care workers and hospice services to individuals in their homes.

2. The complainant, Ariana Towns, (hereinafter "complainant"), began working for the respondent on April 3, 2017, as an office coordinator. Her supervisor was Tessa Decker, the director of nursing services.

3. On October 5, 2017, the complainant, along with four other workers, was counseled for issues related to workplace communication, the roles of managers, and work expectations. The complainant received a counseling form which stated that, although there was no disciplinary action given, "any further disrespect, curt, or insensitive treatment of fellow peers or co-workers could result in disciplinary action; including but not limited to a formal write up." The complainant signed the counseling form.

4. On November 30, 2017, the complainant was counseled about poor work performance, including failure to complete tasks in a timely manner, poor attitude, and lack of organization/time management. The complainant was issued a written warning, which she signed, adding the comment, "mental health."

5. At some point in 2018 the complainant began suffering from a variety of symptoms including dizziness, light headedness, floaters in her eyes, and numbness in her left leg. She missed work during much of the month of May because of those symptoms.

6. On May 14, 2018, the respondent prepared an "employee warning report" which indicated that the complainant had engaged in negativity in the workplace that was causing conflict. Although the warning was marked as "final," with the consequences for further infraction being "possible termination," the complainant did not receive or sign for a copy of the warning.

7. On May 23, 2018, the complainant underwent a CT scan which revealed a "potential small left frontal white matter lesion" on her brain. The complainant was referred for an MRI.

8. On June 2, 2018, the complainant texted her supervisor, Tessa Decker, regarding her medical condition. Ms. Decker asked how the complainant was doing, and the complainant responded that she was okay, although her leg was still causing pain.

9. In another text message to Ms. Decker sent close in time to the previous text, the complainant stated:

> They did ct scan they saw white artifact or something like that could possibly be MS. . . .
>
> I will have to have MRI to see if I do have MS.

The complainant also told Ms. Decker that she was going to miss work for the rest of the week. She apologized for the absence, to which Ms. Decker responded: "Don't be sorry! . . . Schedule MRI ASAP."

10. On June 5, 2018, the complainant had an MRI which revealed "multiple bilateral subcentimeter FLAIR hyperintensities, a pattern most consistent with demyelinating lesions of multiple sclerosis."

11. On June 7, 2018, the complainant's doctor wrote a note restricting her to working half days during the week of June 11 through June 17, 2018 because of a "health condition." The complainant was released to return to work full time beginning on June 18, 2018.

12. On June 11, 2018, the complainant told Ms. Decker she had MS. Ms. Decker responded that she wanted to be sure the complainant was taking care of her health and indicated that, whatever she needed, the respondent would be there for her.

13. On June 22, 2018, Ms. Decker notified the complainant she was discharged. Ms. Decker told the complainant that she was exhibiting negativity and forgetting a lot of things. The complainant had been asked two days earlier to schedule evaluations for the respondent's personal care workers, but had not completed the task.

14. On an "Employee Separation Record" form dated the same day, but not provided to the complainant, Ms. Decker noted that the reason for the separation was:

> Negativity in the work environment
> Poor work performance – doesn't complete tasks that are assigned.
> Lack of team work.
> "Forgets" to complete/follow up with multiple assignments.
> Unable to fulfill on call needs/PLW work if needed.

Conclusions of Law

1. The complainant has failed to prove by a preponderance of the evidence that the respondent discriminated against her because of a disability, within the meaning of the Wisconsin Fair Employment Act.

Memorandum Opinion

Request for Postponement

In its petition for commission review the respondent argues that the administrative law judge abused his discretion by refusing to grant it a postponement when its attorney passed away. The respondent states that it secured legal counsel shortly after the initial determination was issued, in February of 2019. The respondent maintains that it is entitled to legal representation, that it had no obligation to notify the Division of its representative and, further, that even if it did, the attorney's error in failing to tell the Division cannot be imputed to the respondent. The respondent contends that it acted reasonably and prudently to secure legal representation and that it had good cause for requesting a postponement. It argues that it was prejudiced as a result of being forced to proceed unrepresented.

The commission does not find these arguments persuasive. While one can imagine a circumstance in which the death of a party's attorney would warrant a postponement of the hearing date, this is not such a case. Parties in Equal Rights Division hearings are not guaranteed legal representation. *Germaine v. Sussek Machine Corp.*, ERD Case No. CR201001982 (LIRC Feb. 13, 2014). The parties are advised that they may secure legal representation if they wish to do so, but that they must inform the hearing office. Here, the respondent never told the Division it was represented by counsel, although repeatedly directed to do so. While the respondent argues that this failure was its attorney's fault, errors on the part of legal counsel are imputed to the parties. *See*, *Amos v. McDonalds*, ERD Case No. CR200600319 (LIRC May 25, 2007), and cases cited therein.

In addition to the fact that the respondent failed to notify the Division it had retained counsel, the commission notes that, after allegedly retaining counsel in February of 2019, the respondent had no further contact with its attorney and did it even attempt to make such contact until a week before the October 15 hearing, too late to engage in any discovery or to file a timely witness and exhibit list. These facts call into

question the respondent's contention that it took reasonable and prudent actions to secure legal representation and that the administrative law judge unjustly denied it an opportunity to appear via legal counsel.

Further, the commission is unpersuaded by the respondent's argument that it was prejudiced by the refusal to grant a postponement because if it had had counsel it would have brought additional witnesses to the hearing. While it is undoubtedly true that an attorney would have recommended presenting a more vigorous defense, including eyewitness testimony, the lack of counsel did not prevent the respondent from presenting its case. Parties are advised when the matter is certified to hearing that they must bring witnesses who have firsthand knowledge of the facts, and even unrepresented parties are expected to comply with this directive. Although no discovery was conducted in this matter, the respondent should have known what witnesses it would need based upon the allegations contained in the complaint and the findings in the initial determination and should have made some attempt to arrange for the presence of those witnesses at the hearing. The respondent's failure to put in relevant firsthand evidence cannot be attributed solely to its lack of counsel.

Given all the circumstances, the commission believes that the administrative law judge's refusal to grant a postponement in order to permit the respondent additional time to secure an attorney was an appropriate exercise of his discretion and it declines to order a new hearing on that basis.

Merits of the Case

The complainant's burden of proof in a disability discrimination case is to show that she has a disability within the meaning of the Wisconsin Fair Employment Act (hereinafter "WFEA") and that there was an adverse employment action based upon that disability. *See, Copus v. Village of Viola*, ERD Case No. 8402007 (LIRC Dec. 10, 1987). Where, as here, the matter is before the administrative law judge on the merits--probable cause having already been found--the complainant must prove the latter by a preponderance of the evidence; i.e. that the adverse action was more likely than not because of a disability.

Section 111.32(8) of the WFEA defines the term "individual with a disability" as an individual who, (a) has a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work, (b) has a record of such an impairment; or (c) is perceived as having such an impairment. An "impairment" for purposes of the WFEA is a real or perceived lessening or deterioration or damage to the normal bodily function or bodily condition, or the absence of such bodily function or condition. *City of La Crosse Police and Fire Comm. v. LIRC*, 139 Wis. 2d 740, 407 N.W.2d 510 (1987). The test to determine whether an impairment makes achievement unusually difficult is concerned with the question of whether there is a substantial limitation on life's normal functions or on a major life activity. By contrast, the "limits the capacity to work" test refers to the particular job in question.

Further, the inquiry concerning the effect of an impairment is not about mere difficulty, but about unusual difficulty. *AMC v. LIRC*, 119 Wis. 2d 706, 350 N.W.2d 120 (1984).

Where the alleged disability is one that would not be apparent to a layperson, expert opinion must be presented on the existence, nature, extent and permanence of the impairment. *Ewing v. Kohl's Department Stores*, ERD Case No. 200901395 (LIRC July 22, 2013). To demonstrate that a disability under the WFEA exists, the complainant must present competent evidence of a medical diagnosis regarding the alleged impairment. *See*, *Connecticut Gen. Life*, 86 Wis. 2d at 407-08. However, it is not enough to simply state a diagnosis or to list symptoms. The complainant must establish through credible and competent evidence how or to what degree these symptoms made achievement unusually difficult for her or limited her capacity to work. *Doepke-Kline v. LIRC*, 2005 WI App 209, 287 Wis. 2d 337, 704 N.W.2d 605. *See*, *also*, *Smith v. Aurora Health Care*, ERD Case No. 199702722 (LIRC Aug. 25, 2000)(diagnosed mental impairment not necessarily a disability); *Ford v. Lynn's Hallmark, Inc.*, ERD Case No. CR200301184 (LIRC June 27, 2005)(diagnosis of diabetes alone insufficient to establish existence of disability).

In this case, the complainant argued that her disability was multiple sclerosis (hereinafter "MS"). In support of that argument, the complainant offered her own testimony that she was diagnosed with MS by her physician on June 7, 2018. However, the complainant did not provide medical records indicating that such diagnosis was made on June 7, or on any other date. The medical evidence in the record indicates that the complainant was evaluated for dizziness on May 23, 2018 and a CT head scan was done which showed a "potential small left frontal white matter lesion," and that on June 5, 2018 an MRI was performed which revealed a pattern of lesions "consistent with MS." A doctor's excuse dated June 7 requests that the complainant be permitted to work 50% time from June 11 through June 17 because of her "health condition" and indicates that she will be able to work full time thereafter. The doctor's excuse makes no reference to a diagnosis of MS. The only evidence in the record regarding the complainant's diagnosis was her own testimony, and no evidence was introduced to establish the "nature, extent and permanence of the impairment." *Ewing*, *supra*.

Even assuming there was sufficient evidence in the record to establish that the complainant had a diagnosis of MS and that this was a permanent condition, that would be inadequate to find a disability under the WFEA where there is nothing to indicate that MS was an impairment that makes achievement unusually difficult for the complainant or limits her capacity to work. Regarding the latter, the complainant specifically testified that MS did not interfere with her ability to do her job. She did not offer any testimony or other evidence to suggest that MS affected her major life activities in any way, let alone that it made achievement unusually difficult or substantially limited life's normal functions. Absent evidence explaining how the

impairment was disabling for the complainant, it cannot be assumed that this was the case.

In support of the conclusion that the complainant established a disability the administrative law judge cited to a commission decision, *Cave v. Milwaukee County*, ERD Case No. CR200704118 (LIRC Jan. 30, 2014), in which the commission found that an individual with a diagnosis of MS had a disability. However, the finding of a disability in *Cave* did not rely solely on the diagnosis of MS (for which the complainant presented a doctor's note and not just her own testimony), but was based primarily on the fact that the complainant presented medical evidence which indicated that she was diagnosed with rheumatoid arthritis and had permanent work restrictions as a result. Thus, *Cave* had both elements that are lacking here: a documented medical impairment and proof that it limited her ability to perform the job.

Having concluded that the complainant failed to demonstrate she has a disability within the meaning of the Act, the commission has also considered whether the complainant could be covered under the Act on the basis of a "perceived" disability. Wis. Stat. § 111.32(8)(c). The commission concludes she cannot.[2] To establish a claim for discrimination on the basis of a perceived disability, a complainant must show that she was perceived as having an impairment, that the impairment was perceived as making achievement unusually difficult or limiting her capacity to work, and that she was discriminated against because of her perceived disability. *Erickson v. LIRC*, 287 Wis. 2d 204, 217, 704 N.W.2d 398 (WI App 2005). The complainant has made no such showing in this case.

The complainant testified that on June 11, 2017, she told her supervisor, Tessa Decker, about her "situation" including that "they found she had MS." Accepting that as true--since Ms. Decker was not at the hearing dispute it--a question arises as to whether Ms. Decker perceived the complainant's MS as a permanent impairment that made achievement unusually difficult or limited her capacity to work. The commission can locate no evidence in the record that would support such a conclusion. The complainant testified that she told Ms. Decker "everything that was going on," but did not elaborate on that testimony and did not contend that she provided any information that would have led Ms. Decker to believe that she was limited in her ability to perform the job or to engage in major life activities. Although the complainant missed quite a bit of work in May and in the first part of June, at the

[2] The dissenting commissioner indicates that the commission's finding that the complainant was not discriminated against based upon a perceived disability does not comport with the parties' rights to notice and due process because the issue was not addressed by the administrative law judge or the parties. However, the hearing notice indicated that a hearing would be held to determine whether the respondent violated the WFEA, sec. 111.31 – 111.395, Stats., by terminating the complainant's employment because of disability. As such, the hearing notice clearly encompassed that the complainant must prove that she is an individual with a disability under one of the three statutory definitions, which includes a "perceived" disability. *See*, Wis. Stat. § 111.32(8).

time of her discharge she was released to return to work full time with no restrictions and was apparently doing so without any difficulty. Given the lack of work restrictions and the absence of any evidence to suggest that the complainant informed the respondent that her MS interfered with her ability to accomplish her major life activities, there is no basis to assume that the respondent concluded that the complainant's MS was a disabling condition.

The complainant disagrees with this analysis and suggests that there are two pieces of evidence showing that the respondent regarded her MS as interfering with her ability to work. The first is the complainant's testimony that Ms. Decker told her she was discharged in part because she was "forgetting a lot of things." However, while in her complaint the complainant stated, "If you look up MS you will note that forgetfulness does not just all of the sudden occur," which seems to suggest a belief that the respondent erroneously attributed her alleged forgetfulness to MS, there is no evidence on this point in the record. The complainant presented nothing to indicate whether or not MS might cause forgetfulness and there is no basis to presume that Ms. Decker attributed the complainant's conduct in "forgetting a lot of things" to her MS diagnosis.

The second piece of evidence, and the evidence on which the administrative law judge primarily relied in his decision, is a statement contained in the Employee Separation Record that the complainant was "unable to fulfill on-call needs/PCW work if needed." The administrative law judge concluded that this was an "apparent reference" to the complainant's MS. The commission considers that finding to be speculative, as there is nothing in the record to explain what the statement in question was referring to; the record contains no evidence with respect to what type of on-call work was required, what the complainant's availability was for such work, or why she may have been unavailable. Assuming that the complainant was unavailable for on-call work, this could have been for reasons completely unrelated to her health. While the administrative law judge noted that the complainant had missed a substantial amount of work in May of 2018, she ultimately returned to work full time with no restrictions, and the commission can see no basis to presume that any limitations on her ability to work on call were related to her MS or that the respondent believed this to be the case.

Even if the evidence would permit a conclusion that the respondent perceived the complainant as having a disability--and the commission wishes to emphasize that it does not believe such a conclusion is warranted--it would be far from clear that the respondent discriminated against the complainant on that basis. The undisputed evidence indicates that the complainant's supervisor was very supportive of her while she was experiencing adverse health symptoms, and it does not appear that there was any animus or bias against the complainant on the basis of her illness. Further, the respondent provided a number of reasons for the discharge that were clearly and undeniably unrelated to a diagnosis of MS, including negativity and the failure to work as part of a team. While the administrative law judge questioned some prior

disciplinary notices that the respondent entered into the record because the complainant disputed them and they were not signed,[3] at least some of the comments contained in the separation notice addressed performance criticisms that were shown to have pre-dated the complainant's claimed MS diagnosis and which she does not contend were related to MS.

Finally, it should be noted that, even if the commission were to conclude that the respondent's reasons for discharge are questionable, that fact alone would not compel a finding of discrimination. The complainant has the ultimate burden of persuasion in a discrimination case, and a showing that the respondent's reason is pretextual does not necessarily require a conclusion that it was a pretext for discrimination. *Kovalic v. DEC International*, 186 Wis. 2d 162, 167-68, 168, 469 N.W.2d 224 (Ct. App. 1994). Stated differently, doubts about the truthfulness of the respondent's explanation for the discharge do not necessarily warrant a conclusion that the discharge was for prohibited reasons. "It is not adequate for a complainant to present evidence which simply raises the suggestion or the possibility that a prohibited motivation was at work. A complainant bears the burden of demonstrating by a preponderance of the evidence that the respondent's actions were based upon prohibited factors." *Connor v. Heckel's*, ERD Case No. 199600406 (LIRC Sept. 27,1999). While the complainant's evidence in this case might arguably be sufficient to warrant a finding of probable cause--and it is weak even by that standard--it clearly does not establish by a preponderance of the evidence that discrimination occurred. The finding of discrimination is, accordingly, reversed, and the complaint is dismissed.

NOTE: The commission consulted with the administrative law judge about witness credibility and demeanor prior to reversing. The administrative law judge reiterated the credibility observations he raised in his memorandum opinion, but had no demeanor impressions to impart.

[3] In her brief to the commission the complainant states that those documents were "falsified after the fact." However, while the respondent may not have given a copy of the documents to the complainant at the time they were prepared, the commission sees no basis to conclude that the documents were fabricated.

MARILYN TOWNSEND, Commissioner (dissenting):

I agree with the majority that the complainant did not meet her burden to prove an actual disability under the disability discrimination statute. But I disagree with that part of the majority decision which finds that the complainant was not discriminated against based on a perceived disability. This issue was not addressed by the administrative law judge in his decision, nor by the parties. Under such circumstances, I believe deciding whether discrimination occurred based on a perceived disability does not comport with the parties right to notice and due process. I would remand the case to the administrative law judge with instructions that the parties and the administrative law judge address whether the respondent violated section (c-) of Wi. Stat. 111.322(8), which protects an employee from discrimination who "[i]s perceived as having such an impairment."

/s/

Marilyn Townsend, Commissioner

cc: Attorney Stephen L. Fox