

State of Wisconsin



Labor and Industry Review Commission

Shellie D. Locke, Complainant

Fair Employment Decision<sup>1</sup>

Advocate Aurora Health Care, Inc.,  
Respondent

Dated and Mailed:

ERD Case No. CR201802228  
EEOC Case No. 26G201801230C

June 30, 2023

lockesh\_rsd.doc:111

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 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. 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.

### **Memorandum Opinion**

This case concerns the complainant's allegations that the respondent discriminated against her based upon her race, color, and creed when it failed to accommodate her religious observance of the sabbath, asked her to expand the scope of her practice, failed to promote her, discharged her, and did not immediately consider her for an open position. The administrative law judge found no probable cause to believe that discrimination occurred, and the commission agrees.

The complainant argues in her petition for review that the employment contract she signed with the respondent allows her to define her own scope of practice based on her training, education, and experience and prevents the respondent from requiring her to see patients that she deems inappropriate based on that scope of practice. She further argues that she agreed not to see patients over the age of 64 when she obtained her psychology license and that her license therefore does not allow her to see such patients. However, she did not provide her employment contract or any documentation to support her assertions that her license contained restrictions based on a patient's age. In contrast, the respondent provided evidence establishing that the complainant was hired as a general psychologist and was expected to see patients of any age as the respondent's business required. It also provided evidence that the complainant's license did not have any restrictions and allowed her to see patients of any age.

The complainant also argues in her petition that the administrative law judge's decision does not adequately address the respondent's conduct in not requiring providers of other races (Caucasian and Asian) to expand their scope of practice, while she was required to do so. The respondent provided credible testimony that all the providers on rotation with the complainant to provide consults to inpatients at the hospital already provided consults for patients regardless of the patient's age. The complainant was therefore asked to expand her scope of practice for these inpatient consults to match the scope of practice of her colleagues. On the outpatient side of the complainant's practice, there was only one other similarly situated employee, Dr. Bons. Other employees referenced by the complainant were either psychiatrists, part-time providers, or employees working at other clinics. Dr.

Bons did not refuse patients based on their age. Therefore, there was no expansion of her scope of practice necessary. Further, the respondent provided credible evidence that it had a business need for the complainant to expand her scope of practice with outpatients and that it offered additional training, education, and shadowing opportunities to the complainant to allow her to develop any skills she felt she needed to meet this requirement. The complainant provided no evidence that the request to expand her scope of practice was related to her race, color, or creed.

Turning to the issue of religious accommodation, the complainant argues in her petition that the respondent's consultation-liaison schedule, which required her to be on call for seven days at a time to perform consults at a hospital, was "an affront to Sabbath Rest in God for [her as a] Christian Psychologist." However, the complainant did not demonstrate a need for an accommodation for her religious observance or practice. While on call, she was required to respond to a call for a consultation within 24 hours. When she raised this issue with the respondent, it replied that the on-call requirement was unlikely to interfere with the complainant's observance of the sabbath because any calls that came in on Sunday could be handled early Monday, after the end of the sabbath. The complainant provided no evidence of any instances during her more than five years of employment for the respondent in which a consult request came in at a time that did not allow her to complete the consult within the respondent's 24-hour requirement but outside of her observance of the sabbath.

The complainant also raises a variety of concerns regarding the manner in which the hearing was conducted. First, the complainant argues in her petition that the administrative law judge inappropriately made findings related to the complainant's supervisor's intent and asserts it is impossible for the administrative law judge to know another person's heart and mind. However, making findings related to the intent of the individuals involved is a necessary part of an administrative law judge's work. The commission has reviewed these findings and concludes they are supported by the record. The complainant also references a determination from the Wisconsin Department of Workforce Development related to her eligibility for unemployment insurance benefits and argues the administrative law judge should have considered it. However, that determination is not part of the record of this case. Further, a decision as to whether an employee is eligible for unemployment insurance benefits is not relevant to, admissible in, or binding on this proceeding. *See Wis. Stat. § 108.101(1).*

Finally, the complainant contends that the administrative law judge made an erroneous finding of fact when she found that the complainant's supervisor did not tell the complainant that she would not be considered for the open pediatric clinical neuropsychologist position if she did not accept the action plan designed to assist her in expanding her scope of practice or voluntarily resign. The complainant

testified that her supervisor made this comment, but the supervisor testified she did not make any such comment. The complainant further argues that another witness should have been called to corroborate her side of the story. However, the complainant did not call that witness at the hearing or subpoena the witness to appear at the hearing. Nothing in the record indicates her opportunity to do so was limited. Faced with conflicting testimony, the administrative law judge made a credibility determination and credited the supervisor's testimony. The administrative law judge conducted the hearing and was in a good position to determine witness credibility. The commission sees no reason in the record to question the administrative law judge's credibility determination.

For the reasons set forth above, the commission concludes that the complainant failed in her burden of establishing probable cause to believe that she was discriminated against in the manner alleged. The dismissal of the complaint is, therefore, affirmed.

cc: Attorney Brigid Misfeldt  
Attorney Casey Kaiser