

State of Wisconsin



Labor and Industry Review Commission

Susan Schott, Complainant

Lake Geneva Animal Hospital,
Respondent

ERD Case Nos. CR202000313 and
CR202001147

Public Accommodation Decision

Dated and Mailed:

August 29, 2023

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The parties' petitions for review are **dismissed**. Accordingly, this matter is returned to the Equal Rights Division for further proceedings.

By the Commission:

/s/

Michael H. Gillick, Chairperson

/s/

Georgia E. Maxwell, Commissioner

/s/

Marilyn Townsend, Commissioner

Procedural History

This case has a lengthy procedural history, most of which is adequately summarized in the administrative law judge's decision. For purposes of this appeal, the relevant procedural events began on February 10, 2022, at which time, while the matter was awaiting a hearing on the issue of probable cause, the respondent filed a Motion For Sanctions in which it requested a finding that the complainant's claims were frivolous, along with dismissal of the claims and an award of attorney's fees and costs. On August 25, 2022, the administrative law judge issued a decision denying the respondent's motion on the grounds that it was premature. The administrative law judge indicated that the respondent could renew its motion at the close of the probable cause hearing.

A hearing on the issue of probable cause was held on September 14, 2022, with written closing arguments to be submitted thereafter. The respondent submitted its closing arguments on October 21, 2022. On the same day, it submitted a renewed Motion For Sanctions. The administrative law judge gave the complainant 30 days in which to respond to the respondent's motion. The complainant's response was received on November 21, 2022.

On April 24, 2023, the administrative law judge issued a decision captioned "Decision On Motion For Sanctions." However, notwithstanding the title, and although the administrative law judge specifically noted in the decision that the respondent had renewed its Motion For Sanctions after being advised by the administrative law judge that it could do so, the administrative law judge failed to make any findings with respect to the motion. Instead, the decision addressed the merits of the complainant's public accommodations claims and found that the complainant had failed to establish probable cause to believe discrimination occurred.

Both parties have filed timely petitions for commission review of the administrative law judge's April 24, 2023 decision. The complainant challenges the administrative law judge's finding that she failed to establish probable cause, while the respondent requests that the administrative law judge's decision be affirmed, but supplemented to include additional findings granting its Motion for Sanctions and awarding appropriate relief.

Memorandum Opinion

Wisconsin stat. § 227.483 gives Division administrative law judges the discretion to award costs and fees to a respondent for time spent responding to a frivolous equal rights complaint. The statute provides, in relevant part:

- (1) If a hearing examiner or the tax appeals commission finds, at any time during the proceeding, that an administrative hearing commenced or continued by a petitioner or a claim or defense used by a party is frivolous, the hearing examiner or tax appeals commission

shall award the successful party the costs and reasonable attorney fees that are directly attributable to responding to the frivolous petition, claim, or defense.

(2) If the costs and fees awarded under sub. (1) are awarded against the party other than a public agency, those costs may be assessed fully against either the party or the attorney representing the party or may be assessed so that the party and the attorney each pay a portion of the costs and fees.

(3) To find a petition for a hearing or a claim or defense to be frivolous under sub. (1), the hearing examiner must find at least one of the following:

(a) That the petition, claim, or defense was commenced, used, or continued in bad faith, solely for purposes of harassing or maliciously injuring another.

(b) That the party or the party's attorney knew, or should have known, that the petition, claim, or defense was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification, or reversal of existing law. . . .

The respondent has asked the commission to supplement the administrative law judge's decision with an order granting its Motion for Sanctions and awarding its costs and fees. However, per the statute, the administrative law judge must make findings supporting the award of such relief. The commission has no authority to make its own findings under Wis. Stat. § 227.483 and it cannot conduct a *de novo* review of that issue. Instead, the commission reviews the administrative law judge's ruling on the request. See, *Reed v. Heiser Ford, Inc.*, ERD Case No. 200504107 (LIRC May 31, 2013), and *Kutschenreuter v. Roberts Trucking, Inc.*, ERD Case Nos. 200501465 and 2005014 (LIRC April 21, 2011). Where, as here, the respondent requested the administrative law judge to order sanctions based on an argument that the complainant's complaint was frivolous, but the administrative law judge did not rule on the respondent's motion, the commission has no option but to remand the matter to the administrative law judge so that she may do so.

The commission has considered whether, in the meantime, it may review the complainant's petition with respect to the no probable cause finding, but concludes that it cannot. The Division's rules with respect to appeals to the commission provide:

(1) APPEALS LIMITED TO FINAL DECISIONS AND ORDERS. Any party may file a written petition for review of a final decision and order of the administrative law judge by the labor and industry review

commission. *Only final decisions and orders of the administrative law judge are appealable. A final decision is one which disposes of the entire complaint and leaves no further proceedings on that complaint pending before the division.*

Wis. Admin. Code § DWD 218.21 (emphasis added).

The decision finding no probable cause disposed of the complaint on the merits, but left further proceedings pending before the Division. As indicated above, the question of whether the respondent can prevail on its Motion For Sanctions was raised before the administrative law judge, and has not yet been resolved. Because the administrative law judge's decision does not dispose of the entire matter, but leaves proceedings pending, the commission is unable to consider the complainant's petition with respect to the issue of probable cause.

For the reasons set forth above, this matter is returned to the Division so that the administrative law judge who held the hearing can hold an evidentiary hearing on the issue of frivolousness, if warranted,¹ and issue a decision addressing the respondent's Motion for Sanctions. Once a decision has been issued with respect to the respondent's motion, the parties will have an opportunity to file a petition for review by the commission of the entire matter, including with respect to the issue of probable cause.

cc: Attorney Janel Bergsbaken
Attorney Gavin Wardzala

¹ See, *Reed v. Heiser Ford, Inc.*, ERD Case No. 200504107 (LIRC May 31, 2013), for a discussion about the circumstances in which further hearing may be necessary.