

State of Wisconsin



Labor and Industry Review Commission

Yolanda Eason
Complainant

City of Milwaukee
Respondent

ERD Case No. 202102258
EEOC Case No. 26G202200056C

Fair Employment Decision

Dated and Mailed:

August 29, 2023
easonyo_rsd.doc:164

The decision of the administrative law judge and the preliminary determination are **set aside**, and the matter is **remanded** to the Division for an investigation and initial determination on the issue of probable cause and for such further proceedings as may be warranted.

By the Commission:

/s/

Michael H. Gillick, Chairperson

/s/

Georgia E. Maxwell, Commissioner

/s/

Marilyn Townsend, Commissioner

Procedural History

On October 20, 2021, the complainant filed a complaint alleging that the respondent discriminated against her, in violation of the Wisconsin Fair Employment Act (hereinafter "Act"). On the front page of the complaint form the complainant was instructed to check a box or boxes showing the reason for the discrimination. The complainant checked the box "disability" and, in the blank next to it, wrote that her disability was "medical restrictions and end my long term disability with them." In the narrative portion of the complaint the complainant indicated that she was "on long term disability 9/2020-9/17/2021 for covid/pneumonia/lung surgery." The Division accepted the complaint.

On November 3, 2021, the complainant informed the Division that she had retained counsel. The following day her attorney filed a notice of retainer.

On November 29, 2021, the respondent submitted a position statement in which it argued that, assuming the complainant has a disability within the meaning of the Act, she was not discriminated against as a result. The respondent contended that the complainant was on Family and Medical Leave Act leave beginning in March of 2020 and was ultimately cleared to return to work in August of 2020 with certain medical restrictions extending until August of 2021. The respondent explained that it referred the complainant to its Disabled Employee Placement Program in October of 2020. It maintained that in May of 2021, at which point the complainant had apparently not yet returned to work, she provided updated medical restrictions which indicated she could return to work in June of 2021 with restrictions lasting three months. The respondent contended that the complainant began a new position with the respondent in September of 2021 but was discharged a month later due to performance issues. The respondent submitted a number of documents in support of its assertions.

That same day, the equal rights officer assigned to the complaint sent the complainant's attorney an email notifying him that she would be conducting an investigation of the complaint. The equal rights officer provided the complainant's attorney with a copy of the respondent's response and supporting documents and requested a response. In addition, she asked the complainant's attorney to provide information showing that the complainant had a permanent medical condition and explaining why he believed disability was a factor in her discharge. In an email dated December 7, 2021, the complainant's attorney asserted that the complainant returned to work with a "certified disability" and that, because of her disability, was told that she was a safety risk and was terminated from her current employment. In a separate, follow-up email dated December 11, 2021, the complainant's attorney stated, "After she returned to work from a long term disability. . . she returned to her old job of ten years, with a temporary disability that needed to be accommodated. . ." Finally, in a third email, dated January 27, 2022, the complainant's attorney stated,

“she had returned to work . . . with a temporary disability. . . but still she was told by her supervisor that because of her disability he did not want her doing the job. . .”

On March 29, 2022, the Division’s equal rights officer issued a preliminary determination dismissing the complaint for lack of jurisdiction. The equal rights officer reasoned that the complainant had alleged a medical condition that was temporary in nature and not a permanent impairment and, therefore, she did not have a disability and was not covered under the statute.

The complainant filed an appeal of the preliminary determination. In her appeal she argued that it is not lawful to discharge someone with a temporary disability and, further, that her supervisor specifically told her he did not want her with a disability. The respondent filed a response in which it argued that the Act only covers permanent impairments and that the only medical evidence in this case identified restrictions that were temporary in nature. In a letter dated June 6, 2022, the complainant replied that the Division’s analysis that she is not covered because she was only temporarily disabled is suspect, given that she still suffers from the same disability. The complainant further argued that the respondent did not question whether she was permanently or temporarily disabled at the time it discharged her.

On March 14, 2023, an administrative law judge issued a decision affirming the finding of no jurisdiction. The administrative law judge did so without holding a hearing, reasoning that the complainant had alleged only a temporary impairment, which does not constitute a disability for purposes of the Act. The administrative law judge further held that the complainant did not establish that the respondent’s decisionmakers perceived her as having a disability and noted that the medical notes provided to the respondent indicated that her impairment was temporary.

The complainant filed a timely petition for commission review of the administrative law judge’s decision.

Memorandum Opinion

In her petition for commission review the complainant argues that she has a permanent disability that she has been dealing with in some form for over ten years. She argues that if her case had been allowed to proceed to a hearing the evidence would show that she has recently been informed that, after another operation on her wrist, her diagnosed disability has worsened. The complainant also reiterates her earlier contention that her supervisor told her she was being discharged because she has a disability. The commission has considered these arguments and has reviewed the case file and procedural history of this matter. Based on its review, the commission concludes that this matter was improperly resolved on the basis of lack of jurisdiction, and it has remanded the matter to the Division for further proceedings.

The Division's rules provide that the department shall review every complaint filed to determine all of the following:

- (a) Whether the complainant is protected by the act.
- (b) Whether the respondent is subject to the act.
- (c) Whether the complaint states a claim for relief under the act.
- (d) Whether the complaint was filed within the time period set forth in the act, if that issue is raised in writing by the respondent.

Wis. Admin. Code § DWD 218.05(1).

The rules state that the department shall issue a preliminary determination dismissing any complaint, or any portion of a complaint, that fails to meet the requirements of sub. (1). Wis. Admin. Code § DWD 218.05(2). The rules further provide that, with exceptions that are not relevant here, the department shall investigate all complaints that satisfy the review under Wis. Admin. Code § DWD 218.05(1). *See*, Wis. Admin. Code § DWD 218.06(1).

In this case, there has been no allegation that the respondent is not subject to the Act, that the complainant's allegation that she was discriminated against based upon a disability when the respondent refused to provide her with an accommodation and terminated her employment did not state a claim for relief under the Act, or that the complaint was not filed in a timely manner. Thus, the only remaining question is whether the complainant is protected by the Act.

This is not a situation in which the complainant has alleged that she was discriminated against on a basis that is not covered by the Act, such as because of her political beliefs or union membership, in which case dismissal of the complaint because the complainant was not protected by the Act would clearly be warranted. Rather, this is a case in which the complainant alleged that she is an individual with a disability, a protected status under the Act. *See*, Wis. Stat. §§ 111.32(8) and 111.321. However, an equal rights officer for the Division--after conducting the type of investigation that the rules provide should occur once a determination has been made that the complainant is covered by the Act--decided that the complainant does not have a disability for purposes of the Act. Instead of issuing a no probable cause determination based on a conclusion that the complainant did not establish she is an individual with a disability, the equal rights officer instead invoked Wis. Admin. Code § 218.05(1)(a) to dismiss the matter on a jurisdictional basis.

The commission's research has not revealed any other case in which a complaint was dismissed on jurisdictional grounds based upon a complainant's failure to establish that he or she has a disability covered under the Act. Rather, it appears that those cases are almost always resolved on the issue of probable cause. *See, for example, Buck v. 4imprint, Inc.*, ERD Case No. CR201702777 (LIRC May 31, 2022)(initial

determination found no probable cause based in part on the fact that the complainant presented no evidence indicating that he had an impairment that made achievement unusually difficult or limited his capacity to work). The commission takes the view that resolving such issues on the basis of probable cause rather than for lack of jurisdiction is the correct approach.

A determination that someone is or is not an individual with a disability for purposes of the Act generally requires a factual inquiry, and the instant case is no exception. While the complainant indicated in her complaint that she took a leave of absence and returned to work with only short term restrictions, other contentions made by the complainant and her attorney suggest that the complainant did, indeed, have a long-term disability or at least was alleging that this was the case. Further, the complainant has consistently asserted that the respondent perceived her as having a disability. A finding that the respondent was presented with only temporary work restrictions does not necessarily require a conclusion that there was no perceived disability, and such allegation warrants further investigation. Finding a lack of jurisdiction where the complainant has alleged protected status under two separate theories--both actual and perceived disability--is not appropriate. Further, the commission notes that, while the courts have held that an impairment must be permanent in order to constitute a disability, the statute is silent on this point and does not contain such requirement. To find a lack of jurisdiction based upon an interpretation of the statute--which, it is worth noting, the complainant in this case specifically challenges as incorrect--is not a proper exercise of the Division's authority.

For the reasons set forth above, the commission remands this matter to the Division to complete its investigation and issue an initial determination on the issue of probable cause. The commission further notes that, in the event a no probable cause determination is issued and the complainant chooses to file an appeal, a hearing on the question of probable cause would be warranted given the fact intensive nature of the allegations. *See, Williams v. State of Wisconsin DVR*, ERD Case No. CR201300928 (LIRC June 8, 2017).

cc: Attorney Katherine A. Headley