State of Wisconsin

Labor and Industry Review Commission

Rosalinda Garza, Complainant **Koenig Concrete Corp.**, Respondent ERD Case No. CR201902530 EEOC Case No. 26G2012000021C	**Fair Employment Decision**[1] **Dated and Mailed:** October 30, 2023 garzaro_rsd.doc:101

The decision of the administrative law judge is **affirmed**, subject to modification Accordingly, the commission issues the following:

Order

1. *Time within which respondent must comply with Order.* The respondent shall comply with all of the terms of this Order within 30 days of the date on which this decision becomes final. This decision will become final if it is not timely appealed, or, if it is timely appealed, it will become final if it is affirmed by a reviewing court and the decision of that court is not timely appealed.

2. That the respondent shall cease and desist from discriminating against the complainant because she opposed a discriminatory practice by the respondent.

3. That the respondent, if it has not already done so, shall offer the complainant reinstatement to a position substantially equivalent to the position she held prior to her separation from employment following the constructive discharge. This offer shall be tendered by the respondent or an authorized agent and shall allow the complainant a reasonable time to respond. Upon the complainant's acceptance of such

[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.

position, the respondent shall afford her all seniority and benefits, if any, to which she would be entitled but for the respondent's unlawful discrimination, including sick leave and vacation credits.

4. That the respondent shall make the complainant whole for all losses in pay the complainant suffered by reason of its unlawful conduct by paying the complainant the amount she would have earned as an employee, including pension, health insurance and other benefits, from July 10, 2019, the date of the constructive discharge, until such time as the complainant resumes employment with the respondent or would have resumed such employment but for her refusal of a valid offer of a substantially equivalent position. The back pay for the period shall be computed on a calendar quarterly basis with an offset for any interim earnings during each calendar quarter.[2] Any unemployment insurance or welfare benefits received by the complainant during the above period shall not reduce the amount of back pay otherwise allowable, but shall be withheld by the respondent and paid to the Unemployment Compensation Reserve Fund or the applicable welfare agency. Additionally, the amount payable to the complainant after all statutory set-offs have been deducted shall be increased by interest at the rate of 12 percent simple. For each calendar quarter, interest on the net amount of back pay due (i.e., the amount of back pay due after set-off) shall be computed from the last day of each such calendar quarter to the day of payment. Pending any and all appeals from this Order, the total back pay will be the total of all such amounts.

5. That the respondent shall pay the complainant $6,757.86 in out-of-pocket medical expenses, consisting of unpaid medical bills. A check in that amount shall be made payable jointly to the complainant and her attorneys' law firm, HawksQuindel, S.C., and delivered to that firm.

6. That the respondent shall pay to the complainant reasonable attorney's fees and costs incurred in pursuing this matter in the total amount of $82,970.75.[3] A check in that amount shall be made payable jointly to the complainant and her attorneys' law firm, HawksQuindel, S.C., and delivered to that firm.

7. That within 30 days of the date on which this decision becomes final, the respondent shall file with the commission a Compliance Report detailing the specific actions it has taken to comply with this Order. The Compliance Report shall be

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[2] The administrative law judge calculated the amount of $7,805.20 was due in backpay as of January 1, 2021. See complainant's exhibit 8. This amount has not been challenged on review before the commission.

[3] Although the amount claimed in fees and costs was challenged before the administrative law judge, the reduced amount she awarded for representation through the date of her order ($72,929.75 in fees and $2,200.86 in costs) has not been challenged before the commission. The amount claimed for representation before the commission is $7,840 in fees. The commission has reviewed the fees and costs awarded by the administrative law judge, and those claimed for representation before the commission (see below), and found the fees and costs as awarded to be reasonable.

prepared using the "Compliance Report" form which has been provided with this decision. The respondent shall submit a copy of the Compliance Report to the complainant at the same time that it is submitted to the commission. Within 10 days from the date the copy of the Compliance Report is submitted to the complainant, the complainant shall file with the commission and serve on the respondent a response to the Compliance Report.

Notwithstanding any other actions a respondent may take in compliance with this Order, a failure to timely submit the Compliance Report required by this paragraph is a separate and distinct violation of this Order. The statutes provide that every day during which an employer fails to observe and comply with any order of the commission shall constitute a separate and distinct violation of the order and that, for each such violation, the employer shall forfeit not less than $10 nor more than $100 for each offense. *See,* Wis. Stat. §§ 111.395, 103.005(11) and (12).

By the Commission:

/s/

Michael H. Gillick, Chairperson

/s/

Georgia E. Maxwell, Commissioner

Procedural Posture

This case is before the commission to consider the complainant's allegation that the respondent retaliated against her because she opposed discrimination in the workplace, in violation of 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. The respondent 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, except that it makes the following:

Modification

The administrative law judge's Order is deleted and replaced with the Order set forth on pages 1 through 3 of this decision.

Memorandum Opinion

The issue in this case is whether the respondent retaliated against the complainant because she opposed discrimination in the workplace. *See,* Wis. Stat. § 111.322(3). To establish unlawful retaliation under the state fair employment act, an employee must prove that he or she engaged in a protected activity, that he or she was subject to an adverse employment decision, and that there is a causal connection between those two facts. *Kannenberg v. LIRC*, 213 Wis. 2d 373, 395, 571 N.W.2d 165 (Ct. App. 1997). If the employee makes that showing, the employer may rebut the claim of retaliation by articulating a non-discriminatory reason for its action. *Id.* If the employer articulates a non-discriminatory reason, the employee may still prevail by presenting evidence that the proffered non-discriminatory reason was a pretext. *Id.*

The term "opposed" in this context has been used to describe informal "self-help" activities in opposition to a practice of an employer without actual resort to a government agency. *Pampuch v. Bally's Vic Tanny Health and Raquetball Club*, ERD Case Nos. 9350083 and 9253152 (LIRC Mar. 9, 1994). It is not necessary for the employee to have been objectively "right" about a belief that an action opposed was prohibited discrimination, as long as some test of reasonableness and good faith is met. *Nortaro v. Kotecki & Radtke, S.C*, ERD Case No. 8902346 (LIRC July 14, 1993). In this case, there is no dispute that the complainant engaged in a protected activity under Wis. Stat. § 111.322(3), when she complained to the respondent about the treatment of another worker with a Hispanic accent whose offer of employment had been rescinded after the respondent's co-owner questioned the proper completion of an I-9 form.

The complainant contends that, following that complaint, she was subject to an adverse employment action because she was constructively discharged by the

respondent. The respondent asserts that the complainant was not subject to adverse actions or a constructive discharge, and that it acted without discriminatory intent. It also asserts that some of the administrative law judge's findings of fact are not supported by the record, including the legal conclusion that the complainant was constructively discharged.

To establish a constructive discharge, an employee must prove that "due to a discriminatory reason, working conditions are rendered so difficult or unpleasant that a reasonable person would feel compelled to resign." *Waedekin v. Marquette Univ.*, ERD Case No. 8752240 (LIRC Mar. 5, 1991). Stated another way, a constructive discharge occurs when an employer makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation. *Dingeldein. v. Village of Cecil*, ERD Case No. 199503536 (citing *Bartman v. Allis Chalmers Corporation*, 99 F.2d 311, 314 (7th Cir. 1986), cert. denied, 107 S. Ct. 1304 (1987)). Typically, where a complaint procedure is in place through which an employee can reasonably expect appropriate remedial action, a complainant will not be compelled to resign until after he or she has tried the complaint process, unless remaining in the job confronts the complainant with an aggravated situation. *Rhyner v. Veterinary Medical Services*, ERD Case No. CR201301582 (LIRC Feb. 25, 2016).

In this case, the complainant invoked the respondent's procedure for remedial action. At the ensuing meeting, the respondent presented the complainant with a document that contained a space for her signature, and that set out detailed reasons why none of her complaints were valid. In attendance at that meeting was a friend of one of the respondent's owners, chosen by the respondent to offer a "neutral" perspective. The "neutral" read the respondent's document aloud, then informed the complainant that her complaints were merely the consequence of a "difference in culture." The "neutral" further advised the complainant that Wisconsin follows the employment-at-will doctrine under which she could be fired by the respondent at any time.[4] The "neutral" also told the complainant that she could easily find another job as the state unemployment rate was low.

The complainant reasonably believed that signing the document which categorically rejected her claims was a condition of continued employment. Again, the respondent presented the document to the complainant during the meeting to discuss her complaints, and, after reading the document aloud, the respondent's "neutral" informed the complainant that her complaints were not evidence of discrimination and that the respondent could terminate her employment at any time under the state's at-will doctrine. The respondent evidently expected the document (which included a space for notarization of the complainant's signature) to serve some purpose. Under the facts of this case, if the respondent intended the document to

[4] In its brief, the respondent emphasizes that the complainant was told that the at-will doctrine operated to allow her to leave her employment voluntarily. However, the record is clear that she was also told that her respondent could discharge her at any time under the at-will doctrine.

serve a purpose other than as a condition of continued employment, it should have so informed the complainant, instead of advising her through the "neutral" that she could be fired at any time under the employment-at-will doctrine. Failing to do so created an aggravated situation supporting the conclusion that, unless the complainant signed the document rejecting any basis for her complaints, her employment would not continue or, at the very least, would be so difficult or unpleasant that a reasonable person would feel compelled to resign.

In sum, the commission is satisfied that the complainant has met the legal standard for a constructive discharge. The complainant has thus shown that she was subject to an adverse employment action, and that there is a causal connection between that adverse action and her complaint of employment discrimination. Further, after reviewing the record, including the complainant's credible testimony, the commission has adopted the administrative law judge's findings, including the findings that the respondent asserted were unsupported.

Remedies

In its petition, the respondent contends that the complainant failed to provide sufficient evidence to support her claim for medical expenses. However, she provided an itemization of the claimed expenses and testified that, if she had remained employed, her insurance coverage through the respondent would have paid the expenses less deductibles and copays. As the complainant points out, this nearly mirrors the proof found sufficient to support a medical expense award in *Bodoh v. US Paper Converters Inc.*, ERD Case No. 9432221 (LIRC Nov. 14, 1995), *aff'd sub nom. U.S. Paper Converters, Inc. v. LIRC*, 208 Wis. 2d 523, 561 N.2d 756 (Ct. App. 1997).

The respondent also suggests that the complainant failed to mitigate her medical expense claim by purchasing medical insurance. However, the source of the complainant's duty to mitigate is Wis. Stat. § 111.39(4)(c). *See, Anderson v. LIRC*, 111 Wis. 2d 245, 253-54, 330 N.W.2d 596 (1983). *See also, U.S. Paper Converters*, 208 Wis. 2d at 526. That section provides that "[i]nterim earnings or amounts earnable with reasonable diligence by the person discriminated against … shall operate to reduce back pay otherwise allowable." It does not impose a burden on the complainant to buy medical insurance to mitigate medical expense claims.

Finally, the respondent asserts the fee requested by the complainant's attorney associated with responding to the petition for review was excessive, challenging both the hourly rates and the time spent in preparing the brief to the commission. The rates charged by the complainant's attorneys are supported by affidavits from other attorneys of equivalent experience, which the complainant's counsel submitted with the fee request made to the administrative law judge. The respondent offers no competing affidavits supporting lower rates. Regarding the time spent, while many of the issues before the commission were briefed to the administrative law judge,

those issues were, in some instances, more fully developed before the commission. In short, the commission concludes that the hours charged by the complainant's counsel for drafting and reviewing the brief to the commission are reasonable, as are the hourly rates charged.

MARILYN TOWNSEND, Commissioner (concurring):

I write separately because, although I concur in the result and analysis reached by the majority that discrimination occurred, I would draw the parties' attention, to §227.54, Wis. Stat., which provides:

> The institution of the proceeding for review shall not stay enforcement of the agency decision. The reviewing court may order a stay upon such terms as it deems proper, except as otherwise provided in ss. 196.43, 253.06, and 448.02 (9).

/s/

Marilyn Townsend, Commissioner

cc: Attorney Aaron Halstead
Attorney Michael Kruse