

State of Wisconsin



Labor and Industry Review Commission

<p><b>Donna Walther</b>, Complainant</p> <p><b>School District of Altoona</b>, Respondent</p> <p>ERD Case No. CR201700553 EEOC Case No. 26G201700589C</p>	<p><b>Fair Employment Decision<sup>1</sup></b></p> <p><b>Dated and Mailed:</b></p> <p><u>October 30, 2023</u> walthdo_rsd.doc:149</p>
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The decision of the administrative law judge is **affirmed**. Accordingly, the complainant's complaint is dismissed.

By the Commission:

/s/

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Michael H. Gillick, Chairperson

/s/

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Georgia E. Maxwell, Commissioner

/s/

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Marilyn Townsend, Commissioner

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<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 allegations that the respondent discriminated against her on the basis of age, and for opposing a discriminatory practice, all in violation of the Wisconsin Fair Employment Act (hereinafter "Act"). An administrative law judge for the Equal Rights Division (hereinafter the "Division") of the Department of Workforce Development held a hearing and issued a decision finding no probable cause to believe that the complainant was discriminated against as alleged. The complainant 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 upon 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**

The complainant's petition for commission review consists primarily of responses to each of the factual findings and conclusions of law in the administrative law judge's decision and includes several legal arguments in support of her contention that the respondent discriminated against her. Her petition also contains a full recitation, in chronological order, of the events leading to her ultimate separation from employment with the respondent. The commission has considered each of the complainant's arguments and will address the most significant of them in turn.

The complainant begins by arguing that the administrative law judge's findings of fact and memorandum opinion were too brief and did not give sufficient weight to several significant facts which were testified to during the hearing but omitted from the final decision. She specifically argues that the administrative law judge failed to address two allegations: that the respondent denied four employees, all of whom were over the age of 50, the opportunity to apply for new positions for which they were qualified, and that, from 2013 to 2017, the respondent's hiring records show that it hired individuals under the age of 40 over 90% of the time. The complainant contends that these two factual allegations support a finding that the respondent's actions had a disproportionately negative impact on older workers such as herself.

Wisconsin Stat. § 227.47(1) provides that an administrative law judge's findings of fact shall consist of a "concise and separate statement of the ultimate conclusions upon each material issue of fact without recital of evidence." The statute does not require that the administrative law judge's decision provide a detailed account as to the resolution of all the evidence offered at the hearing. All that is required is that the administrative law judge adequately explain the basis for the decision. *Paskiewicz v. Marshfield Clinic*, ERD Case No. CR201001727 (LIRC June 27, 2014) (citing *Patterson v. City of Milwaukee Dept. of Health*, ERD Case No. 9150465 (LIRC Apr. 20, 1993)). Further, findings not explicitly made by the administrative law judge may be inferred from other properly made findings or from the evidence in the record. *Polesky v. United Brake Parts*, ERD Case No. 9250821 (LIRC Aug. 30, 1996). The

commission has conducted an independent review of the evidence presented at the hearing and, while the commission has declined to adopt the factual findings proposed by the complainant in her petition, it has nonetheless considered the entirety of the record before it, including the two specific allegations referenced by the complainant. However, the commission is satisfied that the administrative law judge's decision adequately sets forth the factual basis for the conclusion that there was no probable cause to believe that the complainant was discriminated against as alleged in her complaint.

In her petition the complainant also asserts that the administrative law judge improperly failed to consider her allegations of discrimination that occurred prior to April 28, 2016, and argues that her allegations are timely under a continuing violation theory. The administrative law judge did address the complainant's complaints of harassment in her decision and ultimately found that there was no probable cause to believe that she was harassed based upon her age, in violation of the Act. The commission agrees that the complainant's complaints of harassment are timely and it has considered the entirety of the record with respect to those complaints, including those events occurring prior to April 28, 2016. However, for reasons discussed later in its opinion, the commission agrees with the findings and conclusions of the administrative law judge with respect to the complainant's complaints of harassment.

Next, the complainant disagrees with the administrative law judge's conclusion that she failed to establish probable cause to believe she was retaliated against for opposing a discriminatory practice. A claim of retaliation first requires that the complainant show that he or she has engaged in some statutorily protected act; in this case, the protected act is having opposed a discriminatory practice. However, to be protected under the Act, the complainant's opposition must have been recognizable to and recognized by the employer as involving a claim of employment discrimination. *Norton v. City of Kenosha*, ERD Case No. 9052433 (LIRC Mar. 16, 1994). *See also Crook v. County of Vernon*, ERD Case No. CR200100052 (LIRC Feb. 23, 2004) ("If an employer does not know that an employee has made a complaint of discrimination it obviously cannot be motivated by such knowledge in the conduct it undertakes."). In this case, the complainant notified the respondent that she believed she was being "targeted" based on her status as a specialist teacher and not because of her age or inclusion in any other legally protected class. While in her petition the complainant explains that she used the word "targeted" because she wanted to avoid accusing the respondent of age discrimination, the fact remains that the respondent would have had no reason to understand that the complainant was alleging she had been discriminated against based upon her age.

Finally, the complainant argues that she did not voluntarily retire from her employment with the respondent; rather, she maintains that the respondent repeatedly harassed her and created a hostile work environment that forced her to resign as a result, thereby rendering her separation from employment a constructive discharge. In order to establish a constructive discharge, the complainant must

demonstrate that her working conditions were so intolerable due to a discriminatory reason that she was compelled to quit. *Lamont v. Nelson Global Products*, ERD Case Nos. 201302178 & 201401347 (LIRC June 10, 2019) (citing *Powell v. Salter*, ERD Case No. 199601071 (LIRC July 11, 1997)). Here, it is clear from the record that the complainant's work was extremely challenging and that she was subjected to disrespectful treatment by her superintendent. However, the complainant failed to establish that her working conditions rose to the level of intolerability necessary to find a constructive discharge. Further, the complainant failed to demonstrate that the respondent's actions were motivated by the complainant's age. Notably, the actions of the respondent's superintendent, who the complainant alleges harassed and bullied her, were not limited to those over the age of 40. Because the superintendent treated everyone similarly, regardless of age, the complainant failed to show that the respondent harassed her because of her age, in violation of the Act.

The commission has considered the complainant's various remaining arguments but does not find them persuasive. Because the commission agrees that the complainant failed to establish probable cause to believe that she was discriminated against in the manner alleged in her complaint, the commission affirms the administrative law judge's decision.