

State of Wisconsin



Labor and Industry Review Commission

Ibiyemi Akua Oladunjoye Ogboni,
Complainant

MATC, Respondent

ERD Case No. CR201800510
EEOC Case No. 26G201800533C

Fair Employment Decision

Dated and Mailed:

November 29, 2023

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The decision of the administrative law judge is **set aside** and the matter is **remanded** to the Equal Rights Division of the Department of Workforce Development on the issue of probable cause or, if so stipulated by the parties, on the merits of the case.¹

By the Commission:

/s/

Michael H. Gillick, Chairperson

/s/

Georgia E. Maxwell, Commissioner

/s/

Marilyn Townsend, Commissioner

¹ The commission recognizes that a significant amount of time has passed since this complaint was filed. For that reason, and in the interest of judicial economy, the parties should be afforded a specific opportunity to stipulate to a hearing on the merits, as provided for in Wis. Admin. Code § DWD 218.08(3).

Memorandum Opinion

The complainant filed a complaint with the Equal Rights Division (hereinafter “Division”) of the Department of Workforce Development alleging that she was sexually harassed by her supervisor and subjected to retaliation for opposing discrimination in the workplace in violation of the Wisconsin Fair Employment Act. An administrative law judge for the Division held a hearing at which the complainant attempted to present testimony and documentary evidence in support of her claims. After the hearing, the administrative law judge issued a decision finding no probable cause to believe the complainant was subject to discrimination. A timely petition for review was filed.

In her petition for commission review, the complainant disputes some of the facts found by the administrative law judge and argues that the administrative law judge failed to allow her witnesses to provide their full testimony. The commission has reviewed the record of the case including a synopsis of the hearing and, based on its independent review, it agrees with the complainant that the administrative law judge improperly limited the evidence she could present such that she was prevented from developing a record that may have supported a finding of probable cause.

The administrative law judge limited witness testimony regarding the way the complainant was treated by her supervisor. He indicated that the complainant needed to present evidence comparing the way she was treated to the way male coworkers were treated and that evidence comparing her treatment to that of female coworkers was not relevant. (Synopsis pp. 13-15). However, the complainant’s claim is that she refused a sexual advance from her (female) supervisor and was subsequently subjected to negative treatment because of that refusal. The complainant’s evidence comparing her treatment to that of her coworkers who did not refuse a sexual advance from the supervisor (whether those coworkers were male or female) is relevant and should have been admitted. Additionally, evidence related to the negative treatment the complainant alleges she was subjected to because of her refusal of a sexual advance from her supervisor is also relevant and should have been admitted.²

The complainant also attempted to enter into evidence a note written by her first witness and provided to the administrative law judge and opposing counsel prior to the hearing as a potential exhibit. However, the administrative law judge dismissed the witness before the complainant questioned the witness about the document. The

² The commission notes that the respondent has raised the statute of limitations in this matter. However, it appears the complainant has alleged a continuing course of conduct that began more than 300 days before the complaint was filed but extended into the limitations period. Any evidence related to behavior that is part of a pattern of discrimination that continues from outside the limitations period into the limitations period can be considered part of a continuous violation of the Fair Employment Act if the behavior is closely related and, therefore, may be admitted. *See Talley-Ronsholdt v. Marquette University*, ERD Case No. 199804190 (LIRC Feb. 13, 2001).

complainant was ultimately not permitted to enter the document into evidence on the grounds that it was not relevant without background information. (Synopsis pp. 19-21, 45). The complainant was not represented by an attorney at the hearing and it is clear from the record that she struggled to form appropriate questions for her witnesses and did not know how to lay the foundation for the introduction of documents. The administrative law judge did not adequately assist her in obtaining relevant testimony, which would have included testimony about the note at issue. Had she been able to admit this document and take testimony from the witness about it, it may have provided evidentiary support for a portion of her claim.

In addition, the administrative law judge limited testimony and cross-examination related to the complainant's allegation that her supervisor denied leave requests as part of a pattern of negative treatment related to her sexual harassment claim, stating that the complaint did not include anything about the denial of leave requests. (Synopsis pp. 106-110, 114-115). However, this issue is clearly referenced in the complainant's complaint as part of the negative treatment she alleges she was subjected to due to her refusal to submit to her supervisor's sexual advance. This evidence was therefore improperly excluded.

The commission also notes that the administrative law judge improperly limited testimony with regard to the respondent's asserted nondiscriminatory reason for discharging the complainant – her attendance. The complainant argues in her petition that her absences did not exceed what was allowed by the respondent's policy and suggests the respondent's stated reason for discharge was a pretext for discrimination. Although the complainant provided some testimony to support this argument, the administrative law judge limited the complainant's ability to cross-examine the respondent's witnesses about the respondent's attendance policy and her absences, thereby preventing her from establishing that the respondent's explanation for the discharge was pretextual. The commission believes that any evidence that the complainant's absences should not have counted against her or that her attendance did not warrant discharge under the respondent's policy is relevant and should have been permitted.

Finally, the complainant argues in her petition that the administrative law judge was biased against her. One comment made at the end of the first hearing day supports this view. The administrative law judge stated, according to the synopsis (pp. 72-73):

Just to note, I don't do, in almost any case, dismissals at the close of the Complainant's case, I view that Respondent – that what the commission's position does is put an onus on response counsel to figure out what testimony they need to present. So whatever the situation is, we have a full record and so that they have the choice of either finding probable cause or affirming.

This comment suggests that the administrative law judge had already decided he would not find probable cause before the complainant had completed presenting her case and may have affected his handling of the hearing and decisions about what evidence would be admitted.

An administrative law judge has the authority to regulate the course of the hearing. Wis. Stat. § 227.46(1)(e). However, there can be such a thing as overregulation. *Sharon Roberge v. Department of Agriculture, Trade and Consumer Protection*, ERD Case No. CR 200303360 (LIRC May 31, 2005). In *Roberge*, a case involving a similar situation, the commission indicated that:

The complainant should be given an opportunity to tell her story and to explain why she believes she was discriminated against in violation of the law. Although an administrative law judge may reasonably act to rein in a witness who has strayed too far off topic, the administrative law judge should avoid controlling the hearing with such a heavy hand that the complainant leaves the hearing room feeling, as the complainant did in this case, that she was not afforded her day in court.

In this case, the complainant may well have enough evidence to support a finding of probable cause had she been given a chance to tell her story. However, because of the way in which the administrative law judge chose to control the hearing, the complainant's evidence was not fully presented and is not available in the record for the commission to use as a basis for its decision. A conclusion that the complainant's supervisor's comment regarding a relationship was sexual in nature, that the supervisor made the alleged comment related to the complainant's filing of a complaint with the respondent's human resources staff, or that the respondent's asserted reason for discharging the complainant was false could support a finding of probable cause. Because the commission believes that the hearing did not result in a record sufficient to permit such findings, it concludes that the best course is to remand this matter for a new hearing before a different administrative law judge.