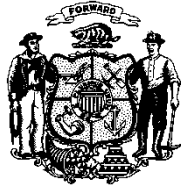


State of Wisconsin



Labor and Industry Review Commission

D. Scott Ayler, Complainant

County of Milwaukee - House of
Corrections, Respondent

ERD Case No. CR202001013
EEOC Case No. 26G202000758C

Fair Employment Decision¹

Dated and Mailed:

February 28, 2024

aylderdsd_rsd.doc:101

The decision of the administrative law judge is **affirmed**. Accordingly, the complainant's complaint is dismissed with prejudice.

By the Commission:

/s/

Michael H. Gillick, Chairperson

/s/

Georgia E. Maxwell, Commissioner

/s/

Marilyn Townsend, Commissioner

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>.

Procedural Posture

This case is before the commission to consider the complainant's allegation that the respondent discharged or otherwise discriminated against him in violation of the Wisconsin Fair Employment Act (hereinafter "Act"). An administrative law judge for the Equal Rights Division of the Department of Workforce Development held a hearing and issued a decision. The complainant 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.

Memorandum Opinion

Wisconsin cases recognize two distinct theories in cases of disability-based employment discrimination: disparate treatment and refusal to accommodate. *Wingra Redi-Mix Inc. v. LIRC*, 2023 WI App 34, ¶50, 408 Wis. 2d 563, 993 N.W.2d 715. The complainant raises both theories in this case, asserting that the respondent engaged in the following prohibited acts of employment discrimination:

- (1) the respondent terminated his employment because of his disability; and
- (2) the respondent failed to accommodate his disability and failed to engage in the required interactive process with respect to an accommodation for his disability.²

The commission concludes that the respondent did not engage in a prohibited act of employment discrimination on either of those grounds.

1. Termination because of disability

The first claim identified above is based on a disparate treatment theory. To prevail, the complainant must show that the respondent terminated his employment because of his disability. *Wal-Mart Stores, Inc. v. LIRC*, 2000 WI App 272, ¶9, 240 Wis. 2d 209, 621 N.W.2d 633; *see also Wis. Bell, Inc. v. LIRC*, 2018 WI 76, ¶32, 382 Wis. 2d 624, 914 N.W.2d 1. As the administrative law judge found, however, the respondent did not terminate the complainant's employment because of his disability. Rather, the respondent discharged the complainant for lying about whether he had received

² The complainant also asserts that the respondent discharged him in unlawful retaliation "for his efforts to initiation the interactive process in order to request a reasonable accommodation for his disability." The January 27, 2021 initial determination found no probable cause regarding that claim and dismissed that part of the complaint. That dismissal became final when the complainant withdrew his appeal of the initial determination's findings of no probable cause. The retaliation claim thus was not addressed by the administrative law judge in the decision now before the commission, and it shall not be further addressed by the commission in this appeal.

training on how to open and populate certain tabs or screens on the respondent's Correction Management System (CMS) program.

The CMS program is a computer program that, among other things, tracks the location and movement of inmates within the Milwaukee County House of Correction. It also allows officers to sign or log inmates in and out of specific locations. In early to mid-March 2020, the complainant was trained by field training officer Wilhelm about how to use the CMS program, including loading and populating certain required tabs or screens, as part of his duties. On March 19, 2020, after the complainant received that training, another training officer, Alvey, observed the complainant using the CMS program without opening or populating the required tabs or screens while monitoring inmates in a dormitory. Alvey then asked the complainant if he had been trained by Wilhelm about how to open and populate the required tabs or screens on the CMS program. The complainant responded that he had not. At this point, Alvey asked Wilhelm to participate in the discussion. The complainant again stated that Wilhelm had not trained him about how to open and populate the required tabs on the CMS program, then stated that if he had been trained he did not recall it, or words to that effect. In subsequent questioning by another officer, Gonzalez, the complainant first denied receiving the training at issue from Wilhelm, then gave contradictory responses to Gonzalez on further questioning on the point.

At hearing, the complainant testified that Wilhem did not show him how to open or populate the required tabs in the CMS program before his March 19, 2020 discussion with Alvey. The complainant further asserts that his responses on questioning by Alvey and Gonzalez were not actually inaccurate or contradictory. He testified that those officers asked him differently-worded questions regarding who had trained him and when, and that he always gave an accurate response.

The administrative law judge found the testimony of Alvey, Wilhelm, and Gonzalez more credible on this point. The commission, after a careful review of the record, shares that credibility assessment. That is, the commission concludes that Wilhelm trained the complainant about the use of CMS program, including opening and populating the requires screens or tabs, and that the complainant lied to Alvey and Gonzalez when he said that Wilhelm did not provide that training.

In addition to Wilhelm's credible testimony that he provided the training at issue, the record contains a "Milwaukee County House of Correction Daily Observation Report" that identifies the complainant as "trainee" and Wilhelm as "FTO" or field training officer. It further documents "20 minutes R.T. log[g]ing inmates out of CMS. Highlighting cheat sheets going over screens." Exhibit R-15, page ERD151. The daily observation report states further:

On Wednesday, March 18th, 2020 CO Ayler was training in Q6 dorm. Ayler continues to have issues on CMS, specific[ally] log[g]ing people out, creating events, log[g]ing people back in. He forgets which screens to use for specific tasks. 20 min. RT.

The report also indicates that “RT” stands for remedial training. It is dated March 18, 2020, and it bears the complainant’s signature.

Three other daily observation reports likewise mention remedial training on the CMS program, including, particularly, logging inmates in and out. Exhibit R-15, pages ERD143, ERD145, and ERD147. Each of these reports indicates that Wilhelm was the complainant’s field training officer. Each was dated before the complainant’s March 19, 2020 conversation with Alvey in which the complainant denied being trained by Wilhelm regarding opening and populating the required tabs of the CMS program used to track the location of inmates within the Milwaukee County House of Correction. Each bears the complainant’s signature. These reports all corroborate Wilhelm’s testimony that he provided the complainant with the training at issue.

The complainant testified that he did not know whether or not he actually signed the March 18, 2020 daily observation report at exhibit R-15, page ERD150. He testified further that his signature might have been added to the document by Photoshop because it did not bear his badge number. The other relevant daily observation reports at exhibit R-15, pages ERD143, ERD145, and ERD147, likewise do not include the complainant’s badge number. Again, however, the complainant did not affirmatively testify that he did not sign the daily observation report at exhibit R-15, page ERD150, but instead testified that he did not know if he had. On this record, the commission declines to conclude that the respondent fraudulently added the complainant’s signature to that document or any other.

The complainant next asserts the reason that the respondent gave for discharging the complainant, lying to his training officers, was pretextual. He points to a March 20, 2020 memo from Gonzalez to his superior, Assistant Superintendent Rugaber. Exhibit R-14, pages ERD140-ERD141. That memo concludes:

It is my professional opinion that Officer Ayler is not a good fit at the House of Corrections as a Correction Officer. He continues to try to find ways to be excused from the physical aspects of the job.

Gonzalez also raised a “fitness for duty issue” in an email to the complainant. Exhibit R-18, page ERD162. However, Gonzalez did not make the decision to discharge the complainant. The decision to terminate the complainant’s employment rested solely with the superintendent at the time, Hafemann. Moreover, the complainant’s disability did not require accommodation at the time of his discharge, when he was still engaged in field training or facility training. The record also indicates that the

complainant had been reassured by training officers that any needed accommodation for his shoulder condition would be addressed in the future, when his training progressed to the more physical jailor's academy (or jailer certification) portion of his training. As discussed below, Gonzalez himself offered to have the complainant speak with other training officers regarding accommodation of his disability during the jailor's academy training. The complainant has failed to prove that the reason offered by the respondent given for his discharge, dishonesty to superiors about his training (which the commission concludes was proven on this record), was merely a pretext for a discharge based on disability. *See Puetz Motor Sales, Inc. v. LIRC*, 126 Wis. 2d 168, 172, 376 N.W.2d 168 (Ct. App. 1985).

In sum, the record establishes that the complainant was discharged for lying about his training on the CMS program. The record also amply supports the conclusion that the respondent expects honesty at all times from its corrections officers. The commission is persuaded that the respondent has not only articulated, but in fact has proven, a legitimate, nondiscriminatory reason for the complainant's termination from employment. The respondent did not terminate the complainant's employment because of disability.

2. Failure to accommodate or engage in the "interactive process"

The complainant also contends that the respondent failed to accommodate his disability and refused to engage in the "interactive process" to identify a reasonable accommodation.

The complainant's arguments regarding accommodation center on his concerns that he would be unable to perform duties required of him in the jailor's academy portion of his training. Again, he was assured by training officers that accommodation of his disability would be addressed when he reached that phase of his training. Further, the respondent provided credible testimony that the complainant would not have begun the jailor's academy training until several weeks after his discharge. At the time of his discharge, the complainant was undergoing field training or facility training, and no accommodations were required for the complainant to perform those duties.

Of course, the complainant did anticipate that he would eventually need an accommodation to do his work. To that end, he asked Gonzales to provide a video of the jailor's academy training that could be reviewed by his doctor. Gonzalez denied the request, but added: "[w]hat I can do for you is have you come down to training and the instructors can give you an idea of what you will be required to do in Jailors." *See* exhibit R-18, page ERD163. The complainant views Gonzalez's response as a failure to accommodate his disability or, at very least, a refusal to engage in the "interactive process" to identify a reasonable accommodation. The commission does not agree.

First, the complainant could, at the time of his discharge, perform his duties without accommodation. He had been informed by his training officers that any need for an accommodation would be addressed when his training progressed. Under these circumstances, there was no immediate refusal to accommodate; at most, the respondent simply did not address the complainant's concerns about the need for an accommodation as quickly as he wished. Second, refusing the complainant's demand for a video of the training, specifically, is not a refusal of an accommodation *per se*, even an anticipated accommodation that might arise in the future. Nor, under the facts of this case, is it a refusal to engage in the "interactive process" with respect to such an accommodation.

The "interactive process" is a concept rooted in federal law that the commission has referred to when interpreting and applying the Act. *Wingra Redi-Mix*, 408 Wis. 2d 563, ¶100. It contemplates that the employer and employee will engage in an informal give-and-take exchange of information so that it can be determined whether an accommodation is needed and what accommodation would enable a disabled employee to continue working. *Id.*, 408 Wis. 2d 563, ¶99. Clearly, the term contemplates both interaction and a process: it does not mean that that an employer must immediately accede to an employee's unilateral demand. Moreover, the commission has previously held that the failure to engage in an interactive process does not, on its own, constitute a violation of the Act. *Schulz v. Wausau School District*, ERD Case No. CR200703495 (LIRC Apr. 30, 2012).

In this case, the record establishes that the employer, though its training officers, did provide the complainant with at least some idea of what his duties during the jailor's academy phase of his training would entail. Gonzalez also offered to have the training officers who actually conducted the jailor's academy training speak with the complainant to provide more detail. The complainant may have believed a video would have been more helpful to his doctor in eventually giving an opinion regarding the complainant's anticipated need for an accommodation with respect to the jailor's academy training, but there is no evidence that the complainant's doctor had actually requested a video. Just as an employee cannot necessarily expect to receive the accommodation he or she most prefers, *Smith v. Wisconsin Bell Inc.* (AT&T), ERD Case No. CR200800434 (LIRC Apr. 19, 2012), an employer does not automatically fail to engage in the interactive process by failing to provide whatever information an employee seeks in the medium he or she prefers.

In short, the complainant has not proven that the respondent actually failed to engage in an interactive process regarding the complainant's anticipated need for accommodation. Nor, given the credible evidence in the record that the jailor's training phase of the complainant's employment would not begin for several weeks, can failing to immediately provide a video on the complainant's demand be viewed as breakdown in the interactive process. Finally, even if there was failure to accommodate or breakdown in the interactive process, it would have little or no

significance in this case. As set out above, the respondent discharged the complainant for a non-pretextual, legitimate nondiscriminatory reason entirely unrelated to the complainant's disability many days before the complainant would begin duties that might require accommodation.

cc: Attorney Alan C. Olson
Attorney Melinda S. Lawrence