

State of Wisconsin



Labor and Industry Review Commission

Susan Shott, PhD
Complainant

Lake Geneva Animal Hospital
Respondent

ERD Case Nos. CR202000313 and
CR202001147

Public Accommodation Decision¹

Dated and Mailed:

April 30, 2024
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The decision of the administrative law judge is **affirmed**. Accordingly, the complainant's complaint is dismissed without sanctions.

By the Commission:

/s/

Michael H. Gillick, Chairperson

/s/

Georgia E. Maxwell, Commissioner

/s/

Marilyn Townsend, Commissioner

¹ **Appeal Rights:** See the pink 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 denied her the full and equal enjoyment of a place of public accommodation based upon her sexual orientation, in violation of the Wisconsin Public Accommodation and Amusement Law (hereinafter "WPAAL"). An administrative law judge for the Equal Rights Division of the Department of Workforce Development held a hearing and issued a decision finding no probable cause to believe that discrimination occurred and, further, denying a motion by the respondent for sanctions based upon an assertion that the complainant's complaint was frivolous. Both parties have filed timely petitions for commission review of that decision, the complainant based upon the no probable cause finding, and the respondent based upon the adverse ruling on the motion for sanctions.²

The commission has considered the petitions 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, with the following:

Modification

Wherever the word "sexuality" appears in the decision it is deleted and the term "sexual orientation" is substituted therefor.³

Memorandum Opinion

Discrimination allegation

In the brief in support of her petition for commission review the complainant argues that the undisputed facts are more than sufficient to prove discrimination. The complainant asserts that the facts show that, prior to learning that she was bisexual, the respondent welcomed her into its clinic and allowed her into the back room of the animal hospital. She further asserts that no one ever communicated that the respondent's staff had complaints about her prior to learning of her protected status. She contends that, within days of learning of her sexual orientation--which occurred in the context of her telling one of the respondent's veterinarians that she loved her--the respondent limited the veterinarians she could see and that, after the complainant sent a letter objecting to this, she was told that the respondent would no longer provide her with veterinary services. Moreover, the

² The complainant also alleged that she was retaliated against for having filed a complaint under the WPAAL. However, an administrative law judge dismissed that claim on the ground that it was not covered by the statute, and the complainant has not requested review by the commission of that issue.

³ In her petition the complainant correctly notes that the term referenced in Wis. Stat. § 106.52(3)(a)1. is "sexual orientation," not "sexuality." The commission has modified the administrative law judge's decision to reflect this.

complainant maintains that, although she never threatened or sexually harassed anyone, the respondent took the additional steps of notifying the police that she was a dangerous threat and heightening security at the clinic. The complainant argues that the above-referenced facts show that the respondent denied her the equal enjoyment of a place of public accommodation based upon her sexual orientation.

The commission has considered the complainant's arguments, but does not find them persuasive. As acknowledged by the complainant in her brief, the complainant told one of the respondent's veterinarians, Dr. Kate Stratton, that she was in love with her. While this information may have put Dr. Stratton on notice that the complainant was bisexual (or, in any event, not heterosexual), there is no reason to conclude that the respondent took any adverse action against the complainant as a result of that revelation. It was the fact of the complainant's personal romantic interest in Dr. Stratton--a matter which Dr. Stratton credibly testified made her feel very uncomfortable--and not the respondent's knowledge of the complainant's sexual orientation, that led it to inform the complainant that she could continue to bring her pets to the clinic but could no longer see Dr. Stratton. The commission can see no reason to believe that, had the complainant informed Dr. Stratton she was bisexual but not expressed a personal interest in a relationship with her, Dr. Stratton would have had any objection to continuing to work with the complainant as a client.

The respondent's subsequent decision to bar the complainant from the clinic entirely came only after the complainant sent a letter to Dr. Stratton at her home explaining that she was angry with Dr. Stratton for telling the respondent about their conversation and making what the complainant described as a "false complaint," expressing concern about Dr. Stratton's health, suggesting that Dr. Stratton would eventually find "the peace and joy that come with accepting yourself with all of your wonderful complexities," and indicating that the complainant would continue to be a good friend to her. In her letter the complainant complained about one of the owners of the clinic, Dr. Mona Hodkiewicz, whom she described as a "hateful bigot," and enclosed a copy of a separate eight-page letter addressed to Dr. Hodkiewicz in which the complainant stated, among other things, that Dr. Hodkiewicz was not competent as a veterinarian, was making false accusations against her, was discriminating against her based upon her sexual orientation by limiting the veterinarians she could see at the clinic, and that if she was not permitted to see veterinarians in the clinic other than the clinic owners she would file a complaint. The respondent's witnesses credibly testified that they considered the contents of these letters threatening and intimidating. The respondent's owners stated that they did not base any decisions on the fact that the complainant is bisexual, and emphasized that they have professional relationships with employees and clients of a variety of sexual orientations. Based upon its review of the record as a whole, the commission is satisfied that the decision to bar the complainant from the veterinary clinic was not based upon animus towards the

complainant related to her sexual orientation but was a reaction to a specific course of conduct on the complainant's part that the respondent viewed as harassing and intimidating.

In her brief the complainant also challenges the respondent's assertion that other staff members had complained about her. She contends that, prior to learning of her sexual orientation, no one ever communicated to her that the staff had any complaints about her and points out that none of these individuals testified at the hearing. Again, the commission finds this unpersuasive. At the hearing the respondent provided the names of several staff members who had made complaints about the complainant and offered testimony regarding the nature of their complaints. The respondent was not obligated to present those individuals as witnesses at the hearing. To the contrary, the complainant had the burden of proof in this matter, and it was incumbent upon her to arrange for the presence of any witnesses she considered necessary to the presentation of her case. The commission further notes that information about complaints by other staff members, while lending support to the respondent's explanation for its actions, was not essential to a conclusion that there was no violation of the statute in this case. The complainant's behavior towards Dr. Stratton and Dr. Hodkiewicz provided ample non-discriminatory justification for the respondent's actions, whether or not other staff members had complaints.

Finally, the complainant argues that the administrative law judge was prejudiced against her. She maintains, among other things, that the administrative law judge refused to permit her to submit two sworn affidavits, and that the administrative law judge did not give sufficient weight to her testimony and refused to consider facts that were in her favor. She further contends that the administrative law judge provided "cover" for the respondent when it was unable to identify individuals who had complained about the complainant by providing it with a long recess during which it could fabricate evidence. These arguments lack merit. The administrative law judge correctly noted that firsthand, in-person testimony is preferable to written affidavits, and the commission agrees with the administrative law judge's decision to exclude the affidavits in favor of the best evidence, the complainant's firsthand testimony. It is the administrative law judge's job to listen to the testimony of the various witnesses, to assess their credibility, and to make findings of fact based upon that testimony. The fact that the administrative law judge did not credit all of the complainant's testimony or afford it the weight the complainant believes it was due is not evidence of bias on her part. Finally, with regard to the allegation that the administrative law judge provided "cover" for the respondent, the record indicates that the respondent requested that the complainant not be permitted to question it about the identity of employees who had complained about her, and the administrative law judge called a five-minute recess in order to give herself time to consider that request. The administrative law judge ultimately concluded that the complainant could ask her questions, and she required the

respondent to provide the names of the employees who complained. Nothing about that interaction suggests bias against the complainant. To the contrary, the administrative law judge specifically allowed the complainant to pursue the line of questioning she chose, notwithstanding the respondent's objections.

The commission has considered the remaining arguments raised by the complainant in her petition, but finds them similarly unpersuasive. Because the commission agrees with the administrative law judge that the complainant failed to establish probable cause to believe she was discriminated against in the manner alleged, the dismissal of her complaint is affirmed.

Motion for sanctions

On February 10, 2022, prior to the hearing in this matter, the respondent filed a motion for sanctions. On or about August 25, 2022,⁴ the administrative law judge issued a decision denying the motion for sanctions, but indicating that the respondent could renew its motion at the close of the probable cause hearing. In denying the motion, the administrative law judge explained that there were disputed issues of material fact and that the information she had before her did not support a finding that the complainant's claim was frivolous. Thereafter, a hearing was held on the issue of probable cause. At the close of the hearing the respondent renewed its motion for sanctions. The administrative law judge ordered the respondent to do so in writing and gave the complainant an opportunity to respond. After receiving the submissions from the parties, the administrative law judge concluded that, for many of the reasons set forth in her original order, the motion for sanctions was denied. The administrative law judge went on to explain that the burden of proof is a high one, and that the respondent had not shown that the complainant commenced this action for purposes of harassing or maliciously injuring it or that she should have known her claim was without any reasonable basis in law or equity. Further, the administrative law judge indicated that it is not evident there was no basis for the complainant's claim that she was denied the full and equal enjoyment of the respondent's clinic due to her sexual orientation.

The respondent has petitioned for commission review of the administrative law judge's order. The respondent makes an argument that no reasonable person, let alone a reasonable attorney, would have commenced this action. It maintains that it should have been obvious to the complainant that her conduct, not her sexual orientation, fueled the respondent's decisions. The respondent further contends that the complainant's complaint was filed in bad faith in the context of ongoing harassing conduct on her part. It argues that the statutory standard has been met

⁴ The administrative law judge's original decision denying the motion contains no date stamp, and the commission relies on the date referenced in the administrative law judge's current decision to determine when that decision was issued.

and that the commission should find that the complaint was frivolous and award it costs and attorney's fees associated with defending against the complainant's claim.

The respondent's argument fails. The commission was not given authority to make its own findings under Wis. Stat. § 227.483, the provision allowing an award of sanctions attributable to responding to a frivolous claim, and therefore cannot conduct a *de novo* review of the issue of whether sanctions should or should not be imposed. Rather, the commission reviews an administrative law judge's decision whether to impose sanctions for making a frivolous claim according to an "abuse of discretion" standard. *Reed v. Heiser Ford, Inc.*, ERD Case No. 200504107 (LIRC May 31, 2013). Under the abuse of discretion standard, the question is whether the administrative law judge "examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." *Reed*, citing *Loy v. Bunderson*, 107 Wis. 2d 400, 415, 520 N.W.2d 175 (1982); *Paytes v. Kost*, 167 Wis. 2d 387, 393, 482 N.W.2d 130 (Ct. App. 1992).

The commission sees no reason to conclude that the administrative law judge abused her discretion in deciding that no sanctions were appropriate, nor has the respondent argued that this was the case. Although the administrative law judge did not hold a separate hearing on the issue of sanctions, the information provided during the probable cause hearing was sufficient to permit a conclusion that the complaint was not shown to have been filed in bad faith or that it was without any reasonable basis in law or equity.⁵ The commission believes that conclusion was adequately explained in the administrative law judge's decision and that it was one a reasonable administrative law judge could reach.

cc: Attorney Janel Bergsbaken
Attorney Gavin Wardzala

⁵ To find a petition for a hearing or a claim or defense to be frivolous under sub. (1), the hearing examiner must find at least one of the following:

(a) That the petition, claim, or defense was commenced, used, or continued in bad faith, solely for purposes of harassing or maliciously injuring another.

(b) That the party or the party's attorney knew, or should have known, that the petition, claim, or defense was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification, or reversal of existing law.

Wis. Stat. § 227.483(3).