

State of Wisconsin



Labor and Industry Review Commission

Timothy L. Hoeller, Complainant

Fair Employment Decision¹

Milwaukee Area Technical College,
Respondent

Dated and Mailed:

ERD Case No. CR201901920
EEOC Case No. 26G201901240C

May 24, 2024

hoellti_rsd.doc:164

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

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

The complainant filed a complaint with the Equal Rights Division (hereinafter “Division”) of the Department of Workforce Development alleging that he was discriminated against based upon disability, age, opposition to discrimination in the workplace, and his arrest and conviction record, all in violation of the Wisconsin Fair Employment Act (hereinafter “Act”). The complainant also alleged that the respondent used an employment application that implied or expressed discrimination based upon arrest record. An equal rights officer for the Division issued an initial determination finding no probable cause on all bases. The complainant filed a timely appeal and the matter was certified to hearing. An administrative law judge for the Division held a hearing and issued an order dismissing the complaint. The complainant has filed a timely petition for commission review of that decision and the matter is now before the commission.

Memorandum Opinion

The complainant requested a hearing to present evidence establishing that he was discriminated against by the respondent when it denied him hire into three different positions for which he had applied. During the hearing the complainant testified on his own behalf, but presented no witnesses nor any supporting documentation. At the close of the complainant’s case-in-chief the respondent made a motion to dismiss the complaint on the ground that the complainant had not stated a *prima facie* case of discrimination. The administrative law judge granted the respondent’s motion and dismissed the complaint.

The commission has repeatedly cautioned against dismissal of a complaint prior to presentation of the respondent’s case. *See, Dieterich v. Lindengrove, Inc.*, ERD Case No. 200503499 (LIRC Dec. 29, 2008), *and cases cited therein*. “In all but the clearest and most unambiguous of circumstances, the best practice is to require the respondent to go forward with its case so that the fact-finder may consider all of the relevant evidence.” *Roberge v. Department of Agriculture, Trade and Consumer Protection*, ERD Case No. CR200303360 (LIRC May 31, 2005). Dismissal at the close of the complainant’s case is only appropriate where there is no way in which the complainant could prevail, even if what he asserts occurred is accepted as true. This case is one of the rare instances in which such mid-hearing dismissal is warranted.

At the hearing the complainant argued that he was denied hire for a quality engineering position based upon his membership in a professional society called the “American Society for Quality.” Even if the complainant could establish that he was discriminated against on that basis, membership in a professional organization is not a protected status that is covered under the Act. Therefore, dismissal of that claim was appropriate.

The complainant further alleged that he applied for a position as a part-time music instructor with the respondent, but was discriminated against based upon his age,

disability and conviction record. However, the complainant conceded that this would be difficult to prove because the respondent did not interview anyone or hire anyone for the position. The commission agrees that, where the complainant does not allege that the respondent interviewed or hired someone from outside of the protected class or classes, and where he has not presented any other evidence to suggest that the respondent decided not to fill the position for discriminatory reasons, he has not set forth a claim of discrimination, and that allegation may be dismissed.

Finally, the complainant argued that he was denied hire as a physics instructor based upon his arrest and conviction records. The complainant's testimony was that, eight months before he applied for the job, there were news reports that indicated he was arrested in Lake County and/or Waukesha County. The complainant did not explain whether or how he believed those reports would have come to the respondent's attention. He further testified that, at the time he applied for the job, he had been convicted of a crime related to a separate arrest occurring in the previous month, but indicated that that conviction had "expired." The complainant stated that the employment application he filled out asked the applicant to disclose prior convictions. However, the complainant did not submit a copy of the employment application and it is not clear from his testimony whether he disclosed any convictions when applying for the job. The complainant testified that he was not told by the respondent that it considered convictions when it reviewed his application but reasoned that, since he had been permitted to interview for a position prior to his arrest and conviction, the arrest and conviction must have had something to do with why he was not hired.

In order to make out a *prima facie* case of discriminatory failure to hire, the complainant must show that he is a member of a protected class, that he applied for an available position for which he was qualified, and that he was rejected under circumstances which give rise to an inference of unlawful discrimination. *Zunker v. RTS Distributors*, ERD Case No. CR201004089 (LIRC June 16, 2014); *Kalsto v. Village of Somerset*, ERD Case No. 199802509 (LIRC Oct. 03, 2000). The complainant's testimony, while arguably sufficient to establish that he had at least an arrest record, if not a conviction record, did not demonstrate that he applied for an available job for which he was qualified, that he disclosed his protected status or that the respondent had other reason to be aware of it, or that he was denied hire under circumstances that would give rise to an inference of discrimination.² Where the complainant's un rebutted evidence is insufficient to make out a bare *prima facie* case of discrimination, the burden does not shift to the respondent to articulate a

² Indeed, with respect to the latter point, the commission notes that the complainant's own testimony provides a potential non-discriminatory reason for the respondent's decision not to hire him: the complainant explained that, after being denied hired by the respondent for a previous job for which he applied and was interviewed, he sent a "barrage of emails" to the respondent, which he described as "my weapons," leading the respondent to allege that he was harassing it.

legitimate, nondiscriminatory reason for failing to hire the complainant and the case does not progress.

In his petition to the commission the complainant argues that no evidence was taken on the issue of his criminal record and that he was not allowed to present witnesses. He also states that this is the first time he has gone through the hearing process and was not aware of the deadline to submit his witness and exhibit list. These arguments fail. While the commission understands that the complainant is not experienced in representing himself before the Division, the pre-hearing scheduling order issued by the administrative law judge on December 2, 2020, a copy of which was mailed to the complainant, notified him of all the relevant requirements and deadlines. Further, and more importantly, the witnesses that the complainant sought to present were individuals with no connection to the respondent and who were not shown to have any relevant information to provide. Finally, the commission notes that, although the administrative law judge did not permit the complainant to present witnesses who were not timely identified and who did not appear to have any connection to the complaint, he deferred any ruling with respect to the complainant's late-identified exhibits until the hearing. The complainant nonetheless made no attempt to present any documentary evidence at the hearing and relied solely on his own testimony. Because the complainant's testimony was insufficient to meet his initial burden of proof in this matter, the dismissal of the complaint is affirmed.

cc: Attorney Bethany McCurdy
Attorney Kristen Decato