

State of Wisconsin



Labor and Industry Review Commission

<p><b>Willis Baird</b>, Complainant</p> <p><b>Kenosha Beef International</b> d/b/a/ Birchwood Foods, Respondent</p> <p>ERD Case No. CR201902909 EEOC Case No. 26G2020000133C</p>	<p><b>Fair Employment Decision<sup>1</sup></b></p> <p><b>Dated and Mailed:</b></p> <p>May 24, 2024 bairdwi_rsd.doc:101</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/  
\_\_\_\_\_  
Marilyn Townsend, Commissioner

<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 allegation that the respondent 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**

In his briefs to the commission, the complainant identifies two separate issues:

1. The respondent took an adverse employment action, in terms of denial of training as back-up grinder that would lead to promotion and his eventual discharge, based on the complainant's race.
2. The respondent discharged or otherwise discriminated against the complainant because he opposed a discriminatory practice by participating in the investigation leading to discharge of a white man.

The complainant has shown that he is African American, that a Caucasian was treated more favorably regarding the back-up grinder training, and that he (the complainant) was discharged. However, the respondent has articulated legitimate, nondiscriminatory reasons for those actions.

Regarding the training as back-up grinder, the respondent's hourly workers are represented by a labor union, and seniority matters in job assignments. Eric Carter, the Caucasian employee who was chosen for the position instead of the complainant, expressed interest in the back-up grinder position before it was filled, and he was senior to the complainant. Regarding the complainant's discharge, the respondent explained that the discharge was based on the horseplay incident and on the complainant's uncooperative behavior when his supervisors were attempting to counsel him on October 25, 2019, for prematurely bringing a new batch of meat in the production area.

Because the respondent articulated legitimate, nondiscriminatory reasons for its actions, the burden shifts back to the complainant to establish the reasons are pretextual. *See Puetz Motor Sales, Inc., v. LIRC*, 126 Wis. 2d 168, 172, 376 N.W.2d 372 (Ct. App. 1985). In this case, the complainant has not established that the respondent's articulated reasons were a pretext for discrimination against the complainant. The credible testimony indicates that the respondent was constrained by union seniority regarding the back-up grinder position. The complainant himself

testified that, before Carter had expressed interest, supervisor Heider approached the complainant about the back-up grinder position, undercutting the assertion that the respondent ultimately did not assign the position to him because of his race. Regarding the discharge, the complainant also admitted engaging in the horseplay, and that he was suspended for it. There was credible testimony about his behavior from Heider and another supervisor, Pedro Cameron, during the counseling session of October 2019. It is corroborated by the complainant's own testimony that he told Heider and Cameron during that meeting that being required to listen to supervisor Heider before responding demonstrated a "master-slave relationship." The individual who ultimately made the decision to discharge the complainant, Pamela Hood-Jones, was, according to the complainant's testimony and other documentation in the record, African American. Under these facts, the commission cannot conclude that the respondent discriminated against the complainant because of race.

The complainant also asserts that the respondent retaliated against him for complaining about the behavior of a Caucasian, Joe Hurley. Under Wisconsin caselaw, the requirements for establishing a retaliation claim in some respects parallel the requirements for a discrimination claim. To establish unlawful retaliation under the Act, an employee must prove that he or she engaged in a protected activity, that he or she was subject to an adverse employment decision, and that there is a causal connection between those two facts. *Kannenbergh v. LIRC*, 213 Wis. 2d 373, 395, 571 N.W.2d 165 (Ct. App. 1997). If the employee makes that showing, the employer may rebut the claim of retaliation by articulating a non-discriminatory reason for its action. *Id.* If the employer articulates a non-discriminatory reason, the employee may still prevail by presenting evidence that the proffered non-discriminatory reason was a pretext. *Id.*

As set out above, the respondent articulated legitimate non-discriminatory reasons for discharging the complainant. Under the facts of this case, the commission cannot conclude that those reasons were a pretext for retaliation against the complainant by the respondent. The record establishes that the respondent did not tolerate offensive racial remarks in the workplace. The respondent acted swiftly to discipline Hurley when it learned that he had been engaging in such conduct. There was considerable testimony that the behavior Hurley exhibited was unusual in the respondent's workplace and that the workers understood it would lead to a discharge. Other workers complained about, or gave statements concerning, Hurley's outburst in the cafeteria, including by the complainant's own testimony, an African American woman who reacted angrily. Yet there is no evidence any of them were discharged, further undercutting the complainant's assertion that the real reason he was fired was that he participated in the investigation of a complaint against a Caucasian.

The complainant also asserted in his complaint that the respondent "engaged in and permitted racial harassment." The Act provides protection against "hostile environment harassment" based on race, and a violation of the Act may occur "[w]hen

the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Earnest Clark v. Plastocon, Inc.*, ERD case no. CR199703063 (LIRC Apr. 11, 2003), citing *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986) and *Harris v. Forklift Systems*, 510 U.S. 17, 21, 114 S.Ct. 367, 126L.Ed.2d 295 (1993).<sup>2</sup> However, an employer can only be held responsible for racially unpleasant working conditions if a complainant's supervisor or others in management authorized or tolerated racial discrimination practiced by nonsupervisory coworkers, as the Act only contemplates liability for supervisory personnel. *Crear v. LIRC*, 114 Wis. 2d 537, 542, 339 N.W.2d 350 (Ct. App. 1983).

Here, while the complainant complained to management about Hurley's use of offensive racial language in connection with a bet between other workers and in connection with the August 2019 cafeteria incident, he did not testify that he complained to management about Hurley's day-to-day behavior. Further, supervisor Heider testified, credibly, that Hurley did not use racial slurs in his presence, and the complainant's coworkers testified either that such language was very uncommon or that it was not used in the presence of supervisors. And while the record demonstrates that the complainant did complain to the respondent about some instances when offensive racial slurs were used in the workplace—Hurley's final outburst in the breakroom, the incident where Hurley assertedly made a bet about racist language with two other coworkers, racial epithets written on a box, and an offensive racial joke told by security guard Dwaine Yearout—the respondent investigated and addressed those complaints. While some of the investigations were inconclusive, the fact remains that the respondent promptly and adequately responded to the complainant's complaints, including discharging Hurley and warning Yearout that he could be discharged if he again engaged in such conduct.

cc: Attorney Mark A. Johnson

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<sup>2</sup> In *Clark*, the commission further stated that, in order to prove a racially hostile work environment claim, an employee must show that: 1) he was subject to unwelcome harassment; 2) the harassment was based on his race; 3) the harassment was severe or pervasive so as to alter the conditions of the employee's environment and create a hostile or abusive working environment; and 4) there is a basis for employer liability.