State of Wisconsin

Labor and Industry Review Commission

Nicole Rodrigues, Complainant **United Ground Express**, Respondent ERD Case No. CR202000736 EEOC Case No. 26G202000656C	**Fair Employment Decision**[1] **Dated and Mailed:** August 16, 2024 rodrini_rsd.doc:103

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

This case is before the commission to consider the complainant's allegation that the respondent refused to reasonably accommodate her disability and terminated her employment because of her disability, in violation of the Wisconsin Fair Employment Act (hereinafter "Act"). An administrative law judge (hereinafter "ALJ") 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

The respondent provided airport operation services for a number of large and small airlines at airports across the country, including at the Green Bay Straubel Airport. The complainant began working for the respondent as a part-time customer service agent in 2017. Beginning in May of 2018, she was off work as a result of PTSD, allegedly arising out of workplace harassment.

The complainant's position was covered by a collective bargaining agreement which provided that employees in part-time positions were required to work a minimum of 15 hours per week. The agreement also provided that employees who were out of work for greater than one year had to complete new employee training again before returning to work.

When she was released to return to work, the complainant was initially limited by her medical provider to working eight hours per week. The complainant's medical provider then released her to work 15 hours per week, and shortly thereafter, to work full time. Because the complainant had been off of work for more than a year at that point, the respondent initiated retraining for her. Upon completion of retraining, the parties discussed how to accommodate the complainant's medical restriction, which required that she be permitted to take unscheduled breaks of an indeterminate duration whenever she experienced a panic attack while at work.

The respondent inquired of the complainant about what things might bring on a panic attack, in order to see if she would be able to perform her work without experiencing them. The complainant identified a few individuals whose presence, she believed, were likely to cause her to suffer a panic attack, but she could not provide an exhaustive list of triggers that might cause her to need to take unscheduled breaks at work. The evidence presented at hearing established that the complainant suffered panic attacks even in situations where the individuals she identified were not present. Indeed, she continued to experience panic attacks requiring unscheduled breaks even when she went on to work for a different employer.

As a customer service agent, the complainant's duties included both "above the wing" and "below the wing" work. "Above the wing" duties included greeting customers, resolving seating and flight issues for customers, and checking luggage. "Below the wing" duties included, among other things, loading and transferring baggage and cargo, marshalling airplanes, securing the outside of the planes, and ensuring planes were safe to take off.

The HR director for the respondent investigated the feasibility of the complainant's requested accommodation by speaking with supervisors directly involved with her work. He determined that, due to the nature of the work, sudden unplanned breaks could pose unacceptable safety risks and cause disruption to the respondent's business.

The complainant proposed that she be permitted to shadow a colleague to see whether, perhaps, she would not experience a panic attack upon her return to work such that her restrictions could be lifted altogether. The respondent denied that request and suggested instead that the complainant consider transferring to another airport served by the respondent, where there might be positions available in which her restrictions could be accommodated. The complainant declined the transfer, and the respondent terminated the complainant's employment.

The ALJ found that the respondent did not violate the Act by declining to provide the complainant with the requested accommodation or by terminating her employment, and the commission agrees. "There are two elements to the question of whether there was a refusal to reasonably accommodate an individual's disability within the meaning of Wis. Stat. § 111.34(1)(b): whether a reasonable accommodation existed, and, if so, whether providing such an accommodation would have worked a hardship on the employer." *Geller v. Heartland Lakeside Joint #3 School Dist.*, ERD Case No. 200404961 (LIRC Mar. 27, 2009). A "reasonable accommodation" is one that effectively enables the disabled individual to perform the job-related responsibilities of his or her employment. *Target Stores v. LIRC*, 217 Wis. 2d 1, 576 N.W.2d 545 (1998). Although being permitted to take unscheduled breaks may have been a reasonable accommodation for the complainant, the respondent was not required to provide that accommodation if doing so would pose a hardship for its business. Here, the commission credits the testimony of the respondent's witnesses regarding the level of disruption to service, as well as the potential safety risk posed by the complainant's proposed accommodation of being allowed to take unscheduled absences during panic attacks. Given the need to provide urgent customer service and final pre-flight safety checks in a small airport, the requested accommodation would have posed a hardship for the respondent. It would disrupt the respondent's ability to provide satisfactory customer service and put employees and customers at risk. The respondent did not violate the Act by denying the complainant the accommodation of leaving her workstation as needed whenever she suffered a panic attack during work.

The complainant also makes an argument that the respondent violated the Act by failing to engage in the "interactive process." The commission has considered this argument, but finds it unpersuasive. Once an employee requests an accommodation, the employer has an obligation to engage in an "interactive process" aimed at determining the precise job-related limitations imposed by a disability and how those limitations could be overcome with a reasonable accommodation. *See*, *Smith v. Wisconsin Bell*, ERD Case No. CR200800434 (LIRC April 19, 2012). The Act includes a duty to gather sufficient information from the employee and from qualified experts, as needed, to determine what accommodations are necessary. *Keller v. UW-Milwaukee*, No. 90-0140-PC-ER, (March 19, 1993). The law envisions a flexible, interactive process by which the employer and employee determine the appropriate reasonable accommodation, *Rehling v. City of Chicago*, 207 F.3d 1009 (7th Cir. 2000), and "a party that fails to communicate by way of initiation or response, may. . . be acting in bad faith." *Beck v. UW-Madison,* 75 F.3d 1130, 1135 (7th Cir. 1996); *Oldenburg v. Triangle Tool Corporation*, ERD Case no. CR201400272 (LIRC Feb. 28, 2018). The commission has held, however, that the failure to engage in an interactive process does not, on its own, constitute a violation of the law. The question is whether the complainant has shown that, if the respondent had engaged in the process, the respondent would have been able to accommodate the complainant. *Gamroth v. Wisconsin Department of Corrections*, ERD Case Nos. CR200303157, CR200303158, and CR200303159 (LIRC Oct. 20, 2006).

In this case, the complainant argues that the respondent violated the Act by refusing to allow her to return to work on a trial basis, during which she would shadow another employee, as a way of determining if she could do the work. However, the complainant did not present any evidence to suggest that, had the respondent allowed the complainant to job shadow, the complainant's disability could have been accommodated. As discussed above, allowing the complainant to take unscheduled absences in this particular job would have worked a hardship on the respondent. Although the complainant suggested that her need for unplanned absences might evaporate upon her trial return to work, the evidence presented at the hearing showed that the complainant was still suffering from panic attacks requiring unscheduled breaks, even after leaving the potential triggers at the respondent's place of business and working elsewhere. The complainant's medical provider testified that her need for these breaks was ongoing and continued subsequent to the end of her employment with the respondent. There is simply no evidence from which the commission could infer that, had the respondent allowed the complainant to attempt a trial return to work in a job shadowing situation, she would have been able to perform her job without the need for unscheduled breaks. Accordingly, the commission also rejects the claim that failure to provide an opportunity to engage in job-shadowing violated the Act in this case.

Finally, in her petition to the commission, the complainant alleges that the ALJ improperly failed to consider her allegation that she had suffered harassment and retaliation at work, in violation of the Act. The complainant initially pled a failure to accommodate her disability upon her return to work from a leave of absence and

alleged that her employment was terminated because of her disability. Prior to the hearing, the complainant submitted a proposed amendment to her complaint, which contained new allegations related to events that occurred more than a year prior to the events raised in the original complaint and that were not a part of her allegations in the original complaint.

The amended complaint involved allegations that the respondent had engaged in sexual harassment and discrimination on the basis of sex, had created a hostile and offensive work environment, and had retaliated against her for opposing discrimination in the workplace. The complainant asserted that these things occurred prior to the leave of absence that she took from work, whereas the allegation in the original complaint addressed a different issue (refusal to reasonably accommodate her disability, and termination of her employment) that arose much later, upon her attempted return to work after the leave of absence. The new allegations in the amended complaint were different in both time and nature from the allegations contained in the original complaint.

The ALJ considered the amended complaint, but ultimately decided it could not be heard in conjunction with the matters raised in the instant complaint because the issues raised arose from different facts and circumstances than those in the already pending case. The ALJ concluded that the new allegations were too factually distinct and remote in time from those in the instant matter to be considered in conjunction with this case. The commission agrees with the ALJ that the additional allegations were not a proper subject for an amended complaint in this case and that if the complainant wished to have those allegations considered, her recourse was to contact the Division and attempt to initiate a new complaint. The commission finds that the ALJ did not err in rejecting the amended complaint for this reason.

For the foregoing reasons, the decision of the ALJ is affirmed in its entirety, and the complainant's complaint is dismissed.

cc: Amanda Collins, attorney for respondent