State of Wisconsin

Labor and Industry Review Commission

Stacey Stackhouse, Complainant **Wisconsin School for the Blind and Visually Impaired,** Respondent ERD Case No. CR201901290 EEOC Case No. 443201900211C	**Fair Employment Decision**[1] **Dated and Mailed:** February 20, 2025 stackhouse_err.doc:101

The decision of the administrative law judge is **affirmed in part and remanded in part**. Accordingly, the commission issues the following:

Order

1. As to the claim of discrimination against the complainant in terms or conditions of employment (other than compensation) because of race, the complaint is dismissed with prejudice.

2. As to the claim of discrimination against the complainant in terms or conditions of employment (other than compensation) because of sex, the complaint is dismissed with prejudice.

3. This matter is remanded to the Equal Rights Division to permit the complainant to file an amended complaint and for an investigation and issuance of a determination regarding the amended complaint as to the claims of discrimination against the complainant in compensation because of race and sex. In her amended complaint the complainant shall specify when she first learned that the respondent was giving DMC awards to individuals outside of the protected class. If it is determined that the facts

[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.

that would have supported a claim of discrimination should have been apparent to the complainant more than 300 days prior to the filing of her initial complaint, her amended complaint may be dismissed on that basis.

By the Commission:

/s/

Michael H. Gillick, Chairperson

/s/

Georgia E. Maxwell, Commissioner

/s/

Marilyn Townsend, Commissioner

Procedural Posture

This case is before the commission to consider the complainant's allegations that the respondent discriminated against her in terms or conditions of employment and in compensation because of her race and sex, in violation of the Wisconsin Fair Employment Act (the Act). An administrative law judge for the Equal Rights Division of the Department of Workforce Development held a hearing and issued a decision finding that there was no probable cause to believe that the respondent discriminated against the complainant on the bases alleged. The complainant filed a timely petition for commission review of that decision.

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 makes the following:

Findings of Fact

1. The complainant is a black female.

2. The complainant began working for the respondent in 1997. The respondent is a state K-12 residential school operated by the Department of Public Instruction.

3. The complainant was initially employed by the respondent as a child care counsellor I. In 2017 and 2018, the complainant worked as a child care counsellor II, a position in which she worked in the school dormitories. She continued in the role of child care counsellor II through November 24, 2018.

4. On November 25, 2018, the complainant began working for the respondent as a teacher. Upon her appointment to the teaching position, the complainant received a pay increase of more than $6.50 per hour. She served a probationary period for this new position from November 25, 2018 through November 24, 2019. She continued working for the respondent as a teacher until her employment ended in August 2021, when she began working for another employer.

5. When the complainant worked for the respondent, it had approximately 100 employees, about equally divided between males and females. Approximately five of the respondent's employees are black.

6. In late February or early March 2018, while the complainant was working as a child care counsellor II, the dean of the respondent's school, Andre Soto, spoke with the complainant on one occasion about several instances in which the complainant had arrived a few minutes late for work. Soto discovered the instances of tardiness because the complainant's time as reported to the respondent's STAR system was 30 minutes short. Upon further investigation, Soto learned that the complainant had punched in late 6 or 7 times in the prior two months, accounting for the 30 minute discrepancy.

7. After Soto spoke to the complainant about her tardiness, the complainant did not again arrive late to work. Soto and the complainant never discussed the issue again. Soto did not formally discipline the complainant for tardiness. However, the complainant's performance review, written by Soto for the period from July 1, 2017 to June 8, 2018, stated:

> Some tardiness to work has been a minor concern this evaluation cycle. However, Stacy has improved this behavior over the last two months. Good job improving Stacy.

The complainant signed the performance review on May 24, 2018.

8. Soto has spoken with other child care counsellors about their tardiness in reporting for work, including counsellors who were white and male.

9. The State of Wisconsin compensation plan authorizes discretionary merit compensation (DMC) awards. Employees are only considered for DMC awards when authorized under the compensation plan.

10. An employee cannot receive a DMC award while in the first 12 months of a probationary period after accepting a new job, or if the employee received a pay adjustment under the "pay upon appointment" provision of the compensation plan within the past 12 months. Further, in practice, the Department of Public Instruction

does not give a DMC award to any employee who received a pay increase in the past 12 months.

11. The respondent made DMC awards to certain of its employees in June 2014, fiscal year 2016, and spring 2017, and to certain of its employees effective on May 13, 2018, May 27, 2019, and June 9, 2019.

12. No DMC awards were paid to anyone between July 13 and November 13, 2018, the time period identified in the complainant's complaint. The complainant was ineligible for a DMC award during 2019 because she was promoted to the role of teacher and was serving a probationary period.

Conclusions of Law

1. There is no probable cause to believe that the respondent violated the Act by discriminating against the complainant in terms or conditions of employment (other than compensation) because of sex.

2. There is no probable cause to believe that the respondent violated the Act by discriminating against the complainant in terms or conditions of employment (other than in compensation) because of race.

3. There is no probable cause to believe that the respondent violated the Act by discriminating against the complainant with respect to compensation because of race during the time period at issue in her complaint.

4. There is no probable cause to believe that the respondent violated the Act by discriminating against the complainant with respect to compensation because of sex during the time period at issue in her complaint.

Memorandum Opinion

The complainant filed a complaint with both the Equal Rights Division and the federal Equal Employment Opportunity Commission (EEOC) on April 26, 2019. She alleged that she worked for the respondent as a child care counsellor II, that during her employment she had been counselled about tardiness, and that she had been denied a discretionary merit compensation (DMC) pay increase. She alleged further that the respondent "discriminated against [her] because of her race (Black) plus sex (female) when [she] was disciplined and denied a wage increase." The complaint covered the period from July 13, 2018 to November 13, 2018.

After an investigation, the EEOC concluded that the information obtained did not establish a violation of the statutes, and it closed its file. The complainant then asked

the Equal Rights Division to review her file. The Equal Rights Division's initial determination found no probable cause to believe that the respondent discriminated against the complainant in terms and conditions of employment, including compensation, because of sex. The Equal Rights Division later corrected its determination to add that there was no probable cause to believe that the respondent discriminated against the complainant in terms and conditions of employment, including compensation, on the basis of race.

The complainant appealed, and a hearing was held before an administrative law judge. She likewise concluded that there was no probable cause to believe that respondent discriminated against the complainant, because of either sex or race, in terms or conditions of employment or in compensation. The administrative law judge dismissed the complaint with prejudice, and this appeal followed.

Probable cause in the context of this appeal "means a reasonable ground for belief, supported by facts and circumstances strong enough in themselves to warrant a prudent person to believe, that a violation of the [fair employment] act probably has been or is being committed." Wis. Admin. Code § DWD 218.02(8). Probable cause "lies somewhere between preponderance of the evidence and suspicion." *Braunschweig v. SSG Corp.*, ERD Case No. CR200400816 (LIRC Aug. 31, 2006). Though the standard of proof at a probable cause hearing is low—less than a preponderance of the evidence—the burden still rests on the complainant. *Boldt v. LIRC*, 173 Wis. 2d 469, 476, 496 N.W.2d 676 (Ct. App. 1992).

Here, the complainant's claims of discrimination may be summarized as:

> (1) Discrimination against her by the respondent in terms or conditions of employment (other than compensation) because of sex or race, based on the incident where the respondent's dean, Andre Soto, spoke with her about tardiness, and documented the discussion and her improvement in a performance review.
>
> (2) Discrimination against her by the respondent in terms of compensation, because of her sex or race, based on the way the respondent made DMC awards.

The commission agrees with the administrative law judge's conclusion that there is no probable cause to believe that the respondent discriminated against the complainant in terms, conditions, or privileges of employment because of her race or sex based on the incident in early 2018 in which the respondent's dean, Andre Soto, spoke with the complainant about tardiness, and then documented the discussion and the complainant's improved attendance in a performance review issued in May 2018. The complainant offered no proof that other employees were treated any more favorably in this regard. Indeed, Soto testified that he had in fact had similar

discussions with male and white employees, testimony which, given his position, is entirely credible. Simply discussing tardiness does not constitute discrimination in the terms, conditions, or privileges of employment where, as here, a complainant does not dispute that she was tardy and agrees that no formal disciplinary action was taken. This seems especially true as Soto characterized the complainant's tardiness as "a minor concern" and noted improvement in the complainant's performance review.

Even if there had been a discrimination based on based on Soto's conversation with the complaint regarding tardiness, it would have occurred, at the latest, on May 24, 2018, when the complainant signed the performance review that mentioned the conversation. As that was more than 300 days before the complainant filed her complaint on April 26, 2019, the tardiness complaint is technically time-barred. *See* Wis. Stat. § 111.29(1).

With respect to compensation, the complainant limited her complaint to the period from July 13, 2018 to November 13, 2018, which approximates the period of time within 300 days of the filing of her complaint on April 26, 2019, in which she worked as a child care counsellor II. The respondent defends on the bases that (a) it did not grant *any* DMC pay adjustments during that period, (b) the complaint was ineligible for a DMC pay raise from November 2018 to November 2019 because she was in a probationary period as a new teacher, and (c) by the time the complainant's probationary period had ended, the respondent was no longer giving DMC pay raises.

The commission agrees that there is no reason to believe that discrimination with respect to compensation occurred during the time period at issue, given the fact that the respondent did not award any DMCs whatever during that time. However, it is clear from the complainant's testimony that she believed there was discrimination with respect to compensation occurring prior to July of 2018, and that she did not include this time period in her complaint because she believed she was limited to events occurring within 300 days of the filing of her complaint. A question then arises as to whether the complainant should have been given an opportunity to amend her complaint to include earlier dates of alleged discrimination.

Wisconsin Stat. § 111.39(1) limits the department's authority to receive and investigate complaints charging discrimination or discriminatory practices to complaints filed with the department no more than 300 days after the alleged discrimination. However, this statute of limitations is subject to the judicially-created "discovery rule." That is, "discrimination occurs when the employer acts *and the employee knows about it*, not when the effects of the action are most painfully felt." *Hilmes v. DILHR*, 147 Wis. 2d 48, 50, 433 N.W.2d 251 (Ct. App. 1988) (emphasis added). Relying on the "discovery rule" that applies to tort actions generally, the commission has held that "[u]nder the 'discovery rule' a claim accrues, and the statute of limitations begins to run, on the date the injury is discovered or reasonably should have been discovered." *Marano v. DaimlerChrysler* Corp., ERD Case No. 99803462

(LIRC June 16, 2000) (citing *Hansen v. A.H. Robins, Inc.*, 113 Wis. 2d 550, 335 N.W.2d 578 (1983)).[2] A statute of limitations begins to run when the facts that would support a charge of discrimination are apparent or would be apparent to a person with a reasonably prudent regard for his or her rights. *Washington v. United Water Services*, ERD Case No. CR199902104 (LIRC Aug. 15, 2003), citing *Oehlke v. Moore-O-Matic*, ERD Case No. 8401191 (LIRC, July 26, 1988).

In this case, the complainant, who appeared *pro se*, testified:

> From my understanding, since 2012 they have been giving out discretionary funds to people if they do certain things like extra work. I hadn't really heard of it but then I started hearing people talk that they got a discretionary fund. I was wondering about how they went about getting it because it seemed like it's kind of discreet. Like, they would go into the director's office and then they would get one. So I never knew how to go about getting one and what you have to do to get one.

It is not entirely clear from that testimony whether the complainant had any awareness that DMCs were being awarded prior to July of 2018 or that, assuming she did, she was in possession of any facts that would have led her to believe discrimination was occurring. If the complaint first discovered (or reasonably should have discovered) that the respondent gave out DMC awards under circumstances that would support a charge of discrimination within 300 days of when she filed her complaint, the discovery rule could allow her to claim that the respondent had engaged in discriminatory practices in connection with the DMC awards back to 2014, the first year that she provided evidence that the respondent made DMC pay raises to employees outside of the protected class.

The commission has previously held that "[w]hen a party appears without legal representation, it falls to the ALJ to ensure that the party is afforded a full and fair hearing." *Dodson v. Henkel Surface Technologies*, ERD Case No. CR200803314 (LIRC, Aug. 16, 2013). In *Dodson*, the commission cited *Kropiwka v. DILHR*, 87 Wis. 2d 709, 721, 275 N.W.2d 881 (1979), a fair employment case where the Supreme Court noted:

> in state administrative agency hearings, the hearing examiner often must protect the rights of a party not represented by counsel, and see to it that the party's case is properly developed. The examiner must be

[2] The commission has also referred to "equitable tolling" of the statute of limitations. In *Sallis v. Aurora Health Care*, ERD Case No. CR200600336 (LIRC Dec. 3, 2010), the commission cited *Newbold v. Wisconsin State Public Defender*, 310 F.3d 1013, 1015-1016 (7th Cir. 2002), a federal equal employment opportunities case, for the proposition that "[e]quitable tolling permits a plaintiff to avoid the bar of the statute of limitations if, despite all due diligence, she is unable to obtain vital information bearing on the existence of her claims."

> impartial, however, and may not engage in partisan activity on behalf of an unrepresented party.

In *Dodson*, the commission identified factors to be considered in determining whether the rights of a party not represented by counsel have been adequately protected in a fair employment proceeding. Those factors parallel the due process requirements of notice and "fair play" generally applicable to administrative proceedings. *See Wright v. LIRC*, 210 Wis. 2d 289, 296, 565 N.W.2d 221 (Ct. App. 1997) and *Zimbrick v. LIRC*, 2000 WI App 106, ¶10, 235 Wis. 2d 132, 613 N.W.2d 198. Read together, these cases suggest that "fair play" may require that the department or the commission make an effort to determine what a complainant is trying to allege in his or her equal rights complaint, even though the allegations may not be artfully made. Certainly, the *Kropiwka* decision broadly states administrative law judges must "see to it that the [unrepresented] party's case is fully developed." *Id.,* 87 Wis. 2d at 721.

Here, the complainant testified at the hearing that she believed that she was discriminated against in terms of pay as far back as 2014 based on the respondent's practice of giving out DMC awards and provided testimony that raised questions as to when she became aware of the facts giving rise to that belief. Given that testimony, the commission believes the administrative law judge should have attempted to elicit further information from the complainant that would have potentially enabled her to amend her complaint to include earlier dates of discrimination. It would not be "engag[ing] in partisan activity on behalf of [the complainant]" to require an investigation into when the complainant discovered or reasonably should have discovered the respondent's practice of awarding DMC awards for the purposes of determining whether her claim is barred by the statute of limitations. Indeed, Wis. Admin. Code § DWD 218.03(6)[3] supports the exercise of such authority in this case.

Based on the above, the commission concludes that it is appropriate to remand this case to the Equal Rights Division to permit the complainant to file an amended

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[3] That rule provides:

> **DWD 218.03 Complaints**. … (6) AMENDMENT OF COMPLAINT. A complaint may be amended, subject to the approval of the department, except that a complaint may not be amended less than 45 days before hearing unless good cause is shown for the failure to amend the complaint prior to that time. If the complaint is amended prior to the issuance of an initial determination, the department shall investigate the allegations of the amended complaint. If the complaint is amended after the case has been certified to hearing, the chief of the hearing section or the administrative law judge may remand the complaint to the investigation section to conduct an investigation and issue an initial determination as to whether probable cause exists to believe that the respondent has violated the act as alleged in the amended complaint. …

To the extent that that this rule requires a showing of good cause for the complainant's failure to amend her complaint, that showing has been met in this case.

complaint and for an investigation and issuance of a determination regarding the amended complaint as to her claims of discrimination in compensation because of race and sex. If it is determined that the facts that would have supported a claim of discrimination should have been apparent to the complainant more than 300 days prior to the filing of her original complaint, her amended complaint may be dismissed on that basis.

cc: Attorney Heather Curnutt