State of Wisconsin

Labor and Industry Review Commission

Barbara Uebelacker, Complainant **Rock Energy Cooperative,** Respondent 2815 Kennedy Road ERD Case No. CR202100138	**Fair Employment Decision**[1] **Dated and Mailed:** April 22, 2025 uebelba_rsd.doc:101

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 violated the Internet Privacy Protection statute, Wis. Stat. § 995.55, and that the respondent discriminated against her, or retaliated against her, in violation of that statute. An administrative law judge for the Equal Rights Division of the Department of Workforce Development held a hearing and issued a decision concluding that the complaint failed to prove either that the respondent violated Wis. Stat. § 995.55(2)(a)1. or that respondent discharged or otherwise discriminated against her for or opposing a practice prohibited by, Wis. Stat. § 995.555(2)(a)1. 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 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 complainant began working for the respondent in 2009, and the respondent terminated her employment on June 30, 2020. She contends that she was discharged because she asked the respondent to investigate her claim that the respondent illegally accessed a private conversation between herself and a coworker, Angela Schuman, obtained from the complainant's personal Facebook Messenger account. While the record establishes that in January 2019 the respondent was able to view a Facebook Messenger conversation between the complainant and Schuman, the respondent contends that it did not discharge the complainant because she asked for investigation of the incident. Instead, the respondent asserts, it discharged the complainant in March 2020 after learning that she downloaded a large number of the respondent's emails to her personal email account, some of which contained contractual information with third parties, then failed to respond forthrightly to the respondent's inquiry as to why she had done so.

Following her discharge, the complainant filed a complaint with the Equal Rights Division alleging that the respondent discriminated or took other action against her in violation of Wis. Stat. § 995.55, which provides in part:

> 995.55 Internet privacy protection. (1) DEFINITIONS. In this section:
> (a) "Access information" means a user name and password or any other security information that protects access to a personal Internet account.
> …
> (d) "Personal Internet account" means an Internet-based account that is created and used by an individual exclusively for purposes of personal communications.
> (2) RESTRICTIONS ON EMPLOYER ACCESS TO PERSONAL INTERNET ACCOUNTS.

> (a) Except as provided in pars. (b), (c), and (d), no employer may do any of the following:
> 1. Request or require an employee or applicant for employment, as a condition of employment, to disclose access information for the personal Internet account of the employee or applicant or to otherwise grant access to or allow observation of that account.
> 2. Discharge or otherwise discriminate against an employee for exercising the right under subd. 1. to refuse to disclose access information for, grant access to, or allow observation of the employee's personal Internet account, opposing a practice prohibited under subd. 1., filing a complaint or attempting to enforce any right under subd. 1., or testifying or assisting in any action or proceeding to enforce any right under subd. 1.
> 3. Refuse to hire an applicant for employment because the applicant refused to disclose access information for, grant access to, or allow observation of the applicant's personal Internet account.

Wisconsin Stat. § 995.02(6)(b) provides for enforcement of violations of sub. (2) using the process under Wis. Stat. § 111.39. In addition, Wis. Stat. § 111.322(2m)(a) provides that it is an act of employment discrimination to discharge or otherwise discriminate against any individual because he or she files a complaint or attempts to enforce any right under Wis. Stat. § 995.55.

In her complaint, the complainant alleged that the respondent illegally discriminated against her because:

- She refused to disclose information, grant access, or allow observation of her personal Internet account;

- She opposed the respondent's request for or requirement of social media disclosures as a condition of employment; and

- The respondent requested or required her, as a condition of her employment, to disclose or otherwise grant access information for her personal Internet account.

The administrative law judge dismissed the complaint, concluding that the complainant failed to prove that the respondent violated Wis. Stat. § 995.55(2). On appeal, the complainant argues that the respondent could only have viewed her private conversation with coworker Schuman by using Schuman's credentials and Google Chrome and Facebook log-in information to find, open, and observe the December 2018 Facebook Messenger conversation between Schuman and the complainant on Schuman's work computer. The complainant asserts that the decision of the respondent's chief executive officer, Shane Larson, to demote her in

early 2019 was based on the private Facebook Messenger conversation between the complainant and Schuman. She further contends that Schuman's Facebook account could not have been instantly viewable by the respondent's information technology worker, Robert Booth, when he logged into Schuman's work computer after she left the respondent's employment as Booth testified, because Schuman had blocked the respondent's access.

The complainant also argues that Wis. Stat. § 995.55 should be liberally or broadly construed, and that the broad term "otherwise require" should be construed to encompass the situation here—where the respondent effectively conditioned the complainant's continued employment after January 2019 on her acceptance of the respondent's access to her private Facebook Messenger conversation—as any means by which an employer might require access to an employee's personal Internet account should be illegal. The complainant argues, too, that the respondent's proffered reason for her termination was a pretext, and that the respondent's witnesses were not credible.

The commission is not persuaded by the complainant's arguments. Remedial statutes should generally be broadly or liberally construed "to suppress the mischief and advance the remedy that the legislature intended to afford." *See, Garcia v. Mazda Motor of Am. Inc.*, 2004 WI 93, ¶8, 273 Wis. 2d 612, 682 N.W.2d 365. However, the liberal construction rule cannot be used to change the wording of a statute to mean something which was not intended by the legislature or by the plain language used. *American Motors Corp. v. DILHR*, 101 Wis. 2d 337, 350, 305 N.W.2d 62 (1981).

Like the administrative law judge, the commission finds that Schuman, having just been discharged by the respondent, did not actually shut down her computer before leaving the respondent's premises. The complainant does not provide a credible explanation, from her technology expert, Robert Smiley, Ph.D., or otherwise, about how Booth could have accessed Schuman's Google Chrome or Facebook accounts if Schuman had in fact closed those applications before leaving work, then immediately changed the passwords upon arriving home. The commission thus adopts as most credible Booth's explanation that he could view the Facebook Messenger conversation between the complainant and Schuman because that application was still open and running on Schuman's computer when he logged into Schuman's work user account after her employment with the respondent ended.

Even if Booth did open the Google Chrome and Facebook applications from Schuman's work computer using the saved or remembered passwords—and again the more credible evidence is instead that the applications were already open and running—that would not amount to a violation of Wis. Stat. § 995.55. In that case, Booth would be able to view the Facebook Messenger conversation because Schuman had logged into her personal Google Chrome and Facebook applications

on her work computer and saved the passwords, not because the respondent required the complainant to provide passwords to *her* personal Internet accounts or allow access or observation of those personal accounts.

The complainant observes that Booth testified that he entered Schuman's work user account on her work computer by recreating a password rather than entering as an administrator. However, that does not violate Wis. Stat. § 995.55(2)(a), as Schuman's user account at work was not a personal Internet account, but one maintained by the respondent. Wisconsin Stat. § 995.55(2)(b)1. specifically excepts from the statute's coverage the situation where an employer

> 1. Request[s] or require[es] an employee to disclose access information to the employer in order for the employer to gain access to or operate an electronic communications device supplied or paid for in whole or in part by the employer or in order for the employer to gain access to an account or service provided by the employer, obtained by virtue of the employee's employment relationship with the employer, or used for the employer's business purposes.

Even expert Smiley's characterization of Booth's action as an "impersonation" of Schuman would still fall within the exception under subdivision 1. Again, Booth re-recreated a password for Schuman's *work* user account, not for Schuman's personal Internet accounts or for any personal Internet account of the complainant's.

The complainant also claims that the reason the respondent gives for the complainant's discharge—that she transferred 2100 of the respondent's emails to her personal account and failed to adequately explain that action—was a pretext. However, the complainant has the burden of proving not only that the reason is a pretext, but also that it was a pretext for illegal discrimination. *See Puetz Motor Sales v. LIRC*, 126 Wis. 2d 168, 172-73, 376 N.W2d 372 (Ct. App. 1985); *Kovalic v. DEC International*, 186 Wis. 2d 162, 167-68, 519 N.W.2d 351 (Ct. App. 1994).

In this case, the more credible evidence from the respondent's administrative officer, Sharon Janes, and chief executive officer Larson establishes that the respondent discharged the complainant for transferring the respondent's emails to her own personal computer without permission, and then failed to explain why she did so following a direct request from Janes. The complainant herself admitted transferring the emails and that her explanation for that action was "not complete;" in fact, her explanation did not address the email transfer at all. Not only did the email transfer violate the respondent's Internet use policy, but Wis Stat. § 995.55(2)(b)2. specifically excepts from the statute's coverage the situation where an employer

> 2. Discharg[es] or discipline[es] an employee for transferring the employer's proprietary or confidential information or financial data to the employee's personal Internet account without the employer's authorization.

Stated simply, the complainant failed to prove that the reason the respondent gave for her discharge—her unauthorized transfer of 2100 work emails to her personal email account and subsequent failure to candidly explain that action—was a pretext, much less that her discharge in June 2020 was based on a violation of Wis. Stat. § 995.55 (or even on the respondent's lingering displeasure with the December 2018 Facebook Messenger conversation between the complainant and Schuman).

The record does establish that the December 2018 Facebook Messenger conversation between the complainant and Schuman was the basis for *some* adverse employment action against the complainant—in January 2019 she was demoted following the respondent's discovery of that conversation—but a claim of discrimination under Wis. Stat. § 995.55 on that basis must fail for two reasons. First, her demotion in January 2019 occurred more than 300 days before she filed her complaint on January 21, 2021. Again, the 300-day statute of limitations in Wis Stat. § 111.39(1) is incorporated by reference into Wis. Stat. § 995.55 at subsection (6)(b). Second, there is no proof that an act prohibited by Wis. Stat. § 995.55 was the basis for the demotion. As explained above, the respondent was able to view the December 2018 Facebook Messenger conversation by accessing Schuman's user account at work—which is not a personal Internet account, *see* Wis. Stat. § 995.55(1)(d) and (2)(b)1. Nor was the respondent's ability to view the Facebook Messenger conversation the result of its demand that the complainant provide passwords to a personal Internet account or that the complainant permit access or observation of such an account.

The complainant did not allege that she was discharged in retaliation for attempting to enforce a right under Wis. Stat. § 995.55 or for filing a complaint under that section, but that she was discharged for opposing the respondent's request or requirement for social media disclosures. *See* Wis. Stat. §§ 111.322(2m)(b) and 995.55(2)(a)2. Indeed, the record does not support a claim of retaliation for attempting to enforce a right under Wis. Stat. § 995.55 or for filing a complaint under that section. The complainant filed her complaint after she was discharged, so the complaint could not be the basis for her discharge. Further the Court of Appeals has that the term "enforcing a right" as used in a similar statute requires some sort of resort to a government authority. *Radtke v. LIRC*, 2025 WI App 14, ¶25, 415 Wis. 2d 347, 18 N.W.3d 187. That, too, did not occur until after she was discharged.

The strongest basis for finding an illegal discharge under Wis. Stat. § 995.55, perhaps, would be that the complainant was discharged in retaliation for "opposing a practice prohibited" under Wis. Stat. § 995.55(a)2. when she sent her June 29, 2020 email asking Janes for an explanation of the respondent's personnel decisions in the context of what she believed was an "unauthorized intrusion into [her] private Facebook Messenger conversation with the former employee" in December 2018. An employee may oppose alleged discriminatory treatment without resorting to a governmental agency. *See, Radtke v. LIRC*, 2025 WI App 15, ¶28. While the complainant suggests otherwise, the administrative law judge addressed this claim in her decision, and concluded that the complainant did not prove retaliation by "opposing a practice."

The commission agrees. As the administrative law judge explained, the complainant's June 29, 2020 email complained that the respondent had viewed her private conversation with Schuman without her authorization. The email did not oppose a practice that violated Wis. Stat. § 995.01(2)(a)1., such as a request or requirement from the respondent that the complainant disclose access information for her personal Internet account as a condition of continued employment, or a request or requirement that she grant access to or allow observation of such an account. Beyond that, of course, the record is amply clear the complainant was discharged for transferring 2100 work emails to her personal account without permission in June 2020 and subsequently failing to provide a full explanation of that action to the respondent upon request, not her demand for an investigation or explanation about the events of December 2018 and January 2019.

cc: Julie A. Lewis
Rhea A. Myers

Editor's Note: The complainant's first name was misspelled in the original decision. This version has been modified to correct this typographical error.

This case has been appealed to circuit court.