

State of Wisconsin



Labor and Industry Review Commission

<p>Jose E. Garcia Joven, Complainant</p> <p>Milwaukee Bd. of School Directors, Respondent</p> <p>ERD Case No. CR201903167 EEOC Case No. 26G202000280C</p>	<p>Fair Employment Decision¹</p> <p>Dated and Mailed: June 23, 2025</p> <hr/> <p>garcijo_rsd.doc:103</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/

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 discriminated against him in terms and conditions of employment on the basis of race, national origin, and sex, and because he opposed discriminatory practices in the workplace, in violation of the Wisconsin Fair Employment Act (hereinafter "Act"). An administrative law judge (hereinafter "ALJ") for the Equal Rights Division (hereinafter "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 petition, the complainant alleges that he was micromanaged, harassed, and treated less favorably than similarly situated individuals outside of the protected class. Specifically, he argues that, among other things, he was paid less than his Black female counterparts, that he was denied professional development opportunities, that he was given negative performance feedback because of his accent and made to apologize to colleagues for his accent, and that while he was on FMLA leave, his supervisor contacted him with work information and requests. Some of these allegations were raised for the first time after the conclusion of the hearing before the ALJ and are not properly before the commission. With respect to the remaining allegations, the commission agrees with the ALJ that the complainant failed to establish he was discriminated against as alleged in his complaint.

Allegation of ALJ bias

The complainant's case before the commission rests almost entirely on his assertion that ALJ Brown held what the complainant describes as an "unconstitutionally biased" hearing. As evidence of bias, the complainant asserts that the ALJ improperly considered the respondent's discovery motion, refused to recuse herself, denied the complainant's request to consolidate this case with another pending case, and refused to permit testimony from one of his witnesses, Dr. Jeremiah Holiday. The commission has considered each of these contentions, but does not find them persuasive.

With respect to the discovery motion, the complainant asserts that the ALJ should not have considered a motion from the respondent because it did not contain the required elements of such a motion. Specifically, the complainant argues that the respondent's May 16, 2022, motion to quash the complainant's subpoena was inadequate because it 1) failed to argue that the evidence sought was irrelevant, 2) failed to state the correct standard for relevance, and 3) failed to identify attempts

by the parties to resolve the situation. The motion did, however, contain each of the required elements, and it was therefore properly considered by the ALJ.

Next, the complainant alleges that the ALJ should have recused herself from the case because another ALJ at the Division, ALJ Fermin, had previously worked as a supervisor for the respondent. The complainant points out that, in a different case in which ALJ Fermin, was called as a witness, ALJ Brown recused herself, noting that she felt she could fairly decide the case but wished to avoid the appearance of impropriety, as ALJ Fermin was her colleague. However, in this case, ALJ Fermin was not identified as a potential witness or called as a witness. The basis for recusing herself in the other case was therefore not present here. ALJ Brown's failure to recuse herself was not improper and is not an indication of bias.

Turning next to the allegation that the ALJ improperly refused to consolidate this matter with another case involving the same parties, the commission notes that this request was not made until the fifth and final day of hearing. The ALJ properly exercised her discretion in denying the request. The complainant explains that his request came on the heels of the issuance of a probable cause finding in the other case. However, had the complainant wished to have the two cases heard together, he could have requested to delay the hearing in the current case until an initial determination was made in the second case. He elected, however, to proceed with the cases separately and only sought consolidation after several days of testimony in the present case. The ALJ's rejection of the request to consolidate the cases on the final day of hearing in this case was not improper and is not an indication of bias.

Finally, the complainant argues that the ALJ improperly excluded testimony from Dr. Holiday. However, the complainant failed to properly subpoena Holiday, issuing the subpoena only one day before the hearing, and when the witness failed to appear, the ALJ reasonably decided not to delay the hearing in order to give the complainant's attorney an opportunity to seek judicial enforcement of his last-minute subpoena. The reason that Holiday did not testify was that he was not issued a subpoena with reasonable notice, and when the hearing was continued months later, the complainant's attorney did not make any further attempt to subpoena the witness with adequate notice. Under the circumstances, the ALJ's refusal to delay the hearing so that the complainant could seek judicial enforcement of a last-minute subpoena was not improper and is not an indication of bias.

For all the reasons set forth above, the complainant is not entitled to a new hearing on the basis of an "unconstitutionally biased" hearing. The complainant has not established either actual bias or an improper appearance of bias.

Merits

In the brief in support of his petition, the complainant argues that he “easily proved probable cause, the lowest of standards” and asks the commission to reverse and find probable cause. However, this case is not before the commission on the issue of probable cause, but on the merits. An equal rights officer for the Division issued an initial determination finding probable cause, after which the case was certified to hearing on the merits. At the hearing, the complainant presented very limited evidence and, because the complainant himself did not testify, was unable to rebut the testimony of the respondent’s witnesses or establish that the legitimate nondiscriminatory reasons the respondent presented for its actions were pretexts for discrimination.

Complainant’s accent: The complainant’s national origin is Colombian, and he speaks with a Colombian accent. One of his job requirements was to give presentations to colleagues, some of whom provided written feedback following a presentation that they had difficulty understanding him. The complainant’s supervisor, Dr. Brown-Gurley, told the complainant that he was difficult to understand due to his accent and his quiet voice. Because the complainant’s job required strong communication skills, Brown-Gurley coached him to improve his skill as a presenter. She suggested that he practice his presentations in advance and that he speak with an authoritative demeanor, as he would have done when he defended his thesis. She reminded the complainant that she considered him very knowledgeable on the subject matter but encouraged him to work on his presentation style.

A person’s accent can be indicative of national origin, and therefore an adverse employment decision based on an accent could be considered discrimination on the basis of national origin. *Obasi v. Milwaukee School of Engineering*, ERD Case No. CR201003882 (LIRC Oct. 14, 2013). However, where the ability to communicate effectively is a legitimate qualification of the job, an honest critique of the complainant’s communication skills, including the effect that an accent may have on clear and effective communication, is not inherently discriminatory. *Id.* In this case, the complainant’s accent, combined with his quiet voice, interfered with his communication and his supervisor appropriately attempted to guide him in developing a clearer presentation. Further, while a witness for the complainant testified that the complainant told her that Brown-Gurley instructed the complainant to apologize to his audience for his accent, Brown-Gurley, the only firsthand witness to the alleged incident, credibly denied having done so. With no evidence to support the allegation, this claim fails.

Harassment and bullying: The complainant argues that his colleague, Dr. Ford, and his supervisor, Dr. Brown-Gurley, both offered unnecessary criticism and engaged in harassment, which amounted to discrimination in violation of the Act. Because the complainant chose not to testify, however, the only firsthand evidence on these issues

came directly from Ford and Brown-Gurley, who both credibly denied harassing or bullying the complainant.

Some of the complainant's allegations were completely unsubstantiated. For example, the complainant argues that Ford yelled at him on February 7, 2019. The only evidence regarding the incident came from Ford, who denied it occurred. Other allegations were supported by testimony from Dr. Debbie Kuether, a colleague of the complainant, but credibly denied by Brown-Gurley who testified that the events never occurred.

While some incidents alleged by the complainant to have taken place were substantiated, they did not amount to harassment in violation of the Act. Ford and Brown-Gurley admitted to certain interactions with the complainant that the complainant argues amounted to harassment, but offered reasonable non-discriminatory explanations for the interactions. For example, Ford thought that administrators were not going to a conference, so she inquired about the complainant's attendance at the conference. Her inquiry was not intended to harass the complainant but to clarify her understanding of who was to attend. Similarly, Gurley-Brown asked the complainant to make his calendar accessible, but did not make that request to Ford because Ford's calendar was already accessible by the team. The commission finds those explanations, which were offered without rebuttal from the complainant, to be credible.

Equal pay: In post hearing briefs and briefing to the commission, the complainant argues that he was paid less than similarly situated colleagues not in the protected class. However, as noted in the decision of the ALJ, this allegation was not included in his complaint. Accordingly, the issue was not properly before the ALJ and the commission makes no finding with regard to this allegation.

Conclusion

For the reasons set forth above, the commission agrees with the ALJ that the complainant failed to establish he was discriminated against by the respondent, in violation of the Act. The dismissal of the complaint is therefore affirmed.

cc: Atty. Laurie J. McLeRoy
Atty. Ben Hitchcock Cross

Editor's Note: This case has been appealed to circuit court.