

State of Wisconsin



Labor and Industry Review Commission

Eric Hunsicker, Complainant

Fair Employment Decision<sup>1</sup>

Charter Steel Division,  
Respondent

ERD Case No. CR202101049  
EEOC Case No. 26G202100560C

Dated and Mailed:

August 8, 2025

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The decision of the administrative law judge is **modified** and, as modified, is **affirmed**. Accordingly, the commission issues the following:

**Order**

1. That the respondent shall cease and desist from discriminating against the complainant on the basis of age.
2. That the respondent shall offer the complainant reinstatement to a position substantially equivalent to the position he held prior to his discharge. This offer shall be tendered by the respondent or an authorized agent and shall allow the complainant a reasonable time to respond. Upon the complainant's acceptance of such position, the respondent shall afford him all seniority and benefits, if any, to which he would be entitled but for the respondent's unlawful discrimination, including sick leave and vacation credits.
3. That the respondent shall make the complainant whole for all losses in pay the complainant suffered by reason of its unlawful conduct by paying the complainant the amount he would have earned as an employee, including pension, health insurance, and other benefits, from the date the respondent discharged the

<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>.

complainant until such time as the complainant resumes employment with the respondent or would have resumed such employment but for his refusal of a valid offer of a substantially equivalent position. The amount due in back pay from the date of discharge through the week ending January 27, 2024, is \$116,223.22.<sup>2</sup>

Thereafter, the back pay for the period shall be computed on a calendar quarterly basis with an offset for any interim earnings during each calendar quarter. Any unemployment insurance or welfare benefits received by the complainant during the above period shall not reduce the amount of back pay otherwise allowable, but shall be withheld by the respondent and paid to the Unemployment Compensation Reserve Fund or the applicable welfare agency. Additionally, the amount payable to the complainant after all statutory set-offs have been deducted shall be increased by interest at the rate of 12 percent simple. For each calendar quarter, interest on the net amount of back pay due (i.e., the amount of back pay due after set-off) shall be computed from the last day of each such calendar quarter to the day of payment. Pending any and all appeals from this Order, the total back pay will be the total of all such amounts.

4. That the respondent shall pay to the complainant reasonable attorney's fees incurred in pursuing this matter in the total amount of \$67,287.50 together with costs of \$930.61. A check in that amount shall be made payable jointly to the complainant and his attorney's law firm, Alan C. Olson & Associates, S.C., and delivered to that firm.

5. That within 60 days of the date this Order is issued,<sup>3</sup> the respondent shall comply with all terms of this Order and file with the commission a Compliance Report detailing the specific actions it has taken to comply with this Order. Pursuant to Wis. Stat. § 227.54, the institution of a proceeding for judicial review shall not stay enforcement of the commission decision unless a stay is ordered by the reviewing court. The commission will not pursue enforcement while a motion for such a stay is pending. The Compliance Report shall be prepared using the "Compliance Report" form which has been provided with this decision. The respondent shall submit a copy of the Compliance Report to the complainant at the same time that it is submitted to the commission. Within 10 days from the date the copy of the Compliance Report is submitted to the complainant, the complainant shall file with the commission and serve on the respondent a response to the Compliance Report.

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<sup>2</sup> The administrative law judge awarded \$118,569.96 based on figures submitted by the complainant on February 16, 2024. The commission instead awards \$116,223.22 based on revised figures submitted by the complainant on March 21, 2024.

<sup>3</sup> For a discussion of the effective date of commission orders and an opposing view, see [Lorenz v. Woodman's Food Market](#), ERD Case No. CR202002781 (LIRC Dec. 18, 2024).

Notwithstanding any other actions a respondent may take in compliance with this Order, a failure to timely submit the Compliance Report required by this paragraph is a separate and distinct violation of this Order. The statutes provide that every day during which an employer fails to observe and comply with any order of the commission shall constitute a separate and distinct violation of the order and that, for each such violation, the employer shall forfeit not less than \$10 nor more than \$100 for each offense. *See* Wis. Stat. §§ 111.395, 103.005(11) and (12).

By the Commission:

/s/

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Michael H. Gillick, Chairperson

/s/

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Georgia E. Maxwell, Commissioner

/s/

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Marilyn Townsend, Commissioner

### **Procedural Posture**

This case is before the commission to consider the complainant's allegation that the respondent discriminated against him on the basis of age, 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 finding that age was a determining factor in the respondent's decision to discharge the complainant. The respondent filed a timely petition for commission review of that decision.

The commission has considered the petition and the positions of the parties, and has reviewed the evidence submitted at the hearing. Based on its review, the commission agrees with the decision of the administrative law judge, and adopts the findings and conclusions in that decision as its own, except that it makes the following:

### **Modifications**

1. In the fourth paragraph of the administrative law judge's Procedural History (on page 1 of the administrative law judge's decision), delete "Attorney Eric Hunsinger, counsel for the complainant;" and substitute "Attorney Alan Olson, counsel for the complainant;"

2. In paragraph 10 of the administrative law judge's Findings of Fact, after the first sentence thereof, insert: "Instead, Hunsicker was required to 'shimmy' or 'crab walk' the cord reel across the top of the storage rack to move it to one side."
3. In paragraph 12 of the administrative law judge's Findings of Fact, delete the last sentence thereof, and substitute "Hunsicker could not have used a ladder to 'shimmy' or 'crab walk' the cord reel because he would have had to overreach or overbalance, possibly causing him to fall or upset the ladder."
4. Delete paragraph 3 of the administrative law judge's Conclusions of Law, and substitute: "The respondent discriminated against the complainant based upon his age, within the meaning of the Wisconsin Fair Employment Act."
5. In paragraph 4 of the administrative law judge's Order, delete "\$118,569.96" and substitute "116,223.22." Delete the eleventh paragraph of the administrative law judge's Memorandum Opinion (the third full paragraph beginning on page 7 of the administrative law judge's decision) and substitute:

"The respondent's Safety Committee reviewing Hunsicker's safety violation acknowledged that there were 'no tie-offs' in the area, meaning that wearing a safety harness was not an option. Hunsicker could not have stood on a ladder when he 'shimmied' or 'crab walked' the cord reel across the wire storage rack, as attempting to do so would have required Hunsicker to overreach or overbalance while standing on the ladder, possibly causing the ladder to tip over, or him to fall from the ladder, or both."

### **Memorandum Opinion**

#### 1. Age discrimination

Before the commission, the respondent challenges the complainant's credibility in part because he accurately recalled neither the date of the event leading to his discharge nor the date of the discharge itself. The respondent also notes that while the complainant testified that he learned that two younger coworkers, Eider and Gilbert, had received a disciplinary leave a few months after his discharge, the complainant's discrimination complaint, filed about three weeks after his discharge, cited Eider's and Gilbert's lesser discipline as evidence of age discrimination. However, the complainant's imperfect recollection of dates does not lead the commission to doubt his general credibility. The complainant's description of the actual events leading to his termination, including his conversations with supervisors Coakley and Novicki, went substantially unchallenged at the hearing.

The respondent presented evidence suggesting that the respondent's management believed that the complainant could have used a ladder to safely move the cord reel across the storage rack. The commission, like the administrative law judge, credited the complainant's testimony that he believed he could not have used a

ladder to move the cord reel because he would have overreached or overbalanced. Nevertheless, whether the complainant could have performed the task safely using the ladder is not the dispositive issue in this case. As the respondent points out in its brief, the commission's role is not to substitute its judgment for that of the respondent's management about how to run the respondent's operations safely. In this case, the record is clear that, regardless of how the task might have safely been performed, the complainant violated the respondent's safety rule by working without fall protection at an unguarded height of four feet or more. However, the question remains whether the respondent used that violation as a pretext for discrimination based on age.

In a claim of discriminatory discharge on the basis of age, the complainant makes a *prima facie* case by showing that: (1) he or she is forty or older and thus a member of the protected age group; (2) he or she was discharged or otherwise subject to an adverse employment decision; (3) he or she was qualified for the job; and (4) either he or she was replaced by someone not within the protected class or others not in the protected class were treated more favorably. *Puetz Motor Sales v. LIRC*, 126 Wis. 2d 168, 173, 376 N.W.2d 372 (Ct. App. 1985). Although the question of a *prima facie* case is mooted where, as here, a respondent articulates a nondiscriminatory reason for its action, *U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715, 103 S. Ct. 1478, 75 L.Ed.2d 403 (1983), the commission agrees with and adopts the administrative law judge's conclusion that the complainant established a *prima facie* case of age discrimination, by showing that he was qualified for his job and that younger coworkers Gilbert and Eider were treated more favorably because they received a disciplinary leave, not a discharge, following a safety violation. The respondent argues that, because the complainant violated a safety rule, he was not qualified for this job, and that he therefore did not make a *prima facie* case of discrimination. It is clear, however, that the complainant, who had worked for the respondent for 36 years without a prior safety violation, was qualified for his job. Evidence of a single failure to comply with an employer safety rule under these facts is not evidence of lack of qualification.

As noted above, the respondent offers the complainant's safety violation as a legitimate nondiscriminatory reason for his discharge. A uniformly-applied disciplinary rule may serve as a legitimate nondiscriminatory reason for a discharge, sufficient to rebut a claim of discrimination. *See Hamilton v. ILHR Dep't*, 94 Wis. 2d 611, 618 et seq., 288 N.W.2d 857 (1980). The issue in this case is whether the complainant has established that the rule violation was a pretext for age discrimination by showing that the rule was not uniformly applied.

The commission is satisfied that the complainant has shown that the respondent did not uniformly apply its safety rules in his case. The record establishes that two of the respondent's electricians, Eider and Gilbert, violated one of the respondent's safety rules one day before the complainant's violation occurred. Specifically, those

two men failed to follow the respondent's lock-out, tag-out policy before working on a roof exhaust fan control panel at the respondent's plant. When their violation was discovered, both men were immediately relieved of their duties and put on leave. By contrast, after the complainant's supervisor observed the complainant standing on the storage rack without fall protection, the supervisor did not immediately suspend the complainant (nor did at least one other supervisor who later became aware of the incident), but allowed him to continue work for several days.

Despite this initial indication that the respondent or its management initially did not regard the complainant's failure to wear fall protection at a height of four to six feet as seriously as Eider and Gilbert's failure to following the lock-out tag-out procedure, the complainant was ultimately discharged while Eider and Gilbert were only given disciplinary leaves. The respondent presented evidence suggesting that the difference in treatment was based on the evaluation of its management the potential "outcome" from the respective safety violations. That is, the outcome from Gilbert and Eider's failure to comply with the lock-out, tag-out procedure was judged not to be "severe or ha[ve] the potential to become severe," while the outcome from the complainant's failure to wear fall protection while working at height of four to six feet was judged to be severe or have the potential to become severe. On this point, the respondent's witnesses explained that Gilbert and Eider's failure to comply with the lock-out and tag-out procedure did not have the potential to become severe because a contractor working with Eider and Gilbert had followed the lock-out and tag-out procedure, because the power was off for the plant, and because a warning would have been given before power was restored.

However, when the respondent gave Eider his disciplinary leave, it informed him that following the lock-out, tag-out procedure was critical to his safety and the safety of his coworkers, and that a failure to follow the procedure "can cause serious accident or death." Exhibit 8. It is reasonable to infer that the reason Eider and Gilbert were expected to perform their own lock-out, tag-out process with respect to the roof exhaust fan control panel was because there was at least a potential that power could be restored to the control panel without warning while the men were working on the panel, despite the steps taken by the contractor. It is also reasonable to infer that the outcome in that event could be at least as severe as a fall from a wire rack four to six feet off the ground. Indeed, the respondent's human resource witness did not dispute that electrocution was a possibility given the failure of Eider and Gilbert to comply with the respondent's lock-out, tag-out requirement.

The respondent contends that it provided evidence that two other younger employees Viesselmann and Kondracki, were discharged following safety violations near in time to the incident involving the complainant, and suggests that this establishes it applied its safety policies evenly, without consideration of age. However, the testimony and other evidence about how those men violated the

respondent's safety rules, and more importantly, how the violations had the potential to have a severe outcome, was not developed. After carefully reviewing the evidence, the commission concludes that the respondent's asserted basis for discharging the complainant—his safety violation—was pretextual.

Merely because an employer's articulated nondiscriminatory reason is pretextual does not necessarily mean the complainant *must* prevail. Rather, the evidence must persuade the commission that the pretext is a pretext for discrimination. *Kovalic v. DEC International*, 186 Wis. 2d 162, 167-68, 519 N.W.2d 351 (Ct. App. 1994); *Theusch v. Steel Craft Corporation of Hartford*, ERD Case No. 199601535 (LIRC May 22, 1998); *Trudell v. Bellin Memorial Hospital*, ERD Case No. CR201303060 (LIRC June 29, 2016). The commission may, but is not required to, reach this inference simply on the complainant's *prima facie* case and on the commission's disbelief of the articulated nondiscriminatory reason. *Kovalic*, 186 Wis. 2d at 167-68. In this case, the commission is satisfied that the evidence presented, including particularly the more favorable treatment of younger workers Eider and Gilbert in terms of the lesser discipline they ultimately received, satisfies the complainant's burden of proving that the asserted safety violation was a pretext for discrimination on the basis of his age.

## 2. Calculation of back pay

The respondent also disputes the administrative law judge's back pay award, which was based on figures provided by the complainant. There is no dispute that the commission (and an administrative law judge) have discretion to award back pay to remedy employment discrimination, including age discrimination. *Wingra Redi-Mix Inc. v. LIRC*, 2023 WI App 34, ¶109, 408 Wis. 2d 563, 993 N.W.2d 715; *see also*, Wis. Stat. § 111.39(4)(c). The respondent does not appear to challenge the accuracy of the underlying numbers relied upon by the complainant in determining the ultimate back pay amount, such as wages actually paid, hours of overtime actually worked, or percentage pay adjustments actually made. Instead, the respondent challenges the complainant's *assumptions* in using those numbers to calculate of the ultimate back pay amount itself, asserting that the assumptions of its expert, Zachary Minute, in coming up with a final figure are more credible. Mr. Minute summarizes his assertion that the complainant's figures are based on faulty assumptions as follows:

Most critically, Complainant's calculation assumes a 9.24% increase in pay for 2021 wages compared to the average gross pay from 2012-2019. Part of this increase is in the assumption of 16.05 hours of "additional" overtime every week for Q2 2021, simply based on hours from Q1 2021, despite years of this average being 5.78. Complainant's calculations have a similar 5.38% increase for 2023 and 7.61% for Q1 2024. Meanwhile, they assume a 5.20% pay decrease for Q1 2024 for DDW compensation, despite experience showing a 10.98% and 9.20%

increase for 2022 and 2023, respectively, based on W2 information reported by Complainant.

... Notably, Complainant's overtime hours showed a declining trend line since 2015.

Respondent expert declaration, filed March 15, 2024, paragraphs 12 and 115.

However, the commission is persuaded that, despite Mr. Minute's assertion to the contrary, the assumptions underlying the complainant's figures are supported. The hearing evidence establishes that the complainant worked a biweekly schedule of 36 hours in one week and 48 hours in the second week. In a bi-weekly pay period, the complainant received both 8 hours of "scheduled" overtime (for the week he worked 48 hours) and a variable amount of "additional" overtime averaging 5.78 hours per week from 2013 through 2019. Discounting 2020 (which covered the period of the COVID-19 health emergency), the complainant's total overtime pay—while it varied from year to year—increased from approximately \$17,000 in 2014 to nearly \$26,000 in 2015, and from \$21,500 in 2017 to over \$23,000 in 2018 and over \$26,000 in 2019. Stated simply, given that his "scheduled" overtime hours remained constant at 8 per biweekly pay period, his "additional" overtime hours fluctuated significantly, both up and down, from 2013 to 2019. Even accounting for his relatively modest pay increases from 2013 to 2019, the complainant's overtime hours did not "demonstrate a declining trendline over time."

Indeed, the complainant had been averaging 15.35 hours of total overtime per week in the first quarter of 2021 (the last full quarter he worked for the respondent). This was an unusually high amount of overtime (working out to about 11.35 hours of "additional" overtime per week after subtracting the "scheduled" overtime), which occurred because he was covering hours from a vacant position. The complainant reasonably assumed that training a new employee for the vacant position could be expected to last into the second quarter of 2021, so that he would have continued to have a relatively elevated amount of "additional" overtime from the respondent in that quarter had he not been discharged. The complainant thus estimated total overtime averaging 12 hours per week (or about 8 hours of "additional overtime" after netting out the "scheduled overtime") had he continued to work for the respondent in that quarter. Then, beginning in the third quarter of 2021, and continuing thereafter, the complainant calculated his back pay based on an assumption of "additional" overtime hours from the respondent only at his long term average of 5.78 hours per week.

Respondent's expert, Minute, also questioned the complainant's figures showing a decrease in pay from his new employer, DD Williamson Colors LLC (DDW), occurring in the first quarter of 2024, despite having substantial pay increases from DDW in the previous two years. However, unlike the lost pay figures for the

respondent, which must necessarily be estimated, the figures for DDW appear to be based on actual earnings. As the complainant's hourly pay rate from DDW remained the same in the first quarter of 2024, any decreased earnings would be due to DDW providing the complainant with fewer hours or increasing the amounts withheld for benefits. The commission declines to question the back pay calculation based on the complainant's 2024 earnings from DDW.

Further, at least one of Mr. Minute's own assumptions is questionable. His estimated annual earnings for the complainant from Charter following the discharge in 2021 remained constant at \$95,280 per year, based on an average of the complainant's actual earnings from 2012 through 2019. He does not account for pay increases given by the respondent in both 2022 and 2023.

In its petition, the respondent also questions the credibility of the complainant's back pay calculation because he did not present the qualifications of the individual who prepared it. However, the respondent does not cite any statute or case law requiring that the back pay figures be verified by an individual with a particular set of credentials. In this case, the figures and assumptions relied upon by the complainant yield a credible and accurate calculation of the complainant's back pay award.

### 3. Attorney fees before the commission

Finally, the respondent challenges the complainant's claim for attorney fees before the commission. Specifically, the complainant's attorney claimed 11 hours of fee for appellate representation at \$450 per hour, for a total of \$4,950. This included a charge for 8.75 hours for drafting a brief to the commission. The respondent argues that the fee should be reduced because portions of the complainant's brief to the commission are derived from his brief to the administrative law judge, which the respondent asserts results in the payment of fee twice for the same work product.

The complainant, of course, is entitled to payment of his reasonable attorney's fees incurred in pursuing this matter. *Masri v. LIRC*, 2014 WI 405, ¶36, 356 Wis. 2d 405, 850 N.W.2d 298. In determining the amount of reasonable attorney fees, the commission looks to *Hensley v. Eckerhardt*, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 40 (1983). In that case, the Court held that the most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate, which provides an objective basis on which to make an initial estimate of the value of a lawyer's services. *Id.*, 461 U.S. at 433. Here, the commission is persuaded that the fees claimed by the complainant's attorney are reasonable both in terms of rate charged and hours expended.

cc: Attorney Kristi Foy  
Attorney Alan Olson

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