

State of Wisconsin



Labor and Industry Review Commission

Michael Birmingham, Complainant

Fair Employment Decision¹

Valley Ridge Leasing, LLC, Respondent

Dated and Mailed:

ERD Case No. CR201900501
EEOC Case No. 26G201900545C

October 30, 2025

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The decision of the administrative law judge 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 complainant, February 1, 2019, until such time as the complainant resumes

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>.

employment with the respondent or would have resumed such employment but for his refusal of a valid offer of a substantially equivalent position. 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 \$16,470. A check in that amount shall be made payable jointly to the complainant and his attorney, Douglas J. Carroll, Jr., of Carroll Law Firm, SC, and delivered to Attorney Carroll at that firm.²

5. That within 60 days of the date this Order is issued,³ 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.

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,

² Briefs were neither requested nor submitted before the commission. Consequently, no additional fees for representation before the commission are awarded.

³ 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).

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/

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 allegation that the respondent discriminated against him because of his 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 concluding that the complainant has proven that the respondent terminated his employment because of his age, in violation of the Act. 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.

Memorandum Opinion

The respondent, a company which provides landscaping services, posted an opening for an operations manager job on an online hiring platform. The duties of an office manager included making landscape plans and leading the respondent's crew in snow events. The respondent's owner was looking for an individual with experience in the landscaping field, including experience designing landscaping plans.

Following an interview, the respondent hired the complainant, who was born on August 6, 1978, as its operations manager. The complainant had landscaping experience, including designing commercial landscaping plans. He began work on December 10, 2018.

The complainant's job duties included pricing jobs for current customers and sending out job proposals to potential customers. He also performed snow removal work for the respondent. At a meeting in which the employer's owner was present, the respondent's attorney/business consultant, Emmanuel Mamalakis, assigned the complainant and another individual additional work creating an inventory system. However, the respondent's owner later instructed the complainant to give that assignment less priority than work sending out job pricing and job proposals.

The applicant's last day of work was February 1, 2019, when he was discharged at a meeting with the respondent's owner and Mamalakis. Mamalakis told the complainant that he was not a good fit for the company, that he was not following instructions, and that he had displayed a bad attitude toward Mamalakis. Mamalakis also told the complainant that he was too old and too experienced, and that the respondent wanted someone younger and more enthusiastic in its operations manager position.

Wisconsin Stat. §§ 111.321 and 111.322 prohibit employment discrimination against an individual, including termination from employment, on the basis of age. The prohibition applies to individuals aged 40 or over, subject to certain exceptions not relevant here. Wis. Stat. § 111.33. The burden in an age discrimination case rests with the employee asserting a violation of the Act. *Puetz Motor Sales, Inc. v. LIRC*, 126 Wis. 2d 168, 172-73, 376 N.W.2d 372 (Ct. App. 1985). In this case, the administrative law judge concluded that the complainant met his burden of proving that the respondent terminated his employment because of age, in violation of the Act.

At the hearing, the respondent's witnesses contended that the respondent discharged the complainant for legitimate nondiscriminatory reasons, specifically his unsatisfactory job performance and poor attitude. In its petition for review, the respondent asserts that the administrative law judge erred by failing to recognize that, because the complainant was a probationary employee, the respondent had more leeway in its discharge decision.

The respondent cites no authority for the proposition that the complainant, as a probationary employee, is entitled to less protection under the Act. Nor did it offer any concrete evidence of an employment policy setting out different performance expectations for probationary employees. The commission concludes that the respondent's position is that, in evaluating whether its articulated nondiscriminatory reason for the discharge was pretextual, the commission should keep in mind that the respondent had only worked for the respondent for a short while.

The more credible evidence in the record establishes that the respondent's decision to discharge the complainant was not actually based on the complainant's job performance or attitude, or on his status as a probationary employee. The complainant credibly testified that the respondent never raised concerns about his job performance or attitude with him before the discharge meeting, even though Mamalakis and he had met only a few days earlier to discuss his progress with the inventory system project. The respondent's primary evidence of unsatisfactory job performance seems to be Mamalakis's dissatisfaction with the complainant's handling of the inventory project, which the complainant had been specifically instructed not to prioritize by the respondent's owner. Regarding attitude, the respondent points to the complainant's "body language," such as receiving work instructions with crossed arms or audible sighs; the respondent identified no verbal comments by the complainant indicative of a poor attitude, nor did it document instances in which the complainant was counselled regarding attitude.

Most importantly, the complainant testified, credibly, that Mamalakis told him that he was being discharged because he was too old and that the respondent wished to replace him with someone younger and more enthusiastic. Indeed, shortly after the complainant was discharged, the respondent hired an individual born in 1996 to perform many of the same duties as performed by the complainant. The complainant's testimony provides credible, direct evidence of a discriminatory termination of employment based on age, and it alone is sufficient to establish a violation of the Act. The complainant's testimony on this point is also evidence supporting the inference that—the complainant's status as a new employee notwithstanding—the respondent's asserted reasons for the discharge were a pretext for discrimination and that the respondent instead acted with discriminatory intent in terminating his employment. *See Kovalic v. DEC Int'l, Inc.*, 161 Wis. 2d 863, 876 *et seq.*, 469 N.W.2d 224 (Ct. App. 1991).

At the hearing, of course, Mamalakis denied telling the complainant that his discharge was based on his age. Mamalakis testified that age was irrelevant to the operations manager job and that, as an attorney, he knew an age-based discharge would be illegal. He contended that the complainant was instead fired because he was argumentative, displayed a bad attitude, and seemed annoyed with the work or projects assigned to him.

The administrative law judge did not credit Mamalakis's testimony on this point. She noted that one might normally expect that an attorney involved in a discharge meeting would not mention advanced age as a reason for a discharge. However, the administrative law judge found that Mamalakis's demeanor and behavior at the hearing suggested that he was prone to inappropriate or impulsive outbursts, at one point responding "screw you" to a question from opposing counsel. By contrast, the complainant was quiet and controlled while testifying, leading the administrative law judge to find his version of the events at the discharge meeting more credible.

A review of the video recording of the hearing shows that Mamalakis did indeed display a combative and disputative demeanor in response to questioning at the hearing, leading the commission, too, to discredit his testimony regarding the reasons for the discharge. Because the commission credits the complainant's testimony with regard to the reasons for the discharge, the finding of discrimination is affirmed.

cc: Attorney Douglas J. Carroll Jr.
Attorney Emmanuel Mamalakis