

State of Wisconsin



Labor and Industry Review Commission

Fred Perry, Complainant

Fair Employment Decision¹

Hawx Pest Control, Respondent

Dated and Mailed:

ERD Case No. CR202101086
EEOC Case No. 26G202100583C

November 20, 2025
perryfr_rsd.doc: 103

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 by harassing him and failing to promote him because of his age, color, and race, and by terminating his employment because he opposed discrimination in the workplace, 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 no probable cause to believe that the respondent violated the Act as 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 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, subject to the following:

Modifications

1. Paragraph 27 of the FINDINGS OF FACT section of the administrative law judge's decision is deleted, and the following paragraph is substituted therefor:

27. The Complainant has failed to establish that there is reason to believe that the Respondent discriminated against him in terms or conditions of employment by refusing to promote him, or by engaging in or permitting harassment against him, because of his age, color, or race.

2. Paragraph 3 of the CONCLUSIONS OF LAW section of the administrative law judge's decision is deleted,² and the following paragraph is substituted therefor:

3. The Complainant has failed to prove that there is probable cause to believe that the Respondent discriminated against him in terms or conditions of employment by refusing to promote him, or by engaging in or permitting harassment against him, because of his age, color, or race, or because he opposed discrimination in the workplace within the meaning of the Act.

3. The third paragraph of the DISCUSSION section of the administrative law judge's decision is deleted.

Memorandum Opinion

The complainant, a pest control technician employed by the respondent, alleges that he was harassed by his supervisor, and that he was passed over for promotion to supervisory positions that were given to younger white colleagues with less

² The commission modifies the administrative law judge's decision to reflect that this case asserted a failure to promote and did not contain an allegation of discrimination in compensation.

experience. The complainant further alleges that the respondent fired him because he complained of discrimination. None of these allegations are supported by the evidence presented at the probable cause hearing in this case.

Failure to promote

The complainant places great emphasis on his longevity with the company and what he refers to as his “seniority.” The respondent’s witness, however, testified credibly that the respondent does not use a seniority system. It promotes only based on performance without regard to the duration of an employee’s tenure with the company. At hearing, the complainant acknowledged that he did not know if the respondent used a seniority system but argued that it should do so. Whether a seniority system is advisable, however, is not a question for the commission. As noted in *Gordon v. United Airlines, Inc.*, 246 F.3d 878, 889 (7th Cir. 2001), citing *Stewart v. Henderson*, 207 F.3d 374 (7th Cir. 2000), the commission does not sit as a superpersonnel department to second guess an employer’s business decision. The only question for the commission is whether the respondent’s actions violated the Act.

When, as here, the respondent has presented a legitimate non-discriminatory reason for its actions, the case proceeds directly to consideration of the ultimate factual inquiry, whether the respondent acted with a discriminatory motive. *Kelly v. Sears Roebuck & Company*, ERD Case No. CR201000439 (LIRC May 30, 2014). The commission has previously noted that:

. . . if an employer articulates a legitimate non-discriminatory reason for a discharge or other employment action, the issue of whether the complainant has established a *prima facie* case becomes moot. Instead, once such a reason is articulated, the burden of proof reverts to the complainant to show that this reason is a pretext for discrimination. *U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983); *Naill v. Western Wisconsin Technical College* (LIRC 02/12/99); *Kurtz v. School Dist. of St. Croix Falls* (LIRC June 10, 1993); *Duarte-Vestar v. Goodwill Industries*, (LIRC Nov. 9, 1990); *Mouncil v. Pepsi Cola*, (LIRC Feb. 16, 1989).

[*Stern v. RF Technologies, Inc.*](#), ERD Case No. 200200780 (LIRC Feb. 6, 2004).

In this case, the respondent’s witnesses testified that the two technicians that it promoted to supervisory positions instead of the complainant were promoted due to their superior performance, follow-through with company policies, and commitment to learning and ongoing education. The complainant presented no evidence to rebut that assertion or to show that the reason was a mere pretext for discrimination.

Termination

When the complainant began working for the respondent, the company was new and its practices were less formal. In 2020, as the company was growing, the respondent's practices became more structured. It began raising expectations, including implementing a new requirement that all technicians plan efficient routes and that they service at least two customers per hour. The complainant was progressively disciplined several times for failing to meet performance expectations, once after repeated reminders. The record contains no evidence to suggest that the complainant was treated differently than younger employees or those of a different race with regard to the discipline that he received. After having received two verbal warnings and two written warnings regarding his performance, the complainant engaged in an argument with his supervisor at a customer site, and it was on that basis that the respondent chose to terminate his employment. Nothing in the record suggests that the respondent's stated reason for the termination was a pretext for discrimination.

Harassment

The complainant alleges that his supervisor harassed him because of his race, color, and age. The complainant and respondent both acknowledge that the complainant and his supervisor engaged in an argument, but nothing in the record suggests that the argument was related in any way to the complainant's race, color or age.

Conclusion

For all of the reasons set forth above, the decision of the administrative law judge, as modified, is affirmed. Because there is no probable cause to believe that the respondent violated the Act, the complainant's complaint is dismissed.

cc: Atty. Spencer Phillips

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