

State of Wisconsin



Labor and Industry Review Commission

Doycellour Neal, Complainant
1844 N. 14th Street
Milwaukee, WI 53205

Independence First, Respondent
540 S. 1st Street
Milwaukee, WI 53204

ERD Case No. CR201902130

Fair Employment Decision¹

Dated and Mailed:

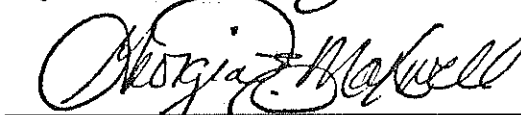
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The decision of the administrative law judge is **affirmed**. Accordingly, the complainant's complaint is dismissed.

By the Commission:


Michael H. Gillick, Chairperson


Georgia E. Maxwell, 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 her for having filed a wage complaint, 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 the complainant failed to establish she was discriminated against in the manner alleged. The complainant has 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's petition for commission review contains no argument, and the commission has no specific indication as to why the complainant believes she should prevail based upon this record. The commission has nonetheless reviewed the record in order to determine whether the findings and conclusions made by the administrative law judge are supported. The commission concludes that they are.

The complainant established a *prima facie* case of discrimination by presenting evidence indicating that she filed a wage complaint against the respondent and that a few months later she was discharged from her employment as a personal care worker assigned to care for her mother. The respondent, in turn, met its burden of presenting a legitimate, nondiscriminatory reason for its actions; it explained that the complainant's mother was removed from care for failing to sign required legal documents and that, because the complainant's only client was her mother, the complainant's employment was then terminated as a result. At the hearing the complainant contended that the respondent got rid of her mother as a pretext to be able to discharge the complainant in retaliation for having filed the wage claim. However, the evidence presented does not support this theory. To begin with, the commission notes that there is nothing in the record to indicate that the respondent was motivated to get rid of the complainant or that it harbored any animus against her for having filed a wage claim. Further, the record contains nothing to connect the respondent's decision to terminate services for the complainant's mother to the wage claim. Prior to the date on which the complainant filed her wage complaint all of the respondent's residents were given a new handbook and other documents that needed to be signed in order to continue receiving care from the respondent. While the complainant contends that her mother did not receive that information until two days before the deadline, she acknowledges that her mother was aware at least as of June 19, 2019, that she was required to sign the documents by June 21 or she would not be allowed to continue services. The complainant's mother did not sign the documents and, accordingly, services were discontinued. There is no reason to believe that the complainant's mother was treated less favorably than others in the

process; indeed, the evidence indicates that the complainant's mother was the only one of over 1,000 clients who failed to sign the required documents. Given these facts, the commission can see no basis to conclude that the respondent's decision to discontinue services for the complainant's mother was related to the complainant's wage claim.

The commission notes that the complainant maintained at the hearing that failure to sign the respondent's handbook and other documents is not a circumstance justifying discontinuing care under DHS rules. However, assuming, without deciding, that the complainant is correct in this assertion, the fact remains that the Act does not protect against wrong or unfair decision making on the part of the employer. "The focus of a pretext inquiry is whether the employer's stated reason was honest, not whether it was accurate, wise, or well-considered. We do not sit as a superpersonnel department that reexamines an entity's business decision and reviews the propriety of the decision. Our only concern is whether the legitimate reason provided by the employer is in fact the true one." *Stewart v. Henderson*, 207 F.3d 374, 378 (7th Cir. 2000). In addition, the complainant must show not only that the respondent's asserted reasons for terminating her employment were false, but that discrimination was the real reason. *See, Burt v. Skaleski Moving & Storage, Inc.*, ERD Case No. 200901633 (LIRC April 8, 2013). Here, there is simply no reason to believe that the respondent's explanation that it discharged the complainant as a consequence of removing her mother from care based upon her mother's failure to sign required documents was not the honest reason for the discharge or that its actions--although arguably ill-advised--were undertaken as a pretext to retaliate against the complainant because she filed a wage claim.

Finally, the commission addresses an argument the complainant made at the hearing that the respondent should have offered her a chance to continue her employment with a different client and that there was no reason for her assignment to end. The commission finds credible the respondent's explanation that, since the complainant had no other clients, once her mother was no longer receiving services the complainant's job was finished. The complainant did not ask to remain employed as a personal care worker for any other client and, in fact, after the separation continued to perform services as a personal care giver for her mother through a different entity.

For the reasons set forth above, the commission agrees with the administrative law judge that the complainant failed to establish she was discriminated against in the manner alleged. The administrative law judge's decision is, therefore, affirmed.

MARILYN TOWNSEND, Commissioner, (dissenting):

I respectfully disagree with the decision reached by the majority and therefore I dissent.

The Commission agrees that the complainant Ms. Neal presented a prima facie case of retaliation, and as a result, the issue for decision is whether the employer has rebutted the prima facie showing by presenting a legitimate nondiscriminatory reason for the discharge. Based on this record I am unable to find credible the employer's claimed reasons for either the discharge of Ms. Neal's mother, Betty Hill, or the subsequent discharge of Ms. Neal, which the employer justified based on its discharge of Ms. Hill. In such circumstances, the law is clear that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000). This is such a case.

First. The employer did not present any testimony from the person who made the decision to discharge Ms. Hill. While its only witness, the Human Resources Director Scott Curwick, testified as to why he believed she was discharged, his testimony was mere speculation, as he readily admitted it was not his decision to discharge Ms. Hill. He stated that the decision was actually made by the program director. (Tr. 145). The Commission has previously found that when the respondent fails to present the testimony of the decisionmaker, it has failed to present a non-discriminatory reason for its action, and therefore rebut the complainant's prima facie case. *Foust v. City of Oshkosh Police Dept.*, ERD Case No. 9200216 (LIRC April 9, 1998). *Zunker v RTS Distributors*, ERD Case No. 201004089 (LIRC June 16, 2014). In *Foust* and in *Zunker*, the Commission found in favor of the complainant for among other reasons that the respondent failed to present the decisionmaker to testify as to why the adverse decision was made.

Second. The Commission cannot rely on uncorroborated hearsay testimony to find that the discharge of the mother was for a legitimate nondiscriminatory reason. *Gehin v. Wisconsin Group Insurance Board*, 2005 WI 16, 56, 278 Wis. 2d 111, 692 N.W.2d 572. Mr. Curwick's testimony that Ms. Hill was discharged for failing to sign some legal documents, is hearsay.

Third. The employer's written policies do not permit it to discharge Ms. Hill for not signing some legal documents. Its policies identified as Exhibit 6 in these proceedings, state that it will comply with state law, specifically DHS 105.17 which provides that consumers, in this case Ms. Hill, cannot be discharged for reasons other than those identified in DHS 105.17. These reasons include such extraordinary events as death and nonpayment of services. These reasons do not include a consumer's failure to sign a legal packet, the reason the employer

presented through the hearsay testimony of its Human Resources Director. It is not credible that the employer actually discharged Ms. Hill based on an unwritten "policy" that conflicted with its written policies.

Fourth. The employer failed to follow its practices and offer Ms. Neal the opportunity to continue to work with First Independence notwithstanding the fact that it had positions available. Mr. Curwick testified that when a consumer is discharged, the personal care giver has about three days to state that they want to continue working with the employer and "if there's consumers within our pool, we can look ... to try to match them." (Tr. 147-148) However the respondent never gave Ms. Neal this opportunity. Her discharge letter simply stated that she was terminated and could reapply at some "future date." It did not give her three days to state that she wanted the opportunity to be matched with consumers in the employer's pool. Ms. Neal was a long-term employee. As her many evaluations reflect, she was a fine employee, who was dependable, and worked well with her supervisors. The failure of the employer to attempt to retain Ms. Neal is evidence of a discriminatory motive.

Under the circumstances, I am unable to find credible the employer's claimed reasons for its discharge of Ms. Neal. Accordingly, as set forth in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000), when the employee has presented a prima facie case as occurred here, and there is sufficient evidence to find that the employer's asserted justification is false as occurred here, I conclude that Ms. Neal was discharged in retaliation for filing a wage claim against her long-term employer.



Marilyn Townsend, Commissioner

cc: Attorney Kevin Terry