State of Wisconsin

Labor and Industry Review Commission

Daniel Stilwell Complainant **Spooner Health System** Respondent ERD Case No.201500607 EEOC Case No.26G201500566C	**Fair Employment Decision**[1] **Dated and Mailed:** MAR 3 1 2017

The decision of the administrative law judge (copy attached) is **affirmed**. Accordingly, the complaint is dismissed.

By the Commission:

Laurie R. McCallum, Chairperson

David B. Falstad, 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 the complainant on the basis of his creed by refusing to hire or employ the complainant and by refusing to reasonably accommodate a religious observance or practice in violation of the Wisconsin Fair Employment Act (WFEA). An administrative law judge (ALJ) for the Equal Rights Division of the Department of Workforce Development held a hearing and issued a decision finding no probable cause the respondent discriminated against the complainant because of his creed. A timely petition for commission review was filed. 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 ALJ, and it adopts the findings and conclusion in that decision as its own.

Memorandum Opinion

Probable Cause Discussion

The Wisconsin Fair Employment Act (WFEA) prohibits discrimination based upon a complainant's creed. Wis. Stat. §§ 111.321 (prohibited bases of discrimination) and 111.322(1) (prohibited acts of discrimination). Wisconsin Stat. § 111.337, further specifies that employment discrimination because of creed includes, but is not limited to refusing to reasonably accommodate an employee's religious observance or practice unless the employer can demonstrate that the accommodation would pose an undue hardship on the employer's business.

The WFEA provides that for the purpose of this act "creed" means a "system of religious beliefs, including moral or ethical beliefs, about right or wrong, that are sincerely held with the strength of traditional religious views." Wis. Stat. § 111.32(3m). *Leal v. International UAW, et. ano.,* ERD Case No. CR201300226, EEOC Case No. 26G201300517C (LIRC March 19, 2015); *Deguire v. Swiss Colony,* ERD Case No. CR200000308, EEOC Case No. 260A00261 (LIRC August 17, 2001); *Augustine v. Anti-Defamation League of B'nai B'rith et ano.,* 75 Wis.2d 207, 215, 249 N.W. 2d 547 (1977).

The complainant identifies his creed as Christian. Specifically he testified, "It's Christian, but it's just basically being truthful." T.26. After being offered the position of purchasing clerk, the complainant explained to the respondent that he could not sign the Standards of Excellence because they violated his religious beliefs. The respondent then filled this position with an individual who attended the same church the complainant was attending at the time he applied for the position. T. 89-90. It should also be noted that although the employee did not sign the standards in 2010 when they were initially created, he did sign the standards in 2014[2]. See Exhibit 7.

[2] Respondent believed the complainant's addendum to the standards related only to his desire to arrive on time for future meetings. T.231.

The issues for review are whether there is probable cause to believe the respondent violated the WFEA by refusing to hire or employ the complainant because of creed and whether there is probable cause to believe the respondent refused to reasonably accommodate a religious observance or practice.

The standard of proof here is probable cause. Probable cause, for purposes of the WFEA, is "a reasonable ground for belief, supported by facts and circumstances strong enough in themselves to warrant a prudent person to believe, that a violation of the [WFEA] has been or is being committed." Wis. Adm. Code § DWD 218.02(8).

The complainant is not alleging that he was not hired because of a discriminatory animus by the respondent against his Christian faith *per se*, but instead that he was not hired because he refused, after the offer of hire had been made, to sign the Standards or Excellence, which the complainant alleges conflicted with a tenet of his faith, i.e., the belief in telling the truth.

However, the complainant's allegation rests upon his assertion that the Standards of Excellence were absolutes that he would be required to follow in all circumstances. However, the evidence of record does not support this assertion, but instead establishes that the Standards of Excellence were not absolutes but rather guidelines created to facilitate an improvement in the work environment and patient outcomes, and were expected to be followed where reasonable. T.140,164. The complainant also fails to explain why these Standards of Excellence violated a tenet of his creed in 2015 when the offer of the position was made, but not when he signed them in 2014.

The complainant also alleges that the respondent's refusal to modify the Standards of Excellence in the manner requested constituted a failure to accommodate his religious beliefs. However, again, this allegation rests upon his assertion that the Standards of Excellence were absolutes, which the record shows they are not. The complainant has failed to establish that the Standards of Excellence, as written and applied, were inconsistent with the truth-telling tenet of his Christian faith, and, as a result, the respondent's refusal to modify them does not constitute a failure of accommodation.

The complainant has failed to sustain his burden to prove that there is probable cause to believe that the respondent discriminated against him based upon his creed as alleged.

Discovery and Prehearing Motion

The complainant also asserts the ALJ interfered with his discovery prior to the hearing and she refused his requests for subpoenas of witnesses. The commission has reviewed the ERD file and concludes the ALJ acted properly and did not abuse her discretion in her rulings.

The ALJ postponed the originally scheduled probable cause hearing on January 27, 2016, in order to grant the complainant additional time to perform discovery. At the

prehearing conference on January 27, 2016, the ALJ directed the complainant to consult chapter 804, Wis. Stats. regarding how to proceed with discovery or alternatively hire an attorney who could assist the complainant. The complainant is responsible for properly executing discovery whether he is represented or not and the ALJ correctly informed the complainant of this requirement in a letter dated February 8, 2016. The ALJ also noted in this letter that the complainant should advise her as soon as possible with names of witnesses he wished to subpoena for the March 30, 2016 hearing.

On March 10, 2016, the complainant sent the ALJ a list of 13 witnesses to subpoena for the hearing. During the prehearing conference on March 21, 2016, the respondent agreed to provide three witnesses, Thomas Tallant, Laura Fairbanks, and Cindy Rouzer without the need for subpoenas. The ALJ determined that nine of the remaining ten witnesses listed by the complainant would not be relevant or would provide overly broad information and did not grant subpoenas for these witnesses. The ALJ did note that the testimony of Michael Schafer, CEO of Spooner Health System, could be relevant since the complainant had alleged in his complainant that he met with Mr. Schafer regarding the standards as it pertained to the respondent's failure to hire him as a purchasing clerk.

The respondent however objected to the issuance of the subpoena for Mr. Schafer because the complainant failed to provide the respondent with 10-day notice of his intention to call Mr. Schafer as a witness. The ALJ suggested the respondent had ample notice since the complainant sent the witness list to the department on March 10, 2016. The respondent's attorney represented he did not receive a copy of that letter. The complainant did not dispute that he did not "cc" the respondent or respondent's attorney of his March 10, 2016 letter. The respondent's attorney also argued that it was unreasonable to ask the CEO of a large company to appear without sufficient notice and in the midst of a move to a new facility.

On March 23, 2016 the ALJ ruled she would not issue subpoenas for any of the complainant's witnesses that were not going to be produced by the respondent's attorney at the hearing. The complainant renewed his objection to the ALJ's decision not to subpoena Mr. Schafer at the March 30, 2016 hearing arguing his witness list submitted for the originally scheduled January hearing was sufficient notice. The ALJ reiterated her March 23, 2016 ruling and the matter proceeded to hearing.

Pursuant to Wis. Admin. Code § DWD 218.17 parties must file with the ERD and serve upon all parties a written list of the names of the witnesses and copies of the exhibits no later than 10 days prior to hearing date. The ALJ may exclude witnesses and exhibits not identified in a timely fashion pursuant to this section.

A complainant's request for a subpoena is a discretionary matter for the ALJ. The standard for the commission's review, then, is whether the ALJ's ruling was an abuse of discretion. *Kutschenreuter and Schoenleber v. Roberts Trucking, Inc.,* ERD Case Nos. 200501465 & 200501422 (LIRC Apr. 21, 2011). Under that standard, a

ruling will be sustained so long as the ALJ "examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." In *Coleman v. Levy Restaurants LLC,* ERD Case No. CR200800179 (LIRC March 28, 2013), the commission also held that the primary consideration in applying the ten-day rule is to protect parties from surprise and to protect the fairness and the due process of the proceedings.

Here, the ALJ correctly noted that the complainant did not rebut the respondent's attorney's assertion that notice of the exhibits and witnesses had not been served on respondent's attorney and that the short notice did affect the witness availability given his position as the respondent's CEO. The ALJ correctly noted that the witness list must be provided 10 days prior to the hearing because situations can change for witnesses, requiring the need for lists closer to the hearing date so parties can prepare their respective case and defenses. Given all of these circumstances, the commission concludes the ALJ did not abuse her discretion. The ALJ's decision not to subpoena Mr. Schafer was based upon the noted notice and fairness considerations.

cc: Complaint
Respondent
Attorney Stephen Weld
EEOC

STATE OF WISCONSIN
DEPARTMENT OF WORKFORCE DEVELOPMENT
EQUAL RIGHTS DIVISION

Daniel Stilwell
N5281 Conroy Dr
Spooner, WI 54801

Complainant

v.

DECISION AND MEMORANDUM OPINION
ERD Case No. CR 201500607
EEOC Case No. 26G201500566C

Spooner Health System
819 Ash St
Spooner, WI 54801

Respondent

In a complaint filed with the Equal Rights Division ("Division") of the Department of Workforce Development on February 24, 2015, the Complainant, Daniel Stilwell ("Stilwell"), alleged that the Respondent, Spooner Health System ("Spooner"), violated the Wisconsin Fair Employment Law by refusing to hire or employ the Complainant because of creed and refusing to reasonably accommodate a religious observance or practice. An Equal Rights Officer for the Division concluded in an Initial Determination issued June 26, 2015, that there was no probable cause to believe that Spooner violated the Law as alleged by Stilwell. Stilwell filed a timely appeal and the Division certified his complaint to hearing.

Administrative Law Judge (ALJ) Maria Selsor held a probable cause hearing regarding Stilwell's complaint on March 30, 2016, in Shell Lake, Wisconsin. Stilwell appeared in person and without counsel. Respondent appeared and was represented by its attorney, Stephen Weld of Weld, Riley, Prenn & Ricci, S.C. A hearing transcript was not prepared. Post-hearing briefs were not submitted.

Based upon the testimony taken and the evidence received at the hearing in this matter, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Respondent, Spooner Health System, is a provider of healthcare services in Washburn County, Wisconsin.

2. The Complainant, Daniel Stilwell, identifies his religion/creed as Christian.

3. Stilwell was hired by the Respondent as a janitor in September 2009. When he was hired, he was a direct employee of the Respondent. At some point he was transitioned to a contract employee. He continues in that role to this day.

4. In 2010, Stilwell was asked to sign a Standards of Behavior document developed by the Respondent. It was a series of "I will" statements that each employee was required to sign. The purpose of the document was to make clear the work and behavior expectations of the

Respondent's employees.

5. Stilwell objected to signing the Standards of behavior in 2010. He disagreed with the absolute nature of the statements and interpreted them as having no room for error. The Respondent did not require him to sign the Standards of Behavior at that time.

6. By 2014, the Standards of Behavior were called Standards of Excellence [hereafter "Standards"] but entailed mainly the same set of expectations and "I will" statements.

7. Stilwell signed the Standards on January 14, 2014. He added a handwritten note at the bottom which read "I will try to do better. I was late for this meeting." Stilwell was not disciplined for adding this addendum.

8. On February 3, 2015, Stilwell applied for a Purchasing Clerk position with the Respondent. On February 12, 2015, he was offered the job by Tom Tallant, the Purchasing Manager, and Laura Fairbanks, a human resources generalist. Fairbanks asked Stilwell about signing the Standards. Stilwell said that he would have to think about it. He took home a copy of the Standards to review overnight.

9. The following day, Stilwell went to Tallant and told him he could not sign the Standards because it was not truthful to say he would always do the things outlined in the document. Tallant explained to Stilwell that the Standards were guidelines, not absolutes, and encouraged Stilwell to sign it.

10. Tallant spoke to someone regarding Stilwell's objection. Later in the day, Tallant informed Stilwell that if he did not sign the Standards, the position would be offered to someone else. Stilwell said it would violate his religious beliefs to sign the Standards. He refused to sign.

11. Stilwell approached Spooner's CEO, Mike Schafer, to discuss the situation. Schafer met with Stilwell in Schafer's office. Stilwell suggested that the policy be changed from "I will" to something like "I will try" or something less absolute. Schafer said that would weaken the policy. Schafer told Stilwell he would bring the issue up at a Leadership Meeting that was coming up in 3-4 weeks. Stilwell never spoke to Schafer again.

12. Spooner filled the Purchasing Clerk position the following day, on February 14, 2015. The person who took the position attended Stilwell's same church.

13. Stilwell does not object to any of the "I will" statements in the Standards; he objects to saying he will *always* do them, regardless of the circumstances. For example, he does not object to agreeing to "Knock prior to entering a room, identify myself and ask permission to enter." However, he objects to having to do that when he, for example, enters the supply closet, the break room, the waiting room (where there is no door), or a lobby. Similarly, he does not object to being "attentive when speaking with a co-worker or customer giving them my undivided attention." However, if another co-worker were to walk by and say hi while he was speaking to the other co-worker, he would violate the Standards by acknowledging the other co-worker.

14. Spooner did not discriminate against Stilwell. Spooner's decision not to hire him or allow him to alter the Standards was based on its legitimate, non-discriminatory policy that all employees must sign the Standards of Excellence as written. There is nothing on the face of

the document nor in its enforcement that singles out Christians.

Based upon the Findings of Fact entered above, the Administrative Law Judge now enters the following:

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of the Wisconsin Fair Employment Act.

2. There is no probable cause to believe that Spooner Health System violated the Wisconsin Fair Employment Act by refusing to hire or employ the Complainant because of creed.

3. There is no probable cause to believe that Spooner Health System violated the Wisconsin Fair Employment Act by refusing to reasonably accommodate a religious observance or practice.

Based upon the Findings of Fact and Conclusions of Law made above, the Administrative Law Judge now issues the following:

ORDER

That the complaint in this matter is hereby dismissed.

Dated at Milwaukee, Wisconsin JUL 22 2016

Maria Selsor
Administrative Law Judge

cc: Complainant
Respondent
Stephen Weld, Attorney for Respondent
EEOC

MEMORANDUM OPINION

The burden of proving probable cause to believe that discrimination occurred is on the Complainant, and the Complainant has not met the burden of proof in this proceeding. Probable cause is a reasonable ground for belief, supported by facts and circumstances strong enough to warrant a prudent person to believe that discrimination probably occurred. It contemplates ordinary, everyday concepts of cause and effect upon which reasonable persons act and it adopts the viewpoint of a prudent, not speculative, imaginative or partisan person. Boldt v. LIRC, 173 Wis.2d 469, 496 N.W.2d 676 (Ct. App., 1992).

No reasonable person would interpret the Standards as Stillwell does. Stilwell reads the Standards so literally that they become absurd. This is not the way the Standards were intended nor the way they were enforced. A certain amount of common sense must be assumed.