

State of Wisconsin



Labor and Industry Review Commission

Casey Weber  
Complainant

VapinUSA-WI LLC  
Respondent

ERD Case No. CR201402244  
EEOC Case No. 26G201401159C

Fair Employment Decision<sup>1</sup>

Dated and Mailed:

MAY 05 2017

The decision of the administrative law judge is **reversed**. Accordingly, the complaint is dismissed.

By the Commission:

Handwritten signature of Laurie R. McCallum in cursive.

Laurie R. McCallum, Chairperson

Handwritten signature of David B. Falstad in cursive.

David B. Falstad, Commissioner

<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>.

### Procedural Posture

An administrative law judge (ALJ) for the Equal Rights Division (ERD) of the Department of Workforce Development held a hearing on the complainant's claim that the respondent engaged in or permitted sexual harassment in violation of the Wisconsin Fair Employment Act (WFEA). The ALJ issued a decision concluding the respondent engaged in sexual harassment in violation of the WFEA and ordered the respondent to cease and desist from engaging in sexual harassment against the complainant and awarded attorney fees to the complainant's attorney. A timely petition for commission review was filed by the respondent and briefs were submitted by the parties. 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 reaches the following:

### Findings of Fact

1. The respondent, VapinUSA-WI LLC, is a retailer that sells electronic cigarettes and related supplies in stores it operates in Wisconsin. The respondent is an employer within the meaning of Wis. Stat. § 111.32(6).
2. The complainant, Casey Weber, is an individual and employee of the respondent within the meaning of Wis. Stat. § 111.32(5) and worked from April 10, 2014 to May 31, 2014 as a sales representative, selling e-cigarettes and e-vapor. She worked at the respondent's Marinette store, earning \$10 per hour, working part-time hours between 5-30 hours per week. The respondent discharged the complainant on May 31, 2014.
3. Other sales representatives the complainant worked with at the Marinette location were William Turpin, Shawn Fehr, Kyle Chin and Bailey Enderby. (T.67).
4. The Marinette location's store manager was Michael Rice. Mr. Rice trained and disciplined employees, assigned employees to perform tasks and created the work schedule for the store's employees. Mr. Rice was the complainant's immediate supervisor. Mr. Rice sent the completed work schedules to the respondent's operations manager for approval.
5. Ms. Allison Vandeveld was the respondent's operations manager. She worked out of one of the Green Bay locations but visited the Marinette store periodically. (T.65). Ms. Vandeveld was responsible for overseeing the entire retail operations for the owner's store locations. All employees from sales representatives to store managers reported to Ms. Vandeveld. Ms. Vandeveld reported to the respondent's owner, David Schroeder. (T.66,67).
6. Mr. Rice made "that's what she said" comments to the complainant. On one occasion, the complainant said the e-cigarette battery was big and Mr. Rice replied "that's what she said". (T.17). Another time the complainant said the battery would not fit in the e-cigarette and Mr. Rice made the same comment. Mr. Rice made "that's what she said" comments almost daily to the complainant. (T.17). The complainant typically did not respond to these

comments. William Turpin heard Mr. Rice make these specific comments at work. (T.112).

7. On May 11, 2014, the complainant and Mr. Rice had a disagreement over whether the complainant could leave early because she was sick. (T.42). Mr. Rice was not in the office that day but during a phone conversation with the complainant, he informed the complainant she could leave work. The complainant then stated to Mr. Rice that she did not want to leave right away but wanted to take a break to see if she felt better so she could stay. Mr. Rice yelled at the complainant during their conversation and ordered her to leave. (T.42,95).
8. On May 12, 2014 the complainant sent an e-mail (Ex.C1) to Ms. Vandeveld following up on their May 11 telephone conversation. In her e-mail, the complainant explained the telephone conversation she had with Mr. Rice on May 11. She recalled Mr. Rice complained she had called him up "bitching" she was "fucking sick" and now he was telling her to get out of the store. She also wrote that Mr. Rice called her a bitch. (T.41). The e-mail made no mention of "that's what she said" comments.
9. One day after Mr. Rice disciplined the complainant for wearing pants (T.27) that violated the respondent's dress code, the complainant asked him about a pair of pants she wore to work. He responded that "they looked good" and made her "look like she had a butt." The complainant did not respond. (T.26-28).
10. Mr. Rice made comments about female customers that visited the store. One time he said that he wanted to bend a female customer over her car and wanting "a piece of that" in reference to a young female customer. Another time he mentioned taking another female customer to bed. (T.19,20).
11. In early May of 2014, the complainant informed Mr. Rice that she needed time off because she and her fiancé had rented a hotel room. Mr. Rice responded to the complainant that he was going to get a hotel room for the complainant and another sales representative, Shawn Fehr. The complainant responded "yeah right". (T.22,23).
12. Mr. Rice also made a comment to the complainant that she needed to "find a real man" when talking about her fiancée. The complainant responded that she already had one. (T.25).
13. The complainant's sales for the store were good. Mr. Rice commented that was only because the complainant looked good. The complainant responded to Mr. Rice that customers bought things from her because she did her job well. (T.23,24).
14. Typically the complainant did not respond to Mr. Rice's "that's what she said" comments or his comments about female customers.

15. In regard to a situation where the complainant's name had been removed from a sales invoice, the complainant e-mailed Ms. Vandeveld and referenced her concern that the work environment was becoming hostile. Ms. Vandeveld responded by asking the complainant what she meant about the work environment becoming hostile and the complainant responded that Mr. Rice's attention over her work performance brought out a general sense of hostility. (T.52). (Exhibit R1).
16. Mr. Fehr stared at the complainant from across the store floor, licking his lips. Mr. Fehr told the complainant that he wanted to hold down her arms and have sex with her. The complainant was shocked by these comments and said nothing to Mr. Fehr. (T.30).
17. When the complainant returned to work with a change of pants after Mr. Rice told her to return with dress code pants, Mr. Fehr asked the complainant if she needed help changing. She responded that she did not need help. (T.31).
18. Mr. Fehr asked her to come to work early so they could have sex. After he made these comments, the complainant started reporting later to work to avoid Mr. Fehr. (T.35,36).
19. Mr. Fehr once told the complainant he wanted to pull her hair and choke her. He also indicated that he had a belly button fetish and asked the complainant to pull up her shirt on numerous occasions. (T.34). The complainant refused to do this. Another time he indicated he wanted to nibble and kiss her hips. The complainant asked him "aren't you married?" and Mr. Fehr responded that you "only live once." (T.31).
20. Mr. Fehr commented the complainant had "come fuck me eyes." The complainant told Mr. Fehr to stop making such comments or she would go to Mr. Rice or Ms. Vandeveld about the comments. (T.32). Mr. Fehr responded that if she complained about him, he would make sure she was fired.
21. The complainant was instructed by Mr. Rice and Ms. Vandeveld to take orders from Mr. Fehr because they were considering making him an assistant store manager. Mr. Fehr asked the complainant to complete certain tasks that included bending and reaching. (T.33). Mr. Fehr said he liked to watch the complainant do those things.
22. Once the complainant was reaching for something Mr. Fehr had asked her to get, he grabbed her buttock. (T.36). The complainant told Mr. Fehr to stop. He grabbed her buttock on one occasion outside of Mr. Rice's office. He once thrust his groin area into the complainant when she had her back to him while looking at the work schedule. (T.37).
23. The complainant did not file any formal complaint with the employer regarding Mr. Rice or any co-workers regarding sexual harassment. The

complainant discussed her plan to file a complaint for harassment [regarding the May 11 incident and dress code violation] with the Department of Workforce Development via text to Ms. Vandeveld. (T,60, 61). (Exhibit R4, pgs.9, 11, 19).

24. On May 31, 2014, the complainant's last day of employment, she reported to Ms. Vandeveld her experiences with Mr. Rice, Mr. Fehr and Mr. Turpin. This was the first time that the complainant had informed Ms. Vandeveld about Mr. Fehr and Mr. Turpin's behavior towards her. (T.38). Ms. Vandeveld said she would discuss the respondent's "zero tolerance policy" with employees.
25. Mr. Rice's employment was terminated after the complainant's employment was terminated. He was terminated because of a lack of communication and performance issues. (T.68).
26. The respondent's Employee handbook provides the respondent has a zero tolerance rule for harassment. The handbook defines harassment as conduct including but not limited to "epithets, slurs, jokes, negative stereotyping; threatening, intimidating or hostile acts; denigrating jokes and written or graphic material that denigrates or shows hostility or aversion... ." (T.70,71). (Ex. C-2).
27. The respondent's Employee Handbook included a "Complaint Procedure and Investigation" clause. The clause in part instructs employees to promptly report a possible incident of sexual harassment or other unlawful harassment or discrimination to the operations manager or the owner if it would be inappropriate to report to the operations manager.

#### **Conclusions of Law**

1. The respondent is an employer within the meaning of the Wisconsin Fair Employment Act.
2. The complainant is an individual and was an employee of the respondent within the meaning of the Wisconsin Fair Employment Act.
3. The complainant has not established by a fair preponderance of the evidence that the respondent engaged in sexual harassment in violation of the Wisconsin Fair Employment Act.

#### **Memorandum Opinion**

The commission has interpreted Wis. Stat. § 111.36(1)(b) as providing for three categories of prohibited conduct: sexual harassment by an employer, *quid pro quo* sexual harassment, and hostile environment sexual harassment. The commission has specifically held, and the court of appeals has affirmed, that under the first category, employment discrimination based on sex occurs if the employer -- meaning

the owner or an agent in a position of responsibility such that it is appropriate to apply the rule of *respondeat superior* and treat the actions of the agent as being the actions of the employer -- engages in conduct that meets the definition of sexual harassment, whether or not that conduct creates a hostile work environment. *Tobias v. Jim Walter Color Separations* ERD Case No.199500297 (LIRC, Aug. 13, 1997); *aff'd. Jim Walter Color Separations v. LIRC and Marcy Ann Tobias*, 226 Wis. 2d 334, 595 N.W. 2d 68 (Ct. App. 1999); *Tolliver v. Milwaukee City Center*, ERD Case No. 200704390 (LIRC February 26, 2010).

The complainant raised allegations of sexual harassment by her store manager and co-workers, in particular Mr. Fehr. In order to be liable for the co-workers' actions, the complainant must show the respondent's management was aware of this conduct, specifically Mr. Fehr's conduct. The complainant failed to show by a preponderance of the evidence that respondent's management knew or should have known about the harassment the complainant alleged she suffered by Mr. Fehr or any other co-worker. It was not until her last day of work that the complainant raised allegations of sexual harassment involving her co-workers<sup>2</sup>. Therefore because the complainant failed to prove discrimination by her co-workers, the only issue for review is whether the respondent engaged in or permitted sexual harassment in regard to the allegations involving Mr. Rice.

It must first be determined whether Mr. Rice as the respondent's store manager is an agent of the respondent in order for the principle of *respondeat superior* to apply. The test applied for determining whether a respondent's employee is an agent is found at *City Firefighters Union Local No. 311 v. City of Madison*, 48 Wis.2d 262, 270-271, 179 N.W.2d 800 (1970). The criteria used includes examining whether the individual has the authority to hire, promote, transfer, discipline or discharge employees; authority to direct and assign the work force; number of employees supervised; level of pay supervisor is paid for the skill of supervising; whether supervisor is primarily supervising an activity or primarily supervising employees; whether supervisor is a working supervisor or spends most time supervising employees and the amount of independent judgment and discretion exercised in supervising. *Id. at page 271*.

Mr. Rice as store manager was responsible for scheduling employees, disciplining employees, training employees, assigning tasks for employees to complete and generally supervising the sales generated by the employees. (T.67,68). Applying the relevant test to these facts, these numerous responsibilities demonstrated that Mr. Rice is an agent of the respondent under the principle of *respondeat superior*.

The next issue to be resolved is whether Mr. Rice engaged in sexual conduct or made sexual comments unwelcomed by the complainant. Under Wis. Stat. § 111.32(13), "sexual harassment" means "unwelcome sexual advances, unwelcome

---

<sup>2</sup> The only witnesses who testified at the hearing were the complainant, the respondent's operations manager, Allison Vandeveld and William Turpin, a sales associate for the respondent.

requests for sexual favors, unwelcome physical contact of a sexual nature or unwelcome verbal or physical conduct of a sexual nature.”

Not all of Mr. Rice’s comments were of a sexual nature. Calling the complainant a “bitch” and telling her to get a real man, while inappropriate, are not of a sexual nature. However, Mr. Rice’s comments about female customers were sexual in nature and “that’s what she said” comments by Mr. Rice implied a sexual connotation. (T.18,74,75). Mr. Rice’s comments about the complainant wearing pants that made it look like she had a butt and that she was doing well with sales because of her looks had sexual implications.

Thus, if the complainant can demonstrate that the conduct to which she was subjected was “unwelcome” by her, she can establish that the respondent engaged in sexual harassment as the result of Mr. Rice’s conduct.

Conduct is considered unwelcome where the employee did not solicit or invite it, and regards it as undesirable or offensive. See, *Fluhr v James Magestro, DDS*, ERD Case No. 19952715 (LIRC April 1, 1999), quoting *Henson v. City of Dundee*, 682 F.2d 897, 903, 29 FEP Cases 787, 792 (11th Cir. 1982). Whether conduct is “unwelcome” presents a question as to the subjective state of mind of the person to whom the conduct is directed. See, *Rhinehart v. A&M Plumbing & Pump Services, LLC*, ERD Case No. CR200900382 (LIRC June 7, 2013); *Lass v. Sawyer*, ERD Case No. 1999603900 (LIRC December 28, 1999).

Although the complainant brought numerous objections regarding Mr. Rice to the respondent’s attention, at no time did she mention or even imply that he was sexually harassing her. The record demonstrates the complainant disliked Mr. Rice’s management style and discipline of her, and that her complaints to Ms. Vandeveld were about that. (R.1, R.4) The May 11, 2014 incident between the complainant and Mr. Rice involved her request to leave work early because she was sick and their ensuing argument over whether she could leave work or try and stick it out.

The complainant also disliked being disciplined for failing to wear pants that met the respondent’s dress code. Although Mr. Rice made an inappropriate comment about her appearance in the pants, she did not respond to Mr. Rice’s comment or inform Ms. Vandeveld of that comment. Instead text messages were sent between the complainant and Ms. Vandeveld regarding what constituted appropriate attire to meet the employer’s dress code. (R.4, pgs.8-19). The other complaint in the record involved the removal of the complainant’s name from a sales’ invoice by Mr. Rice and was not sexual in nature. The respondent explained that it did not have anything to do with the complainant’s compensation but related to general store sales. (R.1)

The commission is persuaded that the complainant’s frustration was with Mr. Rice’s abrasive managerial style and his decision to discipline her for violating the respondent’s dress code policy. (R.1, R.4). In her short tenure with the respondent,

the complainant raised several complaints about Mr. Rice to Ms. Vandeveld. These complaints did not reflect behavior by Mr. Rice predicated upon sexual conduct. When asked by Ms. Vandeveld about the work environment becoming hostile, the complainant responded at the hearing that she was referring to the incident involving removing her name from the invoice. (T.51,52).

The record also demonstrates the complainant typically did not respond to Mr. Rice's "that's what she said" comments. When Mr. Rice commented on her appearance in her work pants, she did not respond. (T.26,28). Mr. Rice's comment about getting a hotel room for the complainant and Mr. Fehr was in response to the complainant stating she needed time off because she and her finance had rented a hotel room. (T.22). Even though the complainant responded to this comment, nothing in her response could be interpreted as an objection. The complainant was not reluctant to bring any concerns or objections she had regarding Mr. Rice to the respondent's attention. Consequently, if she had found Mr. Rice's comments to her to be as unwelcome as she now claims, it stands to reason that she would have raised them to the respondent as well.

The commission conferred with the ALJ to learn her demeanor impressions of the complainant. The ALJ indicated that there was nothing in the complainant's demeanor during the hearing that made her question the complainant's credibility, including her testimony about Mr. Rice's conduct and behavior. The commission questions the complainant's credibility regarding her assertion that Mr. Rice's comments were unwelcome given her other complaints. The record demonstrates that the complainant and Mr. Rice had a combative employee-management relationship where they sometimes engaged in conversation and behavior bordering on the inappropriate. The complainant's complaints relate to this friction-filled relationship and do not reflect any complaints against Mr. Rice that were predicated upon sexual conduct or comments. The commission is persuaded the complainant would have included with her other complaints regarding Mr. Rice any such objections to sexual harassment if they had in fact been unwelcomed.

The record does not demonstrate the complainant established with a preponderance of evidence that the respondent engaged in sexual harassment in violation of the WFEA.

cc: Complainant  
Respondent  
Attorney for the Complainant  
Attorney for the Respondent