



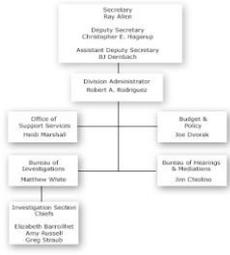
Wisconsin Equal Rights Division:
Overview, Issues, & Trends

Equal Rights Division
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Recent Reorganization





ERD Overview

- ⦿ Nor organized on functional lines, rather than by law
- ⦿ Investigations Bureau oversees all initial investigations
- ⦿ Bureau of Hearings & Mediation oversees work done by our Administrative Law Judges



Thank You!

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You Be the Judge: A step-by-step analysis of a discrimination case



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Amanda Tollefsen
Administrative Law Judge



Introduction

- In this seminar, we will be walking through an actual discrimination case that was decided by one of the ERD's administrative law judges discussing the facts of the case, the procedural steps that the parties went through, and the decision the ALJ came to after hearing the case.

- ☉ *Kamar Jeffrey Owens v. Wisconsin Bell*
- ☉ Alleged race-based discrimination
- ☉ Analysis is the same, regardless of basis





Facts

- The complainant/employee in this case was a technician for a telecommunications company. He identified as a black male.
- In December of 2000, all technicians of the telecommunications company submitted their vacation requests for the following year.





Facts

- The complainant was entitled to five weeks of vacation. During the first round of selections, he was entitled to select three weeks of vacation. Instead, he selected four weeks.
- Other technicians found out that the complainant had selected one more week of vacation than he was entitled to select, and some were not happy about it.





Facts

- Two of his white co-workers fashioned a noose and hung by his locker with a note that read, "Four weeks? Must be a black thing."
- When the complainant came to work, he found the noose hanging by his locker and the note. He responded, "This isn't funny. I don't appreciate it. I'm not laughing."





Facts

- Many of the other technicians in the vicinity, however, did laugh.
- Additionally, while the complainant was taking down the noose, one of the white co-workers who fashioned the noose and note was chanting "Change it, change it!" – a reference to the complainant's vacation selection.





Facts

- The complainant did subsequently reduce his vacation selections from four weeks to three weeks.
- One of the two white technicians that assisted with putting up the noose thereafter approached the complainant and said that if the complainant reported the incident, there may be repercussions. The complainant asked if that was a threat, and his co-worker responded he could take it any way he wanted to.





Facts

- The complainant reported the incident to his supervisor.
- After conducting an internal investigation, the employer decided to discharge the two white technicians responsible for hanging the noose and writing the note.





- **Filing of complaint –**
 - The complainant filed a complaint with the Equal Rights Division alleging race-based harassment under the Wisconsin Fair Employment Act (WFEA).
 - Per the WFEA, complainants must file complaints under the WFEA within 300 days of the date of discrimination.
 - If the complaint is not filed within 300 days, the respondent/employer may raise such fact in a motion to have the case dismissed.
 - In continuing harassment/hostile work environment cases, as long as one act of harassment occurs within 300 days of the date of the complaint, all related claims of harassment are considered timely.
 - In the instant case, the complainant filed a timely complaint.





- **Investigation**
 - After filing his complaint, the complainant's case was assigned to an Equal Rights Officer (ERO) to conduct an investigation into whether there was "probable cause" to believe that the discrimination alleged occurred
 - In determining whether there is probable cause to believe that discrimination occurred, an ERO first considers whether there is any direct evidence of discrimination (i.e. a smoking gun).
 - In the absence of direct evidence, EROs analyze cases under the *McDonnell Douglas* burden-shifting framework .





- **Analysis under *McDonnell Douglas***
 - The complainant must first prove "*prima facie*" case of discrimination, namely that:
 - he was a member of a protected class;
 - his employer subjected him to an adverse employment action;
 - the adverse employment action was directly related to his protected status.





Procedure

- **Analysis under *McDonnell Douglas***
 - If the complainant succeeds in proving a *prima facie* case of discrimination, the respondent must articulate some legitimate, non-discriminatory reason for the adverse employment action (burden of production).
 - If the respondent carries its burden, the burden shifts back to the complainant to prove that the reasons offered by the respondent are pretext for discrimination.





Harassment / hostile work environment analysis

- Harassment based on a protected category other than sex is made unlawful through the WFEA's prohibition against discrimination in the terms, conditions, and privileges of employment.
- Actionable harassment contemplates unwelcome verbal or physical conduct directed at an employee based on his or her protected status. The conduct must be severe or pervasive - both objectively and subjectively - in order to constitute actionable harassment.
- A single incident can be sufficiently severe or pervasive to create a hostile work environment. However, occasional and sporadic use of racial slurs, albeit deplorable, may not rise to the level of a violation of the law.
- An employer cannot be held responsible for racial or religious harassment unless the harassment is carried out directly by the employer or, if carried out by co-employees of the complainant, the employer knew or should have reasonably known of the harassment and failed to take reasonable action to prevent it.





How Would You Decide?

?





Procedure

- **Initial Determination**
- After gathering information from both sides, the ERO made an initial determination that there was probable cause to believe that discrimination occurred.
- As a result, the matter was scheduled for a hearing on the merits of the complaint.
- In more cases than not, EROs determine that the information provided during the investigation is not sufficient to support a finding that discrimination probably occurred, and issue a determination of "No Probable Cause." Complainants have 30 days to appeal such findings. If they do, the matter proceeds to a hearing on the issue of probable cause.





Procedure

- **Hearing**
- ERD hearings are not a review of the ERO's findings, but a presentation by both sides of first-hand testimony and documentary evidence on the issues raised by the complainant's complaint.
- ALJs make their decisions based only on the evidence and testimony presented on the day of hearing.
- Each side is responsible for the presentation of their cases on the day of hearing.
- ALJs are most interested in hearing from first-hand witnesses to the event or events that gave rise to the complainant's complaint, and from the person who actually made the employment action alleged to be discriminatory.
- They also want to see evidence regarding similarly situated employees.





Procedure

- **Answer**
- It is important for the respondent to remember that with a merits hearing, an answer must be filed within 20 days of the issuance of the hearing notice





Respondent's Case

- Defense
 - There are several defenses available to respondents in a harassment/hostile work environment case:
 - The alleged harassment did not occur.
 - The alleged harassment did not rise to the level of an adverse employment action.
 - The employer was not aware that any discrimination was taking place.
 - When the discriminatory harassment was brought to the employer's attention, they took reasonable action to rectify it.





Respondent's Case

- The respondent in this case argued that it took reasonable action after receiving the complainant's complaint of race-based harassment.





ALJ Decision

- The primary claim brought by the complainant was one of race-based harassment by his coworkers.
- In order for an employer to be found liable for discrimination that was perpetuated by coworkers, the complainant must prove that the employer was aware of the race-based harassment, and failed to take reasonable action to prevent it.
- In the instant case, the respondent-employer immediately investigated the complainant's complaint, and took immediate measure to ensure the harassment would not be repeated – it discharged the two employees responsible.
- Under these circumstances, the ALJ found that the employer was not liable for the discrimination of its employees because the employer immediately intervened to end the harassment



ALJ Decision – things to consider



- What if the employee perpetuating the harassment was a manager with control over the employee in question?
- What if the complainant hadn't complained to management about his harassment before filing his complaint with the ERD? What if management perpetuated the harassment, but the complainant did not complain?
- Is there any argument that the harassment suffered by the complainant was not severe or pervasive enough to constitute a violation under the Wisconsin Fair Employment Law?



Questions?

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