COURT OF APPEALS
DECISION
DATED AND FILED

February 26, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2011AP2023
2011AP2024

Cir. Ct. Nos. 2010CV21755
2010CV21756

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

PATRICIA J. SALLIS,

PETITIONER-APPELLANT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION, AURORA HEALTH CARE, JAMES MORAZA AND CHRIS KUKEC,

RESPONDENTS-RESPONDENTS.

APPEALS from orders of the circuit court for Milwaukee County: WILLIAM S. POCAN and WILLIAM SOSNAY, Judges. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Patricia J. Sallis, *pro se*, appeals from orders of the circuit court affirming opinions of the Labor and Industry Review Commission (LIRC). In the LIRC opinion underlying appeal No. 2011AP2024, LIRC affirmed

an administrative law judge's dismissal of Sallis's employment discrimination complaint against Aurora Health Care, Inc. (Aurora). The administrative law judge concluded after a hearing that probable cause did not exist to believe that Aurora unlawfully discriminated against Sallis because of her race, gender, or age. In the LIRC opinion underlying appeal No. 2011AP2023, LIRC upheld an administrative law judge's decision, reached without a hearing, that Sallis's claims in her amended complaint against Aurora are barred by the applicable statute of limitations. In Part I of the instant opinion, we set forth the factual and procedural background underlying these appeals. In Part II, we reject Sallis's arguments challenging the decision that no probable cause exists to believe that Aurora discriminated against her, and we reject her contentions that procedural errors prevented her from developing her allegations. In Part III, we reject her arguments challenging the decision dismissing the claims in her amended complaint as untimely. We affirm.[1]

I.

¶2 We take the facts from the files and records developed during the administrative proceedings. Sallis worked for Aurora as a security officer for approximately twenty-four years before Aurora terminated her employment on August 16, 2006. At the time of her termination, Sallis was a forty-five-year-old African-American woman. Sallis contends that Aurora discriminated against her based on her race, gender, and age, both in the terms and conditions of her employment and in terminating her employment.

[1] On our own motion, we consolidated these appeals for disposition after the parties completed briefing in this court.

¶3 On August 7, 2006, Sallis reported to work at 11:14 p.m., fourteen minutes late for her 11:00 p.m. to 7:30 a.m. shift at the Zilber Family Hospice. She used her employee key card to enter the facility. The key card records show that she left the building at 11:40 p.m. Hospice surveillance equipment recorded that she went to her car and moved it out of range of Aurora's security cameras. Sallis acknowledges that she remained in her car for approximately five hours, getting out of the car only to "stretch." Key card records and hospice surveillance data show that she reentered the hospice building on August 8, 2006, at 4:57 a.m. She left the workplace that day at approximately 7:00 a.m., shortly after Loss Prevention Supervisor Christopher Kukec arrived at the hospice and gave her permission to leave early because she intended to go to Chicago.

¶4 Later on August 8, 2006, a hospice staff member complained to Kukec about not seeing a security officer that morning until 5:00 a.m. The staff member reported that she believed another employee left a voicemail message for the loss prevention department inquiring about the security officer's absence. Kukec was unable to find the voicemail message that the hospice staff member described. He then conducted an investigation that included a review of the Staff Officer Activity Log that Sallis completed for her shift of August 7–August 8, 2006. Sallis's log, in which she recorded her activities using a twenty-four-hour clock, reflected in relevant part:

Time Started	Time Completed	Location	Comments
00:00	00:30	Office/Nurses Station	Routine Patrol/5 Staff, 16 patients
00:30	02:00	Interior/Exterior	Secured Community Room/Routine Patrol
02:00	02:30	Lunch	-
02:30	03:00	Exterior	Routine Patrol
03:00	04:50	Exterior/Interior	Routine Patrol, (2) Journals into office

¶5 Kukec concluded that Sallis's log did not correspond with the surveillance data. The log indicated that Sallis was performing duties inside the hospice during a five-hour period after the data showed that she exited the building and before she re-entered it. Additionally, hospice surveillance did not detect Sallis making any exterior patrols during the five-hour period that the data showed she was outside of the building. Kukec reported his conclusions to the manager of Aurora's Loss Prevention Services, James Moraza.

¶6 On August 10, 2006, Moraza interviewed Sallis about her activities at the hospice from August 7, 2006, through August 8, 2006. Sallis provided a written and signed statement. Sallis said that she had not felt well and she therefore "stayed outside [for] the majority of the shift." She concluded her statement by explaining: "patrols on blotter were written as interior/exterior as general patrols because of visibility of exterior lot and interior points of building that I could see." (Some capitalization omitted.)

¶7 Moraza also questioned Sallis about a telephone message reportedly left in the security office voicemail box during her shift. Sallis acknowledged erasing the message. Believing that Sallis had falsified her activity log by recording that she had patrolled inside the facility when she was sitting in her car, Moraza suspended her employment pending further review.

¶8 Sallis met with Moraza and with Aurora's Human Resources Director, Barbara Molthen, on August 16, 2006. At that time, Sallis offered an explanation that she "had made an error with respect to the times recorded for [the] first two entries on the activity blotter." Specifically, Sallis wrote:

> [e]rror in initial time was recorded on the blotter. Time being 23:15-23:40 hours. During this time was when I was in the office and secured the interior. The next recorded time on the blotter should have read 23:30-02:00 – I came from doing interior patrol to go outside. Outside I had lunch and the rest of blotter follows.

Moraza, however, concluded that Sallis "had documented that she had toured the facility inside during a period of time that we know and she admitted to that she was outside. So, basically, the document is false."

¶9 According to Moraza and Molthen, falsification of records is a very serious violation of Aurora policy. On every occasion that Aurora's internal investigation resulted in the conclusion that an employee in the Loss Prevention department falsified a record, Aurora discharged that employee. Additionally, hospice security officers are expected to patrol inside and outside the building to ensure safety throughout the facility.

¶10 On August 16, 2006, Aurora terminated Sallis's employment. Moraza completed a notice reflecting that the grounds for termination were that Sallis had falsified the security officer activity log and neglected her duties.

¶11 We next review the multifaceted procedural history of this matter. On August 17, 2006, Sallis filed a complaint with the federal Equal Employment Opportunity Commission (EEOC). Pursuant to a work-sharing agreement between state and federal agencies, the complaint was filed shortly thereafter with the Equal Rights Division (ERD) of the Department of Workforce Development, but the EEOC conducted the initial investigation. In the complaint, Sallis alleged that Aurora discriminated against her based on her race, gender, and age when Aurora terminated her employment. She further alleged that Aurora discriminated against her in the terms and conditions of her employment, claiming that Aurora

"disciplined [her] for attendance, but similarly-situated coworkers were not disciplined for attendance infractions." On September 5, 2007, the EEOC dismissed the complaint, stating: "the EEOC is unable to conclude that the information obtained establishes violations" of federal law.[2]

¶12 Sallis then turned to ERD. On September 7, 2007, she asked it to investigate whether the allegations in her original complaint entitled her to relief under Wisconsin law. At that time, she also filed an amended complaint with THE ERD, alleging that Aurora denied her a merit pay increase in 2006 and that Aurora had paid her less than her co-workers because of her race, gender, and age. Aurora responded that the allegations in the amended complaint fell outside of the applicable statute of limitations.

¶13 In November 2007, an investigator with ERD issued an Initial Determination dismissing Sallis's original complaint. The investigator concluded that no probable cause existed to believe that Aurora discriminated against Sallis in the terms and conditions of her employment or in terminating her employment. In a separate Preliminary Determination and Order, the ERD investigator dismissed Sallis's amended complaint on the ground that her allegations of unfair compensation were untimely under the applicable 300-day statute of limitations. Sallis filed two petitions seeking review by an administrative law judge.

[2] Sallis filed suit in federal court to pursue her claims of discrimination under federal statutes. The federal district court rejected her claims and granted summary judgment to Aurora in ***Sallis v. Aurora Health Care, Inc.***, No. 07C1091, unpublished slip op. (E.D. Wis. Aug. 14, 2009). The seventh circuit affirmed. *See* ***Sallis v. Aurora Health Care, Inc.***, No. 09-3228, unpublished slip op. (7th Cir. June 23, 2010).

¶14 On February 22, 2008, ERD gave notice of a hearing in June 2008 before Administrative Law Judge John A. Grandberry to address Sallis's challenge to the Initial Determination dismissing the original complaint. Also in February 2008, Administrative Law Judge James A. Schacht issued a decision affirming the Preliminary Determination and Order that dismissed the amended complaint on the ground that the claims fell outside the 300-day statute of limitations. Accompanying Judge Schacht's decision was a notice that Sallis had a right to appeal but could not yet exercise that right in light of the pending hearing to address her challenge to the Initial Determination. The notice advised Sallis that she could appeal only after she received a final decision disposing of her entire case and that she would receive a notice of appeal rights upon release of a final decision.[3]

¶15 Aurora's counsel requested a postponement of the June 2008 hearing before Judge Grandberry. By notice dated May 25, 2008, the matter was rescheduled for September 19, 2008, and the hearing went forward on that date.

¶16 On November 20, 2009, Judge Grandberry issued a decision concluding that Sallis showed no probable cause to believe that Aurora discriminated against her, and he ordered her claims dismissed. With the decision, ERD included a notice of appeal rights advising that the decision was final and that any party unhappy with either the decision or with earlier nonfinal decisions could petition for review by LIRC within twenty-one days. On December 11,

[3] Judge Schacht first issued a decision on February 21, 2008, dismissing the amended complaint. The decision included an erroneous notice that Sallis must appeal the decision within twenty-one days. Judge Schacht reissued the decision on February 22, 2008, advising that the amended decision corrected only the notice of appeal rights.

2009, Sallis petitioned for review of only Judge Grandberry's decision. On December 30, 2009, Sallis filed a second petition, seeking review of Judge Schacht's decision.

¶17 Aurora's counsel asked LIRC to establish a briefing schedule. LIRC did so, directing the parties to brief the issues relevant to the merits of Judge Grandberry's decision and to brief the question of whether Sallis timely filed her appeal challenging Judge Schacht's decision.

¶18 LIRC resolved Sallis's challenges in two separate opinions. In one opinion, LIRC affirmed Judge Grandberry's decision dismissing the original complaint for lack of probable cause to believe that Aurora discriminated against Sallis. In that opinion, LIRC also rejected Sallis's allegations that procedural errors throughout the administrative process warranted a new hearing or other relief.

¶19 In a second opinion, LIRC affirmed Judge Schacht's decision dismissing the amended complaint. LIRC assumed "for purposes of argument" that it could consider Sallis's petition for review of Judge Schacht's decision notwithstanding Sallis's delinquency in filing her petition more than twenty-one days after the final decision disposing of the case. LIRC then concluded that Judge Schacht correctly dismissed the amended complaint as untimely because Sallis filed it more than 300 days after she allegedly received unfair compensation and nothing excused her delay.

¶20 Sallis petitioned for circuit court review of both LIRC opinions. Following each review, the circuit court rejected all of her arguments, and she appeals.

II.

¶21 Sallis contends that she established probable cause to believe that Aurora discriminated against her in violation of the Wisconsin Fair Employment Act (WFEA), WIS. STAT. §§ 111.31–111.397 (2005-06).[4] On appeal, "[w]e review the commission's factual findings and legal conclusions, not those of the circuit court." ***Epic Staff Mgmt., Inc. v. LIRC***, 2003 WI App 143, ¶13, 266 Wis. 2d 369, 667 N.W.2d 765.

¶22 We are bound by LIRC's findings of fact if credible evidence exists to support them. ***Hill v. LIRC***, 184 Wis. 2d 101, 110, 516 N.W.2d 441 (Ct. App. 1994). "We may not substitute our judgment for LIRC's as to the credibility of witnesses or the weight to be accorded to the evidence." ***Id.*** at 111. Further, "even if LIRC's findings appear contrary to the great weight and clear preponderance of the evidence, we must uphold them if they are supported by any credible evidence." ***Id.***

¶23 We are not bound by an administrative agency's conclusions of law. ***Weston v. DWD***, 2007 WI App 167, ¶12, 304 Wis. 2d 418, 737 N.W.2d 74. Nonetheless, when we review an agency's legal conclusions, we afford the agency one of three levels of deference: great weight, due weight, or no deference. ***Margoles v. LIRC***, 221 Wis. 2d 260, 264-65, 585 N.W.2d 596 (Ct. App. 1998). We afford LIRC's legal conclusions great deference when we review its interpretation of the WFEA because LIRC is the agency charged with interpreting and applying the Act. *See* ***Knight v. LIRC***, 220 Wis. 2d 137, 150, 582 N.W.2d

[4] All subsequent references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

448 (Ct. App. 1998). Accordingly, we afford LIRC's conclusions great deference here.

¶24 To prevail in a claim under the WFEA, an employee must first demonstrate a *prima facie* case of employment discrimination. ***Currie v. DILHR***, 210 Wis. 2d 380, 390, 565 N.W.2d 253 (Ct. App. 1997). An employee proves a *prima facie* case of discriminatory discharge by showing: (1) membership in a protected class; (2) discharge from employment; (3) qualification for the job; and (4) that "either he [or she] was replaced by someone not within the protected class or others not in the protected class were treated more favorably." ***Id.*** at 390 n.4. If the complainant demonstrates a *prima facie* case of discrimination, the burden shifts to the employer to articulate some legitimate nondiscriminatory reason for the employer's action. *See* ***id.*** at 390. Thereafter, the complainant has an opportunity to prove that the reasons offered by the employer were a pretext for discrimination. ***Id.***

¶25 At the outset of the employee's efforts to prove discrimination, LIRC must determine whether probable cause exists to believe that the employer violated the WFEA. *See* WIS. ADMIN. CODE §§ DWD 218.07-218.08. Probable cause in this context "means 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 act probably has been or is being committed." *See* WIS. ADMIN. CODE § DWD 218.02(8). Probable cause "focuses on probabilities, not possibilities." *See* ***Boldt v. LIRC***, 173 Wis. 2d 469, 475, 496 N.W.2d 676 (Ct. App. 1992). It must be assessed in light of "ordinary, everyday concepts of cause and effect upon which reasonable persons act. It is LIRC's duty to consider the facts of each case and determine whether they meet this fluid concept." ***Id.*** at 476.

The burden rests with the employee to prove that employment discrimination probably occurred. *See* ***id.***

¶26 When determining whether the complainant met his or her burden of proving probable cause, "LIRC is entitled to make credibility determinations." ***Id.*** at 475. Moreover, "[s]ome credible evidence of discrimination might exist, but LIRC could still conclude that upon all of the evidence produced at a [probable cause] hearing, it was not probable that discrimination had occurred." ***Id.***

A. *LIRC reasonably concluded that no probable cause exists to believe that Aurora discriminated against Sallis.*

¶27 LIRC found that Aurora personnel conducted an investigation into Sallis's conduct and, based upon that investigation:

> Aurora concluded that Sallis had falsified records by recording that she had toured inside the facility during a period of time when she was outside the facility and could not have been inside to make [the tours], and that she had been negligent in the performance of her duties during her shift.

LIRC recognized that Sallis offered explanations for her inaccurate log entries and that she offered reasons that those entries reflected inadvertent errors rather than intentional falsifications. LIRC concluded, however, that her explanations were not persuasive. LIRC was entitled to reject Sallis's explanations. *See* ***id.***

¶28 LIRC was also entitled to credit the testimony and evidence presented by Aurora. *See* ***id.*** Aurora's evidence reflected that Aurora employees believed, based on their investigation, that Sallis falsified her log entries to hide her failure to perform her duties. Aurora further presented evidence that falsifying Aurora records is a very serious violation of company rules, that Aurora had a policy of terminating anyone who falsified an Aurora record, and that Aurora

consistently adhered to that policy. Thus, Aurora demonstrated that it had a legitimate, nondiscriminatory reason for discharging Sallis. *See* ***Currie***, 210 Wis. 2d at 389.

¶29 Sallis sought to show that Aurora's stated reason for her termination was a pretext cloaking a discriminatory purpose, and, in support, she offered evidence that two male security officers were disciplined but not terminated after an infraction. LIRC concluded, however, that Sallis "did not identify any similarly-situated employee who was treated more favorably than she." The evidence showed that Aurora disciplined Security Officer Chadd Zimmerman for making mistakes in case reports and failing to comply with the procedure for documenting incidents. Aurora eventually discharged him for ongoing violations. Aurora disciplined Security Officer John Rothman for making disparaging remarks about other people, smoking on company grounds in violation of policy, and entering company property before his work shift. Aurora ultimately discharged him for sleeping on the job. This evidence did not demonstrate that either Zimmerman or Rothman remained employed after company investigators found that he had intentionally falsified records to conceal neglect of duties. LIRC therefore could reasonably conclude that Sallis failed to show she was treated more harshly than similarly-situated male employees.

¶30 Sallis also argued that her termination was improper because she did not neglect her duties during the five hours that she spent in her car outside the range of Aurora's security cameras. She maintains here that LIRC could not reject this contention because, she says, she was "the only person in the case with personal knowledge of her activities" during those hours. Sallis misunderstands the fact-finder's role. A fact-finder may choose to reject a witness's assertions, and "[t]his is especially true when the witness is the sole possessor of the relevant

facts." ***State v. Kimbrough***, 2001 WI App 138, ¶29, 246 Wis. 2d 648, 630 N.W.2d 752. Any other rule would risk a miscarriage of justice. *See* ***id.***

¶31 Regardless, the critical question for LIRC was not whether Sallis neglected her duties but whether she demonstrated probable cause to believe that Aurora discriminated against her. *See* WIS. ADMIN. CODE § DWD 218.08. To resolve this question, LIRC was entitled to accept the key evidence that Aurora personnel believed that Sallis falsified her log entries to hide her neglectful job performance. *See* ***Hill***, 184 Wis. 2d at 111. As the circuit court accurately explained, an employer's motivation is a factual determination. *See* ***Currie***, 210 Wis. 2d at 386.

¶32 LIRC found here that Aurora terminated Sallis's employment because Aurora employees who investigated Sallis's activity believed that Sallis intentionally falsified her log to misrepresent that she was performing her duties for a five-hour period when she was sitting in her car. LIRC further determined that Sallis failed to show that Aurora "considered her age, race or sex when [Aurora] discharged her on August 16, 2006 for negligent performance of her duties and falsifying an Aurora record."[5] The record supports LIRC's conclusions, so we will not disturb them. *See* ***Boldt***, 173 Wis. 2d at 475-76.

[5] LIRC also concluded that "Sallis presented absolutely no evidence at the [administrative] hearing to support her claim that Aurora discriminated against her with respect to discipline for attendance." We agree. Moreover, her briefs to this court do not develop an argument refuting LIRC's conclusion on this issue. To the extent, if any, that Sallis included any such argument in her appellate briefs, it is too vague for us to identify, and we consider that issue no further. *See* ***Barakat v. DHSS***, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995) (we will not develop an appellant's amorphous arguments).

B. *LIRC reasonably concluded that the administrative law judge committed no procedural errors requiring a rehearing.*

¶33 Sallis asserts that a variety of procedural errors deprived her of a fair hearing and violated her right to due process. We are not persuaded.

¶34 Sallis alleges that Judge Grandberry acted unfairly by denying her request for an adjournment of the September 19, 2008 hearing. According to Sallis, an attorney that she was able to retain only at the last minute sent a request for an adjournment to LIRC by facsimile seeking time to prepare. Sallis states that LIRC received this request as evidenced by a document stamped: "[r]eceived September 18, 2008 ERD – Hearing Section." The document that she describes, however, is not in the record. Sallis contends that "the real issue is why the fax transmission is not in the ERD record file." That contention is wrong. Sallis, as the appellant, has an obligation to ensure a complete record in connection with any issue that she presents. *See* ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 27, 496 N.W.2d 226 (Ct. App.1993).

¶35 Assuming without deciding that Sallis filed a request for an adjournment on the day before the hearing, however, she does not show any error in rejecting the request. Pursuant to WIS. ADMIN. CODE § DWD 218.18(2), "[a]ll requests for postponements shall be filed with the administrative law judge within 10 days after the notice of hearing, except where emergency circumstances arise after the notice is issued but prior to the hearing." Further, "[p]ostponements and continuances may be granted only for good cause shown…." ***Id.*** The decision to grant or deny an adjournment request rests in the agency's discretion. *See* ***Theodore Fleisner, Inc. v. DILHR***, 65 Wis. 2d 317, 326, 222 N.W.2d 600 (1974).

¶36 Here, Sallis describes a plainly untimely request for an adjournment, submitted, at best, long after Judge Grandberry advised the parties on May 25, 2008, of a September hearing date. Moreover, Sallis was on notice that alleged difficulties in obtaining representation usually do not support a request for a continuance: the record reflects that the agency notified her in February 2008 that it "will not normally postpone a hearing because a party wants to keep looking for an attorney or because the[] attorney needs more time to prepare." Nothing in the record demonstrates that some extraordinary circumstance hindered Sallis's efforts to hire a lawyer or that she made such a showing to support a purported request for a postponement of the hearing. Accordingly, she does not show that the administrative law judge erroneously exercised his discretion by conducting the hearing on the scheduled date.

¶37 Sallis couples her complaint that she was erroneously denied a postponement with a contention that she was treated less generously than Aurora because Judge Grandberry granted Aurora a postponement of the original June 25, 2008 hearing date but declined her request for a delay. Sallis shows no unequal treatment. Aurora's counsel sought a postponement by letter filed on February 26, 2008, within four days of the February 22, 2008 notice of hearing. Aurora's request was therefore timely. *See* WIS. ADMIN. CODE § DWD 218.18(2). Further, Aurora's counsel showed good cause for an adjournment, explaining that counsel had another trial previously scheduled for June 25, 2008.[6] Scheduling conflicts

[6] To the extent that Sallis complains now because the administrative hearing did not proceed on June 25, 2008, she articulates no prejudice arising from the postponement of that hearing date. Indeed, she complains that the September 19, 2008 hearing date came too soon. *See* ***Amsoil, Inc. v. LIRC***, 173 Wis. 2d 154, 167, 496 N.W.2d 150 (Ct. App. 1992) (appellate court will not grant relief absent a showing that an alleged error affected the complaining party's substantial rights).

are a well-recognized basis for granting timely adjournment requests. *See* ***State v. Robert K.***, 2005 WI 152, ¶54, 286 Wis. 2d 143, 706 N.W.2d 257.

¶38 Sallis next contends that Judge Grandberry obstructed her case preparation. She asserts that "on December 14, 2007," she "provided a proposed upon [sic] submission of pre-hearing discovery including a list of proposed witnesses and evidence in a request to produce documents from defendant Aurora. [Judge Grandberry] did not respond in any manner." The only document that in some respects conforms to Sallis's description of a "discovery" document is her petition of December 14, 2007, seeking review of the determination that probable cause did not exist to believe she suffered employment discrimination. Judge Grandberry's response to the petition, however, cannot support a contention that he acted improperly in regard to a discovery matter.

¶39 First, discovery in this proceeding is governed by WIS. ADMIN. CODE § DWD 218.14. With exceptions not relevant here, § DWD 218.14(1) directs that discovery may not begin until a matter is certified for a hearing.[7] Only after the agency determines that a claimant timely filed a petition for review by an administrative law judge does the agency issue a notice certifying the matter for a hearing. *See* WIS. ADMIN. CODE § DWD 218.08(3). In this case, the notice of hearing is dated February 22, 2008. Sallis's petition in December 2007 plainly preceded the agency's decision to hold a hearing on the petition. Thus, the petition did not institute a viable effort to pursue discovery.

[7] WISCONSIN ADMIN. CODE 218.14(1) permits taking and preserving evidence before a matter is certified for a hearing only under circumstances described in WIS. STAT. § 227.45(7). That statute addresses circumstances arising when witnesses are expected to become unavailable or are members of the legislature. *See* ***id.*** Nothing in the record suggests that those circumstances apply here.

¶40 Second, although the administrative rules provide that a party may move the administrative law judge to compel discovery, any such motion must "be accompanied by a statement in writing ... that, after consultation in person or by telephone with the opposing party and sincere attempts to resolve their differences, the parties are unable to reach agreement." *See* WIS. ADMIN. CODE § DWD 218.14(4). No written statement in conformity with the requirement of § 218.14(4) is in the record.

¶41 Third, pursuant to WIS. ADMIN. CODE § DWD 218.14(3), parties must conduct discovery in accord with WIS. STAT. ch. 804. As the circuit court indicated, nothing in the record reflects that Sallis served discovery requests on Aurora, let alone that she served requests that comply with the procedures set forth in ch. 804.[8]

¶42 Sallis cites an administrative decision to support her suggestion that Judge Grandberry did not act appropriately regarding discovery. *See* ***Paul v. Weimer Bearing & Transmission***, ERD case No. 200301671 (LIRC Aug. 16, 2007). In ***Paul***, LIRC suggests that the administrative law judge, under the circumstances presented, should have stepped in to resolve a discovery dispute. *See* ***id.*** at 3. The case, however, does not state that any party sought to involve the administrative law judge in a discovery dispute before the proceeding was certified for a hearing or before the parties engaged in efforts on their own to

[8] The record indicates that Sallis failed to serve Aurora with her December 14, 2007 petition.

resolve disagreements. We are satisfied that Sallis fails to demonstrate any error by the administrative law judge in regard to discovery.[9]

¶43 Sallis also asserts that adverse rulings by Judge Grandberry constituted a "categorical preclusion" of her evidence about the treatment that Aurora afforded employees who broke its rules but who did not share her ethnic and physical characteristics. The record shows, however, that Sallis did present evidence about the actions of other employees and Aurora's responses to allegations of misconduct.

¶44 Sallis examined Kukec about Zimmerman's disciplinary history in an effort to show that Zimmerman was not terminated despite falsifying a report. Kukec testified, however, that he investigated a claim that Zimmerman prepared a "false report," but determined after examining Zimmerman's notes that he had merely confused the names of people involved in an incident. As to Rothman, Sallis presented documentary evidence that he was disciplined for committing a variety of Aurora work-rule violations. Although Judge Grandberry did not permit Sallis to consume hearing time eliciting testimony about those violations because they were unlike those she committed, the judge admitted documentary evidence of Rothman's infractions and the discipline imposed for them. Indeed, the judge admitted disciplinary records of both Zimmerman and Rothman as hearing exhibits. Sallis's claims that Judge Grandberry's ruling prevented her from

[9] Sallis asserts that, in addition to filing a discovery document on December 14, 2007, she "followed up via [f]ax" to pursue her discovery demands. She tells us that the document she describes appears in the record as an attachment to a brief she filed with LIRC on August 24, 2010. We are unable to find any other copy of this document in the record. Moreover, the attachment to her brief has no agency file stamp or other indication of receipt by the agency at any time before August 2010. We are unable to agree that the attachment to her 2010 brief reflects that Sallis took any action before the hearing in 2008.

presenting evidence about other Aurora employees is not supported by the record.[10]

¶45 Sallis also suggests that she had evidence of additional employees who Aurora treated more favorably than it treated her but that Judge Grandberry prevented her from offering that evidence. We agree with LIRC, however, that parties must, no later than ten days before a probable cause hearing, file with the agency and serve on all other parties a written list of the names of witnesses and copies of the exhibits that the party intends to use at the hearing. *See* WIS. ADMIN. CODE § DWD 218.17. The record does not show that Sallis timely filed and served such materials. Rather, Sallis stated at the outset of the hearing that she intended to call only the witnesses that Aurora produced. Accordingly, she does not demonstrate that Judge Grandberry prevented her from presenting evidence that she had properly prepared to offer.

¶46 Sallis also complains that Judge Grandberry did not assist her in presenting her case. *See* ***Kropiwka v. DILHR***, 87 Wis. 2d 709, 721, 275 N.W.2d 881 (1979) (administrative law judge must often ensure proper development of unrepresented party's case). We cannot agree. The judge did caution her about asking compound questions, prevented her from testifying while questioning a witness, and directed her to clarify her questions, and the judge sustained objections when her questions called for irrelevant responses and speculation.

[10] We note, however, that Sallis failed to offer any evidence about the ages and ethnicities of Zimmerman and Rothman. Sallis asserts that this information is contained in the agency's file. Assuming that she is correct, documents in the file that were not presented to the administrative law judge are not evidence. *See* WIS. STAT. § 227.45(2); *see also* BRADDEN C. BACKER, ET AL., EMPLOYMENT LAW IN WISCONSIN § 14.188 (4th ed. 2009) (administrative law judge may consider only evidence that was offered and received at the hearing).

These are the kinds of appropriate actions that assist a *pro se* litigant to elicit admissible testimony and develop evidence. *See* ***id.*** Further, when Sallis explained her theory of the case by saying that she "claim[ed] that Aurora discharged [her] purely on an erroneous entry on a log sheet," Judge Grandberry guided her to the essential allegation that she was "treated differently because of her race, gender and age." As to Sallis's complaint that the judge did not aid her by *sua sponte* interposing objections when Aurora's counsel questioned witnesses, we observe that "the examiner must be impartial ... and may not engage in partisan activity on behalf of an unrepresented party." *See* ***id.***

¶47 Sallis next complains that Judge Grandberry erred by barring her from presenting hearsay testimony even though hearsay evidence may be admitted in administrative hearings. *See* ***Gehin v. Wisconsin Group Ins. Bd.***, 2005 WI 16, ¶50, 278 Wis. 2d 111, 692 N.W.2d 572. A hearing examiner, however, should not admit evidence that is "'immaterial, irrelevant or unduly repetitive.'" *See* ***id.*** ¶49 (citation omitted). Further, hearsay is "'inherently suspect.'" ***Id.***, ¶58 (citation omitted). Sallis fails to show that Judge Grandberry barred any essential testimony on the ground that it was hearsay or that she suffered prejudice from any ruling barring hearsay she offered. Assuming without deciding that the judge could have admitted more hearsay evidence, a party may not obtain relief based on a harmless procedural error. *See* ***Responsible Use of Rural and Agric. Land v. PSC***, 2000 WI 129, ¶56, 239 Wis. 2d 660, 619 N.W.2d 888.

¶48 Sallis also argues that she was "deprived ... of her due process rights" in the administrative proceedings because Aurora attached copies of the federal opinions rejecting her discrimination claims when it filed its post-hearing brief. Sallis is mistaken. Tribunals may consider decisions reached by other courts. *See* WIS. STAT. § 902.02(1). One of the primary purposes of briefing is to

bring to the tribunal's attention those cases that a party believes are helpful to its position. Moreover, Sallis's opening brief in this court includes no citation to any case or statute to support her theory that Aurora and LIRC acted improperly by discussing the federal decisions rejecting her claims. We do not consider matters unsupported by legal authority.[11] ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

¶49 For all of the foregoing reasons, we affirm the circuit court's order upholding LIRC's decision dismissing Sallis's employment discrimination complaint against Aurora. We recognize that, in reaching our conclusion, we have not discussed every argument that Sallis presents. To the extent we have not addressed some of her arguments, such arguments are deemed denied as meritless. An appellate court is not required to discuss arguments unless they have "sufficient merit to warrant individual attention."[12] ***Libertarian Party v. State***, 199 Wis. 2d 790, 801, 546 N.W.2d 424 (1996).

[11] Sallis's reply brief in this court includes two citations that she suggests support her position that Aurora improperly filed copies of federal opinions with its administrative brief. We do not consider matters presented for the first time in a reply brief. ***Techworks, LLC v. Wille***, 2009 WI App 101, ¶28, 318 Wis. 2d 488, 770 N.W.2d 727. Further, nothing that Sallis cites supports the propositions that parties may not discuss and LIRC may not consider federal court decisions in the context of a state discrimination claim.

[12] In the category of meritless arguments that do not warrant discussion, we include, without limitation: (1) Sallis's stream of criticism about the quality of LIRC's circuit court brief; (2) the assertion that, because LIRC did not respond to every allegation Sallis offered in her 108-page opening brief in the circuit court, the allegations in that brief are now "deemed admitted"; and (3) Sallis's tortured exegesis of her log entries leading to her conclusion that "the physical fact of Sallis Activity Log established that she did not mark down interior." (Multiple forms of emphasis omitted.)

III.

¶50 Sallis also challenges the order upholding LIRC's decision to dismiss her amended complaint without a hearing. We turn to that challenge.

¶51 Two separate time bars potentially prevented LIRC from affording Sallis a hearing on the claims in her amended complaint. One such bar arose by operation of the 300-day statute of limitations governing claims under the WFEA. *See* WIS. STAT. § 111.39(1) (agency may investigate complaints of discrimination filed no more than 300 days after the alleged discrimination occurred). Here, Sallis filed her amended complaint on September 7, 2007, alleging wage disparity claims that arose before Aurora terminated her employment more than 300 days earlier.

¶52 The second time bar potentially keeping Sallis from a hearing arose by operation of the deadline for pursuing a challenge to Judge Schacht's decision dismissing the amended complaint. Pursuant to WIS. ADMIN. CODE § LIRC 1.02, a petition for review of an administrative law judge's decision must be filed with LIRC no later than twenty-one days after the agency mails the final decision and order resolving the case. Here, Sallis filed her appeal of Judge Schacht's decision on December 30, 2009, forty days after the agency mailed the final decision in her case on November 20, 2009.

¶53 LIRC assumed without deciding that it could review Sallis's challenge to Judge Schacht's decision, notwithstanding Sallis's failure to file that challenge on or before the deadline imposed by WIS. ADMIN. CODE § LIRC 1.02. LIRC then determined that Judge Schacht correctly dismissed the claims in

Sallis's amended complaint because Sallis filed those claims outside of the 300-day limitations period.[13]

¶54 In this court, Sallis raises a single challenge to the decision dismissing her amended complaint. In her view, she was denied due process because LIRC did not invite her to file a brief addressing the issues related to the 300-day statute of limitations and instead directed her to brief only the question of whether she filed a timely petition for review.

¶55 The fundamental requirements of procedural due process are notice and an opportunity to be heard. ***Mid-Plains Tel., Inc. v. PSC***, 56 Wis. 2d 780, 785-86, 202 N.W.2d 907 (1973). Sallis contends that she was not afforded notice that LIRC would consider whether the statute of limitations barred her claims, and she contends that she had no opportunity to be heard on the issue. We cannot agree.

¶56 As to notice, Sallis was the party that asked LIRC to review Judge Schacht's decision, and LIRC told the parties that it would proceed as appropriate in considering that petition. By letter establishing a briefing schedule, LIRC advised:

[13] Sallis's briefs in this court include a complaint that LIRC improperly "split" her discrimination case. Sallis suggests that permitting claims to be procedurally separated creates confusion about when to appeal. Sallis presented this argument to LIRC in support of her position that LIRC should entertain her petition to review Judge Schacht's decision. We will not consider here Sallis's complaints about the mechanics of launching an appeal to LIRC because LIRC assumed that it could entertain her appeal of Judge Schacht's decision and proceeded to do so. *See* WIS. STAT. § 805.18(1) (court shall disregard at every stage of the proceeding any error or defect in the proceedings that does not affect the substantial rights of the adverse party).

> [t]he parties should address in the briefs the question of whether the decision of Administrative Law Judge Schacht, issued on February 22, 2008, has been timely appealed to the commission....[14]. After receipt of the briefs, the commission will decide the timeliness question, and thereafter proceed accordingly with further briefing if necessary.

Thus, LIRC expressly explained that it would proceed with the petition, seeking further briefing only "if necessary." There is no merit to the suggestion that Sallis was blindsided when LIRC conducted the review she requested.

¶57 As to the opportunity to be heard, we preliminarily observe that the administrative code does not mandate briefing when a party requests that LIRC review an administrative law judge's decision. *See* WIS. ADMIN. CODE § DWD 218.21. Rather, either party may request a briefing schedule. *See* WIS. ADMIN. CODE § LIRC 1.07. We remind Sallis that she did not request a briefing schedule when she filed her petition for review of Judge Schacht's decision. LIRC established a briefing schedule upon Aurora's request.

¶58 Further, Sallis's petition for review of Judge Schacht's decision provided a forum for Sallis to present her arguments challenging that decision, and she fully availed herself of the opportunity. Sallis's petition for review was twenty-one pages long. On the first page of the petition, Sallis asserted that "based on the facts and legal standards provided herein, the complaint should proceed to a formal hearing." On the next seven pages of the petition, she presented seventy-one numbered paragraphs detailing her version of the facts. On page eight, under the heading "argument," she stated the first of her six separately-

[14] The letter also established a scheduling order that encompassed briefing on Sallis's challenges to Judge Grandberry's decision.

lettered legal theories, developed over the next nine pages. Among other arguments, she contended that: (1) she should have been allowed to amend her complaint because she lacked legal counsel; (2) her amended complaint was timely because it related back to the original complaint; and (3) LIRC should apply the concept of equitable tolling to avoid the bar otherwise imposed by the statute of limitations. She next attached a copy of Judge Schacht's decision that she had annotated by inserting paragraphs in boldface type to refute the judge's findings and conclusions point by point.

¶59 The constitutional right to due process does not give a litigant a right to any particular form of pleading or procedure. *See* ***State ex rel. Strykowski v. Wilkie***, 81 Wis. 2d 491, 513-14, 261 N.W.2d 434 (1978). Here, Sallis amply explained in her petition for review the various reasons that she believed she could pursue the claims that she filed after expiration of the applicable 300-day statute of limitations. Further, she did not object to the procedure outlined by LIRC in its letter establishing a briefing schedule. For example, she did not file a document requesting further briefing or advising LIRC that she had more arguments to make regarding the question of whether the statute of limitations barred her claims.

¶60 Additionally, and critically, Sallis does not demonstrate any prejudice from the procedure that LIRC employed here. LIRC's opinion affirming Judge Schacht's decision reflects that LIRC considered the arguments that Sallis presented in her petition for review. Sallis does not identify any new arguments that she would have presented in an additional brief, and she does not demonstrate that any such unidentified argument had merit or would have induced LIRC to rule in her favor. A litigant who asserts a denial of due process in an administrative proceeding must show prejudice as a result of the agency's action. *See* ***Weibel v.***

Clark, 87 Wis. 2d 696, 704, 275 N.W.2d 686 (1979). Because Sallis has not made such a showing, her due process claim must fail.

¶61 In her briefs to this court, Sallis does not address whether the statute of limitations barred the claims she made against Aurora in her amended complaint. Indeed, she states that the question "was not properly before the LIRC for consideration and is not properly before this court." If Sallis included in her appellate briefs any argument obliquely touching on whether the statute of limitations barred her claims, we conclude that any such contention is wholly undeveloped. Accordingly, we do not consider whether LIRC correctly determined that Sallis's amended complaint was untimely. *See* ***Pettit***, 171 Wis. 2d at 646-47.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.