

State of Wisconsin
Labor and Industry Review Commission

Monica K. Byrne , Complainant	Fair Employment Decision¹
Aurora Health Care , Respondent	Dated and Mailed:
ERD Case No. CR201800455 EEOC Case No. 26G201800661C	January 31, 2019

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

By the Commission:

/s/
Georgia E. Maxwell, Chairperson

/s/
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 History

On February 14, 2018, the complainant attempted to file a discrimination complaint with the Equal Rights Division (hereinafter “Division”) of the Department of Workforce Development. An Equal Rights Officer notified the complainant that her complaint lacked essential information and needed to be perfected. The complainant perfected her complaint, and the complaint form was filed on March 26, 2018. In her complaint the complainant contended that the respondent discriminated against her based upon disability. According to the complaint, the discrimination began on March 24, 2015, with the most recent act of discrimination taking place on March 21, 2017.

On May 9, 2018, the respondent filed an answer to the complaint in which it raised the statute of limitations and argued that the complaint should be dismissed. On June 11, 2018, an Equal Rights Officer from the Division issued a preliminary determination dismissing the complaint because it was untimely filed. The complainant filed a timely appeal of the initial determination, and the matter was assigned to an administrative law judge for the Division. On July 26, 2018, the administrative law judge issued a decision affirming the initial determination. The complainant filed a timely petition for commission review of the administrative law judge’s decision.

The commission has considered the petition and the positions of the parties, and it has reviewed information that was before the administrative law judge. Based on its review, the commission agrees with the decision of the administrative law judge, and it adopts the findings and conclusions in that decision as its own, except that it makes the following:

Modification

The first paragraph of the section in the administrative law judge’s decision entitled “Decision and Order” is deleted.

Memorandum Opinion

This appeal concerns the timeliness of the complainant’s discrimination complaint. In her complaint the complainant contended that the respondent discriminated against her by refusing to accommodate her disability, harassing her based upon her disability, and ultimately terminating her employment because of her disability. According to the complaint, the discrimination began on March 24, 2015, with the most recent act of discrimination taking place on March 21, 2017, at which time the complainant’s employment ended. The Wisconsin Fair Employment Act (hereinafter “Act”) provides that a complaint of discrimination must be filed with the department “no more than 300 days after the alleged discrimination.” Wis. Stat. § 111.39(1). Therefore, in order for the complainant’s complaint to be timely, it must have been filed no later than January 15, 2018 (300 days after the complainant’s employment was terminated on March 21, 2017).

The complainant first attempted to file a complaint with the Division on February 14, 2018, and her perfected complaint was filed on March 26, 2018. For purposes of this appeal, the commission considers the filing date of the unperfected complaint to be the date by which timeliness should be measured. *Germaine v. Sussek Machine Corp.* ERD Case No. CR201203380 (LIRC Feb. 13, 2014). A complaint filed on February 14, 2018 is beyond the 300-day statute of limitations period with respect to acts of discrimination occurring on March 21, 2017 and earlier and must be considered untimely.²

In her petition for commission review the complainant argues that the use of the term “days” in the statute lacks clarity and is ambiguous. The complainant states that she interprets the term “days,” when not specifically identified, as business days and not as calendar days. The complainant indicates that she filed her complaint with the Division less than 300 business days after the last date of discrimination. The complainant’s argument fails. The term “days,” as used in the statute, refers to calendar days, not business days,³ and the complainant had no reason to assume otherwise. *See, Banda v. Wisconsin Jobs Now*, ERD Case No. CR201604781 (LIRC March 13, 2018). The ordinary meaning of the term “300 days” is calendar days, and the legislature did not have to specifically use the word “calendar” in order to make this point clear. However, if the complainant regarded the term “300 days” as ambiguous, as she asserts was the case, it was her obligation to either seek clarification as to its meaning or to err on the side of caution by treating the statute as referencing calendar days, rather than taking a chance on a more generous interpretation that she knew might be incorrect.

In her petition the complainant also argues that the time frame to file a complaint for a disabled person is “offensive and discriminatory.” The complainant states that it is much easier for a person who is not disabled to follow the parameters, and contends that there are no numbers to call for a disabled person to receive help for research or to process a formal complaint. This argument also fails. The

² On February 9, 2018, the complainant sent a fax to the U.S. Equal Employment Opportunity Commission indicating that she wanted to file a discrimination complaint. Assuming, without deciding, that there is some basis to use the February 9 date for the purposes of measuring the timeliness of the complaint, it remains the case that the complainant’s complaint was filed beyond the 300-day statute of limitations period.

³ Wisconsin Stat. § 990.001(4), regarding the construction of statutes provides:

TIME, HOW COMPUTED. (a) The time within which an act is to be done or proceeding had or taken shall be computed by excluding the first day and including the last; and when any such time is expressed in hours the whole of Sunday and of any legal holiday, from midnight to midnight, shall be excluded.

The above statute clearly requires that the term “14 days” (contained in the statute applying to civil commitments) must be construed as meaning fourteen “calendar” days. *State ex. rel. Lockman v. Gerhardstein*, 107 Wis. 2d 325, 327, 302 N.W.2d 27 (Ct. App. 1982).

complainant has not contended that her disability prevented her from filing a timely complaint. Rather, she asserts that she filed her complaint late based upon an incorrect assumption that she had 300 business days in which to do so. The complainant's erroneous belief that she had extra time in which to file her complaint is a matter unrelated to disability which cannot justify tolling the statute of limitations in this case.

The complainant also makes reference to the fact that she filed a complaint with the U.S. Department of Justice (DOJ) on December 9, 2017. The complainant indicates that a Memorandum of Understanding (MOU) between the U.S. Equal Employment Opportunity Commission (EEOC) and the DOJ "covers" her. However, a complaint filed with the DOJ is not cross-filed with the EEOC or the Division, and the complainant had no reason to believe this was the case. Indeed, when the DOJ notified the complainant on January 12, 2018 (three days prior to the end of the limitations period) that it had decided not to take any further action with respect to her complaint, it specifically told her that the decision did not affect her right to pursue her complaint in another manner. Nothing in the January 12 correspondence from the DOJ suggested that the complainant need not file a separate complaint with the EEOC or the Division if she wished to have one of those agencies investigate her allegations of discrimination, nor was she given any reason to believe that the statute of limitations had been tolled or extended by virtue of her having filed a complaint with the DOJ.

Finally, the complainant indicates that the Division never refused her complaint when it was submitted and continued to process it "in good standing." However, the fact that the Division initially accepted the complainant's untimely complaint did not preclude the respondent from arguing that the complaint was filed outside of the statute of limitations period and did not prevent the Division from later dismissing it on that basis. Because the commission agrees that the complainant's complaint was untimely filed and that dismissal is appropriate, the administrative law judge's decision is affirmed.

NOTE: In his decision the administrative law judge concluded that the Division lacked jurisdiction to investigate the complaint because it was not filed within the statutory time limits. However, the 300-day filing limit is not a jurisdictional prerequisite, but a statute of limitations which is subject to waiver, estoppel, and equitable tolling. *See, Milwaukee Co. v. LIRC and Nancy Williams*, 113 Wis. 2d 199, 335, N.W.2d 412 (Ct. App. 1983); *Blohm v. Holiday Inns*, ERD Case No. 8652100 (LIRC Jan. 31, 1990); *Mittelsteadt v. AJ Air Express*, ERD Case No. 199604033 (LIRC Jan. 16, 1998); *Ault v. Allen Bradley Co. Inc.*, ERD Case No. 199700008 (LIRC Feb. 5, 1998); *Gruhle v. Random Lake School District*, ERD Case No.

199702881 (LIRC June 19, 1998); *Reddin v. Neenah Joint School District*, ERD Case No. CR200301251 (LIRC Aug. 24, 2004); *Schulke v. Mills Fleet Farm*, ERD Case No. 201000011 (LIRC June 4, 2010); *Scott v. A O Smith Corporation*, ERD Case No. CR201102327 (LIRC Jan. 15, 2014); *Young v. City of Eau Claire*, ERD Case No. CR201701796 (LIRC Jan. 4, 2018). The commission has modified the administrative law judge's order to eliminate the erroneous reference to jurisdiction.

NOTE: In her petition the complainant requests a Notice of Right to Sue and a list of attorneys who specialize in labor and employment law who represent the Chicago District covered by the EEOC. These requests must be addressed to the EEOC. The commission has no authority to issue Right to Sue letters, nor does it maintain a list of attorneys who can assist the complainant.

cc: Stacie Andritsch

Editor's Note: Appealed to Circuit Court. Affirmed, *Byrne v. LIRC*, No. 19-CV-384 (Wis. Cir. Ct. Waukesha Cnty. Jan. 15, 2020).