

State of Wisconsin



Labor and Industry Review Commission

Christine Ostopowicz, Complainant

Fair Employment Decision¹

United Healthcare, Respondent

Dated and Mailed:

Case No. CR201901287
EEOC Case No. 26G201900792C

March 30, 2020
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The decision of the administrative law judge is **affirmed**. Accordingly, the complainant's complaint is dismissed.

By the Commission:

/s/

Michael H. Gillick, Chairperson

/s/

David B. Falstad, Commissioner

/s/

Georgia E. Maxwell, 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

On July 29, 2016, the complainant filed a complaint with the Equal Employment Opportunities Commission (EEOC), which was cross-filed with the Equal Rights Division of the Department of Workforce Development (the "Division"), alleging that her employer had failed to accommodate her disability and had discriminated against her on the basis of her disability and in retaliation for requesting an accommodation. While that initial claim was pending, the respondent terminated the complainant's employment on November 2, 2017. The complainant filed a second complaint with the Division on May 10, 2019. The respondent argued that the second complaint was untimely and should be dismissed. On July 15, 2019, an equal rights officer from the Division issued a preliminary determination finding that the complaint was untimely. The complainant filed a timely appeal of the preliminary determination and an administrative law judge issued a decision and order on October 10, 2019, affirming the preliminary determination and order. The complainant filed a timely petition for commission review of the adverse decision.

Memorandum Opinion

In her petition, the complainant argues that her disabilities interfered with her ability to file a timely second complaint. Accordingly, she requests that the commission apply equitable tolling and accept her complaint as timely.

Under Wis. Stat. § 111.39(1), a complaint of employment discrimination must be filed no more than 300 days after the alleged discrimination occurred. The deadline for filing complaints under the Wisconsin Fair Employment Act (WFEA) is subject to being extended through the principles of equitable tolling and equitable estoppel. See *Schulke v. Mills Fleet Farm*, ERD Case No. 201000011 (LIRC June 4, 2010). Equitable tolling may be appropriate when a complainant's failure to comply with the statute of limitations is attributable to his or her medical condition, but only if it is established through medical evidence that because of the condition the complainant was "entirely incapable of bringing a legal action." *Kiefer v. Caring Alternatives, LLC*, ERD Case No. CR201002702 (LIRC Apr. 29, 2011); *Brantner v. Goodwill Industries*, ERD Case No. 200901415 (LIRC Feb. 19, 2010); *Wilson v. Doskocil Foods*, ERD Case No. CR200202555 (LIRC July 30, 2003). The medical evidence must show that the incapacity lasted essentially throughout the filing period, leaving the complainant unable to file a timely complaint. *Durham v. Emjay Corp.*, ERD Case No. 199604888 (LIRC Mar. 26, 1997); *Wilson, supra*.

In support of her allegation that her disability prevented her from filing a timely complaint, the complainant submitted a substantial number of medical records identifying her various medical conditions and treatment, including traumatic brain injury, post-traumatic stress disorder, breast cancer treatment, and cataract surgery. The commission has reviewed the medical documentation offered by complainant and finds it unpersuasive. The medical support offered does not show that she suffered an appreciable increase in symptoms during the limitations period, and the

complainant has failed to establish that her conditions made her unable to file a new complaint during that time.

The complainant spoke with an equal rights officer at the Division on November 29, 2017. The Division notes indicate that the complainant revealed during that call that she had been fired and was advised that if she believed the termination was also discriminatory, she would need to file a new complaint regarding the termination. The Division notes indicate that the complainant replied that she was not sure she wanted to file a complaint on the termination because she did not think she could prove it. In an email to the Division, the complainant acknowledged the call and stated, "I did not recall this conversation until you mentioned it."

The Division notes reflect that the complainant called the Division again on December 8, 2017, and that the equal rights officer again reiterated that if she wanted to include termination, she would need to file a new complaint. Those notes further reflect that, prior to August 29, 2018 (the 300-day limit for adding the termination claim), the complainant called the equal rights officer two additional times, corresponded with the Division, and, notably, filed a timely appeal of a no probable cause decision in her 2016 case. Together, these acts suggest that the complainant was able to communicate with the Division, to advocate on her own behalf, and to be aware of and comply with deadlines.

The commission additionally notes that, at least for a brief period of time during the 300-day window, the complainant had the assistance of legal counsel, who drafted and filed a response to the Division in her 2016 case. This fact further belies the notion that the complainant was unable to understand that she would need to file a new complaint in order to have the termination considered.

In addition to arguing that she did not know that she needed to file a second complaint, the complainant has also argued that she believed that she had complied with the need to file a separate complaint when she addressed the termination in a discovery response in her first case. Of course, these allegations cannot both be true. If she believed that her discovery response qualified as the filing of a new complaint, then she must have known that she needed to file a new complaint. Moreover, the discovery response was not filed until after the statute of limitations for the termination claim had run.

Under all the facts and circumstances, the commission concludes that the complainant did not file a timely complaint, and that the complainant's medical limitations were not so severe as to render her incapable of bringing a legal action during the 300 days following her termination. Accordingly, the dismissal of the complaint is affirmed.

cc: Attorney Casey Kaiser