

State of Wisconsin



Labor and Industry Review Commission

Brian G. Shore, Complainant

Fair Employment Decision¹

UW Madison, Respondent

Dated and Mailed:

ERD Case No. 201903291
EEOC Case No. 26G202000316C

February 12, 2021
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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

This case is before the commission to consider the timeliness of the complainant's allegation that the respondent discriminated against him based upon his age and sex, in violation of the Wisconsin Fair Employment Act (hereinafter "Act"). An equal rights officer for the Equal Rights Division of the Department of Workforce Development issued a preliminary decision dismissing the complaint as untimely. The complainant filed an appeal. An administrative law judge from the Equal Rights Division issued a decision affirming the dismissal of the complaint. The complainant has filed a timely petition for commission review of that decision.

The commission has considered the petition and the positions of the parties, and it has reviewed the 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.

Memorandum Opinion

On January 22, 2019, the complainant filed a complaint against the respondent (ERD Case No. 201900184) alleging that he was discriminated against based upon his race, sex, and age. Specifically, the complainant alleged that he was laid off and was replaced by a worker who was younger and of a different race. The complainant also maintained that some of the work he had been doing was reassigned to female co-workers. On January 28, 2019, the complainant submitted additional information indicating that he believed the respondent had also discriminated against him by failing to hire him for over 100 jobs for which he had applied since his layoff. The complainant alleged that he was qualified for all of the jobs for which he applied and that he suspected he was not hired due to discriminatory reasons.

On December 20, 2019, the complainant filed the instant complaint, alleging that the respondent discriminated against him based upon his race and sex by failing to offer him a job as a programmer analyst. The respondent argued that the complaint was not timely filed, and that is the issue that is now before the commission.

The Act provides that a complaint of discrimination is to be filed no more than 300 days after the alleged discrimination occurred. *See*, Wis. Stat. § 111.39(1). In his complaint the complainant indicated that the alleged discrimination occurred on February 22, 2019. The complainant's complaint was filed on December 20, 2019--301 days after the alleged discrimination occurred. The complainant maintains, however, that the statute of limitations did not begin to run in his case until April 1, 2019, or later. He explains that it was not until April 1, 2019 that he learned who was hired for the programmer analyst job, and that it was not until September 27, 2019 that he learned the age, sex and race of the person hired. The complainant explains that he received that information in conjunction with his prior discrimination complaint (ERD Case No. CR201900184).

The statute of limitations period begins to run when the complainant knew or reasonably should have known of the wrong that was committed against him. Stated somewhat differently, a statute of limitations begins to run when the facts that would support a charge of discrimination are apparent or would be apparent to a person with a reasonably prudent regard for his or her rights. *Washington v. United Water Services*, ERD Case No. CR199902104 (LIRC Aug. 15, 2003). Therefore, if a reasonable person in the complainant's position would not have known until April or September of 2019 that he was denied employment in possible violation of the Act, he could make an argument for suspending the statute of limitations until such time as that information became available. *See, Ringle v. Milwaukee Board of School Directors*, ERD Case No. 200504613 (LIRC Apr. 7, 2006). *See, also, Anchor v. State of Wisconsin*, ERD Case No. CR200501702 (LIRC Jan. 4, 2012)(The complainant was told that his job was being eliminated; his complaint was timely because it was filed within 300 days of the date the complainant had an inkling that someone else might be performing his duties.)

In this case, the complainant learned on February 22, 2019 that he was not selected for the job at issue in this complaint. However, while the complainant was not provided any information at that time regarding the identity of the successful candidate, it cannot seriously be argued that he had no reason to suspect the job denial was discriminatory. To the contrary, it is clear that the complainant believed discrimination had occurred, having only a month earlier submitted a discrimination complaint in which he alleged that he applied for over 100 jobs with the respondent for which he was denied hire due to his protected status. It is apparent, based upon the allegations in the previous complaint, that the complainant had formed the opinion that the respondent was discriminating against him in hire on a continuing and ongoing basis, such that he would have considered the possibility of discrimination even before he received specific information about the individual who was selected for the job. Having formed the opinion that the denial of the job was discriminatory, the complainant was obligated to preserve his rights by filing his complaint within 300 days. *See, Washington, supra*. The commission agrees with the administrative law judge that the complainant's failure to do so is a circumstance warranting the dismissal of his complaint.

cc: Attorney Anne E. Bilder