

State of Wisconsin



Labor and Industry Review Commission

Kevin Rhyne, Complainant

Resource Marketing Corporation,  
Respondent

ERD Case No. CR202200662  
EEOC Case No. 26G202200681

Fair Employment Decision<sup>1</sup>

Dated and Mailed:

March 30, 2023  
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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/

Georgia E. Maxwell, Commissioner

/s/

Marilyn Townsend, Commissioner

<sup>1</sup> **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 complaint that the respondent discriminated against him based on his race and color in violation of the Wisconsin Fair Employment Act (hereinafter "Act"). An administrative law judge for the Equal Rights Division of the Department of Workforce Development (hereinafter "ERD") issued a decision dismissing the complaint on the basis of timeliness and a failure to state a claim for relief under the Act. 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**

Wisconsin statute § 111.39(1) provides that the department may receive and investigate a complaint charging discrimination or discriminatory practices in a particular case if the complaint is filed with the department no more than 300 days after the alleged discrimination occurred. The complainant's complaint having been filed on March 2, 2022, the only timely acts of discrimination were those occurring on or after May 6, 2021, 300 days prior to the filing of the complaint. The complainant's complaint provided that the most recent act of discrimination occurred on May 16, 2020, the date of his discharge. Therefore, all the acts of discrimination alleged in the complaint occurred more than 300 days before the complainant filed his complaint with the ERD.

During the course of the ERD's investigation, the complainant alleged an additional act of discrimination occurring in September 2021, that the respondent blocked access to his paystubs. The complainant was no longer employed by the respondent when he lost access to the paystubs and there is no allegation that the complainant's inability to access his paystubs affected any employment relationship or future employment opportunities. The commission therefore agrees with the administrative law judge's conclusion that this allegation, if taken as true, would not state a claim upon which relief could be granted under the Act.

In his petition for review, the complainant argues that he did not timely file his complaint with the ERD because he had filed a complaint with the New York Division of Human Rights (hereinafter "NYDHR") and it had informed him that two agencies could not investigate the same complaint at once. The NYDHR's investigation was not complete until October 2021. The complainant argues that investigation was delayed due to the COVID-19 pandemic. The commission has considered whether these circumstances justify tolling the statute of limitations in this case but concludes they do not. While a statute of limitations may be suspended for a period of time in

which a complainant is excusably ignorant of his statutory rights, excusable ignorance does not mean ignorance of the filing periods and technicalities contained in the law. Rather, the question to consider is whether the complainant was generally aware that he had a legal right to be free from discrimination. See *Gruhle v. Random Lake School District*, ERD Case No. 199702881 (LIRC June 19, 1998), citing *Olson v. Lilly Research Laboratories*, ERD Case No. 9001499 (LIRC June 25, 1992). Here, the complainant was aware of his right to be free from discrimination, as evidenced by his filing of a complaint with the NYDHR. However, the complainant stated in his appeal that he first contacted the Wisconsin ERD in January 2022, well after the statute of limitations had already run. While the complainant contends that staff at the NYDHR informed him that two agencies could not investigate a claim at once, he did not allege that he was told he could not file a complaint with the ERD while the NYDHR investigation was ongoing or that the statute of limitations for filing a complaint with the ERD would be tolled during its investigation. The ERD does not have a work-sharing agreement with the NYDHR, so the filing of a complaint with that agency did not constitute filing a complaint with the ERD. Although this is an unfortunate situation, the fact remains that the complainant's complaint was not timely filed and the running of the statute of limitations was not tolled. The dismissal of the complaint is, therefore, affirmed.