

State of Wisconsin



Labor and Industry Review Commission

<p>Gloria Marigny, Complainant</p>	<p>Fair Employment Decision¹</p>
<p>State of Wisconsin – LIRC, Respondent</p>	<p>Dated and Mailed:</p>
<p>ERD Case No. CR202300680</p>	<p>September 29, 2023 mariggl1_rsd.doc:164</p>

The petition for commission review is **dismissed**. Accordingly, the administrative law judge’s decision remains in effect.

By the Commission:

/s/

Michael H. Gillick, Chairperson

/s/

Georgia E. Maxwell, Commissioner

/s/

Marilyn Townsend, 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>.

Memorandum Opinion

On March 1, 2023, the complainant filed a complaint with the Equal Rights Division (hereinafter “Division”) of the Department of Workforce Development alleging that the Labor and Industry Review Commission (hereinafter “LIRC”) discriminated against her based upon her race, color, age, and because she filed a previous complaint of discrimination, all in violation of the Wisconsin Fair Employment Act (hereinafter “Act”). Although the complainant’s complaint references discriminatory conduct by a past employer or employers, the complaint does not specify what action LIRC is alleged to have taken that the complainant believes amounted to discrimination.

On March 9, 2023, an equal rights officer for the Division issued a preliminary determination dismissing the complaint against LIRC based upon a lack of jurisdiction. In the determination, the equal rights officer noted that it did not appear there was an employer/employee relationship between the complainant and LIRC.

The complainant filed a timely appeal of the preliminary determination and the matter was referred to an administrative law judge. In her appeal the complainant provided a list of employers whom she claims have discriminated against her, but did not explain why she believed the proceedings against LIRC should not have been dismissed.

On April 6, 2023, LIRC filed a response to the complainant’s appeal in which it explained that it had never had an employment relationship with the complainant and that the complainant had not alleged LIRC engaged in any discriminatory conduct that affected her future employment opportunities. In its response, LIRC indicated that it appeared the complaint may have been in reference to a decision issued by LIRC in a separate equal rights case, *Marigny v. Sunrise Care Center*, ERD Case No. CR202002291, which affirmed an administrative law judge’s dismissal of an appeal of a preliminary determination on the basis of timeliness.

On May 22, 2023, the administrative law judge issued a decision affirming the preliminary determination. The administrative law judge noted that the complainant did not have an actual or potential employment relationship with LIRC and did not allege that LIRC had interfered with an employment opportunity; rather, the complainant’s complaint appeared to involve prior LIRC decisions that were not resolved to the complainant’s satisfaction.² The administrative law judge

² As stated above, in *Marigny v. Sunrise Care Center*, ERD Case No. CR202002291 (LIRC Dec. 10, 2021), LIRC affirmed the dismissal of the complainant’s complaint against Sunrise Care Center on the basis of timeliness. The complainant appealed the LIRC decision to circuit court, which affirmed it in *Marigny v. LIRC, DWD, and Sunrise Care Center*, No. 22CV114 (Wis. Cir. Ct. Milwaukee Cnty. Jan. 19, 2023). The complainant filed an appeal of that decision, and the matter is now pending before the court of appeals. See, *Marigny v. LIRC, Sunrise Care Center, and Centene MHS-Wisconsin*, Appeal No. 2023AP000348.

further indicated that the complainant had not stated a claim for retaliation under the Act.

The complainant filed a timely petition for review of the administrative law judge's decision. In her petition for review and supporting submissions the complainant makes it clear that her allegations against LIRC are not related to an employment relationship, but are based upon LIRC's prior decision to affirm the dismissal of her complaint as untimely. The complainant argues, among other things, that LIRC "embedded, misconceived its power to review the findings" and that it "merely considered whether the record was 'wholly barren of evidence' to support" its findings. The complainant does not address the administrative law judge's rationale for dismissing her complaint and does not explain why she believes her allegations are covered by the Act.

LIRC now finds itself in the novel situation in which it is both the named respondent and the decision-maker in the complainant's case. In her petition the complainant specifically recognizes this conflict, arguing that she feels there is a conflict of interest with LIRC making a decision in this case, since it is filed against LIRC. LIRC agrees that it is not possible for it to adjudicate a petition for review of a complaint against itself without at least the appearance of a conflict of interest. Absent a mechanism to avoid an appearance of conflict, and because there is no evidence of an actual or potential employment relationship with the commission, the commission believes that it has no option but to dismiss the complainant's petition in this matter.