

State of Wisconsin



Labor and Industry Review Commission

David Nickel, Complainant

Fair Employment Decision¹

City of Milwaukee, Respondent

Dated and Mailed:

ERD Case No. 201600279
EEOC Case No. 26G201600688C

September 29, 2023
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The decision of the administrative law judge is **affirmed**, subject to modification. Accordingly, the complainant's complaint is dismissed.

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>.

Procedural Posture

This case is before the commission to consider the complainant's allegation that the respondent discriminated against him based upon his sex, and in retaliation for its belief that he intended to file a wage claim, in violation of the Wisconsin Fair Employment Act (hereinafter "Act"). An administrative law judge for the Equal Rights Division (hereinafter "Division") of the Department of Workforce Development held a hearing and issued a decision finding no probable cause to believe that discrimination occurred and, further, holding that the complainant's complaint was untimely filed and should be dismissed on that basis. The complainant has 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 the evidence submitted at the hearing. 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 following sentence is inserted after the second sentence in the second paragraph on the first page of the administrative law judge's decision:

On July 20, 2016, the respondent submitted a written response to the complaint to the Division in which it argued, among other things, that the complainant's complaint was untimely filed.

Memorandum Opinion

Statute of limitations

The complainant filed a complaint of discrimination in which he alleged that he was discriminated against based upon his sex, and because the respondent believed he intended to file a wage claim. In the "statement of discrimination" portion of the complaint form, the complainant elaborated that he was told he could take vacation or FMLA leave, but that this offer was later rescinded, and that he was forced to resign--although his work was outstanding and he got along with everyone--and was blocked from reapplying for a year. The complainant stated that at the time of the discharge the HR director suggested he go to the ERD because he was being treated unfairly. The complainant also noted that the manager of the group he worked for had stated he preferred supervising women and that he should have hired a woman instead of the complainant. He maintained that the individual who replaced him was a female and was allowed to take six weeks of vacation during her first year of service. Finally, the complainant contended that he spoke with several managers about his pay and benefits and told them he planned to file a claim with the ERD.

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. It is undisputed that the complainant's employment was terminated on February 12, 2014, and that the complainant did not file his complaint until February 5, 2016, well in excess of 300 days since the last discriminatory event alleged.²

The respondent raised the statute of limitations issue in writing prior to the issuance of the initial determination. However, while the equal rights officer noted in the initial determination that a statute of limitations issue had been raised, the matter was not resolved on that basis because the complainant contended that he did not have the information necessary to file a timely complaint. At the hearing the complainant explained that he only became aware that he was discriminated against when, on September 14, 2015, he ran into a former co-worker, who informed him that a female employee, Wendy Jensen, had been hired to fill his position after he was forced to resign and, further, that Ms. Jensen was allowed to take vacation during her probationary period when the complainant was not. The complainant also testified that the co-worker told him she believed he was discharged because the respondent thought he was planning to file a wage claim. However, the co-worker in question appeared at the hearing on the complainant's behalf, but did not support his contentions in this regard; she denied telling the complainant she believed he was discharged based upon his sex or because the respondent was afraid he would file a wage claim and offered the opinion that such allegations were "absurd." With respect to the issue of leave time, the complainant's witness indicated that she could not recall having discussed Ms. Jensen's taking leave time with the complainant. She elaborated that Ms. Jensen took medical leave and that, because she had not yet earned much vacation, at least some of the leave was without pay. The witness indicated that she knew nothing to support an allegation that the respondent denied male employees leave time while granting it to females.

The statute of limitations in a discrimination case 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 September of 2015 that he was discharged 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, for example, Anchor v. State of Wisconsin*, ERD Case No. CR200501702 (LIRC Jan. 4, 2012)(at the time of discharge the

² Although the complaint form signed by the complainant indicates that the most recent date of discrimination was February 1, 2016, the complainant did not explain what occurred on that date. His statement of discrimination includes no allegations occurring after his discharge.

complainant was told that his job was being eliminated; his complaint was considered timely because it was filed within 300 days of the date the complainant learned that someone else might be performing his duties). By contrast, *see Ringle v. Milwaukee Board of School Directors*, ERD Case No. 200504613 (LIRC Apr. 7, 2006)(the complainant was not able to avoid the bar of the statute of limitations where his assertions indicate that he believed at the time of discharge that his employment had been terminated in possible violation of the Act's prohibition against age discrimination).

In this case, the complainant's employment ended involuntarily in February of 2014, notwithstanding the fact the complainant believed his work was outstanding. The complainant indicated in his complaint that his manager had expressed a preference for female employees and had told him he wished he had hired a female instead. This alone might have caused an individual with a reasonably prudent regard for his rights to wonder if his sex was a factor in the discharge. Further, unlike in *Anchor*, cited above, the respondent did not tell the complainant that his job was eliminated, and the complainant surely understood that there was a chance his replacement would be a female. It was not necessary for him to wait almost two years to confirm that this was the case; the complainant could have contacted the same co-worker who shared that information in September of 2015 or another co-worker immediately to find out who was hired as his replacement. An individual with a reasonably prudent regard for his rights would have done so. Similarly, where the complainant told the respondent that he intended to file a wage claim with the ERD, his subsequent forced resignation would have caused an individual with a reasonably prudent regard for his rights to question immediately whether retaliation was at play; he would not need a former co-worker to bring this theory to his attention. Further, given the complainant's co-worker's vehement denial of having told the complainant she believed his discharge was related to the respondent's belief that he was going to file a wage claim, the commission is not persuaded that the September 14 meeting with the co-worker actually put the complainant on notice of a possible retaliation claim.

Finally, addressing the allegation that the complainant did not learn until September of 2015 that a female employee was able to take leave time--and the commission notes that the complainant alleged the female comparator took six weeks of vacation when his witness stated that the individual in question took unpaid medical leave--during her probationary period, this fact, even if true, is insufficient to justify accepting an untimely complaint. Clearly the complainant had information available to him at the time of his discharge that would have warranted a suspicion that he was being discriminated against based upon his sex: the complainant believed that he had done nothing to justify a discharge and contended that his supervisor told him he wished he had hired a female instead of him. Indeed, the complainant contended that the HR director suggested he file an equal rights complaint. That the complainant alleges he subsequently became aware of

additional evidence of possible disparate treatment that took place after his separation from employment is not a circumstance permitting acceptance of an otherwise untimely complaint.

Probable cause

In his petition for commission review the complainant makes numerous arguments regarding the fairness of the hearing, the fairness of the pre-hearing discovery process, and with respect to the findings and conclusions arrived at by the administrative law judge. However, because the complaint was not filed in a timely manner and was properly dismissed on that basis, the commission considers it unnecessary to address the complainant's arguments regarding his allegations of discrimination or with respect to the various procedural issues he raises. The dismissal of the complaint is affirmed.

cc: Attorney Robin A. Pederson