

State of Wisconsin



Labor and Industry Review Commission

Brenda A. Broughton
Complainant

Express Scripts Inc.
Respondent

ERD Case No. CR201701606
EEOC Case No. 26G201701119C

Fair Employment Decision¹


Dated and Mailed:

MAY 30 2018

The decision of the administrative law judge (copy attached) is **affirmed** subject to **modification**. Accordingly, the complaint is dismissed because it was filed beyond the 300-day statute of limitations for filing a WFEA complaint.

By the Commission:


Georgia E. Maxwell, Chairperson


Laurie R. McCallum, Commissioner


David B. Falstad, 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.

Procedural Posture

This case is before the commission to consider the complainant's allegation that the respondent discriminated against the complainant because of her age in violation of the Wisconsin Fair Employment Act (WFEA). An administrative law judge (ALJ) for the Equal Rights Division (ERD) of the Department of Workforce Development (department) issued a Decision on an Appeal of a Preliminary Determination and Order dismissing the complainant's complaint because it was untimely filed with ERD. The commission has considered the complainant's petition and the positions of the parties, and based on its review, the commission agrees with the decision of the administrative law judge, and it adopts the findings and conclusion in that decision as its own, except that it makes the following:

Modifications

1. In the first sentence of the first paragraph on page one of the ALJ's Decision and Order, replace "Complainant's age, race and sex." with "Complainant's age."
2. In the first sentence of the first paragraph and third sentence of the third paragraph on page three of the ALJ's Decision and Order, replace "Wisconsin Administrative Code sec. 218.03(4)" with "Wisconsin Administrative Code § DWD 218.03(5)".
3. In the second sentence of the second paragraph on page three of the ALJ's Decision and Order replace "subsection (4)" with "subsection (5)".

Memorandum Opinion

Procedural History

On or about November 12, 2014, the complainant filed a charge of discrimination with the Milwaukee Area Office of the EEOC. This case was assigned EEOC Case No. 443-2015-00164C. The charge also identified the local fair employment practice agency (FEPA) that would receive a copy of the complaint as the "St. Louis Civil Rights Enforcement." On December 5, 2014, the complainant was informed by the Milwaukee Area Office of the EEOC that her charge of discrimination was being transferred to the St. Louis District Office for "processing because the harm occurred within its geographical jurisdiction," apparently due to the fact the actions the complaint alleged were discriminatory arose principally out of respondent's headquarters in St. Louis, Missouri.

On July 25, 2017, the St. Louis District Office of the EEOC issued a "Dismissal and Notice of Rights" because it was unable to conclude that the information obtained established violations of the statutes. The complainant was notified that she had 90 days to pursue her employment discrimination complaint under federal law in EEOC Case No. 443-2015-00164C.

Just before the EEOC's dismissal, the complainant filed a complaint on June 12, 2017, with ERD alleging the respondent terminated her because of her age in

violation of the Wisconsin Fair Employment Act (WFEA). The complainant stated in her complaint she was terminated on November 5, 2014. On July 31, 2017, ERD served the respondent with the complaint. Shortly thereafter, the respondent moved to have the complaint dismissed because the alleged act of discrimination, the complainant's termination, occurred on November 5, 2014, well past the 300-day time limit for filing a complaint with ERD under Wis. Stat. § 111.39(1).

The complainant responded by acknowledging that her November 12, 2014, EEOC charge was never cross-filed with ERD but instead was cross-filed with the local FEPA in Missouri. The complainant argued that her ERD complaint filed in 2017 with ERD should be treated as having been filed in November, 2014.

On September 25, 2017, an ERD investigator issued a Preliminary Determination and Order dismissing the complainant's complaint because it was filed beyond the 300-day time period following the alleged act of discrimination which occurred on November 5, 2014. The complainant timely appealed and the case was assigned to an administrative law judge (ALJ) for review and a decision.

On November 30, 2017, the ALJ issued a decision and order dismissing the June 12, 2017, complaint filed with ERD as untimely because it was filed beyond the 300-day filing limit. The ALJ also held she could not consider the complaint in EEOC Case No. 433-2015-00164C because it was never deferred to ERD by the EEOC. The complainant timely petitioned the commission for review.

Discussion of Timeliness of Complaint

Pursuant to Wis. Stat. § 111.39(1), the department is authorized to receive and investigate complaints charging discrimination "if the complaint is filed with the department no more than 300 days after the alleged discrimination...occurred." Through statutory construction, that period of time has been interpreted to be a statute of limitations and may be waived. *County of Milwaukee v. LIRC*, 113 Wis.2d 199, 205, 335 N.W.2d 4112 (Ct. App. 1983).

It is undisputed that the complainant's 2014 federal complaint was never deferred by the EEOC to ERD. Wisconsin Admin. Code § DWD 218.03(5) provides that a complaint that has been deferred to ERD by a federal or local employment opportunity agency with which the department has a worksharing agreement is considered filed when received by the federal or local agency. However, it does not permit assigning the 2014 EEOC filing date to the complaint. The information provided by the parties indicates that the EEOC complaint initially filed in the Milwaukee Area office and subsequently transferred to the St. Louis District Office of the EEOC was deferred to the local FEPA in Missouri, not to ERD.

The complainant asserts she is being penalized for EEOC's failure to cross-file the federal charge in EEOC Case No. 443-2015-00164C with ERD and that her complaint should not be time-barred. A complainant may avoid the bar under the 300-day statute of limitations under the doctrine of equitable tolling when a complaint is untimely due to errors by the FEPA. See, *Schulke v. Mills Fleet Farm*,

ERD Case No. 201000011, EEOC Case No. 26G201000485C (LIRC June 4, 2010) and *Mailen v. Madison Media Institute*, ERD Case No. CR201101923 (LIRC April 2, 2015), citing *Chappel v. Emco Machine Works Co.*, 601 F.2d 1295 (5th Cir. 1979).

However, there is no allegation that the Wisconsin ERD engaged in any conduct that would warrant the application of equitable tolling. In fact, ERD had no knowledge of the original complaint, a fact which the complainant was well aware of. The original 2014 complaint, which the complainant signed, identified the local FEPA that would receive the complaint as the City of St. Louis Civil Rights Enforcement Agency, not ERD. The EEOC investigation was transferred to its St. Louis District office, which the complainant was informed of by letter a few weeks later. If the complainant believed that this was the wrong agency to receive and investigate the complaint, it was incumbent upon her to say so then, not two and one-half years later, after the EEOC's investigator told her that EEOC "must close the case." Consequently, there is no basis for equitable tolling of the statute of limitations in ERD Case No. CR201701606. The complainant's June 2017 complaint is time-barred because the alleged act of discrimination, the complainant's termination, occurred in November of 2014, far outside the 300-day time limit for filing a complaint with ERD under Wis. Stat. § 111.39(1).

STATE OF WISCONSIN
DEPARTMENT OF WORKFORCE DEVELOPMENT
EQUAL RIGHTS DIVISION

Brenda A. Broughton
4718 N. Parkway Ave.
Milwaukee, WI 53209
Complainant

vs.

DECISION ON AN APPEAL OF A
PRELIMINARY DETERMINATION
AND ORDER
ERD Case #201701606
EEOC Case #26G201701119C

Express Scripts, Inc.
One Express Way
St. Louis, MO 63121
Respondent

In a complaint filed on June 12, 2017, with the Equal Rights Division of the Department of Workforce Development, the Complainant alleged that the Respondent violated the Wisconsin Fair Employment Act (WFEA) by terminating the Complainant's employment because of the Complainant's age, race and sex. The Complainant stated in her complaint that the Complainant's employment was terminated on November 5, 2014.

During the investigation of the complaint, the Respondent asked that the Complainant's complaint be dismissed because the Complainant filed the Complainant's complaint more than 300-day after statute of limitations period had run. The Respondent stated in an August 29, 2017 letter to the Division's investigator that the Complainant had previously filed a claim with the Milwaukee Office of the EEOC on or about November 12, 2014 alleging that the Respondent discriminated against the Complainant when the Respondent terminated the Complainant's employment because of the Complainant's age. This complaint was given EEOC Case #443201500164C. The Respondent provided a letter that showed that on December 5, 2014, the Complainant and the Respondent were notified by the Milwaukee EEOC office of the decision to transfer the Complainant's November 12, 2014 complaint to the St. Louis EEOC Office. The Respondent told the Division's investigator in the August 29, 2017 letter that the Complainant's complaint filed in 2014 was investigated by the St. Louis EEOC Office. The Respondent provided the Division's investigator with a copy of the "Dismissal and Notice of Rights" document sent to the Respondent and the Complainant by the St. Louis EEOC Office on June 25, 2017. The document informed the parties that the St. Louis EEOC Office had been unable to conclude that a violation had occurred and notified the Complainant that the Complainant had to file a federal complaint within 90 days if the Complainant wanted to pursue her employment discrimination complaint under federal law in EEOC Case #443201500164C. The Respondent stated in the August 29, 2017 letter that the Complainant did not file her complaint with the Division in ERD Case #201701606 alleging that the Respondent violated the WFEA by terminating the Complainant's employment on November 5, 2014 until more than 2 years had passed since the date the Complainant's employment was terminated on November 5, 2014. Therefore, the Respondent argued that the Complainant's WFEA employment discrimination complaint about the termination of the Complainant's employment was filed with the Division well beyond the 300-day statute of limitations and should be dismissed.

In response to the Respondent's motion to dismiss, the Complainant stated that she filed her complaint about the termination of her employment by the Respondent with the Milwaukee EEOC office a week after the termination of the Complainant's employment but the complaint was not cross-filed with the Division under the WFEA. The Complainant stated that she did not understand the need to have her complaint cross-filed with the Division until she spoke to an attorney in June of 2017 when the St. Louis office of the EEOC was about to close her EEOC complaint against the Respondent. After speaking to the attorney in June of 2017, the Complainant states that she spoke to someone from the Division and was told that her complaint against the Respondent was not cross-filed by the EEOC with the Division under the WFEA. The Complainant stated that she was told that a later employment discrimination complaint that the Complainant had filed against a different employer had been cross-filed with the Division. The Complainant stated that she tried to find out from the EEOC why the Complainant's complaint against the Respondent was not cross-filed with the Division but the Complainant stated that she did not receive a response. The Complainant argues that she did not understand the need to have her complaint against the Respondent cross-filed with the Division and that she should not be penalized because she did not understand the process. The Complainant argues that her 2017 complaint in this matter should be treated as having been filed in November of 2014. In a telephone conversation with the Division's investigator, the Complainant explained that after her EEOC complaint was transferred to the St. Louis office of the EEOC, the Complainant's complaint was cross-filed with the State of Missouri equivalent of the Division for the Complainant's complaint to be investigated under Missouri's employment discrimination law.

On September 25, 2017, the Division's investigator issued a Preliminary Determination and Order dismissing the Complainant's complaint in this matter. The investigator determined that the Complainant's complaint of employment discrimination against the Respondent under the WFEA was not filed with the Division until June 14, 2017. Since the Complainant's employment was terminated on November 5, 2014, the investigator determined that the Complainant's WFEA complaint was filed more than 300 days after the termination of the Complainant's employment with the Respondent. The investigator determined that the Complainant's complaint had to be dismissed because it was filed well beyond the WFEA's 300-day statute of limitations period.

On October 13, 2017, the Complainant filed a timely appeal of the dismissal of her 2017 complaint in this matter. The Complainant's appeal letter made similar arguments concerning the fact that the Complainant's complaint against the Respondent filed in 2014 was not cross-filed by the EEOC with the Division. The Complainant again asked that her 2017 complaint be treated as if the complaint was filed with the Division in 2014 when the Complainant filed her original complaint with the EEOC.

The Complainant's appeal was referred to the undersigned Administrative Law Judge for review and for a decision. The Administrative Law Judge determines that the Complainant's complaint in this matter was not cross-filed with the Division by the EEOC in 2014, so the Complainant's 2014 complaint was never timely filed with the Division. As a result, the only complaint file with the Division about the termination of the Complainant's employment by the Respondent was filed on June 12, 2017. This complaint was filed more than 300 days after the termination of the Complainant's employment by the Respondent. Therefore, the complaint was not timely filed under the WFEA.

Wisconsin Administrative Code sec. 218.03(4), provides the following about the date of filing of a complaint deferred by another agency:

DATE OF FILING OF COMPLAINT DEFERRED BY ANOTHER AGENCY. A complaint which is deferred to the department by a federal or local employment opportunity agency with which the department has a worksharing agreement complies with the requirements of sub. (3) and is considered filed when received by the federal or local agency.

Subsection (3) of Wisconsin Administrative Code sec. 218.03 discusses what is required to file an employment discrimination complaint with the Division under the WFEA. Based on subsection (4) of Wisconsin Administrative Code sec. 218.03, a complaint that is "received by [a] federal or local agency" that is "deferred" to the Division by the federal or local employment opportunity agency pursuant to a worksharing agreement is considered filed with the Division under the WFEA when the complaint is received by the federal or local agency. The Administrative Law Judge will take administrative notice that the Division has a worksharing agreement with the EEOC. It is undisputed by the parties that the Complainant's complaint filed in 2014 was received by the EEOC, a federal agency with which the Division has a worksharing agreement. It is also undisputed by the parties that the Complainant's 2014 complaint was not "deferred" by the EEOC to the Division. The Administrative Law Judge has reviewed the Division's computer system and has found no evidence that the EEOC deferred the Complainant's 2014 complaint in EEOC Case #443201500164C to the Division. The information provided by the parties indicates that the Complainant's EEOC complaint in EEOC Case #443201500164C was deferred to the Missouri Commission on Human Rights for review by that state agency.

Based on the information presented in this matter, it appears that the Complainant's EEOC complaint in EEOC Case #443201500164C cannot be considered to have been filed with the Division in November of 2014. This case number does not exist in the Division's computer system and the case cannot be before the Administrative Law Judge in this matter since it does not exist and is not assigned the Administrative Law Judge for decision. Additionally, since Complainant's EEOC complaint in EEOC Case #443201500164C was never "deferred" to the Division, the Complainant's complaint cannot be considered, under Wisconsin Administrative Code sec. 218.03(4), to have been filed with the Division when it was received by the EEOC in November of 2014. Therefore, the Administrative Law Judge determines that the Complainant's EEOC complaint in EEOC Case #443201500164C cannot be considered as a timely complaint under the WFEA of the Complainant's claim of age discrimination against the Respondent with respect to the termination of the Complainant's employment in 2014.

Since the Administrative Law Judge cannot consider the Complainant's EEOC complaint in EEOC Case #443201500164C, the Administrative Law Judge can only consider the Complainant's complaint in this matter against the Respondent that was filed with the Division on June 12, 2017. The Complainant's June 12, 2017 complaint that the Respondent violated the WFEA when the Respondent allegedly terminated the Complainant's employment because of age in November of 2014 was filed more than 300 days after the Complainant's employment with the Respondent was terminated. Since the Complainant's complaint in this matter was filed after the 300-day statute of limitations period had run, the Complainant's complaint must be dismissed because the complaint was untimely filed.

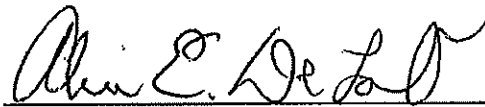
Based on the forgoing, the Administrative Law Judge issues the following:

ORDER

1. The September 25, 2017 Preliminary Determination and Order dismissing the Complainant's complaint in this matter is affirmed. The Complainant's complaint in this matter was filed beyond the 300-day statute of limitations period and the complaint was not timely filed.
2. The Administrative Law Judge determines that the Complainant's 2014 EEOC complaint in EEOC Case #443201500164C was never deferred by the EEOC to the Division and the complaint is not before the Administrative Law Judge. Therefore, the Complainant's EEOC complaint in EEOC Case #443201500164C cannot be considered a basis for finding that the Complainant's claim of age discrimination against the Respondent with respect to the termination of the Complainant's complaint was timely filed under the WFEA.

Dated at Milwaukee, Wisconsin

NOV 30 2017



Alice E. DeLaO
Administrative Law Judge

cc: Complainant
Respondent
Kallin M. Berry, Attorney for Respondent
EEOC