

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH 3

DANE COUNTY

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ANDREW T. MURPHY,

Petitioner,

v.

Case No. 16-CV-1259

**FILED**

APR 5 2017

LABOR AND INDUSTRY REVIEW COMMISSION,  
THE BOARD OF REGENTS OF THE UNIVERSITY OF  
WISCONSIN SYSTEM,

DANE COUNTY CIRCUIT COURT

Respondents.

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**DECISION AND ORDER**

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**INTRODUCTION**

The Petitioner petitioned this Court to review a decision of the State of Wisconsin Labor and Industry Review Commission ("LIRC") upholding a decision of the State of Wisconsin Department of Workforce Development ("DWD"). For the following reasons, IT IS ORDERED that LIRC's decision is AFFIRMED.

**FACTS**

In November 2012, Petitioner Andrew Murphy filed a charge of age and sex discrimination against the University of Wisconsin System ("UWS") with the United States Equal Employment Opportunity Commission ("EEOC"). The charge was cross-filed with DWD as a Wisconsin Fair Employment Act ("WFEA") complaint. Since Mr. Murphy's complaint was filed with EEOC first, the organization initiated its investigation while DWD held the matter in abeyance. (R. 4.)

On June 20, 2013, EEOC dismissed Mr. Murphy's charge following an investigation but issued Mr. Murphy a "right to sue" letter so that he could pursue his claim in federal court. On

May 8, 2014, DWD sent a letter to Mr. Murphy's last known address by certified mail, inquiring whether he wished DWD to investigate his WFEA complaint. The letter expressly stated that Mr. Murphy's case would be dismissed if he failed to respond to the letter by May 28, 2014. DWD also sent a copy of the letter to Mr. Murphy's attorney. DWD received confirmation that the letter was received at Mr. Murphy's address and signed for on May 12, 2014. Mr. Murphy did not respond to the letter by the May 28 deadline, and so on May 30, 2014, DWD sent Mr. Murphy a notice of dismissal. (R. 4-5.)

Mr. Murphy's attorney responded via faxed letter on June 2, 2014. He requested that DWD's WFEA complaint be held in abeyance while Mr. Murphy pursued his federal claim. Although DWD had already dismissed Mr. Murphy's complaint, the organization elected to place the complaint in abeyance. On December 24, 2014, the federal district court dismissed Mr. Murphy's sex discrimination claim on the merits, and dismissed his age discrimination claim on the grounds of sovereign immunity. UWS sent a copy of the federal court decision to DWD. (R. 5.)

On August 20, 2015, DWD notified Mr. Murphy that his WFEA complaint was being dismissed on the basis of the federal court holding. Mr. Murphy appealed this second dismissal, arguing that his age discrimination claim survived because the federal court had not dismissed it on the merits. On that basis, he requested that DWD proceed with his WFEA age discrimination complaint. (R. 5.)

On February 26, 2016, a DWD administrative law judge issued a decision and order dismissing Mr. Murphy's WFEA complaint because Mr. Murphy failed to timely respond to the DWD letter issued on May 8, 2014. Alternatively, the administrative law judge decided that,

under the doctrine of issue preclusion, Mr. Murphy was barred by the federal court decision from re-litigating his discrimination allegations. (R. 5-6.)

### PROCEDURAL POSTURE

Mr. Murphy petitioned for review of the DWD decision pursuant to Wis. Stat. § 111.39(5)(a). On April 11, 2016, LIRC affirmed the order dismissing Mr. Murphy's discrimination complaint against UWS because he failed to respond to correspondence from DWD within 20 days. (R. 3.) LIRC expressly declined to reach the alternative ground for dismissal, issue preclusion, addressed in the administrative law judge's decision. (R. 3.)

### STANDARD OF REVIEW

Whether Mr. Murphy's complaint was timely under Wis. Stat. § 111.39(3) is a question of law. *See McNeil v. Hansen*, 2007 WI 56, ¶ 7, 300 Wis.2d 358, 731 N.W.2d 273 (statutory interpretation and application to undisputed facts are questions of law). A reviewing court is not bound by an agency's conclusions of law, but it may accord them one of three levels of deference, depending on the circumstances. *UFE Inc. v. LIRC*, 201 Wis.2d 274, 284, 548 N.W.2d 57 (1996). In this case, it appears that LIRC is accorded due weight deference. *Rice Lake Harley Davidson v. State of Wisconsin Labor & Indus. Review Comm'n*, 2014 WI App 104, ¶¶ 21-24, 357 Wis. 2d 621, 639-40, 855 N.W.2d 882, 891-92 (finding that due weight deference is owed to LIRC's interpretation of WIS. STAT. § 111.39(1)). Due weight deference is appropriate "when an agency has some experience in the area but has not developed the expertise that necessarily places it in a better position than a court to interpret and apply a statute." *Id.* Under due weight deference, a court will uphold the agency's interpretation if it is reasonable and comports with the purpose of the statute, unless it determines another interpretation is more reasonable. *Id.* However, under any of the levels of deference, the outcome would be the same.

## DISCUSSION

Wisconsin Stat. §111.39(3) provides that DWD “shall dismiss a complaint if the person filing the complaint fails to respond within 20 days to any correspondence from [DWD] concerning the complaint and if the correspondence is sent by certified mail to the last-known address of the person.” On May 8, 2014, DWD sent a letter to Mr. Murphy’s last known address by certified mail, inquiring whether Mr. Murphy wanted DWD to investigate his complaint after EEOC had investigated and dismissed his companion federal charge. The letter warned Mr. Murphy that his WFEA complaint would be dismissed if the DWD Equal Rights Division did not receive a response to the letter by May 28, 2014. Mr. Murphy did not respond by May 28. Rather, Attorney Nicholas E. Fairweather responded on Mr. Murphy’s behalf on June 2, 2014.

Mr. Murphy argues that his attorney’s correspondence was a timely response to DWD’s May 8 letter. He argues that Wisconsin Stat. § 801.15(5)(a)<sup>1</sup> gave him three extra days to respond to DWD’s notice, and since his response then would have been due Saturday, May 31, 2014, his time to respond would have been further extended to Monday, June 2, 2014 by operation of Wisconsin Stat. § 990.001(4)(c).<sup>2</sup>

Mr. Murphy is incorrect. Wis. Stat § 801.15(5)(a) only applies to civil actions and proceedings in state circuit courts. *See Baker v. Dep’t of Health Servs.*, 2012 WI App 71, ¶ 7, 342 Wis. 2d 174, 179, 816 N.W.2d 337, 339; *Chevrolet Div., Gen. Motors Corp. v. Indus. Comm’n*, 31 Wis. 2d 481, 489, 143 N.W.2d 532, 537 (1966). Since Mr. Murphy is appealing an

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<sup>1</sup> Wisconsin Stat. § 801.15(5)(a) provides: “Whenever a party . . . is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party: (a) If the notice or paper is served by mail, 3 days shall be added to the prescribed period.”

<sup>2</sup> Wisconsin Stat. § 990.001(4)(c) provides: “When the last day within which . . . an act [is to be] done, which consists of . . . service upon or the filing with any officer, agent, agency, department or division of the state . . . falls on a Saturday . . . such act may be done on the next succeeding day that is not a Sunday or a legal holiday.”

administrative agency decision, he does not enjoy the benefit of an extended response period under Wis. Stat § 801.15(5)(a). See *Baker v. Dep't of Health Services*, 342 Wis. 2d at 181.

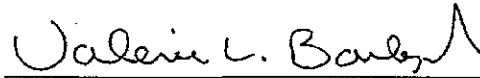
Mr. Murphy further argues that LIRC failed to afford him a thorough review under Wisconsin Stat. §111.39(5)(b) because it elected not to address the ALJ's dismissal of the WFEA complaint under the issue preclusion doctrine. He asks the Court to remand this case to LIRC to decide that issue. LIRC properly declined to address an issue that was unnecessary to sustain its dismissal of Mr. Murphy's complaint, and so Mr. Murphy's case will not be remanded. LIRC's interpretation of the relevant statutes was reasonable. Thus, under the due weight deference standard of review, this Court must uphold the agency's determination.

#### CONCLUSION

For the foregoing reasons, IT IS ORDERED that the decision of the Labor and Industry Review Commission is AFFIRMED.

Dated this 5<sup>th</sup> day of April, 2017.

BY THE COURT:



Judge Valerie Bailey-Rihn  
Dane County Circuit Court, Branch 3

cc: Andrew T. Murphy  
Labor and Industry Review Commission  
The Board of Regents of the University of Wisconsin System  
Nicholas E. Fairweather, Attorney for Petitioner  
Sierra Beckles Young, Attorney for Respondents