

State of Wisconsin



Labor and Industry Review Commission

**David Nickel**  
Complainant

**City of Milwaukee**  
Respondent

ERD Case No. CR201600279  
EEOC Case No. 26G201600688C

**Fair Employment Decision**

**Dated and Mailed:**

August 30, 2017

The decision of the administrative law judge is **set aside** and the matter is **remanded** for a hearing on the issue of probable cause and for such further proceedings as may be warranted.

By the Commission:

/s/

Laurie R. McCallum, Chairperson

/s/

David B. Falstad, Commissioner

### **Procedural Posture**

On April 20, 2016, the complainant filed a complaint with the Equal Rights Division (hereinafter “ERD”) of the Department of Workforce Development, alleging that the respondent discriminated against him based upon his sex and because he filed a complaint under the wage payment law or because the respondent believed he had done so or may attempt to do so. On November 9, 2016, the ERD issued an initial determination finding no probable cause to believe that discrimination occurred. The complainant filed an appeal of the no probable cause initial determination. The issue presented in this case is whether the complainant’s appeal was filed in a timely manner and, if not, whether there is a basis to accept his late appeal and certify the matter for a hearing on probable cause.

### **Memorandum Opinion**

The rules governing appeals of initial determinations provide that within 30 days after the date of the initial determination finding that there is no probable cause, a complainant may file a written request for a hearing on the issue of probable cause. Wis. Admin. Code § DWD 218.08. The rules specify that “filing” means the physical receipt of a document. Wis. Admin. Code DWD § 218.02(6).

While filing an appeal by fax is permitted, the rules indicate that documents filed by fax after the regular business hours of the ERD as established by Wis. Stat. § 230.35(4)(f) shall be considered filed on the next business day. Wis. Admin. Code § DWD 218.25(1)(b). Wisconsin Statute § 230.35(4)(f) provides that the close of business for state government offices is 4:30 p.m. The ERD rules further provide that documents may be filed by electronic mail only if expressly authorized by the equal rights officer or the administrative law judge assigned to the case. Wis. Admin. Code § DWD 218.25(2).

As indicated above, the initial determination finding no probable cause in this case was issued on November 9, 2016. Pursuant to the relevant administrative rules, an appeal had to be physically received within 30 days, or by December 9, 2016, in order to be considered timely.

The complainant filed his appeal by fax on December 9, 2016, at 11:55 p.m., well after the ERD’s regular business hours. The complainant contended that he also mailed a copy of his appeal on December 8, 2016. However, no appeal was received by mail on or before December 9, 2016, as required by the rules. Finally, although the rules provide that the ERD does not accept documents filed by e-mail absent express authorization, the complainant also sent a copy of his appeal by e-mail on December 9, 2016, at 11:58 p.m.

The administrative law judge dismissed the complainant’s appeal as untimely filed, given that no written appeal was received before the end of regular business hours on the 30<sup>th</sup> day after the decision was mailed. The administrative law judge reasoned that the complainant’s faxed appeal, received after regular business hours

on Friday, December 9, 2016, was considered to have been filed on the next business day, Monday, December 12, 2016. The administrative law judge also found that the complainant was not authorized to file an appeal by e-mail, and that even if he was, his e-mailed appeal was received after regular business hours and was, therefore, untimely. The complainant has asked the commission to review the administrative law judge's decision dismissing his appeal.

In his petition for review, the complainant argues that the ERD did not provide him with timely notification of the initial determination and of his appeal rights. The complainant maintains that he contacted the ERD on November 17, 2016, and informed it that he had not received the initial determination. The complainant states that he contacted the ERD several more times thereafter but still did not receive the initial determination until December, more than three weeks after the date of the initial determination, and then only by e-mail. However, while it does appear that the complainant may have requested but not immediately received a copy of his initial determination,<sup>1</sup> this was not a circumstance justifying the complainant's failure to file a timely appeal. Based upon the complainant's own statements, it is clear that he became aware of the initial determination by November 17, 2016, and that he had received a copy of the initial determination and was able to draft an appeal and place it in the mail by December 8, 2016, the day before the appeal was due. Given the circumstances, the commission agrees with the administrative law judge that there is no reason to believe the complainant could not have managed to submit a timely appeal either in person or by fax prior to the close of regular business hours on December 9, 2016.

The complainant also argues that the ERD provided incomplete information as to when the appeal needed to be received. He states that the initial determination does not indicate that the appeal must be received by 4:30 p.m. and that no one from the ERD told him this. The commission addressed and rejected a similar argument in *Jackson v. Wal-Mart Stores, Inc.*, ERD Case No. CR201203897 (LIRC June 29, 2016). The complainant in *Jackson* filed an appeal by fax at 4:50 p.m. on the last day of the appeal period and contended that this should be acceptable because the instructions for appeal in the initial determination only stated that the appeal had to be received by the ERD within 30 days of the date of mailing of the initial determination, but said nothing about a time deadline on the 30<sup>th</sup> day. The commission rejected that argument, noting that it was incumbent on the complainant to ascertain how the 30-day deadline applied depending on the filing method he chose. The commission pointed out that, if the complainant had chosen

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<sup>1</sup> The case file indicates that a copy of the initial determination was mailed to the complainant at his most recent address on November 9, 2016. However, in an e-mail to the ERD dated November 17, 2016, the complainant indicated that he had not received the determination and requested that the information be provided to him. It is not entirely clear from the case file when the ERD provided the complainant with the copy of the initial determination he requested, nor is there any indication in the file as to whether it did so via the United States Postal Service or by e-mail.

to file his appeal in person, he would have been responsible for knowing the time the office closed in order to ensure that the appeal would be received that day<sup>2</sup> and that he was similarly responsible to know the rules governing filing by fax.

However, while the commission has generally held that an appeal received after regular business hours on the 30<sup>th</sup> day cannot be accepted, the instant case involves a unique set of circumstances that warrants doing so:

In his petition for review the complainant states that he received an e-mail on December 8, 2016 from Thomas Kral of the ERD which suggested there was a flexible timeline for filing his appeal. The commission's review of department records reveals that the complainant and Mr. Kral, an Equal Rights Officer for the ERD, engaged in a lengthy e-mail correspondence on December 8, 2016, which included the following exchange:

From: David Nickel  
Sent: Thursday, December 08, 2016 12:34 AM  
To: Kral, Thomas C – DWD

Hi again!

I'm sorry, but I have another quick question. . .

Leticia Daley<sup>3</sup> finally sent the initial determination a few days ago.

It is stamped with November 9, 2016 and states the appeal must be received within 30 days. Would the final day for me to submit an appeal be December 9, 2016? Just want to make sure that I'm not off by a day.

Thanks!

From: Kral, Thomas C – DWD  
Sent: Thursday, December 8, 2016 2:25 PM  
To: David Nickel

Hi David,

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<sup>2</sup> See, *Wilson v. Milwaukee Bd. of School Directors*, ERD Case No. 200403752 (LIRC July 14, 2006)(A complainant's written petition for review was not timely filed where the complainant slid it under the door of the ERD's office after it had closed for business at 4:30 p.m. on the last day of the appeal period).

<sup>3</sup> Ms. Daley is the Equal Rights Officer who issued the initial determination.

Yes, but if it's a little late they usually won't close it. There is a fudge factor because we are going "paperless". . . and everything is now routed through Madison first unless mailed directly here (819 N. 6<sup>th</sup> St.).

Tom Kral

The information provided by Mr. Kral, suggesting that the complainant could file his appeal "a little late," was erroneous and clearly contrary to the Division's rules, which mandate dismissal of appeals that are not filed within 30 days.

The question then becomes what, if any, remedy is available to a complainant who has filed an untimely appeal after being advised by the ERD that he was permitted to do so. The rule regarding appeals of initial determinations, Wis. Admin. Code § DWD 218.08, provides that if no timely appeal is filed, the initial determination's order of dismissal shall be the final determination of the department. The rule does not provide any grounds or standard on the basis of which the untimeliness of an appeal could be overlooked. *Sipprell v. Kenosha Unified School District*, ERD Case No. CR201104269 (LIRC Jan. 15, 2015); *Rivas v. City of Milw. Building Inspection*, ERD Case No. 199601483 (LIRC, May 24, 1999). However, the commission has recognized that there are some circumstances in which the fact that an appeal of a determination is untimely does not necessarily foreclose the possibility that the appeal could be addressed and ruled on. *See, for example, Carlson v. SPF North America*, ERD Case No. CR200601472 (LIRC April 27, 2007), and *Shorey v. Dillon Bindery, Inc.*, ERD Case No. CR201302433 (LIRC Oct. 31, 2016). Moreover, the commission has specifically held that misinformation supplied by a department representative with respect to appeal deadlines is a circumstance that warrants accepting the late appeal. *Magnarini v. Jos. Reilly*, ERD Case No. 8052083 (LIRC June 17, 1981)(where the ERD incorrectly advised a complainant that she had 20 days, instead of the then mandated 15 days, in which to file an appeal of a no probable cause determination, the complainant was entitled to rely on such information in filing her appeal and the ERD was obliged to treat her appeal, filed within 20 days, as timely).

Applying the logic of *Carlson*, *Shorey*, and *Magnarini* to the instant case, the commission believes that, where the complainant specifically asked for information regarding the deadline for filing his appeal and was advised by a department representative that an appeal filed a little late would be accepted, his appeal that was filed after regular business hours on the 30<sup>th</sup> day of the appeal period must be considered timely. The commission therefore accepts the complainant's appeal and remands this matter for a hearing on probable cause.

cc: Attorney Robin A. Pederson