

State of Wisconsin



Labor and Industry Review Commission

James Birmingham
Complainant

Capital Finishing, LLC
Respondent

ERD Case No. CR201602071
EEOC Case No. 26G201601168C

Fair Employment Decision

Dated and Mailed:

July 31, 2018

The administrative law judge's decision is set aside in part and the complainant's petition for commission review is dismissed. Accordingly, this matter is returned to the Equal Rights Division for further proceedings consistent with this decision.

By the Commission:

/s/

Georgia E. Maxwell, Chairperson

/s/

Laurie R. McCallum, Commissioner

/s/

David B. Falstad, Commissioner

Procedural History

The complainant filed a complaint in which he alleged that the respondent discriminated against him in the terms and conditions of his employment and terminated his employment based upon his race. An equal rights officer for the Equal Rights Division (“Division”) issued a split initial determination finding no probable cause to believe that the complainant was discharged based upon his race, but finding that there was probable cause to believe that the respondent discriminated against him with respect to the terms and conditions of his employment. Accordingly, the termination allegation, on which no probable cause was found, was dismissed. The initial determination indicated that the terms and conditions portion of the complaint, on which probable cause was found, would continue to be processed. The initial determination described the following procedure:

“This case will be certified for a formal hearing. If the Complainant appeals the no probable cause portion of this decision, a hearing will be held on those issues first. If the Administrative Law Judge finds probable cause after that hearing, a second hearing will be held on the merits of the complaint. If the Complainant does not appeal the no probable cause portions of this determination, the Administrative Law Judge will conduct a merits hearing on the probable cause portion of the complaint. A notice of hearing stating the date, time, and place of hearing will be sent to the parties in the near future. . . .”

The complainant filed a timely appeal of the no probable cause determination, and that matter was certified to hearing.

The administrative rules provide that, in a split case, where the complainant has requested a hearing on probable cause, the department can (with the consent of the parties) consolidate the matter and hold the hearing on the merits and the hearing on probable cause together. *See*, Wis. Admin. Code § DWD 218.08(3). The Division did not follow that procedure in this case; rather than consolidating the probable cause and no probable cause portions of the complaint into a single hearing, the no probable cause portion was assigned to an administrative law judge for hearing and the probable cause portion was put on hold, per the description of the process contained in the initial determination.

The administrative law judge responsible for the no probable cause hearing held a prehearing telephone conference with the parties on October 3, 2017. The complainant was incarcerated in the Oregon Correctional Center at the time, and appeared by telephone. During the conference, the complainant advised the administrative law judge that he was scheduled to be released from jail on October 10, 2017. The administrative law judge asked the complainant to notify him immediately upon his release of his new mailing address, telephone number,

and email address, and the complainant agreed to do so. However, the complainant failed to provide his contact information to the administrative law judge or the Division upon his release. Thus, the last address the Division had on record for the complainant was at the Oregon Correctional Center.¹

On November 6, 2017, the respondent's attorney emailed the administrative law judge and indicated that she had received no response to discovery requests served on the complainant and did not know how to contact the complainant. The respondent's attorney asked the administrative law judge whether he had received the complainant's contact information and could share it with her. The administrative law judge did not immediately respond to this email, but instead took it upon himself to conduct a search in an attempt to locate that information. The administrative law judge began by contacting the Oregon Correctional Center, but was told that the facility did not have any contact information for the complainant. The administrative law judge was given the name and contact information for the complainant's probation agent, whom the administrative law judge then attempted to contact both by telephone and by email. On November 28, 2017, the administrative law judge telephoned the probation agent and left a detailed voicemail message, followed by an email the same day, in which the administrative law judge explained that he was assigned to hear an employment discrimination case the complainant had filed. In his email, the administrative law judge described the complainant's promises to provide a new address and failure to do so, and stated that if he was unable to locate the complainant his claim would be dismissed. The administrative law judge asked the probation agent to contact him as soon as possible, but received no response.

On December 14, 2017, at which point the complainant still had not provided updated contact information, the Division issued notice of a hearing scheduled for March 1, 2018 at 9:30 a.m. in Madison, Wisconsin. The hearing notice was mailed to the complainant at his last address of record, the Oregon Correctional Center.

File notes indicate that on January 9, 2018, the complainant's probation agent called the Division and indicated that he had been forwarded a copy of the hearing notice from the Oregon Correctional Center. The probation agent stated that he was trying to obtain a more current address for the complainant. The Division representative told the probation agent that the Division still had the Oregon Correctional Center listed as the complainant's address, and that therefore the complainant probably did not receive notice of the hearing. The probation agent stated that if by chance the complainant showed up at the hearing the police were to be contacted because the complainant had absconded and there was a warrant out for his arrest. Based on that telephone call, the administrative law judge

¹ The Correctional Center was also the address the complainant used when he filed his complaint. The Division had no permanent mailing address on file for the complainant.

arranged to have police present at the hearing. The administrative law judge also contacted the respondent's attorney and apprised her of the situation.

On the day of the hearing two police officers appeared and asked the administrative law judge for the complainant's birth date and other identifying information, which the administrative law judge provided. The police officers were able to determine based upon that information that the complainant was incarcerated in the Milwaukee Secure Detention Facility.

The complainant did not appear at the hearing, although the respondent was present and prepared to proceed. The administrative law judge stated on the record that the portion of the complaint alleging discrimination in termination would be dismissed based upon the complainant's failure to appear, unless the complainant showed good cause in writing for his non-appearance within 10 days. The complainant did not contact the administrative law judge after the hearing and did not attempt to show good cause for his failure to appear.

On March 21, 2018, the administrative law judge issued a decision dismissing the complainant's complaint based upon his failure to appear at the hearing. In his decision the administrative law judge noted that, although he had stated on the record that the sole claim that would be dismissed if the complainant failed to appear at the hearing or show good cause for his nonappearance was the termination claim, upon further reflection he had decided to dismiss the entire complaint, and not simply the portion relating to termination. The administrative law judge stated that that result was required by the administrative rule, which provided that if the complainant fails to appear at the hearing, the administrative law judge "shall dismiss the complaint." Wis. Admin. Code § DWD 218.18(4).

The administrative law judge sent a copy of the decision to the complainant at his address at the Milwaukee Secure Detention Facility. The complainant received the decision and filed a timely petition for commission review of the dismissal of his complaint.

Memorandum Opinion

As set forth in the Procedural History section above, the administrative law judge issued a decision purporting to dismiss the complainant's entire complaint, both that portion on which probable cause was found and that on which no probable cause was found. In doing so, the administrative law judge reasoned that Wis. Admin. Code § 218.18(4), which states that if the complainant fails to appear at the hearing, the administrative law judge "shall dismiss the complaint," meant he was to dismiss every aspect of the complaint, including the portion that was to be certified to hearing on the merits. The administrative law judge noted that the rule calls for a dismissal of the "complaint," and not merely those claims set forth in the complaint that were noticed to be heard.

Although the rule requiring dismissal of the complaint if the complainant fails to appear at a hearing does not specify that the word “complaint” applies only to those claims set forth in the complaint that were noticed to be heard, it is axiomatic that the administrative law judge only has jurisdiction over that portion of the complaint that is before him. *See, Josellis v. Pace Industries Inc.*, ERD Case No. CR200100081 (LIRC June 21, 2001)(finding that an administrative law judge’s dismissal of a complaint as a sanction for failing to comply with a discovery order extended only to the portion of the complaint that was actually before the administrative law judge). In this case, the administrative law judge had no jurisdiction over the portion of the complaint that had not yet been certified to hearing, and the commission concludes that he erred in dismissing the entire complaint rather than merely that portion on which no probable cause was found.

The commission therefore finds that the portion of the complaint finding probable cause must be permitted to proceed to hearing. To the extent the administrative law judge’s decision finds otherwise, that portion of the decision is hereby set aside. Because there has yet to be a final decision with respect to the probable cause issue, the no probable cause portion of the complaint that was before the administrative law judge (and which could properly be dismissed based upon the complainant’s failure to appear), is not yet ripe for commission review.² Once a decision has been issued by the Division with respect to that portion of the complaint that was not dismissed based upon the complainant’s failure to appear at a hearing, the complainant will have an opportunity to file a petition for review by the commission of the entire matter.

cc: Maria DelPizzo Sanders
Lyndsey K. Bley

² *See*, Wis. Admin. Code § DWD 218.21(1):

(1) APPEALS LIMITED TO FINAL DECISIONS AND ORDERS. Any party may file a written petition for review of a final decision and order of the administrative law judge by the labor and industry review commission. *Only final decisions and orders of the administrative law judge are appealable. A final decision is one which disposes of the entire complaint and leaves no further proceedings on that complaint pending before the division.* (emphasis added).