

State of Wisconsin



Labor and Industry Review Commission

Kenneth Pendleton
Complainant

Madison Kipp Corporation
Respondent

ERD Case No. CR201702481
EEOC Case No. 26G201701297C

Fair Employment Decision

Dated and Mailed:

August 22, 2018

The decision of the administrative law judge (copy attached) is **set aside** and the matter is **remanded** to the Equal Rights Division for a hearing at which the complainant will have the burden to prove that he did not receive the preliminary determination and/or the initial determination, and for further proceedings if warranted.

By the Commission:

/s/

Georgia E. Maxwell, Chairperson

/s/

Laurie R. McCallum, Commissioner

/s/

David B. Falstad, Commissioner

Procedural History

On September 12, 2017, the complainant filed a discrimination complaint with the Equal Rights Division (hereinafter “Division”) of the Department of Workforce Development, alleging that the respondent terminated his employment and then refused to rehire him based upon his race and his arrest record. On February 15, 2018, an Equal Rights Officer with the Division issued a preliminary determination dismissing the discharge allegations on the ground that they were time barred. The preliminary determination explained that the complainant had 20 days in which to file an appeal.¹ Thus, to be timely, an appeal of the preliminary determination had to be filed on or before March 7, 2018.

On the same day, February 15, 2018, the Equal Rights Officer issued a separate initial determination addressing that portion of the complaint that was not dismissed based on timeliness. The initial determination found no probable cause to believe that the complainant was discriminated against with respect to rehire. That determination notified the complainant that he had 30 days in which to file a hearing request, or his case would be closed. Therefore, to be timely, an appeal of the initial determination had to be filed by March 17, 2018. Both determinations were mailed to the complainant at his most recent address of record with the Division.

The complainant filed a single appeal of both the preliminary and no probable cause determinations. The complainant’s appeal was postmarked on March 16, 2018 and received by the Division on March 19, 2018, too late to meet either appeal deadline. In his appeal letter, the complainant stated that he knew his appeal was late but that he had been having trouble with his mail since he had a change of address and did not receive the determinations until “just now.” The matter was assigned to an administrative law judge for a decision regarding the timeliness of the complainant’s appeal.

On March 30, 2018, the administrative law judge issued a decision dismissing the complainant’s appeal. The dismissal was based upon the representations contained in the complainant’s appeal, as well as other file materials, and was issued without benefit of an evidentiary hearing. Citing a notation in the file which indicated that the complainant had telephoned the Division on March 6, 2018, at which time he stated that he had received the determinations “today,” the administrative law judge did not find credible the complainant’s assertion that he did not receive the determinations until the date he mailed his appeal. The administrative law judge additionally noted that the complainant made reference to having problems with his mail because he moved, but that his address had not changed since he filed his complaint in September of 2017. The administrative law judge concluded that this

¹ For purposes of the administrative rule, “filing” means the physical receipt of the document by the Division. *See*, Wis. Admin. Code § DWD 218.02(6).

“level of contradiction” removed any chance of the complainant’s having sufficient credibility to rebut the presumption of receipt.

The complainant filed a timely petition for commission review of the dismissal of his complaint.

Memorandum Opinion

The Division’s rules regarding the appeal of preliminary and initial determinations contemplate dismissal if appeals are not filed within the time limits specified. *See*, Wis. Admin. Code §§ DWD 218.05(3) and 218.08(2). While neither rule contains any exception for appeals that are filed late for good cause or due to compelling personal circumstances, it is implicit that the rules contemplate that the complainant be given a reasonable opportunity to receive a determination or to otherwise become aware of its existence in order for the appeal period to run. *Carlson v. SPF North America*, ERD Case No. CR200601472 (LIRC April 27, 2007).

In this case, the complainant indicated in his appeal that he did not receive the determinations at issue until “just now.” Since the complainant mailed his appeal on March 16, 2018, the commission interprets the complainant’s assertion that he received the determinations “just now” as a statement that he received them that day.

The commission has repeatedly held that a plausible assertion of non-receipt of a decision or hearing notice should not be rejected, consistent with due process, without providing an opportunity for hearing to prove non-receipt. *See*, *Marrero v. Bullseye Inc.*, ERD Case No. CR201402243 (LIRC Aug. 31, 2015), *and cases cited therein*. In *Hernandez v. Starline Trucking Corp.*, ERD Case No. CR201002662 (LIRC Feb. 29, 2012), a case involving the alleged non-receipt of a notice of hearing, the commission explained:

“While the commission has on some occasions invoked the presumption of receipt of mailed items, referred to in *State ex rel. Flores v. State*, 183 Wis. 2d 587, 612-613, 516 N.W.2d 362 (1994), *see, e.g., Griffin v. Manor Care Health Service*, ERD Case No. CR200700667 (LIRC March 23, 2010), it has also noted that *Flores* holds that if receipt of the mailing is denied the presumption is spent and a question of fact is raised. *Salley v. Nationwide Mortgage & Realty*, ERD Case No. CR200502419 (LIRC Dec. 13, 2007). Wisconsin accepts that the presumption of receipt cannot be given conclusive effect without violating the due process clause. *Mullen et al. v. Braatz*, 179 Wis. 2d 749, 508 N.W.2d 446 (Ct. App., 1993).

“While there are circumstances here which suggest that the complainant should have received the notices of hearing that the file appears to show were mailed to him, the commission cannot disregard

the fact that the complaint has expressly and directly asserted, that he did not receive any notification”

Here, the complainant asserted that he did not receive the determinations until March 16, 2018, after the time period for appealing the preliminary determination had already expired and a day before the final day to appeal the initial determination. While a note in the case file indicates that the complainant contacted the hearing office on March 6, 2018, and stated that he had received the determinations “today,” without any further foundation that note constitutes hearsay and cannot form the basis for disregarding the complainant’s assertion of non-receipt. Further, even concluding that the complainant received the determinations on March 6, 2018, rather than on March 16, 2018, a question arises as to whether receipt of a determination on that date would have given the complainant a reasonable opportunity to submit a timely appeal of the preliminary determination, considering that the appeal had to be received by the Division no later than March 7, 2018. Finally, the commission notes that the fact the complainant did not change his address after September of 2017 does not negate his assertion that he had trouble with his mail, and the commission believes that the complainant should be given opportunity to establish that this was in fact the case.

Because the commission believes that the complainant must be given an opportunity to be heard with respect to his assertion that he did not receive the determinations in a timely manner, this matter is remanded to the Division for a hearing on that question.

cc: Attorney Thomas R. Crone