

State of Wisconsin



Labor and Industry Review Commission

Gary Phelan
Complainant

Alter Trading Corp.
Respondent

ERD Case No. CR201604412
EEOC Case No. 26G201700178C

Fair Employment Decision¹

Dated and Mailed:

November 30, 2018

The decision of the administrative law judge (copy attached) is **affirmed**. Accordingly, the complainant's complaint is dismissed.

By the Commission:

/s/

Georgia E. Maxwell, Chairperson

/s/

Laurie R. McCallum, Commissioner

/s/

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.

Appeal rights and answers to frequently asked questions about appealing a fair employment decision to circuit court are also available on the commission's website <http://lirc.wisconsin.gov>.

Procedural History

On November 7, 2016, the complainant filed a complaint with the Equal Rights Division (“Division”) alleging discrimination in employment. The Division issued an initial determination finding no probable cause to believe that discrimination occurred and dismissing the complaint. The initial determination was sent to the complainant at his last address of record with the Division on May 9, 2017. The determination explained that the dismissal of the complaint would become final unless the complainant submitted a written appeal within 30 days of the date the determination was mailed. Thus, to be timely, an appeal of the initial determination had to be filed on or before June 8, 2017. The complainant’s appeal was not filed until January 2, 2018.

In his letter of appeal the complainant stated that he no longer resided at the address where the initial determination was mailed and had not lived there for quite some time. The complainant provided a document showing that he filed a change of address form with the United States Postal Service on June 3, 2017. In subsequent correspondence to the Division the complainant also asserted that his mail has been tampered with or stolen. He did not explain how he or when he learned about the initial determination, which he claimed to have never received. An administrative law judge for the Division reviewed the complainant’s appeal and supporting correspondence and, on April 26, 2018, dismissed the appeal because it was not filed in a timely manner. The complainant has filed a timely petition for commission review of that decision.

The commission has considered the petition and the positions of the parties, and it has reviewed information contained in the case file. Based on its review, the commission agrees with the decision of the administrative law judge, and it adopts the findings and conclusions in that decision as its own.

Memorandum Opinion

The Division’s rule regarding the appeal of initial determinations requires dismissal if appeals are not filed within the time limits specified. *See*, Wis. Admin. Code § DWD 218.08(2). While the rule does not contain any exception for appeals that are filed late for good cause or due to compelling personal circumstances, it is implicit that the rule contemplates 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). Thus, the commission has held that a plausible assertion of non-receipt of a decision 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 this case, the complainant’s assertions that he did not receive the initial determination are not plausible. First, the complainant contended that he did not receive the initial determination because he no longer resides at the address to which

it was mailed. However, United States Postal Service records provided by the complainant indicate that he did not move from that address until a month after the initial determination was mailed. Moreover, even if the complainant had moved earlier, it would have been his responsibility to provide the Division with an updated mailing address, which he did not do. That leaves the complainant's claim that his mail was taken from his mailbox. The complainant's support for this assertion is entirely speculative: he explains that he lives in a small community and "everyone has their nose in other people's business." In prior correspondence to the administrative law judge the complainant also asserted that he has had important documents stolen from his apartment in the past. It is clear that the complainant has no evidence to support a conclusion that his mail was stolen, and his claims in that regard are completely hypothetical. Given the implausibility of the various explanations offered by the complainant for the late appeal, and considering the fact that the complainant has never explained how or when he came to learn about the adverse initial determination, the commission does not consider it necessary to order a hearing on the issue of non-receipt. The commission concludes that the complainant's untimely appeal was properly dismissed, and it affirms the administrative law judge's decision.

cc: Attorney Mark Goldstein

Decision affirmed in *Phelan v. LIRC*, No. 2018CV0383 (Wis. Cir. Ct. Waupaca Cnty. March 14, 2019).