

**State of Wisconsin  
Labor and Industry Review Commission**

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**Ra Shonda Butler**, Complainant

**Fair Employment Decision<sup>1</sup>**

**Kennedy Heights Community Center**,  
Respondent

ERD Case No. CR201802036

**Dated and Mailed:**  
April 30, 2019

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A petition for commission review must be received within 21 days after the administrative law judge's decision was mailed to the party's last-known address. The petition in this matter was filed late and is therefore **dismissed**. The administrative law judge's decision remains in effect.

By the Commission:

/s/

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Michael H. Gillick, Chairperson

/s/

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David B. Falstad, Commissioner

**Procedural Posture**

An administrative law judge for the Equal Rights Division (hereinafter "Division") of the Department of Workforce Development issued a decision in this matter dismissing the complaint on the basis of timeliness. The complainant filed a petition for commission review of that decision. The issue to be decided is whether the complainant's petition for review was timely filed and, if not, whether there is any circumstance under which the petition could be accepted.

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<sup>1</sup> **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>.

### Memorandum Opinion

The applicable statutes provide that a party who is dissatisfied with the findings and order of the examiner may file a written petition with the department for review by the commission of the findings and order, that if no petition is filed within 21 days from the date that a copy of the findings and order of the examiner is mailed to the parties the findings and order shall be considered final, and that if the commission is satisfied that a petitioner has been prejudiced because of exceptional delay in the receipt of a copy of any findings and order it may extend the time another 21 days for filing the petition with the department. *See*, Wis. Stat. § 111.39(5), Wis. Stat. § 106.52(4)(b).

Wisconsin Admin. Code LIRC § 1.02 provides, in relevant part, as follows:

All petitions for commission review shall be filed within 21 days from the date of mailing of the findings and decision or order. . .

Wisconsin Admin. Code LIRC § 1.025 provides, in relevant part, as follows:

(1) Petitions for review may be filed by mail or personal delivery. A petition for review filed by mail or personal delivery is deemed filed only when it is actually received by the commission or by the division of the department to which the petition is mailed, except that petitions for review in unemployment insurance cases under s. 108.09 or 108.10, Stats. which are filed by mail or personal delivery are deemed filed when received or postmarked as provided for in s. LIRC 2.015.

The administrative law judge's decision having been dated and mailed on November 30, 2018, the last day on which a timely petition for review could have been filed was December 21, 2018. The complainant's petition was filed on December 26, 2018.

In her petition the complainant argues that she did not receive the decision until after the 21-day appeal period was over. Under Wis. Stat. § 111.39(5), the commission may consider a late petition if it is satisfied that a party has been prejudiced because of exceptional delay in the receipt of a copy of the administrative law judge's decision. However, the commission has held that, for purposes of the statute, "exceptional delay" refers exclusively to a delay in the receipt of a copy of the decision that is caused by the Division. *Lacy v. Briggs & Stratton*, ERD Case No. 8950728 (LIRC July 9, 1991). The decision in this case was mailed to the complainant at her last-known address,<sup>2</sup> and there is no reason to believe that there

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<sup>2</sup> Although the street address on the decision contains a typographical error ("Ridgeway Way" rather than "Ridgewood Way"), the Notice of Appeal Rights correctly indicates that the complainant resides

was any delay in the Division's mailing of the decision. Consequently, it does not appear that there was any error by the Division that could have caused an exceptional delay in the complainant's receipt of the decision.

Assuming, however, that "exceptional delay" could also be extended to a delay in the receipt of the decision that was caused by something other than an error on the part of the Division, the commission can see no compelling reason to believe that such delay occurred in this case. The complainant asserted that she did not receive the decision on time. However, she has not explained when she received the decision, and has not provided any information with respect to the circumstances of her receipt of the decision that would allow the commission to conclude that, if indeed she received the decision too late to file a timely petition, this was due to reasons beyond her control. See, *Chavez v. Blue Harbor Resort*, ERD Case No. CR201000076 (LIRC Jan. 4, 2012).

The commission therefore finds that the petition for commission review was not timely filed and that the complainant has not shown she was prejudiced because of exceptional delay in the receipt of a copy of the decision, within the meaning of the applicable statutes.

NOTE: Pursuant to Wis. Stat. § 111.39(5)(c), the commission may reopen its decision within 28 days based upon mistake or newly discovered evidence. Thus, if within 28 days of the date of this decision the commission receives from the complainant some type of clear, specific and plausible explanation concerning the lateness of her petition for review, it could set aside the dismissal and reconsider the matter.

**Editor's note: affirmed *Butler v. LIRC*, Case No. 19-CV-1462 (Dane County Cir. Ct., Sept. 20, 2019).**

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on Ridgewood Way, and department records indicate that the decision was mailed to the Ridgewood Way address.