

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

Phillip Carter, Complainant

Fair Employment Decision

Community Action, Inc., Respondent
3301 S. Highway 51
Janesville, WI 53546

Dated and Mailed:

ERD Case No. CR201502875
EEOC Case No. 443201501040C

May 17, 2019

The decision of the administrative law judge is **set aside** and this matter is **remanded** to the Equal Rights Division for an investigation or such further proceedings as may be warranted.

By the Commission:

/s/

Michael H. Gillick, Chairperson

/s/

David B. Falstad, Commissioner

/s/

Georgia E. Maxwell, Commissioner

Procedural History

On June 16, 2015, the complainant filed a complaint of discrimination with the United States Equal Employment Opportunity Commission (hereinafter “EEOC”). The complaint was cross-filed with the Wisconsin Equal Rights Division (hereinafter “Division”), pursuant to a work sharing agreement between the EEOC and the Division. The EEOC conducted the initial investigation of the complaint and, on November 13, 2017, it issued a Dismissal and Notice of Suit Rights.

On March 19, 2018, the Division sent the complainant a letter informing him that he needed to notify the Division as to whether or not he wished to have it conduct an independent review of his complaint. The letter stated that a reply must be received by April 9, 2018, or the case would be dismissed pursuant to Wis. Stat. § 111.39(3). The Division did not receive a response from the complainant by April 9, 2018 and, on April 16, 2018, it issued a notice of dismissal.

On May 2, 2018, the Division received a letter from the complainant indicating that he did want the Division to conduct an independent review of his complaint. The Division treated the complainant’s letter as an appeal of the dismissal of the complaint and the matter was assigned to an administrative law judge. The administrative law judge gave the respondent an opportunity to respond to the complainant’s appeal and, on June 5, 2018, the respondent submitted a position statement in support of dismissal.¹

On September 24, 2018, the administrative law judge issued a decision affirming the dismissal of the complaint. The complainant has filed a timely petition for commission review of the administrative law judge’s decision.

Memorandum Opinion

The complaint in this matter was dismissed because the complainant failed to respond within 20 days to a department letter that was sent to him on March 19, 2018. The dismissal was based on Wis. Stat. § 111.39(3), which states:

The department shall dismiss a complaint if the person filing the complaint fails to respond within 20 days to any correspondence from the department concerning the complaint and if the correspondence is sent by certified mail to the last-known address of the person.

There is no indication that the Division’s letter was sent to the complainant by certified mail. The letter does not state that it was sent by certified mail, and the case file contains nothing to show that the complainant signed a return receipt. In

¹ In its position statement the respondent framed the issue as being that of an untimely appeal. However, the question in this case is not whether the complainant filed a late appeal (he did not), but whether it was appropriate to dismiss his complaint for failing to respond to department correspondence in a timely manner.

his appeal the complainant stated that he received the letter from someone who lives several blocks from his home, who found it in his mailbox, suggesting that the letter was sent by regular, and not certified, mail.

The administrative law judge dismissed the matter nonetheless. In her decision, the administrative law judge explained that Wis. Stat. § 111.39(3) provides, “in part,” that the department shall dismiss a complaint if the person filing the complaint fails to respond within 20 days to any correspondence from the department concerning the complaint. However, that partial reading of the statute omits the essential final clause: “*and if the correspondence is sent by certified mail to the last-known address of the person.*” The statute *requires* the use of certified mail for the department correspondence. *Unseth v. County of Vernon*, ERD Case No. 200404469 (LIRC June 30, 2005)(emphasis added). If the legislature had intended that complaints be dismissed based upon failure to respond within 20 days to any department correspondence, it would not have expressly limited the statute to situations in which the correspondence was sent by certified mail.

Because the department’s dismissal of the complaint did not comply with the provisions of Wis. Stat. § 111.39(3), the commission concludes that dismissal of the complaint was impermissible. The commission therefore sets aside the dismissal and remands this matter for further proceedings.

cc: Attorney Farrah N.W. Rifelj