

State of Wisconsin



Labor and Industry Review Commission

Mitchell Pimentel, Complainant

Fair Employment Decision

County of Waukesha, Respondent

ERD Case No. CR201604857

Dated and Mailed:

September 17, 2021
pimenmi_err.doc:164

The decision of the administrative law judge is **reversed**. Accordingly, the administrative law judge's Order of Dismissal 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/
Georgia E. Maxwell, Commissioner

/s/
Marilyn Townsend, Commissioner

Procedural History

On November 15, 2016, the complainant filed a discrimination complaint with the United States Equal Employment Opportunities Commission (EEOC). Pursuant to a work sharing agreement between the EEOC and the Wisconsin Equal Rights Division (ERD), the complaint was cross-filed with ERD.

On December 28, 2016, the Wisconsin Equal Rights Division (ERD), sent a letter to the respondent, with a copy to the complainant, notifying it that the complainant's charge of discrimination was originally filed with the EEOC and that, pursuant to a work sharing agreement, the EEOC would process the complaint first and the ERD would take no action pending the EEOC's processing of the complaint.

On June 21, 2018, the EEOC sent the complainant written notification that conciliation of his claim was unsuccessful and that the United States Department of Justice had determined not to file suit in the complainant's case. The notice provided the complainant with information about his right to file a civil action, but made no mention of further proceedings by the ERD.

On November 2, 2020, the ERD sent the complainant a letter by certified mail asking him whether he wished the ERD to do an independent investigation of his complaint or whether he no longer wished to pursue the matter. The letter stated that if no response was received by November 23, 2020, the case would be dismissed. The certified letter was sent to the complainant at his address of record with the ERD, W229 S8782 Clark St, Big Bend, WI 53130. A separate copy of the letter was sent to the address of the complainant's legal representative, Attorney Martin C. Kuhn. On November 9, 2020, the ERD received a card from the U.S. Postal Service showing that Attorney Kuhn had signed for the certified 20-day letter on November 4, 2020. On November 10, 2020, the letter addressed to the complainant was returned to the ERD with a U.S. Postal Service label indicating that the complainant had a new address, 135 Amanda Ct, Mukwonago, WI 53149-1471, but that the forwarding order for that address had expired. Neither the complainant nor Attorney Kuhn submitted a response to the ERD's letter within 20 days.

On November 30, 2020, the ERD issued a "Notice of Dismissal" dismissing the complaint on the ground that the complainant failed to respond to a certified letter from the ERD within 20 days, pursuant to Wis. Stat. § 111.39(3).

The complainant filed a timely appeal of the dismissal. In his appeal, the complainant explained that he had moved within the last 15 months, and did not receive the certified letter. The complainant also stated that he has not had any contact with his legal representative for over two years and that Attorney Kuhn did not notify him that he received a certified letter. The complainant indicated that he would like the ERD to conduct a review of his complaint.

On December 28, 2020, the ERD received a copy of a letter from Attorney Kuhn to the ERD stating that he no longer represented the complainant. The letter in question was dated two years earlier, December 22, 2018.

On January 21, 2021, an administrative law judge from the ERD issued a decision affirming the dismissal of the complaint. The administrative law judge reasoned that the complainant had moved and failed to inform the ERD of his new address, causing him to fail to respond to the ERD's letter within 20 days, and that under the circumstances, dismissal was required by statute.

The complainant has filed a timely petition for commission review of the administrative law judge's decision, and the matter is now before the commission.

Memorandum Opinion

Wisconsin Statute § 111.39(3) provides 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 and if the correspondence is sent by certified mail to the last-known address of the person.

The statute is silent with respect to what happens in the event the complainant does not receive the correspondence from the department in time to submit a timely response. The commission has addressed this situation in prior decisions, most recently in *Xu v. Epic Systems Corp.*, ERD Case No. CR201301600 (LIRC March 26, 2015), in which the commission stated, as follows:

Although the statute indicates that the department “shall” dismiss a complaint where the complainant has failed to respond to certified correspondence from the department within 20 days, suggesting that dismissal is mandatory, the courts and commission have held that due process considerations may dictate otherwise where, through no fault of his or her own, the complainant never received the certified correspondence. *See, Laboy v. Mantissa Corp.*, ERD Case No. CR201000830 (LIRC March 21, 2012); *Bailey v. Target Stores*, ERD Case No. CR200703486 (LIRC Oct. 22, 2010); *McGee v. County of Milwaukee*, ERD Case No. CR200503166 (LIRC Aug. 18, 2006); *Nzeaka v. South Point Health Care*, ERD Case No. CR200500170 (LIRC Aug. 26, 2005); *Peterson v. K-Mart*, ERD Case No. CR9000431 (LIRC May 24, 1991). The intent of the statute is frustrated when the complainant does not receive the certified letter. *Wilson v. LIRC and New Horizon Center, Inc.*, Case No. 01CV006492 (Wis. Cir. Ct. Milwaukee Co., Jan. 11, 2002).

With respect to the specific facts in *Xu*, the commission stated:

In this case, the complainant did not receive the department's certified letter because it was sent to an address where he no longer resided. The complainant, who is a layperson and unrepresented by counsel, was informed when he filed his complaint that he needed to keep both the EEOC and ERD apprised of his current mailing address. However, while the complainant was told that his charge was cross-filed with both agencies, there is nothing in the ERD case file to indicate that the complainant was ever specifically advised that after the EEOC completed its investigation he would have an opportunity to request a separate investigation by the ERD. Consequently, it is not clear that, once the EEOC notified the complainant that it had closed its file in his case, the complainant would have had any reason to expect further contact from the ERD. This is particularly relevant given that the complainant received a letter from the ERD, after his complaint was already dismissed by the EEOC, containing the erroneous and misleading information that the EEOC would be processing his complaint. The ERD then made no attempt to contact the complainant further about his complaint for fourteen months, more than a year after it had been dismissed by the EEOC. The requirement to keep the ERD apprised of a complainant's current mailing address does not continue in perpetuity and, under the circumstances in this case, the commission does not believe the complainant could reasonably have understood that he need continue to do so, nor does it believe that the complainant's failure to respond to the certified letter within 20 days is a circumstance that should deprive him of an investigation into his complaint by the ERD.

... Upon consideration of the length of time that elapsed since the ERD's last communication with the complainant, along with the fact that the ERD had provided the complainant with inaccurate information regarding the processing of his case, the commission is satisfied that dismissal of his complaint on the basis of his failure to respond to the certified letter was inappropriate. The commission has, therefore, remanded the matter for an investigation into the merits of the complainant's complaint and/or for such other proceedings as may be warranted.

While, in the instant case, the complainant was not misinformed by the ERD about its intention to conduct its own investigation of the complaint, the other pertinent facts are essentially the same as those in *Xu*. The complainant was told to keep his

address updated with the ERD when he filed his complaint in 2016,¹ but then received no contact from the ERD thereafter. The first correspondence from the ERD came approximately four years after the complaint was filed, and two and a half years after the EEOC had closed its file. The complainant was never notified that the ERD would be conducting its own investigation into the matter and had no reason to expect further correspondence from the ERD with respect to his case. Given the circumstances, the complainant's failure to notify the ERD of his new mailing address--more than three years after the complaint was filed and after the EEOC had already closed its file--was understandable. The commission believes that to deny the complainant an investigation into his complaint because he failed to respond to correspondence that he never received, and had no reason to expect he would be receiving, would frustrate the purposes of the statute. Therefore, it has set aside the dismissal decision and remanded this matter to the ERD for further proceedings.

cc: Attorney Mary E. Nelson

¹ This instruction was provided at the bottom of the complaint form, above the space for the complainant's signature, where the following message appeared: "I want this charge filed with both the EEOC and the state or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures."