

State of Wisconsin



Labor and Industry Review Commission

Theresa Brookens
Complainant

Wendy's
Respondent

ERD Case No. CR202100920

Public Accommodation Decision

Dated and Mailed:

August 31, 2022

brookth_rsd.doc:164

The decision of the administrative law judge is **set aside** and the matter is **remanded** to the department for further proceedings consistent with this decision.

By the Commission:

/s/

Michael H. Gillick, Chairperson

/s/

Georgia E. Maxwell, Commissioner

/s/

Marilyn Townsend, Commissioner

Procedural History

On April 28, 2021 the complainant filed a complaint with the Equal Rights Division (hereinafter “Division”) of the Department of Workforce Development alleging that the respondent discriminated against her based upon her race, color, and sex, in violation of the Wisconsin Public Accommodations and Amusements Law. On August 25, 2021, an equal rights officer for the Division issued an initial determination finding probable cause to believe that discrimination occurred. Accordingly, the matter was certified to a hearing before an administrative law judge.

On February 1, 2022, the administrative law judge who was assigned to the case sent the parties a letter notifying them that a pre-hearing conference would be held on March 8, 2022. The letter was addressed to the complainant at her most recent address of record with the Division, a post office box. Shortly thereafter the complainant’s copy of the letter was returned to the Division by the United States Postal Service. The returned letter bore a stamp that stated, “Box Closed, Unable To Forward, Return to Sender.” On February 7, 2022, the administrative law judge mailed a certified letter to the complainant at the same post office box address. In his letter the administrative law judge explained that he had attempted to telephone the complainant without success, and that he had no email address for her and no mailing address other than the post office box. The letter stated that the prehearing conference was still scheduled but that, pursuant to Wis. Stat. § 111.39(3), if no response was received in 20 days the complaint would be dismissed.

The complainant failed to respond to the letter within 20 days and, on March 4, 2022, the administrative law judge issued a decision dismissing the complaint. The complainant has filed a timely petition for commission review of that decision.

Memorandum Opinion

The complainant’s complaint was filed under the Wisconsin Public Accommodations and Amusements Law (hereinafter “WPAAL”), Wis. Stat. § 106.52. However, the statute cited by the administrative law judge in support of his decision dismissing the complaint, Wis. Stat. § 111.39(3), applies to cases that are filed under the Wisconsin Fair Employment Act. The WPAAL contains no comparable provision. Instead, the authority to dismiss a complaint filed under the WPAAL for failure to respond to correspondence from the department is found in an administrative rule, which provides as follows:

Complainant’s duty to respond to correspondence from the department.

The department *may* dismiss the complaint if the complainant fails to respond to the department within 20 days from the date of mailing of any correspondence from the department concerning the complaint, provided that such correspondence was sent by certified mail, return

receipt requested, to the last known address of the complainant. (emphasis added).

Wis. Admin. Code § DWD 221.07.

Unlike § 111.39(3) of the Fair Employment Act, which requires dismissal of the complaint under these circumstances,¹ Wis. Admin. Code § DWD 221.07 makes dismissal discretionary. The word “may” when used in a statute is generally construed as being permissive, rather than mandatory. *See, State of Wisconsin v. Camara*, 28 Wis. 2d 365, 371, 137 N.W.2d 1 (1965).

In *Soto v. Menards, Inc.*, ERD Case No. CR201301496 (LIRC June 27, 2014), a case involving a similar situation, in which the administrative law judge erroneously relied upon Wis. Stat. § 111.39(3) to dismiss a complaint filed under the WPAAL, the commission stated:

In review of a discretionary matter, the issue for the commission is whether the department abused its discretion. Under this standard, the question is whether the department “examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.” *Loy v. Bunderson, supra*; *Reed v. Heiser Ford, Inc.*, ERD Case No. 200504107 (LIRC May 31, 2013). By applying the mandatory dismissal provision of Wis. Stat. § 111.39(3), the ALJ failed to apply the proper standard of law, and because of that, the commission is unable to determine whether the department properly exercised its permissive authority to dismiss. The matter is remanded to allow the department to reconsider its decision under the correct standard.

In this case, as in *Soto*, the administrative law judge dismissed the complaint without consideration of the facts surrounding the complainant’s failure to respond because he regarded dismissal as being mandatory. The commission therefore considers it necessary to remand this matter to the administrative law judge in order to exercise his discretion to determine whether dismissal of the complaint is an appropriate response to the complainant’s failure to respond to certified correspondence given the relevant facts and circumstances and to explain what standard was applied in reaching that conclusion. If, after consideration, the administrative law judge determines that dismissal is appropriate, a new appealable decision should be issued.

¹ “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.” Wis. Stat. § 111.39(3)(emphasis added).