

State of Wisconsin



Labor and Industry Review Commission

Leonard Buckner, Complainant

Fair Employment Decision¹

Capitol City Tree Experts, Inc.,
Respondent

Dated and Mailed:

ERD Case No. CR202000436
EEOC Case No. 26G202000518C

June 30, 2023

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The decision of the administrative law judge is **reversed**. Accordingly, this matter is **remanded** to the Division for a hearing on probable cause.

By the Commission:

/s/

Michael H. Gillick, Chairperson

/s/

Georgia E. Maxwell, Commissioner

/s/

Marilyn Townsend, 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

The complainant filed a complaint with the Equal Rights Division (hereinafter “Division”) of the Department of Workforce Development on February 12, 2020, alleging that the respondent discriminated against him based upon his race, color, and in retaliation for having opposed a practice of discrimination. On August 28, 2020, the Division issued an initial determination finding no probable cause. The complainant filed a timely hearing request. During a pre-hearing conference held on February 22, 2021, the parties decided they wanted an in-person hearing rather than a hearing via WebEx video. A hearing was scheduled for September 28, 2021. However, because the Division had temporarily halted in-person hearings due to COVID-19, and had not yet resumed them by September of 2021, the matter was put on hold. In May of 2022 the Division resumed live hearings. On May 4, 2022, the administrative law judge assigned to the matter sent the parties an email informing them of this fact and offering a variety of hearing dates in August, September and October. The parties were asked to respond with their availability for a live hearing. However, neither party responded and no hearing was scheduled for the late summer or fall of 2022.

On January 9, 2023, the administrative law judge sent the complainant a letter by certified mail to the complainant’s most recent address of record, which explained that the administrative law judge had emailed earlier about hearing availability, but the complainant had not responded. The administrative law judge indicated that the Division needed to know if the complainant wanted to pursue his claim. The letter stated, with emphasis in the original:

Pursuant to Sec. 111.39(3) Wis. Stats., this letter is being sent to notify you that you must contact me and tell me whether you intend to appear and proceed with this case. You must contact me and respond to this letter as described above **within 20 calendar days** of the date of this letter.

. . . If you do not contact me to respond to this letter within 20 calendar days of the date of this letter your case will be dismissed with prejudice for failure to respond, pursuant to Sec. 111.39(3) Wis. Stats. If you have any questions, please contact me at the Equal Rights Division. My direct telephone numbers are [two telephone numbers provided]. My email address is [email address provided].

The administrative law judge’s letter did not specify how the response was to be submitted, but, as set forth above, included telephone numbers for the administrative law judge, as well as the administrative law judge’s email address. The stationery on which the letter was written also included the Division’s address and fax number at the top.

On Monday, January 30, 2023, at 4:31 p.m., the administrative law judge received an email from the complainant confirming that he wanted to proceed with his case.

On February 21, 2023, the administrative law judge issued a decision finding that the complainant failed to timely respond to the Division's certified correspondence and dismissing the complaint on that basis. The complainant has filed a timely petition for commission review of the administrative law judge's decision.

Memorandum Opinion

Wisconsin Stat. § 111.39(3), commonly known as the "20-day letter" statute, provides:

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.

As stated above in the Procedural History, the complainant received a certified letter from the administrative law judge, which was mailed to him at his last-known address, in which he was advised, in relevant part:

. . . If you do not contact me to respond to this letter within 20 calendar days of the date of this letter your case will be dismissed with prejudice for failure to respond, pursuant to Sec. 111.39(3) Wis. Stats.

The letter was mailed on January 9, 2023. Because the 20th day from the date of mailing of the 20-day letter was January 29, 2023, which fell on a Sunday, the complainant had until Monday, January 30, 2023--21 days after the letter was mailed--in which to respond. *See*, Wis. Admin. Code § DWD 218.02(4).

The complainant submitted his response to the administrative law judge by email on January 30, 2023, the 21st day after the certified letter was sent, and it arrived in the administrative law judge's inbox at 4:31 p.m. State offices close at 4:30 p.m. *See*, Wis. Stat. § 230.35(4)(f). The administrative law judge concluded that, because the complainant's email was received after the Division's offices had closed for the day, it should be treated as having been received on the following business day. The administrative law judge based this decision on Wis. Admin. Code DWD § 218.25, which provides, as follows:

DWD 218.25 Filing of documents by facsimile transmission or electronic mail.

(1) FILING OF DOCUMENTS BY FACSIMILE TRANSMISSION.

(a) Except where otherwise directed by the division, documents may be filed by facsimile transmission. . . .

(b) The date of transmission recorded by the division's facsimile machine shall constitute the date of filing of a document under this section, except that documents filed by facsimile after the regular business hours of the division as established by s. 230.35 (4) (f), Stats., or on a day when the offices of the division are closed pursuant to s. 230.35 (4) (a), Stats., shall be considered filed on the next business day of the division.

(2) FILING OF DOCUMENTS BY ELECTRONIC MAIL. Documents may be filed by electronic mail only if expressly authorized by the equal rights officer or the administrative law judge assigned to the case.

However, while the administrative rule cited above specifies that documents that are filed by fax will be regarded as having been filed on the next business day if they are received after the close of state office hours, the only thing the rule has to say about filing documents by email is that one must have express authorization from an equal rights officer or administrative law judge in order to do so. The rule is silent on the question of what time a document that is submitted by email will be regarded as having been received and does not contain a requirement that an email must be submitted by the end of state office hours.

The letter from the administrative law judge to the complainant in this case notified him that he could reach the administrative law judge via email and provided an email address for the administrative law judge. Therefore, it is clear that the complainant was authorized to respond to the administrative law judge by email. However, there was nothing in the letter from the administrative law judge that would have put the complainant on notice that his response must be received by 4:30 p.m.

That state offices close at 4:30 p.m. is not a matter of common knowledge. Nor is it necessarily understood that, when given a deadline by which to submit an email response, the response is due at the close of office hours on the final day rather than at any time up until midnight of the day in question. Indeed, in his petition the complainant argues, "No reasonable citizen . . . would assume that business day end would be the strict deadline." Given the silence in the statute and rule, and considering the lack of any general understanding on this point, the commission believes that if the Division wishes to impose a requirement that responses submitted by email be received no later than 4:30 p.m. on the day they are due, it must clearly notify parties of this fact. As stated above, that was not done in this case.

In addition to the lack of information pertaining to the time by which the complainant's email response must be received, the commission notes that the statute is unclear with respect to whether the response to a 20-day letter must be

received by the Division by the 20th day or whether it is sufficient for a response to have been submitted by day 20.

Again, Wis. Stat. § 111.39(3) provides:

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 indicates that a party must *respond* to certified mail from the Division within 20 days, but does not specify that the response must be received within 20 days. While the Division's rules provide at Wis. Admin. Code § DWD 218.02(6) that "filing" means the physical receipt of a document--such that where the statute or rule provides that documents are to be filed within a specified number of days it is contemplated that the documents will actually be *received* within that time frame²--the rules contain no definition of the term "respond," and it cannot be presumed that Wis. Stat. § 111.39(3) contemplates actual physical receipt of a responsive document within 20 days.

Given the ambiguity in the meaning of the word "respond," as used in Wis. Stat. § 111.39(3), the commission takes the view that, if the Division wishes to interpret the statute as requiring actual receipt of the response by the 20th day, it must clearly advise parties of this fact. Again, that was not done in this case.

The commission notes that in her decision, the administrative law judge references a prior commission decision, *Reed v. Innovative Health & Fitness*, ERD Case No. CR200403483 (LIRC July 15, 2005), as standing for the proposition that responses to 20-day letters must be received by 4:30 p.m. on the 20th day. In *Reed*, the commission found that when a complainant attempted to hand deliver a response to a certified letter to the Division after 4:30 p.m. on the 30th day,³ he was too late. However, *Reed* is distinguishable from the instant case. In *Reed*, the complainant was on notice that his response must be received by the administrative law judge within 30 days of the date of the letter and chose to deliver the response in person

² See, for example, Wis. Admin. Code § DWD 218.08, which provides that a complainant may file a written request for a hearing within 30 days of a no probable cause initial determination and that the initial determination will be final "if no timely written request for a hearing is filed." See, also, Wis. Stat. § 111.39(3), which provides that "if no petition is filed within 21 days" the administrative law judge's decision shall be considered final. In each of these instances, it is clear that the appeal must be *physically received* by the date indicated, because, per Wis. Admin. Code § DWD 218.02(6), "filing" is defined in the rule as requiring physical receipt.

³ In *Reed*, the department's certified letter provided the complainant with 30 days in which to respond, rather than the 20 days contemplated by statute.

to the Division on the final date by which receipt was permitted. Because he arrived at the Division's office after the office had closed for the day, his response could not be delivered until the day after the deadline. Here, by contrast, the complainant's response was actually received by the administrative law judge on the 21st day (an extra day having been allowed because the 20th day fell on a Sunday), but was treated as having been received on the following business day, a day too late.

That said, given the harsh consequences for failing to respond in a timely manner to a 20-day letter--the complete dismissal of the complaint--the better practice would be for the Division to clearly notify all complainants who are asked to respond to certified correspondence from the Division within 20 days both of the manner in which responses may be submitted (U.S. mail, fax, email, and in-person delivery, as applicable) and of all relevant deadlines, including the date and time by which the response must be received.

Because in this case the complainant responded to the Division's certified letter within the time period provided by statute, and because he was not on notice of a requirement that the response must be received by 4:30 p.m., the commission concludes that the complainant complied with the requirements of the statute and that dismissal of his complaint was not warranted. The matter is therefore remanded to the Division so that the complainant may have an opportunity to proceed with a probable cause hearing.

NOTE: In his petition for commission review the complainant indicates that he wants a jury trial. However, hearings in equal rights cases before the Division are held by administrative law judges in accordance with the provisions of the Wisconsin Fair Employment Act and chapter 227 of the statutes. There is no right to a jury trial.

cc: Attorney Peter Albrecht