

State of Wisconsin



Labor and Industry Review Commission

**Yolanda Eason**, Complainant

**Fair Employment Decision**

**City of Milwaukee**, Respondent

**Dated and Mailed:**

ERD Case No. CR202102258  
EEOC Case No. 26G202200056C

June 18, 2024

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The complainant's petition for commission review is dismissed. Accordingly, this matter is returned to the Equal Rights Division for further proceedings.

By the Commission:

/s/

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Michael H. Gillick, Chairperson

/s/

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Georgia E. Maxwell, Commissioner

/s/

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Marilyn Townsend, Commissioner

### **Procedural History**

On October 20, 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 disability, in violation of the Wisconsin Fair Employment Act (hereinafter “Act”). On March 29, 2022, an equal rights officer for the Division issued a preliminary determination dismissing the complaint for lack of jurisdiction. The equal rights officer reasoned that the complainant had alleged a medical condition that was temporary in nature and not a permanent impairment and that, therefore, she did not have a disability and was not covered under the statute. The complainant filed an appeal of the preliminary determination and the matter was assigned to an administrative law judge.

On March 14, 2023, without having held a hearing, the administrative law judge issued a decision affirming the finding of no jurisdiction. The complainant filed a timely petition for commission review of the administrative law judge’s decision. The commission conducted a review and disagreed that the Division lacked jurisdiction. It therefore remanded the matter to the Division for an investigation and initial determination on the question of probable cause.

The Division conducted an investigation, as directed, and, on December 21, 2023, an equal rights officer for the Division issued two separate determinations: the first was a preliminary determination finding that some of the complainant’s allegations were untimely, and the second was an initial determination finding no probable cause to believe that the remaining, timely allegations established a violation of the Act. The complainant filed a timely appeal of both determinations.

Department records indicate that, on January 25, 2024, the matter was assigned to an administrative law judge for consideration of the appeal of the preliminary determination. However, the appeal of the no probable cause initial determination was not certified to hearing and no action was taken by the Division with respect to that matter. On April 2, 2024, the administrative law judge issued a “Decision and Order on Appeal of Preliminary Determination,” affirming the preliminary determination. The administrative law judge’s decision found that some of the complainant’s allegations were untimely and dismissed the complainant’s allegations of discrimination with respect to events occurring from August to October of 2020. The administrative law judge’s decision made no reference to the fact that a separate initial determination addressing the question of probable cause had been issued or that the complainant had also filed an appeal of that determination.

The administrative law judge’s decision was accompanied by a “Notice of Appeal Rights,” which indicated that the decision was a final one and that the complainant could petition for commission review of the decision within 21 days. The

complainant filed a timely petition for commission review of the administrative law judge's decision pursuant to those instructions.<sup>1</sup>

### Memorandum Opinion

The Department of Workforce Development's rules set out the procedure by which preliminary determinations may be appealed. Wis. Admin. Code DWD § 218.05(3) provides, in relevant part:

If a timely appeal [of the preliminary determination] is filed. . . . The matter shall be referred to the hearing section of the division for review by an administrative law judge. The administrative law judge shall issue a decision which shall either affirm, reverse, modify, or set aside the preliminary determination. . . . If the decision affirms the preliminary determination, it may be appealed to the labor and industry review commission *if it is a final decision and order as defined in s. DWD 218.21(1)*. (emphasis added).

Wis. Admin. Code DWD § 218.21(1), referenced above, provides:

(1) APPEALS LIMITED TO FINAL DECISIONS AND ORDERS. Any party may file a written petition for review of a final decision and order of the administrative law judge by the labor and industry review commission. *Only final decisions and orders of the administrative law judge are appealable. A final decision is one which disposes of the entire complaint and leaves no further proceedings on that complaint pending before the division.* (emphasis added).

The administrative law judge's "Decision and Order on Appeal of Preliminary Determination" issued in this matter was not a "final decision," as that term is defined in Wis. Admin. Code § DWD 218.21(1). While the decision disposed of some of the issues raised in the complaint--those allegations that were untimely--the allegations that were raised during the limitations period, including failure to accommodate a disability, discriminating in terms and conditions of employment based upon disability, and termination of employment because of disability, are still awaiting resolution by the Division.<sup>2</sup> Because the administrative law judge's

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<sup>1</sup> As discussed more fully in the NOTE at the end of this decision, the complainant's petition, although accepted as having been timely filed, was erroneously filed directly with the commission rather than with the Division.

<sup>2</sup> Once the complainant filed her timely appeal of the no probable cause initial determination issued by the equal rights officer, the matter should have been certified for hearing and the case assigned to an administrative law judge. *See*, Wis. Admin. Code § DWD 218.08(3). Department records contain no indication that, as of the date of this decision, the matter has been certified to hearing.

decision is not a final decision, leaving portions of the complaint unresolved, it is not appealable to the commission at this time.<sup>3</sup>

For the reasons set forth above, the commission is unable to accept the complainant's petition. The matter is returned to the Division so that it can process the complainant's appeal of the no probable cause determination. Once a final decision has been issued by the Division with respect to that portion of the complaint that was not dismissed as untimely, the complainant will have an opportunity to file a petition for review by the commission of the entire matter.

NOTE: Although the Notice of Appeal Rights specified that a petition for review must be filed with the Division at one of the addresses provided, per Wis. Admin. Code LIRC § 1.025(1s), the petition in this case was instead filed directly with the commission. Ordinarily such a filing would not be accepted by the commission, and the complainant would be notified that she must file her petition with the Division per the instructions contained in the Notice of Appeal Rights. That the complainant's petition was accepted in this instance, although not properly filed, was an administrative error which in no way relieves the parties of the obligation to follow the directions contained in the rules and explained in the appeal rights notice. Should either party wish to file a petition for review by the commission after the administrative law judge issues the final decision in this case, such petition must be filed in accordance with the commission's rules in order to be accepted.

cc: Attorney Rocky Coe  
Attorney Katherine Headley

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<sup>3</sup> The fact that the administrative law judge's decision was accompanied by a Notice of Appeal Rights which erroneously indicated that the decision could be appealed in 21 days does not affect the resolution of this matter. *Ford v. Briggs & Stratton, Corp.*, ERD Case No. CR201700522 (LIRC April 19, 2018), citing *Sigl v. Village of Black Creek*, ERD Case No. CR201102969 (LIRC Oct. 31, 2012).