

State of Wisconsin



Labor and Industry Review Commission

Shawn Ahn, Complainant

Trimble Dental, Respondent

ERD Case No. CR202300477

EEOC Case No. 26G202300538

Fair Employment Decision¹

Dated and Mailed:

November 21, 2024

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A petition for commission review must be received within 21 days after the administrative law judge's decision was mailed to the party's last known address. The petition in this matter was filed late and is therefore **dismissed**. The administrative law judge's decision remains in effect.

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>.

Memorandum Opinion

An administrative law judge for the Equal Rights Division (hereinafter “Division”) of the Department of Workforce Development issued a decision in this matter finding no probable cause to believe that the complainant was discriminated against as alleged in his complaint and denying a request by the respondent for attorney’s fees and costs based upon an allegation of frivolousness. A petition for review of the administrative law judge’s ruling regarding fees and costs was filed by the respondent.

The applicable statute provides that a party who is dissatisfied with the findings and order of the examiner may file a written petition with the department for review by the commission of the findings and order, that if no petition is filed within 21 days from the date that a copy of the findings and order of the examiner is mailed to the parties the findings and order shall be considered final, and that if the commission is satisfied that a petitioner has been prejudiced because of exceptional delay in the receipt of a copy of any findings and order it may extend the time another 21 days for filing the petition with the department. Wis. Stat. § 111.39(5).

Wisconsin Admin. Code § LIRC 1.02 provides, in relevant part, as follows:

All petitions for commission review shall be filed within 21 days from the date of mailing of the findings and decision or order . . .

Wisconsin Admin. Code § LIRC 1.025 provides, in relevant part, as follows:

(1s) A petition for commission review in an equal rights case shall be filed with the equal rights division by any of the following methods:

(a) *Milwaukee*. By mail or personal delivery to 8191 North Sixth Street, Milwaukee, WI 53203 or by facsimile transmission to (414) 227-4084.

(b) *Madison*. By mail to 201 East Washington Avenue, P.O. Box 8928, Madison, WI 53708; by personal delivery to 201 East Washington Avenue, Madison, WI 53703; or by facsimile transmission to (608) 327-6001.

. . .

(3)(a) A petition for review transmitted by facsimile is not deemed filed unless and until the petition is received and printed at the recipient facsimile machine of the commission or of the division of the department to which the petition is being transmitted. The party transmitting a petition by facsimile is solely responsible for ensuring

its timely receipt. The commission is not responsible for errors or failures in transmission.

(b) 1. Except as provided in subds. 2 and 3., a petition for review transmitted by facsimile transmission is considered filed on the date of transmission recorded and printed by the recipient facsimile machine.

2. Except as provided in subd. 3., a petition for review in an equal rights case transmitted by facsimile transmission after the regular business hours of the equal rights division is considered filed on the next business day.

3. If the commission's, the division of hearings and appeals', or department's records indicate receipt of the facsimile at a date later than the date of transmission recorded and printed by the recipient facsimile machine, then the later date shall control.

Wisconsin Stat. § 230.35(4)(f), provides, in relevant part, as follows:

Monday to Friday the offices of the agencies of state government shall open at 7:45 a.m. and close at 4:30 p.m. . . .

The administrative law judge's decision having been dated and mailed on June 17, 2024, the last day on which a timely petition for review could have been filed was July 8, 2024.

The Notice of Appeal Rights, which was enclosed with the administrative law judge's decision, explained how and when a petition could be filed. It specified that the petition should be mailed or faxed to the Division and provided the relevant addresses and fax numbers for the Milwaukee and Madison offices. The Notice of Appeal Rights further specified:

Petitions filed by fax ("facsimile transmission") shall be considered filed on the next business day if they are received after 4:30 pm or on a day when the offices are closed.

The respondent's petition for review was submitted by the respondent's attorney via fax at 2:44 p.m. on July 8, 2024. However, rather than submit the fax to one of the two Division fax numbers that appeared on the Notice of Appeal Rights, the respondent's attorney instead sent it to the commission's fax number. At approximately 3:15 p.m. on July 8 a member of the commission's staff contacted the respondent's attorney and notified him that he had sent the fax to the incorrect fax number and would need to resubmit it. The respondent's attorney thereafter faxed a copy of the petition to the Division at 4:58 p.m., after the Division's offices had

closed for the day. Therefore, pursuant to Wis. Admin. Code § LIRC 1.025(3)(b)2., the respondent's petition is considered to have been filed on the next business day, July 9, 2024. As such, it was untimely.

The respondent's attorney argues that the petition was filed timely and should be accepted. He explains that he originally faxed the petition to a number that "frequently appears as the LIRC's fax number." He further states that he was working on another deadline and therefore did not re-fax the appeal until after the 4:30 p.m. deadline. These arguments fail. While the number to which the respondent's attorney originally sent the petition was indeed the commission's fax number, the statutes provide that the petition must be filed "with the department," Wis. Stat. § 111.39(5)(a), and the rules specify that petitions shall be filed at either of two addresses for the Equal Rights Division. Wis. Admin. Code § LIRC 1.025(1s). The Notice of Appeal Rights accompanying the administrative law judge's decision indicated that the petition was to be sent to the Division at either of the two addresses or fax numbers for the Division and clearly set forth what those addresses and fax numbers were. Further, once the commission received the misdirected fax, it notified the respondent's attorney of his error in time for him to correct the mistake. However, the respondent's attorney did not do so until after the Division's offices had closed for the day. Therefore, as explained above, the petition was considered filed on the next business day and was late. The only circumstance allowing the commission to accept a late petition is where the petitioner establishes he or she was prejudiced by an exceptional delay in the receipt of a copy of the decision. That was not the case here.

The commission therefore finds that the petition for commission review was not timely and that the respondent was not prejudiced because of exceptional delay in the receipt of a copy of the decision, within the meaning of the applicable statutes. Consequently, the petition for review must be dismissed.

cc: Attorney Steven Weld