

State of Wisconsin



Labor and Industry Review Commission

Delores Martin
Complainant

HZ OPS Holding, Inc.
Respondent

ERD Case No. CR202101631
EEOC Case No. 26G2021007755C

Fair Employment Decision

Dated and Mailed:

April 22, 2025
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The decision of the administrative law judge is **set aside**, and the matter is remanded to the Equal Rights Division for further proceedings in accordance with this decision.

By the Commission:

/s/

Michael H. Gillick, Chairperson

/s/

Georgia E. Maxwell, Commissioner

/s/

Marilyn Townsend, Commissioner

Memorandum Opinion

On July 27, 2021, the complainant filed a complaint of discrimination with the Equal Rights Division (hereinafter “Division”) of the Department of Workforce Development, alleging that she was subjected to sexual harassment and was discharged in retaliation for complaining of sexual harassment, in violation of the Wisconsin Fair Employment Act (hereinafter “WFEA”). The respondent named in the complaint was Popeye’s Louisiana Kitchen, with a street address on National Avenue in Milwaukee, Wisconsin. The respondent did not submit any response to the complaint and, on September 10, 2021, an equal rights officer for the Division sent a letter to the respondent by certified mail requesting that it do so. The letter was addressed to the Legal Department of Popeye’s Louisiana Kitchen at the address of the respondent’s business, 1567 W. National Avenue, in Milwaukee. On September 17, 2021, an agent of the respondent signed for the letter. However, no response was filed.

On October 7, 2021, the Division’s equal rights officer, having heard nothing from the respondent, issued an initial determination finding probable cause to believe that discrimination occurred and certifying the matter to a hearing on the merits before an administrative law judge. The initial determination was, again, mailed to Popeye’s Legal Department at the National Avenue address. On October 11, 2021, the complainant’s attorney sent a notice of intent to take discovery on the respondent. The notice was sent to the Human Resources/Legal Department of Popeye’s Louisiana Kitchen, at the National Avenue address. Discovery requests were then sent to the same address, but the respondent did not respond. Other documents were sent to the respondent at the National Avenue address, including a motion to compel discovery, a letter from the administrative law judge denying the motion to compel, a prehearing order, and a notice of an August 22, 2022 hearing, none of which received any response from the respondent.

On August 22, 2022, at which time the hearing was originally scheduled to be held, the complainant’s attorney notified the Division that she had found an additional address for the respondent. Based on that information, the Division postponed the hearing and served a copy of the complaint on the respondent at the following address: HZ OPS Holding UNC [sic],¹ Popeye’s, 4415 Highway 6, Sugar Land, TX 77478.

Thereafter, all correspondence, including a new hearing notice for a January 20, 2023 hearing, was copied to the respondent at the HZ OPS Holding Inc. address in Texas, in addition to being sent to the National Avenue address in Milwaukee. None was returned as undeliverable. However, the respondent did not appear at the hearing, and a hearing was held at which only the complainant presented evidence.

¹ “UNC” was a typographical error which was eventually corrected to “Inc.”

On March 21, 2023, the administrative law judge issued a non-final decision finding discrimination, along with notice of a briefing schedule on the subject of attorney's fees. The non-final decision named the respondent as "HZ OPS Holding Inc. d/b/a Popeyes." Both documents were sent to the respondent both at the Sugar Land, Texas address and the National Avenue address in Milwaukee, and neither was returned as undeliverable. On April 4, 2023, the complainant's attorney submitted her fee petition to the administrative law judge, with a copy to the respondent's attorney. The copy of the fee petition in the Division's file does not indicate what address was used for the respondent. However, in its petition for review, the respondent's attorney indicates that the attorney's fee petition was mailed to the correct address—without ever explaining what that address is—and contends that this was the first document related to the case that it has received.

On April 6, 2023, the administrative law judge issued a final decision finding discrimination and awarding back pay and attorney's fees. The decision was mailed to the respondent at both the Texas and Milwaukee addresses and was received by the respondent, which filed a timely petition for commission review.

In its petition, the respondent makes a number of arguments in support of reversal. First, it contends that the administrative law judge's decision improperly found that Popeye's was the employer. The respondent points out that, pursuant to Wis. Stat. § 111.3205, a franchisor is not considered to be an employer of a franchisee. The commission does not find this argument persuasive. The respondent, although a franchisee, was doing business under the name of the franchisor: Popeye's. Further, while the administrative law judge's findings of fact refer to the respondent by the name Popeye's, the caption of the administrative law judge's decision indicates that the respondent is "HZ Ops Holding, Inc. d/b/a Popeye's." Thus, the decision clearly names the proper employing unit.

Next, the respondent argues that the complainant never amended her complaint to name the proper respondent and that it was never served with a copy of the complaint. This argument also fails. As indicated above, the complainant initially named Popeye's, which was both the name of the franchisor and the name under which the franchisee was operating its business, and provided the business address of the franchisee's Milwaukee restaurant. The complainant later obtained the address of the holding company under which the franchisee operates, and a new copy of the complaint was mailed to the respondent at that address. Consequently, it appears that the proper respondent was named and was served with a copy of the complaint.

Finally, the respondent argues that the administrative law judge's decision amounts to a default judgment against Popeye's, and that Wis. Stat. § 806.02(3) requires proof of service of a summons upon a defendant who fails to appear before entering a default judgment. This argument, too, is unavailing. A default judgment

is not available under the Wisconsin Fair Employment Act, *see, Kemp v. Heinen*, ERD Case No. 199804076 (LIRC Oct. 27, 2000), nor was one issued in this case. Rather, the administrative law judge issued a decision on the merits of the case based upon the evidence the complainant submitted at the hearing, which went un rebutted by any evidence from the respondent.

The real question here is not whether the complainant named the wrong entity or failed to amend her complaint to do so, nor whether she won an improper default judgment. Rather, the question is whether the respondent, which missed the hearing and contended that it never received the hearing notice, should be given a further opportunity to establish good cause for its failure to appear.

The Division's rules contain a provision addressing this situation:

DWD 218.18(4) FAILURE TO APPEAR AT HEARING. If the complainant fails to appear at the hearing, either in person or by a representative authorized to proceed on behalf of the complainant, the administrative law judge shall dismiss the complaint. If the respondent fails to appear at the hearing, the hearing shall proceed as scheduled. If, within 10 days after the date of hearing, any party who failed to appear shows good cause in writing for the failure to appear, the administrative law judge may reopen the hearing.

The hearing notice, like the copy of the complaint and the administrative law judge's decision, was mailed to the respondent both at the HZ Ops Holding, Inc. address in Texas and at the Milwaukee address of the restaurant where the respondent was doing business as Popeye's. Neither letter was returned to the Division as undeliverable. There is a rebuttable presumption that mail which is properly addressed is delivered and received. *State ex rel. Flores*, 183 Wis. 2d 587, 612, 516 N.W.2d 362 (1994); *Mullen v. Braatz*, 179 Wis. 2d 749, 763, 508 N.W.2d 446 (Ct. App. 1993). However, that said, the commission has held that a plausible assertion of non-receipt of a notice of hearing cannot be rejected or resolved, consistent with due process, without providing an opportunity for hearing. *Wills v. TA Operating LLC*, ERD Case No. CR200903932 (LIRC, March 31, 2011). The commission's test of plausibility is not rigorous; an express denial of receipt, so long as it is not incredible on its face, may be sufficient. *Howard v. Lena's Food Market*, ERD Case No. 200801181 (LIRC Jan. 14, 2014). Consequently, while there are circumstances here that suggest the respondent should have received notice of the hearing—and, indeed, the commission is skeptical of the claim that no documents related to this case were received prior to the complainant's request for attorney's fees—the commission cannot reject the respondent's assertion that it did not receive the notice without allowing an opportunity for hearing on the question.

At the remand hearing the respondent bears the burden of proving that it did not receive notice of the hearing. If, after considering the evidence, the administrative law judge finds that it establishes by a preponderance of the evidence that the respondent did not receive notice of the hearing, the administrative law judge shall conduct further hearing addressing the issues originally noticed for hearing in this matter and shall issue a decision on those issues. If, on the other hand, after considering the evidence, the administrative law judge finds that it does not establish by a preponderance of the evidence that the respondent did not receive notice of the hearing, the administrative law judge shall reissue the April 6, 2023 decision on the merits of the case.

cc: Atty Shannon D. McDonald
Attorney Donald G. Slezak