

State of Wisconsin



Labor and Industry Review Commission

Stephen P. Kotecki, Complainant

Fair Employment Decision<sup>1</sup>

Costco Wholesale, Respondent

ERD Case No. CR201902884

Dated and Mailed:

May 9, 2025

Kotecst\_rpr.doc:164

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

<sup>1</sup> **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 that complainant failed to establish the respondent discriminated against him based on his sex. The complainant filed a petition for commission review of that decision.

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:

(1) A petition for review filed by mail or personal delivery is deemed filed only when it is actually received by the office to which the petition is mailed or delivered, except that petitions for review in unemployment insurance cases and worker classification compliance cases which are filed by mail or personal delivery are deemed filed when received or postmarked as provided for in s. LIRC 1.031.

The administrative law judge’s decision having been dated and mailed on February 14, 2024, the last day on which a timely petition for review could have been filed was March 11, 2024. The complainant’s petition for review was filed on March 20, 2024.

In his petition the complainant states that on March 15, 2024 he received a letter from the Division dated March 11, 2024<sup>2</sup> indicating that his case was closed because he did not file a petition for review. The complainant states that he is “totally confused” by this because there was no decision accompanying the Division’s letter and he did not receive one under separate mailing.

---

<sup>2</sup> In his petition the complainant refers to these dates as “*May 15*” and “*May 11*.” However, the letter was sent on March 11 and the complainant’s reply came in March.

The only statutory authority allowing the commission to accept a late petition is when a party establishes that he or she has been prejudiced by “exceptional delay” in the receipt of the decision. The commission has held that, for purposes of the statute, “exceptional delay” refers to a delay in the receipt of a copy of the decision that is caused by the Division. *Lacy v. Briggs & Stratton*, ERD Case No. 8950726 (LIRC July 9, 1991). The decision in this case was mailed to the complainant at his last-known address, and there is no reason to believe that there was any delay in the Division’s mailing of the decision. Consequently, it does not appear that there was any error by the Division that could have caused an exceptional delay in the complainant’s receipt of the decision.

Assuming, however, that “exceptional delay” could also be extended to a delay in the receipt of the decision caused by something other than an error on the part of the Division, the commission can see no compelling reason to believe that such delay occurred in this case. There is a rebuttable presumption that mail which is properly addressed is delivered and received. *Vang v. Donaldson Co.*, ERD Case No. 200004048 (LIRC Aug. 29, 2002); *Kemp v. Heinen*, ERD Case No. 199804076 (LIRC Feb. 19, 2002), citing *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). The administrative law judge’s decision was properly addressed and was not returned to the department as undeliverable. While the complainant has asserted that he did not receive the decision, he has not provided any information with respect to the circumstances surrounding the receipt of his mail that would allow the commission to conclude that, if indeed no copy of the mailed decision was received, this was due to the fault of the U.S. Postal Service or for other reasons over which the complainant had no control. See, *Chavez v. Blue Harbor Resort*, ERD Case No. CR201000076 (LIRC Jan. 4, 2012) and *Hemphill v. Bryant & Stratton College*, ERD Case No. CR202002212 (LIRC July 29, 2022).

The commission therefore finds that the petition for commission review was not timely and that the complainant 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.

NOTE: Pursuant to Wis. Stat. § 111.39(5)(c), the commission may reopen its decision within 28 days based upon mistake or newly discovered evidence. Thus, if within 28 days of the date of this decision the commission receives from the complainant some type of clear, specific and plausible explanation concerning the lateness of his petition for review--including but not limited to information as to how and whether the complainant was monitoring his mail during the time period when the decision would have arrived and information regarding his usual practice with respect to the

receipt and retrieval of his mail--it could set aside the dismissal and reconsider the matter.

cc: Uma Chandrasekaran and Kyla J. Miller, attorneys for the respondent