

**EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
210 MARTIN LUTHER KING, JR. BOULEVARD
MADISON, WISCONSIN**

<p>Jeffrey Moore 3307 A. North 11 Street Milwaukee, WI 53206</p> <p style="text-align: center;">Complainant</p> <p style="text-align: center;">vs.</p> <p>Leader Nursing and Rehabilitation Ctr. 801 Braxton Place Madison, WI 53715</p> <p style="text-align: center;">Respondent</p>	<p>HEARING EXAMINER'S DECISION AND ORDER ON RESPONDENT'S MOTION TO DISMISS</p> <p>Case No. 21810</p>
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BACKGROUND

On November 6, 1992, the Complainant, Jeffrey Moore, filed a complaint of discrimination with the Madison Equal Opportunities Commission (MEOC or Commission) against the Respondent, Leader Nursing and Rehabilitation Center. The complaint charged that Moore had been discriminated against on the basis of his race in the terms and conditions of his employment and had been terminated from employment as a result of his complaining about discrimination. The complaint was assigned to an Investigator who after investigation prepared and issued an Initial Determination on April 5, 1993. The Initial Determination concluded that there is probable cause to believe that the Respondent had discriminated against the Complainant on the basis of his race in the terms and conditions of his employment and that there is no probable cause to believe that the Complainant was discriminated against on the basis of his race in connection with his termination. A finding of no probable cause to believe that discrimination has occurred may be appealed by a complainant within ten (10) days of the receipt of the Initial Determination.

The Initial Determination was mailed to the parties on April 6, 1993. On May 3, 1993, the Initial Determination that was sent to the Complainant by certified mail was returned to the Commission with the notation "unclaimed".

On May 13, 1993, the Acting Executive Director of the Commission administratively dismissed the complaint as a result of the Complainant's failure to accept the Initial Determination. A complaint that is administratively dismissed is dismissed without prejudice and with a right to appeal the dismissal within twenty days of the issuance of the dismissal.

The Complainant filed an appeal of the administrative dismissal on May 26, 1993. Because the dismissal occurred within the three hundred day limit for filing the complaint, the Commission staff determined that it would be most efficient to simply allow the Complainant to refile his original complaint rather than to process the appeal of the administrative dismissal. To this effect, on June 3, 1993, the Complainant was sent a new copy of the original complaint with instructions to sign the complaint form and to have his signature notarized. A letter explaining this decision was sent to both parties on June 16, 1993.

The file contains a notarized complaint signed by the Complainant on June 14, 1993. The file also contains an unnotarized complaint signed by the Complainant and received by the Commission on July 26, 1993. Further, the file contains a Rapid Note to the Complainant dated July 27, 1993 indicating that the Complainant needed to have his signature notarized. This Rapid Note does not appear to have ever been mailed.

Pursuant to the letter of explanation sent to the parties on June 16, 1993, the Initial Determination was issued again. On June 23, 1993, the Complainant apparently came to the Commission offices and signed for the Initial Determination. On June 29, 1993 and July 1, 1993, the Complainant filed appeals of the Initial Determination.

On July 7, 1993, the Hearing Examiner issued a Notice of Review giving the parties the opportunity to supplement the record and to submit arguments in support of their respective positions. Neither party submitted any additional material or objected to the process leading up to that stage. On November 18, 1993, the Hearing Examiner issued a Decision and Order on the Complainant's appeal determining that the finding of no probable cause on the issue of termination should be reversed and a finding of probable cause should be substituted in its place.

Pursuant to the Hearing Examiner's Decision and Order the complaint was remanded to conciliation. Efforts to conciliate the complaint failed and the complaint was certified to the Hearing Examiner for the holding of a public hearing. A Pre-hearing Conference was held on February 17, 1994. At that conference, a date for the hearing of the complaint was set along with several interim dates. One of these dates required that any dispositive motions going to the issue of the Commission's jurisdiction be filed on or before March 11, 1994. The Respondent filed a Motion to Dismiss the portion of the complaint relating to the termination of the Complainant's employment asserting that the Commission was without jurisdiction because the Complainant had not timely appealed the Initial Determination issued on April 5, 1993. The Complainant opposed the Respondent's motion arguing that the Respondent had waived this objection.

DECISION

While the record of this complaint raises a number of concerns for the Hearing Examiner, the issues presented by this motion are relatively straightforward. The Respondent contends that the Commission is deprived of jurisdiction over that portion of the complaint relating to the Complainant's termination. The basis for this position is that the Complainant failed to timely appeal the finding of no probable cause to believe that discrimination occurred with respect to the Complainant's termination and that therefore all that followed is barred. The Complainant, in response, takes the position that even if the Complainant failed to properly appeal the finding of no probable cause, the Respondent has waived the objection by proceeding with the complaint and not objecting at the time of the appeal. The issue can be settled without resorting to the arguments of the parties.

Controlling in this matter is Rule 7.5 of the Commission. That rule establishes the process by which a complainant may appeal a finding of no probable cause. The complainant must file a written appeal at the offices of the Commission no later than ten days after his or her receipt of the Initial Determination containing the finding. The record in this matter is clear. The Initial Determination was prepared and signed on April 5, 1993 and was mailed to the parties, certified to the Complainant, on April 6, 1993. The Initial Determination sent to the Complainant was returned to the Commission on May 3, 1993, marked "unclaimed". The Initial Determination mailed on April 6, 1993 was never received by the Complainant. There is evidence in the record that indicates that the Complainant or a

member of his family may have received notice of the attempt to deliver a piece of certified mail, but receipt of that notice does not constitute receipt of the Initial Determination. In other words, the Complainant did not have an opportunity to appeal the Initial Determination mailed on April 6, 1993 because he did not know of its existence.

In support of its position, the Respondent cites the case of Adams v. Consolidated Paper Company, ERD No. 8301429 (3/12/84). This case holds that any appeal beyond the time limit set for the filing of an appeal nullifies the appeal. The Hearing Examiner agrees with the substance of the decision but finds that it is inapplicable to the present matter. In Adams, the procedure used by the Equal Rights Division (ERD) is shown to be different from that used by the Commission. Once a finding of no probable cause is issued by ERD, it must be appealed within thirty days of the date of the Initial Determination. As indicated above, the time period for appealing a Commission finding of no probable cause is triggered by the receipt of that Initial Determination by the complainant. In the ERD process, it does not matter whether the complainant receives the Initial Determination or not. In the Commission process, such receipt is crucial. The Adams case is simply not controlling in this matter.

The Respondent argues that the Complainant's failure to keep the Commission informed of his whereabouts or address, and the fact that the Complainant or a member of his family may have received notice of the attempt to deliver a certified letter represent a constructive receipt of the Initial Determination sufficient to trigger the period for appeal of the Initial Determination. The Hearing Examiner rejects this argument. Rule 7.5 is unequivocal in its requirement that the period of appeal begins with the receipt of the Initial Determination by the complainant. There is nothing in the language of Rule 7.5 that gives any indication that the Commission wished the appeal period to be triggered by a constructive receipt. The Commission is well aware that many parties that come before it are unrepresented and may be unsophisticated about the strict requirements of the law, in general, or ordinance, specifically. To permit the extinguishment of a claim without giving the complainant actual notice of that potential action is contrary to the broad remedial purposes of the ordinance.

The possibility of abuse by unresponsive complainants is dealt with in other areas of the Commission's rules. Rule 6.15 and 6.22 give the Commission authority to dismiss complaints where a complainant is not responsive or fails in his or her duty to keep the Commission informed of his or her whereabouts. In fact, when the Initial Determination that was mailed on April 6, 1993 came back to the Commission "unclaimed" on May 3, 1993, the Commission administratively dismissed the complaint on May 16, 1993. Such dismissals are specifically without prejudice to allow the complainant the opportunity to appeal and to explain his or her conduct. Because the Commission recognizes the possibility that a recalcitrant complainant may simply refuse to accept such a dismissal or may have moved from the area and lost interest in his or her complaint, the appeal period of twenty days runs from the date of the dismissal not from the date of receipt.

In this case, the Complainant timely appealed the administrative dismissal of his complaint. Since the dismissal was without prejudice, the Commission staff determined that the Complainant could either proceed with his appeal or file a new complaint in effect reactivating the original complaint. The Complainant filed a new complaint restating the allegations of the original complaint on June 14, 1993. Apparently this was filed after another complaint form had been sent to him on June 3, 1993. It appears that the Complainant sent this form back to the Commission on July 26, 1993 but failed to have his signature notarized. This failure is irrelevant because of the complaint dated June 14, 1993, though on July 27, 1993 someone at the Commission prepared a letter seeking to have the Complainant notarize his signature.

Subsequent to the filing of the reinstated complaint the Initial Determination from April was reissued and sent to the parties. The Complainant came to the Commission on June 23, 1993 and personally signed for his copy of the Initial Determination. It was on this date that the appeal period set forth in Rule 7.5 and in the cover letter to the Initial Determination began to run. The record contains appeals filed by the Complainant on June 29, 1993 and July 1, 1993. Either of these appeals were sufficient to commence the review of the finding of no probable cause conducted by the Hearing Examiner. That review resulted in the reversing of the finding of no probable cause to believe that discrimination occurred with respect to the Complainant's termination.

The issue of possible discrimination on the basis of race in the termination of the Complainant's employment is properly before the Hearing Examiner. The Respondent's Motion to Dismiss this issue is denied.

ORDER

It is ordered that the Respondent's Motion is denied and that the complaint in this matter will proceed to hearing as set forth in the Notice of Hearing issued on February 23, 1994.

Signed and dated this 6th day of May, 1994.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner