

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

Carnel Adams 437 West Main Street Madison, WI 53703  <p style="text-align: center;">Complainant</p> <p style="text-align: center;">vs.</p> Genna's Lounge 105 West Main Street Madison, WI 53703  <p style="text-align: center;">Respondent</p>	<p>DECISION AND ORDER</p> <p>Case No. 3327</p>
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**BACKGROUND**

On July 26, 1993, the Complainant Carnel Adams filed a complaint of discrimination against the Respondent, Genna's Lounge, alleging that he was discriminated against on the basis of his race when he was refused service at a public place of accommodation or amusement. The complaint was investigated and an initial determination concluding that there was probable cause to believe that the Complainant was discriminated against on the basis of his race was issued on November 8, 1993. Attempts to conciliate the complaint failed and the complaint was transferred to the Hearing Examiner for the conduct of a public hearing.

A Pre-hearing Conference was held on December 15, 1993. As a result of that Pre-hearing Conference, a Notice of Hearing and Scheduling Order was issued on December 17, 1993. The Scheduling Order, pursuant to MEOC Rule 15.33 permitted either party to conduct discovery until March 9, 1994. That date was extended to March 21, 1994 as the result of an order issued March 8, 1994. This extension was granted because of the Complainant's failure to appear for a deposition noticed by the Respondent.

On March 9, 1994 the Respondent filed a Motion for Contempt, Relief From Scheduling Order and Remedial Sanctions with the Commission. This motion was filed because the Complainant failed to appear at a deposition noticed by the Respondent and failed to appear at a second deposition noticed by the Respondent. In preparation for the second noticed deposition, the Respondent requested a subpoena from the Commission that was provided to the Respondent and the Respondent mailed the subpoena by certified mail to the Complainant. Service of a subpoena in this matter is not permitted by state statute. The Hearing Examiner construed the Respondent's motion to be a motion seeking an order to compel discovery pursuant to the requirements of MEOC Rule 15.35. A hearing was held on that motion on March 18, 1994 at 3:30 p.m. in Room GR120 of the Madison Municipal Building, 215 Martin Luther King, Jr. Blvd. The Complainant failed to appear at that hearing. The notice of that hearing, which was sent by certified mail, was not received by the Complainant until March 21, 1994. As a result of the March 18, 1994 hearing, the Hearing Examiner issued a Scheduling Order and Order to Compel Discovery on March 23, 1994. That order required the Complainant to make himself available for the taking of his deposition on or before April 8, 1994. The Order indicates that failure to comply with the order may lead to the dismissal of the complaint.

On April 13, 1994 the Respondent filed a Motion to Dismiss and for Remedial Sanctions. This motion, in addition to seeking the dismissal of the complaint, asks for an award of costs and attorney fees related to the Complainant's failure to comply with discovery and orders of the Hearing Examiner.

**DECISION**

MEOC Rule 15.35 sets forth the procedures for seeking sanctions for a party's failure to submit to discovery or to comply with an order of the Commission. Orders of the Hearing Examiner are orders of the Commission for this purpose. Where a party refuses to make discovery or to obey an order, the Hearing Examiner is authorized

to order that person to submit to discovery or to comply with the order. Such an order was issued by the Hearing Examiner on March 23, 1994. Where the party continues to refuse to make discovery or to comply with an order after the order of the Hearing Examiner, the Hearing Examiner may make additional remedial orders. This includes dismissal of the complaint, pursuant to MEOC Rule 15.3515.

In this case the Complainant has failed to comply with the order of the Hearing Examiner dated March 23, 1994. However, the Complainant did not receive that order as evidenced by the return of the certified mail letter containing the order on April 12, 1994. A Complainant's failure to accept certified mail from the Commission is a separate ground for the dismissal of a complaint. Under the circumstances of this case, dismissal of the complaint is appropriate and warranted given the Complainant's failure to comply with the orders of the Hearing Examiner and his failure or refusal to accept certified mail from the Commission.

The Respondent seeks an Order awarding it costs and attorney's fees in the amount of \$567.50. These costs and attorney's fees relate to the Complainant's failure to appear for two noticed depositions, failure to appear at the March 18, 1994 hearing and failure to comply with the March 23, 1994 order. It is not appropriate that there be an award of costs or fees for any of these items.

With respect to the Complainant's failure to comply with the March 18, 1994 order the Respondent seeks \$72.50. The Complainant never received this order and therefore had no notice of its contents or his need to comply with it. To award the Respondent its costs where there was no notice either actual or constructive would be unjust. Similarly, with respect to the Complainant's failure to appear at the March 18, 1994 hearing, the Complainant was without timely notice of the hearing. The record indicates that the Complainant did not receive or sign for the certified mail notifying him of the hearing until 3 days after the date of the hearing. It is inappropriate to sanction a party for failing to appear at a hearing at a time when the party did not know of the scheduling of that hearing. The Respondent seeks \$145.00 for the Complainant's failure to appear at the March 18, 1994 hearing. Finally, the Respondent seeks \$350.00 for costs related to the Complainant's failure to appear at depositions noticed for March 2, 1994 and March 8, 1994. As noted above the Respondent's attempt to serve a subpoena requiring the Complainant's appearance at the March 8, 1994 deposition is inadequate. Subpoenas must be served either personally or affixed to the Complainant's residence where it will be readily seen. Mailing, even by certified mail, is insufficient to constitute service of a subpoena. Additionally, since the Complainant had failed to appear at the initial deposition, the Respondent should not have expended additional sums on a court reporter until it knew that the Complainant had received its notice and subpoena.

As a general matter, the Commission is unwilling to award Respondent's costs and fees for fear of chilling a Complainant's exercise of the right to file a complaint pursuant to the ordinance. The ordinance establishes essentially a single enforcing mechanism for Complainant and if they were to be easily subjected to awards of costs and fees for their failures to proceed with an action, the number of complaints brought under the Ordinance could be substantially curtailed. The City Council, by adopting the ordinance, has expressed its policy that Complainants be encouraged in all instances to bring and pursue complaints where they believe they have been the victim of discrimination. The Commission should not and will not act in a manner that would unnecessarily dissuade Complainants from filing complaints of discrimination.

An award of costs and fees may be appropriate where there is clear evidence that a party has abused or willfully neglected his or her responsibilities under the Ordinance. This is not such a case. There is no evidence that the Complainant received either notice of deposition. The Complainant did not receive notice of the March 18, 1994 hearing until after the date of that hearing. The Complainant never received the March 23, 1994 order compelling his compliance with the discovery procedures. At best, it can be said that the Complainant has exhibited a degree of irresponsibility and unresponsiveness that requires dismissal of his complaint. On this record it cannot be said that the Complainant has willfully abused the complaint process.

#### **ORDER**

The complaint of discrimination in the above-captioned matter is hereby dismissed. The Respondent's motion for remedial sanctions is denied.

Signed and dated this 19th day of April, 1994.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III  
Hearing Examiner