

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

<p>Lolita Velazquez-Aguilu 206 E Winnequah Rd Madison WI 53716</p> <p style="text-align: center;">Complainant</p> <p style="text-align: center;">vs.</p> <p>Abercrombie &amp; Fitch 46 West Towne Mall Madison WI 53719</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. 03398</p>
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**BACKGROUND**

On October 30, 1997, the Complainant, Lolita Velazquez-Aguilu, filed a complaint of discrimination with the Madison Equal Opportunities Commission (Commission). The complaint alleged that the Respondent, Abercrombie & Fitch, discriminated against her on the basis of her race and national origin/ancestry in a public place of accommodation or amusement when it allegedly did not accept a return of merchandise purchased at the Respondent's store in Madison, Wisconsin on the same terms as a person not of her race or national origin/ancestry.

After filing of the complaint, the Commission investigated the allegations and issued an Initial Determination concluding that there was probable cause to believe that the Respondent had discriminated against the Complainant as alleged in the complaint. Efforts to conciliate the complaint proved unsuccessful. The complaint was transferred to the Hearing Examiner for a hearing on the merits of the complaint.

On April 8, 1998, the Hearing Examiner issued a Notice of Pre-Hearing Conference. The conference was to be held at 1:30 p.m. on April 23, 1998, in Room LL-120 of the Madison Municipal Building, 215 Martin Luther King, Jr. Blvd. in Madison, Wisconsin. The notices were mailed by certified mail, return receipt requested, to the parties. The Complainant's notice was mailed to the address she had given the Commission as her mailing address. This appears to have been her home address. The Complainant is a student attending classes at the University of Wisconsin, Madison. The record reflects that even though the Complainant gave her home address as her mailing address, she actually lived elsewhere. The Complainant's notice was signed for on April 17, 1998, by R. J. Aguilu.

At the time scheduled for the Pre-Hearing Conference, the Respondent appeared by its attorney, Ritchie Sturgeon, of the law firm of Whyte, Hirschboeck, Dudek, S.C. The Complainant did not appear at the scheduled time or within 30 minutes of the scheduled time. The Complainant did not call the Commission prior to the scheduled time of the conference to request postponement or alternative arrangements.

After waiting for 30 minutes, the Hearing Examiner heard the Respondent's Motion to Dismiss for the Complainant's failure to appear. The Hearing Examiner took the motion under advisement and issued an Order to Show Cause why the complaint should not be dismissed on April 28, 1998.

The Complainant timely responded to the Hearing Examiner's order, apologizing for not appearing. She admitted that the notice had been sent to the correct address and had been received in time for her to have attended the conference. By way of explanation, the Complainant stated that her mother had inexplicably failed to open the notice or notify the Complainant of the time and date of the conference. She requested that her complaint not be dismissed and stated that she would not repeat the non-appearance.

### DECISION

The Commission has established a "bright line" test with respect to a failure to appear at a Pre-Hearing Conference or hearing. If the Commission mails a notice to a party to the address provided by the party and the notice is received at that address in a timely manner, failures to appear will not be excused absent some additional compelling reason. Hohlstein v. Shopko, MEOC Case No. 22381 (Ex. Dec. 11/26/96), Murphy v. Woodman's Food Market and Rodney Kellahue, MEOC Case No. 21688 (Comm'n. Dec. 10/26/93), Francis v. Quarra Stone Company, MEOC Case No. 21764 (Comm'n. Dec. 11/4/93). Failure of a person signing for a notice to actually pass it along to the party is not a sufficient excuse. Francis, supra. Failure of a member of one's family to forward a notice to a party living at another address is similarly insufficient. Murphy.

Failure of a party to actually receive a notice mailed to the party's given address is sufficient if there is no evidence that the notice was signed for by anyone or was not timely received. Williams v. Millans Treasure Chest, MEOC Case No. 3374 (Comm'n. Dec. 8/29/97), Williams v. Footlocker, MEOC Case No. 3375 (Comm'n. Dec. 8/29/97), Moore v. Leader Nursing and Rehabilitation Ctr., MEOC Case No. 21810 (Comm'n. Dec. 10/13/94, Ex. Dec. 5/6/94). Inability to attend a Pre-Hearing Conference or hearing due to a lack of financial resources, residence out of state or because of the lack of an attorney are not adequate reasons excusing a failure to appear. Hieb v. Marc's Big Boy, MEOC Case No. (Comm'n. Dec. 11/18/92), Morris v. Madison Kipp Corp., MEOC Case No. 21302 (Ex. Dec. 11/20/92), Foy v. Madison Rehabilitation & Convalescent Center, MEOC Case No. 21831 (Comm'n. Dec. 6/5/95, Ex. Dec. 7/5/94). A failure to appear because of an alleged conflict in one's personal schedule where there are grounds to doubt the truth of the offered explanation and where there was no prior request to reschedule is not excused. Downing v. Labor Ready, MEOC Case No. 22462 (Comm'n. Dec. 8/29/97, Ex. Dec. 11/20/96).

As in the Murphy case, the Complainant gave the Commission one address while living elsewhere. There is nothing wrong with such an arrangement and, in fact, the reasons for this arrangement were sensible. However, the Commission places the burden on a party in such an arrangement to make him or her remain in contact with the process. It appears that, for reasons beyond the Complainant's control, she did not have a sufficient connection with the process to get actual notice of the Pre-Hearing Conference. The Complainant probably should have expected a communication from the Commission given the fact that efforts to conciliate the complaint had recently failed.

Since the record is clear that the notice was sent to and received at the address provided to the Commission, the Hearing Examiner is without discretion to do more than dismiss the complaint. While the Commission in the past could have followed a more flexible approach by allowing parties to continue their actions with a payment of costs to the party who appeared, it chose to establish the current process.

**ORDER**

The complaint is hereby dismissed. The parties shall bear their own costs. This Decision and Order may be appealed to the Commission as a whole by filing a written appeal or request for review at the offices of the Commission within 20 days of the undersigned date.

Signed and dated this 30th day of March, 1999.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III  
Hearing Examiner

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**BACKGROUND**

On October 30, 1997, the Complainant, Lolita Valasquez-Aguilu, filed a complaint of discrimination with the Madison Equal Opportunities Commission (Commission). The complaint charged that the Respondent, Abercrombie & Fitch, Inc., failed or refused to accept the return of merchandise under circumstances where it accepted similar merchandise from others and thereby discriminated against her on the basis of her national origin/ancestry in a public place of accommodation or amusement in violation of Section 3.23 (5) Mad. Gen. Ord. The Respondent denies the allegations of the complaint.

The complaint was assigned to an Investigator/Conciliator for the Commission. After investigation, the Investigator/Conciliator issued an Initial Determination concluding that there was probable cause to believe that the Respondent had discriminated against the Complainant on the basis of national origin/ancestry in provision of a public place of accommodation or amusement.

Attempts at conciliation failed as a result of the Respondent's refusal to participate. The complaint was transferred to the Hearing Examiner for a public hearing on the merits of the complaint.

A Pre-Hearing Conference was scheduled for April 23, 1998. The Respondent appeared by its attorneys, Whyte Hirschboeck Dudek S.C., by Ritchie Sturgeon. The Complainant failed to appear at the scheduled time or within 30 minutes of that time. The Respondent moved to dismiss the complaint for the Complainant's failure to appear. The Hearing Examiner took the motion under advisement.

On April 28, 1998, the Hearing Examiner issued an Order to Show Cause why the complaint should not be dismissed for the Complainant's failure to appear at the Pre-Hearing Conference. The Complainant responded to the Order to Show Cause on May 8, 1998.

The Complainant admitted that the Notice of Pre-Hearing Conference was sent to the address noted in her file and that it was received in a timely manner. The Complainant stated that her mother failed to open or forward the notice until after the scheduled date. The Complainant stated that she wished to pursue her complaint and assured the Hearing Examiner that there would not be a future default.

The Respondent objected to the Complainant's explanation. The Respondent pointed to other cases in which similar reasons were found not to be good cause for missing a hearing or Pre-Hearing Conference.

On March 30, 1999, the Hearing Examiner issued a Decision and Order on Respondent's motion to dismiss. The Hearing Examiner found that the Complainant had not provided a sufficient reason for her failure to appear. Essentially, the Hearing Examiner concluded that the Commission had met its obligation of notice by sending the Notice of Pre-Hearing Conference to the address provided by the Complainant. Once the notice was received, as evidenced by a return receipt, it became the Complainant's responsibility to attend meetings or to make sure that she was notified of meetings or to request a change in the date. The Hearing Examiner's Decision and Order provided that it could be appealed by filing a request to appeal within twenty days of the date on which the Decision and Order was issued.

The Complainant filed a request to appeal the Hearing Examiner's Decision and Order on April 29, 1999. The Executive Director, on behalf of the Commission, issued a Notice of Appeal and Briefing Schedule on the Complainant's appeal.

On May 22, 1999, the Respondent filed a motion to dismiss the Complainant's appeal contending that the appeal was filed too late. On May 26, 1999, the Executive Director, on behalf of the Commission, issued a briefing schedule on the Respondent's motion. No documents were received by the Commission on either the appeal or the motion to dismiss from the Complainant. The Complainant received both briefing schedules as evidenced by signed return receipts.

On July 8, 1999, the Commission met to consider the Respondent's motion to dismiss the Complainant's appeal. Participating in the Commission's considerations were Commissioners: Hicks, Morrison, Poulson, Rahman, Sentmanat, Stapleton, Tomlinson, Verriden and Zarate.

### **DECISION**

In reviewing the file, the Commission notes that the period for submission of briefs on both the motion to dismiss and the original appeal have lapsed. Accordingly, the Commission exercises its discretion to resolve the whole dispute rather than a small part of it by deciding the appeal rather than merely addressing the Motion to Dismiss. The Commission determined that for reasons of organizational economy and because the parties had not responded to the opportunity to submit briefs that the record on the underlying appeal was complete that it should exercise its discretion to resolve the appeal.

The Commission adopts and incorporates by reference as if fully set forth herein, the Hearing Examiner's Decision and Order dated March 30, 1999.

**ORDER**

The complaint is hereby dismissed.

Agreeing in this decision are Commissioners: Hicks, Morrison, Poulson, Rahman, Sentmanat, Stapleton, Tomlinson, Verriden and Zarate. There were no Commissioners opposing or abstaining from this decision.

Signed and dated this 20th day of July, 1999.

EQUAL OPPORTUNITIES COMMISSION

De Ette Tomlinson  
Vice President