

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

Wanda McCann-Smith
PO Box 259289
Madison WI 53725-9289

Complainant

vs.

St Mary's Hospital
707 S Mills St
Madison WI 53715

Respondent

HEARING EXAMINER'S DECISION AND
ORDER ON RESPONDENT'S MOTION TO
DISMISS

CASE NO. 20092160

EEOC CASE NO. 26B200900067

BACKGROUND

On September 16, 2009, the Complainant, Wanda McCann-Smith, filed a complaint of discrimination with the Madison Department of Civil Rights, Equal Opportunities Division (EOD). The complaint charged that the Respondent, St. Mary's Hospital, discriminated against her on the basis of her color and race in her terms and conditions of employment. The Respondent denied any discrimination.

On December 22, 2009, a Division Investigator/Conciliator issued an Initial Determination concluding that there was probable cause to believe that the Respondent had discriminated against the Complainant in employment on the bases of her color and race. Efforts at conciliation of the allegations of the complaint were unsuccessful and the complaint was forwarded to the Hearing Examiner for further proceedings.

On April 8, 2010, the Hearing Examiner issued a Notice of Pre-Hearing Conference in this matter. The pre-hearing conference was held at 11:00 a.m. on April 26, 2010 in Room LL-120 of the Madison Municipal Building. The Complainant appeared in person and the Respondent appeared by counsel.

At the pre-hearing conference, the Hearing Examiner set the hearing to begin at 9:00 a.m. on September 21, 2010 in Room LL-120 of the Madison Municipal Building, 215 Martin Luther King, Jr. Blvd., Madison, WI. As a result of the pre-hearing conference, the Hearing Examiner issued a notice of hearing and scheduling order including the time and date of the hearing. The notice of hearing and scheduling order were issued on April 27, 2010.

On May 4, 2010, the Hearing Examiner received a letter from the Complainant acknowledging her receipt of the notice of hearing and scheduling order and acknowledging the time and date of the hearing in this matter.

On September 21, 2010, the Respondent appeared by a corporate representative and its counsel. The Complainant did not appear at 9:00 a.m. as required by the notice of hearing. The Hearing Examiner waited until 9:40 a.m. to call the case. Once the case was called, the Respondent moved to dismiss the complaint for lack of the Complainant's appearance.

The Hearing Examiner took the Respondent's motion under advisement. On September 22, 2010, the Hearing Examiner issued an order to show cause why the complaint should not be dismissed for the Complainant's failure to appear. The order to show cause established a schedule for the submission of materials by the parties. On September 30, 2010, the Complainant submitted her explanation for her failure to appear at the hearing as scheduled. On October 8, 2010, the Respondent submitted an objection to the materials submitted by the Complainant.

DECISION

The Complainant states that she did not receive the Notice of Hearing setting forth the time, date and location of the hearing. She also indicates that because of homelessness, she has lost much of her correspondence. She further indicates that she contacted an Investigator/Conciliator at the Commission to verify the time of the hearing since she already had the date of the hearing.

The Respondent in its submission points out that on May 4, 2010, the Complainant acknowledged receipt of the notice of hearing and scheduling order. It is also uncontroverted that the Complainant was present during the pre-hearing conference and was advised of the time and date of the hearing during the pre-hearing conference. The Respondent also submits a copy of an email from Melissa Gombar indicating that she advised the Complainant that the hearing would commence at 9:00 a.m. on September 21, 2010.

If the Complainant's credibility were not already severely strained by the record in these proceedings, her explanation for her failure to appear might be enough to schedule further proceedings in this case. However, since the Complainant states that she did not receive a notice of hearing and scheduling order but clearly acknowledges that she received the notice of hearing and scheduling order, the Hearing Examiner cannot now credit her statement that she did not have notice of the time and date of the hearing. The Complainant's contention that there was miscommunication as a result of her contacting Investigator/Conciliator Gombar is equally not credible. The email provided by Ms. Gombar indicates her clear recollection of the conversation along with her indication that she informed the Complainant that the hearing would commence at 9:00 a.m.

Given the clear record of communication in this matter to the Complainant setting forth a start time of 9:00 a.m. for the hearing on September 21, 2010, the Hearing Examiner is confused and troubled by the fact that the Complainant appeared at 10:00 a.m. on September 21, 2010. This discrepancy in time is not explained in any manner in the submission of the Complainant. While her actual appearance, albeit an hour late, is some indication of the Complainant's interest and willingness to proceed in this matter, it is insufficient to convince the Hearing Examiner that the Complainant will actually appear at further proceedings and at the time scheduled.

It should be noted that the Respondent appeared on time and with witnesses ready to proceed at the scheduled hour. This entailed an expenditure of time and resources on the part of the Respondent that cannot be ignored by the Hearing Examiner.

Given the fact that this matter was clearly scheduled for 9:00 a.m. on September 21, 2010 and that the Complainant had notice of this time and date in person, in writing and through a telephone conversation with a Division Investigator/Conciliator, the Hearing Examiner cannot find that the Complainant has set forth a good faith explanation for her failure to appear as required by the order to show cause. Accordingly, the complaint is dismissed subject to the Complainant's right to petition the Equal Opportunities Commission for review of the Hearing Examiner's Decision and Order. Such a petition must be made in writing and be filed with the Commission no later than twenty days from the undersigned date. A copy must be served upon counsel for the Respondent.

ORDER

It is ordered that the complaint be dismissed subject to the Complainant's right to petition the Madison Equal Opportunities Commission.

Signed and dated this 3rd day of November, 2010.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

cc: Chris Johnson