

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

Ghita Hamidi
3805 Portage Rd #4
Madison WI 53704

Complainant

vs.

Dreamweavers Inc
612 W Main St Ste 303
Madison WI 53703

Respondent

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

CASE NO. 20112071

EEOC CASE NO. 26B201100045

BACKGROUND

On April 28, 2011, the Complainant, Ghita Hamidi, filed a complaint of discrimination with the Madison Department of Civil Rights, Equal Opportunities Division (EOD). The complaint alleged that the Respondent, Dreamweavers, Inc., discriminated against her on the bases of sex, religion and national origin/ancestry and that the Respondent retaliated against her for exercising a right protected by the ordinance.

After filing of the complaint, a Division Investigator/Conciliator investigated the allegations and issued an Initial Determination of Probable Cause/No Probable Cause on July 15, 2011. The Investigator/Conciliator found that there was probable cause to believe that the Respondent retaliated against the Complainant for opposing a discriminatory practice in the workplace. The Investigator/Conciliator further determined that there was no probable cause to believe that the Respondent discriminated against the Complainant on the bases of sex, religion and national origin/ancestry in her terms and conditions of employment and in her termination.

The Complainant did not appeal the no probable cause portion of the Initial Determination and the retaliation claim for which there was a finding of probable cause was transferred to conciliation. Efforts to conciliate the complaint proved unsuccessful. On August 4, 2011, the complaint was transferred to the Hearing Examiner for a hearing on the merits.

On August 24, 2011, the Hearing Examiner issued a Notice of Pre-Hearing Conference to the parties. The Complainant's Notice was mailed to the address she had given to the EOD as her home mailing address. Further, the Notice was sent "delivery confirmation," which means that the U.S. Post Office tracks efforts to deliver such a piece of mail. It appears that the Post Office attempted to deliver the Notice on August 26, 2011 and left a notice of attempted delivery for the Complainant. Postal records listed the Notice as "unclaimed" on September 21, 2011 and indicated that it was "undeliverable as addressed" on September 22, 2011. However, the Notice has as of yet to make its way back to the EOD.

The Pre-Hearing Conference was to be held at 11:00 a.m. on September 15, 2011 in Room LL-120 of the Madison Municipal Building, 215 Martin Luther King, Jr. Blvd. in Madison, Wisconsin. At the time scheduled for the Pre-Hearing Conference, the Respondent appeared by its attorney, Christa Westerberg, of the law firm McGillivray, Westerberg & Bender, LLC. The Complainant did not appear at the scheduled time or within 30 minutes of the scheduled time. The Complainant did not call the EOD prior to the scheduled time of the conference to request postponement or to make 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 September 19, 2011.

On September 28, 2011, the Complainant filed a letter requesting that the complaint not be dismissed and explaining that she had not received the Notice of Pre-Hearing Conference because she had temporarily moved to the Wisconsin Dells for work. That same day, the Hearing Examiner sent the Respondent a copy of the Complainant's response by facsimile transmission as it appeared that the Complainant had not provided the Respondent with a copy. On October 10, 2011, the Respondent filed its opposition brief.

DISCUSSION

The Commission has established a "bright line" test with respect to a failure to appear at a Pre-Hearing Conference or a 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. See generally Hohlstein v. Shopko, MEOC Case No. 22381 (Ex. Dec. 11/26/96); Murphy v. Woodman's and Kellahue, MEOC Case No. 21688 (Comm. Dec. 10/26/93); Francis v. Quarra Stone Company, MEOC Case No. 21764 (Comm. Dec. 11/4/93).

Failure of a party to actually receive a notice mailed to the party's given address is excusable if there is evidence that the notice was not signed for by anyone or there is evidence that the notice was not timely received. See Williams v. Millans Treasure Chest, MEOC Case No. 3374 (Comm. Dec. 8/29/97); Williams v. Footlocker, MEOC Case No. 3375 (Comm. Dec. 8/29/97).

The Complainant timely responded to the Hearing Examiner's Order to Show Cause by a letter dated September 26, 2011. In her letter, the Complainant apologized for not appearing at the Pre-Hearing Conference and explained that she did not receive the Notice of Pre-Hearing Conference because she had been away from her home address for two months. The Complainant asserted that she could not find work in Madison subsequent to the Respondent's termination of her employment. As a result, she found a job at the T-Shirt Factory in the Wisconsin Dells. The Complainant explained that the commute to and from work was exhausting and that it was easier for her to live in the Wisconsin Dells during her period of employment with the T-Shirt Factory. In her letter, the Complainant left a contact phone number for her employer at the T-Shirt Factory.

The Respondent argues that the Complainant failed to demonstrate that her failure to appear at the Pre-Hearing Conference amounted to excusable neglect and cites Norris v. Cost Cutters of Madison in support. MEOC Case No. 20052134 (Ex. Dec. 05/11/07). The

Respondent asserts that its Director of Human Resources, Susan Rathke, contacted the T-Shirt Factory on October 4, 2011 via the phone number provided by the Complainant in her September 26 letter. Rathke asked the male individual who answered the phone if he could verify the Complainant's dates of employment. The individual answered in the affirmative and told Rathke that the Complainant had worked at the T-Shirt Factory for several years on a seasonal basis. This individual also told Rathke that the Complainant had resumed employment with the T-Shirt Factory in May 2011 and that she had ended her employment on or about September 19, 2011.

The Respondent asserts that the Complainant failed to keep the Equal Opportunities Commission apprised of her whereabouts and cites Lawler v. Madison Metropolitan School District for the proposition that the Commission "...has generally not reopened claims where the failure to appear is either directly or primarily connected to the Complainant's dereliction." MEOC Case No. 20102194 (Ex. Dec. 07/20/11). The Respondent maintains that the Complainant should have either provided the Commission with her mailing address in the Wisconsin Dells or ensured that mail received at her residence in Madison was forwarded to the Wisconsin Dells.

The Hearing Examiner observes that this case is factually distinct from both Norris and Lawler. In Norris, there was evidence that the Respondent's Human Resources Director, Stacey Carroll, physically received the Notice of Pre-Hearing Conference and that she had read it. MEOC Case No. 20052134 (Ex. Dec. 05/11/07). The Hearing Examiner was not persuaded by Ms. Carroll's assertion that she did not understand the contents of the Notice and found that she could have sought clarification from the Hearing Examiner or the Investigator/Conciliator with whom she had previously consulted on a procedural matter. Id. In contrast, there is no evidence that the Complainant in this case actually received the Notice of Pre-Hearing Conference. Further, unlike Ms. Carroll, the Complainant was not continuously available at the mailing address provided to the EOD during the relevant delivery period (August 24, 2011 – August 26, 2011).

In Lawler, while the Complainant asserted that she did not receive the Notice of Pre-Hearing Conference, postal records indicated that two notices of attempted delivery were left at her residence. MEOC Case No. 20102194 (Ex. Dec. 07/20/11). Accepting that Ms. Lawler did not actually receive the Notice and recognizing that she resided at the mailing address provided to the EOD during the relevant delivery period, the Hearing Examiner determined that, in light of the attempted delivery notices, the Complainant could have and should have retrieved the Notice of Pre-Hearing Conference from the post office. Id. Had Ms. Lawler done so, she could have assured her attendance at the conference. Like Ms. Lawler, the Complainant in this case did not receive the Notice of Pre-Hearing Conference. However, it appears that, unlike Ms. Lawler, the Complainant was not living at her residence when the postal carrier left an attempted delivery notice on August 26, 2011. Since the Complainant's last day of work at the T-Shirt Factory was September 15, 2011 (the date of the Pre-Hearing Conference) it is not likely that the Complainant could have retrieved the Notice in time to assure her attendance.

The Hearing Examiner finds that the more relevant and factually similar case to that of the Complainant is Velazquez-Aguilu v. Abercrombie & Fitch, Case No. 03398 (Comm. Dec. 07/20/99; Ex. Dec. 03/30/99). In that case, the EOD issued a Notice of Pre-Hearing Conference to the mailing address provided by Ms. Velazquez-Aguilu. Id. Like the Complainant in this case, Ms. Velazquez-Aguilu chose to reside at a different address and, consequently, did not receive notice of the scheduled Pre-Hearing Conference. Due to her absence from the residence, Ms.

Velazquez-Aguilu's mother accepted the Notice on her behalf. Id. Ms. Velazquez-Aguilu asserted that she did not attend the Pre-Hearing Conference because her mother failed to open the letter containing the Notice and failed to notify her of its receipt. Id. The Hearing Examiner recognized that it is acceptable for a Complainant to provide the EOD with one address while living at another. Id. However, the Hearing Examiner found that "the Commission places the burden on a party in such an arrangement to...remain in contact with the process." Id. Ms. Velazquez-Aguilu failed to do so and, as a result, the Hearing Examiner dismissed her complaint. For this same reason, the Hearing Examiner finds that the Complainant in this case failed to demonstrate that her absence from the Pre-Hearing Conference on September 15, 2011 was excusable.

Although Norris and Lawler are factually dissimilar to Velazquez-Aguilu, there is a common thread that ties all three cases together. Essentially, it was within the power of each intended recipient of the Notice of Pre-Hearing Conference to make a timely appearance. The question of whether it was within the control of a Complainant (or a Respondent, as the case may be) to timely attend a scheduled hearing or conference is paramount. See Williams v. Millans Treasure Chest, MEOC Case No. 3374 (Comm. Dec. 8/29/97) (finding that a Complainant's failure to appear at a scheduled Pre-Hearing Conference was due to circumstances that were beyond his control and recognizing that the Complainant was diligent in keeping the Commission apprised of his whereabouts).

Hence, in Norris, the Respondent's representative could have contacted the EOD to allay her confusion about the information contained in the Notice. In Lawler, the Complainant could have taken steps to retrieve the Notice from the post office upon having received notice of its attempted delivery. In Velazquez-Aguilu, the Complainant could have notified the EOD of her alternate living arrangements and provided the relevant address or made arrangements to have mail forwarded to her alternate residence.

Similarly, in this case, the Complainant could and should have kept the EOD informed as to her whereabouts. In this regard, Commission Rule 3.16 is unequivocal as to a Complainant's responsibility to provide detailed contact information and to inform the EOD of address changes. See EOC Rule 3.16 ("Any person who files a complaint with the Equal Opportunities Division shall promptly inform the EOD of any changes of address or telephone number, or any prolonged absences from the address which he or she has provided to the EOD when necessary..."). For decades, this has been a continuing responsibility of Complainants seeking redress before the Commission. See Murphy v. Woodman's and Kellahue, MEOC Case No. 21688 (Comm. Dec. 10/26/93) (holding that a Complainant must keep the Commission apprised of his or her contact information at all times during the complaint process or risk the dismissal of his or her claims). Under Commission Rule 3.16, the Complainant had an obligation to notify the EOD of her impending absence from the mailing address she had previously provided and to inform the EOD of her new mailing address in the Wisconsin Dells. Had the Complainant provided such notification, she would have timely received the Notice of Pre-Hearing Conference and could have made arrangements to either attend the conference or reschedule for a later date.

ORDER

For the abovementioned reasons, the Hearing Examiner finds that the Complainant failed to provide an adequate excuse for her absence from the Pre-Hearing Conference held on September 15, 2011, and grants the Respondent's motion to dismiss the complaint.

The Complainant may seek review of this Decision and Order by filing a written request with the Department of Civil Rights within twenty (20) days of the undersigned date.

Signed and dated this 16th day of August, 2012.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

cc: Christa O Westerberg