

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

<p>Tyrone Wiggins 7313 Farmington Way Madison, WI 53717</p> <p style="text-align:center">Complainant</p> <p style="text-align:center">vs.</p> <p>Shakey's Pizza and Buffet 714 South Gammon Road Madison, WI 53719</p> <p>Richard Skillrud 714 South Gammon Road Madison, WI 53719</p> <p style="text-align:center">Respondent</p>	<p>DECISION AND ORDER ON RESPONDENT'S MOTION FOR SANCTIONS</p> <p>Case No. 21409</p>
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**BACKGROUND**

On December 21, 1990, the Complainant, Tyrone Wiggins, filed a complaint of discrimination with the Madison Equal Opportunities Commission (MEOC or Commission) alleging that the Respondents, Shakey's Pizza and Buffet and Richard Skillrud, had racially harassed him at a company party in violation of Madison General Ordinance 3.23(7). After investigation, an Initial Determination concluding that there was probable cause to believe that discrimination had occurred was issued on February 28, 1991. Efforts to conciliate the complaint failed and the complaint was certified to the Hearing Examiner for a public hearing on the allegations of the complaint. A Pre-Hearing Conference was held on November 16, 1992. At that conference, the time for the hearing was established along with several interim dates that were embodied in a Notice of Hearing and Scheduling Order issued on November 18, 1992. One of the interim dates set forth in the Scheduling Order was a date for the completion of discovery. Discovery is permitted in proceedings before the Commission pursuant to Commission Rule 15.33.

The Respondents filed a motion to compel discovery at the Pre-Hearing Conference because the Complainant had not responded to a discovery demand. On October 2, the Respondents served upon the Complainant interrogatories and demands for production of documents. Service of these documents pre-dated the Pre-Hearing Conference. At the conference after discussion of the Respondents' motion the Complainant agreed to respond to the existing discovery request on or before November 30, 1992. This date was incorporated into the Scheduling Order. The Complainant did not respond to the Respondents' discovery demand.

On January 12, 1993, the Respondents filed a motion requesting sanctions against the Complainant for his failure to comply with the outstanding discovery demand. A hearing on the Respondents' motion was held on February 11, 1993 at 3:00 p.m. The Respondents appeared in person and by their attorney, Charles W. Giesen. The Complainant failed to appear. When the Complainant failed to

appear at the time of the hearing, the Hearing Examiner contacted the Complainant's attorney's office to determine whether the Complainant or his attorney were going to appear. The Complainant is represented by Willie J. Nunnery. The Hearing Examiner was told that Mr. Nunnery was in court on another matter but that it did not appear that he had received the notice of the hearing. On February 15, 1993, Mr. Nunnery sent a affidavit to the Hearing Examiner confirming his office assistant's statements. There has never been an explanation of why the Complainant did not appear himself.

The Hearing Examiner allowed the Respondents to proceed with the hearing despite the Complainant's absence. The Respondents set forth the timetable of events that is summarized herein.

The Hearing Examiner found that the Complainant had failed to comply with the Scheduling Order of November 18, 1992. He issued a new Order requiring the Complainant to comply with the discovery demands on or before February 22, 1993, and to show cause, on or before March 1, 1993, either why the complaint should not be dismissed for his failure to comply with the discovery demands and the orders of the Hearing Examiner or why further proceedings on the complaint should not be made conditional upon payment by the Complainant of the Respondents' attorney's fees. The Hearing Examiner used the method of an order to show cause to accommodate the lack of participation of the Complainant in the February 11, 1993 hearing. The Hearing Examiner ordered the Respondents to file a bill of costs relating to the discovery requests on or before February 18, 1993.

On February 22, 1993, the Complainant served a copy of his responses to the discovery requests of the Respondents. The Respondents filed the bill of costs on February 15, 1993. The Complainant filed no response to the order to show cause. Despite the considerable passage of time, the Complainant has never responded to the Hearing Examiner's order to show cause.

Some additional efforts to conciliate the complaint have been made. These efforts have proven unsuccessful.

## **DECISION**

MGO 3.23(9)(b)(6) authorizes the Commission to adopt rules and regulations that may be necessary to carry out the Commission's responsibilities under the Ordinance. The Commission has adopted various rules pursuant to this section. Rule 15 sets forth the procedures once a complaint has been certified to public hearing. Rule 15.33 establishes the right to conduct discovery and incorporates by reference the standards and procedures of Wis Stats 804. Rule 15.35 authorizes the imposition of sanctions where a party fails to comply with the discovery provisions of the rules or an order of the Hearing Examiner.

Rule 15.351 establishes the procedure for imposing sanctions and in subparagraphs 15.3511 through 15.3515 sets forth a non-exhaustive list of examples of some sanctions that might be imposed. Rule 15.352 imposes the responsibility to seek sanctions on the parties. It also places on the Hearing Examiner the responsibility to grant appropriate relief so as to compensate for the withholding of or lack of testimony, documents or other evidence.

The procedure established in Rule 15.351 requires that there be a failure to make discovery, an order to make discovery and a continuing failure to make discovery after the order. In this case the Respondents served a valid discovery demand on October 2, 1992. While it is somewhat unusual for discovery to occur prior to the Pre-Hearing Conference, it is not precluded by Rule 15.33. At the Pre-Hearing Conference held on November 16, 1992, the Respondents filed a motion to compel the discovery that had not been complied with to that date. After a discussion of the discovery demand,

the Complainant agreed that the outstanding discovery demand could be answered on or before November 30, 1992. A requirement that the Complainant comply with the outstanding discovery demand was contained in the Scheduling Order dated November 18, 1992. The Complainant continued in his failure to make the requested discovery.

Facing the close of discovery and a hearing date, the Respondents filed a further request for an order compelling discovery and the imposition of sanctions. A hearing was scheduled for February 11, 1993, to address the Respondents' motion. Neither the Complainant nor his attorney appeared at this hearing. There has been no explanation of the Complainant's failure to appear though a possibly reasonable explanation for his attorney's failure was provided. The Respondents and their attorney appeared. There was no request by the Complainant to postpone the hearing.

The Hearing Examiner determined that the Complainant had not complied with the terms of the Scheduling Order and that there was no apparent reason for that failure. The Hearing Examiner once again ordered the Complainant to comply with the discovery demand. Because of the Complainant's failure to appear at the February 11, 1993 hearing and his failure to comply with the original discovery demand and the failure to comply with the Scheduling Order provision agreed to by the Complainant, the Hearing Examiner also ordered the Complainant to show cause why the complaint should not be dismissed or in the alternative why further proceedings should not be conditioned on the Complainant's payment of the Respondents' attorney's fees related to the Complainant's noncompliance with discovery and orders. Despite the Respondents' request for sanctions, the Hearing Examiner declined to immediately impose sanctions. Instead, the Hearing Examiner gave the Complainant the opportunity to demonstrate that sanctions were inappropriate by allowing the Complainant to show cause why the sanctions of dismissal or payment of the Respondents' attorney's fees were not justified.

The Complainant provided the Respondents with answers to the discovery demand on February 22, 1993. The Respondents have not objected to these answers. The Complainant did not submit any document in response to the show cause portion of the February 12, 1993 order and has not as of today's date.

The Commission has a reasonable expectation that its orders and those of its Hearing Examiner will be fully followed or that it will be provided with an explanation of why the order could not be followed. Given this expectation, the Hearing Examiner must determine what, if anything, should be done in light of the Complainant's failure to respond to the order to show cause portion of the February 12, 1993 order.

The purpose of this order was to gain a response to the discovery demand of the Respondents. It was also to assure the Respondents and the Commission that the Complainant had a reasonable explanation for its earlier failure and to assure that the Complainant would be likely to comply with future orders of the Commission. Dismissal of the complaint would be authorized by Rule 15.3515. However, since the Complainant eventually responded to the discovery demand, it does not seem reasonable to dismiss the complaint for the earlier failures of the Complainant because the order partially accomplished its purpose. Similarly, the suggested list of possible sanctions contained in Rules 15.3511 through 15.3514 are inapplicable because the information requested by the Respondents has now been provided. What is needed is a remedy or sanction that will encourage the Complainant and other similarly situated parties to respond to Commission orders, while not necessarily requiring the dismissal of the complaint and at the same time compensating the Respondents for the additional time and expense that the Complainant's actions have occasioned. While requiring the Complainant to offer some personal assurance of future cooperation might meet

the first requirements, it does nothing to redress the loss of the Respondents. Similarly, requiring the Complainant to post a form of a performance bond does not compensate the Respondents.

As an agency or Commission that deals with large numbers of individuals who are not necessarily knowledgeable about the legal system and the importance of complying with the requirements established by that system, the Commission must be careful not to impose a remedy that will unreasonably discourage those people for whom the system was intended from using the system. At the same time that the Commission must be cognizant of the effect of its orders and remedies on potential complainants, it must also be aware of the effect that its orders have on the regulated communities. If the Commission ignores the reasonable needs of respondents to relief from uncooperative Complainants, it may lose its reputation for neutrality, upon which it, in part, depends for its regulatory authority. If either side to a complaint is seen to ignore orders of the Commission with impunity, there will be little incentive for either party or any future party to comply with the requirements of the Commission.

Under the circumstances of this complaint, a reasonable remedy that meets the needs of the parties and the Commission, is to require the Complainant to pay the Respondents a reasonable amount to compensate them for their additional expense occasioned by his conduct or that of his attorney in order to continue with his complaint. The financial hardship of paying those additional expenses of the Respondents, should assure that the Complainant will not fail to comply with orders of the Commission as the complaint proceeds to hearing. It will also send a message to other parties that an apparently intentional failure to comply with the orders of the Commission has serious and substantial consequences. The Respondents will be put in the same place as they would have been were it not for the Complainant's unexplained refusal to respond to a legitimate discovery demand. The Complainant will be permitted to pursue his complaint, should he wish to proceed. It represents a middle step between ignoring the Complainant's failure to comply with at least two Commission orders and dismissal of the complaint.

The Respondents, pursuant to the February 12, 1993 order of the Hearing Examiner, have submitted a bill of the costs that they believe were incurred as a result of the Complainant's conduct. The Hearing Examiner will apply the same standards to this list of costs as he would to a petition for cost and fees to a prevailing complainant after a public hearing on the merits of a complaint. In this regard, the Hearing Examiner will review the petition to see if there are entries for unnecessary or duplicative work. Chung v. Paisan's MEOC Case No. 21192 (September 23, 1993), Harris v. Paragon Restaurante Group, Inc., MEOC Case No. 20947 (September 27, 1989) It is the moving parties' burden to demonstrate the appropriateness of all itemized charges. The customary hourly rate of the attorney is presumed to be a reasonable hourly rate. Chung (supra).

On February 18, 1993, the Respondents submitted a bill of their costs relating to the efforts expended to obtain the materials requested in their discovery demand of October 2, 1992. The hourly rate of \$150 per hour and \$100 per hour for another attorney in the firm and \$30 per hour for a paralegal are presumed to be reasonable hourly rates. The Respondents have not established, however, that all of the charges listed in the submission are appropriate, necessary and not duplicative. For example, the charge of \$175 for drafting the initial discovery request and work prior to making the discovery demand would have been expended even if the Complainant had promptly responded. The Complainant should not be made to pay for the initial discovery demand.

The Respondents list a number of charges for file review. While certainly some review during this process would be required, it is impossible to determine from the Respondents' bill what was reviewed and whether it was truly necessary to gain the desired information. The charges identified

for September 23, 1992 of \$60, September 27, 1992 of \$50, September 28, 1992 of \$20, October 2, 1992, of \$45, part of the charge of November 16, 1992 of \$112.50, December 9, 1992 of \$30 and, February 11, 1993 of \$141 will be disallowed as either unnecessary or duplicative.

The remaining charges are reasonable and appear to be necessary and not duplicative. The amount that the Complainant shall pay to the Respondents is \$562.50.

The Hearing Examiner is sympathetic to the undoubted economic difficulty imposition of this remedy may have on the Complainant. Accordingly, the Hearing Examiner will allow some period of time to either pay the required amount or to make arrangements with the attorney for the Respondents for payment of the amount. A period of 45 days should be sufficient for this purpose. It is anticipated that the attorney for the Respondents will not unreasonably withhold his cooperation from the Complainant in seeking to work out a payment schedule if necessary. If the Complainant believes that such cooperation is being unreasonably withheld, he may petition the Commission for an appropriate remedy.

From the record in this matter, it cannot be determined whether the failure to make discovery resulted from conduct of the Complainant in not providing his attorney with needed information or if it was caused by his attorney's failure to promptly act upon the discovery request. The Hearing Examiner must allow the Complainant and his attorney to work these problems out between themselves. If the delay was a result of the attorney's inaction, it would be appropriate for the attorney to compensate the Complainant for any money that he must pay.

### **ORDER**

1. The Complainant, as a condition of continuing this action, shall pay to the Respondents the amount of \$562.50.
2. The Complainant shall submit evidence to the Commission no later than 45 days from the undersigned date that the amount specified in 1 above has either been paid in full or that the Complainant has entered into an agreement with the Respondents for the payment of that amount.
3. Should the Complainant fail to submit the information required in #2 above within the period provided, the complaint shall be dismissed.
4. Should the complaint be dismissed pursuant to #3 above, the obligation of the Complainant to pay any amount to the Respondents shall be expunged.
5. Either party may appeal this decision by filing with the Commission and serving on the opposing party (s) a written request for the Commission to review the Hearing Examiner's disposition within ten (10) days of the undersigned date.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III  
Hearing Examiner

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

	ORDER OF DISMISSAL
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Tyrone Wiggins  
7313 Farmington Way  
Madison, WI 53717

Complainant

vs.

Shakey's Pizza and Buffet  
714 South Gammon Road  
Madison, WI 53719

Richard Skillrud  
714 South Gammon Road  
Madison, WI 53719

Respondent

Case No. 21409

### FINDINGS

1. On February 4, 1994 the Hearing Examiner issued a Decision and Order on the Respondents' motion for sanctions in the above-captioned matter.
2. In paragraph 2 of the Order, the Hearing Examiner ordered the Complainant to produce evidence that he had either paid the attorney's fees and costs assessed in the Order or arranged for the payment of those costs and fees, within forty-five (45) days of the order.
3. Paragraph 3 of the Order states that if the Complainant does not produce such a statement within the time period prescribed, the complaint will be dismissed.
4. The Complainant has not produced any statement showing either that he has paid the assessed attorney's fees and costs or entered into an agreement with the Respondent for the payment of those costs or fees.
5. The Complainant did not appeal from the Hearing Examiner's Decision and Order issued on February 4, 1994.

### ORDER

Pursuant to Paragraph 3 of the Hearing Examiner's Decision and Order issued on February 4, 1994 and Rule 15.3515, the complaint in this matter is dismissed with prejudice. Pursuant to Paragraph 4 of the Hearing Examiner's Decision and Order issued on February 4, 1994, the Complainant's indebtedness to the Respondent for attorney fees and costs is hereby expunged. There shall be no further costs or fees to either party.

Signed and dated this 31 day of March, 1991.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III  
Hearing Examiner