

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

<p>John Hohlstein 825 County Trunk A Rewey, WI 53580</p> <p style="text-align: center;">Complainant</p> <p style="text-align: center;">vs.</p> <p>Shopko 2602 Shopko Dr. Madison, WI 53704</p> <p style="text-align: center;">Respondent</p>	<p>HEARING EXAMINER'S DECISION AND ORDER ON RESPONDENTS MOTION TO DISMISS</p> <p>Case No. 22381</p>
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On January 31, 1996, the Complainant, John Hohlstein, Jr., filed a complaint of discrimination with the Madison Equal Opportunities Commission (Commission). The complaint charged that the Respondent, Shopko, discriminated against Hohlstein on the basis of his conviction record when it terminated his employment. After investigation, an Initial Determination was issued concluding that there was probable cause to believe that discrimination had occurred. Efforts to conciliate the allegations of the complaint failed.

The Hearing Examiner issued a Notice of Pre-Hearing Conference on September 12, 1996. This notice set the Pre-Hearing Conference for 9:30 a.m. on September 26, 1996. The notice was received and signed for on September 16, 1996. Though the signature on the return receipt is difficult to read, it appears that it was signed for by the Complainant. It does not appear that it was signed for by Pat Hohlstein, who has signed for other documents, but the signature could be that of the Complainant's father, John Hohlstein, Sr.

On or about September 16, 1996, the Respondent's attorney contacted the Hearing Examiner by telephone and asked that the scheduled Pre-Hearing Conference be re-scheduled to early October because of a conflict on the schedule of the Respondent's attorney. The Respondent also inquired whether the Pre-Hearing Conference could be conducted by telephone because the attorney's office is in Green Bay. The Hearing Examiner consented to re-schedule the Pre-Hearing Conference but indicated that because the Complainant was unrepresented, both parties would be required to appear in order to provide the Complainant with the greatest opportunity to understand the proceedings. The Respondent sent the Hearing Examiner, with a copy to the Complainant, a letter confirming the conversation.

Pursuant to the Respondent's request, the Hearing Examiner issued an Amended Notice of Pre-Hearing Conference on September 18, 1996. This notice set the Pre-Hearing Conference for 9:30 a.m. on October 9, 1996. The amended notice was received and signed for on September 21, 1996. The return receipt indicates that the amended notice was received by Pat Hohlstein.

Both notices were sent to the same address, 825 County Trunk A, Rewey, Wisconsin 53580. The Commission has not received any notice of a change of address for the Complainant. If a change of address had been received, it would be noted in the case file.

The Complainant did not appear at the time or place set for the Pre-Hearing Conference. Prior to the Pre-Hearing Conference, the Complainant did not contact the Hearing Examiner to request that the Pre-Hearing Conference be re-scheduled to accommodate a conflict in his schedule. The Hearing Examiner waited for thirty minutes before convening the Pre-Hearing Conference. The Respondent moved the Hearing Examiner for an order dismissing the complaint for the Complainant's failure to appear. The Hearing Examiner took this motion under advisement and indicated that he would issue an Order to Show Cause why the complaint should not be dismissed for the Complainant's failure to appear at the Pre-Hearing Conference.

Later in the day on October 9, 1996, a person who identified himself as the Complainant left a message on the voice mail of Commission Investigator Juan Alvarez. The message inquired about how things had gone but did not leave a telephone number where the caller could be reached.

The Hearing Examiner issued an Order to Show Cause why the complaint should not be dismissed on October 14, 1996. The order was sent to the only address on file for the Complainant. The order was received and signed for by Pat Hohlstein on October 17, 1996. The order required the Complainant to provide information demonstrating good cause for his failure to appear at the Pre-Hearing Conference and to serve such demonstration on the Respondent on or before October 23, 1996.

The Complainant's response was not served on the Respondent. The Hearing Examiner provided the Respondent's attorney with a copy of the Complainant's statement and extended the Respondent's time to respond accordingly. The Respondent filed a response objecting to the statement filed by the Complainant.

## **DECISION**

In its efforts to eliminate and prevent discrimination, the Commission has always attempted to accommodate the legitimate needs of both complainants and respondents. This can only be accomplished when the Commission is made aware of the needs of the parties. Where a party fails to inform the Commission of a difficulty in complying with an order of the Commission and consequently fails to comply with the order of the Commission, the only recourse of the Commission is to dismiss the complaint or enter a default order while giving the party the opportunity to explain the reasons for failing to comply.

The present case demonstrates both the Commission's willingness to accommodate a party's need for a change in schedule and the consequences of a party's failure to appear for a Pre-Hearing Conference. The Pre-Hearing Conference in this matter was initially scheduled for 9:30 a.m. on September 26, 1996. The notice of this conference was sent to the parties on September 12, 1996. It appears that both parties received this notice on September 16, 1996. The record contains a return receipt apparently signed by the Complainant on September 16, 1996. The Respondent contacted the Hearing Examiner on September 16, 1996 to inquire about re-scheduling the Pre-Hearing Conference stating that it had received the notice that day.

The Commission accommodated the need of the Respondent to re-schedule the Pre-Hearing Conference. The Respondent sent the Hearing Examiner written confirmation of this agreement and sent the Complainant a copy of the correspondence. The letter sent by the Respondent indicated that

the Pre-Hearing Conference was to be re-scheduled for some time in early October. On September 18, 1996, the Hearing Examiner sent an Amended Notice of Pre-Hearing Conference to the parties in furtherance of his agreement to re-schedule. The new date for the Pre-Hearing Conference was October 9, 1996. The amended notice was received by the Complainant's mother, Pat Hohlstein, on September 21, 1996. The Respondent's attorney appeared at the scheduled time for the Pre-Hearing Conference. The Complainant did not appear at the time set in the amended notice nor did he appear within the next thirty minutes. The Complainant had not contacted the Hearing Examiner prior to October 9, 1996 to request re-scheduling of the Pre-Hearing Conference as the Respondent had done earlier. The Respondent's attorney moved the Hearing Examiner for an order dismissing the complaint because of the Complainant's failure to appear at the Pre-Hearing Conference. The Hearing Examiner withheld ruling on the Respondent's motion and indicated that he would issue 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 Hearing Examiner issued the Order to Show Cause on October 14, 1996. It required the Complainant to demonstrate good cause for his failure to appear at the Pre-Hearing Conference on or before October 23, 1996. The order was received by Pat Hohlstein on October 17, 1996. The Complainant filed a timely response to the order but failed to serve a copy on the Respondent as required by the order. The Hearing Examiner forwarded a copy of the Complainant's response to the Respondent and extended the Respondent's time to reply accordingly. The Respondent submitted a reply to the Complainant's response.

Though it is somewhat difficult to summarize the response of the Complainant, it appears that he contends that he did not actually receive the amended notice until some undefined time subsequent to the Pre-Hearing Conference because he had changed his address and because he was out of town on some undefined work project. The Complainant further indicates that he had provided the Commission with his change of address. The Complainant also indicates that the Complainant wishes to pursue a settlement of the complaint as soon as possible. Among the explanations for the failure of the Complainant to receive the amended notice, the Complainant indicates that Ms. Hohlstein signed for the Commission's amended notice on September 21, 1996 but erroneously believed that it was for her husband not her son. Holding this belief, apparently Ms. Hohlstein set the letter aside.

The Respondent's reply need not be seriously considered, It is sufficient to state that the Respondent does not particularly contradict the facts set forth in the Complainant's response but believes that those facts do not demonstrate good cause for the Complainant's failure to appear at the Pre-Hearing Conference. Though the Respondent does not truly raise any factual disputes, the record does indicate that the Complainant's response to the order is not entirely open. For instance, someone identifying himself as the Complainant contacted Commission Investigator Juan Alvarez on the afternoon of October 9, 1996 to inquire about how things had gone. This contact came in the form of a message left on Mr. Alvarez's office voice mail. The caller did not leave a number where Mr. Alvarez could reach him.

The existence of this message is an indication that the Complainant knew of the Pre-Hearing Conference prior to the scheduled date. It leaves open the question of why the Complainant did not contact the Hearing Examiner prior to the date to request re-scheduling of the Pre-Hearing Conference as the Respondent had.

The Complainant's response indicates that the Complainant had informed the Commission of a change in his address. The record does not reveal any such contact from the Complainant.

Even if these factual disputes can be resolved in favor of the Complainant, the question before the Hearing Examiner is still whether the Complainant has set forth a sufficient reason for his failure to

appear at the Pre-Hearing Conference. Had the Complainant contacted the Hearing Examiner prior to the Pre-Hearing Conference with a request to re-schedule, the reasons put forth by the Complainant would have certainly been adequate. The problem is that the Complainant did not contact the Hearing Examiner prior to the Pre-Hearing Conference requiring the Respondent and the Commission to expend resources that would not have been spent had the Complainant requested re-scheduling. By not contacting the Hearing Examiner in advance, the Complainant carries a higher burden to explain his absence. The Hearing Examiner does not believe that the Complainant has met this burden when the record as a whole is examined.

The first problem presented by this record is the possibility of a lack of truthfulness on the part of the Complainant. The telephone message left for Mr. Alvarez on October 9, 1996 and the statement that a change of address had been provided when the record does not support that fact, raise significant questions about the Complainant's credibility.

Second, the circumstances set forth in the Complainant's statement, while possible, do not appear likely. For example, the Complainant indicates that Ms. Hohlstein received the amended notice but that she believed that it was intended for her husband, John Hohlstein, Sr. not her son, John Hohlstein, Jr. There is no indication why Ms. Hohlstein would believe the Commission to be corresponding with her husband. He has not filed a complaint or apparently had any dealings or contact with the Commission. Even if Ms. Hohlstein reasonably believed that the letter was intended for her husband, it was received on September 21, 1996, nineteen (19) days, almost two and a half weeks, before the re-scheduled Pre-Hearing Conference. Nothing in the Complainant's response explains how or why the amended notice was not examined and the information transmitted to the Complainant before the date of the Pre-Hearing Conference.

A third problem presented by the record in this matter stems from the initial re-scheduling. It appears that the Complainant received actual notice of the initial Pre-Hearing Conference. The return receipt dated September 16, 1996 bears a signature that appears to be his. The Hearing Examiner acknowledges that it could be the signature of the Complainant's father, but there is no indication in the Complainant's response to that effect. It would appear that the Complainant must have also received a copy of the Respondent's September 16, 1996 letter because the Complainant did not appear on September 26, 1996 for a Pre-Hearing Conference as set forth in the original notice. This letter should have put the Complainant on notice to expect a new Notice of Pre-Hearing Conference setting the conference for about the period in which it was set. The fact that the Complainant did not appear on September 26, 1996 can be explained in any of three ways, none of which particularly support the Complainant's request for re-scheduling.

First, the Complainant may not have intended to appear at the original Pre-Hearing Conference. Dismissal would be appropriate under this circumstance. Second, the Complainant received the Respondent's September 16, 1996 letter and did not appear, but knowing the likely time period for the re-scheduled Pre-Hearing Conference took no steps to seek a more convenient time. Third, the Complainant received the amended notice and knew he did not need to appear on September 26, 1996 but took no steps to request a postponement of the October 9, 1996 Pre-Hearing Conference. The Hearing Examiner, given the circumstances as set forth in the record, simply cannot find that the Complainant's absence from the Pre-Hearing Conference on October 9, 1996 has been reasonably explained. Under these circumstances, the Hearing Examiner reluctantly grants the Respondent's motion to dismiss the complaint for the Complainant's failure to appear at the Pre-Hearing Conference on October 9, 1996.

The Hearing Examiner never is happy dismissing a complaint or entering a default judgment. It deprives the affected party of the opportunity of a day in court. Often, as in this case, the record in its as yet incomplete form indicates that there may well be a significant factual basis for the party's position. However, filing a complaint or being subject to a complaint carries significant responsibilities for each party that must be accepted and failure to do so can, as in this case, result in loss of one's opportunities before the Commission.

### **ORDER**

It is hereby ordered that the complaint in this matter is dismissed. The Complainant may seek review of this order by filing a written request for review at the offices of the Commission within 20 days of the undersigned date.

Signed and dated this 26th day of November, 1996.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III  
Hearing Examiner