

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**JERRY M. KLEMA**, Complainant,

vs.

**WINGRA REDI-MIX, INC.**, Respondent.

Case 3  
No. 58899  
Cw-3670

**Decision No. 31056-B**

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**Appearances:**

**Jerry Klema**, 4212 Oak Street, McFarland, Wisconsin 53558, appearing on his own behalf.

**Peter Richter**, Attorney, Stroud, Willink & Howard, 25 West Main Street, Suite 300, Madison, Wisconsin 53701-2235, appearing on behalf of Wingra Redi-Mix, Inc.

**ORDER ON REVIEW OF EXAMINER'S DECISION**

On February 15, 2005, Examiner Raleigh Jones issued Findings of Fact, Conclusions of Law and Order Granting Respondent's Motion to Dismiss in this matter. The Examiner dismissed the complaint because he concluded that Complainant Klema had abandoned the prosecution of the complaint.

On March 3, 2005, Klema filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Sec. 111.07(5), Stats. The parties thereafter filed written argument in support of and in opposition to the petition -- the last of which was received by April 12, 2005.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

**ORDER**

- A. The Examiner's Findings of Fact are affirmed.
- B. The Examiner's Conclusion of Law 1 is affirmed.
- C. The Examiner's Conclusions of Law 2 and 3 are reversed and set aside and the following Conclusion of Law is made:

Dec. No. 31056-B

2. Complainant Klema did not abandon prosecution of his complaint.

D. The Examiner's Order is reversed and set aside and the following Order is made:

Respondent's Motion to Dismiss is denied.

Given under our hands and seal at the City of Madison, Wisconsin, this 27<sup>th</sup> day of May, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

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Judith Neumann, Chair

Paul Gordon /s/

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Paul Gordon, Commissioner

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner

**Wingra Redi-Mix, Inc.**

**MEMORANDUM ACCOMPANYING ORDER**  
**ON REVIEW OF EXAMINER'S DECISION**

The salient facts are as follows. Complainant Klema filed a complaint pro se on May 22, 2000 against the Respondent company, alleging that Wingra had violated Sec. 111.06(2)(c) of the Wisconsin Employment Peace Act (WEPA). After an unsuccessful period of conciliation, the case was assigned to Examiner Jones in August 2000 for hearing. After consulting with the parties, the Examiner tentatively scheduled the matter for hearing on November 9, 2000, pending Klema's attempt to secure an attorney who would be available on that date. Until November 8, when the Examiner received telephone messages from an attorney asserting that he represented Klema, the Examiner had not heard further from Klema confirming the November 9 hearing date. Accordingly, the Examiner cancelled the November 9 hearing date.

For another four months thereafter, the Examiner heard nothing from either party about scheduling the hearing. On March 9, 2001, Klema contacted the Examiner and requested that a hearing be scheduled. In further conversation with the Examiner, Klema indicated that he still hoped to obtain an attorney and he and the Examiner agreed to hold the matter in abeyance while Klema pursued that effort. By letter dated March 12, 2001, the Examiner advised Klema and Wingra that, given Klema's "ongoing efforts to retain legal counsel, his complaint will continue to be held in abeyance."

On July 6, 2004, having heard nothing from either party in the intervening years, the Examiner advised Klema by letter as follows:

As you know, your complaint against Wingra Redi-Mix has been held in abeyance, at your request, while you sought legal counsel.

With this letter, I am notifying you that given the length of time that has elapsed since I heard from you (three years), I plan to dismiss your complaint unless you notify me to the contrary by Monday, July 26, 2004.

On July 14, 2004, Klema advised the Examiner that he (Klema) was ready to proceed to hearing. By the following letter dated July 15, 2004, the Examiner advised Wingra as follows:

July 15, 2004

Mr. Joseph Bartol  
Stroud, Willink & Howard  
Attorneys at Law  
25 West Main Street, Suite 300  
Madison, WI 53701-2236

Re: Wingra Redi-Mix, Inc.  
Case 3 No. 58899 Cw-3670  
(Jerry Klema vs. Wingra Redi-Mix)

Dear Mr. Bartol:

On July 14, 2004, Mr. Klema came to my office unannounced in response to my July 6 letter and talked to me. The purpose of this letter is to apprise you of what occurred.

First, Mr. Klema indicated that he had been unable to retain legal counsel because of the costs involved. Second, he indicated that he still wanted his complaint against Wingra Redi-Mix to go forward. Third, he indicated he would be representing himself in this matter. Fourth, after Mr. Klema told me the foregoing, I responded that I would write you a letter memorializing the foregoing and proposing dates for a hearing. Finally, Mr. Klema gave me two handwritten documents, copies of which are enclosed. In the first document, he requests a hearing. In the second document, he requests a subpoena. With regard to the second document (i.e. the subpoena request), I told him that after the case was scheduled for hearing, I would sign a blank subpoena and send it to him, but that it was his responsibility to have it (i.e. the subpoena) served.

In response to Mr. Klema's request for a hearing, I am offering the following dates: Thursday, September 9; Friday, September 10; Thursday, September 16; Friday, September 17 or Friday, September 24, 2004.

Very truly yours,

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones  
Examiner

REJ/gjc  
G0082G.28  
Enclosure  
cc- Mr. Jerry Klema (No enclosures)

By the following letter, dated August 18, 2004, Wingra asked that the complaint be dismissed:

August 18, 2004

**VIA HAND DELIVERY**

Raleigh Jones  
Examiner  
Wisconsin Employment Relations Commission  
P.O. Box 7870  
Madison, WI 53707-7870

Re: Jerry Klema vs. Wingra Redi-Mix  
Case 3 No. 58899 Cw-3670

Dear Mr. Jones:

Thank you for your recent letters regarding Mr. Klema's request to proceed to a hearing in this matter. As I alluded to in my voice-mail message earlier this week, in light of the extended amount of time that has passed, your letters and Mr. Klema's request for a hearing certainly took Wingra Redi-Mix, Inc. ("Wingra") by surprise. If you recall, Mr. Klema's complaint in this matter was filed back in May of 2000 and has essentially been sitting idle for the past four and a half years. Furthermore, Mr. Klema's May 2000 complaint is based entirely on a settlement that was reached back in June of 1999. This matter was originally scheduled for a hearing to be held on November 9, 2000, but that hearing was apparently cancelled on November 8, 2000, when Mr. Klema failed to respond to your inquiry about whether he was ready to proceed. Apparently, Mr. Klema would now like to have this case brought to a hearing and you have therefore identified possible hearing dates in September. As I suggested in my message, Mr. Klema's request for a hearing caught Wingra off guard and Wingra is still in the process of reviewing all of its information in regard to the June 1, 1999 settlement upon which Mr. Klema's claim is based. Therefore, Wingra respectfully requests some additional time. If that is acceptable, please advise as to available dates in October and November.

Notwithstanding the foregoing request, Wingra would ask that you consider whether a hearing is warranted. As you know, Section 111.07(2)(a), Wis. Stats., provides that complaints are to be heard no more than forty (40) days after the filing of the complaint. Obviously, this complaint has not been heard within the prescribed forty-day period. Mr. Klema certainly had the right and opportunity to request that the hearing be postponed and rescheduled. However, it does not appear that Mr. Klema ever submitted a written request to postpone and reschedule the November 9, 2000 hearing. He certainly did not file any such motion or request within the two (2) day period mandated by ERC 10.12(1). At

this point, the only written request that has been submitted by Mr. Klema is the July 14, 2004, letter which he apparently presented to you at the conclusion of your meeting with him on that same day. Because Mr. Klema did not previously file anything requesting an adjournment and rescheduled hearing, Wingra did not file a written objection. In light of the foregoing, Wingra must now formally object to Mr. Klema's written request to proceed with a hearing over forty (40) months after the originally scheduled hearing date and Wingra therefore respectfully submits that this matter should be dismissed. If you would like the parties to brief this matter, please advise.

Thank you for your careful consideration of the matters set forth herein and we look forward to your response.

Very truly yours,

STROUD, WILLINK & HOWARD, LLC

By: Peter J. Richter /s/  
Peter J. Richter

PJR/gh  
cc: Jerry Klema  
Wingra Redi-Mix, Inc.

The Examiner granted Wingra's request that the complaint be dismissed, principally because, during the 40 months between March 2001 and July 2004, Klema had never contacted the Examiner as to the status of his effort to retain legal counsel. Citing BLACKHAWK TECHNICAL COLLEGE, DEC. NO. 30023-D (WERC, 10/03), the Examiner concluded that the lack of contact for that extended period was sufficient to establish that Klema had abandoned prosecution of the complaint.

While we do not necessarily condone a complainant's failure to initiate communication with an examiner for more than three years in a pending case, under the circumstances present here we cannot agree with the Examiner's conclusion that Klema abandoned prosecution. The Examiner's March 12, 2001, letter holding the complaint in abeyance did not place a time limit on Klema's efforts to secure legal counsel and did not require that Klema keep the Examiner advised as to the status of those efforts. Further, between March 2001 and July 2004, neither the Examiner nor Wingra expressed any concern as to the length of time it was taking for Klema to secure legal counsel or about the absence of contact from Klema. In such circumstances, Klema could reasonably assume that neither Wingra nor the Examiner had any objection to the passage of time in question. When the Examiner ultimately contacted Klema in July 2004, Klema responded within a week and indicated he was prepared to proceed to hearing. These facts do not support a conclusion that Klema abandoned prosecution of his complaint and we conclude instead that he is entitled to proceed to hearing.

Contrary to the Examiner, we do not consider the result in this case at odds with our holding in BLACKHAWK. In BLACKHAWK, the complainant had failed to respond to directives from the examiner (including a directive to show cause why he had not abandoned prosecution of his case), the respondents had moved to dismiss based on the failure to respond, and complainant had failed to respond timely to the motion to dismiss. Based on these facts, the Commission concluded:

2. By failing to respond to the Examiner's May 22, 2001 and October 2001 directives and by failing to show cause why his complaint should not be dismissed, Mr. Benzing abandoned prosecution of his complaint.

Here, in contrast, Klema did not fail to respond to any directive from the Examiner. Indeed, when asked, Klema timely advised the Examiner that he was prepared to go to hearing, and the Examiner was prepared to convene a hearing until Wingra objected. By then, Wingra's objections to proceeding were themselves untimely. If Wingra was concerned about the absence of a formal request from Klema in March 2001 to postpone a hearing and hold the matter in abeyance, the time to object was in March 2001. If Wingra was concerned about the passage of time while Klema sought legal counsel, Wingra could have asked the Examiner to establish a deadline to terminate those efforts. Wingra did neither.

Given all of the foregoing, we have reversed the Examiner's order dismissing the complaint.<sup>1/</sup>

Dated at Madison, Wisconsin, this 27<sup>th</sup> day of May, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

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Judith Neumann, Chair

Paul Gordon /s/

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Paul Gordon, Commissioner

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner

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<sup>1</sup> Wingra properly objected to any consideration of the materials which accompanied Klema's petition or his written argument and thus we have not considered same when deciding this matter.