

JANET WERMUTH,

Complainant,

v.

Secretary, DEPARTMENT OF
AGRICULTURE, TRADE AND
CONSUMER PROTECTION

Respondent.

Case No. 82-PC-ER-47

INTERIM
DECISION
AND
ORDER

This matter was filed as a complaint of discrimination alleging harassment and discharge because of complainant's handicap. On January 5, 1988, respondent filed a renewed motion to dismiss for lack of prosecution. The parties have been provided an opportunity to file briefs.

In an interim decision and order dated June 24, 1987, the Commission denied the respondent's initial motion to dismiss. A copy of the Commission's interim decision and order is attached hereto. That decision explains the facts which led the Commission to conclude that the complainant should be granted an indefinite postponement of the hearing on the condition that within five months of the date of the decision, she submit "a physician's analysis including an opinion as to whether the complainant may safely appear at a hearing in this matter."

On December 14, 1987, the Commission received a letter from David L. Fogelson, M.D., which stated:

Jan Wermuth is currently under my professional supervision. She continues to suffer from Obsessive-Compulsive Disorder. While she has improved she still has symptoms which cause significant interference in her life and she requires help from others to function. In my opinion she is not yet able to safely appear before a hearing.

On January 5, 1988, the respondent renewed its motion to dismiss for "unreasonable neglect to proceed." The motion stated, in part:

Although the Commission's Interim Decision and Order granted complainant's request for an indefinite postponement of the hearing, there must of necessity be a finite limit to the length of time an action may be held in abeyance. If complainant's medical condition and treatment requirements make it inadvisable for her to attend a hearing, there are alternative means for introducing evidence from an unavailable witness. Within the five month time period after the Commission's interim decision, complainant not only was to provide a medical opinion regarding her condition, but also, according to the Commission's opinion, was to pursue her ". . . responsibility to either represent herself, or have someone else represent her in proceedings before the Commission." There is no basis to conclude that anything to accomplish the latter has been done and respondent therefore is renewing its motion to dismiss the appeal for lack of prosecution.

After the conclusion of the schedule for filing briefs on the respondent's motion, the designated hearing examiner informed the parties that he wished to speak with complainant's physician, Dr. Fogelson. The complainant agreed to contact Dr. Fogelson so that a telephone conference could be scheduled. Subsequent correspondence with the complainant indicated that due, at least in part to the complainant's medical condition, she was unable to complete a medical release form necessary for the conference between the parties, the examiner and Dr. Fogelson. By letter dated November 1, 1988, the complainant was directed to complete a medical release form at the time of her next appointment with Dr. Fogelson which was scheduled for some time in November. The Commission never received a completed release form from the complainant.

It has now been five and one-half years since the complainant first obtained a postponement of this matter for medical reasons. During that period, the complainant has received treatment for her medical condition. The Commission is currently unable to obtain reliable medical information as to whether the complainant may safely participate in a hearing. The most recent available information, dated December 14, 1987, is Dr. Fogelson's opinion that the complainant could not safely appear at a hearing. In addition, the information provided by Dr. Fogelson that is summarized in the Commission's June 24, 1987 order indicated that the complainant suffered from obsessive-compulsive disorder and from depression. Dr. Fogelson's description of the symptoms of those conditions indicates that these conditions are apt to interfere in the complainant's ability to pursue her complaint to hearing. This in-

formation is also consistent with a conclusion that the complainant's medical condition has interfered with her ability to provide additional information relative to the respondent's renewed motion to dismiss.

Based on the available information and on the inferences that may be derived therefrom, the examiner must deny the respondent's motion to dismiss. The examiner is unaware of any statutory language setting forth the authority of a quasi-judicial administrative body to dismiss matters for lack of prosecution, except to the extent that it is included within the reference in §227.44(5), Stats., to "informal disposition . . . by . . . default." However, that authority is inherent in the Commission's responsibility to process the cases that are placed before it:

It is considered well established that a court has the inherent power to resort to a dismissal of an action in the interest of orderly administration of justice. The general control of the judicial business before it is essential to the court if it is to function. Latham v. Casey & King Corp., 23 Wis. 2d 311, 314-15, 127 N.W.2d 225 (1964).

The policies behind the discretionary power of dismissal include the orderly administration of justice and the punishment of plaintiffs who have engaged in dilatory tactics. Marshall-Wis. v. Juneau Square, 139 Wis. 2d 112, 136, 406 N.W. 2d 764 (1987). While the underlying policies are apparent, Wisconsin case law does not offer a recitation of the factors which should be weighed when considering dismissal for lack of prosecution. Cases from other jurisdictions suggest that at least three factors may be considered: 1) the duration of the delay, 2) the reason for the delay,¹ and any prejudicial effect on the adverse party "such as the death of or unexplained absence of material witnesses." Holliday v. Foster, 221 Pa Super 388, 292 A2d 438 (1972). However, the cases only infrequently discuss the factor of prejudice to the adverse party, because such injury may be presumed from an unreasonable delay (27 C.J.S. §65(2) Dismissal & Nonsuit) and because prejudice is not required where no reasonable basis for the delay has been shown. Even where good cause exists for a delay in prosecution, the case of Jarva v. United States, 280 F2d 892 (CA9, 1960) indicates that prejudice to the adverse party may cause dismissal for lack of prosecution. In

¹The illness of a party as an excuse for the failure to prosecute an action is discussed in 80 A.L.R.2d 1399.

Jarva, the court vacated an order for dismissal that was entered under a court rule providing that the court might dismiss any action pending in which no steps had been taken for 6 months, unless good cause for the lack of prosecution was shown. During the greater part of the 6 month period, the plaintiff in Jarva had been ill and hospitalized, so there was hardly any time when he either could or should have attended the trial. The court stated that the case might be different if the defendant had suffered some particular prejudice during the period, and remanded the case so that if such prejudice was claimed, proof could be offered.

In the instant case, the respondent has not made any allegation that its ability to offer a defense to the complainant's claim of handicap discrimination has been prejudiced by the delay in the hearing. Given the complainant's medical condition and recognizing that the burden is on the complainant, rather than on the respondent, to proceed, the most efficacious method of finally determining whether this matter should be dismissed for lack of prosecution is for the respondent to renew its motion at such time that the complainant seeks the scheduling of a hearing or when the complainant's medical condition improves so that she is clearly able to respond to a motion to dismiss. However, at present, the respondent's motion to dismiss must be denied.

ORDER

The respondent's renewed motion to dismiss for lack of prosecution is denied.

Dated: January 31, 1989 STATE PERSONNEL COMMISSION


KURT M. STEGE, Designated Hearing
Examiner

KMS