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LINDA BUSH,

Complainant,

v.

Chancellor, UNIVERSITY OF  
WISCONSIN - MADISON,

Respondent.

Case No. 93-0069-PC-ER

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DECISION  
ON  
MOTION  
TO DISMISS

This matter is before the Commission on respondent's motion to dismiss for default or lack of prosecution made at the adjournment of the hearing on July 26, 1993. The background of this matter is as follows.

This case involves a charge of discrimination on the basis of the Family Medical Leave Act (FMLA)(§103.10, Stats.) and the Fair Employment Act (FEA) (Subchapter II, Chapter 111, Stats.), both with respect to the claim that respondent failed to return complainant to an exactly equivalent position on her return from a leave of absence. The complaint was filed on May 11, 1993. The FMLA requires that hearings of such matters be held within 60 days after the complaint is filed. §103.10(12)(b), Stats. A hearing originally was tentatively scheduled for June 21, 1993. However, due to ongoing settlement negotiations, the hearing was postponed and both parties agreed in writing to waive the 60 day requirement to the extent that the hearing be held no later than July 28, 1993.

A prehearing conference was held on July 14, 1993, at which the parties stipulated to a hearing on July 26, 1993, at 12:30 P.M., pursuant to a waiver of investigation. §230.45(1m), Stats. Complainant was represented by a union representative.

On July 19, 1993, complainant contacted the Commission and advised that she had retained counsel and that they needed to postpone the hearing. She was advised that her attorney should contact opposing counsel to try to arrange a postponement by stipulation, and failing that to get back to the Commission. On July 20, 1993, a representative of the respondent notified the Commission that it would not stipulate to a postponement.

On July 21, 1993, a prehearing conference call was held at which time complainant's union representative stated that she was not "representing" complainant but only "advising" her, that they were trying to retain counsel and had sent him the file, and that they assumed he would be handling the matter until she (the union representative) had called the Commission earlier that date and had been informed by the examiner that the attorney had told the examiner that he would not be appearing for complainant. The union representative further stated she was going to a union convention the next day and there was no way she could prepare for a hearing, submit her exhibits, etc., so she needed a postponement. Respondent's representative stated that because of his schedule and his witnesses' schedules he would not agree to a postponement, but was willing to waive service of documents and a list of witnesses,<sup>1</sup> so long as they were provided to him at least some time the morning of July 26, 1993. The examiner advised that he had been informed earlier that day by the attorney complainant wished to retain that he would not represent complainant unless and until a postponement was obtained by her union representative. The examiner further stated that in light of the statutory requirement to hold a hearing within 60 days, the impending expiration of the parties' limited waiver of that requirement, and the fact that complainant's union representative had appeared on complainant's behalf at the July 14, 1993, prehearing conference and had stipulated to the July 26, 1993, hearing date with no indication that this was contingent on retaining counsel, the postponement request was denied. The examiner further stated that complainant's union representative should advise complainant of this and that the hearing would proceed as scheduled, and if she could not represent complainant, to try to make arrangements for someone else to represent her. A letter confirming the denial of the postponement was sent out the same day to complainant and the parties' representatives.

On July 26th, the complainant and her representative arrived about 15 minutes late for the hearing. Complainant's representative again requested a postponement, stating that she was moving for a postponement so that the attorney of record could be there. The examiner stated that the attorney again had advised him the morning of the hearing that he had informed the union that he could not take the case unless a postponement were granted, and that

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<sup>1</sup> Section PC 4.02, Wis. Adm. Code, requires service of documents and witness lists at least three working days prior to hearing.

he was not on the case, and in any event there was no basis to believe he was now representing complainant. Complainant's representative then stated that due to the question about representation, she did not have the case records, which were en route to the attorney, and she had not been able to prepare. The examiner again denied the motion, reiterating essentially the same reasons as were given at the July 21st conference.

At that point, in response to a question from the examiner, complainant's representative recited a list of witnesses. Respondent's attorney objected to complainant's witnesses and any exhibits, noting that while he had been willing to waive the §PC 4.02 notice requirement to the extent of accepting notice provided through the morning of the hearing, no notice had been provided prior to hearing. The examiner sustained the objection, but inquired whether complainant herself would be a witness. Complainant's representative then stated that she wanted to use complainant as a witness and to testify herself. Respondent's attorney stated he would not object to them testifying.

At this point, complainant's representative received an approximate 20 minute recess to consult with complainant and to prepare her case. The hearing reconvened about 1:40 P.M. Following testimony from complainant and her representative, complainant rested her case about 3:30 P.M. Respondent's representative requested a discussion about hearing logistics so he could make arrangements with respect to several witnesses he had on call. Complainant and her representative stated that due to parental and child care responsibilities, they had to leave at 4:30 P.M. The examiner asked them to check on alternative arrangements. After consultation, they advised they could not stay past 5:00 P.M. Another union representative who had been present at the hearing stated she was not in a position to assume representation at that point, and did not want to proceed without complainant being present. Respondent's representative would not stipulate to a postponement, citing the witnesses' and his own schedules and respondent's interest in getting this matter resolved because of uncertainty regarding the positions in question.

The examiner stated it was clear the hearing could not be completed before complainant and her representative would have to leave, and it made little sense to proceed with the hearing at that time under those circumstances, but he would have to consider whether what had occurred amounted in effect to a default or failure of prosecution. Respondent's

representative stated he would formally request the case be dismissed on that basis. This motion was argued briefly and taken under advisement, and the hearing was adjourned about 4:10 P.M.

At this point the Commission will address the issue of whether this case should be dismissed for lack of prosecution. For judicial proceedings, dismissal for lack of prosecution requires findings of egregious conduct and that there was no clear and justifiable excuse for the delay. Monson v. Madison Family Institute, 162 Wis. 2d 212, 224, 470 N.W. 2d 853 (1991). The Commission will assume that no less rigorous standard applies in a proceeding of this nature. In deciding this issue, the Commission must consider all the circumstances surrounding the failure to have completed the hearing on July 26, 1993.

As noted above, under the FMLA, "the hearing shall be held within 60 days after the [Commission] receives the complaint." §103.10(12)(b), Stats. The parties waived this requirement to the extent that the hearing would be held by July 28, 1993. At a prehearing conference held July 14, 1993, complainant's union representative agreed to a hearing date of July 26, 1993. There was no indication that this agreement was contingent on retaining counsel. A week later another conference was convened at which the same representative requested a postponement to permit counsel to take over the case, and advised that due to her impending attendance at a convention, she would have no time to prepare the case. In light of the statutory hearing requirement and the fact that the same representative had just agreed to this hearing date a week before, the examiner denied the motion. However, he urged the representative to do what was necessary to prepare the case for hearing, or make other arrangements for complainant's representation by the union. Respondent's attorney offered to waive service of exhibits and a witness list as long as he received them by the morning of the hearing.

At the beginning of the hearing on July 26th, complainant's representative again moved for a postponement, on the same ground as before. The examiner denied the motion, noting that in a conversation that morning, the attorney in question had made it clear that he would not become involved as attorney in this matter unless and until there was a postponement of the hearing.

To this point, complainant's representative had made no attempt to exchange documents and a witness list with respondent's attorney as required by §PC 4.02, notwithstanding the denial of the postponement request on July 21st, the offer by respondent's attorney to accept service on a delayed basis,

and the fact that she had absolutely no reason to have thought that the renewed postponement motion, with no new grounds stated and in the face of a statutory deadline for hearing, would be granted. Under these circumstances, the case was undoubtedly subject to dismissal for lack of prosecution. However, after inquiry by the examiner whether complainant herself would seek to testify, and yet another waiver of objection under §PC 4.02 by respondent, the case proceeded.

Because complainant's representative had done essentially no preparation, a recess was held while she consulted with the complainant. Largely because of the time taken by the late arrival of the complainant and her representative, the discussion of the postponement motion, and the need for a recess, the complainant's representative did not proceed with her case until about 1:40 P.M. Following the presentation of complainant's case and the discussion of hearing logistics, complainant and her representative advised they had to leave at 4:30 P.M. (this was later revised to 5:00 P.M.). Since there was inadequate time to do more than start the respondent's case before the time that complainant and her representative, had to leave, and the other union representative declined to proceed as complainant's representative under the circumstances, the examiner adjourned the hearing about 4:10 P.M., after having taken under advisement the motion to dismiss.

Under all the circumstances, it must be concluded that the complainant's representative made no effort to prepare this matter for hearing, either after the July 26th hearing date was agreed to on July 14th, or after the postponement request was denied on July 21st. On July 26th she was not ready to proceed, she had made no effort to comply with §PC 4.02, despite respondent's unilateral agreement to accept documents up to the morning of the hearing, and she had not taken steps to be available, or to have complainant available, after 4:30 P.M., in the event that some additional time beyond the normal State quitting hour was needed to complete the hearing. Clearly, she was relying solely on her second request for postponement, which she had absolutely no reason to think would be granted since it was simply a reiteration of her previous motion that had been denied. Due to this lack of preparedness and stubborn reliance on her previously denied motion for continuance, the hearing was not completed on June 26th. In the Commission's opinion, this amounts to egregious conduct without any clear or justifiable excuse.

Complainant's representative stated at the hearing that she had been advised by a Commission investigator that if she were unable to handle the case due to being in bargaining, or if representation were changed, and the new representative were unable to do it, the hearing could be postponed. Assuming such a statement was made by a Commission investigator, this does not provide a reasonable basis for a belief that there was an absolute right to a postponement under any and all circumstances, such as are present here. There certainly could have been no basis whatsoever to rely on any such representation once the initial postponement request was denied on July 21st. Complainant's representative also referred to a belief that the matter would be settled. She may have had this belief, but she has not cited any progress in negotiations that would have made this a realistic expectation. It should have been clear after the July 21st conference that the hearing would proceed on July 26th. In any event, there was a duty to prepare in the event there was no settlement.

It should be emphasized that the Commission's conclusion that this case should be dismissed for failure of prosecution is based on all of the circumstances discussed above. The problem is not simply that complainant and her representative were unable to finish the hearing on July 26th, but that in the context in which this occurred -- an essentially total lack of preparedness to proceed, and a reliance on a postponement request which had been denied earlier, and which had no prospects for being granted when renewed at the commencement of the hearing.

Also, the Commission realizes that dismissal of this complaint is a harsh result. However, this must be weighed against the total disregard for the entire process by the failure of complainant's representative to prepare this case for hearing after stipulating to the hearing date, and then again after the motion to postpone was denied. This all occurred in the context of the statutory requirement for conducting the hearing within a certain time period, §103.10(12)(b), Stats.

In most cases, the egregious conduct of an attorney is imputed to the client, see Johnson v. Allis-Chalmers, 162 Wis. 2d 261, 284-85, 470 N.W. 2d 859 (1991). In this case, complainant was represented by a union representative. The Commission's rules do not require that a party's representative be an attorney, and a party's representative shall be presumed to have full authority to act on behalf of the party, §PC 1.04(1), Wis. Adm. Code. Complainant's union representative appeared for her at the July 14th prehearing, and complainant

also was present and aware of the agreement to proceed with the hearing on July 26th. While complainant was not present at the July 21st conference, a letter confirming that the postponement request had been denied was mailed to complainant that date. Under the circumstances, the complainant cannot be divorced from responsibility for the handling of this matter by her union representative.

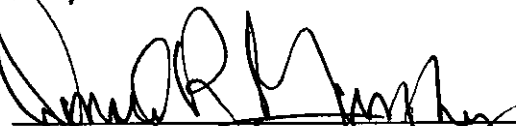
ORDER

This complaint is dismissed for lack of prosecution.

Dated: September 30, 1993 STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

AJT:lah

  
DONALD R. MURPHY, Commissioner

  
JUDY M. ROGERS, Commissioner

Parties:

Linda Bush  
4324 Lumley Road  
Madison, WI 53711

David Ward  
Chancellor, UW  
158 Bascom Hall  
500 Lincoln Drive  
Madison, WI 53706

NOTICE  
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW  
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

**Petition for Rehearing.** Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

**Petition for Judicial Review.** Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.