

**DEANNA NEUMAIER,**  
*Complainant,*

v.

**Secretary, DEPARTMENT OF HEALTH  
AND FAMILY SERVICES,**  
*Respondent.*

**RULING ON  
RESPONDENT'S  
MOTION TO DISMISS  
FMLA CLAIMS**

Case No. 98-0180-PC-ER

This case is before the Commission to resolve respondent's motion to dismiss complainant's FMLA claims due to her failure to appear at a prehearing conference. The facts recited below appear to be undisputed by the parties unless specifically noted to the contrary.

**FINDINGS OF FACT**

1. This complaint was filed on October 9, 1998. Complainant alleged that respondent discriminated against her because of her disability in violation of the Fair Employment Act (FEA), Subch. II, Ch. 111, Stats. She also alleged that respondent retaliated against her because of her use of family or medical leave in violation of the Family and Medical Leave Act (FMLA), §103.10, Stats.

2. Special time constraints exist for processing claims under the FMLA. This was explained to complainant in a Commission letter dated October 13, 1998. Pertinent excerpts are shown below.

By statute, §103.10(12)(b), Stats., complaints filed under FMLA are to be investigated and, if there is a finding of probable cause, a hearing held within 60 days after the Commission receives the complaint. Because of this abbreviated time frame, the investigation must be completed and the written Initial Determination issued within about 30 days. In order to complete the investigation within this period, the investigator will need to have all documents in hand from both the complainant and respondent by about the 25<sup>th</sup> day. Depending on the complexity of the case, it may be very difficult to carry out a full investigation within the allotted amount of time. The investigator may find

it necessary to issue the Initial Determination even though all of the relevant information has not been obtained.

Because the 60 day time frame can present some logistical problems, the Commission has scheduled a conference on October 22, 1998, at 9:00 a.m., to be held via telephone. A representative of the Commission will preside at the conference. Unless you contact us prior to the conference, we will assume that you can be reached for the conference at (telephone number given) . . .

3. The conference was held as scheduled but complainant's phone rang without answer each of the three attempts made to contact her. Respondent moved for dismissal based on lack of prosecution. The hearing examiner who conducted the prehearing prepared a certified letter, which provided complainant with an opportunity to explain why she did not appear at the scheduled conference.

4. Complainant called the Commission about three hours after the scheduled conference call (around noon on October 22, 1998) and spoke with the hearing examiner. It was explained to complainant that she was being sent a certified letter with an opportunity to explain why she did not appear at the conference. Complainant said she called the Commission that morning to say she could not appear because she had to work but no one answered the Commission's telephone. The hearing examiner indicated that someone is on premises at 7:00 a.m. Complainant said she phoned at about 7:15 a.m. Added to the certified letter for mailing was a summary of this conversation, as well as a statement from the Commission staff person who arrives at 7:00 a.m., which indicated she was out of the office for about five minutes and could have missed complainant's call.

5. A status conference was held on October 23, 1998, to attempt to resolve respondent's motion informally. The conference did not resolve the motion. Complainant elected to have her statement at the conference stand in lieu of any written statement she could have submitted under the instructions in the certified letter. Complainant's statement was summarized as follows in a letter to the parties dated October 23, 1998:

(The hearing examiner) first asked Ms. Neumaier to explain why she did not appear at yesterday's telephone conference and she provided the information noted in this paragraph. She said she was at work in a child care facility where

she works from 8:30 a.m. to 5:30 p.m., without much of a lunch. She said it is hard to come in late. She has had the job for three weeks. She knew about a week ago that the job conflicted with the scheduled (conference). She thought the Commission's hours were 8 a.m. to 4:30 p.m. When she worked for respondent it was at Central Colony where she mainly worked the second shift. (The hearing examiner) indicated that the information provided did not persuade (the hearing examiner) that (complainant) did what she could have to appear or provide advance notice of (complainant's) inability to appeal. (Complainant) agreed with (the hearing examiner's) conclusion.

#### OPINION

Respondent's request for dismissal of FMLA claim for complainant's failure to appear at the prehearing is denied. The Commission agrees that complainant knew of the importance of appearing at the prehearing and had no good excuse for failing to appear. However, she did telephone the hearing examiner three hours after the prehearing conference to explain her failure to appear. She also made herself available for the second conference on October 23, 1998, to attempt to resolve the matter informally.

The Commission feels dismissal, as a sanction is too severe under the circumstances presented. The Commission does not mean to imply that it condones or approves of complainant's conduct. Complainant is warned that a repeated failure by her to prosecute her case will be viewed as a serious matter with the potential that dismissal may be imposed as a sanction. The Commission will contact the parties to reschedule the prehearing conference.

ORDER

Respondent's motion to dismiss the FMLA claims is denied.

Dated: November 4, 1998.

STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

  
DONALD R. MURPHY, Commissioner

  
JUDY M. ROGERS, Commissioner

JMR

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