STATE OF WISCONSIN PERSONNEL COMMISSION

HALLEY H. YOUNG,
Complainant,

v.

Secretary, DEPARTMENT OF TRANSPORTATION
Respondent.

Case No. 00-0025-PC-ER

RULING

This is a charge of WFEA (Wisconsin Fair Employment Act; Subchapter II, Chapter 111, Stats. discrimination on the basis of age and disability. By letter of November 1, 2000, a conference call was scheduled for November 21, 2000. At that time the Commission placed a call to Mr Young and reached his answering machine. At this time, he was unrepresented. A message was left, but as of November 30, 2000, Mr Young had not returned the call. On that date the Commission sent another letter to Mr. Young which explained the above and stated "[w]e will assume you no longer are pursuing this case if we do not receive a written confirmation from you by December 20, 2000 providing a satisfactory explanation as to why you missed this conference call."

On December 4, 2000, the Commission received a notice of appearance advising that complainant had retained counsel. On December 8, 2000, the Commission received another letter from complainant's attorney which stated that "Mr Young was unable to leave work so he could take your call at the scheduled time. In other words, he may have jeopardized his present employment in order to be at his residence [to take the call]. He apologizes for any inconvenience this may have caused."

On December 13, 2000, the Commission received a letter from respondent's counsel. This raised the point that complainant had not provided an explanation for not contacting the Commission in advance of, on, or shortly after the date of the

prehearing., and contended that "Complainant has failed to provide a satisfactory reason for his neglect and his complaint should be dismissed."

In another letter from complainant's counsel filed December 22, 2000, he stated:

> In retrospect, it would have been better for him [complainant] to contact the Commission to explain that he would not be able to make it. He apologizes to both the Commission and counsel for the Department for any inconvenience he may have caused. However, dismissing his complaint for missing this [pre]hearing seems to be far too drastic. My office has appeared on Mr Young's behalf as counsel; therefore, there will be no more missed hearings in this matter Any prejudice suffered by the Department would presumably be minimal.

Subsequent to this missive, respondent's counsel replied by a letter filed January 5, 2001. In that letter, counsel asserts that complainant's excuse is inadequate since:

> Mr Young's experiences in a recent case [*Young v. DOT*] Case No. 00-0129-PC-ER certainly should have taught him the critical importance of schedules in matters before the Commission. In addition, in that same case, Mr Young had participated in prehearing telephone conference calls, and that alone should have made him aware of their importance. Mr. Young was sophisticated enough to file the appeal in this matter, and he should be held accountable for his neglect in not timely contacting the Commission.

The aforementioned case involved the same parties represented by the same attorneys. In that case, Mr. Young had a hearing scheduled for November 8, 2000. On November 7, 2000, complainant's attorney contacted the Commission and advised that Mr Young had just retained him that morning, and requested postponement of the hearing. When this request was denied, complainant dismissed his case. The Commission agrees with respondent that this experience should have impressed on Mr. Young the need to proceed with his complaint in accordance with notice provided by the Commission, and not to take his obligations lightly However, in comparing the two cases, there is a substantial difference in that in the first case the proceeding in question was the hearing on the merits, whereas in the instant case it was a prehearing conference call. Clearly, Mr. Young should have advised the Commission in advance

that he did not feel he could take the phone call in question at the appointed time. Yet, it would be a drastic step to dismiss the entire claim. A case should not be dismissed for failure of prosecution unless the complainant's conduct has been in bad faith or egregious.[1] *Witt v. DOT,* 93-0093-PC, 11/14/95. Failure to participate in a prehearing conference under varying circumstances has been found not to be egregious conduct. *See Neumaier v. DHFS,* 98-0180-PC-ER, 11/4/98; *Balele v. DOR,* 98-0002-PC-ER, 2/24/99. Also, in the present case, rescheduling the conference call will not prejudice respondent. While the Commission does not condone complainant's behavior, it will not dismiss this case at this time.

ORDER

This case will not be dismissed for failure of prosecution at this time. Another prehearing conference will be scheduled.

Dated: February 23, 2001

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

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JUDY M. ROGERS, Commissioner

[1] This principle does not apply in situations involving a letter to a complainant sent by certified mail pursuant to §111.39(3), Stats., which requires dismissal if the complainant does not respond in 20 days.