

STATE OF WISCONSIN

PERSONNEL COMMISSION

**CHRISTIAN JOHN COFFEY,**  
*Complainant,*

v.

**Secretary, DEPARTMENT OF HEALTH  
AND SOCIAL SERVICES  
(DEPARTMENT OF HEALTH AND  
FAMILY SERVICES),<sup>1</sup>**  
*Respondent.*

**RULING ON MOTION  
TO DISMISS FOR LACK  
OF PROSECUTION**

Case No. 95-0076-PC-ER

This matter is before the Commission on respondent's motion to dismiss for lack of prosecution. Both parties have submitted arguments on this motion.

No hearing has been held in this case, which involves a complaint of sex discrimination and retaliation under the WFEA (Wisconsin Fair Employment Act; Subchapter II, Chapter 111, Stats.). Originally, a hearing had been scheduled for May 8, 1997, at the Wisconsin Resource Center (WRC) in Winnebago, Wisconsin, on complainant's appeal of the investigator's initial determination of no probable cause to believe that discrimination had occurred with respect to complainant's probationary termination. On May 7, 1997, complainant's wife called the hearing examiner and requested on behalf of her husband that the hearing be postponed due to the death of her husband's mother. Respondent's attorney was added to the call, and had no objection to the postponement. After a short discussion, the hearing was rescheduled for May 27, 1997.

On May 27, 1997, the hearing examiner arrived at the WRC about 9:45 a. m. He was advised at that time by Karla Souzek, the WRC personnel manager that she had

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<sup>1</sup> Pursuant to the provisions of 1995 Wisconsin Act 27 (s. 9126(19)), the authority previously held by the Secretary of the Department of Health and Social Services (DHSS) with respect to the position that is the subject of this proceeding is now held by the Secretary of the Department of Health and Family Services (DHFS), effective July 1, 1996.

found a message on her answering machine at about 6:48 a. m. that morning. The message was from complainant's wife, and stated that he had a stomach illness. Respondent's attorney arrived shortly and an attempt was made to call complainant's number. However, the line was continually busy for about 20 minutes, and this attempt was abandoned. The Commission itself never received any communication from or on behalf of complainant concerning his absence on May 27<sup>th</sup> until he replied to the motion to dismiss.<sup>2</sup>

In its motion to dismiss,<sup>3</sup> respondent notes that complainant has never submitted a list of exhibits,<sup>4</sup> that no witnesses appeared for complainant at the hearing site, and that complainant never submitted a written confirmation of the reason for his unavailability at the first hearing date, as had been discussed in the conference call involving complainant's wife when the first hearing was postponed.

Complainant's response to the motion to dismiss is largely a personal attack on respondent's attorney. He notes that the prehearing conference call was twice postponed at the request of respondent's attorney due to illness in *his* family, and that he (complainant) never questioned the reasons given for these postponements. He also states:

I posses [sic] legal documents of my ulcerative colitis flair-up [sic] also for your respectful perusal. I do not feel an apology is appropriate for life's inconveniences that interrupt daily occurrences.

I apologize for Mr. Harris's thoughtlessness and the embarrassment & hurt his letter has caused my family & I. I expected more professionalism & compassion which evidently died when he entered his chosen law school. (letter to Commission received June 16, 1996)

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<sup>2</sup> Respondent also states in its motion to dismiss that "[a] woman apparently complainant's wife, left a telephone message at my office and at the Wisconsin Resource Center prior to the scheduled start of the hearing."

<sup>3</sup> §PC 5.03(8)(a), Wis. Adm. Code, provides that if a party fails to appear at a hearing and has the burden of proof (as complainant does here), "the commission shall consider a motion to dismiss by the parties present without requiring the presentation of any evidence."

<sup>4</sup> Pursuant to §PC 4.02, Wis. Adm. Code, each party must submit copies of its exhibits and a list of the names of its witnesses at least three working days before the commencement of the hearing.

Having considered respondent's motion and complainant's response, the Commission concludes that the motion should be granted and this case should be dismissed for lack of prosecution. Complainant's point that the prehearing conference was postponed twice at respondent's request is of little significance. These situations are not comparable. As respondent points out in response to complainant's letter, the postponement of the pre-hearing conferences did not involve the same kind of logistical problems as the postponement of a hearing because of the greater amount of preparation required for a hearing, the need to arrange for the attendance of witnesses, etc. Furthermore, the reschedulings of the pre-hearing conferences were worked out in advance. The only notice that was provided with respect to complainant's failure to appear at the second (May 27<sup>th</sup>) hearing was a message from complainant's wife left on the answering machine of the WRC personnel manager at about 6:48 a. m. the morning of the hearing, and another such message left at the office of the respondent's attorney after he had left for WRC. Certainly under these conditions, and there already having been one postponement, it should have come as no surprise to complainant that his failure to appear at the second hearing would be questioned. Yet although he refers in his response to the motion to dismiss to being in the possession of "legal documents of my ulcerative coliltis," he has not seen fit to submit them.

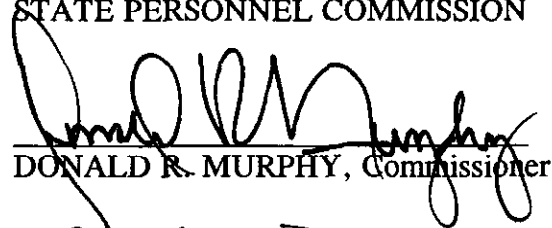
ORDER

Respondent's motion to dismiss is granted, and this case is dismissed for failure to prosecute.

Dated: July 16, 1997

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STATE PERSONNEL COMMISSION

  
DONALD R. MURPHY, Commissioner

  
JUDY M. ROGERS, Commissioner

Parties:

Christian Coffey  
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Secretary, DHFS  
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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 (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) 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 appli-

cation 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.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.)

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