

**EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
210 MARTIN LUTHER KING, JR. BOULEVARD
MADISON, WISCONSIN**

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| Peggy A Duff 912A N Clover Ln Cottage Grove WI 53527 <p style="text-align: center;">Complainant</p> <p style="text-align: center;">vs.</p> JC Penney Stores 135 East Towne Mall Madison WI 53704 <p style="text-align: center;">Respondent</p> | COMMISSION'S DECISION AND FINAL ORDER Case No. 20032069 |
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BACKGROUND

On March 27, 2003, the Complainant, Peggy Ann Duff, filed a complaint with the Madison Equal Opportunities Commission (Commission). The complaint alleged that the Respondent, J. C. Penney, had prevented her advancement within the Respondent's salon on several bases including age, sex, and color in violation of the Madison Equal Opportunities Ordinance, MGO 3.23 et seq. The Respondent denied the allegations of discrimination and indicated that either the Complainant failed to understand her benefit package or that she had failed to meet the Respondent's legitimate performance standards as quickly as other employees.

During the pendency of the investigation, the Complainant amended the complaint on October 9, 2003, to add lawful source of income and retaliation for her exercise of rights protected by the ordinance. Later, the Complainant would withdraw her claim of lawful source of income discrimination as being irrelevant. At the conclusion of the investigation, a Commission Investigator/Conciliator issued an Initial Determination concluding that there was probable cause to believe that the Respondent had retaliated against the Complainant for her exercise of rights protected by the ordinance, but there was no probable cause to believe that the Complainant had been discriminated against on any other basis. The Complainant appealed the findings of no probable cause to the Hearing Examiner.

Subsequent to the opportunity to supplement the record and provide additional written argument, on November 4, 2004, the Hearing Examiner affirmed the Initial Determination's findings of no probable cause in their entirety. The Complainant appealed the Hearing Examiner's Decision and Order, dated November 4, 2004, to the Commission.

After the opportunity to submit additional written argument was given to the parties, the Commission, on May 25, 2005, issued a Decision and Final Order reversing the Hearing Examiner's findings of no probable cause with regard to color, but upheld all other findings of no probable cause. The Commission found that the Complainant had most likely made a mistake and had intended to identify race as the protected class instead of color. The Commission concluded that the record held some grounds upon which it could find probable cause with regard to a claim of differential treatment based upon the Complainant's race. The complaint's allegations of discrimination based upon the Complainant's color/race, along with the claim of retaliation, were transferred to conciliation. Efforts at conciliation failed to produce a resolution of the allegations of the complaint.

The complaint was again transferred to the Hearing Examiner, this time for a hearing on those allegations of the complaint for which there was a finding of probable cause. After a considerable number of disagreements between the parties about discovery and schedules that were set and then broken and reset, a Hearing was set for April 11, 2006.

The Respondent appeared by a corporate representative and by counsel. The Complainant failed to appear at the time set for hearing or within 30 minutes of the scheduled time. Just as the Respondent was preparing to move for dismissal of the complaint, the Complainant appeared with someone to be a witness. The Complainant offered no explanation for her tardy appearance.

The Hearing Examiner called the case to order. As the first item, the Respondent moved for sequestration of witnesses. Sequestration is routinely granted as a method for assuring unbiased testimony from witnesses. The Complainant objected but was unable to state any compelling reason why sequestration should not be granted.

The Hearing Examiner asked the Complainant how she would like to proceed. She, in rough terms, indicated that she would not put on any witness or testimony. The Hearing Examiner explained that a failure to present any evidence or testimony would require the Hearing Examiner to dismiss the complaint. The Complainant continued to refuse to call any witness or present any testimony or evidence.

The Respondent moved for dismissal of the complaint. After one more explanation of the potential consequences of a continued refusal to present her case, the Complainant persisted in her refusal. The Hearing Examiner dismissed the complaint for a failure of proof.

On April 13, 2006, the Hearing Examiner issued a written embodiment of his oral decision. From this written decision the Complainant appealed to the Commission.

After providing the parties with the opportunity to submit additional written argument in favor of their respective positions, the Commission met on August 10, 2006, to consider the Complainant's appeal. Taking part in the Commission's consideration were Commissioners Brandon, Enemuoh-Trammell, Howe, McDonell, Morrison, Ross, Selkove and Zipperer.

DECISION

Given the record in this complaint, the Commission must affirm the Hearing Examiner's dismissal of the complaint. It is clear that the Hearing Examiner explained the potential consequences of the Complainant's refusal to present testimony or evidence in furtherance of her claim. Despite the explanations, the Complainant persisted in her refusal to proceed. Such conduct deprives the Hearing Examiner and the Commission of any factual record whatsoever. Without a record, the complaint must be dismissed.

The Commission wonders if the outcome might have been different if the Complainant had counsel available to her during the pendency of this claim. While it does appear that she was briefly represented at one stage of the process, the record demonstrates someone who did not have an understanding of the process or the expectations of one filing a complaint with the Commission. There is nothing that the Commission can do at this stage to assist the Complainant with her failure to comprehend the importance of the requirements involved in bringing a complaint. However, the Commission suspects that the Complainant may be a good example of why adequate representation before the Commission is almost essential.

ORDER

The complaint is hereby dismissed with prejudice.

Joining in the Commission's action are Commissioners Brandon, Enemuoh-Trammell, Howe, McDonell, Morrison, Ross, Selkove and Zipperer. There were no Commissioners opposing the Commission's action.

Signed and dated this 25th day of August, 2006.

EQUAL OPPORTUNITIES COMMISSION

Bert G. Zipperer
President

cc: Robert C Howard III
Lisa Abram

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BACKGROUND

On March 27, 2003, the Complainant, Peggy A. Duff, filed a complaint with the Madison Equal Opportunities Commission (Commission). The complaint alleged that the Respondent, JC Penney, discriminated against her on several bases in her terms and conditions of employment and retaliated against her for her exercise of rights protected by the ordinance. The Complainant amended her complaint on October 9, 2003, to add several allegations of discrimination and new protected classes.

Subsequent to an investigation of the complaint as amended, a Commission Investigator/Conciliator on March 1, 2004, issued an Initial Determination concluding that there was probable cause to believe that the Respondent had retaliated against the Complainant for her exercise of rights protected by the Ordinance but that there was no probable cause to believe that the Respondent had discriminated against the Complainant on any of the other bases set forth in the Complainant's complaint as amended. The Complainant timely appealed the Initial Determination's findings of no probable cause. The complaint was transferred to the Hearing Examiner for further proceedings.

On November 4, 2004, the Hearing Examiner issued a Decision and Order affirming the Initial Determination's findings of no probable cause to believe that discrimination had occurred. The Complainant timely appealed the Hearing Examiner's Decision and Order dated November 4, 2004 to the Commission.

Subsequent to the opportunity to submit written argument in support of the parties position, the Commission, on May 24, 2005, issued the Commission's Decision and Interim Order affirming the Hearing Examiner's conclusion that there was no probable cause to believe discrimination had occurred as set forth in the Initial Determination with the exception that the Commission found that there was probable cause to believe that discrimination may have occurred on the basis of color in the terms and conditions of the Complainant's employment. The Commission remanded this issue to conciliation so that it could be joined with the issue of retaliation for which there had been a finding of probable cause in the Initial Determination dated March 1, 2004.

Efforts at conciliation failed and this matter was certified to the Hearing Examiner for a public hearing on the issues of discrimination on the basis of color and retaliation for the exercise of rights protected by the ordinance. After extensive pre-hearing motions and disputes, the Hearing Examiner, on March 8, 2006, issued a Notice of Hearing setting the date for hearing on the merits of the complaint for April 11, 2006. The

Complainant received the Notice of Hearing on March 10, 2006, as evidenced by a return receipt signed by the Complainant.

DECISION

The hearing on the merits of the complaint was noticed to begin on April 11, 2006 at 9:00 a.m. in Room LL-120 of the Madison Municipal Building, 210 Martin Luther King, Jr. Blvd., Madison, WI (sic). The Complainant and a companion, Aaron Green, appeared at 9:35 a.m. for the hearing without an explanation for their tardiness. The Respondent appeared prior to 9:00 a.m. by its counsel, Lisa Abram, and by its corporate representative, Russell Henke.

Once the case was called, the parties sought to clarify issues relating to medical records and the issues for hearing. After those issues had been resolved on the record, the Hearing Examiner asked the Complainant if she was prepared to call her first witness. The Respondent made a request for sequestration of witnesses. One witness for the Respondent left the hearing room. It was determined that the Complainant's companion would also be a witness. She refused to have Mr. Green be subject to the sequestration order. At no time did the Complainant indicate that Mr. Green was appearing as a lay representative, only that he would testify at the hearing.

In response to the Respondent's motion for sequestration, the Hearing Examiner indicated to the Complainant that Mr. Green would have to leave the hearing room pending his testimony. The Complainant's response was to indicate that the Respondent had submitted its proposed exhibits only the day before and had only served those documents upon the Complainant late in the evening or over night the day before the hearing. The Complainant seemed to assert that the Hearing Examiner was favoring the Respondent.

The Hearing Examiner indicated that the issue of the Respondent's timeliness in submitting its exhibits was a separate issue from that of the sequestration of witnesses. The Hearing Examiner indicated further that the exhibits were merely proposed and had not yet been moved into or received into evidence. The Hearing Examiner attempted to explain on the record why documents contained in the Commission files were not automatically considered part of the hearing record. The Hearing Examiner indicated that only documents presented as exhibits at the hearing would be considered by the Hearing Examiner in determining whether discrimination or retaliation had occurred. It was pointed out that the Complainant had failed to submit any documents in advance of the hearing as required by the Hearing Examiner.

After further discussion, the Complainant contended that she did not believe that she could get a fair hearing before the Hearing Examiner. The Hearing Examiner indicated that he saw no basis for her concerns based upon the rulings made so far that date. The Complainant moved for a continuance of the hearing. The Respondent objected to the Complainant's motion.

The Hearing Examiner attempted to inquire into the grounds for the Complainant's motion for a continuance. In general, it appears that the Complainant felt that she would not be given a fair hearing and that there would be no prejudice to the Respondent given the length of time the complaint had been in process. The Hearing Examiner denied the Complainant's motion for a continuance indicating that she had failed to state any compelling or reasonable grounds for a continuance. The Hearing Examiner indicated that proceedings had been ongoing for a sufficiently long period of time for the parties to familiarize themselves with Commission process and procedures so that a continuance would not be necessary.

When the Hearing Examiner asked the Complainant if she would call her first witness, she indicated that she would not call any witness. The Hearing Examiner next asked if the Complainant was resting her case. The Complainant indicated that she was. The Respondent then moved for dismissal of the complaint for a failure to prosecute/lack of evidence in the record.

After taking argument from the Complainant, the Hearing Examiner granted the Respondent's motion to dismiss. The Complainant's only contention was that it was unfair that the complaint be dismissed; that the Hearing Examiner should give her latitude since she was unrepresented and that she had a Constitutional right to a hearing. The Hearing Examiner, given the lack of any willingness on the part of the Complainant to put any evidence into the record at all, could find no support for the Complainant's contentions.

ORDER

For the foregoing reasons, the Hearing Examiner hereby orders that the complaint as amended in the above-captioned matter be dismissed. Though not so enumerated, this Decision and Order shall stand as the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order for purposes of Section 11.1 and 11.2 of the Rules of the Equal Opportunities Commission.

Signed and dated this 13th day of April, 2006.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner

cc: Robert C Howard III
Lisa Abram