

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

David A Burns
306 N Brooks St #429
Madison WI 53715

Complainant

vs.

Erbert's & Gerbert's Sandwich Shop
540 University Ave
Madison WI 53703

Respondent

HEARING EXAMINER'S DECISION
AND ORDER ON RESPONDENT'S
MOTION TO DISMISS

CASE NO. 20142208

BACKGROUND

On November 18, 2014, the Complainant, David Burns, filed a complaint of discrimination with the Madison Department of Civil Rights Equal Opportunities Division (EOD). The complaint charged that the Respondent, Erbert and Gerbert's Sandwich Shop, either failed to hire him or fired him from employment due to his conviction record in violation of the Madison Equal Opportunities Ordinance, Sec. 39.03(8) Mad. Gen. Ord. The Respondent denied having discriminated against the Complainant in any manner.

Subsequent to an investigation, a Division Investigator/Conciliator issued an Initial Determination finding that there was probable cause to believe that the Respondent had discriminated against the Complainant in employment on the basis of his conviction record. The Complaint was transferred to conciliation. Efforts to conciliate the complaint were unsuccessful. On May 11, 2015, the complaint was transferred to the Hearing Examiner for a public hearing on the allegations of the complaint.

On June 3, 2015, the Hearing Examiner issued a Notice of Pre-Hearing Conference. The Notice set the time and date for a Pre-Hearing Conference for 11:00 a.m. on June 15, 2015. On the morning of the Pre-Hearing Conference, the Hearing Examiner received a message on his voice mail in the office from the Complainant. The Complainant requested that the Pre-Hearing Conference be rescheduled because the Complainant was unable to be released from work to attend the Pre-Hearing Conference. The Complainant indicated that it was an unusual circumstance that no other employees were available and that he'd be sure to attend a rescheduled Pre-Hearing Conference.

The Hearing Examiner reluctantly agreed to reschedule the Pre-Hearing Conference. The Respondent was notified by telephone of the rescheduling.

On July 28, 2015, the Hearing Examiner once again issued a Notice of a Pre-Hearing Conference. This rescheduled Pre-Hearing Conference was set for 11:00 a.m. on August 13, 2015. The Hearing Examiner attempted to give the Complainant adequate notice so that the Complainant could attend the Conference as the Complainant had committed when the earlier Pre-Hearing Conference was rescheduled.

At the time set for the Pre-Hearing Conference, the Respondent appeared by its owner and a corporate partner. The Complainant did not appear at the scheduled hour. The Hearing Examiner and the Respondent's representatives waited for thirty minutes during which the Complainant did not appear. At the end of the thirty-minute period, the Hearing Examiner called the Pre-Hearing Conference to order. The Respondent moved that the complaint be dismissed for the Complainant's failure to appear.

The Hearing Examiner took the Respondent's motion under advisement and indicated Complainant's failure to appear at the Pre-Hearing Conference as scheduled. On August 20, 2015, the Hearing Examiner issued the Order to Show Cause giving the Complainant until August 28, 2015 to provide the Hearing Examiner with a good explanation for his failure to appear. On August 31, 2015, the Hearing Examiner received a response from the Complainant. As there was no indication that the Complainant had served a copy of his response on the Respondent, the Hearing Examiner caused a copy to be sent to the Respondent and permitted a reasonable period of time for a reply from the Respondent.

DECISION

While the Equal Opportunities Commission recognizes that default judgments are not favored by the courts and that it is preferable for each person to have his day in court, the Commission has a long history of holding, particularly Complainants, to the requirements to attend scheduled proceedings. Norris v. Cost Cutters of Madison, MEOC Case No. 20052134 (Comm. Dec. 03/12/2014), Hohlstein v. Shopko, MEOC Case No. 22381 (Ex. Dec. (11/26/96), Velazquez-Aguilu v. Abercrombie & Fitch, MEOC Case No. 03398 (Comm. Dec. 7/20/99, Ex. Dec. 03/30/99). In determining whether a party before the Commission should be excused for a failure to appear, the Commission has determined that the standard of excusable neglect should be used. Norris, supra. In this test, it is the duty of the party seeking relief for a failure to appear to demonstrate something more than mere inadvertence or the everyday reasons for one to miss an appointment. Norris, supra.

The present matter is somewhat unusual in the experience of the Hearing Examiner. On the first occasion where the Complainant discovered that he was not going to be able to keep the scheduled time for the Pre-Hearing Conference, he took reasonable steps to notify the Hearing Examiner. While the explanation for the Complainant's failure to be able to appear on June 15, 2015, may have been somewhat questionable, the Complainant's responsible action of notifying the Hearing Examiner of the problem and requesting consideration for his circumstances demonstrated a good faith intention to proceed.

It is this background that makes the Complainant's failure to appear or to request rescheduling of the August 13, 2015 Pre-Hearing Conference that more puzzling. This is compounded by the Complainant's failure to make a timely submission to the Hearing Examiner's Order to Show Cause for the Complainant's failure to appear. The Order to Show Cause required that the Complainant make his demonstration on or before August 28, 2015.

While it appears that the Complainant may have attempted to mail his submission on August 28, 2015 that does not constitute compliance with the Hearing Examiner's Order.

The Complainant in his submission asserts that he was overwhelmed with a new work position and that he simply forgot the Pre-Hearing Conference. The Complainant states that if the complaint is rescheduled, he will not miss any further proceedings.

While the Hearing Examiner is inclined to believe that the Complainant did not intend to miss the rescheduled Pre-Hearing Conference due to the press of his work schedule, the Hearing Examiner is not convinced that the Complainant's statements of contrition demonstrate excusable neglect or are sufficient evidence of the Complainant's ability to keep future requirements. It is the Hearing Examiner's opinion that the Complainant's explanation for his failure to appear is precisely the type of common negligence or common occurrence that falls short of demonstrating excusable neglect. This belief is strengthened by the Complainant's failure to make a timely submission to the Order to Show Cause.

While the Hearing Examiner does not like to dismiss a complaint where a party appears to be contrite and promises not to miss future scheduled proceedings, the Hearing Examiner must consider the impact of a party's actions on not only the Hearing Examiner and the Commission's resources, but must also consider the affect of continued efforts to schedule proceedings will have on the other party. In this matter, the Respondent was prepared to appear on June 15, 2015 and did appear on August 13, 2015. One of the Respondent's representatives travelled from Minnesota to appear. Without a more secure belief that there will not be future scheduling problems, the Hearing Examiner finds that it is unfair to place additional expense upon the Respondent.

ORDER

For the foregoing reasons, the Hearing Examiner dismisses the complaint for the Complainant's failure to appear at the Pre-Hearing Conference on August 13, 2015 and for the Complainant's failure to timely submit a response to the Hearing Examiner's Order to Show Cause.

The Complainant may seek review of this Decision and Order by submitting a written request to the Appeals Committee within 20 days of the undersigned date.

Signed and dated this 7th day of October, 2015.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner