

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

Evelyn E Miller
1409 McKenna Boulevard #4
Madison WI 53711

Complainant

vs.

Madison Pointe Senior Living
705 Ziegler Road
Madison WI 53714

Respondent

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

CASE NO. 20162043

EEOC CASE NO. 26b201600025

On March 31, 2016, Evelyn Miller, the Complainant, filed a complaint of discrimination with the Madison Department of Civil Rights Equal Opportunities Division (EOD). The complaint alleged that the Respondent, Madison Pointe Senior Living, discriminated against her on the bases of race and color when it terminated her employment. The Respondent denied that it discriminated against the Complainant on any basis.

Subsequent to an investigation, a Division Investigator/Conciliator issued an Initial Determination concluding that there was probable cause to believe that the Respondent had discriminated against the Complainant on the bases of race and color in employment when the Respondent terminated the Complainant's employment. Efforts at conciliation were unsuccessful. The complaint was transferred to the Hearing Examiner for further proceedings.

On November 16, 2016, the Hearing Examiner issued a Notice of Pre-Hearing Conference scheduling a Pre-Hearing Conference for room 103A of the City-County Building at 9:30 a.m. on December 7, 2016. The Respondent appeared by its counsel Kristina Hulseby. The Complainant did not appear at the scheduled time nor within 30 minutes of the scheduled time.

After waiting for 30 minutes for the appearance of the Complainant, the Hearing Examiner called the case. The Respondent moved for dismissal of the complaint for the failure of the Complainant to appear. The Hearing Examiner took the Respondent's motion to dismiss under advisement and indicated that he would issue an Order to Show Cause why the complaint should not be dismissed for the Complainant's failure to appear. On December 8, 2016, the Hearing Examiner issued the Order to Show Cause.

The Order gave the Complainant until December 23, 2016 to provide an explanation for her failure to appear. The Respondent was to have the opportunity to respond to any submission of the Complainant.

On December 22, 2016, the Complainant submitted an explanation for her failure to appear. She did not provide a copy of her submission to the Respondent. On January 9, 2017, the Hearing Examiner mailed a copy of the Complainant's submission to the Respondent and extended the time for the Respondent to file a response to January 27, 2017. The Respondent filed a response to the Complainant's submission on January 23, 2017 along with a request that if the Respondent's motion was denied, that she be permitted to appear by telephone.

DECISION

When sending Notices of Pre-Hearing Conferences and other similar documents, the Division generally sends mail "delivery confirmation." This means that the United States Post Office will confirm the date and time of the delivery of such a document. It does not require signature of someone at the address of the addressee. In the present matter, the tracking information provided by the United States Post Office for the Notice of Pre-Hearing Conference indicates that it delivered the document "at or in" the Complainant's mailbox on November 18, 2016.

The Complainant, in her submission received by the Department on December 22, 2016, states that despite the information provided by the United States Post Office that she did not receive the Notice of Pre-Hearing Conference. The Complainant cannot explain what happened to the Notice other than to speculate that it was perhaps delivered to the wrong mailbox.

In response to the Complainant's explanation that she never received the Notice of Pre-Hearing Conference, the Respondent recites that it has received all documents mailed to it and to counsel in a timely manner. The Respondent, for this reason, doubts the sincerity of the Complainant's explanation.

The Hearing Examiner recognizes that the Complainant is placed in a difficult position trying to prove a negative. Accepting the truth of the Complainant's statement, it will be virtually impossible for the Complainant to prove that she did not actually receive the document that the Post Office asserts it delivered.

The Hearing Examiner notes that the Complainant appears to have received and responded to all requests for information or notices to appear for other meetings during the processing of her complaint. The Hearing Examiner sees two possible inferences to be drawn from this fact. First, the Complainant's explanation that she did not receive the Notice of Pre-Hearing Conference is true as she would likely have appeared as required. Second, the Complainant's past history of receipt and response indicates that there was unlikely to have been a failure of delivery and the Complainant's current explanation represent a falsehood.

At this point in the process, the Hearing Examiner finds that the Complainant's explanation, though subject to question, is more likely true and that accordingly, the Hearing Examiner will deny the Respondent's Motion to Dismiss and will reschedule the Pre-Hearing Conference. The Hearing Examiner finds that the Complainant's past history of responsiveness to correspondence from the Department suggests that she did not receive the Notice of Pre-Hearing Conference. The Hearing Examiner notes that the Post Office's tracking information that was provided to the parties along with the Order to Show Cause does not state that the document was delivered to the Complainant's mailbox only that it was placed in or at or nearby

the Complainant's mailbox. This leaves open the possibility of misdirection at the point of delivery.

The Department's move from "return receipt required" to "delivery confirmation" carries with it some degree of imprecision. It would be wrong to impose the consequences of that imprecision on the Complainant especially when it would require the proof of a negative.

ORDER

The Respondent's motion to dismiss is denied. By separate cover, the Hearing Examiner will schedule further proceedings in this matter.

Signed and dated this 9th day of February, 2017.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

cc: Kristina R Hulse