

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

<p>Joyce Foy 50 Mount Zion Rd., #F1 Atlanta, GA 30354</p> <p style="text-align: center;">Complainant</p> <p style="text-align: center;">vs.</p> <p>Madison Rehabilitation & Convalescent Center 2308 University Avenue Madison, WI 53705</p> <p style="text-align: center;">Respondent</p>	<p>COMMISSION'S DECISION AND ORDER</p> <p>Case No. 21831</p>
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BACKGROUND

The Complainant, Joyce Foy, is an African American female. On January 5, 1993, she filed a complaint of discrimination with the Madison Equal Opportunity Commission (Commission) charging that the Respondent, Madison Rehabilitation and Convalescent Center, had discriminated against her on the basis of her race by terminating her employment in December of 1992. The Respondent denied the allegations, asserting that she was terminated for legitimate nondiscriminatory reasons connected with her performance of her job duties. An Initial Determination concluding that there was probable cause to believe that the Complainant had been discriminated against in violation of the Equal Opportunities Ordinance MGO Sec. 3.23 et seq. was issued on July 8, 1993. The claims of discrimination were transferred to conciliation. Efforts to resolve the complaint through conciliation proved unsuccessful and the complaint was transferred to the Hearing Examiner for a public hearing on the merits of the remaining allegations.

A Pre-Hearing Conference was scheduled for August 19, 1993. This conference was conducted telephonically because the Complainant had moved from the State of Wisconsin during the processing of the complaint. During that Pre-Hearing Conference, the parties entered into settlement negotiations and with the assistance of a Commission conciliator reached an agreement. That agreement was memorialized in the form of a Commission conciliation agreement that was then sent to the parties for their approval. The Complainant refused to sign the conciliation agreement and repudiated the settlement.

A further Pre-Hearing Conference was held on March 16, 1994. At that conference a date for the hearing was established with the consent of the parties along with several other interim dates. These dates were embodied in a Notice of Hearing and Scheduling Order that were issued on March 18, 1994.

The Complainant only partially complied with the requirements of the Scheduling Order in that she filed only an initial witness list but filed or exchanged no other information or documents required by the Scheduling Order.

On April 29, 1994, the Respondent filed a Motion to Dismiss alleging that the Commission was without jurisdiction to hear the complaint. As grounds the Respondent cited a settlement agreement in a union grievance purporting to settle the Complainant's discrimination claim. The Hearing Examiner issued a Decision and Order on July 5, 1994 denying the Respondent's motion and indicating that the hearing on the Complainant's complaint would commence as scheduled on July 19, 1994.

The Hearing Examiner called the hearing to order at 8:30 a.m. on July 19, 1994. The Complainant was not present and had not contacted any person at the Commission prior to the hearing to request a postponement or delay in the proceedings. The Respondent appeared by its attorney C. William Isaacson, and several employees who were not identified on the record. The Hearing Examiner waited for the 30 minutes required by Commission Rule 9.4. At that time the Respondent moved for the dismissal of the complaint. The Hearing Examiner took this motion under advisement and indicated that he would issue an Order to Show Cause why the complaint should not be dismissed.

Shortly after returning to the Commission offices, the Hearing Examiner received a package of materials from the Complainant. These documents appear to claim that some of them had been sent at an earlier date and others seem to have been sent to indicate that the Complainant would not be appearing at the hearing because of some undefined illness and that the Complainant would pursue remedies before other forums.

On July 21, 1994, the Hearing Examiner issued the above referenced Order to Show Cause. This Order required the Complainant to submit in the form of an affidavit, her explanation of her failure to appear and to justify any belief that the complaint should not be dismissed. On August 5, 1994, the Complainant submitted a response to the order. The materials submitted by the Complainant indicated that she had not appeared because of illness but did not explain what that illness was or why she, did not contact the Commission before the hearing date. Pursuant to the terms of the order, the Respondent was given an opportunity to reply to any materials submitted by the Complainant. Since it did not appear that the Complainant had served a copy of her materials on the Respondent, the Hearing Examiner forwarded a copy of the Complainant's submittal to the Respondent on August 11, 1994. On August 19, 1994, the Respondent filed its reply.

On August 29, 1994, the Hearing Examiner issued a Decision and Order dismissing the complaint. The Hearing Examiner concluded that the Complainant had failed to demonstrate good cause for her failure to appear for the hearing on July 19, 1994. He further found that the Complainant's explanation that she was ill was not supported by the record. The Complainant appealed the decision on September 8, 1994.

The Commission issued a Notice of Appeal and Briefing Schedule on September 13, 1994. On October 12, 1994, the Complainant submitted materials in support of her appeal including a statement of her son indicating that he had been prepared to drive his mother to Wisconsin for the hearing. The Commission met on May 25, 1994 to consider the Complainant's appeal. Participating in the Commission's deliberations were Commissioners Bruskewitz, Gardner, Greenberg, Vedder, Verridan and Washington.

DECISION

The Complainant asks the Commission to substitute its judgment for that of the Hearing Examiner with respect to her demonstration of good cause for her failure to appear at the hearing scheduled for July 19, 1994. On this record, the Commission is unable to do so.

Essentially the Complainant renews her claim that she was ill at the time of the hearing and was thereby prevented from appearing. To bolster her contention that she had intended to appear, she includes the statement of her son that he was ready to drive his mother to Madison. Unfortunately, there is nothing in this record that allows the Commission to determine the nature or severity of the Complainant's illness. Without evidence supporting a finding that her illness was so serious that it prevented the Complainant from traveling, appearing or contacting the Commission to explain her circumstances, the Commission cannot conclude that the Hearing Examiner erred in determining that the Complainant had failed to show good cause for her failure to appear at the scheduled hearing.

There is ample evidence that the Complainant knew of the hearing date and the requirement that she appear on that date. She had participated in a Pre-Hearing Conference during which the date was established. She received the Notice of Hearing and Scheduling Order which sets forth the requirement of appearance and the need to make the Hearing Examiner aware of any problems that the parties might have with the dates set forth therein. The Notice of Hearing indicates that no changes will be made in the hearing date within 7 days of the hearing unless there is an emergency. The Complainant also received a copy of the Hearing Examiner's Decision and Order dated July 5, 1994 in which he reaffirmed the date of the hearing. Despite being aware of the need to attend her hearing, the Complainant did not appear and did not inform anyone prior to the hearing of any reason why she could not appear.

In order to show good cause why she was unable to attend the hearing, the Complainant must demonstrate that some event beyond her control intervened and that a reasonable person would consider the intervening event to be serious enough to have prevented her from attending the hearing. While illness could be one of these circumstances, it must be serious and definable. The statement of a medical professional would be helpful but is not necessarily required.

In the present case, the Complainant states that she was ill. She provides no documentation of this fact. She does not describe her illness other to say that she did not feel that she would be able to travel to attend the hearing. This, by itself, is insufficient to demonstrate that there was good cause for her failure to attend the hearing. The Complainant's illness might have been a particularly bad cold or something more serious. It is impossible to say on this record. Since it is the Complainant's burden to make the required demonstration, she must present enough evidence or facts to persuade the Commission or its representatives that she was legitimately unable to attend the hearing. She fails in this because she does not provide any information about her illness that could lead the Commission to the conclusion that she was so seriously ill that she could not travel or attend the hearing.

The Complainant also asserts that she mailed her excuse Federal Express and that should be considered sufficient notice of her inability to attend. The Complainant sent this notice the day before the hearing. It was not received by the Hearing Examiner until after the hearing had been called to order and adjourned. The Commission determines that it was unreasonable of the Complainant to have believed that a package sent Federal Express would have arrived prior to the start of the hearing at 8:30 a.m. on July 19, 1994. If the Complainant had seriously intended to inform the Hearing Examiner of her unavailability, she should have sent her package earlier or contacted the Commission's office by telephone.

ORDER

The Complainant's appeal is denied. The complaint is hereby dismissed.

Joining in this decision are the following Commissioners: Bruskewitz, Gardner, Greenberg, Vedder, Verridan and Washington.

Signed and dated this 5th day of June, 1995.

EQUAL OPPORTUNITIES COMMISSION

Booker Gardner
President

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

<p>Joyce Foy 1567 Woodland Ave., SE Atlanta, GA 30316</p> <p style="text-align: center;">Complainant</p> <p style="text-align: center;">vs.</p> <p>Madison Rehabilitation & Convalescent Center 2308 University Avenue Madison, WI 53705</p> <p style="text-align: center;">Respondent</p>	<p>HEARING EXAMINER'S DECISION AND ORDER DISMISSING COMPLAINT</p> <p>Case No. 21831</p>
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BACKGROUND

The Complainant, Joyce Foy, is an African American female. On January 5, 1993, she filed a complaint of discrimination with the Madison Equal Opportunities Commission (Commission) charging that the Respondent, Madison Rehabilitation and Convalescent Center, had discriminated against her on the basis of her race by terminating her employment in December of 1992. The Respondent denied these allegations, asserting that she was terminated for legitimate non-discriminatory reasons connected with her performance of her job duties. An Initial Determination concluding that there was probable cause to believe that the Complainant had been discriminated against in violation of the Equal Opportunities Ordinance, MGO Sec. 3.23 et seq. was issued on July 8, 1993. The claims of discrimination were transferred to conciliation. Efforts to resolve the complaint through conciliation proved unsuccessful and the complaint was transferred to the Hearing Examiner for a public hearing on the merits of the allegations.

A Pre-Hearing Conference was scheduled for August 19, 1993. This conference was conducted telephonically because the Complainant had moved from the State of Wisconsin during the processing of the complaint. During that Pre-Hearing Conference, the parties entered into settlement negotiations and with the assistance of a Commission conciliator reached an agreement. That agreement was memorialized in the form of a Commission conciliation agreement that was then sent to the parties for

their approval. The Complainant refused to sign the conciliation agreement and repudiated the settlement.

A further Pre-Hearing Conference was held on March 16, 1994. At that conference a date for the hearing was established with the consent of the parties along with several other interim dates. These dates were embodied in a Notice of Hearing and Scheduling Order that were issued on March 18, 1994. The Complainant received these documents as evidenced by a signed return receipt.

The Complainant only partially complied with the requirements of the Scheduling Order in that she filed only an initial witness list but filed or exchanged no other information or documents required by the Scheduling Order. The Hearing Examiner called the Hearing to order at 8:30 a.m. on July 19, 1994. The Complainant was not present and had not contacted any person at the Commission prior to the hearing to request a postponement or delay in the proceedings. The Respondent appeared by its Attorney C. William Isaacson, and several employees who were not identified on the record. The Hearing Examiner waited for the 30 minutes required by Commission Rule 9.4. At that time the Respondent moved for the dismissal of the complaint. The Hearing Examiner took this motion under advisement and indicated that he would issue an Order to Show Cause why the complaint should not be dismissed.

Shortly after returning to the Commission offices, the Hearing Examiner received a package of materials from the Complainant. A copy of these materials are attached as Exhibit A to this Decision and Order. On July 21, 1994, the Hearing Examiner issued the above-referenced Order to Show Cause. This Order required the Complainant to submit in the form of an affidavit, her explanation of her failure to appear and to justify any belief that the complaint should not be dismissed. On August 5, 1994, the Complainant submitted a response to the Order. The Complainant's submittal is attached to this Decision as Exhibit B. Pursuant to the terms of the Order, the Respondent was given an opportunity to reply to any materials submitted by the Complainant. Since it did not appear that the Complainant had served a copy of her materials on the Respondent, the Hearing Examiner forwarded a copy of the Complainant's submittal to the Respondent on August 11, 1994. On August 19, 1994, the Respondent filed its reply. A copy of that reply is attached to this Decision as Exhibit C.

DECISION

The Complainant asserts that her complaint should not be dismissed because she was ill and was therefore unable to travel to Madison for the hearing. In her submittal in response to the Order to Show Cause, the Complainant further states that she informed the Commission of this illness in her package of materials that she sent on July 18, 1994 that was received by the Commission on July 19, 1994. The Complainant also contends that if her complaint is dismissed she will appeal that decision and will seek further forms of redress that may be more responsive to her claims.

The Respondent asserts that the Complainant has failed to demonstrate that her absence on July 19, 1994 was justified. It states that a mere assertion of illness is not sufficient to excuse the Complainant's absence. The Respondent also asserts that the materials submitted by the Complainant are a pretext because the dates do not match the facts.

The Complainant has failed utterly to demonstrate that her complaint should not be dismissed for her failure to appear at the hearing set for July 19, 1994. The record in this matter indicated that the Complainant had little if any intent to shoulder the burdens of proving the allegations of her complaint after she left Madison. In fact, the record could be read to show a willful intent on the part of the Complainant to use the Commission process to harass the Respondent. This is highlighted by the

Complainant's refusal, on two occasions, to be bound by the terms of settlements reached with the Respondent. The first of these settlements was reached in response to a union grievance filed on the Complainant's behalf. The second was the Complainant's repudiation of the settlement negotiated with her and the Respondent by the Commission. Since that time, the Complainant has performed only those minimal tasks required to keep her complaint from being dismissed.

The materials submitted by the Complainant on August 5, 1994 are entirely without credibility. The Complainant submits a letter dated July 10, 1994 as evidence of her having informed the Commission of her illness, claiming that it was included in her submittal of July 19, 1994. The letter dated July 10, 1994 was not included in the Complainant's July 19, 1994 submittal. Further, the Complainant's explanation of this letter is preposterous. She asserts that this letter was erroneously dated July 10 and that it should have been dated July 18, 1994. The Hearing Examiner cannot believe that the Complainant expects anyone to accept that a letter mailed from Atlanta, Georgia the day before a scheduled hearing would arrive in Madison, Wisconsin in time to postpone a hearing even if sent by Federal Express as this one allegedly was.

It would be more believable if the Complainant asserted that the letter was correctly dated, properly mailed as dated and failed to arrive for some unexplained reason. However the letter submitted by the Complainant fails to identify her illness and provide any basis for an expectation that the illness would keep her from attending a hearing nine days later.

The Complainant admits that she has no statements from a doctor or other health care provider attesting to her illness. While under some circumstances, the Hearing Examiner might be able to excuse this lack of documentation, he cannot do so in this case. Nowhere does the Complainant ever indicate the nature or severity of her illness. As far as the Hearing Examiner can tell from the record, the Complainant could have been confined to bed or may have only had a cold. Whatever the nature of the Complainant's illness, she fails to explain why she did not call the Commission to let the Hearing Examiner know of her inability to attend the hearing. Despite the Complainant's acknowledged poverty, she has managed to obtain the resources to call the Commission on several occasions since her case was certified to Hearing.

Another problem with the Complainant's explanation is her mailing a package of materials from Atlanta, Georgia on July 18, 1994. As indicated above, the Complainant would have to be hopelessly naive to believe that such a package would get to the Commission in time to stop a hearing scheduled to begin at 8:30 the next morning. If the Complainant had really intended to attend the hearing, she would have had to leave Atlanta at some time prior to her mailing of the package on July 18, 1994. In other words if the Complainant were ill on July 18, she would most likely have already been in Madison or at least on her way to Madison if she had really intended to attend a hearing scheduled for July 19. To this end, the Complainant could have supplied copies of bus, train or airplane tickets to demonstrate that she had actually made the necessary arrangements to attend the hearing.

As indicated by the Respondent, the materials actually received by the Commission on July 19, 1994 are more consistent with a person who does not intend to attend a Hearing. These materials are a clear indication that the Complainant wished to follow other routes to further her apparent vendetta against the Respondent. There is no reason for the Complainant to have sent these materials to the Commission if she intended to appear for a Hearing on her complaint.

The Complainant has consistently taken a bullying attitude throughout the processing of her complaint. She has been quick to indicate that she would appeal adverse rulings. To the best of the Hearing Examiner's knowledge, no one at the Commission has ever tried to limit the Complainant's

rights to review any decision. The Complainant has also stated that she has been attempting to have the facts of her case reviewed by other government agencies and publicly in the press. Again no one at the Commission has to the best knowledge of the Hearing Examiner attempted to limit the Complainant's access to any forum she chooses. While these activities are the right of the Complainant, the Complainant's vocal assertion of her rights and her intent to pursue those rights where ever she can leads the Hearing Examiner to doubt the sincerity of the Complainant with regards to her pursuit of her claim before the Commission.

For the foregoing reasons, the Hearing Examiner concludes that the Complainant has failed to show good cause for her failure to appear at the public hearing of her complaint on July 19, 1994. The Complainant has also failed to demonstrate any good reason why her complaint should not be dismissed as a result of her failure to appear at the time of her public hearing.

ORDER

It is hereby ordered that the complaint in this matter be dismissed with prejudice and without costs to either party.

Signed and dated this 29th day of August, 1994.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

EXHIBIT A

TO: Mr. William Isaacson
Labor Counsel, United Health Inc.
Milwaukee, WI 53203

FROM: Joyce Foy
50 Mount Zion Rd., Apt. F-1
Atlanta, GA 30354

July 3, 1994

Mr. Isaacson,

Enclosed is a partial list of departments which will receive a copy of this letter and all other information and correspondence done with you and your department over the last almost two years.

I have attempted to settle this matter in a civil manner, yet your repeated attempts to further discredit me, totally ignoring the reason for this communication in the first place.

I have no other choice at this time but to expose this matter and put it into the hands of peoples and departments that can and will handle this matter in a timely, fair and proper manner.

Sincerely,

Joyce Foy
Enclosure

- 1) Mr. Blackwell III, -- E.E.O.C.
- 2) Unites States Justice Department
- 3) NAACP, -- All Branches accross United States
- 4) Civil Rights Dept. -- Washington, DC branch
- 5) United States President, -- Mr. Bill Clinton
- 6) National Rainbow Coalition, -- Washington, DC
- 7) 1-800 SPEAK-UP
- 8) State Of Wisconsin, -- Office of the Governor

These are some of the departments that will receive all information and all correspondence I have received from you concerning this matter.

EXHIBIT B

Aug. 3rd, 1994

Mr. Clifford E. Blackwell III,

I am reading this Order to show cause letter. It states that the Complainant had not appeared for the hearing which was scheduled for July 19th, 1994 at 8:30 am. It states that I have not contacted anyone at the commission explaining why I was absent or to request a postponement. But I don't see how this is possible when I have in front of me a receipt from Federal Express dated 7-18-94 in which I sent to you a brief statement as to why I wasn't present and requesting another hearing date. I am enclosing that same statement again. Now if for some reason you feel that this is not clear why I did not attend or if it's a part in which you do not understand then again I state that because of illness I was unable to attend. I don't have a doctor's statement nor do I have a copy of a hospital bill or any other documents giving proof because when someone is ill, does not necessarily mean that a doctor or a hospital has to be involved.

I noticed on the letter I sent you the date is 7-10-94 which was incorrect a simply mistake on my part because my illness was just a few days before the hearing and the only reason I sent the notice that I wouldn't appear is because I was hoping to recooperate by the time of the hearing.

Mr. Blackwell I noticed the date on this order to show cause just beside your signature; of July 21, 1994. Yet my notice to you from federal express is dated July 18th, 1994 yet you state by this date of July 21 that you have not received anything from me stating why I did not appear or to request a postponement when I have done both.

Again I am enclosing another copy of the 1st letter I sent to you on the 18th of July. I don't think you would mis-place such a important statement especially when I had 2 other pieces of paper enclosed in which I sent to the Governor of Wisconsin & to Mr. McIsaacson on the exact same day.

Thank you

Joyce Foy
8-3-94

Joyce Foy #71
50 Mt. Zion Rd.
7-10-94

Mr. Clifford E. Blackwell III,

Due to illness I am unable to be there for the hearing scheduled for July 19 1994 at 8:30 am. I am requesting another hearing date. If my case is dismissed I will appeal. I have enclosed copies of the letter I have sent out.

Thank you
Joyce Foy

I sent this letter to you via Federal Express on July 18, 1994

EXHIBIT C

United Health, Inc.
105 West Michigan Street
Milwaukee, Wisconsin 53203
(414) 271-9696
DIRECT DIAL: 414/347-4651
DIRECT FAX: 414/347-4657

August 12, 1994

Mr. Clifford Blackwell III
Hearing Examiner
Equal Opportunities Commission
City of Madison
City-County Building, Room 500
210 Martin Luther King, Jr. Boulevard
Madison, WI 53710

Re: MEOC Case #21831; Order to Show Case

Dear Mr. Blackwell:

I respectfully submit that the complaint has not met her burden as required in your ORDER TO SHOW CAUSE why the matter should not be dismissed. First of all she has failed to submit her explanation in the form of an affidavit. Procedurally she has defaulted.

In her written material she refers to a statement dated July 18, 1994 which she said she sent. At the hearing, it was clear that this statement had not been received. Further, a simple naked allegation of

illness with no substantiation should not be sufficient to meet the order to show cause requirement. Further, the note was dated July 10, 1994 which the complainant now alleges was a mistake. Further, the Respondent has never received the copies she alleged she sent to me.

The only correspondence I have received, is the letter dated July 3, 1994 which I received July 25, 1994 in which you were copied, and as I remember a telephone conversation you received.

This letter seemed to indicate that she was not interested in the hearing, but preferred to launch a publicity campaign. For all these reasons the Respondent moves that the matter be dismissed under the terms of the ORDER TO SHOW CAUSE. She has not effectively explained her absence at the hearing or in any timely fashion requested a postponement. The matter should be dismissed.

Very truly yours,

UNITED HEALTH CARE, INC.

C. William Isaacson
Corporate Legal Counsel

cc: Joyce Fay
1567 Woodland Avenue, SE
Atlanta, GA 30316

**EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
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<p>Joyce Foy 1567 Woodland Ave., SE Atlanta, GA 30316</p> <p style="text-align: center;">Complainant</p> <p style="text-align: center;">vs.</p> <p>Madison Rehabilitation & Convalescent Center 2308 University Avenue Madison, WI 53705</p> <p style="text-align: center;">Respondent</p>	<p>HEARING EXAMINER'S DECISION AND ORDER ON RESPONDENT'S MOTION TO DISMISS</p> <p>Case No. 21831</p>
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BACKGROUND

On January 5, 1993, the Complainant, Joyce Foy, filed a complaint with the Madison Equal Opportunities Commission (Commission) alleging that the Respondent, Madison Rehabilitation and Convalescent Center, discriminated against her on the basis of her race in the terms and conditions of her employment and terminated her employment because of her race. After an investigation of the complaint, an investigator for the Commission issued, on July 8, 1993, an Initial Determination

concluding that there was no probable cause to believe that the Complainant had been discriminated against in the terms and conditions of her employment and probable cause to believe that the Respondent had discriminated against the Complainant with respect to her termination from employment. After numerous attempts to conciliate the complaint failed, the complaint was transferred to the Hearing Examiner for the holding of a public hearing on the remaining allegations of the complaint.

A Pre-Hearing Conference was conducted by the Hearing Examiner and a Notice of Hearing and Scheduling Order was issued on March 18, 1994. This Notice set the hearing for July 19 and 20, 1994.

The Scheduling Order required any dispositive motions to be filed on or before May 2, 1994. On April 29, 1994, the Respondent submitted a Motion to Dismiss the complaint. The basis of this motion is the Respondent's contention that a settlement of a related union grievance requires dismissal of this complaint.

DECISION

During 1992 and early 1993, the Complainant was employed as a nurse by the Respondent at its facility in Madison, Wisconsin. It is uncontroverted that the Complainant's employment was terminated by the Respondent. The Complainant contends that she was terminated because she was subjected to discipline that was not similarly imposed upon those not of her race. The Respondent asserts that the Complainant was legitimately terminated because of deficiencies in her performance and violations of the Respondent's work rules. In an effort to regain her position, the Complainant filed several actions. On January 4, 1993, the Complainant filed a grievance with her union. On January 5, 1993, she filed the complaint in this action. When filing the complaint with the Commission, she indicated that she wished her complaint to be cross-filed with other relevant state and federal agencies. This resulted in cross-filing with the State of Wisconsin's Department of Industry, Labor and Human Relations Equal Rights Division (ERD). The ERD is a contract agency for the United States Equal Employment Opportunities Commission (EEOC). A complaint filed with the ERD would normally also be filed with the EEOC. A complaint whose number is 269 30990 was filed with the EEOC in this case.

The Complainant's union entered into negotiations with the Respondent on behalf of the Complainant. The Respondent contends that these negotiations resulted in an agreement to return the Complainant to work, to pay her some portion of her back pay and for the Complainant to dismiss the current complaint.

The Complainant did return to work sometime in January, 1993. It appears that date might be January 25, 1993. The Complainant was paid \$702.08 towards her back pay. The Complainant did not dismiss her complaint before the Commission.

It is the Respondent's position that this record requires the dismissal of the Complainant's complaint. The essence of this position is that it would be inequitable for the Complainant to receive the benefits of an agreement while failing or refusing to do that which the agreement requires of her. In support of its motion to dismiss, the Respondent attaches a brief of authorities, an affidavit of Steve Gardipee dated April 28, 1994, a copy of her grievance dated January 4, 1993 and a copy of a letter to the Complainant dated January 25, 1993 from Lee Ann Dillman. Gardipee's affidavit demonstrates that the Complainant was paid \$702.08 in back pay. The letter from Dillman purports to set forth the terms

of the agreement by which the Complainant could return to work. One of the conditions set forth in the Dillman letter is that the Complainant's complaint with the EEOC be dismissed.

While the Hearing Examiner is sympathetic to the position of the Respondent in these circumstances, the record in this matter does not support the requested relief. The Dillman letter clearly specifies that the EEOC complaint of the Complainant be dismissed. It makes no reference to the complaint before the Commission or the ERD. There was, in fact, an EEOC complaint filed in this matter. While there could have been a clerical mistake made in drafting Dillman's January 25, 1993 letter, there is nothing on this record that makes it clear that the reference to an EEOC complaint alone was erroneous and not a specific limitation of the actions to be dismissed. The Respondent or one of its employees was responsible for the drafting of the January 25, 1993 letter and accordingly its provisions must be construed strictly against the Respondent.

In a circumstance such as this, it would have been helpful to have a copy of an agreement that was signed by the Complainant or a representative on her behalf. If, as the Respondent asserts, there is no signed document because the Complainant never signed the agreement, then at least a draft of an agreement prepared by the Complainant or her representative is necessary. Minimally, a statement from a union representative attesting to the fact that the agreement contemplated the dismissal of all actions should have been submitted. Without this type of documentation, the Hearing Examiner is left with no conclusion but that the agreement as stated in the January 25, 1993 letter from Dillman did not require the Complainant to dismiss her complaint against the Respondent pending before the Commission.

Certainly, the Respondent will be entitled to an offset of damages in the amount of the \$702.08 that has already been paid to her. On this record, that is the most that the Hearing Examiner is able to grant the Respondent.

ORDER

The Respondent's Motion to Dismiss dated April 29, 1994 is denied. The hearing set to begin on July 19, 1994 will go forward as scheduled.

Signed and dated this 5th day of July, 1994.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner