

State of Wisconsin



Labor and Industry Review Commission

Patricia Dillard
Complainant

Charter Communications, LLC
Respondent

ERD Case No. CR201503190
EEOC Case No. 443201600079C

Fair Employment Decision¹

Dated and Mailed:

May 18, 2018

The decision of the administrative law judge is **rewritten** and, as rewritten, is **affirmed**. Accordingly, the complaint of discrimination is dismissed.

By the Commission:

/s/

Georgia E. Maxwell, Chairperson

/s/

Laurie R. McCallum, Commissioner

/s/

David B. Falstad, Commissioner

¹ **Appeal Rights:** See the green enclosure for the time limit and procedures for obtaining judicial review of this decision. If you seek judicial review, you **must** name the Labor and Industry Review Commission as a respondent in the petition for judicial review.

Appeal rights and answers to frequently asked questions about appealing a fair employment decision to circuit court are also available on the commission's website <http://lirc.wisconsin.gov>.

Procedural History

On October 16, 2015, the complainant filed a complaint with the Equal Rights Division (hereinafter “Division”) of the Department of Workforce Development, in which she alleged that the respondent discriminated against her based upon her race, religion, disability, and because she opposed a discriminatory practice, all in violation of the Wisconsin Fair Employment Act.

At the time she filed her complaint the complainant provided a Fond du Lac mailing address. Division records show that on September 29, 2016, the complainant updated her mailing address. Thereafter, the Division sent all mail to the complainant at “6 Plum Drive, Unit 7, Waupun, WI 53963.” The complainant used the “6 Plum Drive, Unit 7” address as her return address on multiple pieces of correspondence she sent to the Division, and she received documents that were mailed to her at that address by the Division.

On June 26, 2017, the administrative law judge assigned to the case held a prehearing conference with the parties by telephone. The following day, the administrative law judge sent the parties a document entitled “Prehearing Conference Report and Scheduling Order,” in which he enumerated the items that were discussed at the pre-hearing conference. Paragraph number 10 on that list stated, “The hearing in this matter will be scheduled for **February 6 & 7, 2018, in Fond du Lac, Wisconsin.** A notice of hearing will be sent to the parties. . . .” The information regarding the date and place of the hearing was underlined and bolded, as shown in the previous sentence.²

In an e-mail to the respondent’s attorney dated October 31, 2017, a copy of which was sent to the administrative law judge, the complainant stated that her correct address was “6 Plum Drive, Unit 8, Waupun WI, 53963,” and asked that all correspondence be sent to her at that address. The complainant went on to explain that Unit 7 was a vacant unit. She did not specify whether she had lived in Unit 7 in the past and subsequently moved to a different unit, and provided no explanation as to why the apartment number had changed.

In an e-mail response sent the same day, the administrative law judge indicated that he had received the complainant’s e-mail and the correction to her address. However, Division records do not indicate that the complainant’s mailing address

² The commission notes that the mailing address that appears on the Prehearing Conference Report and Scheduling Order is “6 Plum Drive, Unit 7, Waupun, WI 53964.” However, the correct zip code for the complainant is 53963. While it is not clear whether or not the correct zip code appeared on the actual mailing envelope, it is apparent that the complainant did receive a copy of the scheduling order. The complainant has not denied receiving the document. In fact, she submitted a copy of the scheduling order along with other documents she provided to the administrative law judge and respondent prior to the hearing, further establishing that she received it. In its response to the complainant’s petition the respondent also asserts that it provided a copy of the scheduling order to the complainant as an attachment to an e-mail it sent her in December of 2017.

was updated at that time, and the administrative law judge and Division staff members continued to address documents to the complainant at “6 Plum Drive, Unit 7,” rather than Unit 8. No document sent to the complainant by the Division was ever returned to it as undeliverable, however, and it was not established that the complainant did not receive the mail that was sent to her at her former mailing address.

On December 7, 2017, the Division sent the parties a hearing notice advising them that a hearing would be held on February 6 and 7, 2018, at 160 S. Macy Street, Fond du Lac, WI, at 10:00 a.m. The hearing notice was mailed to the complainant at “6 Plum Dr. Unit #7, Waupun, WI 53963.” As with other documents mailed to the complainant at that address, the hearing notice was not returned to the Division as undeliverable.

Division notes indicate that on the morning of February 6, 2018, the day of the hearing, the complainant contacted a worker’s compensation administrative law judge to ask if she had a hearing that day. The worker’s compensation administrative law judge notified the Division of the complainant’s call. A representative from the Division then contacted the complainant to notify her of the address and time of the hearing. Division notes indicate that the representative telephoned the complainant two times, but the complainant contended that she was unable to hear the representative. Thereafter, the Division representative left the complainant a voicemail message with the time and location of the hearing. Division notes indicate that these calls took place prior to 8:15 a.m.

At about 9:50 a.m. on February 6, 2018, the complainant called the Division again and spoke to the same staff person who had left her the earlier voicemail. The complainant stated that she was in Madison and could not find the address of the hearing. The complainant was told that the hearing was in Fond du Lac, as indicated in the voicemail message the Division representative had left for her that morning. The representative told the complainant she would contact the administrative law judge and notify him that the complainant was in Madison, but indicated that the complainant should expect that her hearing would be dismissed.

The complainant’s hearing convened at 10:00 a.m. in Fond du Lac, WI. The respondent appeared and was ready to proceed. However, the complainant--who was in Madison as of 9:50 a.m.--did not appear. At 10:30 a.m., at which point the complainant still had not arrived, the administrative law judge dismissed the complainant’s claim based upon her failure to appear.

The following day, February 7, 2018, the complainant called the Division and requested a copy of the hearing notice. A Division representative sent the complainant a copy of the hearing notice by e-mail. At approximately 11:00 a.m. that day the complainant called back and informed the Division representative that

she never received a copy of the hearing notice and that the hearing notice had the wrong apartment number on it.

On February 8, 2018, the administrative law judge issued an Order dismissing the complainant's appeal based upon her failure to appear at the hearing. The Order was sent to the complainant at "6 Plum Dr., Unit 7, Waupun, WI 53963." It was not returned as undeliverable, and the complainant does not claim to have not received it.

The complainant has filed a timely petition for commission review of the administrative law judge's Order dismissing her complaint. The commission has considered the petition and the positions of the parties, and it has reviewed the information submitted to the administrative law judge. Based on its independent review, the commission finds that the complainant lacked good cause for her failure to appear at the hearing.

Memorandum Opinion

In her petition for commission review the complainant argues that she never received the hearing notice. The complainant maintains that someone at the Department of Workforce Development told her that her hearing notice was mailed to the wrong address, "6 Plum Drive, Unit 6, Waupun, WI 53963," but that her correct address is "6 Plum Drive, Unit 8, Waupun, WI 53963."³ The complainant states that on the day of the hearing she tried to find out where the hearing was scheduled to be. She explains that she called numerous people and ended up writing down an address without a city or zip code; she states that she drove to Madison, but could not find the address she was given. The complainant contends that she immediately called the Fond du Lac court house and left a message for the receptionist to let the administrative law judge know that she was in the wrong city and was driving straight there. However, the administrative law judge called her back and told her he was dismissing her case because she was a no-show.

The commission has considered these arguments, but does not find them persuasive. Although the hearing notice was sent to the complainant at "6 Plum Drive, Unit 7," rather than "6 Plum Drive, Unit 8," there is no reason to assume the complainant did not receive that correspondence notwithstanding the error. The complainant had previously provided the Division with the Unit 7 address, and had received other correspondence sent by the Division to that address. The hearing notice was not returned to the Division as undeliverable mail, and although the complainant was apparently no longer residing in Unit 7 (which she contends is a vacant unit), it does not necessarily stand to reason that she would not have received a letter sent to her at that address. It must also be noted that, prior to the

³ No documents from the Division were ever addressed to the complainant at "6 Plum Drive, Unit 6." Rather, as indicated above in the Procedural History section of this decision, the document which the complainant contends she did not receive was mailed to the complainant at "6 Plum Dr., Unit 7."

issuance of the hearing notice, the complainant received a copy of the scheduling order that was sent by the administrative law judge on June 27, 2017, which stated in bold letters that the hearing would be held on February 6 and 7, in Fond du Lac, WI. Thus, even crediting that the complainant did not receive the hearing notice, it is clear that the complainant had been informed of the date of the hearing and had been advised that it would be held in Fond du Lac.⁴ The fact that the complainant called a worker's compensation administrative law judge on the morning of February 6, 2018 to confirm that she was scheduled for a hearing that day clearly establishes that the complainant did receive notice of the hearing.

The complainant has not explained why, recognizing that she was scheduled for a hearing on February 6, 2018, she did not make any effort prior to the date of the hearing to figure out exactly when and where the hearing would be held, and the commission sees no reason to believe that she could not have easily done so. A simple telephone call to the Division prior to February 6 would have resolved the issue. The complainant has also not explained why she drove to Madison on the day of the hearing, even though she had not been provided any information to suggest that the hearing would be held in that location. She does not assert that anyone told her the hearing would be held in Madison, and the notes taken by the Division representative who spoke with the complainant on the day of the hearing indicate this was not the case.

A party who requests a new hearing after her case has been dismissed based upon a failure to appear at the hearing must demonstrate good cause for the failure to appear. Good cause has been defined to mean excusable neglect, i.e. the degree of neglect a reasonably prudent person might be expected to commit in similar circumstances. *Alvey v. First Student Inc.*, ERD Case No. 200802323 (LIRC Aug. 22, 2011), citing *Matousek v. Sears Roebuck and Company*, ERD Case No. CR200302571 (LIRC Oct. 15, 2004). The complainant's failure to make any effort to determine the correct time and place of the hearing prior to the hearing day, or even to ascertain in which city the hearing would be held, was not the behavior of a reasonably prudent person under similar circumstances. Consequently, the commission concludes that the complainant did not establish good cause for missing the hearing.

NOTE: The administrative law judge's decision addressed a variety of matters pertaining to discovery, postponement requests, and the adequacy of the complainant's preparation for the hearing, many of which are in turn

⁴ A letter from the respondent to the administrative law judge dated January 30, 2018, a copy of which was sent to the complainant at her correct address, asserts that the complainant failed to serve her witness and exhibit list "at least 10 days prior to the hearing date (which would be January 27, 2018)." This letter constitutes yet another document putting the complainant on notice that a hearing was scheduled for February 6, 2018.

addressed by the complainant in her petition for commission review. However, because those matters are not directly related to the question of whether the complainant established good cause for her failure to appear at the hearing, the commission has not addressed the complainant's arguments with respect to those points, but has confined its review to the question of whether the complainant had good cause for failing to appear at the hearing. The commission has rewritten the administrative law judge's decision in accordance with this rationale and to reflect the fact that the hearing notice was not mailed to the complainant at her most recent apartment number.

cc: Attorney Ryan J. Gehbauer