

**FILED**

05/15/2023

Clerk of the  
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs February 1, 2023

**EMILY MORELAND v. STATE OF TENNESSEE**

**Appeal from the Tennessee Claims Commission**  
**No. T20190376-1 William A. Young, Commissioner**

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**No. E2022-00623-COA-R3-CV**

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This case involves a complaint before the Tennessee Claims Commission. After a year of no action on the part of the claimant, the State moved to dismiss the case for failure to prosecute. The Claims Commission granted the motion, and the claimant now appeals. For the reasons discussed herein, we affirm the dismissal of the claimant’s case.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Tennessee Claims  
Commission Affirmed and Remanded**

ARNOLD B. GOLDIN, J., delivered the opinion of the Court, in which KENNY ARMSTRONG and JEFFREY USMAN, JJ., joined.

John C. Cavett, Jr., Chattanooga, Tennessee, for the appellant, Emily Moreland.

Jonathan Skrmetti, III, Attorney General and Reporter, Andrée Sophia Blumstein, Solicitor General, and Heather C. Ross, Senior Assistant Attorney General, for the appellee, State of Tennessee.

**OPINION**

**BACKGROUND AND PROCEDURAL HISTORY**

This case arises from a formal complaint against the State of Tennessee (“State”) filed with the Tennessee Claims Commission (“Commission”) on December 10, 2018, by Emily Moreland (“Claimant”). The allegations asserted in Claimant’s complaint stemmed from an incident in December 2015, when Claimant, a student at the University of Tennessee – Chattanooga (“UTC”), was allegedly sexually assaulted by another UTC student. Claimant reported the incident to UTC, after which an investigation was initiated. Ultimately, UTC issued a ruling finding that the student was guilty of sexual misconduct with regard to Claimant and suspended him for two semesters. This ruling was issued

seven months after a hearing on the matter and fifteen months after Claimant had reported the incident. The student appealed the ruling, and UTC later affirmed its initial decision but reduced his suspension to the fall semester of 2017. According to applicable UTC rules, a suspended student is not permitted on campus, and if they do come onto campus, it is considered criminal trespass.

In her complaint, Claimant alleged that the student did not adhere to his suspension requirement, as she was informed that he had been on campus during his period of suspension. Claimant contacted UTC's attorney and informed him of the student's presence on UTC's campus. However, Claimant contends that UTC took no steps to ensure that the student was not coming onto campus during his suspension. According to Claimant's complaint, he was on UTC's campus more than thirty times during his suspension. Moreover, he allegedly often went to the UTC student athletic center and used his student ID to gain access. Claimant alleged that "UTC did nothing to revoke, deactivate or even 'flag' [his] student ID during his suspension." Additionally, Claimant alleged that, in early December 2017, with his suspension still ongoing, the student came onto campus and went to the office of the dean, who had knowledge of his suspension. As a result of the student's presence on campus in violation of his suspension, Claimant alleged that she "was afraid to come to school except to attend classes after which she quickly exited campus" and "[o]ften . . . would not walk on the campus without someone to escort her." Additionally, Claimant contended that, during the student's suspension, "UTC had the ability and duty to control him . . . by keeping him off of the campus" and that she "suffered fear, panic, distress and depression as a result of UTC's failure to keep [him] from coming onto the UTC campus . . . ." Ultimately, Claimant's complaint alleged, among other assertions, that "UTC negligently breached its duty to [Claimant] to institute interim measures to protect her from [him] . . . while conducting its investigation and prosecution of [him]" and that "UTC negligently breached its duty to keep [him] from coming onto the UTC campus while he was suspended."

Subsequent to the filing of Claimant's complaint, the Commission entered an "Initial Order Governing Proceedings" on December 13, 2018, which advised the parties of the provision in Tennessee Code Annotated section 9-8-402(b), which states "it is mandatory that any claim filed with the claims commission upon which no action is taken by the claimant to advance the case to disposition **within any one-year period of time** be dismissed with prejudice." *See* Tenn. Code Ann. § 9-8-402(b) (emphasis added). After proceedings not pertinent to our discussion herein took place, the State filed an answer to Claimant's complaint on April 6, 2020.

In July 2021, the Commission entered an "Order to Provide Scheduling Order and to Schedule Trial," directing the parties to confer and submit a proposed scheduling order or to demonstrate good cause as to why a scheduling order is deemed unnecessary. There is no indication in the record that either party responded to this order. On March 14, 2022, the State filed a "Motion to Dismiss for Failure to Prosecute," stating that "Claimant has

taken no action on this claim in over a one-year period.” Approximately two weeks later, Claimant filed a motion to compel the State to respond to her discovery requests which had remained unanswered since June 2020.

On May 5, 2022,<sup>1</sup> the Commission entered an order dismissing Claimant’s claim. Although Claimant had pointed to attempted communications with the State to show that sufficient action was taken to advance her claim within the one-year period at issue, the Commission observed that “[b]oth Claimant’s counsel and Defendant’s counsel confirm that the two did not communicate during the relevant period” and ultimately concluded that the attempted communications proffered by Claimant “did not . . . suffice as an ‘action . . . taken by the Claimant to advance the case.’” As a result, the Commission found that, under these particular facts, dismissal was “mandatory.” This appeal followed.

### **ISSUE PRESENTED**

Based on Claimant’s briefing, we ascertain a single issue for review, which is as follows:

Whether the Commission properly dismissed Claimant’s claim for failure to prosecute pursuant to Tennessee Code Annotated section 9-8-402(b).

### **STANDARD OF REVIEW**

Appeals of Commission judgments are governed by the Tennessee Rules of Appellate Procedure. Tenn. Code Ann. § 9-8-403(a)(1). On appeal, this Court reviews the Commission’s factual findings with a presumption of correctness, and we will not overturn such findings absent evidence that preponderates against them. Tenn. R. App. P. 13(d); *Waller v. State*, No. M2005-02056-COA-R3-CV, 2006 WL 2956515, at \*4 (Tenn. Ct. App. Oct. 16, 2006). “A trial court has ‘considerable discretion to dismiss a case for failure to prosecute.’” *Ledford ex rel. Rodriguez v. State*, No. E2019-00480-COA-R3-CV, 2020 WL 1686377, at \*2 (Tenn. Ct. App. Apr. 7, 2020) (quoting *Grissom v. State*, No. W2001-03021-COA-R3-CV, 2002 WL 31895712, at \*2 (Tenn. Ct. App. Dec. 23, 2002)).

### **DISCUSSION**

The issue in Claimant’s appeal concerns whether the Commission properly dismissed her claim under Tennessee Code Annotated section 9-8-402(b) for failure to prosecute. Subsection (b) specifically provides, in pertinent part:

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<sup>1</sup> The Commission entered a “Corrected Order Dismissing Claim” on September 2, 2022, correcting a clerical mistake regarding dates recited in the body of the order. However, there were no substantive changes.

Absent prior written consent of the commission, it is mandatory that any claim filed with the claims commission upon which no action is taken by the claimant to advance the case to disposition within any one-year period of time be dismissed with prejudice.

Tenn. Code Ann. § 9-8-402(b). Accordingly, this Court “has recognized on several occasions that the plain language of the statute mandates dismissal if no action is taken for a one-year period,” except in circumstances where a claimant has secured the prior written consent of the Commission. *Ledford ex rel. Rodriguez*, 2020 WL 1686377, at \*2 (quoting *Mathis v. State*, No. M2009-02398-COA-R3-CV, 2010 WL 2482330, at \*3 (Tenn. Ct. App. June 10, 2010)).

Here, Claimant filed her complaint with the Commission on December 10, 2018. The State claims that Claimant’s last action in the matter was on December 30, 2020, when Claimant and the State filed a “Joint Motion for an Agreed Protective Order.” The State argues that no further action by Claimant to advance the case to disposition occurred between December 30, 2020, and December 30, 2021, and, therefore, dismissal was mandatory pursuant to the plain language in section 9-8-402(b).

In her brief, Claimant argues that, in the one-year period between December 30, 2020, and December 30, 2021, she made multiple attempts to advance the case towards disposition. Specifically, she states that, in the fall of 2021, Claimant’s counsel’s assistant attempted to contact Kimberly Kester, one of two attorneys in the Tennessee Attorney General’s Office assigned to the matter—the other being Heather Ross.<sup>2</sup> Claimant further contends that on December 1, 2021, after failing to contact Ms. Kester, her counsel sent an email to Ms. Ross, stating, “[C]ould you please call us regarding this matter. We need to get some dates and start the file moving again.” It should be noted that, at this point in the proceedings, neither party had submitted a proposed scheduling order to the Commission or explained why one had not been presented. According to Ms. Ross’s affidavit, although she contacted Claimant’s counsel’s office and scheduled a telephone conference, “[Claimant’s counsel] failed to present at the telephone conference. Neither [Claimant’s counsel] nor anyone in his office contacted me to explain his failure to attend the telephone conference or to reschedule or for any reason.” In her brief, Claimant refutes this assertion, stating that her counsel did not receive such a message from Ms. Ross and that there are no records in support thereof. As such, Claimant maintains that Ms. Ross’s assertions lack credibility, as there is no specificity as to when the call occurred or when the purported conference was scheduled.<sup>3</sup>

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<sup>2</sup> Based on our review of the record, Ms. Kester had filed an appearance in the matter as co-counsel for the State on May 29, 2020, but was no longer working for the Attorney General’s Office by the fall of 2021. Nevertheless, Heather Ross remained on the matter as counsel, as she had since its inception.

<sup>3</sup> According to the State’s brief, this telephone conference was scheduled in December 2021. However, we find nothing in the record specifically indicating the date on which the conference was to occur.

Having reviewed the record and having considered the arguments of the parties, we find no error in the Commission's decision to dismiss the case for failure to prosecute, as we are of the opinion that Claimant, for over a year, did not take action to advance the case to disposition within the meaning of section 9-8-402(b). Although Claimant's counsel did allegedly attempt to contact the State's counsel, he took no further action other than a phone call and an email. Moreover, as noted previously, the Commission found that Claimant's counsel and the State's counsel "did not communicate during the relevant period." As argued by the State in its brief, it is the responsibility of *Claimant* to take action to advance the case to disposition. *Id.* at \*3. Inaction by the State does not absolve Claimant of her responsibility to act, *Grissom*, 2002 WL 31895712, at \*2, and as noted previously, a claimant's failure to act is permissible only when the claimant has secured previous written consent of the Commission. Tenn. Code Ann. § 9-8-402(b). Here, even with the State's inaction, Claimant, at any time during the year at issue, could have filed a motion to compel the State to respond to her discovery requests that had gone unanswered since June 2020. However, the record indicates no attempt to do so, and Claimant did not file such a motion until after the State's motion to dismiss was filed. Claimant offers no explanation for her failure to compel the State's response within the relevant period nor for her failure to file a proposed scheduling order or any other filing pertaining to the case.

Although Claimant has cited to various case law in an attempt to convince this Court that she took sufficient action pursuant to section 9-8-402(b), we are unconvinced. For instance, Claimant attempts to rely on this Court's opinion in *Skipper v. State*, No. M2009-00022-COA-R3-CV, 2009 WL 2365580 (Tenn. Ct. App. July 31, 2009), wherein this Court upheld the Commission's dismissal of a case and stated that "[d]uring the more than one year that the case sat dormant, [Mr. Skipper's counsel] made no attempt to contact [the State] about th[e] case." *Id.* at \*4. Claimant does not expound on exactly how or why this language from *Skipper* supports her position, and we note that the language merely constitutes an observation and does not represent a holding that any mere attempt to contact the State would constitute sufficient action pursuant to section 9-8-402(b). Moreover, Claimant attempts to rely on *Jones v. State*, No. M2006-02299-COA-R3-CV, 2007 WL 2198171 (Tenn. Ct. App. July 25, 2007), wherein this Court stated that:

Assuming all of the factual allegations in Claimant's attorney's affidavit are true, the most that can be said concerning the relevant one year period is that Claimant's attorney's legal assistant made a phone call to the State's attorney at some point between November 11, 2004, and November 30, 2005. Thus, there may or may not have been any activity during the relevant one year period, depending on when that phone call was placed.

*Id.* at \*5. According to Claimant, based on this Court's statement in *Jones*, the phone call "would have constituted an effort to advance the case if the proof had been sufficient that the call was made during the one-year period." However, *Jones* does *not* stand for this proposition, as the *Jones* opinion notably states that, "[w]e express no opinion on whether

the phone call made by the legal assistant would have constituted sufficient ‘action’ for purposes of Tenn. Code Ann. § 9-8-402(b) if Claimant had proven that phone call definitely took place during the relevant one year period.” *Id.* at \*6 n.3.

As referenced earlier, the Commission concluded that the attempted communications relied upon by Claimant did not suffice as an action to advance the case within the meaning of the statute and noted that the attempted communications did not even result in actual communications between counsel. Further, the Commission observed that counsel did not “discuss or agree to any action” and opined “[n]o action appears to have been taken during the relevant period to advance the claim.” As we signaled earlier, we agree with this assessment and conclude that the mere attempt to contact opposing counsel here, based on the facts before us, did not constitute an effort to advance the case as contemplated by Tennessee Code Annotated section 9-8-402(b).

### CONCLUSION

Based on the foregoing, the Commission’s order is affirmed.

s/ Arnold B. Goldin  
ARNOLD B. GOLDIN, JUDGE