

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

<p>Jermaine Butler 9 Goldenrod Lane Madison, WI 53719</p> <p style="text-align: center;">Complainant</p> <p style="text-align: center;">vs.</p> <p>Russ Darrow 6525 Odana Road Madison, WI 53719</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. 3359</p>
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BACKGROUND

On October 16, 1995, the Complainant, Jermaine Butler, filed a complaint of discrimination with the Madison Equal Opportunities Commission (Commission). The complaint alleged that the Respondent, Russ Darrow, Inc., discriminated against the Complainant on the basis of his race by refusing him service in a public place of accommodation or amusement. Subsequent to an investigation, on February 28, 1996, the Commission issued an Initial Determination concluding that there was probable cause to believe that discrimination had occurred. On April 12, 1996, the Hearing Examiner issued a Notice of Pre-Hearing Conference setting a Pre-Hearing Conference for April 25, 1996. This notice was sent by certified mail. The Complainant declined or refused to accept this document and it was returned to the Commission.

By letter dated April 17, 1996, the attorney for the Respondent sought to reschedule the Pre-Hearing Conference and requested that the conference be conducted telephonically. On April 23, 1996, the Hearing Examiner wrote to the Complainant to advise him that the Pre-Hearing Conference was being rescheduled to April 30, 1996 but that he would not hold the conference by telephone because of the Complainant's status as an unrepresented party. The Complainant did not object to the rescheduling of the Pre-Hearing Conference.

The Respondent appeared at the Pre-Hearing Conference by its attorney, M. Christine Cowles. The Complainant did not appear nor did he contact the Hearing Examiner either in advance of the Pre-Hearing Conference or subsequent to it to explain why he could not appear at the conference.

On May 3, 1996, the Hearing Examiner issued an Order to Show Cause why the complaint should not be dismissed. The Complainant was ordered to demonstrate good cause for his failure to appear at the Pre-Hearing Conference on or before May 17, 1996. This order was sent by certified mail which was signed for on May 6, 1996. The Complainant did not submit any explanation for his failure to appear at the Pre-Hearing Conference as required by the Order to Show Cause. On June 24, 1996, the Hearing Examiner received a notice of retainer from Tracey Thomas indicating that he would be representing the Complainant's interests. On June 28, 1996, the Hearing Examiner held a status conference in this matter to judge whether he should immediately grant the Respondent's motion to

dismiss. The Hearing Examiner agreed to allow the Complainant additional time to explain his earlier failures.

Based upon the submittals of the parties, the Hearing Examiner reaches the following conclusion.

DECISION

The Complainant contends that his complaint should not be dismissed because he did not understand that he was not being represented by a member of the Commission staff and the Respondent has not demonstrated that it has been prejudiced by the delay in proceedings caused by the Complainant's failures. In support of his position, the Complainant alleges that he has always demonstrated that he wished to pursue his claim and that he has not failed to meet his other obligations in pursuing his complaint.

The Respondent does not argue that it has been prejudiced by the Complainant's failures. Instead, it points out why one should find that the reasons set forth by the Complainant are not believable.

The Complainant's position ignores that he was required by the Hearing Examiner in the Order to Show Cause to explain his failure to appear on or before May 17, 1996. Despite the clear indication that he or some member of his household received the Order to Show Cause on May 6, 1996, the Complainant did not make any showing in this regard until July 10, 1996. The Hearing Examiner's order of May 3, 1996 states that a failure to make the required showing will result in dismissal of the Complainant's complaint. The Complainant failed to make the required showing as outlined in the Order to Show Cause.

The Complainant contends that he did not understand his responsibilities because he believed that a member of the Commission staff was representing him. On this record, such a position is not credible. The Hearing Examiner's letter of April 23, 1996 clearly states that the Hearing Examiner was taking certain steps such as requiring the presence of the Respondent because the Complainant was unrepresented. This fact was restated in the Order to Show Cause dated May 3, 1996. Even if the Complainant had some mistaken belief on April 23, 1996, he could not have reasonably believed in such representation as of the date upon which he received the Order to Show Cause because he was about to be sanctioned for the failure of anyone to appear at the Pre-Hearing Conference. Alarm bells should have been triggered once the Complainant received the Order to Show Cause. Instead, the Complainant took no action to preserve his interests until over a month later. While it may be true that the Respondent has suffered no appreciable prejudice by the Complainant's failure, the Commission has a significant interest in seeing that its orders are followed. To ignore the Complainant's failure to attend the Pre-Hearing Conference coupled with his failure to comply with the Order to Show Cause would make a mockery of the Commission's interest in regulating its cases. The Rules of the Commission do not provide for any lesser sanction than dismissal. If the Hearing Examiner had the authority to apply some lesser level of sanction such as the imposition of costs, he might be inclined to exercise such discretion. Such discretion might be warranted since the Complainant is not likely to repeat such a failure now that he is represented by counsel. Unfortunately, the Hearing Examiner knows of no authority for some intermediate sanction. The Complainant has failed to meet his burden to demonstrate that he had some legitimate reason for missing the Pre-Hearing Conference on April 30, 1996. The Hearing Examiner must order the complaint dismissed.

ORDER

The complaint is hereby dismissed. The Complainant may seek review of this decision by the Commission. A request for review must be received no later than twenty days (20) days from the undersigned date. Such a request must be in writing.

Signed and dated this 8th day of March, 1995.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner