

**BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY**

<p>Roberta Welborn, Charging Party, versus Omo Construction, Respondent.</p>	(Human Rights Act Case No. 9809008483
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	(<i>Order of Dismissal</i>
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On March 1, 1999, at 9:00 a.m., the hearing examiner convened a further prehearing conference to address discovery sanctions, dismissal and conduct of the hearing (if any).

Welborn filed her initial appearance and preliminary prehearing statement, signed also by her attorney, on December 4, 1998. In that preliminary prehearing statement, she did not list witnesses or exhibits, but stated she would do so within 15 days. She did not. The parties had difficulty scheduling Welborn's deposition, and the hearing examiner issued an order compelling her appearance for her deposition. The hearing examiner also delayed hearing in accord with the stipulation of the parties. That order issued on December 24, 1998, less than a week before discovery completion. The hearing examiner extended discovery to close on February 15, 1999, setting hearing for March 4, 1999.

On February 25, 1999, counsel for Welborn filed initial responses to Omo Construction's first and second discovery requests, due on (respectively) December 30, 1998 and January 20, 1999. Welborn had not objected to either set of discovery requests, had not requested additional time to respond, and had not responded at all until February 25, 1999, after the hearing examiner ordered responses. On February 18, 1999, Welborn appeared for her deposition, noticed for the sixth time. Her attorney did not attend her deposition. She did not produce documents Omo Construction had requested she provide at the time of her deposition. On February 25, 1999, she produced a considerable volume of documents not previously identified or exchanged in this contested case, all in the context of the late responses to discovery.

On February 26, 1999, Welborn faxed to the hearing examiner and Omo Construction her witness and exhibit lists. Welborn had previously identified one of the listed witnesses, Brad MacGrady, in her complaint to the Human Rights Bureau. Omo Construction knew of the identity and probable testimony of two other witnesses, Peggy Schippen and Resa Todd. Welborn had mentioned by name one of her witnesses, Dr. Olson, in her deposition on February 18, 1999.

The hearing examiner, after hearing argument and participating in the conference, advised the parties he would preclude Welborn from offering her exhibits C, I and K, and preclude her from calling any witnesses except Brad MacGrady, Douglas Welborn (her spouse), Ronald Peppers (her son), Peggy Schippen, Resa Todd and any witnesses timely

identified by Omo Construction (including Welborn herself). Welborn withdrew proposed exhibits G (duplicative of B), H (due to a stipulation of fact) and J (after the hearing examiner noted its hearsay nature). After further discussion, the hearing examiner decided, in the interest of administrative economy and fairness, to dismiss Welborn's contested case as the appropriate discovery sanction.

Without expert testimony (precluded by failure timely to disclose), Welborn's claim of aggravated post traumatic stress disorder must fail. Without further support for her damage claims, her own testimony is unlikely to be sufficient to support her claim for past and future lost wages (now extended over 16 years). Welborn would now present her case without some of her liability witnesses and exhibits as well as without most of her damage witnesses. Rather than require Welborn to present a truncated version of the case she proposed to present, and then pursue appeal on the discovery sanctions, the hearing examiner decided to dismiss. With so much of Welborn's case precluded by this sanctions order, and perhaps more of it at risk of exclusion during hearing (as additional instances of non-disclosure are identified in the offered evidence), it is unfair to both parties to require a trial on some issues, with the majority of issues waiting in the wings for a decision on appeal.

Welborn's extended and repeated failures to follow the rules and the scheduling orders can not be excused by claims that her lawyer was moving his office, that some other lawyer lost some of her files and that her PTSD rendered her virtually unable to function. Welborn, represented by counsel since the beginning of December, has failed to provide even a bare minimum of timely disclosures. She has argued that she could not access the contents of the Human Rights Bureau file (and therefore could not provide her discovery responses), while arguing at the same time that anything in the Human Rights Bureau file was known to Omo Construction because it could have accessed the file. On the face of it, her failure to obey the rules and scheduling orders prejudices Omo Construction.

The Montana Legislature adopted the district court trial model for Montana Human Rights Act cases in 1997. The Rules of Evidence apply. The Rules of Civil Procedure apply. Welborn's cavalier disregard for the rules results in a harsh outcome, with no consideration of the merits of her claims. Unfortunately, any other result would effectively require Omo Construction to go to hearing this week (March 4, 1999) with no time to obtain witness statements from the witnesses, no time to depose the doctors, no time to change its own witness and exhibit lists and no time to prepare. Throughout this contested case, Welborn and her counsel have displayed the attitude that at hearing her case would be unfolded. By withholding information until after discovery closes, Welborn has assured that Omo Construction has no time to prepare and to respond to the merits of her claims. This is precisely the kind of conduct the rules are designed to prevent.

This case is dismissed.

Dated: March 2, 1999.

Terry Spear, Hearing Examiner
Montana Department of Labor and Industry

PLEASE NOTE that this is the department's final decision in this contested case.

ALL SUBMISSIONS HEREAFTER FILED BY ANY PARTY MUST INCLUDE THE ORIGINAL AND 6 COPIES OF THE ENTIRE SUBMISSION.

Any party dissatisfied with this ORDER OF DISMISSAL MUST FILE AN ORIGINAL NOTICE OF APPEAL WITHIN 10 BUSINESS DAYS OF RECEIPT OF THIS ORDER with Terry Spear, Hearings Bureau, Department of Labor and Industry, P.O.Box 1728, Helena, Montana 59624. The notice of appeal is a submission-- the original and six copies must be filed. At the same time, copies of your notice of appeal must be filed with the Human Rights Commission, c/o Kathy Helland, Human Rights Bureau, Department of Labor and industry, P.O. Box 1728, Helena, Montana 59624-1728, and with all other parties of record.

TRANSCRIPTS OF THE PREHEARING CONFERENCES HELD ON FEBRUARY 23, 1999, AND MARCH 1, 1999, ARE BEING PREPARED BY THE DEPARTMENT FOR INCLUSION IN THE RECORD FILE. If the proceedings at either or both of those prehearing conferences are relevant to your appeal, your notice of appeal MUST state that Commission review of the hearing transcript is required. You must arrange with the Hearings Bureau for filing with the Human Rights Commission of the original and six copies of the completed prehearing transcripts. Contact Department staff as soon as possible)Sandra Page, 406-444-3805(to make these arrangements. Failure to specify transcript review as part of your appeal can limit a party's right to seek review. Please also note 49-2-505)4(MCA, requiring that the Commission hear all appeals within 120 days of receipt of notice of appeal.