

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
CENTRAL DIVISION**

MARKUS WILLIAMS and TRACY  
WILLIAMS,

Plaintiffs,

vs.

EMP SERV L.L.C., PIPESTONE  
SYSTEMS VETERINARY  
CLINIC/HAWKEYE II L.L.P., and  
HAWKEYE IV L.L.P., also d/b/a THE  
PIPESTONE SYSTEM,

Defendants.

No. C99-3055-MWB

**ORDER REGARDING DEFENDANTS'  
MOTION TO DISMISS**

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This matter comes before the court on defendants' Motion To Dismiss Plaintiffs' Complaint (#12) filed on July 5, 2001. Defendants seek dismissal of this case, pursuant to Federal Rule of Civil Procedure 41(b), for plaintiffs failure to prosecute the litigation and to comply with a prior order of this court's to make themselves available for the taking of their depositions.

Plaintiffs Markus Williams and Tracy Williams filed this employment discrimination lawsuit on July 23, 1999, against their former employer alleging that they were subjected to race discrimination and harassment during their employment, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* This case was set for trial on June 4, 2001. Defendants attempted to arrange the depositions of plaintiffs. In spite of these efforts, defendants were unable to take plaintiffs' depositions. On April 26, 2001, the parties filed a joint motion to continue the trial in this case and allow the parties to complete discovery. Specifically, defendants requested that the court order plaintiffs to

make themselves available for the taking of their depositions. On April 30, 2001, the court granted the joint motion, reopening discovery and continuing the trial in this case. The court cautioned plaintiffs that this case was subject to dismissal if they failed to cooperate with discovery and appear for their depositions. Subsequently, defendants' counsel noticed the depositions of plaintiffs on April 30, 2001, and, with the consent of plaintiffs counsel, plaintiffs' depositions were set for May 21, 2001. Subpoenas were also directed to plaintiffs' counsel to accept on behalf of plaintiffs. Neither plaintiff appeared for their scheduled deposition on May 21, 2001. Defendants' have now moved for dismissal of this case for plaintiffs' failure to prosecute. Plaintiffs have not responded to defendants' motion to dismiss even though their counsel requested and was granted an extension of time to do so.

Federal Rule of Civil Procedure 41(b) provides that:

For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

FED. R. CIV. P. 41(b). A district court has the power under Rule 41(b) to dismiss a case for the plaintiff's failure to prosecute or to comply with any court order and, unless otherwise specified, such a dismissal operates as an adjudication on the merits. *Brown v. Frey*, 806 F.2d 801, 803 (8th Cir. 1986). Because it operates as an adjudication on the merits, a Rule 41(b) dismissal is "'a drastic sanction which should be exercised sparingly.'" *Brown*, 806 F.2d at 803 (quoting *Pardee v. Stock*, 712 F.2d 1290, 1292 (8th Cir. 1983)). The district court should only exercise this dismissal power when the plaintiff has demonstrated a "'clear record of delay or contumacious conduct.'" *Haley*, 761 F.2d at 491

(citations omitted).

Here, the court finds that there is a record of clear disregard for this court's prior order and that lesser sanctions would not suffice. The court continued the trial in this matter and reopened discovery with the central purpose being to permit defendants to take plaintiffs' depositions. In addition, plaintiffs were specifically warned that their action was subject to dismissal if they failed to appear for their depositions. Despite this warning, neither plaintiff appeared for their deposition. No reason for their failure to appear has been put forward by plaintiffs. Indeed, notwithstanding plaintiffs counsel's obtaining of an extension of time to respond to defendants' motion to dismiss, no response to defendants' motion was filed by plaintiffs' counsel, no doubt due to the dilatory nature of his clients. Thus, the court concludes that although a remedy of last resort, *Haley*, 761 F.2d at 491, dismissal with prejudice is proper in the present case and defendants' Motion To Dismiss Plaintiffs' Complaint is **granted**. Therefore, this case is dismissed with prejudice pursuant to Rule 41(b) of the Federal Rules of Civil Procedure.

**IT IS SO ORDERED.**

**DATED** this 8th day of August, 2001.

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MARK W. BENNETT  
CHIEF JUDGE, U. S. DISTRICT COURT  
NORTHERN DISTRICT OF IOWA