U.S. Department of Labor

Office of Administrative Law Judges
36 E. 7th St., Suite 2525
Cincinnati, Ohio 45202

(513) 684-3252
(513) 684-6108 (FAX)

Issue Date: 04 December 2007

Case No.: 2007-SOX-00056

In the Matter of

THERON T. MATTHEWS,
Complainant

v.

LABARGE, INC.,
Respondent

ORDER OF DISMISSAL

This proceeding arises under the Employee Protection Provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514(A) and the regulations promulgated thereunder at 29 C.F.R. Part 1980 (2004). Theron T. Matthews filed the complaint involved in this case on March 27, 2007, which was investigated by the U.S. Department of Labor and denied on April 15, 2007 by the Acting Regional Administrator, Occupational Safety and Health Administration, Dallas, Texas. The matter was referred to the Office of Administrative Law Judges on May 15, 2007 and Mr. Matthews requested a formal hearing regarding this complaint on June 6, 2007.

PROCEDURAL HISTORY

I issued a notice of hearing and pre-hearing order on July 5, 2007 setting the case for hearing on August 29, 2007 at Tulsa, Oklahoma. I directed in that notice that the parties should expedite discovery "in good faith" and that discovery was to be completed by August 15, 2007. I also provided certain requirements regarding the exchanging and filing of pre-hearing submissions. Respondent, on July 13, 2007, filed a motion to shorten the time for the complainant to provide responses and produce documents in response to its first request for production of documents. Counsel for the respondent, Hollye Stolz Atwood, essentially explained that she was encountering problems with arranging a deposition of the complainant and voluntary agreement with the complainant to expedite discovery. She advised that "[t]ime is of the essence in this matter" because of the pending hearing.

I issued an order on July 16, 2007 granting the respondent's motion to shorten the time to respond to the document requests and requiring the complainant to provide written responses and produce the requested documents by July 27, 2007. I further ordered the complainant to appear at the deposition scheduled for July 30, 2007, or another mutually agreeable weekday in accordance with the respondent's notice of deposition.

Complainant, on July 30, 2007, filed by facsimile a request to cancel the deposition and to settle the case. He argued in this response that the deposition should be cancelled on the grounds the respondent had not complied with his discovery requests, which were faxed to respondent's counsel on July 17, 2007. He went on to provide some details regarding the filing and the substance of his complaint, then requested that I require the respondent to settle the case by paying him $500,000.

I conducted a telephone conference with the complainant and respondent's counsel shortly after I received the complainant's facsimile on July 30, 2007. I advised Mr. Matthews that his request to cancel the deposition was denied and that the respondent would be allowed the same amount of time to respond to his discovery requests, July 31, 2007. During the conference, I encouraged the complainant to consider obtaining counsel to represent his interests in this matter. I further advised him that the regulations pertaining to this case are set forth at 29 C.F.R. Part 18 and that I expected the parties to comply with the procedural regulations in presenting their case. I noted to him it was not my position to be involved in the settlement of his case and I emphasized to the parties the importance of cooperating in the development of the evidence because of the complexity of the litigation and the expedited procedures under which they were working.

The complainant filed a document entitled "Request for Subpoena" on August 6, 2007. He essentially requested in this document that I issue an order requiring the respondent to produce all documents requested in his first request for documentation. Respondent filed an opposition to the complainant's request for subpoena by facsimile on August 8, 2007, arguing the subpoena went beyond the specific issues before me.

Respondent also filed a motion for continuance of the August 29, 2007 hearing on August 7, 2007. Counsel maintained in this motion that it was impossible to complete discovery by August 15, 2007. Mr. Matthews responded to the respondent's request for continuance by facsimile on August 13, 2007 opposing the motion and requesting I issue an order requiring the respondent to comply with his discovery requests.

I issued an order on August 13, 2007 directing the parties to immediately confer regarding their discovery problems. I further directed the respondent to comply with the complainant's request for documents or show cause for such failure on August 17, 2007. I denied the motion to continue the hearing, but extended the cut-off date for discovery to August 22, 2007. I again encouraged the parties to be reasonable in attempting to resolve their discovery problems. I also modified the July 5, 2007 notice of hearing and pre-hearing order to allow the parties until August 24, 2007 to file their pre-hearing submissions.

Respondent, on August 16, 2007, filed a motion for protective order. I issued an order on August 20, 2007 denying the respondent's motion for protective order. I found in this order that the respondent had not shown good cause for treating discovery in this case as confidential.

Also on August 16, 2007, respondent filed a motion to compel discovery, with supporting memoranda. In the motion, counsel argued that the complainant's response to her request for production of documents dated July 26, 2007 was cursory in that it merely responded "CD" to 9 of the 15 paragraphs contained in the request. Respondent's counsel noted that it took her staff several days to print the thousands of documents from the CD and the documents were not indexed, organized or identified with the request number to which each document pertained. She therefore requested an order compelling the complainant to comply with her discovery request immediately by linking the produced documents to the appropriate document request. She went on to argue in the motion that the complainant had also refused to produce notes that he maintained in his daily planner concerning his employment with the respondent.

In the August 20, 2007 order, I agreed that the complainant had not complied with the discovery requests of the respondent and that it was reasonable for the respondent to expect documentation produced pursuant to the request to be indexed and organized in such a manner so that the opposing party and ultimately the Court could determine whether the responding party had reasonably complied with the discovery request. I therefore granted the respondent's motion to compel and required the complainant to comply with the respondent's discovery request by indexing and organizing the documentation filed with the respondent. I further required him to produce all of his notes contained in his planner or to show cause for his failure to do so. I directed the complainant to comply with the motion to compel by August 22, 2007, explaining that I would be forced to entertain another motion to continue the August 29, 2007 hearing, if the discovery problems were not resolved. I again reiterated to the complainant that I was <u>not</u> "to conduct settlement negotiations," although the complainant had requested that I do so.

I issued an order on August 21, 2007 pertaining to the respondent's August 17, 2007 request that I find good cause for her failure to comply with Mr. Matthews' request for documents. After addressing all of the arguments raised by the parties, I directed that the respondent answer some of the complainant's discovery requests and found that respondent had shown good cause for failing to answer some of the other requests. In view of the discovery problems and the need to maintain the hearing schedule, I further extended the discovery cut-off date in this order to August 24, 2007.

I conducted a telephone conference on August 22, 2007 with the complainant and respondent's counsel for the purpose of discussing the parties' preparation for the August 29, 2007 hearing. Prior to that telephone conference, respondent had filed a motion for summary judgment and an alternative motion *in limine*. These motions were discussed and I advised the parties that I agreed with respondent's counsel that I had no jurisdiction over certain violations raised in Mr. Matthews' complaint. I also advised respondent's counsel that her client's motion for summary judgment was being denied as untimely under 29 C.F.R. § 18.40.

I detailed some of the problems raised in the conference call in an order dated August 23, 2007. Specifically, I noted the complainant's failure to index and organize the voluminous documentation that he had produced to Ms. Atwood. I acknowledged during this conference and the August 23, 2007 order that it was not possible to prepare this case for litigation as scheduled on August 29, 2007. I therefore continued the hearing and I directed in this order that the parties proceed with discovery in accordance with the provisions of my recent orders so that discovery could be completed as soon as possible. I directed the parties to file a status report by September 10, 2007 as to their discovery efforts and trial preparation so that I could reschedule the case for hearing. Also in this order, I noted that the respondent had filed a motion for partial summary judgment, which I was denying as untimely, and a motion *in limine* which I granted to the extent that the evidence at the hearing would be limited solely to the alleged violations of the Sarbanes-Oxley Act.

Discovery and procedural problems continued into September. Respondent filed another motion for protective order on September 7, 2007, to which the complainant responded on September 10, 2007, and the respondent replied on the following date. I issued an order on October 3, 2007 granting respondent's motion for protective order in part and denying it in part. I also noted in that order that the complainant had filed a motion for summary judgment on September 9, 2007, which I denied in the order on the grounds it was baseless.

I also noted in the October 3, 2007 order that the respondent had filed its discovery status report on September 10, 2007, in which respondent's counsel stated that she anticipated completing her review of the thousands of documents she needed to produce to the complainant by September 15, 2007. She indicated in the request that the complainant still had not produced the notes from his daily planner and she had not received an index from the complainant or means of organizing the voluminous information previously produced by the complainant. Mr. Matthews filed his status report on September 17, 2007 advising that he would need additional time to tabulate and paginate the documents previously requested by the respondent. He therefore specifically requested that he be allowed until October 16, 2007 to comply with the respondent's request. He also requested that I waive the indexing and paginating requirements. I denied the complainant's request to waive the indexing and organizing of the documents previously submitted to the respondent, but granted his request to be allowed until October 16, 2007 to provide the information. I advised respondent's counsel that she should produce the documentation previously requested by the complainant immediately following the receipt of the information from the complainant. I finally ordered that discovery be completed by November 23, 2007, since I anticipated scheduling the case for hearing on December 5, 2007.

I issued a notice of hearing and pre-hearing order on October 18, 2007 setting the case for hearing on December 5, 2007. I specifically provided in this notice that the parties were to expedite discovery and that discovery was to be completed by November 23, 2007. I also directed the parties to file their exchanges and pre-hearing submissions by November 29, 2007. I specifically provided in the last paragraph of the notice "[f]ailure to comply with this pre-hearing order without good cause may result in the dismissal of the proceeding or the imposition of other appropriate sanctions against the non-complying party."

Discovery problems continued. The respondent, on October 23, 2007, filed a motion for sanctions and supporting memorandum. In the motion, respondent requested, pursuant to 29 C.F.R. § 18.6(d)(2)(iii), for me to enter an order either dismissing the complaint involved in this matter or prohibiting the complainant from introducing into evidence or testifying about any of the documents that he produced to the respondent on July 27, 2007 in response to respondent's document request. Counsel explained that the thousands of documents on the CD produced by the complainant were not indexed, were not organized and were not identified with the number of the request to which each document is responsive. She noted the history regarding the complainant's failure to comply with my orders and specifically referred to the October 3, 2007 order in which I granted complainant's request to be allowed until October 16, 2007 to index and paginate the documents in question. She stated that the complainant still had failed to comply with that order. Ms. Atwood went on to argue in her motion that the complainant's failure to comply with my orders had caused the respondent to incur legal fees unnecessarily. She therefore requested the dismissal of Mr. Matthews' complaint because of his "utter disregard" for my orders or alternatively requested that I prohibit Mr. Matthews "from testifying about or introducing into evidence any of the documents" recently submitted to the respondent pursuant to her discovery requests.

Complainant filed a response to the respondent's motion for sanctions and supporting memorandum by facsimile on October 25, 2007. Among other things not pertinent to this order, complainant stated that I have "extended discovery to November 23, 2007 and it is the Complainant's understanding that this is the deadline to have the tabulation and pagination complete." He also noted that he had not received any documentation from the respondent, although he indicated that I had ordered the respondent to comply with his discovery requests. He therefore requested that I issue an order requiring the respondent to comply with his document requests and to force the respondent to settle this case.

Respondent filed a reply to complainant's response on October 30, 2007. Counsel essentially disputed the complainant's allegations regarding his compliance with her discovery requests and my orders regarding discovery. She argued that Mr. Matthews' excuse for failing to produce the required indexing and pagination of the previously produced documentation "has not even a scintilla of credibility."

I issued an order on November 1, 2007, noting the discovery problems and the filings by the parties. I again emphasized to the complainant that I did not have the authority to become involved in settlement negotiations and that I intended to conduct the scheduled hearing on December 5, 2007, "absent extraordinary circumstances." I also advised the complainant in the order I was not persuaded by his allegations. I advised him that I was convinced that he knew, or should have known if he had read the October 3, 2007 order, that I allowed him until the requested date of October 16, 2007 to provide the respondent with the indexing and organization of the documents he had previously submitted pursuant to the respondent's requests. I added that I also was convinced that the complainant knew, or should have known if had read the October 3, 2007 order, that I did not require the respondent to produce any additional documentation to Mr. Matthews until such time as he complied with that order and provided the requested indexing and organization to the respondent.

I concluded the November 1, 2007 order by noting that I found the respondent's motion for sanctions deserving of serious consideration. I therefore ordered the complainant to show cause by November 13, 2007 why the respondent's request for sanctions either in the form of a dismissal of his complaint or prohibition against Mr. Matthews "from testifying about or introducing into evidence any of the documents on the CD" should not be granted. 29 C.F.R. § 18.6(d)(2)(iii). I further stated that the respondent was not required to produce any additional documentation to the complainant because of Mr. Matthews' failure to comply with my previous orders and cooperate in discovery. I emphasized to the parties that the due date for the filing of pre-hearing submissions required in the notice of hearing and pre-hearing order dated October 18, 2007 remain unchanged.

The complainant responded to the November 1, 2007 order by facsimile on November 8, 2007. In this response, complainant noted that he had been extremely busy at work for the last six weeks and had not had the time to comply with my order. He stated that "[a]ll information will be sent overnight mail on November 12, 2007." He failed to provide any other rationale as to why sanctions should not be imposed due to his failure to comply with my previous order.

By facsimile dated November 13, 2007, respondent provided a status report of complainant's discovery responses. According to Ms. Atwood, respondent received a facsimile (not overnight mail) from complainant on November 12, 2007 that was largely illegible due to the small size and print of the document. In addition, the document appeared to summarize only 213 pages of documents, instead of addressing the thousands of pages that complainant produced on the CD. Ms. Atwood attached a copy of complainant's facsimile.

Complainant, by facsimile dated November 19, 2007, responded to the status report of the respondent. Among other things, Mr. Matthews attempted in this response to explain away his failure to provide the respondent with the information that I directed him to provide in my previous orders, arguing that some of the requests were overly burdensome and essentially pertained to irrelevant documents. Ms. Atwood also replied to the facsimile of Mr. Matthews on November 19, 2007 and again argued that the information provided to her client was essentially insufficient to meet the respondent's requests and the provisions of my previous discovery orders.

I issued an order on November 23, 2007 detailing the continuing problems with discovery in this case and agreeing with the respondent that the complainant's attempt to comply with my previous orders pertaining to discovery was "too little and too late." I found in this order that the complainant's excuse for failing to provide the information required in my October 3, 2007 was not adequate to prevent the imposition of sanctions and that his attempt to comply with my order by providing limited information and refusing to provide additional information further justified sanctions in some form. After specifying the sanctions available under 29 C.F.R. § 18.6(d)(2), I ordered that the complainant would not be permitted to introduce evidence at the hearing relating to any of the documents that he produced to the respondent on the CD on July 27, 2007 because of his repeated failure to comply with my discovery requests and because such action had caused undue delay in the proceedings. I chose this sanction over a dismissal of his claim, explaining that a dismissal seemed extreme given the circumstances in this case. I further directed in that order that the respondent was not required to produce any documentation pursuant to the

complainant's discovery requests because of the complainant's failure to fully comply with respondent's discovery requests and my orders pertaining to such requests. I concluded the order by directing that discovery was terminated and ordering the parties to comply with the provisions of my notice of hearing and pre-hearing order dated October 18, 2007 and serve the necessary pre-hearing exchanges and filings by no later than November 29, 2007.

Pursuant to the notice of hearing and pre-hearing order issued on October 18, 2007, respondent's counsel filed her client's pre-hearing exchange by facsimile on November 29, 2007. Of particular importance, Ms. Atwood provided in paragraph 4(C) of that response that copies of all non-stipulated documents were to be forwarded by overnight mail to me because they are too voluminous to include with the facsimile. She added that the complainant had failed to respond to her communications concerning the need to stipulate to the authenticity of these exhibits.

I issued an order on November 30, 2007 noting that the complainant had not complied with the provisions of the October 18, 2007 notice of hearing and pre-hearing order and the November 23, 2007 order pertaining to the service of the pre-hearing exchanges and filings by no later than November 29, 2007. Respondent filed a motion to dismiss on that same date due to the complainant's failure to comply with the pre-hearing order. Counsel explained in detail in this motion why the complaint involved in this case should be dismissed, not only for the complainant's failure to comply with the October 18, 2007 pre-hearing order and my order of November 26, 2007, but because of the complainant's failure to comply with "discovery orders and circumventing the rules established for matters before Department of Labor Administrative Law Judges." She also added that her client had been prejudiced by the complainant's complete disregard for my pre-hearing orders "yet, complainant has the benefit of Respondent's submission." I therefore directed in the order that the complainant show cause by the December 5, 2007 hearing why sanctions should not be imposed, including the dismissal of his complaint, because of his failure to comply with the provisions of the October 18, 2007 notice of hearing and pre-hearing order and the November 23, 2007 order. *See* 29 C.F.R. § 18.6(d)(2); *see also* Fed. R. Civ. P. 41(b). I also instructed respondent's counsel to withhold filing copies of any documentary evidence until the hearing.

By facsimile dated December 3, 2007, Theron T. Matthews responded to my order of November 30, 2007. He initiates his response by objecting to what he characterized as an "unjustifiable and unlawful order", stating that my "arrogance and inaccuracies are second only to" my gross prejudice and blatant pro-corporate bias. He goes on at great length to allege how I have favored the respondent in all of the discovery disputes involved in this case. He argues that I have shown "gross prejudice" and that I have "unlawfully and unjustifiably over exercised and reprimanded the Complainant" and showed corporate bias essentially by not requiring the respondent to produce any documents. He argues that I completely ignored his motions in violation of procedures and that I have "not taken an active role in managing the disclosure process and in fact has been seemingly apathetic." He finally objects to my November 30, 2007 order and demands that I take one of the following actions:

1) Put aside the gross prejudice and pro corporate bias and remove the sanctions placed on the disclosure documentation. Order the Respondent to produce all the information requested in the Complainant's Fist Request for Documentation. Stop the Respondent's efforts to embarrass the Complaint [sic] by ruling in favor of the Complainant's motion to suppress this information. Reschedule the hearing allowing the Complainant time to review the Respondent's disclosed documentation.

2) If this Court is unwilling or unable to put aside the prejudice and bias, then the Court must turn this case over to another Court. One that will follow the procedures to this proceeding. One that is willing to allow both parties to present all the facts then make a fair and impartial ruling.

3) If this Court is unwilling of [sic] unwilling to follow options 1 or 2, then the Court must release this complaint and allow the Complainant to pursue this complaint in Federal court with a trial by jury.

In view of the response received from Mr. Matthews on December 3, 2007, I issued an order on that date cancelling the hearing on the grounds I intended to issue this order dismissing his complaint.

Conclusions

Complainant has given me three options to resolve the problems involved in this case. I reject his initial request of requiring me to order the respondent to produce all of the documentation requested by the complainant in his discovery requests and to reschedule the hearing to allow him time to review this information. I do so because I specifically directed respondent's counsel to withhold serving the documentation the respondent had assembled to comply with the complainant's discovery requests and my order to produce. I did this because the complainant had repeatedly refused to index and organize the voluminous documentation that he had served on the respondent on the CD. The numerous orders that I have issued in this case clearly demonstrate the discovery difficulties encountered with the complainant and show a pattern of non-compliance with my orders by Mr. Matthews.

Obviously, I also am unwilling to comply with the complainant's second option of essentially recusing myself from this case. Notwithstanding Mr. Matthews' allegations of prejudice and bias against him, the numerous orders that I have issued in this case regarding discovery clearly show that I have ruled both for and against both parties in resolving discovery controversies. Moreover, I have followed the procedural guidelines set forth regarding discovery in 29 C.F.R. Part 18. If anything, I perhaps have been too lenient with the parties, particularly the complainant, in attempting to convince the parties to amicably resolve the discovery controversies involved in this proceeding.

Complainant finally requests that if I am unwillingly to follow either of the first two options, then I must release his complaint to allow him to pursue it "in Federal court with a trial by jury." The Sarbanes-Oxley Act and the regulations promulgated thereunder provide a complainant with the option of "bringing an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such action without regard to the amount of controversy." 18 U.S.C. § 1514(A)(b)(B); 29 C.F.R. § 1980.114(a). However, that statutory section allows such review by the district court if the Secretary of Labor "has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the complainant." If a complainant meets the requirements of this statutory provision and seeks the jurisdiction of the federal district court by filing a petition, then the Office of Administrative Law Judges loses jurisdiction over the matter. *Stone v. Duke Energy Corp.*, 432 F.3d 320 (4th Cir. 2005).

Mr. Matthews filed the complaint involved in this matter on March 27, 2007. Thus, he meets the above-cited requirement in that the Secretary of Labor has not issued a final decision regarding his complaint within 180 days of the filing of that complaint. However, I have not yet lost jurisdiction over this matter because Mr. Matthews has merely expressed an interest in pursuing his complaint in the federal district court. There is no evidence that he has filed such a petition. Moreover, I also question whether the district court would assume jurisdiction in this matter because I find that the delay in the administrative process is due to the "bad faith of the complainant." Indeed, it is possible that a decision on the merits would have been issued within 180 days of the filing of the complaint by Mr. Matthews had he cooperated in discovery and trial preparation for the hearing originally scheduled on August 29, 2007. Therefore, I am not dismissing his complaint on the grounds that the complainant has sought, or intends to seek, de novo review before the U.S. District Court.

I reiterate that the regulations applicable to this case are set forth at 29 C.F.R. Part 1980 (2003). Section 1980.107 of that part provides that the proceedings are to be "conducted in accordance with the Rules of Practice and Procedure for Administrative Proceedings Before the Office of Administrative Law Judges", which are set forth at 29 C.F.R. Part 18. The authority of an administrative law judge to conduct a fair and impartial hearing is set forth at 29 C.F.R. § 18.29. Moreover, an administrative law judge is permitted to take any action authorized by the Administrative Procedures Act and the Rules of Civil Procedure for the U.S. District Courts. 29 C.F.R. § 18.29(a)(6) and (8). Subsection (a)(9) of that section provides for the administrative law judge to do all other things that are necessary to enable the judge to discharge the duties of his office. 29 C.F.R. § 18.29(a)(9).

Specifically set forth at 29 C.F.R. § 18.6(d)(2) are the powers of an administrative law judge with regard to motions and requests of the parties when an officer or agent of a party fails to comply with a subpoena or an order of an administrative law judge. This section of the regulations sets forth the following sanctions for a party's failure to comply with an order of an administrative law judge:

> If a party or an officer or agent of a party fails to comply with a subpoena or with an order…the administrative law judge…may take such action in regard thereto as is just, including but not limited to the following:

> (i) Infer that the admission, testimony, documents or other evidence would have been adverse to the non-complying party;
>
> (ii) Rule that for the purposes of the proceeding the matter or matters concerning which the order or subpoena was issued be taken as established adversely to the non-complying party;
>
> (iii) Rule that the non-complying party may not introduce into evidence or otherwise rely upon testimony by such party, officer or agent, or the documents or other evidence, in support of or in opposition to any claim or defense;
>
> (iv) Rule that the non-complying party may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence should have shown.
>
> (v) Rule that a pleading, or part of a pleading, or a motion or other submission by the non-complying party, concerning which the order or subpoena was issued, be stricken, or *that a decision of the proceeding be rendered against the non-complying party, or both.* (emphasis added)

Thus, it is evident that an administrative law judge has been granted the authority, where appropriate, to dismiss a complaint of a party who violates an order of an administrative law judge. The remaining question is when is it appropriate to dismiss a complaint of a party for failing to follow the orders of a judge.

The Administrative Review Board (Board), to which this case is initially appealable, has affirmed an administrative law judge's decision to dismiss a complaint for failure to properly prosecute. *See Bacon v. Con-Way Western Express*, ARB No. 01-058 (Apr. 30, 2003). In doing so, that Board referenced its decision in *Reid v. Niagara Mohawk Power Corp.*, ARB No. 00-082 (Aug. 30, 2002). However, it also acknowledged that a dismissal with prejudice is a severe sanction because it defeats a litigant's right to access the courts and that it should be used only as a last resort and reserved for extreme circumstances. *Bacon*, ARB No. 01-058, p. 3. The Board then went on to identify the factors that the controlling federal Courts of Appeal have considered in reviewing a dismissal.

In the case of *Howick v. Campbell-Ewald Company*, ARB No. 03-156 (Nov. 30, 2004), the Board reviewed an administrative law judge's dismissal of a complaint under the Surface Transportation and Assistance Act. It initially looked in that decision to Rule 41(b) of the Federal Rules of Civil Procedure, which pertains to an involuntary dismissal by the court for a party's failure to prosecute or comply with an order of the court. *Id.* at pp. 5 and 7. It pertinently acknowledged that the Tenth Circuit Court of Appeals had identified a number of factors to be considered before a dismissal of a case is justified. *Id.* at p. 7.

Mr. Matthews resides in and worked in Oklahoma at the time of his termination by the respondent. Thus, this case falls under the appellate jurisdiction of the Tenth Circuit Court of Appeals. In its decision in *Conkle v. Potter*, 352 F.3d 313 (10th Cir. 2003), that court explained that a district court should ordinarily evaluate the following factors in determining whether a dismissal of an action is an appropriate sanction under Fed. R. Civ. Proc. 41(b):

1. the degree of the actual prejudice to the opposing party;
2. the amount of interference with the judicial process;
3. the culpability of the party;
4. whether the party was warned in advance by the court that a dismissal of the action would be a likely sanction for non-compliance; and,
5. efficacy of imposing lesser sanctions.

See also Ehrenhaus v. Reynolds, 965 F.2d 916 (10th Cir. 1992); *Gripe v. City of Enid*, 312 F.d 3d 1184 (10th Cir. 2002). The court also emphasized in the *Conkle* decision that dismissal with prejudice is appropriate "only in cases of willful misconduct", citing its decision in the *Ehrenhaus* case. The Tenth Circuit previously had defined "a willful failure as 'any intentional failure as distinguished from involuntary non-compliance, no wrongful intent need be shown.'" *M.E.N. Co. v. Control Fluidics, Inc.*, 834 F.2d 869 (10th Cir. 1987).

There is no question that Mr. Matthews' actions in this case have prejudiced the respondent. As is detailed in the filings of respondent's counsel, she and her staff have devoted a substantial number of hours in attempting to understand the voluminous documentation produced by the complainant and in assembling thousands of pages of documents to be produced to the complainant pursuant to his discovery requests and my orders. Although obviously stressful to counsel, the respondent ultimately suffers the consequences of the complainant's actions because it has to bear the legal expenses associated with discovery requests. Moreover, the complainant's actions were prejudicial to the respondent because such actions hindered respondent's counsel in attempting to develop evidence to counter Mr. Matthews' complaint of discrimination. Ms. Atwood's most recent pre-hearing submission alone demonstrates the level of respondent's commitment to its defense of Mr. Matthews' complaint.

There also is no question that the actions of the complainant caused a significant amount of interference with the judicial process. The numerous orders that I have issued in this case regarding discovery document the substantial amount of time that I have devoted to attempting to insure that this case would proceed to hearing. Despite these efforts, the complainant's failure to comply specifically with the October 3, 2007 order, as well as the notice of hearing and pre-hearing order dated October 18, 2007 and my recent November orders, has caused substantial interference in preparing the case for litigation and ultimately the conducting of the formal hearing.

The culpability of the complainant is well-documented. He is the cause of the parties' failure to prepare this case for litigation. His delay and ultimately his non-compliance in providing the respondent with the indexing and organization of the voluminous documentation that he had produced pursuant to the respondent's discovery requests are the principal reasons this case was not ready for hearing. His failure to comply with my specific orders requiring him

to provide the indexing and organization, and his failure to file the required pre-trial submissions, ultimately led to the imposition of evidentiary sanctions, the cancellation of the hearing and the dismissal of this complaint.

Mr. Matthews was warned in advance that the dismissal of this action was likely for his non-compliance. Both the notice of hearing and pre-hearing orders dated July 5, 2007 and October 18, 2007, as well as the orders of November 1 and November 30, 2007, specifically provide for the dismissal of the proceedings for a party's failure to comply with those orders.

The efficacy of the sanctions was considered in my November 23, 2007 order. In imposing sanctions in that order in the form of limiting the type of evidence the complainant would be allowed to produce at the hearing, I noted at that time that a dismissal of the case did not appear to be an appropriate sanction and seemed extreme under the circumstances. Obviously, the imposition of those sanctions was not sufficient to convince Mr. Matthews to comply with the notice of hearing and pre-hearing orders. Rather than attempt to show cause for his failure to comply with such orders, his most recent response accuses me of prejudice and bias, as well as arrogance. I am now convinced that no sanction other than the dismissal of Mr. Matthews' complaint would produce an effective resolution of this matter. This dismissal is the direct result of Mr. Matthews' willfulness, bad faith and intentional failure to comply with the discovery requests of the respondent and my orders.

In conclusion, I find the record is replete with evidence demonstrating the complainant's failure to properly prosecute the complaint involved in this case. It shows his blatant failure to comply with my orders regarding discovery and the filing of pre-hearing submissions. Therefore, IT IS HEREBY ORDERED that respondent's motion to dismiss is granted and the complaint involved in this proceeding is dismissed with prejudice, pursuant to 29 C.F.R. § 18.6(d)(2) and Fed. R. Civ. Proc. 41(b).

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DONALD W. MOSSER
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of the administrative law judge's decision. *See* 29 C.F.R. § 1980.110(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

At the time you file the Petition with the Board, you must serve it on all parties, as well as the Chief Administrative Law Judge, U.S. Department of Labor, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. The Petition must also be served on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.109(c). Even if you do file a Petition, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days after the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1980.109(c) and 1980(a) and (b).