



**Issue Date: 17 March 2009**

**CASE NO.: 2008-SOX-00013**

In the Matter Of:

**JAY CARCIERO**  
Complainant

v.

**SODEXHO ALLIANCE, S.A.**  
**SODEXHO, INC.**  
**SODEXO OPERATIONS, LLC**  
Respondents

**DECISION AND ORDER OF DISMISSAL**

The matter arises from a complaint of discrimination filed by Complainant Jay Carciero under 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.A. § 1514A (West 2004) and the procedural regulations found at 29 C.F.R. Part 1980 (2004).

**Procedural Background**

The Notice of Hearing in this case issued on November 26, 2007, initially set the hearing for February 25, 2008. Several extensions of the hearing date were issued at the parties' request. The hearing was eventually rescheduled to April 1, 2009.

On October 1, 2008, I issued an order granting Respondents' Motion to Compel Discovery Responses and directed Complainant to respond to the request for production of documents by October 6, 2008. On October 16, 2008, the parties filed a Joint Motion for Independent Medical Examination of Jay Carciero and Extension of Deadlines.<sup>1</sup> On October 20, 2008, I issued an order granting the parties' Joint Motion, and appointed a physician to conduct

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<sup>1</sup> The their Joint Motion, the parties sought an IME for the purpose of determining whether Complainant Jay Carciero has the capacity to provide competent testimony in a deposition and to otherwise prosecute this action on his own behalf, and if not, to predict if and when he would be able to provide meaningful testimony and participate in these proceedings.

the IME and to file a report within thirty days. The Order also directed Mr. Carciro to present himself for the IME, extended the deadlines for completion of discovery to December 5, 2008, the filing of dispositive motions to December 22, 2008, and rescheduled the hearing for April 1, 2009. I held a telephone conference call with the parties the next day, October 21, 2008, to ensure the parties understood their responsibilities under the Order. On November 20, 2008, I held an additional telephone status conference with the parties, upon Respondents' request, to address difficulties which had arisen in completing the IME. (11/22/08 Telph. Conf. TR. at 5-6). After considering the parties' positions and the Respondents' efforts to address Mr. Carciro's issues with completing the IME, I agreed to extend the date for completing the IME from November 20 to December 1, 2008. (11/22/08 Telph. Conf. TR at 12-14).

On December 2, 2008, Respondents filed a Motion for Sanctions Against Complainant Jay Carciro, seeking dismissal of the claim for his failure to comply with discovery.<sup>2</sup> (Resp. Mot. Sanct.). On December 8, 2008, Complainant filed an Opposition to the Motion for Sanctions.<sup>3</sup> (C. Opp to Sanct).

In response to the parties' pleadings, I issued an Order Holding Motion for Sanctions in Abeyance and Order to Show Cause and Order Severing Cases on December 16, 2008. (Dec. 16, 2008 Ord.) The Order held the Respondents' Motion for Sanctions and for dismissal in abeyance until February 20, 2009 to afford the Complainant one final opportunity to complete the ordered IME. (Dec. 16, 2008 Ord. at 5). The Order directed that if the IME was not completed by February 20th, Complainant was directed to Show Cause Why the Motion for Sanctions should not be granted by February 27, 2009.<sup>4</sup> *Id.* at 5, 6. The December 16, 2008 Order also ordered Complainant to respond to specific document requests made by the Respondents and directed that if Complainant failed to do so by February 20, he had until February 27, 2009 to show cause why the motion for sanctions should not be granted.<sup>5</sup> (Dec. 16, 2008 Ord. at 5). To date, Complainant has not responded to the Court's December 16, 2008 order requiring him to complete the IME and respond to the written discovery or the order to show cause why his

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<sup>2</sup> Specifically, the failure to comply with the October 20, 2008 Order Granting Parties Joint Motion for an Independent Medical Examination (IME) of Jay Carciro, to determine whether he is competent to recall events, provide testimony at deposition, and proceed to prosecute this civil action with assistance of counsel and the failure to comply with the October 1, 2008 Order to provide responses to Respondents' written discovery. (Resp. Mot. Sanct.).

<sup>3</sup> Complainant's opposition to the motion for sanctions acknowledged that he was in violation of the Court's order to submit to a psychiatric IME. *Id.* at 1-7, 9. Jay Carciro's response states that counsel was informed by Complainant's brother, John Carciro, that Jay Carciro suffers from severe depression that appears to be exacerbated during the holiday season. Complainant's response argues that "should Jay Carciro suffer from some sort of mental impairment,"... "the Court should not further Jay Carciro's plight by dismissing his case when there is other significant evidence that the case can be determined on its merits." *Id.* at 9. On December 15, 2008, Complainant's counsel delivered a one sentence letter to the undersigned stating that Jay Carciro had been hospitalized for mental health issues on December 14, 2008.

<sup>4</sup> Additionally, the December 16, 2008 Order severed Jay Carciro's claim from a claim his brother, John Carciro, had against the same Respondents. (Dec. 16, 2008 Ord. at 5-6).

<sup>5</sup> This was the second order requiring Jay Carciro to respond to written discovery requests from Respondents. I originally ordered the Complainant to provide written responses to the Respondents' discovery requests on October 1, 2008.

complaint should not be dismissed, should he fail to complete the IME or provide specific responses to discovery requests.

### **Discussion**

The court has the authority to dismiss a case for failure to comply with pre-trial orders and deadlines and for lack of prosecution. 29 C.F.R. 18.6(d)(2)(v); *Mathews v. Labarge, Inc.*, ARB No. 08-038, ALJ No. 2007-SOX-56 (ARB Nov. 26, 2008) slip op. at 3; *Zahara v. SLM Corp.*, ARB No. 08-020, ALJ No. 2006-SOC-130 (March 7, 2008) slip op. at 3. I have given the Complainant multiple opportunities to comply with my two orders to provide responses to written discovery and the order to complete the IME. The Complainant has not complied with either. Nor did the Complainant respond to the Order to Show Cause. Accordingly, the Respondents' Motion for Sanctions seeking dismissal for failure to comply with discovery is granted and Jay Carciero's claim is dismissed.

### **Order**

For the foregoing reasons, it is Ordered that Respondents' December 2, 2008 Motion for Sanctions is GRANTED and the claim is dismissed with prejudice.

**SO ORDERED.**

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**COLLEEN A. GERAGHTY**  
Administrative Law Judge

Boston, Massachusetts

### **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, Suite S-5220, 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, Office of Administrative Law

Judges, 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 1980.110(a) and (b).