U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 10 November 2016

CASE NO.: 2016-STA-00037

In the Matter of:

DAVID BOSTIC,
Complainant,

v.

JERICHO SERVICES, INC.,
Respondent.

ORDER DISMISSING CASE

This action involves a complaint under the employee protection provisions of the Surface Transportation Assistance Act ("STAA"), 49 U.S.C. § 31105, and the implementing regulations found at 20 C.F.R. Part 1978. Complainant is a self-represented litigant. Attorney Peter Morowski represents Respondent. No hearing date is currently set.

As explained below, based upon the procedural history of this matter and Complainant's continued refusal to comply with orders from this court regarding discovery, Complainant's appeal of the OSHA order denying his claim is dismissed.

1. Procedural Background

On March 2, 2016, the Occupational Health and Safety Administration ("OSHA") denied Complainant's claim under the whistleblower protections of STAA. Complainant filed his notice of appeal on March 30, 2016. The case was assigned to me on April 13, 2016. On April 21, 2016, I issued a Notice of Hearing and Pre-Hearing Order that included the requirement that the parties make initial disclosures pursuant to 29 C.F.R. § 18.50(c).

Complainant submitted a series of documents on May 16, 2016, but it was unclear from the documents if he was making any requests of the court or that he had sent the information to Respondent. On May 23, 2016, I issued an Order Denying Complainant's Request without prejudice to resubmit the request following the applicable rules.

On July 1, 2016, I issued an Order Regarding Discovery ("July 1 Order") that addressed numerous filings submitted by Complainant, as well as a Motion to Compel Initial Disclosures filed by Respondent. The July 1 Order directed Complainant to make additional disclosures

required by 29 C.F.R. § 18.50(c). Specifically, Complainant was ordered to provide, within 10 days of the date of the Order, additional information about the witness names he had disclosed and the subjects of their information about the case; disclose required documents, including any electronically stored information, such as text messages; and information about any damages he is seeking and how he calculated those damages. July 1 Order at 2-3, 5. The July 1 Order also cautioned Complainant that his failure to cooperate in the process and follow the orders in the case could subject him to sanctions up to and including dismissal of the case. On July 19, 2016, Complainant submitted a "Notice of Complaint Filing with OAH & OALJ & State Bar of California." Complainant did not otherwise respond to or comply with the July 1 Order.

On August 4, 2016, I issued an Order Granting Motion to Compel Production, which granted Complainant's request for an order that Respondent produce driver's logs. The Order directed Respondent to provide the information to Complainant within 14 days. Respondent timely provided the information.

On August 4, 2016, Respondent filed a separate Motion to Compel Initial Disclosures and Answers and Responses to Interrogatories, Requests for Production, and Requests for Admissions, or Alternatively, Motion to Dismiss. On August 10, 2016, while Respondent's motion was pending, Complainant filed a series of documents that included a Motion to Order/Compel Subpoena Order, a separate document entitled "ALJ Replacement, Continuances and Discovery Request," a separate document entitled "Motion to Compel Subpoena, Contempt Order," and a separate "Motion ALJ Richard M. Clark Replacement, Continuance, Judicial Notice Violations." Complainant did not file a response to Respondent's August 4 Motion to Compel. Employer filed a response to Complainant's motions on August 22, 2016. In conjunction with reviewing Complainant's August 10 filings, I determined, in an abundance of caution that he had asked for additional time to respond to Respondent's Motion to Compel.

On August 23, 2016, I issued an Order Vacating Hearing and Granting Complainant Additional Time to Respond to Respondent's Motion to Compel Discovery ("August 23 Order"). The August 23 Order gave Complainant until September 6, 2016, to respond to Respondent's August 4 Motion. The August 23 Order stated: "Complainant should specifically address why he has not responded to the interrogatories, requests for production, requests for admission, and why he has not otherwise complied with the discovery order issued on July 1, 2016, requiring that he provide additional disclosures." August 23 Order at 2. Complainant did not respond in writing to the August 23 Order.

On September 15, 2016, I issued an Order Denying Recusal and a separate Order Denying Complainant's Motion Compel Subpoena. I also issued an Order Granting Motion to Compel Response to Interrogatories and Requests for Production and Order Deeming Facts Admitted ("September 15 Order Compelling Responses"), which granted Respondent's August 4 motion. The September 15 Order Compelling Responses ordered Complainant to respond to the interrogatories and requests for production within 14 days of the date of the Order, as well as provide the additional disclosures as required by the July 1 Order. The September 15 Order Compelling Responses reviewed the potential sanctions available for Complainant's continued recalcitrance, and stated that: "Complainant's continued refusal to cooperate in the process and comply with the issued orders may warrant further sanction, including dismissal of the matter

without a hearing." September 15 Order Compelling Responses at 8. The September 15 Order Compelling Responses directed Respondent to file an update within 21 days of the date of the Order whether Complainant had responded and noted that I would entertain a further motion for sanctions, up to and including dismissal of the action. On October 5, 2016, Respondent submitted a letter stating that Complainant had not complied with the September 15 Order Compelling Responses.

On October 18, 2016, I issued an Order to Show Cause Why Matter Should Not Be Dismissed ("OSC") explaining what steps Complainant needed to take no later than November 1, 2016, or the case would be dismissed. Complainant did not respond to the OSC or otherwise comply with the previous orders issued in this case.

2. Applicable Law and Analysis

An administrative law judge ("ALJ") has broad discretion to conduct and authorize discovery. *See Vinnett v. Mitsubishi Power Systems*, ARB No. 08-104, OALJ No. 2006-ERA-00029, slip op. at 13 (July 27, 2010). A party may obtain discovery regarding any non-privileged matter relevant to any claim or defense asserted by a party. 29 C.F.R. § 18.51(a). Relevant material need not be admissible at the hearing so long as the discovery is reasonably calculated to lead to the discovery of admissible evidence. *Id.*

The Administrative Procedure Act authorizes administrative law judges to regulate the course of the hearing and to dispose of procedural matters. 5 U.S.C. § 556(c)(5) & (9). The OALJ procedural rules, which govern this proceeding, grant the ALJ "all powers necessary to conduct fair and impartial proceedings," including regulating the course of a proceeding and compel the production of documents. 29 C.F.R. § 18.12. An ALJ may sanction a party that "fails to obey an order to provide or permit discovery," including dismissing the proceeding in whole or in part. 29 C.F.R. § 18.57(b). The ALJ may also dismiss a case on his own initiative for lack of prosecution in order to control the docket and achieve the orderly and expeditious disposition of cases. *Matthews v. Ametek, Inc.*, ARB Case No. 11-036; OALJ Case No. 2009-SOX-026, slip op. at 5-6 (ARB May 31, 2012); *Lewman v. Ken Brick Masonry Supply*, ARB No. 07-01, OALJ No. 2006-STA-016, slip op. at 3-4 (ARB Oct. 31, 2007) ("Dismissal as a sanction for failure to prosecute is a matter within the ALJ's sound discretion.").

If a party fails to obey an order to provide or permit discovery, including an order issued pursuant to Section 29 C.F.R. § 18.57(a) (failure to make disclosures or to cooperate in discovery), the judge may issue further just orders, including dismissing the proceeding in whole or in part. 29 C.F.R. § 18.57(b)(1)(v). A judge may impose sanctions under 29 C.F.R. § 18.57 upon "[n]otice from the judge followed by a reasonable opportunity to be heard." 29 C.F.R. § 18.57(f).

A terminating sanction, including dismissal of a plaintiff's action, is very severe and only "willfulness, bad faith, and fault" justify terminating sanctions. *Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills*, 482 F.3d 1091, 1096 (9th Cir. 2007); *In re Exxon Valdez*, 102 F.3d 429, 432 (9th Cir. 1996). Federal courts have a five-part test, with three subparts to the fifth part, to determine whether a case-dispositive sanction under Rule 37(b)(2), upon which 29 C.F.R. §

18.57 is based, is appropriate: (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its dockets; (3) the risk of prejudice to the party seeking sanctions; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions. *Id*. The sub-parts to the fifth factor are whether the court has considered lesser sanctions, whether it tried them, and whether it warned the recalcitrant party about the possibility of case-dispositive sanctions. *Id*.

a. Complainant's Willful Refusal to Participate

Complainant has demonstrated a continued unwillingness and refusal to cooperate in the pre-hearing discovery process. He has failed to comply with four orders of this tribunal related to discovery issues: the July 1 Order requiring additional disclosures; the August 23 Order allowing him additional time to respond and specifically requiring him to address the pending issues; the September 15 Order Compelling Responses to Employer's duly served interrogatories and request for production, and an additional order that he again make the disclosures required by the July 1 Order; and, the October 18 OSC. Each Order advised Complainant that his failure to comply with the orders from this tribunal may result in sanctions, including dismissal of his case. Moreover, Complainant has not had any contact in writing with the court since August 12, 2016, a period of approximately 90 days. Complainant has filed multiple requests with the court on previous occasions and is well aware of how to seek relief and make requests of the court if needed. I find that Complainant's failure to respond in any manner demonstrates willful conduct and that he is no longer prosecuting his claim in this matter. Complainant's continued refusal to cooperate in the process and prosecute his claim, as well as his failure to comply with the issued orders warrant dismissal of the matter without a hearing as a sanction for his continued recalcitrance.

b. Dismissal is Appropriate

In order to determine if dismissal as a sanction is appropriate, five factors should be considered. The first, the public's interest in expeditious resolution of litigation, and the second, the court's need to manage its dockets, both weigh towards dismissal. As a previous sanction, I vacated the hearing date and indicated that I would not set the matter for hearing until Complainant complied with the duly issued orders in this matter. Complainant has failed to comply with any order regarding discovery and is no longer cooperating in the process at all; he has not communicated in writing with the court in approximately 90 days. His failure to act and respond runs contrary to the public interest to expeditiously resolve cases and also places a drag on caseload management and dockets. I find that the first and second factors weigh towards dismissal.

The third factor, the risk of prejudice to the party seeking sanctions, is great. Here, Respondent has diligently followed the procedural rules and has attempted in good faith on multiple occasions to gain Complainant's voluntary compliance without resorting to court order. Respondent has well-documented its attempts to do so. Complainant's refusal to respond to interrogatories and request for production of documents is alone sufficiently prejudicial to Respondent who is unable to adequately and completely prepare its case for hearing. *See Computer Task Group, Inc. v. Brotby*, 364 F.3d 1112, 1116 (9th Cir. 2004) citing *Payne v. Exxon*

Corp., 121 F.3d 503, 508 (9th Cir. 1997) (failure to produce documents is sufficient prejudice). Respondent is also prejudiced by the time and money it spends having its lawyer needlessly file motions in order to gain information from Complainant that he is willfully withholding. Further, Complainant has threatened without any basis to report Respondent's attorney to the state bar if he did not acquiesce to Complainant's demands. Moreover, the information Respondent sought was relevant to the proceeding and could not be obtained in any other way. Specifically, Complainant refused to respond to interrogatories or request for production, disclose what damages he was seeking and how he calculated that information, as well as provide contact information for witnesses he named in his disclosures, why the witness was relevant, and what that person might offer in the proceeding. The third factor weighs towards dismissal.

The fourth factor, weighs against dismissal only in the sense that the strong public policy favoring disposition of cases on their merits. It would be better to hear Complainant's issues on the merits, which must be balanced against his refusal to provide necessary and relevant information through the discovery and comply with orders and direction from the court. As documented in this Order and in the case file, Complainant has been given multiple opportunities to participate in the process and comply with requests and orders, but he has refused to do so. His recalcitrance is directly within his control and he has not otherwise indicated any inability to gain information or provide a reasonable explanation for his unwillingness to participate. When Complainant has requested relief from the court, his requests have been considered on the individual merits and ruled upon in writing in a timely manner. The procedural posture of this matter recognizes the preference to hear this matter on the merits, but also demonstrates that Complainant has refused to allow the process to get to a hearing on the merits. The fourth factor weighs towards dismissal.

Finally, the fifth factor, the availability of less drastic sanctions, warrants dismissal of the case. Complainant has been given every opportunity to comply, including extensions of time by Respondent and the court in order to allow him time to prepare a response or reply, but Complainant ultimately does not follow through. The hearing date was vacated in order to allow Complainant time to further prepare at his request, but also as a sanction for his continued refusal to participate in discovery and otherwise comply with the orders issued in this matter. No hearing date would be set until Complainant provided the information required by the orders of the court. There are no other less drastic sanctions available that have not otherwise been tried, and I have repeatedly warned Complainant that his failure to cooperate in the process may result in his case being dismissed. I issued an OSC giving Complainant one last opportunity to provide the necessary information, but he again did not respond. Thus, I find that due to Complainant's willful refusal to participate in the process and pursue his claim, as well as his refusal to comply with the orders of this tribunal weighs heavily towards dismissal of the case.

Complainant has been given multiple opportunities over a period of months to conform his conduct to the requirements of this proceeding, but he has refused to do so. Moreover, he has threatened to report the court and Respondent's counsel to the state bar if matters were not handled the way he wanted them to be handled. His threats show bad faith on his part and further demonstrate that his conduct has been willful and within his control. The only factor that potentially mitigates against dismissal is the preference for hearings on the merits, but, based

upon Complainant's conduct, I find that factor does not outweigh the significant weight from the other factors warranting dismissal.

c. Conclusion

Complainant has refused multiple opportunities to comply with duly issued orders in this matter requiring him to supplement his disclosures, provide documents and information through discovery, and compelling him to act, but he has willfully refused to do so. The court has no further option other than to dismiss his case without a hearing. Accordingly, Complainant's case is dismissed with prejudice. All dates are vacated.

SO ORDERED.

Digitally signed by Richard M.Clark
DN: CN=Richard M.Clark, OU=Administrative Law Judge, O=US DOL Office of Administrative Law Judges, L=San Francisco, S=CA, C=US
Location: San Francisco CA

RICHARD M. CLARK
Administrative Law Judge

San Francisco, California

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: https://dol-appeals.entellitrak.com. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; 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. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1978.110(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. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.
Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

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. §§ 1978.109(e) and 1978.110(b). Even if a Petition is timely filed, 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 of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1978.110(b).