



Issue Date: 29 October 2020

Case No.: 2020-STA-00066

In the Matter of

JOHN HUNGERFORD
Complainant

v.

J.B. HUNT TRANSPORTATION SERVICES, INC.
Respondent

DECISION AND ORDER DISMISSING CASE

The above-captioned matter arises under the employee protection (“whistleblower”) provision in the Surface Transportation Assistance Act (“Act”), 49 U.S.C. § 31105, and its implementing regulations at 29 C.F.R. Part 1978. Complainant, John Hungerford, alleges that Respondent, J.B. Hunt Transportation Services, Inc., subjected him to various employment actions in violation of the Act.

Complainant has failed to take substantive action to prosecute his case and be ready for a scheduled hearing, including failing to appear for a scheduled prehearing conference on September 23, 2020 and failing to respond to the Order to Show Cause issued by the undersigned on that date. Therefore, dismissal of the case is deemed appropriate.

Procedural background

A Prehearing Status Conference Summary And Order (“Prehearing Order”) was issued on August 19, 2020, summarizing an on-the-record status conference held on that date at which both Complainant, who is self-represented and counsel for Respondent, J.B. Hunt Transportation Services, Inc., attorney Ronald Polly, were present.

The Prehearing Order memorialized directives I provided to the parties at the August 19, 2020 prehearing status conference.¹ It also set additional filing deadlines, as well as scheduled a new hearing for 10:00 a.m., October 2, 2020 and another telephonic prehearing status conference for 10:00 a.m., September 23, 2020. The Prehearing Order also provided that “all other deadlines and directives established in the Notice of Case Assignment and Initial Prehearing Order issued

¹ Including the directive that Employer provide Complainant with discovery he had requested by September 3, 2020 and advised that failure to do that could result in the imposition of sanctions described in the Prehearing Order.

on June 23, 2020 remain in effect.” With regard to sanctions, the June 23, 2020 Notice of Case Assignment and Initial Prehearing Order provided the following:

Failure to comply with the provisions of this Order - especially a specifically enumerated filing deadline - may result in the imposition of sanctions. Such sanctions could include, but are not limited to, exclusion of evidence, dismissal of the claim, entry of a default judgment, or removal of the offending representative from participation in the case. 29 C.F.R. §§ 18.12(b), 18.35(c), 18.57, 18.87.

During the August 19, 2020 prehearing status conference, I verbally advised the parties of the dates and times set for the conference and hearing as noted in the Prehearing Order. The Prehearing Order directed the parties to submit exhibit lists and prehearing statements 10 days prior to the hearing date which would have been September 22, 2020.

Neither Complainant nor Respondent submitted an exhibit list or prehearing statement as ordered.² The telephonic prehearing conference call was convened as scheduled at 10:00 a.m., on September 23, 2020 and neither Complainant nor Respondent appeared for it. So the parties have failed to comply with an Order issued by the undersigned by not filing the prehearing submissions as directed and by failing to appear for the prehearing status conference as directed.

An Order To Show Cause And Notice Regarding Electronic Service (“Order To Show Cause”) was issued on September 23, 2020, directing the parties to show cause, in writing, by no later than October 5, 2020, as to why sanctions should not be imposed against them for non-compliance with the Prehearing Order.³ The September 23, 2020, Order To Show Cause advise the parties that **failure to respond as it directed could be deemed a waiver of any objection to the imposition of any proposed sanction.** The September 23, 2020 Order To Show Cause also advised the parties that the hearing scheduled for October 2, 2020 was postponed until further notice.

A letter from Respondent’s counsel dated and received electronically on October 5, 2020, offering an explanation for his failure to appear for the September 23, 2020 prehearing conference. Specifically, he maintains that his office did not received the August 19, 2020 Prehearing Order scheduling the September 23, 2020 prehearing conference and that he was out-of-state attending a Board of Directors meeting at the time of that prehearing conference.

To date, no written response has been received from Complainant to the September 23, 2020 Order To Show Cause regarding his failure to appear for the prehearing conference scheduled for September 23, 2020.

Discussion

“If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it.” FED. R. CIV. P. 41(b).⁴ “The

² Complainant did indicate verbally during the last prehearing status conference held on August 19, 2020 that he does not intend to call any witnesses.

³ The Order To Show Cause also provided detailed information about electronic service of documents issued by OALJ, as well as electronic submission of filings OALJ currently requires of the parties.

⁴ As this Office’s Rules of Practice and Procedure are silent about failure to prosecute, I apply the Federal Rules of

authority of a court to dismiss on its own motion (*sua sponte*) for lack of prosecution has generally been considered an ‘inherent power,’ governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.” *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962).

Like the courts, ALJs “must necessarily manage their dockets in an effort to ‘achieve the orderly and expeditious disposition of cases.’” *Dorman v. Chinook Charter Servs.*, ARB No. 08-011, ALJ No. 2007-STA-28, PDF at 2 (ARB Feb. 19, 2009) (quoting *Link*, 370 U.S. at 630-31). “Dismissal as a sanction for failure to prosecute is a matter within the sound discretion of the administrative law judge.” *Sparks v. Rich Wilson Blacktop Paving Co.*, ARB No. 09-095, ALJ No. 2009-STA-21, PDF at 3 (ARB June 30, 2009). “ALJs must exercise this power discreetly Because dismissal is perhaps the severest sanction and because it sounds “‘the death knell of the lawsuit,” [the ALJ] must reserve such strong medicine for instances where . . . misconduct is correspondingly egregious.” *James v. Suburban Disposal, Inc.*, ARB No. 10-037, 2009-STA-71, PDF at 5 (ARB Mar. 12, 2010) (citation omitted).

A dismissal is also within a judge’s discretion when a complainant fails to obey an administrative law judge’s orders and fails to show good cause for the failure. *Anderson v. Greyhound Trash Removal, Inc.*, ARB No. 07-115, ALJ 2007-STA-24, PDF at 3-4 (ARB Feb. 27, 2009) (Surface Transportation Assistance Act); *Matthews v. LaBarge, Inc.*, ARB No. 08-038, ALJ No. 2007-SOX-56, PDF at 3 (ARB Nov. 26, 2008) (Sarbanes-Oxley Act); *Zahara v. SLM Corp.*, ARB No. 08-020, ALJ No. 2006-SOX-130, PDF at 3 (ARB Mar. 7, 2008) (Sarbanes-Oxley Act); *Carciero v. Sodexo Alliance*, ALJ No. 2008-SOX-00013 (Mar. 17, 2009) (Geraghty, ALJ); see also, 29 C.F.R. § 18.57(b)(1)(v), (c) (failure to comply with discovery-related orders such as orders requiring initial disclosures).

The mandatory nature of pre-hearing conferences is established by regulation. See 29 C.F.R. § 18.44(c) (“All parties must participate in prehearing conferences as directed by the judge.”). Indeed, under the applicable procedures, absent a sufficient explanation from Claimant, his failure to appear at the pre-hearing conference, standing alone, is an adequate reason to dismiss.

As the regulation provides:

When a party has not waived the right to participate in a hearing, conference or proceeding but fails to appear at a scheduled hearing or conference, the judge may, after notice and an opportunity to be heard, dismiss the proceeding or enter a decision and order without further proceedings if the party fails to establish good cause for its failure to appear.

29 C.F.R. § 18.21(c).

The initial order setting this matter for hearing as issued on June 23, 2020, warned the parties that, if they failed to comply with its requirements, including the undersigned’s orders, sanctions could be imposed up to dismissal of Complainant’s case or finding Respondent liable by default. The September 23, 2020 Order To Show Cause also advised the parties that failure to respond to it could result in the imposition of such sanctions.

Civil Procedure. See 29 C.F.R. § 18.10.

To date, Complainant has not offered any explanation for his failure to appear for the prehearing conference scheduled for September 23, 2020. He has also not filed any prehearing statement as directed in the August 19, 2020 Prehearing Order. While Respondent has also been non-compliant with directives in this matter, it is noted that it is Complainant who bears the responsibility of prosecuting this case.

Conclusion

The September 23, 2020 Order To Show Cause expressly warned that failure to respond to it would likely result in the dismissal of this case. Given Complainant's failure to prosecute his case and to comply with the undersigned's orders – particularly the September 23, 2020 Order To Show Cause – dismissal is the only appropriate sanction under these circumstances. *See* 29 C.F.R. § 18.12(b)(7) (an ALJ has authority to “[t]erminate proceedings through dismissal or remand when not inconsistent with statute, regulation, or executive order.”).

ORDER

Complainant's complaint is **DISMISSED** with prejudice.

SO ORDERED.

LYSTRA A. HARRIS
Administrative Law Judge

Cherry Hill, New Jersey