

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Newport News, VA

Issue Date: 07 May 2024

Case No.: 2023-STA-00061

In the Matter of:

MICHAEL D. LEAR,
Complainant,

v.

GFL ENVIRONMENTAL,
Respondent.

ORDER OF DISMISSAL
AND
ORDER CANCELING HEARING

This matter arises from a complaint filed under the provisions of the Surface Transportation Assistance Act of 1982, U.S. Code Title 49, Section 31105, as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53 ("STAA"). It is governed by the implementing Regulations found in 29 CFR Part 1978.

Facts and Background

1. By a *Notice of Hearing* issued December 8, 2023, this matter was scheduled for formal hearing to be held April 10-12, 2024. The Notice ordered that discovery would close 50 days prior to the first day of the hearing (i.e., February 20, 2024).

2. On March 1, 2024, Respondent filed a *Motion for Continuance* (consolidated with its reply on its motion for a protective order), to allow time for Complainant to produce certain documents and for Respondent to reconvene Complainant's deposition to discuss the documents, if necessary. Respondent had propounded its discovery requests on December 18, 2023, with responses due January 17, 2024. Complainant was granted an extension through February 2, 2024. On February 3, 2024, Complainant served his answers to interrogatories and produced some documents, but his deposition on February 8, 9, and 12, 2024, revealed that "numerous documents that are responsive to GFL's document requests" had not been produced. Complainant "agreed to search for additional documents and the parties agreed that GFL may reconvene Lear's deposition if needed based on Lear's supplemental discovery responses." To

allow time to obtain and review the requested documents, Respondent requested a continuance of the hearing.

3. On March 4, 2024, I issued an *Order Granting Continuance and Canceling and Rescheduling Hearing and Order Compelling Production of Documents*. The Order granted a continuance and rescheduled the hearing to May 29-31, 2024. It also stated:

Complainant is **ORDERED** and **COMPELLED** to produce the requested documents by **March 18, 2024**.

The Scheduling Order section further provided:

DISCOVERY COMPLETION. The discovery period has closed. However, Complainant has not yet provided responsive documents to certain of Respondent's document requests that were timely made during the discovery period. Complainant must provide the requested documents no later than **March 18, 2024**. If necessary, the parties may resume Complainant's deposition; the deposition must be completed by **April 12, 2024**.

The Scheduling Order also directed the parties to "mark and exchange their exhibits and exhibit lists *with each other* no later than **April 29, 2024**," and to "identify expert witnesses and exchange witness lists *with each other* no later than **April 29, 2024**." (Emphasis in original.) Dispositive motions were due by April 19, 2024, with any response due within 14 days of service of the motion.

4. Complainant did not provide all requested documents by March 18, 2024, as ordered. Instead, on March 18, 2024, Complainant filed a 233-page *Motion to Disqualify Lehoan T. Pham (Hahn)*, seeking to disqualify Respondent's attorney from continuing to represent his client. That motion was denied by Order issued March 25, 2024.

5. On March 29, 2024, Respondent filed a *Motion to Enforce the Discovery Order and for Discovery Sanctions*, stating that Complainant had not provided five categories of discovery that had been requested and for which production had been compelled: all the audio recordings that relate to his employment with GFL, separated out and in native format; documents showing the extent of Lear's withdrawals from his 401K account and Employee Stock Ownership Plan ("ESOP"); all text messages relating to Lear's employment that he exchanged with his former managers at GFL; all documents relating to the job log that Lear filled out with the Georgia Department of Labor; and executed authorizations for Lear's personnel records and tax returns.

6. On April 12, 2024, Complainant filed a response to the motion, which argued in part that he had provided discovery but also argued again, at some length, that Mr. Pham should be removed as counsel for Respondent.

7. By Order issued April 15, 2024, I granted leave for Respondent to file a five-page reply and I set a hearing on the motions for April 30, 2024.

8. On April 17, 2024, Respondent requested leave to file one of the exhibits to its forthcoming *Motion for Summary Decision* under seal. The exhibit was an Investigation Report that had already been provided to Complainant in discovery subject to a Protective Order issued by this tribunal. I granted the request to file the exhibit under seal on April 18, 2024.¹ On April 19, 2024, Respondent timely filed its *Motion for Summary Decision* and supporting exhibits.

9. On April 30, 2024, a hearing was held on the pending motions. Complainant's motion for reconsideration of the denial of his motion to disqualify Mr. Pham from representing Respondent was denied as meritless. The outstanding items of discovery were addressed. Respondent accepted Complainant's representations that all documents in his possession had been provided regarding the 401K withdrawal and the text messages (although some were provided as part of his 233-page motion to disqualify Mr. Pham, rather than through a proper discovery response). I found a discovery violation with regard to Complainant's job logs filled out with the Georgia Department of Labor and the authorizations for personnel records and tax returns that Complainant refused to provide, and struck the claim for back pay as a sanction for Complainant having impeded Respondent's ability to investigate and prepare for hearing on this issue. With regard to the audio recordings, I ordered Complainant to file a list of audio recordings in his possession by noon on May 1, 2024, and ordered Respondent to compare the audio recordings that had been provided in discovery to those on Complainant's list and note any discrepancies in a list due by noon on May 2, 2024.

10. Complainant did not file the list of audio recordings in his possession on May 1, 2024, as ordered.

11. Complainant also did not exchange his exhibits, exhibit list, and witness list with Respondent on April 29, 2024, as directed in the Scheduling Order. In a letter filed May 2, 2024, Respondent noted the failure and argued that Complainant "has prejudiced GFL's ability to adequately prepare for trial."

12. On May 2, 2024, Complainant filed a *Motion to Compel and Request for Extension on Summary Decision*. Complainant sought an order compelling a further response from Respondents to requests for discovery that had been originally answered in August 2023 (response to Complainant's first requests) and November 2023 (response to Complainant's second set of requests). He also requested an extension of the deadline for his response to the Motion for Summary Decision, until the motion to compel was satisfied. I issued an Order denying the request for extension on May 2, 2024, and deferring ruling on the motion to compel pending Respondent's response.

¹ Complainant moved for reconsideration of this order on April 30, 2024. I denied Complainant's motion by order issued May 1, 2024.

13. Also on May 2, 2024, I issued an *Order to Show Cause* regarding Complainant's failures to file the list of audio recordings in his possession as ordered, and to exchange his exhibits, exhibit list, and witness list as ordered. The Order provided:

Complainant is hereby ORDERED TO SHOW CAUSE why sanctions should not be imposed for his failure to file the list of audio recordings as ordered in the April 30, 2024 hearing. Complainant is further ORDERED to file the past-due list by 12:00 p.m. EDT on May 3, 2024.

Complainant is also ORDERED TO SHOW CAUSE why sanctions should not be imposed for his failure to serve Respondent with his exhibits, exhibit list, and witness list by April 29, 2024, as previously ordered. Complainant is further ORDERED to serve Respondent with his past-due exhibits, exhibit list, and witness list by 12:00 p.m. EDT on May 3, 2024.

Complainant's responses to the Orders to Show Cause are due by 5:00 p.m. on May 6, 2024. Each response is limited to 10 pages in length.

14. At 1:55 p.m. on May 3, 2024, Respondent filed a letter stating that Complainant had not filed his list of audio recordings as ordered in the *Order to Show Cause*, and that Complainant had not provided Respondent with his exhibits, exhibit list, and witness list as ordered in the *Order to Show Cause*. Respondent argued that "the prejudice to GFL is becoming more severe as the days go by."

15. Complainant filed his *Response* to the *Motion for Summary Decision* on May 3, 2024. Respondent filed a letter seeking leave to file a short reply, which is pending.

16. Complainant also filed his *Response* to the *Order to Show Cause* on May 3, 2024 (at 11:46 p.m.). Complainant stated his "deep concern regarding the conduct of GFL Environmental" (Respondent), arguing that Respondent's "actions amount to an abuse of the discovery process and are hindering my ability to pursue justice in this matter." Complainant argued the Respondent was "attempting to overload my workload" and "seeking to further harm me by obtaining rulings against me." He argued Respondent had "change[d] positions" in its motion for summary decision, which prejudiced his ability to respond in time. He stated he was aware of the deadlines for the submission of his documents and lists, but "GFL's deliberate attempts to deceive both myself and the Department of Labor in denying the existence of relevant evidence have made it very difficult for me to proceed with the discovery process in an efficient manner." He requested a protective order "to prevent GFL from continuing this conduct and to ensure that I am able to pursue my legal rights without undue interference, obstructions and/or prejudice." Beyond these arguments, Complainant did not explain his failures to file the list of audio recordings as directed at the prehearing conference, and again in the *Order to Show Cause*, and he did not explain his failures to exchange his exhibits, exhibit list, and witness list, as directed in the Scheduling Order and again in the *Order to Show Cause*.

17. On May 6, 2024, Complainant filed a letter listing 14 audio recordings. The recordings in Complainant's list have titles corresponding to dates (for example, "2021-08-18.mp4"). Also on May 6, 2024, Respondent filed its responsive letter regarding the recordings. Respondent stated that the audio recordings provided by Complainant in discovery had different names assigned (for example, "(R)FRED SAYS MY COMPLAINTS ANNOY AND HE DONE"), making it difficult to determine which of the recordings on Complainant's list filed with this tribunal correspond to recordings provided in discovery. Respondent also noted in its letter that Complainant "still has not served GFL with his exhibits, Exhibit List, and Witness List."

18. At 4:59 p.m. on May 6, 2024, Respondent filed a *Reservation of Objections*. Respondent noted that Complainant had been repeatedly ordered to serve his exhibits, exhibit list, and witness list on Respondent, but he has not done so. Respondent stated that in responding to the Order to Show Cause, Complainant "admitted that he has violated the Court's imposed deadlines and has not served GFL with his trial disclosures." Respondent reserved the right to object to Complainant's proposed exhibits or witnesses, which have not been identified.

19. As of 5:00 p.m. EDT on May 6, 2024 (i.e., the deadline to respond), no further response had been filed by Complainant to the *Order to Show Cause*.

Discussion

Complainant did not timely serve his exhibits, exhibit list, and witness list on Respondent as ordered in the Scheduling Order, which was part of the *Order Granting Continuance and Canceling and Rescheduling Hearing and Order Compelling Production of Documents* issued on March 4, 2024. In response to Complainant's failure to timely serve his trial documents, this tribunal issued an *Order to Show Cause*, which directed Claimant to serve the past-due documents by noon on May 3, 2024, and to show cause why sanctions should not be imposed by 5:00 p.m. on May 6, 2024. Complainant again refused to serve his trial documents as ordered.

Complainant has violated two orders of this tribunal in refusing to serve his exhibits, exhibit list, and witness list: the Scheduling Order and the *Order to Show Cause*. His response to the *Order to Show Cause* does not establish any excusable basis for his failures. Instead of explaining his own delinquency, he lodges vague, conclusory, and irrelevant accusations against Respondent. Because Complainant has not shown any good cause why sanctions should not be imposed for his failures to comply with this tribunal's orders to provide his trial disclosures to Respondent, I find that sanctions are warranted.

I find that dismissal of the complaint is the appropriate sanction here, due to Complainant's repeated instances of contumacious conduct.

While a sanction of dismissal is extreme, I find it is warranted here. I reach that conclusion after considering several factors. The first is the prejudice to the opposing party that results from Complainant's conduct. Complainant has impeded the orderly progress of discovery already in this case, resulting in a previous rescheduling of the hearing and necessitating a motion hearing

after Complainant failed to comply with the *Order Compelling Production of Documents*. Now, Complainant is impeding orderly preparation for the hearing, which is scheduled to commence in three weeks, by refusing to serve his exhibits, exhibit list, and witness list upon Respondent. Respondent cannot properly prepare for the formal hearing without Complainant's trial disclosures, and his obstructive behavior has severely prejudiced Respondent, as it has repeatedly noted in its recent filings.²

I find that Complainant's obstruction and interference with the progress of this case has been willful and done in bad faith. By way of example, at the motion hearing on April 30, 2024, Complainant voiced no concerns with being able to file his list of audio recordings by noon the next day. It was not a difficult task to complete, and it was necessary to resolve a discovery dispute over materials that were already past due, and subject to the previously issued *Order Compelling Production*. But then he simply did not do it. This tribunal had to issue an *Order to Show Cause*, directing Complainant to file the list by Friday at noon, and again he simply refused to file the list. When he finally filed the list the following Monday, he had changed the names of the recordings from the way they were named when produced to Respondent, unnecessarily complicating the very purpose of comparing lists to determine which files, if any, had not been produced. Similarly, and critically, the rescheduling order issued on March 4, 2024, and set the deadline of April 29, 2024, for the exchange of exhibits, exhibit lists, and witness lists. Discovery had already closed on February 20, 2024 (subject to the exception for Complainant's past-due productions). Complainant had eight weeks to prepare and compile his trial materials for exchange on April 29, 2024, but he failed to make the disclosures. This tribunal then ordered him to make the past-due exchange by May 3, 2024, in an *Order to Show Cause* why sanctions should not be imposed, but he again refused to do so. He offered no excuse for his failures, only attacks on Respondent. Thus, despite this tribunal's express order to provide the overdue hearing documents to Respondent by May 3, 2024, Complainant again refused to provide his exhibits and evidence lists to Respondent, and instead used his Response to the *Order to Show Cause* to blame Respondent for his own failures to abide by this tribunal's orders. I find Complainant's failures stem from a stubborn refusal to cooperate with bringing this case to hearing in an orderly manner, and I find that Complainant has both interfered with the judicial process (now jeopardizing even the rescheduled hearing dates) and has done so willingly and in bad faith.

Complainant was put on notice that he would be sanctioned for continued noncompliance, through the *Order to Show Cause*, as well as the *Order Granting Continuance and Canceling and Rescheduling Hearing and Order Compelling Production of Documents* issued on March 4, 2024.³ Yet instead of bringing himself into compliance and explaining why he was late

² I also note that Respondent has shown patience and professionalism with Mr. Lear's dilatory tactics, acknowledging that he is self-represented and trying to allow for some flexibility as a result. Mr. Lear's attacks on Respondent are baseless. By spending his time and efforts on repeatedly assailing Respondent and its counsel, and trying to obstruct Respondent's development of evidence and preparation for the formal hearing, rather than on fulfilling his obligations related to discovery and hearing preparation, Complainant has severely prejudiced Respondent's ability to prepare for the formal hearing.

³ Paragraph 7 of the Scheduling Order within that Order states:

in doing so, Complainant again refused to make his trial exchanges and used his response to the Order to Show Cause to make unfounded accusations against Respondent.

I have considered whether lesser sanctions would be effective in deterring further obstruction and noncompliance, but I have determined dismissal is warranted. While I could exclude Complainant's exhibits and witnesses as a lesser sanction for his refusal to make his trial disclosures, that would produce an absurd result of requiring Respondent (and this tribunal) to expend time and resources on a formal hearing at which Complainant cannot present evidence. Because Complainant bears an initial burden of proof, the exclusion of Complainant's exhibits and witnesses would render any trial meaningless. Therefore, I find a lesser sanction of exclusion of the evidence which Complainant has refused to disclose (*i.e.*, his exhibits and witnesses) is inadequate, and I find that dismissal is warranted.

In sum, Complainant has left this tribunal with no alternative than to dismiss his complaint due to his obstruction and repeated failures to follow Orders, especially his stubborn refusal to exchange his exhibits, exhibit list, and witness list even after an *Order to Show Cause* was issued. There is no excuse for this refusal, and it significantly and directly harms Respondent, who cannot prepare for the formal hearing without Complainant's disclosure of his witnesses and exhibits. Therefore, I find that Complainant's complaint should be dismissed with prejudice.

ORDER

For the reasons set forth above, IT IS ORDERED that the complaint filed by Michael Lear against Respondent GFL Environmental alleging a violation of the STAA is DISMISSED with prejudice.

In light of the dismissal, the formal hearing scheduled to commence at 9:30 a.m. Eastern time each day on May 29-31, 2024, by video conference is CANCELED.

SO ORDERED.

MONICA MARKLEY
Administrative Law Judge

CONSEQUENCES OF FAILURE TO COMPLY. Failure to comply with the provisions of this prehearing order may result in the imposition of sanctions including, but not limited to: the exclusion of evidence, the dismissal of the claim, the entry of a default judgment, or removal of the offending representative from the case. 29 CFR §§ 18.12(b), 18.35(c), 18.50(d)(3), 18.57 and 18.87.

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 the administrative law judge’s decision.

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. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, the Associate Solicitor, Division of Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

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).

FILING AND SERVICE OF AN APPEAL

1. Use of EFS System: The Board’s Electronic Filing and Service (EFS) system allows parties to initiate appeals electronically, file briefs and motions electronically, receive electronic service of Board issuances and documents filed by other parties, and check the status of appeals via an Internet-accessible interface. Use of the EFS system is free of charge to all users. To file an appeal using the EFS System go to <https://efile.dol.gov>. All filers are required to comply with the Board’s rules of practice and procedure found in 29 C.F.R. Part 26, which can be accessed at <https://www.ecfr.gov/current/title-29/subtitle-A/part-26>.

A. Attorneys and Lay Representatives: Use of the EFS system is **mandatory for all attorneys and lay representatives** for all filings and all service related to cases filed with the Board, absent an exemption granted in advance for good cause shown. 29 C.F.R. § 26.3(a)(1), (2).

B. Self-Represented Parties: Use of the EFS system is **strongly encouraged for all self-represented parties** with respect to all filings with the Board and service upon all other parties. Using the EFS system provides the benefit of built-in service on all other parties to the case. Without the use of EFS, a party is required to not only file its documents with the Board but also to serve copies of all filings on every other party. Using the EFS system saves litigants the time and expense of the required service step in the process, as the system completes all

required service automatically. Upon a party's proper use of the EFS system, no duplicate paper or fax filings are required.

Self-represented parties who choose not to use the EFS system must file by mail or by personal or commercial delivery all pleadings, including briefs, appendices, motions, and other supporting documentation, directed to:

Administrative Review Board
Clerk of the Appellate Boards
U.S. Department of Labor
200 Constitution Avenue, N.W., Room S-5220
Washington, D.C., 20210

2. EFS Registration and Duty to Designate E-mail Address for Service

To use the Board's EFS system, a party must have a validated user account. To create a validated EFS user account, a party must register and designate a valid e-mail address by going to <https://efile.dol.gov>, select the button to "Create Account," and proceed through the registration process. If the party already has an account, they may simply use the option to "Sign In."

Once a valid EFS account and profile has been created, the party may file a petition for review through the EFS system by selecting "eFile & eService with the Administrative Review Board" from the main dashboard, and selecting the button "File a New Appeal - ARB." In order for any other party (other than the EFS user who filed the appeal) to access the appeal, the party must submit an access request. To submit an access request, parties must log into the EFS system, select "eFile & eService with the Administrative Review Board," select the button "Request Access to Appeals," search for and select the appeal the party is requesting access to, answer the questions as prompted, and click the button "Submit to DOL."

Additional information regarding registration for access to and use of the EFS system, including for parties responding to a filed appeal, as well as step-by-step User Guides, answers to frequently asked questions (FAQs), video tutorials and contact information for login.gov and EFS support can be found under the "Support" tab at <https://efile.dol.gov>.

3. Effective Time of Filings

Any electronic filing transmitted to the Board through the EFS e-File system or via an authorized designated e-Mail address by 11:59:59 Eastern Time shall be deemed to be filed on the date of transmission.

4. Service of Filings

A. Service by Parties

Service on Registered EFS Users: Service upon registered EFS users is accomplished automatically by the EFS system.

Service on Other Parties or Participants: Service upon a party that is not a registered EFS user must be accomplished through any other method of service authorized under applicable rule or law.

B. Service by the Board

Registered e-filers will be e-served with Board-issued documents via EFS; they will not be served by regular mail (unless otherwise required by law). If a party unrepresented by counsel files their appeal by regular mail, that party will be served with Board-issued documents by regular mail. Any party may opt into e-service at any time by registering for an EFS account as directed above, even if they initially filed their appeal by regular mail or delivery.

5. Proof of Service

Every party is required to prepare and file a certificate of service with all filings. The certificate of service must identify what was served, upon whom, and manner of service. Although electronic filing of any document through the EFS system will constitute service of that document on all EFS-registered parties, electronic filing of a certificate of service through the EFS system is still required. **Non EFS-registered parties must be served using other means authorized by law or rule.**

6. Inquiries and Correspondence

After an appeal is filed, all inquiries and correspondence related to filings should be directed to the Office of the Clerk of the Appellate Boards by telephone at 202-693-6300 or by fax at 202-513-6832. Other inquiries or questions may be directed to the Board at (202) 693-6200 or ARB-Correspondence@dol.gov.