BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

IN RE: OFFICE OF ADMINISTRATIVE HEARINGS CASE NO. 272-2019:

JESSICA CRABB,	)	HRB Case No. 0180152
	)	
Charging Party,	)	**ORDER GRANTING**
	)	**RESPONDENT'S MOTION TO**
vs.	)	**DISMISS AND NOTICE OF**
	)	**INTENT TO DISMISS**
COVERED WAGON MOBILE HOME PARK,	)	
	)	
Respondent.	)	

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I. PROCEDURAL BACKGROUND

On January 24, 2018, the Charging Party, Jessica Crabb, with the assistance of Jorge Pareja, filed a Charge of Discrimination alleging Covered Wagon Mobile Home Park (Covered Wagon) discriminated against her on the basis of disability based upon their method of snow removal that left her allegedly homebound. The Montana Human Rights Bureau (HRB) conducted an informal investigation and determined that the preponderance of the evidence did not support Crabb's allegation that Covered Wagon discriminated against her on the basis of disability.

Crabb subsequently filed an objection with the Montana Human Rights Commission (HRC). The HRC considered the matter on July 20, 2018 and sustained Crabb's objection. *See* HRC Remand Ord., (08/20/18). The matter was remanded to the Office of Administrative Hearings (OAH) and certified for hearing on August 21, 2018.

Discovery issues began shortly after the scheduling order was issued on September 6, 2018. The parties were repeatedly encouraged to address discovery issues with one another before contacting OAH. Despite this directive, the parties continued to send discovery disputes to OAH without a proper motion being filed.

On November 9, 2018, Covered Wagon, through its counsel, Jordan Helvie, submitted a letter explaining what issues he had encountered during the course of discovery. Helvie noted Pareja had called him on the morning of October 29, 2018 and proceeded to yell at him regarding Covered Wagon's First Set of Combined Discovery Requests. Crabb's inadequate discovery responses were received by Helvie the following day. Helvie mailed a meet and confer letter on October 30, 2018 identifying the deficiencies in Crabb's response and seeking a meeting to discuss the course of discovery.

On November 13, 2018, the hearing officer issued an Order Resetting Contested Case Hearing Date and Prehearing Schedule to allow the parties additional time to conduct discovery based upon Pareja's request. Helvie did not object to the motion.

On December 3, 2018, Covered Wagon filed its Rule 37(A)(3), M.R.Civ.P., Motion to Compel Discovery Responses. On December 4, 2018, Pareja, on behalf of Crabb, responded to the motion via email. Pareja sent a second email the following day. On December 5, 2018, Covered Wagon filed its reply and filed a sur-reply the following day. In an order dated December 7, 2018, the hearing officer granted Covered Wagon's motion to compel.

On January 22, 2019, Covered Wagon filed a Motion to Dismiss with Prejudice and Motion for Summary Judgment arguing that Crabb's claim should be dismissed with prejudice based upon her failure to comply with the Order Granting Respondent's Motion to Compel, or, in the alternative, grant its motion for summary judgment.

On January 22, 2019, the Charging Party, Jessica Crabb, filed an email response to Covered Wagon's motions. Crabb argued she fully responded to the discovery requests and has made a good faith effort to resolve discovery disputes between the parties.

On January 25, 2019, Covered Wagon filed its reply in which it reiterated its request to have the matter dismissed for discovery abuses by Crabb or, alternatively, have its motion for summary judgment granted.

On January 31, 2019, the hearing officer conducted a telephone conference in this matter. Crabb appeared, as did Pareja. Jordan Helvie, Attorney at Law, appeared on behalf of Respondent. The parties discussed the various issues that have arisen during the course of discovery and ways of moving forward with the case.

On February 6, 2019, the hearing officer issued an Order Denying Respondent's Motion to Dismiss and Motion for Summary Judgment on the basis that many of the issues that had arisen during the course of discovery were due to Pareja's confusion while assisting Crabb in responding to the discovery requests.

On February 14, 2019, the hearing officer issued an Amended Order Setting Contested Case Hearing Date and Prehearing Schedule to allow the parties additional time to complete discovery and prepare for hearing. The hearing officer conducted a telephone conference with the parties that same day in an effort to address some of the issues Pareja had raised in a series of emails to OAH regarding discovery.

On February 22, 2019, Covered Wagon filed a Motion in Limine seeking to limit any new claims Crabb had not included in her Charge of Discrimination. Pareja sent an email to OAH that same day arguing that events that occurred after the filing of the Charge of Discrimination constituted retaliation and entitled Crabb to recover double damages.

On February 28, 2019, Covered Wagon filed a reply in support of its motion in limine. Helvie noted that Pareja had indicated that Crabb was seeking $600,000.00 in damages for medical bills related to her June 2018 pregnancy. Helvie also noted that many of the new claims appear to be Pareja's rather than Crabb's.

On March 1, 2019, Pareja sent multiple emails to OAH explaining what issues he and Crabb had encountered in contacting the Gallatin County Sheriff's Department regarding snow removal issues, as well as reiterating Crabb's initial complaints regarding snow removal by Covered Wagon. Helvie subsequently filed a Motion to Strike asking the hearing officer to strike all of Pareja's March 1, 2019 emails.

On March 11, 2019, Sandra Page, OAH Legal Secretary, sent an email to Pareja in response to a phone message he left questioning discovery requests Crabb had received from Covered Wagon. Page advised Pareja that he needed to contact Helvie to attempt to resolve the matter before filing any motion.

Pareja responded with an email in which he argued how he has attempted to comply with Covered Wagon's discovery requests and the orders of the hearing officer. Pareja requested the services of a "peace officer" to act as a courier for any documents he may produce in response to Covered Wagon's discovery requests. Helvie responded via email declining to have a "peace officer" act as a courier and reiterating how Pareja could respond to the discovery requests. Pareja responded via

email demanding to know why his employment records, which were the subject of at least one of Covered Wagon's discovery requests were relevant to the matter before the hearing officer. Helvie responded by explaining that the information was discoverable pursuant to Rule 26(b)(1), M.R.Civ.P. Page then sent an email to the parties reminding the parties that OAH was not involved in discovery and would only act upon a properly filed motion. Pareja responded:

> "You all can go fuck yourselves, I am done with this bullshit, harassment, and complete and total ignorance of the actual issue."

See email chain beginning with email from Pareja to Page, cc: Helvie, Jessica Crabb v. Covered Wagon Mobile Home Park, (03/11/19, 11:39:25 AM) and ending with email from Pareja to Page, Helvie, 03/12/19, 12:55 PM).

On March 12, 2019, Page sent an email to Pareja and Helvie:

> "You have served as an intermediary for Ms. Crabb throughout the proceedings before the Office of Administrative Hearings (OAH). Did you intend your most recent email sent on behalf of Ms. Crabb to serve as a Motion to Dismiss? Please advise at your earliest convenience."

Email from Page to Pareja, cc: Helvie (03/12/19 2:01 PM).

To date, no response has been received.

II. DISCUSSION

Administrative Rules of Montana 24.8.749 provides: "The methods, scope, and procedures of discovery are those governed and permitted by the Montana Rules of Civil Procedure . . .". Rule 37(b), M.R.Civ.P. provides that sanctions may be imposed where a party fails to obey a discovery order or to permit discovery. Possible sanctions include ". . .(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence; (iii) striking pleadings in whole or in part; (iv) staying further proceedings until the order is obeyed; (v) dismissing the action or proceeding in whole or in part; . . .". Rule 37(b)(2)(A)(ii)-(v), Mont.R.Civ.P.

The Montana Supreme Court outlined a three-factor test for assessing the appropriateness of discovery sanctions in *Smith v. Butte-Silver Bow County* (1996), 276 Mont. 329, 339-40, 916 P.2d 91, 97. The three-factor test (1) relates to the extent

and nature of the discovery abuse; (2) relates to the extent of the prejudice to the opposing party which resulted from the discovery abuse; and (3) is consistent with the consequences expressly warned of by the trial court, if such a warning was actually issued. The court further noted, "We also clarified that the third prong of the "harshness" test does not require a trial court to issue a warning before imposing a discovery sanction. *Id.* quoting *McKenzie v. Scheeler* (1997), 285 Mont. 500, 516, 949 P.2d 1168, 1178. The court went on to further clarify that ". . . the third prong of the *Smith* test requires only that the sanctions imposed be consistent with those of which the trial court expressly warns a party. Thus, this factor only applies if the trial court issues an express warning." *Id.*

The court also addressed the propriety of discovery in those cases prosecuted or defended by a pro se litigant. In *First Bank (N.A.)-Billings v. Heidema* (1986), 219 Mont. 373, 375-376, 711 P.2d 1384, 1386 (citations omitted), the court held:

> This Court's attitude towards dilatory discovery tactics is unequivocal:
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> In adopting a position that dilatory discovery actions are no longer to be dealt with leniently, we are in accord with the recent trend of cases intent upon punishing transgressors rather than patiently trying to encourage their cooperation . . . When litigants use willful delay, evasive responses, and disregard of court direction as part and parcel of their trial strategy, they must suffer the consequences.
>
> The emerging standards for willfulness in the Ninth Circuit should dispel any reluctance on the part of trial judges to apply sanctions.
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> Where it is determined that counsel or a party has acted willfully or in bad faith in failing to comply with rules of discovery or with court orders enforcing the rules or in flagrant disregard of those rules or order, it is within the discretion of the trial court to dismiss the action or to render judgment by default against the party responsible for the default . . . Litigants who are willful in halting the discovery process act in opposition to the authority of the court and cause impermissible prejudice to their opponents. It is even more important to note, in this era of crowded dockets, that they also deprive other litigants of an opportunity to use the courts as a serious dispute-settlement mechanism.

> While we are predisposed to give pro se litigants considerable latitude in proceedings, that latitude cannot be so wide as to prejudice the other party, as happened in the case at bar. To do so makes a mockery of the judicial system and denies other litigants access to the judicial process. It is reasonable to expect all litigants, including those acting pro se, to adhere to the procedural rules. But flexibility cannot give way to abuse. We stand firm in our expectation that the lower courts hold all parties litigant to procedural standards which do not result in prejudice to either party. The judgment ordered by the lower court in this case was well within the boundaries of its discretion and it is affirmed.

"The hearing officer may establish prehearing and hearing dates and procedures, rule upon procedural petitions and motions, make procedural rulings and orders which appear necessary from the record, and otherwise regulate the conduct and adjudication of contested cases as provided by law." Admin. R. Mont. 24.8.710(3). In accordance with a basic proposition "long-acknowledged" by the courts of this state, judicial authorities "possess inherent power to sanction willful or reckless conduct, especially when combined with frivolousness, harassment, or [an] improper purpose." *Motta v. Granite County Commissioners*, 2013 MT 172, ¶ 17 (2013) (upholding finding that Motta was a "vexatious litigant" whose misconduct warranted the imposition of effective sanctions).

In light of Pareja's most recent email on behalf of Crabb, the hearing officer has determined it appropriate to reconsider her previous ruling on Covered Wagon's motion to dismiss as a sanction for Crabb's failure to fully comply with her order granting Covered Wagon's motion to compel full and complete responses to Covered Wagon's discovery requests. The hearing officer appreciates the difficulties Crabb has faced in prosecuting her claim. However, those issues have been exacerbated by Pareja's continued interference with the process. Pareja has repeatedly derailed discovery efforts by imposing improper and unnecessary conditions on Crabb's response to Covered Wagon's discovery requests. The discovery sought by Covered Wagon has not been unreasonably cumulative or duplicative; nor has its requests been burdensome or unlikely to lead to the discovery of admissible evidence. See Rule 26(a)(1), (2)(C)(i)-(iii), M.R.Civ.P. Pareja has protested almost every discovery request propounded by Covered Wagon.

The hearing officer has attempted to address some of Pareja's concerns in various telephone conferences. However, as the parties have been repeatedly advised, the hearing officer cannot act on discovery disputes without a proper motion having been filed. Further, the hearing officer is limited in what assistance she can provide a

party as she cannot serve as an advocate for either party. While sympathetic to the plight of Crabb and Pareja, the hearing officer is not convinced that discovery will ever be fully completed in this matter, due in large part to Pareja's continued efforts to derail the process. Pareja's obstructive conduct has now escalated to the point where he has sent an email to OAH staff that included profane language clearly demonstrative of a continued unwillingness to properly respond to Covered Wagon's discovery requests or abide by the orders of the hearing officer.

Pareja has served as an authorized agent of Crabb throughout this process. While the hearing officer has been reticent to impose sanctions due to Pareja's involvement on behalf of Crabb, the hearing officer is left with little choice at this point. A review of the file shows Helvie, on behalf of his client, has continued to act in a respectful manner toward Pareja and Crabb in his effort to discharge his duty to his client. In contrast, the record shows Pareja has repeatedly acted in a dilatory and obstructive fashion. While Crabb is entitled to a certain amount of latitude as a pro se litigant, that latitude cannot be so great as to prejudice the other party. Therefore, the hearing officer has reconsidered her previously ruling denying Covered Wagon's motion to dismiss and now GRANTS the motion to dismiss.

III. ORDER

IT IS THEREFORE ORDERED that the hearing officer's previous order denying Covered Wagon's motion to dismiss is hereby VACATED. Covered Wagon's motion is hereby GRANTED.

IT IS THEREFORE ORDERED, that the parties are hereby on notice of the hearing officer's intent to dismiss the complaint of Jessica Crabb. The Montana Human Rights Bureau has not made a reasonable cause finding in this matter. *See* Admin. R. Mont. 24.8.734(6). However, given the nature of Crabb's issues and the involvement of Pareja, notice is being given to HRB of the proposed dismissal.

IT IS THEREFORE FURTHER ORDERED, that, by the close of business on April 19, 2019, Crabb shall file and serve a response to the Notice of Intent to Dismiss explaining why the matter should not be dismissed. If no such filing is received by that date, or if such filing fails to show why the matter should not be dismissed, the hearing officer will dismiss the complaint. The hearing officer is providing copies of this notice of intent to dismiss to HRB and its counsel. As a result of this order, the Amended Order Setting Contested Case Hearing Date and Prehearing Schedule issued on February 14, 2019 is hereby VACATED.

DATED this 18th day of March, 2019.

Caroline A. Holien

Caroline A. Holien, Hearing Officer
Office of Administrative Hearings
Department of Labor and Industry

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CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing document were, this day, served upon the parties or their attorneys of record by depositing them in the U.S. Mail, postage prepaid, and addressed as follows:

JESSICA CRAB
1121 NORTH 17TH AVE
BOZEMAN MT 59715

JORDAN P HELVIE
KASTING KAUFFMAN & MERSEN PC
716 SOUTH 20TH AVENUE STE 101
BOZEMAN MT 59718

The undersigned hereby certifies that true and correct copies of the foregoing document were, this day, served upon the parties or their attorneys of record by means of the State of Montana's Interdepartmental electronic mail service.

MARIEKE BECK, BUREAU CHIEF
HUMAN RIGHTS BUREAU

TIMOTHY LITTLE, ATTORNEY
HUMAN RIGHTS BUREAU

Signed this 18th day of March, 2019.

Sandra Page

Legal Secretary, Office of Administrative Hearings
Montana Department of Labor and Industry

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