

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

IN RE OFFICE OF ADMINISTRATIVE HEARINGS CASE NO. 844-2019:

ANDREW CRAWFORD,)	
)	
Charging Party,)	AMENDED
)	ORDER GRANTING
vs.)	RESPONDENT'S RULE 37
)	MOTION TO DISMISS
FRATERNAL ORDER OF THE EAGLES)	
#326,)	
)	
Respondent.)	

* * * * *

I. PROCEDURAL BACKGROUND

On April 6, 2018, Andrew Crawford filed a Charge of Discrimination with the Montana Human Rights Bureau alleging the Fraternal Order of the Eagles #326 (FOE) discriminated against him on the basis of disability by failing to reasonably accommodate his disability and by excluding him from a public accommodation after he was ordered out of the business with his service animal.

On December 17, 2018, the matter was certified for hearing before the Office of Administrative Hearings (OAH). On December 14, 2018, OAH issued a Notice of Hearing, which included the directive that the parties were required to file their Appearance and Preliminary Prehearing Statement within 20 days of the date of mailing of the notice. On January 7, 2019, OAH received FOE's Appearance and Preliminary Prehearing Statement. On January 18, 2019, OAH received Crawford's Appearance and Preliminary Prehearing Statement. Crawford failed to provide FOE a copy of his Appearance and Preliminary Prehearing Statement.

On December 26, 2018, OAH issued an Order Setting Contested Case Hearing Date and Prehearing Schedule setting forth the prehearing deadlines and contested case hearing date. This order also included the following:

Failure to comply with an order of the Hearing Officer or to participate in a prehearing conference may result in sanctions. Sanctions include dismissal of the charge, default of Respondent or other appropriate action, as a prerequisite of continuing to prosecute or resist the complaint.

On January 18, 2019, FOE filed a Motion to Dismiss arguing that Crawford's behavior at his deposition, which included refusing to answer questions; acting in a threatening manner toward the court reporter; and carrying a concealed weapon warranted the dismissal of Crawford's complaint with prejudice. Included with FOE's motion was a recording of the deposition.

On February 1, 2019, Crawford filed his response denying he acted in the manner described by FOE in its motion. Crawford argued he did not act in a threatening manner but reacted to what he considered to be the rude behavior of FOE's counsel. Crawford denied refusing to answer any questions and argued that a series of questions asked by FOE's counsel referred to matters of public record, which he did not have to answer. Crawford also takes issue with FOE's counsel's request to see notes Crawford claims to have regarding the alleged incident involving the FOE. Crawford denied having a weapon on his person at the deposition but contended he was wearing an empty leather knife case and left the knife in his pickup.

On February 4, 2019, FOE filed its reply arguing Crawford admitted using profanity and telling the Court Reporter not to smile when raping him. FOE again alleged Crawford brought a concealed weapon that appeared to be a hunting knife with him to the deposition.

On February 11, 2019, the hearing officer issued an Order Denying Respondent's Motion to Dismiss. The hearing officer noted Crawford's behavior at the deposition was inappropriate and he was advised that he was required to answer opposing counsel's questions.

On February 21, 2019, FOE's counsel attempted to depose Crawford for a second time. The parties contacted OAH regarding various disputes that had occurred during the deposition. The hearing officer was out of town for another hearing. As a result, Hearing Officer Chad R. Vanisko addressed their issues, which included Crawford's refusal to answer questions regarding his claim for worker's compensation benefits. Additionally, FOE's counsel reported that Crawford had "flipped off" him and the court reporter and refused to face them during the deposition.

On March 19, 2019, FOE's counsel filed a Rule 37 Motion for Sanctions and Brief in Support. FOE argues that Crawford refused to be sworn after arriving for his second deposition and "flipped off" the court reporter when he did assent to the oath being administered. FOE states Crawford refused to face the court reporter, which made it difficult for her to hear and understand his testimony. FOE then contends Crawford refused to answer a series of questions regarding his physical condition and refused to respond to FOE's first set and second set of discovery requests.

On April 3, 2019, Crawford filed his response to FOE's motion via email. Crawford denies engaging in the conduct alleged by FOE's counsel and argued he was reacting to what he perceived to be a hostile situation. Crawford also included what appears to be recitation of events on the day of the deposition.

On April 4, 2019, FOE filed its reply via email. FOE argues that Crawford's conduct during the course of discovery, as well as his combative and offensive behavior at both depositions, has prejudiced its ability to effectively mount a defense to his allegations. Specifically, FOE argues that Crawford has failed to disclose the nature of his alleged disability or why he requires a service animal. FOE also argues that Crawford has failed to allow for investigation into the specifics of his claim or the nature of his damages.

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:

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.

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).

The hearing officer previously denied FOE’s motion for sanctions in an effort to allow Crawford additional time to complete discovery in recognition of his status as a pro se litigant. Crawford has chosen to repeatedly engage in disruptive and offensive conduct despite having been warned that such behavior could result in sanctions being imposed. Crawford’s behavior has unnecessarily lengthened the discovery period and has delayed hearing in this matter. Crawford’s behavior has been willful and harassing and appears to have been intended to stonewall the efforts of FOE to complete discovery in this matter. While Crawford has been granted some leniency due to his pro se status, that leniency has been strained to the point where his conduct has unduly prejudiced FOE. Therefore, FOE’s motion for sanctions pursuant to Rule 37, M.R.Civ.P., is well taken and is hereby GRANTED.

III. ORDER

IT IS THEREFORE ORDERED that the Fraternal Order of the Eagles #326 motion to dismiss pursuant to Rule 37, M.R.Civ.P. is hereby GRANTED. The claim of Andrew Crawford is hereby DISMISSED with prejudice.

DATED: this 8th day of April, 2019.

/s/ CAROLINE A. HOLIEN
Caroline A. Holien, Hearing Officer
Office of Administrative Hearings
Montana Department of Labor and Industry

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Andrew Crawford, Charging Party; and Fraternal Order of the Eagles #326, Respondent, and its attorney, Geoffrey Angel:

The decision of the Hearing Officer granting Respondent's Rule 37 Motion to Dismiss, which is an administrative decision appealable to the Human Rights Commission, issued April 5, 2019, in this contested case. **Unless there is a timely appeal to the Human Rights Commission, the decision of the Hearing Officer becomes final and is not appealable to district court. Mont. Code Ann. § 49-2-505(3)(C) and (4).**

TO APPEAL, YOU MUST, WITHIN 14 DAYS OF ISSUANCE OF THIS NOTICE, FILE A NOTICE OF APPEAL, Mont. Code Ann. § 49-2-505 (4), WITH ONE DIGITAL COPY, with:

**Human Rights Commission
c/o Annah Howard
Human Rights Bureau
Department of Labor and Industry
P.O. Box 1728
Helena, Montana 59624-1728**

You must serve ALSO your notice of appeal, and all subsequent filings, on all other parties of record.

ALL DOCUMENTS FILED WITH THE COMMISSION MUST INCLUDE THE ORIGINAL AND ONE DIGITAL COPY OF THE ENTIRE SUBMISSION.

The provisions of the Montana Rules of Civil Procedure regarding post decision motions are NOT applicable to this case, because the statutory remedy for a party aggrieved by a decision, timely appeal to the Montana Human Rights Commission pursuant to Mont. Code Ann. § 49-2-505(4), precludes extending the appeal time for post decision motions seeking relief from the Office of Administrative Hearings, as can be done in district court pursuant to the Rules.

The Commission must hear all appeals within 120 days of receipt of notice of appeal. Mont. Code Ann. § 49-2-505(5).

THERE IS NO TRANSCRIPT OF HEARING, BECAUSE RESPONDENT'S RULE 37 MOTION TO DISMISS WAS GRANTED PRIOR TO HEARING. Direct any questions about the appeal process to Annah Howard, (406) 444-4356, Human Rights Bureau, Department of Labor and Industry.

Crawford.Amended Order Granting Respondent's Rule 37 Motion to Dismiss