

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

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

ANDREW CRAWFORD,)	HRB Case No. 0180278
)	
Charging Party,)	
)	ORDER GRANTING
vs.)	RESPONDENT'S MOTION
)	TO DISMISS
FRATERNAL ORDER OF THE EAGLES)	
#326,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

On August 11, 2020, the Fraternal Order of the Eagles #326 (FOE #326), by and through its attorney, filed its Renewed Motion to Dismiss and Brief in Support pursuant to Rule 37, M.R.Civ.P. FOE #326 argues Andrew Crawford failed to fully respond to its discovery requests by failing to disclose his medical records; refusing to set forth the his contentions of fact related to his damages claim; and failing to produce for inspection and copying the notebook he claims to have made notes following the events giving rise to his claim of discrimination. Specifically, FOE #326 argues Crawford's answers to the following discovery requests were incomplete:

Interrogatory No. 7: Identify each and every medical provider whom you've seen for the injury which you claim renders you disabled including each medical provider's name, address, telephone number, area of expertise and the date or dates you saw each provider for treatment.

Answer: Respondent has over 350 pages of med records.

Interrogatory No. 9: Set forth each diagnosis you received for the alleged impairment to your hand and identify the medical provider who

diagnosed you including each provider's name, address, telephone number and area of expertise.

Answer: Respondent has over 350 pages of med records of charging party.

Interrogatory No. 12: Set forth your contentions of fact that support your claim for damages.

Answer: Previously answered.

On August 17, 2020, Crawford filed his response arguing FOE #326 “has all medical records relating to [his] disability.” Crawford noted, “I am not a doctor and do not know how to further respond.” Crawford argues the facts related to his claim for damages “are simple.” I entered the FOE with my service animal and was told to leave by the bartender for the FOE because I had no paperwork showing my dog was a service animal.” Crawford argued he had already produced the relevant portions of his notebook, “The so called notebook is a personal diary covering [approximately] 12 years of my life. It’s a personal book. Not open for public viewing to become public record.”

II. PROCEDURAL BACKGROUND

On April 6, 2018, Crawford filed a Charge of Discrimination with the Montana Human Rights Bureau (HRB) alleging FOE #326 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 #326’s Appearance and Preliminary Prehearing Statement. On January 18, 2019, OAH received Crawford’s Appearance and Preliminary Prehearing Statement.

On January 18, 2019, FOE #326 filed a Motion to Dismiss arguing Crawford’s offensive and obstructive behavior at his deposition warranted the dismissal of Crawford’s complaint with prejudice. Included with FOE #326’s motion was a

recording of the deposition. After reviewing the parties' arguments, the hearing officer denied FOE #326's motion to dismiss on February 11, 2019.

On March 19, 2019, FOE #326 filed a Rule 37 Motion for Sanctions and Brief in Support arguing Crawford initially refused to be sworn in; "flipped off" the court reporter when he did assent to the oath being administered; and engaged in other disruptive and discourteous behavior. The Hearing Officer granted the motion to dismiss pursuant to Rule 37, M.R.Civ.P. on April 5, 2019. Crawford timely appealed the dismissal order.

The Montana Human Rights Commission (MHRC) considered the matter on July 19, 2019. On October 6, 2019, the MHRC remanded the matter on the grounds the Hearing Officer's dismissal was an abuse of discretion and excessive in proportion to the discovery violations verifiable in the record. *MHRC Remand Order*, p. 8. MHRC noted specifically there was a question of fact regarding what medical records Crawford had allegedly failed to produce. *Id.* at p. 7.

On October 11, 2019, OAH issued a Notice of Hearing on Remand notifying the parties that the matter had been remanded to OAH for further proceedings consistent with MHRC's order. On October 18, 2019, FOE #326 requested an opportunity to submit briefs on the issues noted by MHRC. After a telephone conference with the parties, the Hearing Officer issued an order on October 30, 2019, setting a briefing schedule. After reviewing the parties' respective arguments, as well as MHRC's remand order, the Hearing Officer denied FOE #326's motion to dismiss on January 14, 2020. On January 27, 2020, the Hearing Officer issued a scheduling order setting the matter for hearing on May 12, 2020.

On March 26, 2020, Governor Steve Bullock issued a stay at home directive as a result of the COVID-19 pandemic that required "all business and operations, except for essential business and operations defined in the direction, to stop all activities within the state." Governor Bullock ordered Phase Two of the Reopening of Montana on May 19, 2020. However, many businesses and public buildings, including the Bozeman Public Library, remained closed or had limited hours of operation during Phase Two.

On April 10, 2020, the Hearing Officer issued an Order Resetting Contested Case Hearing Date and Prehearing Schedule due to COVID-19 related scheduling issues.

On April 15, 2020, FOE #326 filed a Renewed Motion to Dismiss pursuant to Rule 37, M. R. Civ. P. arguing its discovery efforts had been frustrated due to Crawford's failure to timely respond to its written discovery requests. On April 15, 2020, FOE #326 filed a Motion to Dismiss and Brief in Support arguing the matter should be dismissed pursuant to Mont. Code Ann. § 49-2-512(2)(b), because more than one year has elapsed since the filing of the complaint.

On April 23, 2020, Crawford sent an email to the Office of Administrative Hearings and counsel for FOE #326 indicating he could not timely respond to the motions due to the Bozeman Public Library being closed pursuant to the Governor's directives related to COVID-19.

On April 29, 2020, the Hearing Officer found Crawford, who relies upon publicly available computers to prepare his filings, had shown good cause for extending the time of reply due to the closure of the Bozeman Public Library as a result of Governor Bullock's stay at home directives. Crawford was given until May 15, 2020 to respond, and Respondent was given until May 29, 2020, to file its reply.

On May 30, 2020, Crawford filed a motion for an indefinite stay in this matter due to the impact COVID-19 closures and restrictions had on his ability to prepare for hearing. After reviewing the parties' respective arguments, the Hearing Officer denied the motion on June 15, 2020.

On July 28, 2020, FOE #326 filed a Motion to Compel, with its Fourth and Fifth Combined Discovery Requests. FOE #326 argued its discovery requests were served upon Crawford on February 5, 2020, and March 9, 2020, respectively. Crawford failed to respond by the deadlines of March 4, 2020, and April 6, 2020.

On July 7, 2020, the Hearing Officer conducted a final prehearing conference in this matter for the hearing that was set for July 14, 2020. The Hearing Officer addressed FOE #326's most recent motion to compel during the conference.

Crawford indicated he had been unable to file prehearing disclosures as required, including his witness list, exhibit list, and request for subpoenas, due to the closure of the Bozeman Public Library. Crawford represented that he had tested positive for COVID-19 in March 2020, but had tested negative for the virus approximately three weeks earlier. The Hearing Officer denied Crawford's request for additional time due to the many delays introduced to the prehearing process caused by his willful refusal to abide by the orders of the Hearing Officer. Crawford was

ordered to respond to the discovery requests by July 20, 2020. As a sanction for his failure to abide by the Scheduling Order, Crawford was prohibited from offering exhibits or calling witnesses during his case-in-chief.

Following the conference, OAH staff s learned there were no hearing sites available in Bozeman for the scheduled dates for hearing. OAH staff emailed the parties after learning the Law and Justice Center had a jury room available for August 3, and August 4, 2020. Angel confirmed he and his client would be available those dates. Crawford did not respond.

On July 10, 2020, Sandra Page, OAH Legal Secretary, called Crawford to confirm his availability. Crawford indicated he was not available and refused to commit to any dates. Page told him that she would advise the Hearing Officer. The matter was then set for hearing on August 3, and August 4, 2020, at 9:00 a.m., MDT, at the District Court Room 310 - Jury Room B, Law and Justice Center, 615 South 16th Avenue, Bozeman, Montana.

On July 12, 2020, Crawford sent a profanity laced email to Office of Administrative Hearings (OAH) administrative staff in response to an email inquiring about his availability for hearing on August 3, 4, and 5, 2020. Crawford wrote:

Have you heard from me yet!!!!#####!# what the FUCK????????
WHAT THE FUCK??????? WORLD WIDE PANDEMIC..... NO
YOU'RE MUCH BIGGER THAN THAT RIGHT!!!!# FUCK YOU
AND THAT SO CALLED WHITE HORSES ALL OF YOU THINK
YOU CAME IN RIDING IN ON. NO YOU ARE WRONG. WHAT
THE FUCK.

On July 21, 2020, FOE #326 filed a motion to dismiss and motion to compel. FOE #326 noted Crawford's offensive email was part of a continuing pattern of obstructive and abusive behavior. FOE #326 argued dismissal was warranted due to Crawford's repeated failure to respond to its discovery request despite the most recent order of the Hearing Officer and his offensive email to OAH staff. On July 28, 2020, the Hearing Officer issued an order denying the motion.

On Saturday, August 1, 2020, FOE #326 filed a motion to dismiss citing Crawford's repeated failure to respond to its discovery requests and his failure to abide by the orders of the Hearing Officer. The Hearing Officer had not received a copy of the motion by the time of hearing. The parties were allowed to make a

record as to the motion to dismiss. The Hearing Officer took the motion under advisement.

On August 3, 2020, the Hearing Officer convened a hearing in this matter at District Court Room 310 - July Room B, Law and Justice Center, 615 South 16th Avenue, Bozeman, Montana. Andrew Crawford appeared pro se. The Fraternal Order of the Eagles #326 (FOE #326) appeared through its designated representative Michael Peters. Geoffrey Angel, Attorney at Law, represented FOE #326.

The Hearing Officer took oral argument on FOE #326's motion to dismiss. Crawford argued he had all his evidence and information requested by Angel with him, including two USB thumb drives. Crawford's friend, who had accompanied him to hearing, assured the Hearing Officer he would assist Crawford in answering the discovery requests and in preparing for hearing. The Hearing Officer allowed Crawford one FINAL opportunity to properly respond to discovery and to submit his prehearing disclosures due to the limited access he had to public computers due to COVID-19 related closures. The Hearing Officer warned Crawford that failure to fully respond to the discovery requests and to timely file his prehearing disclosures would result in the dismissal of his case. Crawford was advised that handwritten responses were acceptable, and the Hearing Officer would accept legible, hand written prehearing disclosures. Crawford was order to respond to FOE #326's discovery requests no later than Friday, August 7, 2020. The parties were ordered to file their prehearing disclosures no later than Friday, August 14, 2020. The hearing was rescheduled to August 24, 2020.

III. 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), M.R.Civ.P. "[A]n evasive or incomplete answer or response must be treated as a failure to answer or respond." Rule 37(a)(4), M.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).

Under Rule 37(c), M.R.Civ.P., the key questions are whether Crawford’s failure to fully respond to FOE #326’s was substantially justified and whether the effect of the failure to produce was harmless. “Dismissal . . . is so harsh a penalty it should be imposed as a sanction only in extreme circumstances.” *Thompson v. Housing Auth. of Los Angeles*, 782 F.2d 829, 831 (9th Cir. 1986). *See also Dahl v. City of Huntington Beach*, 84 F.3d 363, 366 (9th Cir. 1996) (quoting *Thompson*). “[W]hat is most critical for case-dispositive sanctions, regarding risk of prejudice and of less drastic sanctions, is whether the discovery violations ‘threaten to interfere with the rightful decision of the case.’” *Valley Eng’rs v. Electric Eng’rs Co.*, 158 F.3d 1051, 1058 (9th Cir. 1998). Discovery violations can threaten to interfere with a rightful decision in two ways. First, a party’s discovery violations may present a “pattern of deception . . . [that makes] it impossible’ for the district court to conduct a trial ‘with any reasonable assurance that the truth would be available.’” *See Valley Eng’rs*, 158 F.3d at 1057 (quoting *Anheuser-Busch, Inc. v. Natural Beverage Distrib.*, 69 F.3d 337, 352 (9th Cir. 1995)). Even a single violation of a discovery order can be

justification for dismissing a case under our cases if critical documents are being withheld, and the integrity of the entire process is called into question. *See id.* Second, a party's repeated failure to comply with orders compelling production may threaten the rightful resolution by preventing the other party from preparing for a fast-approaching trial date. *See Payne v. Exxon Corp.*, 121 F.3d 503, 508 (9th Cir. 1997) (holding dismissal to be an appropriate sanction when plaintiffs ignored four separate orders, including one identified as the "last chance to comply with the court's previous orders"); *Adriana Intern. Corp. v. Thoren*, 913 F.2d 1406, 1412 (9th Cir. 1990)(holding that "the repeated failure of Adriana to appear at scheduled [depositions] compounded by their continuing refusal to comply with court-ordered production of documents constitutes an interference with the rightful decision of the case" (emphasis added)).

FOE #326 seeks Crawford's medical records. Crawford has placed his medical condition at issue by alleging he was discriminated against on the basis of disability. The only medical records produced by Crawford were for health care providers he visited more than ten months after the incident at FOE #326. Crawford has produced no information regarding medical treatment he has received related to or because of his alleged disability, thereby denying FOE #326 from accessing evidence necessary to cross-examine Crawford or otherwise fully prepare for hearing.

FOE #326 has also sought evidence regarding Crawford's claim for damages. While Crawford believes the facts of this case are "simple," he has requested damages to compensate him for the discrimination he alleges to have suffered. FOE #326 is entitled to information regarding the basis for his calculation of damages, not simply his request for damages. Crawford's failure to simply provide the information request is unreasonable and unjustified.

Crawford's repeated failure or refusal to completely respond to FOE #326's multiple discovery requests has not only prejudiced FOE #326, but has placed the integrity of the entire discovery process into question. It is not clear what evidence Crawford had when hearing was convened on August 3, 2020, because he has chosen to disclose only what he feels is appropriate. That is not for Crawford to decide. Further, Crawford is not free to dictate the course and conduct of discovery. While mindful of his pro se litigant status, the Hearing Officer has tolerated what has been a repeated and willful pattern of Crawford's part to disrupt and to obstruct the discovery process. As a result, the Hearing Officer is not convinced it is possible for her to conduct a hearing in the matter "with any reasonable assurance that the truth would be available." *See Valley Eng'rs*, 158 F.3d at 1057 (*quoting Anheuser-Busch*, 69 F.3d at 352. Therefore, FOE #326's motion to dismiss is well taken.

IV. ORDER

IT IS THEREFORE ORDERED that Fraternal Order of the Eagles #326's motion to dismiss pursuant to Rule 37, M.R.Civ.P., is hereby **GRANTED**. The claim of Andrew Crawford is hereby **DISMISSED** with prejudice. The hearing scheduled for August 24, 2020 is hereby **VACATED**.

DATED: this 21st day of August, 2020.



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

* * * * *

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, or by means of the State of Montana's Interdepartmental mail service, and addressed as follows:

ANDREW CRAWFORD
PO BOX 6461
BOZEMAN MT 59771

GEOFFREY ANGEL
ATTORNEY AT LAW
803 WEST BABCOCK
BOZEMAN MT 59715

DATED: this 21st day of August, 2020.



Legal Secretary