UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

NOE RODRIGUEZ, Complainant,	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 04B00024
TYSON FOODS, INC., Respondent	)	Judge Robert L. Barton, Jr.

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

(*October 19, 2004*)

I. SUMMARY

On August 24, 2004, I issued an Order Granting Respondent's Motion to Compel Discovery and Requiring Complainant to File Witness and Exhibit Lists. In that Order, I noted that Complainant had not filed any response to Respondent's motion to compel and also had not served or filed his preliminary exhibit and witness lists, as required by my March 31, 2004 Order. Similarly, Complainant has not filed any response to Respondent's motion to dismiss. In the August 24 Order, I commanded Complainant to file and serve his preliminary witness and exhibits lists by September 15, 2004, and I also ordered him to serve answers to Respondent's discovery requests by that date. He has neither filed his witness and exhibits lists, nor served answers to Respondent's discovery requests. Consequently, Respondent's motion to dismiss is granted, and the Complaint is dismissed with prejudice.

II. PROCEDURAL HISTORY

On January 29, 2004, Complainant filed a Complaint pro se with the Office of the Chief Administrative Hearing Officer (OCAHO), alleging that Tyson Foods, Inc. (Respondent) had knowingly and intentionally fired him because of his citizenship status and national origin in violation of 8 U.S.C. § 1324b(a)(1). Respondent filed an Answer on March 22, 2004, in which it admitted some of the allegations in the Complaint and denied some others, including the central

allegation of discriminatory firing.

On February 20, 2004, the Chief Administrative Hearing Office served both parties by certified mail with a copy of the Complaint and a Notice of Hearing. An Answer to the Complaint was filed, and on March 31, 2004, I issued an Order Governing Prehearing Procedures (OGPP), which, among other things, contained a procedural schedule. The procedural schedule required that Complainant serve and file his exhibit and witness lists by May 3, 2004. However, to date, Complainant still has not served or filed either list or a copy of his exhibits. These submissions now are overdue by five months, and there is no indication that Complainant ever intends to file such documents. By contrast, despite Complainant's failure to file his exhibit and witness lists, on June 3, 2004 Respondent timely filed its Preliminary Witness and Exhibit List, and then filed its Supplemental Preliminary Witness and Exhibit list on June 15, 2004, and its Second Supplemental Preliminary Witness and Exhibit list on July 14, 2004.

In addition to his failure to file the exhibit and witness lists and copies of exhibits, Complainant also has failed to respond to Complainant's discovery requests. The OGPP set the date of August 2, 2004 for completion of discovery. On June 1, 2004, Respondent served on Complainant, via ordinary mail, Interrogatories, Requests for Production, and Requests for Admissions. See Respondent's Motion to Compel Discovery. The discovery requests were accompanied by a cover letter dated June 1, 2004. In the June 1 letter, Respondent reminded Complainant that to date it had not received Complainant's preliminary witness and exhibit lists, or a copy of his exhibits. Respondent also referenced the separate discovery requests and explained that the responses were due thirty days from the date of service. Respondent's counsel further stated that if Complainant failed to respond to Respondent's Requests for Admissions within thirty (30) days of service, they could be deemed admitted under §§ 68.18-68.21 of the OCAHO rules of practice. Id.

On July 14, 2004, Respondent's counsel sent another letter to Complainant, stating that to date it still had not received a copy of Complainant's witness and exhibit lists and also informed Complainant that it had not received any responses to Respondent's discovery requests. Respondent requested that Complainant furnish responses by July 23, 2004. Respondent's counsel stated that he was seeking to resolve this problem without the Court's intervention but if he did not receive answers and responses by July 23, he planned to file a motion to compel discovery. Subsequently, Respondent filed a Motion to Compel Discovery in which it related that Complainant had not provided Respondent with his preliminary witness and exhibit lists and also that Complainant had failed to provide answers to its discovery requests, specifically, Respondent's interrogatories, requests for production of documents, or requests for admission.

Complainant did not file any response to Respondent's Motion to Compel, and on August 24, 2004 I issued an Order granting Respondent's Motion to Compel, ordering that Complainant, not later than September 15, 2004, serve on Respondent complete responses to the interrogatories and requests for production and also serve on Respondent and file with the Court his

preliminary exhibit and witness lists. In the August 24 Order, I warned Complainant that if he failed to comply with my Order by September 15, 2004, Respondent could move for sanctions, which might be granted without any opportunity for an evidentiary hearing.

On October 4, 2004, Respondent filed a Motion to Dismiss. In the motion, Respondent's counsel states that, to this date, Complainant has neither served any answers or any response to the Respondent's discovery requests, nor has he filed his exhibit and witness lists. Consequently, Complainant is in direct violation of my prior Orders.

III. DECISION

Although dismissal with prejudice is a "severe sanction," it will be upheld against a party who is proceeding pro se, so long as the court has warned the party that noncompliance can result in dismissal. In my August 24 Order, I specifically warned Complainant that his continued failure to comply with my Orders could result in the severe sanction of dismissal. Nevertheless, he has persisted in refusing to obey my Orders.

I grant Respondent's motion and dismiss Complainant's Complaint with prejudice for two separate but related reasons. First, Complainant essentially has abandoned his Complaint by failing to prosecute this case and by failing to respond to my orders. Second, I dismiss the Complaint as a discovery sanction, because he has violated my August 24 Order requiring him to provide answers to Respondent's interrogatories and requests for production, despite clear warning that such behavior could result in dismissal.

A. Abandonment

Pursuant to the OCAHO rules of practice, a complaint may be dismissed upon its abandonment by the party who filed it. 28 C.F.R. § 68.37(b) (2003). One of the grounds for finding abandonment is when the party fails to respond to orders issued by the Administrative Law Judge (ALJ). 28 C.F.R. § 68.37(b)(1) (2003). OCAHO precedent supports the dismissal of a pro se complainant's complaint with prejudice when he or she fails to obey orders issued by an ALJ. See, e.g., Palma v. Farley Foods, 5 OCAHO 283, 286, 1995 WL 463998, at *3 ("this is another case of an individual invoking protection under § 1324b without accepting the responsibility to abide reasonably by established procedures as required by the presiding judge."); Chavez v. Nat'l By-Prod., 4 OCAHO 293, 295, 1994 WL 269764, at *2; Gallegos v. Magna-View, Inc., 4 OCAHO 359, 361-362, 1994 WL 386824, at *2.

Complainant has abandoned his Complaint. Since filing his Complaint in January of 2004, he has done nothing to advance this litigation. The OCAHO rules of practice provide in pertinent part that a complaint may be dismissed if a party fails to respond to orders issued by the ALJ.

28 C.F.R. § 68.37(b)(1) (2003). In this case, Complainant failed to respond to the First Prehearing Order issued on February 23, 2004; he has failed to respond or comply with the OGPP issued on March 31, 2004; and he has failed to comply with my August 24, 2004 Order Granting Respondent's Motion to Compel Discovery. Moreover, he has failed to submit any kind of written communication with my office indicating that he intends to comply, or that he intends to continue with his lawsuit.

Thus, the only reasonable conclusion is that Complainant has abandoned his Complaint, and therefore it should be dismissed pursuant to 28 C.F.R. § 68.37(b).

B. Discovery Sanction

Aside from the abandonment issue, even if the Complainant had not abandoned his lawsuit, the motion to dismiss may be granted as a discovery sanction. The OCAHO rules of practice provide for various types of sanctions, including dismissal, for failing to comply with a judge's order compelling a party to answer interrogatories or to produce documents pursuant to a request for production of documents. 28 C.F.R. § 68.23(c) (2003). Specifically, section 68.23(c)(5) provides in pertinent part that if a party fails to comply with a discovery order, including but not limited to the production of documents or the answering of interrogatories, or any other order of the Administrative Law Judge, the Judge may, for the purpose of permitting resolution of the relevant issues and disposition of the proceeding and to avoid unnecessary delay, rule that a decision be rendered against the non-complying party.

Section 68.23(c) is patterned after Rule 37(b) of the Federal Rules of Civil Procedure (FRCP). Rule 37(b) provides, in relevant part, that if a party fails to comply with a court order compelling discovery entered pursuant to Rule 37(a), then the court may impose sanctions, including dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party. See FRCP 37(b)(2)(C). While the language of Rule 37(b)(2)(C) and § 68.23(c)(5) are not identical, the two provisions are substantively the same. Thus, both Rule 68.23 of the OCAHO rules and Rule 37 of the FRCP provide, in appropriate circumstances, for dismissal as a sanction when a party fails to obey a discovery order. Consequently, the case law interpreting Rule 37(b) is pertinent in deciding whether to grant Respondent's motion to dismiss.

Because both parties are situated in Kansas, the case law of the United States Court of Appeals for the Tenth Circuit (Tenth Circuit) is authoritative. See 28 C.F.R. § 68.57 (2003). In Ehrenhaus v. Reynolds, 965 F.2d 916 (10th Cir. 1992), the Court affirmed a district court's dismissal of a complaint when the plaintiff deliberately disobeyed a court order to attend a deposition. The Court observed that dismissal represents an extreme sanction appropriate only in cases of wilful misconduct, and that in cases involving a pro se party, the court should carefully assess whether it might appropriately impose some sanction other than dismissal. Id. at 920. The Court opined that before a trial court chooses dismissal as a just sanction, it should consider a number of factors, including (1) the degree of actual prejudice to the opposing party; (2) the amount of interference with the judicial process; (3) the culpability of the litigant; (4) whether the court warned the party in

advance that dismissal was a likely sanction for noncompliance; and (5) the efficacy of lesser sanctions. Id. at 921. Accord Gripe v. City of Enid, Oklahoma, 312 F.3d 1184, 1188 (10th Cir. 2002). In Gripe, the issue involved failure to attend a court ordered status conference, rather than failure to comply with a court order to answer discovery requests, but the Tenth Circuit applied the same five factors and affirmed the district court's decision to dismiss the complaint as a sanction under Rule 37(b). Id. at 1188-1190.

In a recent unpublished decision by the Tenth Circuit, the court affirmed the dismissal of a pro se employment applicant's discrimination claim when the applicant did not fully respond to defendant's requests for discovery even after being warned that the court would consider dismissing the complaint unless he answered the interrogatories and produced all documents responsive to defendants' discovery requests. Amadasu v. Utah, 92 Fed. Appx. 766, 2004 WL 586120 (10th Cir. 2004). The defendants filed a motion to dismiss the complaint under Rule 37(b)(2), and the district court granted the defendants' motion and dismissed the case with prejudice. Applying the Ehrenhaus factors, the Tenth Circuit Court concluded that, although the applicant was appearing pro se, the district court acted within its discretion in dismissing the complaint.

I recognize that here Respondent is acting pro se, and if he had made any attempt to comply with my Orders, I would be reluctant to dismiss his action. However, he has not shown the slightest inclination to do so. Moreover, applying the Ehrenhaus factors, dismissal is amply justified. With respect to the first factor, Complainant's actions have prejudiced Respondent by causing delay and additional attorney's fees. See Ehrenhaus at 921. Moreover, a lawsuit charging employment discrimination stigmatizes the reputation of the respondent company, which has a vested interest in vindicating its name. However, as the Tenth Circuit recognized, delay alone is not sufficient reason to dismiss absent other justifying circumstances. Id.

The second factor, interference with the judicial process, also supports dismissal. Complainant has repeatedly failed to obey my orders, and there is no assurance that he will obey any orders in the future. See Ehrenhaus at 921. As to the third factor, culpability, Complainant has repeatedly and intentionally refused to obey two Orders; he has refused to file his exhibit and witness lists, and he has failed to respond to Respondent's discovery requests. I find that his actions are in bad faith and wilful, and constitute intentional disobedience. See id. Further, with respect to the fourth factor, Complainant was clearly warned in my August 24, 2004 Order that his Complaint could be dismissed with prejudice if he failed to comply with the order to file the exhibit and witness lists by September 15, 2004, or to serve answers to Respondent's discovery requests by that date.

Finally, as to the fifth factor, I have considered whether lesser sanctions would be appropriate, but the actions of the Complainant in this case are perhaps even more egregious than that of the plaintiff in Ehrenhaus. In the Ehrenhaus case, the plaintiff failed to comply with only one court order, and the failure only concerned one discovery event (i.e., his deposition). Here, Respondent has failed to comply with several orders and has failed to respond to three discovery requests. Complainant has not responded in any way to Respondent's letters, and he has not made

any effort to comply with my orders. Moreover, because Complainant failed to serve or file his exhibit and witness lists, Respondent would be unable to prepare for trial. Given Complainant's complete failure to obey the discovery order or to provide Respondent with the information necessary to enable Respondent to prepare for trial, dismissal is the only appropriate sanction in this case.

After Complainant failed to respond to the interrogatories or the request for production of documents, Respondent sought and obtained an Order compelling discovery. The August 24 Order required Complainant to serve the discovery responses by September 15, 2004. Respondent asserts that Complainant has not done so, and Complainant has not filed anything with this tribunal denying that assertion.

The OGPP required Complainant to serve and file his exhibit and witness lists by May 3, 2004. After the Motion to Compel Discovery was filed, Complainant was given until September 15, 2004 to serve and file the lists, thus receiving a de facto four-month extension of time. Despite that fact, he still did not file the lists and did not request an extension of time to file.

Complainant was given clear warning of the consequences for failing to obey this discovery order in the August 24 Order. In that Order, I warned Complainant that if he failed to comply by September 15, 2004, "Respondent may move for dismissal or other sanctions, which may be granted without any opportunity for an evidentiary hearing." He has failed to obey the discovery Order, and therefore, as authorized by 28 C.F.R. § 68.23(c)(5), and Rule 37(b)(2)(C), the Complaint may be dismissed with prejudice.

IV. CONCLUSION

The Complaint is dismissed for two separate but related reasons. First, Complainant has abandoned his Complaint pursuant to 28 C.F.R. § 68.37(b) by not responding to my orders and by not prosecuting his lawsuit. Second, he has failed to comply with the Orders to serve and file his exhibit and witness lists and to answer Respondent's interrogatories and requests for production. Therefore, Respondent's motion to dismiss is granted, and the Complaint is dismissed with prejudice.

ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE

Notice Concerning Appeal

This Order constitutes the final agency decision. As provided by statute, no later than 60 days after entry of this final Order, a person aggrieved by such Order may seek a review of the Order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business. See 8 U.S.C. § 1324b(i); 28 C.F.R. § 68.57 (2003).