

U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



IN THE MATTER OF:

RICO MITCHELL,

ARB CASE NO. 2024-0047

COMPLAINANT,

ALJ CASE NO. 2023-STA-00055

ALJ THEODORE W. ANNOS

v.

DATE: August 7, 2025

WARREN PAVING, INC.,

RESPONDENT.

Appearances:

For the Complainant:

Rico Mitchell; *Pro Se*; Gautier, Mississippi

For the Respondent:

Lott Warren, Esq.; *Butler Snow LLP*; Ridgeland, Mississippi

Before JOHNSON, Chief Administrative Appeals Judge, and KAPLAN and BURRELL, Administrative Appeals Judges

DECISION AND ORDER

This case arises from a complaint filed by Complainant Rico Mitchell against his employer, Respondent Warren Paving, Inc., alleging retaliation in violation of the whistleblower protections of the Surface Transportation Assistance Act of 1982 (STAA) and its implementing regulations.¹ Complainant appeals Administrative Law Judge (ALJ) Theodore W. Annos' June 6, 2024 Order of Dismissal, which dismissed his complaint with prejudice due to his non-compliance with discovery

¹ 49 U.S.C. § 31105(a); 29 C.F.R. Part 1978 (2025).

orders. Because the ALJ did not abuse his discretion in dismissing the complaint, we affirm.

BACKGROUND

On August 25, 2021, Complainant, who is self-represented, filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging Respondent terminated his employment in retaliation for his report of safety concerns regarding his assigned truck.² On October 26, 2022, OSHA dismissed the complaint, finding it did “not have reasonable cause to believe” that Respondent violated the STAA.³ Complainant timely requested a hearing before the Office of Administrative Law Judges (OALJ).⁴

The ALJ issued a Notice of Hearing and Prehearing Order on July 19, 2023, which set a hearing date and a schedule for discovery to be conducted pursuant to 29 C.F.R. §§ 18.50-18.65, and warned that failure to comply could result in sanctions, including dismissal, pursuant to 29 C.F.R. §§ 18.12(b), 18.35(c), 18.57, and 18.87.⁵ Complainant then furnished incomplete responses to Respondent’s first set of interrogatories and requests for admission, did not respond to the requests for production, and objected to a requested deposition as “burdensome and annoying.”⁶ Respondent moved to compel Complainant to fully respond to its discovery requests and make himself available for deposition.⁷

Without opposing Respondent’s motion, Complainant filed a “Motion to Submit” along with four documents, photographs, and a recording labeled as

² August 25, 2021 OSHA Complaint. Complainant asserted that Respondent terminated his employment on August 25, 2021, because he notified his supervisor about “the malfunction of the steering column, brakes, fluid leaks, and hydraulic system on [the] truck cargo bed” on August 12, 2021. *Id.*

³ October 26, 2022 OSHA Determination Letter. OSHA determined protected activity was not a contributing factor in the adverse action, and absent that activity, Respondent would have taken the same adverse action. *Id.*

⁴ Notice of Docketing.

⁵ Notice of Hearing and Prehearing Order at 1-4.

⁶ Order: Denying Complainant’s Motion to Compel, Granting Respondent’s Motion to Compel, Extending Discovery, Cancelling Hearing, and Vacating Deadlines (December 2023 Discovery Order) at 4-5; Order of Dismissal at 2.

⁷ December 2023 Discovery Order at 2-3; Order of Dismissal at 2.

exhibits for the hearing.⁸ Respondent objected on the basis that discovery was ongoing.⁹ The ALJ's decision on Complainant's motion is unapparent from the record.

Even so, the ALJ granted Respondent's motion to compel on December 21, 2023, and ordered Complainant to respond to Respondent's requests for production, to fully respond to 14 specified interrogatories and requests for admission, and to sit for deposition. The order warned non-compliance could lead to sanctions including dismissal of the case.¹⁰

After the ALJ's order, Complainant's second set of responses to 13 of the 14 interrogatories requiring completion were non-substantive or identical to his first set, he disputed each request for admission with minimal explanation, he responded to each of Respondent's eighteen requests for production with precisely the same stock answer, and he largely objected to questions at deposition, including those about a Driver Vehicle Inspection Report on the subject truck.¹¹ As a result, Respondent filed a Motion to Dismiss and for Sanctions seeking dismissal with prejudice, or alternatively, that Complainant be required to supplement his discovery responses and sit for another deposition, which Complainant opposed.¹²

Finding Complainant's discovery responses and deposition testimony non-compliant with the first discovery order, the ALJ issued a second discovery order on May 23, 2024. The order gave Complainant "one more opportunity" to supplement

⁸ Order of Dismissal at 2; *see also* December 2023 Discovery Order at 2-3.

⁹ Respondent's Response in Opposition to Complainant's "Motion to Submit" at 1-2.

¹⁰ December 2023 Discovery Order at 4-6. While the December 2023 Discovery Order addressed neither Complainant's November Motion to Submit nor Respondent's opposition, it noted that Complainant had furnished "deficient," "improper and unresponsive" answers to the interrogatories and requests for admission. *Id.* at 4-5.

¹¹ Order Deferring Ruling on Motion to Dismiss and Directing Complainant to Supplement Responses to Discovery Requests (May 2024 Discovery Order) at 4; *see also* Respondent's Motion to Dismiss and for Sanctions at 3-15, Ex. 5, 6. To each request for production, Complainant replied: "Any and all communications have been provided either through investigation or administrative (sic) and Complainant requests the right to debunk any fraudulent testimony." Respondent's Motion to Dismiss and for Sanctions at 6-7, Ex. 5.

¹² *Id.* at 17-18. In opposition, Complainant contended "defendant's questions were all answered but were not the answers they wanted. The [C]omplainant's objections were based on privilege and relevancy that would only lead to speculation." Complainant's In Response to Defendant's Motion at 1.

the interrogatories and requests for admission with responses which “must be substantive in nature;” stated that any “objection to relevancy or on any other grounds is not a substantive response;” stated that no privilege applied to the information sought in the discovery requests; and, again warned that “failure to comply with this Order [by May 30, 2024] may result in the dismissal of the case.”¹³

On May 24 and 26, 2024, Complainant re-filed the same documents and recording he had previously filed with his November 2023 Motion to Submit.¹⁴ He contended that (1) he had “answered all questions involving employment but did not disclose any information involving evidence intended to be used for hearings,” (2) the ALJ failed to docket his motions, (3) his case was “held hostage,” (4) the “agency is illegally aiding the defendants,” and (5) the discovery process was “one sided.”¹⁵

Consequently, on June 6, 2024, the ALJ granted Respondent’s motion to dismiss and dismissed Complainant’s complaint because of Complainant’s “failure to prosecute his case” and pursuant to 29 C.F.R. § 18.57(b)(l)(v) and Federal Rule of Civil Procedure 41(b).¹⁶ Complainant timely appealed the ALJ’s Order of Dismissal to the Board. Both parties filed briefs.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the ARB to hear appeals from ALJ decisions and issue agency decisions in cases arising under the STAA.¹⁷ The Board reviews an ALJ’s determinations on procedural issues, evidentiary rulings, and sanctions under an abuse of discretion standard.¹⁸ An ALJ abuses their discretion if they: (1) base the decision on an error of law or use the wrong legal standard; (2) base their decision on a clearly erroneous factual finding; or (3) reach

¹³ May 2024 Discovery Order at 4-5.

¹⁴ Order of Dismissal at 6. On June 3, 2024, four days after the discovery deadline, Complainant filed a recording “of day of termination” and a “message to HR.” *Id.* at 7 n.12.

¹⁵ *Id.* at 5-7.

¹⁶ *Id.* at 9.

¹⁷ Secretary’s Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13,186 (Mar. 6, 2020).

¹⁸ *Carter v. BNSF Ry. Co.*, ARB No. 2021-0035, ALJ No. 2013-FRS-00082, slip op. at 7 (ARB Sept. 26, 2022) (citations omitted); *Butler v. Anadarko Petroleum Corp.*, ARB No. 2012-0041, ALJ No. 2009-SOX-00001, slip op. at 2 (ARB June 15, 2012) (citations omitted).

a conclusion that, though not necessarily the product of a legal error of a clearly erroneous finding, cannot be located within the range of permissible decisions.¹⁹

DISCUSSION

On appeal, Complainant argues the ALJ erred in concluding he was non-compliant with the discovery orders because his November 28, 2023 filings to the ALJ were “ninety percent of this case” and answered “the request for production and some of the interrogatories.”²⁰ He also argues the ALJ denied his right to due process by ignoring his filings, “refus[ing] to acknowledge” his pro se status, and denying him “the very same privileges afforded to attorneys.”²¹ Respondent, in turn, replies the ALJ’s dismissal fell squarely within the ALJ’s discretion and that Complainant’s remaining arguments are meritless.²² We agree with Respondent.

Pursuant to the Rules of Practice and Procedure for hearings before the OALJ, an ALJ may sanction parties for their non-compliance with discovery orders, including “[d]ismissing the proceeding in whole or in part.”²³ The OALJ Rules also provide that ALJs may “take any appropriate action authorized by the [Federal Rules of Civil Procedure]” in exercising “all powers necessary to conduct fair and impartial proceedings.”²⁴

Further, ALJs are inherently authorized to manage the orderly and expeditious disposition of their cases, which may include issuing appropriate sanctions such as the discovery sanctions of dismissal or default judgment.²⁵ The

¹⁹ *Xia v. Lina T. Ramey & Assoc., Inc.*, ARB No. 2023-0046, ALJ No. 2022-LCA-00013, slip op. at 7-8 (ARB Oct. 7, 2024) (citation omitted).

²⁰ Complainant’s Brief (Comp. Br.) at 1.

²¹ *Id.* at 2.

²² Respondent’s Response Brief in Opposition to Complainant’s Opening Brief at 22-29.

²³ 29 C.F.R. § 18.57(b)(1)(v).

²⁴ *Id.* § 18.12(b)(10). Under Rule 37(b) of the Federal Rules of Civil Procedure, a court may order dismissal of “the action or proceeding in whole or in part” for a party’s failure “to obey an order to provide or permit discovery.” FED. R. CIV. P. 37(b)(2)(A)(v).

²⁵ *Newport v. Fla. Power & Light Co.*, ARB No. 2006-0110, ALJ No. 2005-ERA-00024, slip op. at 4 (ARB Feb. 29, 2008); *Jenkins v. EPA*, ARB No. 2015-0046, ALJ No. 2011-CAA-00003, slip op. at 8 (ARB Mar. 1, 2018).

Board reviews discovery sanctions under an abuse of discretion standard,²⁶ yet ALJs “must exercise this power cautiously . . . and should take care in fashioning sanctions for conduct that abuses the judicial process.”²⁷ The sanctions of default or dismissal “deserve[] closer scrutiny within the abuse-of-discretion framework.”²⁸ Further, “[s]ince dismissal is perhaps the severest sanction and because it sounds ‘the death knell of the lawsuit,’ [the ALJ] must reserve such strong medicine for instances where . . . misconduct is correspondingly egregious.”²⁹

In the Board’s recent decision in *Keller v. Pittsburgh Baptist Church*, ARB No. 2025-0008, ALJ No. 2023-TAX-00012 (ARB July 30, 2025), the Board explained that it is normally appropriate “for an ALJ to consider and balance the following non-exhaustive factors” when determining whether the sanctions of dismissal with prejudice or default judgment are warranted:³⁰

- (1) the culpability, willfulness, or bad faith of the non-compliant party;
- (2) whether the non-compliant party was warned their conduct or failure to comply could result in dismissal or default judgment;
- (3) the efficacy of less drastic sanctions;
- (4) whether the party failed to comply with an order;
- (5) whether the non-compliant party engaged in dilatory conduct;
- (6) whether and to what extent there was prejudice to the opposing party;
- and,
- (7) interference with the judicial process.³¹

²⁶ *Jenkins*, ARB No. 2015-0046, slip op. at 7 (citations omitted).

²⁷ *Pfeifer v. AM Retail Grp., Inc.*, ARB No. 2023-0009, ALJ No. 2021-SOX-00030, slip op. at 3-4 (ARB Mar. 22, 2023) (citing *Newport*, ARB No. 2006-0110, slip op. at 4).

²⁸ *Adm’r, Wage & Hour Div., U.S. Dep’t of Lab. v. Global Horizons Manpower, Inc.*, ARB No. 2009-0016, ALJ No. 2008-TAE-00003, slip op. at 11 (ARB Dec. 21, 2010); *see also Jenkins*, ARB No. 2015-0046, slip op. at 10 (citation omitted) (“Nevertheless, where a lower court’s order of dismissal or default as a discovery sanction is under review, the review is more thorough because the drastic sanction deprives a party completely of its day in court.” (quotations and citations omitted)).

²⁹ *Newport*, ARB No. 2006-0110, slip op. at 4 (quoting *Somerson v. Mail Contractors of Am.*, ARB No. 2002-0057, ALJ Nos. 2002-STA-0018, 2002-STA-00019, slip op. at 8-9 (ARB Nov. 25, 2003)).

³⁰ *Keller v. Pittsburgh Baptist Church*, ARB No. 2025-0008, ALJ No. 2023-TAX-00012, slip op. at 8 (ARB July 30, 2025).

³¹ *Id.* at 9.

The factors are not to be applied rigidly.³² Thus, under the particular circumstances of any case, “any one factor may take on more (or less) significance than the others” and all the factors need not necessarily be evaluated.³³ Dismissal cannot be utilized, however, to punish a party for failure to cooperate in discovery if the failure stems from mere negligence; it must clearly be the product of “willfulness, bad faith, or fault.”³⁴ Additionally, “prior to issuing a dismissal or default judgment, an ALJ should warn an uncooperative party of the potentiality of a litigation-ending sanction within an order affording them an opportunity to come into compliance.”³⁵ And, while pro se litigants are granted a measure of latitude, they are “equally bound to follow the rules of practice and procedure as complainants represented by counsel.”³⁶

The ALJ permissibly determined that the factor of culpability, willfulness, or bad faith of the litigant³⁷ was satisfied. The ALJ concluded Complainant was “uncooperative and unwilling to comply” with the ALJ’s three discovery orders.³⁸ Indeed, by the June 6, 2024 Order of Dismissal, Complainant had still failed to fully and substantively supplement his responses to: Respondent’s requests for admission; thirteen of fourteen of Respondent’s interrogatories; and, several deposition questions per the ALJ’s December 2023 and May 2024 Discovery Orders.³⁹ Complainant’s self-professed aim to “not disclose any information

³² *Id.* at 10 (citing *Howick v. Campbell-Ewald Co.*, ARB No. 2003-0156, ALJ Nos. 2003-STA-00006, 2004-STA-00007, slip op. at 8 (ARB Nov. 30, 2004) (“[T]he factors do not create a rigid test . . .”).

³³ *Id.* (quoting *Lear v. GFL Env’t*, ARB No. 2024-0045, ALJ No. 2023-STA-00061, slip op. at 10 (ARB May 19, 2025)); *see also id.* at 8 n. 45 (“[T]he factors need not all be evaluated in every case; circumstances will vary.”)

³⁴ *Global Horizons Manpower, Inc.*, ARB No. 2009-0016, slip op. at 11 (citation omitted).

³⁵ *Keller*, ARB No. 2025-0008, slip op. at 10.

³⁶ *Xanthapoulos v. Mercer Inv. Consulting*, ARB 2022-0032, ALJ No. 2021-SOX-00017, slip op. at 27 (ARB Sept. 28, 2023) (citing *Jeanty v. Lily Transp. Corp.*, ARB No. 2019-0005, ALJ No. 2018-STA-00013, slip op. at 12 (ARB May 13, 2020)).

³⁷ *Keller*, ARB No. 2025-0008, slip op. at 10 (“culpability, willfulness, or bad faith must be met prior to a case’s dismissal with prejudice or the issuance of a default judgment for a party’s failure to comply with a discovery order . . .”) (citations omitted).

³⁸ Order of Dismissal at 8.

³⁹ *Id.*; *see also* Respondent’s Motion to Dismiss and for Sanctions at 6-11, 17-18, Ex. 1.

involving evidence intended to be use[d] for hearings” in response to the May 2024 Discovery Order cemented the willful nature of his non-compliance.⁴⁰

The second factor outlined in *Keller*, whether the party was warned in advance of the potential for dismissal for discovery non-compliance, was addressed by the ALJ in the Order of Dismissal. Each of the three orders related to discovery in this matter (the July 2023 prehearing order, the December 2023 Discovery Order, and May 2024 Discovery Order) warned Complainant that his failure to comply could result in dismissal.⁴¹

Regarding the third and fourth *Keller* factors of lesser sanctions and non-compliance, the ALJ found Complainant’s “persistent disregard of the discovery process and my Orders” demonstrated that “no lesser sanction will cure his continued failure to prosecute this case.”⁴² Compounded with Complainant’s stated objective to continue concealing discovery, the ALJ did not err in reaching the conclusion that a less drastic sanction would not cure Complainant’s non-compliance.⁴³

In assessing the sixth *Keller* factor of prejudice to the opposing party, the ALJ found Complainant’s willful withholding of basic information in discovery interfered with Respondent’s ability “to obtain information for which it is entitled” and to “mount a meaningful defense.”⁴⁴ The extent to which Complainant deliberately left his discovery responses uncured comports with the ALJ’s determination that Complainant’s non-compliance prejudiced Respondent.⁴⁵

⁴⁰ Order of Dismissal at 6.

⁴¹ Notice of Hearing and Prehearing Order at 4; December 2023 Discovery Order at 6; May 2024 Discovery Order at 5.

⁴² Order of Dismissal at 9; *see also* December 2023 Discovery Order at 6; May 2024 Discovery Order at 5.

⁴³ Order of Dismissal at 8; *see also Doe v. Am. Airlines*, 283 F. App’x 289, 291 (5th Cir. 2010) (“[A] less dramatic sanction would not achieve the desired deterrent effect because Appellant has indicated she has no intention of complying with the discovery order in question. Appellant, warned multiple times that her failure to comply with court orders could result in dismissal of her claims, continued and continues to refuse to comply. Thus, the district court did not err in dismissing Appellant’s suit with prejudice.”).

⁴⁴ Order of Dismissal at 9.

⁴⁵ *See Chisesi v. Auto Club Family Ins. Co.*, 374 F. App’x 475, 477 (5th Cir. 2010) (“[T]he defendant was undoubtedly prejudiced. It was denied any discovery for months, was

Finally, the ALJ reviewed the degree of interference with the judicial process, noting that Complainant’s discovery violations “frustrated” and “inhibit[ed] a fair and efficient [discovery] process,” in spite of the “latitude and additional consideration he has been afforded.”⁴⁶ In sum, our review indicates that although the ALJ did not evaluate all the factors, altogether the factors which were evaluated strongly tip the balance in favor of a determination that the ALJ acted within his discretion to sanction Complainant for his discovery violations via dismissal.⁴⁷

Lastly, we address Complainant’s contention that the attachments he submitted to the ALJ together with his November 2023 “Motion to Submit” answered “the request for production and some of the interrogatories” and were “ninety percent of this case.”⁴⁸ We construe this as an argument the ALJ erred in finding Complainant non-compliant with discovery before dismissing the Complaint.

The ALJ’s failure to decide the November 2023 motion before finding Complainant non-compliant and issuing the December 2023 discovery order, and ultimately dismissing the complaint, was harmless error. Assuming Complainant’s submissions satisfied the requests for production and some interrogatories as he contends, the December 2023 Discovery Order was also based on Complainant’s then failures to provide full responses to interrogatories 1-8, 14, 16-19, and 21; to fully respond to requests for admission 3-5, and 8; and, to sit for a deposition.⁴⁹ As “an evasive or incomplete disclosure, answer, or responses must be treated as a failure to disclose, answer, or respond,”⁵⁰ the ALJ did not err in finding

prejudiced in its ability to prepare for trial, and was forced to spend time and money attempting to coerce discovery.”).

⁴⁶ Order of Dismissal at 8-9.

⁴⁷ See *Keller*, ARB No. 2025-0008, slip op. at 10 (“[F]or a litigation-ending sanction to be imposed, all of the factors do not need to be met, if on balance and upon careful review of the entire record, the factors, taken together, lead an ALJ to conclude that the sanction is indeed warranted.”); *Berry v. CIGNA/RSI-CIGNA*, 975 F.2d 1188, 1191 (5th Cir. 1992) (stating dismissals with prejudice pursuant to Rule 41(b) are affirmable when there exist factors including a “clear record of delay *or* contumacious conduct by the plaintiff . . .”) (emphasis added).

⁴⁸ Comp. Br. at 2.

⁴⁹ December 2023 Discovery Order at 4-5; Respondent’s Motion to Compel at 4-9.

⁵⁰ 29 C.F.R. § 18.57(a)(3).

Complainant non-compliant and granting Respondent's November 20, 2023 motion to compel.

In view of Complainant's non-compliance with the December 2023 and May 2024 Discovery Orders and the course of discovery violations from this case's inception which were properly analyzed by the ALJ, we find the ALJ did not abuse his discretion by dismissing Complainant's STAA complaint.

For the foregoing reasons, we **AFFIRM** the ALJ's dismissal of the complaint because Complainant's failed to comply with discovery orders.

SO ORDERED.

RANDEL K. JOHNSON
Chief Administrative Appeals Judge

ELLIOT M. KAPLAN
Administrative Appeals Judge

THOMAS H. BURRELL
Administrative Appeals Judge