U.S. Department of Labor

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

IN THE MATTER OF:

TAREN KELLER,

COMPLAINANT,

v.

PITTSBURGH BAPTIST CHURCH,

RESPONDENT.

ARB CASE NO. 2025-0008

ALJ CASE NO. 2023-TAX-00012
ALJ NATALIE A. APPETTA

DATE: July 30, 2025

Appearances:

For the Complainant:
Taren L. Keller; *Pro Se*; Carnegie, Pennsylvania

***For the Respondent*:**
Andrea Shaw, Esq.; *Law Office of Andrew H. Shaw, P.C.*; Carlisle, Pennsylvania

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

DECISION AND ORDER VACATING AND REMANDING

This case arises from a complaint filed by Complainant Taren Keller against her employer, Respondent Pittsburgh Baptist Church, alleging retaliation in violation of the whistleblower protections of the Taxpayer First Act of 2019 (TFA) and its implementing regulations.[1] Complainant appeals Administrative Law Judge (ALJ) Natalie A. Appetta's September 4, 2024 Order Memorializing Outcome of September 3, 2024 Pre-Hearing Conference Call with the Parties and Dismissing Complaint with Prejudice. Owing to the absence of analysis supporting the dismissal, we are unable to conclude it was not an abuse of discretion. We vacate

[1] 26 U.S.C. § 7623(d); 29 C.F.R. Part 1989 (2025).

the ALJ's dismissal order, and remand for further proceedings consistent with this opinion.

BACKGROUND

After an apparent impasse in the discovery phase of this matter, the ALJ issued an April 9, 2024 order granting Respondent's motion to compel which directed Complainant to provide full and complete responses to Respondent's discovery requests by April 12, 2024.[2] The ALJ denied, however, Respondent's requested sanction of designating facts as established due to Complainant's discovery non-compliance, but noted Respondent had moved for "dismissal of the instant action" if Complainant again failed to furnish the full discovery responses.[3]

The ALJ's Order Regarding Motion to Compel stated "I certainly do not rule out the possibility of the imposition of the requested sanctions in the future, should Complainant fail to comply . . . ."[4] The order cited 29 C.F.R. § 18.57(b)(1)(i)-(b)(1)(vi)'s list of available sanctions for non-compliance with a discovery order, including dismissal.[5] It warned "[f]ailure to comply, may result in the imposition of sanctions" without specifying which sanction she contemplated imposing.[6]

On April 19, 2024, Respondent filed a Motion for Discovery Sanctions alleging Complainant's further non-compliance with the ALJ's April 9, 2024 discovery order. In the motion, Respondent again moved for discovery sanctions including asking the ALJ to designate certain facts as established, to make a presumption against Complainant's credibility, to award attorney's fees, and to order "any and all other relief this Court deems just and proper."[7] In a May 6, 2024 order, the ALJ noted she would address Respondent's April 19, 2024 Motion for Discovery Sanctions "in a separate Order at a later time."[8] The May 6, 2024 order also, however, acknowledged receipt of "Complainant's timely responses to the discovery requests that were the subject of the April 9, 2024 Order" by the April 12, 2024 deadline, and reminded Complainant of her "ongoing duty to supplement all

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2 Order Regarding Respondent's Motion to Compel Discovery Responses and For Sanctions (Order Regarding Motion to Compel at 4-5).

3 *Id.* at 4-6.

4 *Id.* at 5.

5 *Id.* at 3-4.

6 *Id.* at 6.

7 Respondent's Motion for Discovery Sanctions.

8 Order Denying Complainant's Motion to File a Nunc Pro Tunc to Amend Answers and Extend Time to Comply with Order of April 9, 2024 and Supplement Answers as Moot (Order Denying Complainant's Motion to Supplement Answers) at 2 n.2.

prior discovery responses . . . regardless of her timely response to my Order."[9] The ALJ subsequently issued no other written orders finding Complainant non-compliant with a discovery order.

Subsequently, the parties entered mediation and the hearing was rescheduled for September 9, 2024.[10] On August 6, 2024, Respondent's counsel sent Complainant's counsel a proposed settlement agreement containing a general release of all claims.[11] During two conference calls on August 26, 2024, Respondent indicated its readiness to settle the matter under the terms of the August 6 settlement agreement, and noted that the agreement was the outcome of the parties' mediation.[12] Complainant's attorney then confirmed that all of Complainant's claims had been settled, that the language of the August 6 agreement only required "fine tun[ing]," and agreed to send Respondent's attorney proposed revisions later that day.[13] During the August 26, 2024 pre-hearing conference, the ALJ ordered the parties to file on August 29, 2024, either their executed settlement agreement for review and approval or in the alternative, their respective responses to evidentiary objections.[14]

Instead of complying with the ALJ's order, on August 28, 2024, Complainant's attorney filed a motion which stated that on "August 20, 2024 the case was settled" and sought postponement of the hearing for 21 days to allow Complainant to review the settlement as an older individual pursuant to 29 U.S.C. § 626(f).[15] The ALJ denied Complainant's motion in an August 29, 2024 written order, noting deadlines for the parties to prepare for hearing had already been extended.[16] The August 29 order repeated the ALJ's directive to the parties to file their signed settlement agreement for review and approval, and alternatively, to file their respective responses to evidentiary objections by that day, and if no settlement was filed by close of business that day, the parties were to submit their exhibits for

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9 *Id.* at 1-2 (emphasis added).

10 Order Appointing Mediator. Notice of Rescheduled Hearing and Order Amending Certain Pre-Hearing Deadlines.

11 Aug. 26, 2024 Conference Call Transcript (Tr.) at 147.

12 *Id.*

13 *Id.* at 154-55.

14 Order Denying Complainant's Motion to Postpone Hearing and Reminding the Parties of Upcoming Pre-Hearing Deadlines (Order Denying Complainant's Motion to Postpone Hearing) at 1. However, an August 26, 2024 Order Concluding Mediation signed by Chief ALJ Henley directed the parties "to reduce their agreement to writing" and send it to the ALJ within 14 days. Order Concluding Mediation.

15 Motion to Postpone the Trial Set to Begin September 9, 2024 at 1.

16 Order Denying Complainant's Motion to Postpone Hearing at 2.

the September 9, 2024 hearing by August 30, 2024, and to attend a September 3, 2024 pre-hearing conference call.[17]

Later on August 29, 2024, and without conferring with Respondent's attorney, Complainant's attorney filed with the ALJ a settlement agreement solely settling the TFA claim, and absent the general release contained in the agreement Respondent had conveyed to Complainant on August 6, 2024. The settlement also included only Complainant's signature and initials, which were dated August 28, 2024.[18]

On August 30, 2024, the ALJ issued an order rejecting the unexecuted settlement, and scheduled a conference call on September 3, 2024, for Complainant's attorney to show cause as to why sanctions should not be imposed pursuant to 29 C.F.R. §§ 18.22(c), 18.35(c), and 18.87.[19] The ALJ concluded Complainant's August 28 motion for a 21-day postponement of the September 9 hearing to review a settlement, which had been in her possession for 3 weeks since August 6, and her signing it the very day she sought a postponement, revealed to the ALJ Complainant's efforts to "unnecessarily delay the proceedings or more dilatory tactics."[20] The ALJ also stated Complainant's submission of the materially altered settlement without informing Respondent was another delay tactic and was also "unethical and unacceptable conduct."[21]

Additionally, the August 30, 2024 order stated that Complainant, at that point, was "already facing potential sanctions due to discovery violations and in light of the conduct detailed in this Order, she and/or her counsel may be subject to additional sanctions."[22]

During the September 3, 2024 conference call for Complainant to show cause, Respondent stated it was no longer open to settling the matter and moved to dismiss.[23] The ALJ granted Respondent's motion. Prior to doing so, she discussed

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17 Order Denying Complainant's Motion to Postpone Hearing at 2-3.

18 Order Rejecting Unexecuted Settlement, Requiring Attendance at September 3, 2024 Pre-Hearing [Conference] and Ordering Complainant to Show Cause why Sanctions Should Not be Imposed (Order Rejecting Unexecuted Settlement) at 2.

19 *Id.* at 1-2.

20 *Id.* at 2.

21 *Id.* at 2. The order sustained Respondent's timely submitted objections to Complainant's evidence and deemed Complainant's overdue objections waived. *Id.* at 1.

22 Order Rejecting Unexecuted Settlement at 2. The order did not explain how Complainant's discovery responses, at that point, were violative.

23 Tr. at 117.

the following three elements of conduct on the part of Complainant and/or her attorney after finding the latter's responses to the show cause order wanting:

(1) Discovery non-compliance:

> "I had been withholding any decision on the discovery sanctions . . . And now I have [Respondent's attorney], who's moving to dismiss."[24]

(2) Submission of settlement removing a general release tentatively agreed to by the parties without telling opposing counsel:

> [Y]ou did no negotiating . . . You basically added provisions to it which changed it substantially . . . And then, I caught that it was only signed by your client . . . you changed the terms of it and didn't tell her…that is borderline unethical . . . conduct most judges are not going to put with, including this one.[25]

(3) Motion for a 3-week hearing postponement:

> [T]hat [misrepresentation in altering the settlement without consulting Respondent], in combination with the fact you filed a motion to postpone [on Aug 28] . . . the day before the settlement was supposed to be due [on Aug 29] or we were to proceed for hearing, asking for an additional 21 days to review . . . where you had already had the terms in front of you since August 6th . . . it appears you did absolutely nothing until you filed your motion to postpone and sent [the settlement] to me on the 29th.[26]

In granting Respondent's motion to dismiss during the September 3, 2024 conference call, the ALJ stated: "I mean, everything that we've just discussed, *for all those reasons*, this case is dismissed."[27]

The following day the ALJ issued an Order Memorializing Outcome of September 3, 2024 Pre-Hearing Conference Call with the Parties and Dismissing

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24 Tr. at 116.

25 Tr. at 126-27.

26 Tr. at 128.

27 Tr. at 129 (emphasis added).

Complaint with Prejudice "for the reasons detailed in the [9/3/24] conference call . . . " without more.

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 TFA.[28] As a condition for appellate review under the Administrative Procedure Act (APA), "[t]he record shall show the ruling on each finding, conclusion, or exception presented"[29] and "[a]ll decisions . . . shall include a statement of findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and the appropriate rule, order, sanction, relief, or denial thereof."[30]

The Board reviews ALJ determinations on procedural issues, evidentiary rulings, and sanctions under an abuse of discretion standard.[31] An ALJ engages in an abuse of discretion if their decision "cannot be located within the range of permissible decisions," or, is based on a clearly erroneous factual finding, an error of law or an incorrect legal standard.[32]

On appeal, Complainant argues the ALJ abused her discretion in dismissing her complaint because dismissal was not permitted by the OALJ Rules of Practice and Procedure,[33] and punished her for her "former counsel['s] . . . inadequate representation."[34] Respondent counters the ALJ's dismissal was not an abuse of discretion and that Complainant was herself culpable of conduct justifying dismissal.[35]

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[28] 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).

[29] 5 U.S.C. § 557(c)(3).

[30] 5 U.S.C. § 557(c)(3)(A)-(B).

[31] *Butler v. Anadarko Petroleum Corp.*, ARB No. 2012-0041, ALJ No. 2009-SOX-00001, slip op. at 2 (ARB June 15, 2012) (the Board reviews an ALJ's imposition of discovery sanctions on an abuse of discretion standard) (citations omitted).

[32] *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).

[33] Petitioner's Brief (Pet. Br.) at 3-11.

[34] *Id.* at 13.

[35] Respondent's Brief (Resp. Br.).

DISCUSSION

We recognize this case entails challenges no ALJ wishes to encounter. But, without meaningful analysis of the conduct mentioned by the ALJ during the September 3, 2024 telephone conference, we are unable to assess whether the dismissal fell within the ALJ's discretion. We vacate the ALJ's dismissal order and remand for the ALJ to reevaluate whether the extreme sanction of dismissal with prejudice was warranted in this case.

Pursuant to the Rules of Practice and Procedure for hearings before OALJ, an ALJ may sanction parties for their non-compliance with discovery orders, including "[d]ismissing the proceeding in whole or in part."[36] 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."[37]

Moreover, ALJs possess "an inherent power governed not by rule or statute, but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."[38] This power is to "appropriate[ly] sanction for conduct which abuses the judicial process," including outrightly dismissing a case.[39] "Because of their very potency, inherent powers must be exercised with restraint and discretion."[40] Indeed, "ALJs must exercise this power discreetly, thereby fashioning an appropriate sanction for conduct which abuses the judicial process."[41] Further, "[s]ince dismissal is perhaps the severest sanction and because it sounds 'the death knell of the lawsuit,' [the ALJ] must

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[36] 29 C.F.R. § 18.57(b)(1)(v).

[37] 29 C.F.R. § 18.12(b)(10). Under Rule 37(b) of the Federal Rules of Civil Procedure (FRCP), 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).

[38] *Newport v. Fla. Power & Light Co.,* ARB No. 2006-0110, ALJ No. 2005-ERA-00024, slip op. at 4 (ARB Feb. 29, 2008); *see also Jenkins v. EPA,* ARB No. 2015-0046, ALJ No. 2011-CAA-00003, slip op. at 7 (ARB Mar. 1, 2018); *Chambers v. NASCO, Inc*., 501 U.S. 32, 43 (1991) (citing *Link v. Wabash R. Co.,* 370 U.S. 626, 630-31 (1962)); *id.* at 50 ("[W]hen there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power. But if in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power.").

[39] *Chambers,* 501 U.S. at 44-45 (citing *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 765 (1980)).

[40] *Id.* (citing *Roadway Express, Inc.,* 447 U.S. at 764).

[41] *Newport*, ARB No. 2006-0110, slip op. at 4.

reserve such strong medicine for instances where . . . misconduct is correspondingly egregious."[42]

The Board reviews sanctions pursuant to the inherent power[43] and any other authority for an abuse of discretion.[44] In light of their finality, the sanctions of default or dismissal "deserve[ ] closer scrutiny within the abuse-of-discretion framework."[45]

In determining whether to issue the harsh sanction of dismissal with prejudice or default judgment, and considering the entire record in the case, it will normally be appropriate for an ALJ to consider and balance the following non-exhaustive factors: [46]

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[42] *Id.* (citing *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)).

[43] *See Pfeifer v. AM Retail Grp., Inc.,* ARB No. 2023-0009, ALJ No. 2021-SOX-00030, slip op. at 3-4 (ARB Mar. 22, 2023) (reviewing dismissal as a sanction pursuant to the inherent authority for abuse of discretion); *Chambers*, 501 U.S. at 55 (citing *Link*, 370 U.S. at 633) ("[A] court's imposition of sanctions" is reviewed "under its inherent power for abuse of discretion.").

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

[45] *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Glob. 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) ("[W]here 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.'"); *Wash. Metro. Area Transit Comm'n v. Reliable Limousine Serv.,* 776 F.3d 1, 4 (D.C. Cir. 2015) ("The abuse-of-discretion standard, however, is "a verbal coat of many colors . . . [D]efining the proper scope of review . . . requires considering in each situation the benefits of closer appellate scrutiny as compared to those of greater deference.") (citation omitted). As discussed in greater detail below, at n.50, the factors need not all be evaluated in every case; circumstances will vary. To clarify, in the Board's recent decision in *Miller v. Rhino, Inc.* ARB No. 2024-0002, ALJ No. 2021-STA-00041 (ARB July 18, 2024), the Board held the ALJ erred in in failing to evaluate the efficacy of lesser sanctions prior to rendering a default judgment of $322,940.60. This should not be interpreted to require that all the factors be met before a decision dismissing a case. *Id.*, slip op. at 9-10.

[46] Having surveyed the circuits, we believe the above factors represent the most prevalent and/or salient among the non-exclusive factors analyzed in assessing whether to issue litigation-ending sanctions. See various circuit factor analyses: First Circuit: *U.S. ex rel. Nargol v. DePuy Orthopaedics, Inc.*, 69 F.4th 1, 14 (1st Cir. 2023) (willfulness, lesser sanctions, prejudice, judicial process, mitigating excuses); Second Circuit: *Park v. Kim*, 91 F.4th 610, 612-13 (2d Cir. 2024) (Rule 37 factors: willfulness, warning, lesser sanctions, duration of noncompliance); (Rule 41(b) factors: warning, lesser sanctions, prejudice, duration of noncompliance, balancing docket management with interest in opportunity for fair hearing); Third Circuit: *Hildebrand v. Allegheny Cty.*, 923 F.3d 128, 132 (3d Cir. 2019) and *Knoll v. City of Allentown*, 707 F.3d 406, 409 (3d Cir. 2013) (factors for all case-ending

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

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sanctions: willfulness/bad faith, lesser sanctions, dilatory conduct, prejudice, party's culpability vs. that of attorney, merit to claim/defense); Fourth Circuit: *Mey v. Phillips*, 71 F.4th 203, 218 (4th Cir. 2023) (Rule 37(b) default judgment factors: bad faith, lesser sanctions, prejudice, need for deterrence); *Ballard v. Carlson*, 882 F.2d 93, 95 (4th Cir. 1989) (Rule 41(b) factors: willfulness, lesser sanctions, dilatory conduct, prejudice, degree of personal responsibility); Fifth Circuit: *Berry v. CIGNA/RSI-CIGNA*, 975 F.2d 1188, 1191 (5th Cir. 1992) (Rule 41(b) factors: willfulness/dilatory conduct, lesser sanctions); *Calsep A/S v. Dabral*, 84 F.4th 304, 311 (5th Cir. 2023) (Rule 37 factors: willfulness/bad faith, lesser sanctions, prejudice, personal responsibility); Sixth Circuit: *U.S. v. Reyes*, 307 F.3d 451, 458 (6th Cir. 2002) (Rule 37(b) and Rule 41(b) factors: culpability/willfulness/bad faith, warning, lesser sanctions, prejudice); Seventh Circuit: *Pendell v. City of Peoria*, 799 F.3d 916, 917-18 (7th Cir. 2015) (dismissal factors: willfulness, warning, lesser sanctions, prejudice, merit to suit, personal responsibility); Eighth Circuit: *Comstock v. UPS Ground Freight, Inc.*, 775 F.3d 990, 992 (8th Cir. 2014) (Rule 37 factors: willfulness, non-compliance with order, prejudice); *DiMercurio v. Malcolm*, 716 F.3d 1138, 1140 (8th Cir. 2013) (Rule 41(b) factors: willfulness or dilatory conduct, lesser sanctions); Ninth Circuit: *Luna Distrib. LLC v. Stoli Grp. USA LLC*, 835 F. App'x 224, 226 (9th Cir. 2020) and *Dreith v. Nu Image, Inc*, 648 F.3d 779, 788 (9th Cir. 2011) (dismissal/default judgment factors: lesser sanctions, prejudice, public's interest in expeditious case resolution, need to manage docket, public policy favoring disposition of cases on their merits); *Conn. Gen. Life Ins. Co v. New Images of Beverly Hills*, 482 F.3d 1091, 1096 (9th Cir. 2007) (sub-factors: warning, lesser sanctions); Tenth Circuit: *Xyngular v. Schenkel,* 890 F.3d 868, 873 (10th Cir. 2018) and *Klein-Becker USA, LLC v. Englert*, 711 F.3d 1153, 1159-60 (10th Cir. 2013) (dismissal/default judgment factors: culpability, warning, lesser sanctions, prejudice, judicial process); Eleventh Circuit: *In re Parrott*, 118 F.4th 1357, 1364 (11th Cir. 2024) and *Maus v. Ennis*, 513 F. App'x 872, 879 (11th Cir. 2013) (dismissal/default judgment factors: willfulness or dilatory conduct, lesser sanctions); D.C. Circuit: *Wash. Metro. Area Transit Comm'n,* 776 F. 3d at 4-5 and *Bristol Petroleum Corp. v. Harris*, 901 F.2d 165, 167 (D.C. Cir. 1990) (dismissal/default judgment factors: prejudice, judicial process/effect on docket, need for deterrence) (all internal citations and quotation marks within this footnote have been omitted).

Of these factors, the first of 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, given the universality of that requirement.[47]

Additionally, regardless of the authority invoked and 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.

Supplemental factors which may inform an ALJ's analysis of the appropriateness of a dispositive sanction include: the duration of the period of non-compliance or dilatory conduct, deadlines given for the litigant to come into compliance, the repetition of the violation, mitigating explanations, the need for deterrence to facilitate expeditious issuance of decisions, interference with the ALJ's ability to manage the docket, and any merit to the non-compliant party's claims or defenses.

We continue to hold that the application of the factors is not rigid[48] and that "any one factor may take on more (or less) significance than the others" depending on the circumstances of the case.[49] We further clarify that for 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.[50] An analysis weighing and

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[47] *See Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 640 (1976) (quoting *Societe Internationale pour Participations Industrielles et Commerciales v. Rogers,* 357 U.S. 197, 212 (1958)) ("Rule 37 'should not be construed to authorize dismissal of (a) complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner.'"); *see also Glob. Horizons Manpower, Inc.,* ARB No. 2009-0016, slip op. at 11 (dismissal cannot be utilized 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.").

[48] *Howick v. Campbell-Ewald Co.*, ARB Nos. 2003-0156, 2004-0065, 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 . . . ." *Id.*).

[49] *Lear v. GFL Env't,* ARB No. 2024-0045, ALJ No. 2023-STA-00061, slip op. at 10 (ARB May 19, 2025).

[50] This approach is consistent with that of several circuits. First Circuit: *Benitez-Garcia v. Gonzalez-Vega*, 468 F.3d 1, 5 (1st Cir. 2006) ("Our inquiry into sanctions orders is not a mechanical one . . ."); Second Circuit: *S. New England Tel. Co. v. Glob. NAPs Inc.*, 624 F.3d 123, 144 (2d Cir. 2010) (the four Rule 37 factors "are not exclusive, and they need not each be resolved against the party challenging the district court's sanctions for us to conclude that those sanctions were within the court's discretion."); *Europacific Asset*

considering the non-exclusive factors should not be onerous, but the ALJ must sufficiently articulate conclusions drawn from their application and the reasons for imposing case-dispositive sanctions in order to facilitate our review.

Lastly, we note that although it appears the ALJ here may have dismissed this case with prejudice for, in part, discovery non-compliance, there are no findings that we can discern to support a determination that the Complainant disobeyed a discovery order as of the dismissal date. The immediately preceding determination on discovery is the May 6, 2024 order finding Complainant timely complied with the April 9, 2024 order compelling discovery responses, noted no deficiencies in those responses, and deferred a ruling on Respondent's April 19, 2024 Motion for Discovery Sanctions.[51] At present and without ALJ findings that Complainant flouted a discovery order, dismissal pursuant to 29 C.F.R. § 18.57(b) cannot be "located within the range of permissible decisions."[52]

Mgmt. Corp. v. Tradescape, Corp., 233 F.R.D. 344, 350 (S.D.N.Y. 2005) ("the Second Circuit has directed its district courts to balance the following five factors [before dismissing a case pursuant to Rule 41(b)] . . . No single factor is dispositive . . ."); Third Circuit: *Mindek v. Rigatti*, 964 F.2d 1369, 1373 (3d Cir. 1992) (". . . not all of the [ ] factors need be satisfied in order to dismiss a complaint. Instead, the decision must be made in the context of the district court's extended contact with the litigant . . ."); Fourth Circuit: *Folse v. Frazier*, 2:23-cv-00555, 2025 WL 1648368, at *2 (S.D. W. Va. June 10, 2025) (four factors "are not meant to be applied as a rigid, formulaic test, but rather serve to assist the Court, along with the particular circumstances of each case, in determining whether or not dismissal is appropriate."); Sixth Circuit: *Schafer v. City of Defiance Police Dept*., 529 F.3d 731, 737 (6th Cir. 2008) (". . . typically none of the factors is outcome dispositive"); Seventh Circuit: *McMahan v. Deutsche Bank AG*, 892 F.3d 926, 932-33 (7th Cir. 2018) ("[T]he warning requirement is not a 'rigid rule . . . It was intended rather as a useful guideline to district judges—a safe harbor to minimize the likelihood of appeal and reversal."); Ninth Circuit: *Conn. Gen. Life Ins. Co.,* 482 F.3d at 1096 (five-part factor analysis "is not mechanical. It provides the district court with a way to think about what to do, not a set of conditions precedent for sanctions . . ."); Tenth Circuit: *Lee v. Max Intern., LLC*, 638 F.3d 1318, 1323 (10th Cir. 2011) ("the factors 'do not represent a rigid test' . . .") (all internal citations within this footnote have been omitted).

[51] Order Denying Complainant's Motion to Supplement Answers at 1-2. A decision on Respondent's April 19, 2024 Motion for Discovery Sanctions with findings explaining how Complainant disobeyed a discovery order is not apparent from the record either.

[52] 5 U.S.C. § 557(c)(3)(A)-(B); *Xia,* ARB No. 2023-0046, slip op. at 7-8 (citation omitted).

For the foregoing reasons, we **VACATE** the ALJ's dismissal of the complaint and **REMAND** for further proceedings consistent with the Board's opinion.

SO ORDERED.

RANDEL K. JOHNSON
Chief Administrative Appeals Judge

ELLIOT M. KAPLAN
Administrative Appeals Judge

THOMAS H. BURRELL
Administrative Appeals Judge