



Issue Date: 15 December 2005

CASE NO. 2005-SOX-0025

In the Matter of:

CHRIS ESPINOZA,
Complainant,

vs.

SYSCO CORPORATION,
Respondent.

CASE NO. 2005-SOX-0026

In the Matter of:

TIM McDANIEL,
Complainant,

vs.

SYSCO CORPORATION,
Respondent.

ORDER DISMISSING McDANIEL'S COMPLAINT

Tim McDaniel brought this action *pro se* against his former employer under the whistleblower protection provisions of Section 806 of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A. He alleges that he was fired from his truck driver job in retaliation for making complaints that private vehicles of some managers were being serviced on company time by company mechanics at the company facility. His case was consolidated for trial with a related case brought by Chris Espinoza, the mechanic who worked on the managers' vehicles.¹ The

¹¹ There is an ambiguity as to who was McDaniel's and Espinoza's employer. OSHA Regional Administrator found that they were employees of the captioned Respondent Sysco Corporation, which is a publicly traded company. Carlton Disante & Freudenberger LLP (by Mark Spring and Robin E. Weideman) appeared for Respondent but declared they were appearing on behalf of "Sysco Food Services of Sacramento, Inc., (erroneously sued as Sysco Corporation)" Sysco Corporation's website, of which I take judicial notice for this collateral purpose, shows that it is a Houston-based corporation with more than 40,000 employees engaged in food

cases were initially set for a joint trial on February 28, 2005, but had to be continued. Discovery disputes, described below, started in March 2005, and they eventually dictated an indefinite postponement of the trial.² These disputes culminated in Sysco's "Motion for Terminating Sanctions and for Monetary Sanctions Against McDaniel," which is now before me. Sysco seeks dismissal of McDaniel's case as a sanction for his refusal to be deposed.³

McDaniel's discovery deposition was initially set for April 18, 2005. However, on April 15, 2005, McDaniel informed Sysco's counsel that he would not appear unless compelled. When Sysco moved to compel, McDaniel resisted arguing that he was a party and should therefore not be deposed, that attending a deposition would be a hardship, and that the deposition was sought to harass him. Sysco's motion was granted on April 28, 2005 in **Discovery Order No. 1**, which ordered McDaniel to submit to a deposition scheduled for May 3, 2005. McDaniel appeared as ordered but informed Sysco that he was taking medication which impaired his ability to provide accurate testimony. The deposition was postponed for two days.

On May 5, 2005, McDaniel appeared for his deposition but refused to answer any questions which might touch on his pending workers' compensation case or his union grievance. McDaniel repeatedly threatened to "terminate" the deposition, claiming that he felt Weideman was badgering and mocking him, and walked out after three and a half hours. Thereupon Sysco filed its second motion to compel. Sysco's second motion was granted on May 12, 2005 in **Discovery Order No. 2**, which ordered McDaniel to submit to a continuation of his deposition forthwith at a place and time reasonably specified by Sysco's counsel.

Sysco notified McDaniel that it had scheduled his deposition for May 19, 2005, because that was apparently McDaniel's day off work. He did not appear, but he maintains that he notified Sysco by fax on May 16 that he could not attend. Sysco says it never received this

distribution in 161 "locations" in the U.S. and Canada. Sysco Food Services of Sacramento, Inc. is listed as one of its "locations," and it does not appear to be a publicly traded company. Carlton's pleadings by and large have been referring to Respondent simply as "Sysco," without drawing any distinction between the two entities, or explaining their relationship. While Carlton averred that McDaniel and Espinoza were employed by the Sacramento entity, they did not contend that McDaniel and Espinoza were not employed by a publicly traded company and therefore not covered by the whistleblower provisions of Sarbanes-Oxley. Under these circumstances, for purposes of this motion, I make no distinction between the two entities, and proceed on the assumption that Respondent, which I will also designate simply as Sysco, is a publicly traded company which employed McDaniel and Espinoza. This order of dismissal is intended to dismiss McDaniel's captioned complaint regardless of whether his employer was Sysco Corporation or Sysco Food Services of Sacramento, Inc.

² The protracted discovery disputes started in March 2005. See Sysco's "Motion to Compel the Deposition of Complainant Tim McDaniel" and its "Motion to Compel Complainant Espinoza to Appear for Further Deposition," both dated April 22, 2005, and supporting affidavits. Espinoza's deposition commenced on April 7, and was apparently completed a month later. There was also an extended dispute over McDaniel's right to hear audiotapes of interviews of other Sysco employees by an investigator retained by Sysco as a prelude to McDaniel's firing. Sysco's efforts to shield the tapes were rejected. When McDaniel complained that the copies of the tapes he was given were hard to hear, Sysco was ordered in Discovery Order No. 3 to let McDaniel listen to the originals in the investigator's or attorneys' offices to protect the integrity of the original tapes. Apparently McDaniel did not avail himself of the opportunity to listen to the original tapes.

³ Also pending before me is "Sysco's Motion for Summary Decision on Chris Espinoza's Complaint".

notice. Although McDaniel produced a copy of the ostensible fax, he did not produce a fax confirmation sheet to show that the letter was in fact faxed to Sysco's counsel.

Sysco filed its third motion to compel McDaniel to complete his deposition but the motion was not ruled upon, apparently because McDaniel promised to appear, and did appear, on June 8, 2005 at 10:00 a.m. The partial transcript in the file reveals this session was a reprise of the first.⁴ McDaniel again refused to provide any information or answer any questions which he felt related to: 1) his union grievance; 2) his workers' compensation claim; 3) a proceeding where he is contending that he was fired for filing a workers' compensation claim; 3) his complaint to the NLRB alleging that his firing was discriminatory; 4) his telephone calls to an "ethics line" about something called "fraternization"; 5) his activities and dealings with Sysco's officials apparently about the same fraternization complaint; 6) an e-mail he sent to news reporters; and 7) his dealings with his congressman or the Attorney General's office. Lastly, McDaniel declined to answer some questions for reasons which he refused to disclose, and he refused to give the names of his witnesses because he felt it was not yet time for this disclosure. He behaved rather as if he were giving an interview in which he was free to refuse to answer or evade any question for any or no reason. He repeatedly replied that he could not or would not "comment" on that. At approximately 2:00 p.m., McDaniel stated that Weideman had had more than the two to three hours she previously estimated she needed, and left.

My reading of the partial transcripts of the attempted depositions reveals that although the combined times of the two sessions was considerable, much of the time at both sessions was spent dealing with McDaniel's refusals to answer and his claims that he was being harassed, and Weideman's efforts to make a record of his refusals and his reasons for doing so.

On June 22, 2005, Sysco filed its fourth motion to compel. It was granted on July 5, 2005 in **Discovery Order No. 4**, which provided in part: "Complainant is again ordered – for the last time – to submit to and cooperate in completing his deposition by Respondent **before July 31, 2005**. Should he fail to do so, a motion to dismiss this case will be entertained. Complainant is forewarned that his willful non-compliance with this third order, if adequately demonstrated by Respondent's affidavits and/or partial deposition transcripts, will result in the dismissal of this case." (Emphasis in original).

Sysco notified McDaniel that his continued deposition was scheduled for 10:00 a.m. on July 26, 2005. The declarations of McDaniel and Sysco's counsel agree that McDaniel left a telephone message for Weideman around 9:00 a.m. on the morning of the deposition. However, McDaniel maintains that his message indicated that he was ill and asked for a return call at a specified number. Weideman's declaration says that McDaniel's message did not mention an illness or that he would not attend his deposition, but was only a request to call back. Weideman's affidavit states that she and her assistant called the number McDaniel left, but that the number did not answer. Near the start time for the deposition, McDaniel's declaration says that he reached Weideman's colleague and informed him that he "had an ear infection and that [he] had seen a doctor," and that he would not be attending the deposition.⁵

⁴ Exhibit B to "Sysco's Fourth Motion to Compel McDaniel to Complete his Deposition".

⁵ "Declaration of Tim McDaniel" of August 26, 2005.

On August 5, 2005, Sysco filed the motion to dismiss the complaint which is now before me. McDaniel responded that he could “prove [his] illness” on July 26, 2005.

An **Order to Show Cause** was issued on August 11, 2005, ordering McDaniel to show cause why his complaint should not be dismissed as a sanction for his failures to comply with orders to submit to a deposition, and inviting him to “prove [his] illness for the July 26, 2005 deposition” by medical records, affidavits, or otherwise.

McDaniel’s response consisted of his and Espinoza’s affidavits and an electronic record of McDaniel’s visit to a doctor on July 22, 2005, complaining about what the physician called “acute swimmers’ ear,” and recording that the physician placed a “wick” in one of his ears. It does not say that McDaniel had problems with his jaw or allude to a problem in both ears. The printout makes no reference to any restrictions on McDaniel’s activities or an inability to hear, speak, travel, or otherwise function on the date of his deposition scheduled four days later, on July 26. McDaniel’s declaration admits that he worked as a delivery driver for another employer the day before and the two days after the day of his scheduled deposition. He declared that on July 26 when Espinoza came to pick him up around 8:00 a.m. to go to the deposition, he “told [Espinoza] . . . that my ears and jaw were hurting.” (Emphasis supplied). Notably, McDaniel’s declaration does not say that he was unable to hear or to talk, or to travel to the deposition. Espinoza’s affidavit essentially echoes what he heard McDaniel say.

Sysco submitted a *sub rosa* surveillance video and an affidavit of a private investigator who started to watch McDaniel’s home on July 26 at about 11:00 a.m, which is to say about one hour after the time set for the deposition. The video shows McDaniel and Espinoza arriving at McDaniel’s home around 12:15 p.m., and shows them talking in an open garage and/or driveway for about half an hour, Espinoza’s departure, and McDaniel’s subsequent telephone conversation lasting another half hour. While talking on the telephone, some of the time McDaniel paced around, gesticulated, and for a brief time dusted or cleaned his house windows while continuing to hold the telephone receiver at his ear.

McDaniel has repeatedly charged Sysco’s counsel with professional misconduct in the course of their efforts to depose him, indeed has repeatedly libeled them with having committed perjury. However, although he was given ample opportunity to do so, McDaniel has not even attempted to show that he was harassed or humiliated in the course of the depositions as he has claimed over and over again. The transcripts do not show any impropriety or harassment of him by Weideman. Rather, they show the contrary: in both sessions with McDaniel (as well as in the Espinoza deposition), Weideman’s conduct was professional, correct, patient, and polite in the face of McDaniel’s attempts to bully her. Her questions were proper discovery questions, and McDaniel’s stated reasons for refusing to answer have no legal basis.

Based on the above recited facts, the deposition transcripts, the parties’ filings, and the inferences I have drawn from them, I find that from March 2005 McDaniel has deliberately engaged in conduct calculated to defeat Sysco’s right to depose him, and to make the discovery process as costly and as frustrating to Sysco as possible. I have concluded that he has persistently evaded or failed to comply with orders compelling him to submit to a deposition, and

that during the two deposition sessions McDaniel voiced specious objections, was evasive, and refused to answer proper questions.

McDaniel did not, to use his phrase, “prove [his] illness” on July 26. He has not shown that he was unable to attend the deposition on that day on account of his swimmers’ ear or any other medical reason. The affidavit of the private investigator and the video tape demonstrate that two hours after the deposition was to start, McDaniel was clearly fit enough to be deposed. His hour long conversation in person and on the telephone belies any claim that an ear or jaw ache prevented him from being deposed as scheduled.

My careful consideration of the entire record before me leads me to the conclusion that discovery orders notwithstanding, McDaniel has persisted in his contumacious conduct not because he was untrained in the law, but in a deliberate and calculated effort to frustrate Sysco’s right to depose him. The record leaves me in little doubt that for a layman, McDaniel is sophisticated, resourceful, and quite well informed about the law pertaining to this case, and that his refusals to answer proper discovery questions were not due to his ignorance of the law or procedure, but were willful attempts to deny Sysco’s discovery rights. I have concluded that McDaniel’s attempt to use his lack of training in the law as an excuse for his mischievous conduct is a sham.

Lastly, I infer from the conduct described above that McDaniel deliberately, and in bad faith, contrived to give Sysco’s counsel little or no advance notice that he would not appear for scheduled depositions, and that this was designed to run up Sysco’s costs, and to annoy or vex Sysco and its attorneys.

The U.S. Supreme Court addressed the power of federal trial judges to dismiss an action as a sanction for failure to comply with discovery orders in *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976). The Court reversed a Circuit Court and upheld the trial judge’s discretion to impose the ultimate sanction of dismissal for failure to timely answer written interrogatories. In the Ninth Circuit, where the present case arose, a dismissal sanction is appropriate if the violation is due to willfulness or bad faith. *Adriana Int’l Corp. v. Thoeren*, 913 F.2d 1406, 1412 (9th Cir. 1990) held that a plaintiff’s repeated failure to be deposed prejudices the adversary and “constitutes an interference with the decision of the case.”

The procedures for the handling of discrimination complaints under federal employee protection statutes which are brought before the Department of Labor are set out in 29 C.F.R. Part 24, notably Section 24.6(e)(4)(B), which provides that a claim may be dismissed “upon the failure of the complainant to comply with a lawful order of the administrative law judge.” The Secretary of Labor has affirmed dismissal of a whistleblower complaint as a sanction for the claimant’s failure to comply with discovery orders, holding that “the authority of an ALJ over the course of a hearing is analogous to that of a federal district judge over pre-trial and trial proceedings.” *Malpass v. General Electric Co.*, 85-ERA-38 (Sec’y Mar. 1, 1994) at 5. The Secretary has further ruled that dismissal is appropriate where there is “an unmistakable pattern of contumacious conduct.” *Billings v. Tennessee Valley Authority*, 89-ERA-16 (Sec’y July 29,

1992) at 4. I find that the above described conduct of McDaniel demonstrates just such an unmistakable pattern of contumacious conduct.

The Administrative Review Board listed the factors to be considered before the sanction of dismissal is imposed in its recent decision in *Howick v. Campbell-Ewald Company*, 2004-STA-7 (ARB Nov. 30, 2004) at 8. They are: 1) prejudice to the other party; 2) the amount of interference with the judicial process; 3) the culpability, willfulness, bad faith or fault of the litigant; 4) whether the party was warned in advance that dismissal of the action could be imposed for failure to cooperate or noncompliance; and 5) whether the efficacy of lesser sanctions were considered.

The above factors have been carefully weighed. The culpability, willfulness, bad faith or fault of McDaniel is clear, unmistakable, and evident from his misconduct. I find that McDaniel's persistent refusals to submit to a deposition materially prejudiced Sysco's ability to prepare its case for trial in as much as McDaniel was the principal witness as well as its adversary. McDaniel's interference with the judicial process was substantial in that it required several months of pointless wrangling, numerous motions and multiple orders, resulting in considerable waste of judicial time and resources, and interference with my judicial function and with the fair and prompt disposition of this case. I have considered the efficacy of lesser sanctions, but have concluded that no lesser sanctions are feasible or practical in this case.

Alternatives less drastic than dismissal, i.e., the previous discovery orders, have been tried but proved futile. Moreover, McDaniel was specifically warned in Discovery Order No. 4 that his further willful failure to submit to a deposition would result in dismissal of his complaint. His failure to heed the order and warning, on a contrived illness excuse, was a clear, knowing defiance of it. In light of these facts, I find that McDaniel's protracted obstruction of the orderly processes of justice was contumacious and warrants the sanction of dismissal of his complaint.

Sysco's motion for monetary sanctions and to have its costs and attorney fees assessed against McDaniel are denied on the grounds that there is no statutory authority for making such an award in this case. *Malpass v. General Electric Co.*, 85- ERA-38 (Sec'y Mar. 1, 1994) at 11.

ORDER

For the foregoing reasons this complaint is **DISMISSED** with prejudice, but Sysco's motion for monetary sanctions, attorney fees and costs, is **DENIED**.

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ALEXANDER KARST
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review (“Petition”) with the Administrative Review Board (“Board”) within ten (10) business days of the date of the administrative law judge’s decision. *See* 29 C.F.R. § 1980.110(a). The Board’s address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. The Petition must also be served on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge’s decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.109(c). Even if you do file a Petition, the administrative law judge’s decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days after the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).