



Issue Date: 23 March 2018

Case No.: 2018-AIR-00002

In the Matter of

PAUL CARPENTER
Complainant

v.

THALES AVIONICS, INC.,
Respondent

**ORDER DISMISSING COMPLAINT WITH PREJUDICE FOR COMPLAINANT'S
FAILURE TO COMPLY WITH HIS DISCOVERY OBLIGATIONS AND
CANCELLING THE HEARING**

This matter arises under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), which was signed into law on April 5, 2000. The Act includes a whistleblower protection provision, with a Department of Labor complaint procedure.¹ Implementing regulations are at 29 C.F.R. Part 1979, published at 68 Fed. Reg. 14,107 (Mar. 1, 2003).

Procedural History

On July 13, 2016, Complainant filed a complaint with OSHA alleging violations of AIR 21. The Secretary dismissed the AIR 21 complaint on September 19, 2017, finding that neither Respondent nor Complainant was covered under AIR 21. Complainant filed a letter to the Office of Administrative Law Judges ("OALJ") on October 14, 2017, which the OALJ construed as a request for appeal.

On November 24, 2017, this Tribunal issued a Notice of Assignment and Conference Call Order. In part, this Order instructed the parties as follows:

Discovery is to commence immediately. Within 21 days from the date of this order, and without awaiting a formal discovery request, the parties must provide to all other parties the documents and information set forth in 29 C.F.R. § 18.50(c)(1)(i). The Parties are advised that I have broad discretion to limit discovery in order to expedite the hearing and therefore they should begin their discovery immediately and plan accordingly. 29 C.F.R. § 1979.107(b).

¹ Pub. L. 106-181, tit. V, § 519(a), Apr. 5, 2000, 114 Stat. 145. See 49 U.S.C. § 42121.

In a footnote, the Tribunal further encouraged the parties to familiarize themselves with the Tribunal's Rules of Practice, particularly the discovery rules. *See* Notice of Assignment and Conference Call, footnote 4.

On December 13, 2017, the Tribunal held a teleconference. During this teleconference, the Tribunal established deadlines for motions, discovery, exchange of exhibits, and set the hearing in this matter for Cherry Hill, New Jersey beginning April 20, 2017. The Complainant indicated that he was proceeding *pro se*. The Tribunal informed the Complainant how to obtain a copy of the Tribunal's Rules of Practice and, while he would be afforded some leeway, these were adversarial proceedings and he would be expected to comply with his discovery obligations. Tr. at 5-6.

On December 15, 2017, the Tribunal issued a Notice of Hearing and Pre-hearing Order reiterating the dates provided during the December 13, 2017 teleconference. In this Order, the Tribunal reminded the parties that discovery was to commence immediately and was to end March 9, 2018.² The Tribunal also cautioned the parties that failure to fully comply with the Tribunal's Order could result in sanctions.

On December 15, 2017, Respondent served Complainant with its Initial Disclosures as well as written discovery requests. Resp.'s Mot. to Dismiss at Ex. G. Respondent asserted that as of that date, Complainant had failed to comply with his initial discovery obligations and had not responded to its written discovery request.

On January 11, 2018, Respondent served Complainant with a letter notifying him that his discovery responses were overdue. Resp.'s Mot. to Dismiss at Ex. H.

On January 12, 2018, Complainant sent Respondent's counsel an email responding to the January 11, 2018 letter. Resp.'s Mot. to Dismiss at Ex. I. In this email Complainant asserted that Respondent had not released "all of [Respondent's] internal letters, emails and memos mentioning [him], or discussions about any of [his] interactions with coworkers." He wrote that until discovery was mutual and until the U.S. District Court case was formally dismissed, or this Tribunal's jurisdiction was "completely clarified," he "will not take part in this phishing expedition, involved in litigation in a higher court."

On January 29, 2018, this Tribunal received a Motion to Dismiss from Respondent for Complainant's failure to cooperate in discovery.

On January 31, 2018, this Tribunal declined to grant Respondent's Motion to Dismiss, but instead issued a Discovery Order directing the Complainant to comply with his discovery obligations by February 14, 2018. The Tribunal explained to Complainant his discovery obligations and the potential consequences for failing to comply with them. It also explained to Complainant that his potential actions in United States District Court did not deprive this Tribunal of jurisdiction and the Tribunal would continue with this matter unless and until

² The Order was amended on December 21, 2017. In this Order the Tribunal again emphasized that discovery was to commence immediately.

directed otherwise by a superior court. The Tribunal further cautioned Complainant that failure to comply with the Order could result in sanctions, including the dismissal of his complaint.

On February 15, 2018, the Tribunal received from Complainant a document entitled “Response to Defendant’s US DOL Request for Production of Documents, and Sur-Reply, and in Support of District Court Summary Judgment in Plaintiff’s Favor, as on Summons”, dated February 12, 2018. In this document, Complainant argues that the U.S. Department of Labor ALJ “is an implicated but unlisted defendant trying to establish cause for dismissal of a U.S. District Court complaint to hide their culpability.” Complainant maintained that “[a] majority of the questions and documents posed in the December 15, 2017 interrogatories go beyond the quasi-criminal jurisdiction of the ALJ hearing, focused on the issues of safety, and misconduct, see Exhibit One.³ Most questions are involving civil facts such as awards and [Complainant’s] private criminal history, and similar.” Complainant then recounts 47 interrogatories that apparently he was served in some related litigation, and provides his objections to them. Attached to this response were eight exhibits.

On March 2, 2018, the Tribunal received from Respondent a Motion renewing its January 29, 2018 Motion to Dismiss. Respondent maintained that, as of March 2, 2018, Complainant had still failed to comply with his discovery requests, and again argued that his complaint should be dismissed.

On March 5, 2018, this Tribunal again declined to grant Respondent’s Motion to Dismiss, but instead issued a Second Order Directing Complainant to Comply with Discovery or Face Dismissal of His Complaint. In this Order, Complainant was given ten calendar days from the date of the Order to comply with his discovery obligations, including those set forth in 29 C.F.R. § 18.50(c)(1).⁴ The Tribunal *sua sponte* reviewed Respondent’s interrogatory requests related to matter before this Tribunal and found them appropriate, although it narrowed Interrogatories 10 and 12. Complainant was directed to respond to Respondent’s discovery requests in this matter, except as limited in its Order.⁵ Complainant was specifically warned that, if Complainant desired the matter to proceed, he must comply with the Order.

On March 16, 2018, Respondent submitted to the Tribunal a letter indicating that Complainant still had failed to submit his initial disclosures and had not provided any responses to its discovery. Accordingly, it renewed its request to dismiss this matter.

On March 17, 2018, two days after the Second Discovery Order deadline, Complainant sent an email to the Tribunal. In this email, Complainant alleged that he previously answered Respondent’s interrogatories and again attached his responses to 47 interrogatories apparently related to his concurrent litigation against Respondent in U.S. District Court.⁶ Complainant

³ The Tribunal infers that this is a reference to one of the eight attachments to this document.

⁴ The Tribunal even recited the rule for Complainant in its Order.

⁵ To ensure that Complainant did not confuse the 25 interrogatories served in this litigation with any concurrent interrogatories served in his U.S. District Court case against Respondent, this Tribunal attached a copy of Respondent’s 25 interrogatories to its Order.

⁶ In almost every single response, Complainant objected to those 47 interrogatories. For example, to most of the first twenty-five interrogatories he replied: “Objection, argumentative, burdensome,

stated that this Tribunal had ignored his original submission, which he believed to reveal an “unexplained bias for the corporate defendant.” He further expressed that “I would not be surprised if the OALJ discarded their notarized original, trying to quash the public safety matter before them.”

Discussion

The heart of this matter is Complainant’s failure to comply with his discovery obligations *in this proceeding*—not the discovery obligations accompanying his concurrent litigation against Respondent in U.S. District Court. This Tribunal has gone out of its way to explain to Claimant that his discovery obligations in this matter are distinct, and that failure to comply with the procedural requirements of this forum will result in sanctions, including dismissal of his claim. However, based on his most recent response on March 17, 2018, Complainant still believes that his responses to Respondent’s 47 interrogatories in his U.S. District Court litigation satisfied his discovery obligation in this proceeding. Complainant’s belief is incorrect. For the reasons explained below, this Tribunal has no choice but to dismiss his complaint with prejudice.

At the outset, the Tribunal is cognizant of Complainant’s *pro se* status in this matter, but a *pro se* litigant cannot be permitted to shift the burden of litigation of his case on to Respondent or the Tribunal, “nor avoid the risk of failure that attend his decision to forego expert assistance.” *Pik v. Credit Suisse AG*, ARB No. 11-034, ALJ No. 2011-SOX-6, slip op. at 4 (May 21, 2012). An ALJ has *some* duty to assist *pro se* litigants, but he also has a duty of impartiality and must refrain from becoming an advocate for the *pro se* litigant. *Id.* at 5. While this Tribunal is required to construe Complainant’s filings liberally in light of his lack of legal training, an ALJ must be mindful of the required balance between accommodation and evenhanded administration.

In this matter, the Tribunal has repeatedly explained to Complainant his discovery obligations and the consequences of his failure to comply. *See* Notice of Hearing and Conference Call, at 2; Notice of Hearing and Pre-Hearing Order, at 2; Discovery Order, at 2-3; and Second Order Directing Complainant to Respond, at 3-5. *Sua sponte*, the undersigned reviewed Respondent’s 25 interrogatories, narrowing Interrogatories 10 and 12. The Tribunal went so far as to attach a copy of Respondent’s interrogatories to its second discovery order so there would be not confusion as to which interrogatories Complainant needed to respond. The Tribunal can do little more. To allow these proceedings to continue when Complainant has repeatedly failed his basic discovery obligations—after being given explicit directions and

oppressive, overbroad, repetitive disclosure, and more than equally available if not still in their possession.” In fairness to Complainant, his original February 12, 2018 interrogatory response to the U.S. District Court and this Tribunal included eight exhibits. The Tribunal has reviewed those eight exhibits and finds that they are not responsive to Respondent’s discovery requests. And clearly the exhibits that Complainant attached to this response do not adequately answer all of Respondent’s interrogatories. In response to Interrogatories 26-47 of these interrogatories, Complainant asserts that they violate FRCP 33(a)(1). This rule limits the number of interrogatories a party can serve an opposing party to 25, absent leave from the court. This Tribunal has a similar rule. *See* 29 C.F.R. § 18.60(a)(1). On this issue, Complainant’s assertion could have merit, *but those interrogatories are not the ones posed for these proceedings.*

multiple opportunities to comply—would prejudice the rights of Respondent. Respondent has every right to seek information in an attempt to defend itself. Complainant has the initial burden in these proceedings, but it would prejudice Respondent for it to be required to proceed without the benefit of Complainant's responses to its reasonable discovery requests. Further, the Tribunal has compared Complainant's answers to the 47 interrogatories in his U.S. District Court litigation to the 25 interrogatories posed in connection with his AIR 21 complaint. The answers to the 47 interrogatories do not answer most, if not all, of the questions posited in the 25 interrogatories posed *in these proceedings*. Accordingly, even liberally construing his responses, Complainant has failed to comply with his discovery obligations and this Tribunal's repeated orders.

If a party fails to obey an order to provide or permit discovery, an administrative law judge may issue further just orders. *See* 29 C.F.R. § 18.57(b). As result of Complainant's failure to respond to discovery, this Tribunal has had to issue both a Discovery Order and a Second Order Directing Complainant to Comply with Discovery. This Tribunal has been more than patient in giving the Complainant an *opportunity* for a hearing; however, there is no unqualified right to a hearing, particularly when a party fails to comply with its discovery obligations. *See* 5 U.S.C. § 554(c).

These are adversarial proceedings. Title 29 C.F.R. § 18.57 gives the Administrative Law Judge broad powers to regulate discovery. Complainant has filed a complaint alleging violations of AIR-21. A party cannot merely make an allegation and refuse to cooperate in the discovery process; discovery is a two-way street. For all the foregoing reasons, this Tribunal finds Complainant has failed to comply with his discovery obligations as set forth in 29 C.F.R. §§ 18.50(c)(1) and 18.60(b)(1)-(4). After repeated warnings, this Tribunal finds the appropriate remedy is dismissal per 29 C.F.R. § 18.57(b)(1)(v).⁷ This Tribunal separately finds that, by failing to comply with his discovery obligations, Complainant has abandoned his claim.

For all the foregoing reasons, the Complaint in this matter is hereby **DISMISSED** with prejudice. The hearing in this matter set to begin on April 18, 2018 is hereby **CANCELLED**.

⁷ Independent of its powers under 29 C.F.R. § 18.57, this Tribunal possesses the "inherent power" to dismiss a case on its own initiative for lack of prosecution. *Link v. Wabash Railroad Co.*, 370 U.S. 626, 630 (1962); *see also* 29 C.F.R. § 18.12(b). This power is "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." *Link*, 370 U.S. at 630-631. Dismissal as a sanction for failure to prosecute is a matter within the administrative law judge's sound discretion. *Ferguson v. Bomac Lubricant Techs., Inc.*, ARB No. 04-057, ALJ No. 2002-STA-27 (ARB June 29, 2005). Like the courts, the Department of Labor's Administrative Law Judges must necessarily manage their dockets in an effort to "achieve the orderly and expeditious disposition of cases."

SO ORDERED.

SCOTT R. MORRIS
Administrative Law Judge

Cherry Hill, New Jersey

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 issuance of the administrative law judge’s decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; 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. § 1979.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1979.110(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. You must also serve 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. *See* 29 C.F.R. § 1979.110(a).

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party’s supporting legal brief of points

and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

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. § 1979.110. Even if a Petition is timely filed, 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 of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b).