



**Issue Date: 23 January 2020**

**CASE NO.: 2019-AIR-00009**  
**OSHA NO.: 3-06540-16-033**

*In the Matter of:*

**Danny Ho**  
*Complainant*

v.

**Air Wisconsin Airlines**  
*Respondent*

**ORDER GRANTING RESPONDENT'S MOTION FOR SANCTIONS AND  
ORDER OF DISMISSAL**

**BACKGROUND**

This is a Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 ("AIR21"), case. Danny Ho ("Complainant") is a self-represented litigant who has brought whistleblower claims against his former employer, Air Wisconsin Airlines ("Respondent") (referred to together hereinafter as the "parties"). Before the Court is the Respondent's Second Motion for Sanctions and Dismissal of the Case or, Alternatively, Third Motion to Compel Deposition and for Sanctions, and Motion to and Modify Deadlines in the Pre-hearing Order and Continue Trial filed on December 11, 2019.

**PROCEDURAL HISTORY**

This matter was docketed with the Office of Administrative Law Judges ("OALJ") on February 13, 2019. On March 5, 2019,<sup>1</sup> the Respondent filed its Motion for Extension of Time to Respond to the Complaint. Thereafter, on March 15, 2019, the Respondent filed its answer.

On May 31, 2019, I issued a Notice of Assignment, Notice of Hearing, and Prehearing Order ("May 31 Order"), which specifically stated that 'parties must complete all discovery no later than 120 days from the date of this order, as well as:

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<sup>1</sup> Throughout this decision and order, I refer to the papers received by the Court by the date they were filed with the U.S. Department of Labor Office of Administrative Law Judges ("OALJ"). The date a paper is considered filed is the date that the paper is *received* by the OALJ pursuant to 29 C.F.R. § 18.30(b)(2).

Failure to comply with the provision of this order may result in the imposition of sanctions including, but not limited to: the exclusion of evidence, *the dismissal of the claim*, the entry of a default judgment, or removal of the offending representative from the case. 29 C.F.R. §§ 18.12(b), 18.35(c), 18.57 and 18.87.

On September 10, 2019, the Respondent submitted a Motion to Compel Complainant's Deposition and for Sanctions ("Respondent's First Motion for Sanctions"). In the Respondent's First Motion for Sanctions, it requested that I issue an order compelling the Complainant's appearance at a scheduled deposition and issue sanctions, up to and including dismissal. The motion stated that on September 9, 2019, it had served the Complainant with a Notice of Deposition scheduled for September 26, 2019. The Respondent stated that the "Complainant has indicated that he intends not to comply with this Notice and not to appear for his deposition." As evidence, the Respondent attached an email exchange as Exhibit 2, Exhibit 3, and Exhibit 4. The email chain evidenced that the Respondent had attempted to coordinate a date and time for an oral deposition with the Complainant, but the Complainant did not cooperate. Rather, the Complainant stated that he would not submit to an oral deposition but would participate in a written deposition.

On September 17, 2019, the Court received the Complainant's response to the motion. The response was titled, Opposition to the Motion to Compel from Respondent on Deposition by Oral Examination per 29 CFR §18.64, instead Deposition by Written Questions per 29 CFR §18.65 is the solution ("Complainant's September 17 Response"). The Complainant argued that he should not have to participate in an oral deposition because English is his second language and he instead chose to testify through a written deposition.

On September 23, 2019, I issued an Order Granting In Part and Denying In Part Respondent's First Motion for Sanctions ("September 23 Order"). The September 23 Order explained the discovery rules regarding depositions and ordered the Complainant to appear at his oral deposition set for September 26, 2019. I explained that "[T]he party seeking discovery generally has the choice of discovery methods." *Office of Federal Contract Compliance Programs v. Crown Zellerbach Corp.*, ALJ No. 87-OFC-23 (Jun. 6, 1989). Importantly, the order stated,

If Complainant fails to appear for his deposition, he may be subject to sanctions. 29 C.F.R. § 18.64(d)(2). Sanctions could include, *dismissal of Complainant's case with prejudice* or granting a motion for summary decision against him. *Id.* This means that Complainant's case *could be ended and he would not have the option to bring the same claims against Respondent ever again.*

I further explained that an order compelling the Complainant to cooperate in discovery was the appropriate measure because the Complainant had not yet failed to comply with the notice for deposition and denied the Respondent's request for dismissal of the claims.

On September 26, 2019, the Complainant appeared for the deposition. However, the Complainant's actions and behavior prevented the deposition from taking place. Despite, the Respondent's provision of an interpreter, the Complainant questioned her credentials delaying the deposition. After further delaying tactics, the Complainant abandoned the deposition.

On September 30, 2019, the Respondent filed its Motion for Sanctions and Dismissal of the Case or, Alternatively, Second Motion to Compel Deposition and for Sanctions, and Motion to and Modify Deadlines in the Pre-Hearing Order and Continue Trial ("Respondent's Second Motion for Sanctions"). In the motion, the Respondent argued that in addition to abandoning the deposition, the Complainant's responses to interrogatories and production requests were insufficient. On October 10, 2019, the Complainant filed his Response to the Motion. Thereafter, on October 11, 2019, Respondent filed a reply.

On November 13, 2019, I issued an Order Granting In Part and Denying In Part Respondent's Second Motion for Sanctions ("November 13 Order"). In the November 13 Order, I found that, "Complainant's evasive behavior and abandonment of his deposition violated 29 C.F.R. § 18.64 and this Court's September 23, 2019 Order." I also found that, "While some of Complainant's answers to discovery requests were evasive and others were not answered at all, an order directing him to make a good faith effort to comply with the discovery requests is more appropriate [than dismissal]." I explained that "Complainant must make a good faith effort to cooperate in the discovery process." I further explained that, "[t]he Court cannot be used in lieu of legal advice and the Parties cannot 'ask the Court to set up the rule[s]' for litigation." I then ordered the Complainant "to fully respond to Respondent's interrogatories and requests for production *within 14 days of this Order*." Moreover, I requested that the Complainant "to participate in his deposition in good faith and allow the deposition to be completed. *Complainant is forewarned that if he fails to comply with this Order, his failure may likely lead to dismissal of his complaint.*" I emphasized that, "[a]ny further failures to respond, evasive responses, or actions taken to curtail discovery will not be taken lightly." In order to give the parties enough time to complete discovery, I cancelled the December 10, 2019 hearing and rescheduled the hearing for January 22, 2020.

On December 2, 2019, the Complainant filed A Second Motion on Compel and Motion to Sanction any Oral Deposition until Responding the Discovery on Interrogatory and Request for Production of 09/23/2019 ("Complainant's December 2 Motion").<sup>2</sup> On December 11, 2019, the Respondent filed Respondent Air Wisconsin Airlines' Response to Complainant's Second Motion on Compel and Motion to Sanction any Oral Deposition until Responding the Discovery on Interrogatory and Request for Production of 09/23/19 ("Respondent's December 11 Response"). The Respondent requested that I deny the Complainant's December 2 Motion because "Complainant did not serve discovery requests until approximately two days before the discovery deadline and did not meet and confer with Air Wisconsin before filing the Motion as required by the Pre-Hearing Order." In addition, the Respondent requested that I require the Complainant to fully respond to its Interrogatories and Requests for Production, comply with the

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<sup>2</sup> While Complainant's motion is filed as a second motion, the court does not have a record of receiving a first motion to compel. It appears that the Complainant considered its motion to compel and sanction the Occupational Safety and Health Administration ("OSHA") investigator filed on September 30, 2019, his first motion to compel.

November 13 Order. On December 13, 2019, I issued an Order denying Complainant's December 2 Motion.

On December 11, 2019, the Respondent filed Respondent Air Wisconsin Airlines' Second Motion for Sanctions and Dismissal of the Case or, Alternatively, Third Motion to Compel Deposition and for Sanctions, and Motion to and Modify Deadlines in the Pre-hearing Order and Continue Trial ("Respondent's Third Motion for Sanctions").<sup>3</sup> This motion is currently before the Court. In the motion, the Respondent described its communications with the Complainant, and provided evidence of those communications, related to the enforcement of my November 13 Order. The Complainant failed to appear, in accordance with a Supplemental Notice of Deposition, for a December 2, 2019 deposition.

On December 26, 2019, the Complainant filed his Opposition to Dismissal and Electronic Device is Allowed in Oral Deposition By Law 29 CFR §18.61 Producing documents, electronically stored information ("Complainant's December 26 Response"). The Complainant argued as follows: One, the Respondent failed to respond to his September 2019 discovery requests<sup>4</sup> and that the discovery deadline of October 27, 2019 per the Court's May 31 Order had passed. Two, he should be able to use an electronic device at any oral deposition. For this proposition he stated that 29 C.F.R. § 18.61 titled, "Producing documents, electronically stored information, and tangible things, or entering onto land, for inspection and other purposes" entitled him to use his tablet at an oral deposition. He argued that the cases the Respondent cited as disallowing the witness giving the deposition from using electronic devices were from 1985 and 1993 and because 29 C.F.R. § 18.61 was promulgated more recently the Respondent's argument had "NO legitimacy." Three, he argued that because the Complainant's December 2 Motion to Compel and for Sanctions was "pending" before this Court that is December 2, 2019 deposition was not allowed to go forward. Four, he argued, "[t]he other important is, without the Extension of Discovery period, Q: *what is the ground for the second Oral Deposition scheduled on 12/02/2019?*"

On January 3, 2020, the Respondent filed Respondent Air Wisconsin Airlines' Reply in Support of Second Motion for Sanctions and Dismissal of the Case or, Alternatively, Third Motion to Compel Deposition and for Sanctions, and Motion to and Modify Deadlines in the Pre-hearing Order and Continue Trial ("Respondent's January 3 Reply"). The Respondent argued that the Complainant admitted that he did not appear at his December 2, 2019 deposition and that "Complainant implied that he filed his motion to compel so that he could rely on it to attempt to justify his refusal to appear at the deposition."

### LEGAL STANDARD

The relevant legal standards for failure to cooperate in discovery are found at 29 C.F.R. § 18.57. Section 18.57(a)(3) states that, "an evasive or incomplete disclosure, answer, or

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<sup>3</sup> While Respondent's motion is filed as a second motion for sanctions and dismissal, because Respondent requested dismissal in its September 10, 2019 motion for sanctions, I will refer to the December 11, 2019 motion for sanctions as its third motion for sanctions.

<sup>4</sup> Respondent in fact responded to the discovery requests in the form of objections.

response must be treated as a failure to disclose, answer, or respond.” 29 C.F.R. § 18.57(a)(3) (2015). Section 18.57(b)(1)(v) states that, “[i]f a party . . . fails to obey an order to provide or permit discovery . . . the judge may issue further just orders. They may include . . . [d]ismissing the proceeding in whole.” 29 C.F.R. § 18.57(b)(1)(v) (2015). Section 18.57(d)(1) states, “[p]arty’s failure to attend its own deposition . . . [i]n general . . . [is] grounds for sanction.” 29 C.F.R. § 18.57(d)(1) (2015).

The relevant legal standards for depositions by oral examination are found at 29 C.F.R. § 18.64 (2015). Section 18.64(d)(1) states, “[t]he judge must allow additional time consistent with § 18.51(b) if needed to fairly examine the deponent . . . if the deponent . . . impedes or delays the examination.” 29 C.F.R. § 18.64(d)(1). Section 18.64(d)(2) states, “[t]he judge may impose an appropriate sanction . . . on a person who impedes, delays, or frustrates the fair examination of the deponent.” 29 C.F.R. § 18.64(d)(2).

Additionally, in *Howick v. Campbell-Ewald Co.*, the Administrative Review Board (“ARB”) adopted factors to be considered before dismissal of a case is warranted. *Howick v. Campbell-Ewald Co.*, ARB Case No. 04-065, ALJ Case No. 04-STA-07, slip op. 8 (Nov. 30, 2004). The ARB stated that ALJs must consider:

- (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 a [sanction] for failure to cooperate or noncompliance, and
- (5) whether the efficacy or lesser sanctions were considered.

*Id.*<sup>5</sup> The facts of this case are analyzed under these *Howick* factors below.

## DISCUSSION

### *Violations*

The Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (“Rules”), 29 C.F.R. § 18, part A (2015), govern the procedure of proceedings before the OALJ. 29 C.F.R. § 18.10(a). They are meant to secure the just, speedy,

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<sup>5</sup> The ARB cited factors from the Sixth and Tenth Circuit Courts of Appeals. The Third Circuit Court of Appeals, whose law governs in this case, has adopted a similar standard which considers:

- (1) the extent of the party's personal responsibility;
- (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery;
- (3) a history of dilatoriness;
- (4) whether the conduct of the party or the attorney was willful or in bad faith;
- (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and
- (6) the meritoriousness of the claim or defense.

*Poullis v. State Farm Fire & Casualty Co.*, 747 F.2d 863, 868 (3d Cir. 1984). Because the factors are so similar, the analysis under the *Howick* factors would lead to the same outcome if the facts were analyzed under the *Poullis* factors.

and inexpensive determination of every proceeding before the Court. *Id.* In all proceedings under this part, administrative law judges (“ALJs”) have all powers necessary to conduct fair and impartial proceedings. 29 C.F.R. § 18.12. When a party before the Court does not comply with one of the Court’s rules, the ALJ may sanction the non-compliant party, up to and including termination of the proceedings through dismissal. 29 C.F.R. § 18.12(b)(7).

As explained in my September 23 Order, discovery is the method by which information is exchanged between parties in legal proceedings. The Rules regarding discovery are found at 29 C.F.R. §§ 18.50 – 18.65. The Rules provide that when a party fails to comply with an ALJ’s order to cooperate in discovery, the ALJ may dismiss the proceeding in whole. 29 C.F.R. § 18.57(b)(1)(v).

In this case the Complainant has knowingly and repeatedly failed to comply with my orders to participate in discovery. The September 26 Order, ordered the Complainant to appear for his deposition. While he did attend, his behavior was evasive and arguably calculated to defeat the Respondent’s right to depose him. Again, the November 13 Order, ordered the Complainant to participate in his deposition in good faith and allow the deposition to be completed, as well as fully respond to the Respondent’s interrogatories and requests for production within 14 days of the Order. Despite the two orders with clear instruction from the Court to participate in good faith, the Complainant has impeded, frustrated, and delayed the discovery process. As such, I find that the Complainant has violated the Rules of this Court, 29 C.F.R. §§ 18.57 and 18.64, by failing to fully respond to the Respondent’s interrogatories, by not responding at all to Respondent’s request for production, and by refusing to participate in his deposition in good faith. Accordingly, I find that sanctions are clearly warranted.

#### *The Sanction of Dismissal*

The real question before this Court is whether the sanction of dismissal is the appropriate sanction for the Complainant’s failure to participate in the discovery process. The ARB has consistently affirmed the decisions of ALJs’ who have dismissed the claims of pro se whistleblower complainants when they failed to participate in the discovery process in good faith and failed to comply with the ALJ’s discovery orders. *See Powers v. Pinnacle Airlines, Inc.*, ARB Case No. 05-022, ALJ Case No. 2004-AIR-32 (January 31, 2006); *Howick v. Campbell-Ewald Co.*, ARB Case No. 03-156, ALJ Case No. 03-STA-06 (November 30, 2004), *Supervan, Inc.*, ARB Case No. 00-008, ALJ No. 94-SCA-14 (September 30, 2004).<sup>6</sup>

In *Howick*, the ARB adopted factors to be considered before dismissal of a case is warranted. The ARB stated that ALJs must consider:

- (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 a [sanction] for failure to

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<sup>6</sup> See also Board of Service Contract Appeals cases *Tri-Way Security and Escort Service, Inc.*, BSCA No. 92-05 (July 31, 1992) and *Cynthia E. Aiken*, BSCA No. 92-06 (July 31, 1992).

cooperate or noncompliance, and (5) whether the efficacy or lesser sanctions were considered.

*Id.* An analysis of the facts in this case under these factors leads to the conclusion that dismissal is the appropriate sanction in this case.

1. *Prejudice to the Other Party*

The Respondent cannot be made to defend against the Complainant's claims if he will not participate in discovery. The process of discovery is designed for the parties to exchange information which will assist complainants in prosecuting their claims and respondents to defend their cases. The Respondent in this case is highly prejudiced by the Complainant's refusal to participate in discovery.

2. *The Amount of Interference with the Judicial Process*

This is the third motion in which the Respondent has requested the sanction of dismissal. The formal hearing in this case has already been cancelled twice to give the parties time to complete discovery. The Complainant's refusal to participate in discovery has greatly interfered with the judicial process, making it slow and costly, vices the Rules were meant to deter.

3. *The Culpability, Willfulness, Bad Faith or Fault of the Litigant*

The Complainant admitted that he knew the Court ordered him to appear to his deposition and he willfully refused to participate. (Respondent's Third Motion for Sanctions at Exhibit 8). Additionally, the Complainant's suggestion in his December 26 Response that the Respondent does not have the grounds to take his deposition because the discovery deadline has passed suggests that he has been trying to run out the clock discovery and evade a deposition all together. This demonstrates culpability and bad faith.

4. *Whether the Party Was Warned In Advance That Dismissal of the Action Could Be a Sanction for Failure to Cooperate or Noncompliance*

This Court has on three prior occasions warned the Complainant that failure to cooperate in discovery could result in the dismissal of his claims. Each of the warnings have been given with an increasing sense of urgency. The May 31 Order notified the Complainant that dismissal of his claims could be a consequence of failure to cooperate in discovery. The September 23 Order weighed the appropriateness of dismissal but determined the sanction of dismissal was not "yet" warranted, but warned that if he failed to cooperate in discovery dismissal could be warranted. That order went on to explain the consequences of dismissal in layman's terms. Finally, the November 13 Order warned the Complainant that if he failed to comply with my discovery order his case "may likely" be dismissed. The Complainant knew that dismissal of the case could be a consequence of his failure to comply, but he chose not to cooperate in the discovery process in good faith.

5. *Whether the Efficacy of Lesser Sanctions Were Considered*

Before coming to the conclusion that dismissal of the Complainant's claims was the appropriate sanction for failure to comply with my order, I considered the efficacy of lesser sanctions. Specifically, I considered whether the Respondent's alternative request for a motion to compel the Complainant's deposition would lead to a just outcome. However, the Complainant's repeated disregard for the Rules of Procedure before this Court and my direct orders, along with his suggestion that he has run out the clock on discovery – therefore Respondent does not have grounds to depose him and collect the information it needs to defend its case – lead me to conclude that lesser sanctions would not lead to a just administration of the law.

For the reasons discussed above, the Respondent's Third Motion for Sanctions is **GRANTED**.

The case is hereby **DISMISSED** with prejudice.

**SO ORDERED.**

**FRANCINE L. APPLEWHITE**  
Administrative Law Judge  
Washington, D.C.

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review (“Petition”) with the Administrative Review Board (“Board”) within fourteen (14) 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](mailto: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, in cases in which the Assistant Secretary is a party, on the Associate Solicitor, Division of Fair Labor Standards. *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 maybe 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. §§ 1979.109(e) and 1979.110(a). 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. §§ 1979.110(a) and (b).