

U.S. Department of Labor

Office of Administrative Law Judges
90 Seventh Street, Suite 4-800
San Francisco, CA 94103-1516

(415) 625-2200
(415) 625-2201 (FAX)



Issue Date: 08 February 2019

CASE NO.: 2018-SOX-00038

In the Matter of

DIEDRE QUEEN,
Complainant,

v.

WELLS FARGO BANK,
Respondent.

Appearances: DieDre R. Queen
Self-represented Complainant

John A. Berg, Esq.
Bradley J. Krupicka, Esq.
Attorneys for Respondent Wells Fargo Bank

Before: Steven B. Berlin
Administrative Law Judge

DECISION AND ORDER OF DISMISSAL

This matter arises under the Sarbanes-Oxley Act, 18 U.S.C. § 1514A (as amended in the Dodd-Frank Wall Street Reform Act), and its implementing regulations, 29 C.F.R. Part 1980, as well as under the Consumer Financial Protection Act, 12 U.S.C. § 5567. I will dismiss the case as a sanction because of Complainant's persistent failure to comply with any of her disclosure and discovery obligations and with orders of the administrative law judge. *See* 29 C.F.R. § 18.57(b)(1)(v).

Procedural History

After an adverse determination at OSHA, Complainant Queen objected and requested a hearing before an ALJ. Queen was then, and continues to be, self-represented. This Office issued a Notice of Docketing on August 23, 2018. The Notice informed the parties that the procedural rules applicable to this case are published in the Code of Federal Regulations at 29 C.F.R. §§ 18.10-18.95 and that these rules are available for anyone to read through the OALJ website.

The Notice informed the parties that, within 21 days, they must comply with the initial disclosure requirements at 29 C.F.R. § 18.50(c)(1).

After the case was assigned to me, I issued a Notice of Hearing and Pre-Trial Order (Aug. 30, 2018). The Notice set the hearing for March 4, 2019, in Portland, Oregon. In the Pre-Trial Order, I stated that discovery was to be conducted according to 29 C.F.R. Part 18. Pre-Trial Order at II. Those are the same rules to which the Notice of Docketing referred. I stated that, if the parties had not yet made their initial disclosures, they must do so within 14 days. I stated that this requirement applied “in every case, including cases where a party does not have an attorney.” *Id.* at II.B.

On December 3, 2018, Respondent Wells Fargo moved to compel Queen to produce the initial disclosures, to respond to its written interrogatories and to its requests for production, and to attend and testify at a deposition. Wells also moved to dismiss the case if Queen failed to comply with the order compelling her to make the disclosures and discovery responses.

Prior to filing the motion, Wells’ counsel wrote to Queen, first about the initial disclosures. Queen responded, stating that “I am not turning anything in right now.” She addressed counsel as: “You lying, stalker, piece of trash.” Counsel responded that Queen’s compliance with the initial disclosure requirement was not optional. He stated that Wells would give Queen another six days to provide the disclosures; otherwise, it would file a motion to compel. In addition, Wells propounded a set of interrogatories and a set of requests for production, and it asked Queen when she would be available to give a deposition.

Commenting to defense counsel that he is Jewish and that “Jewish people” were harassing her, Queen did not serve any initial disclosures. Wells’ counsel wrote again, demanding the disclosures, and Wells waited. Complainant did not serve the initial disclosures and did not respond to the interrogatories, the requests for production, or the request for deposition dates. At that point, Wells filed the motion to compel and for sanctions.

Queen did not oppose or otherwise respond to the motion. Considering Wells’ moving papers and the credible declaration supporting it, I found that Queen had failed to meet her obligations on the initial disclosures, the interrogatories, and the requests for production. Under the rules, Wells could have sought immediate sanctions,¹ but it sought only to compel the disclosures and discovery responses unless Queen continued to fail to comply with her obligations.

In an order issued on December 20, 2018, I granted the motion with some limited exceptions. I compelled Queen within 14 days to produce the initial disclosures and the responses to Wells’ interrogatories and requests for production. I notified Queen that a failure to comply could result in a variety of sanctions authorized by regulation, including a dismissal of her claim, citing 29 C.F.R. § 18.57(b)(1). As to the deposition, Queen had failed to provide available dates, but Wells had not actually noticed a deposition. I therefore limited my order: I stated only that

¹ See 29 C.F.R. § 18.57(d) (when a party fails to serve answers to interrogatories or respond to a request for production, on motion, sanctions may be imposed from among those listed at 29 C.F.R. § 18.57(b)(1); see also 29 C.F.R. § 18.57(c) (same as to initial disclosures). As Wells did not move for immediate sanctions and those sanctions may be imposed only on motion, I did not consider imposing any sanctions at that time.

Wells could unilaterally set the deposition date, time, and place.² But I notified Queen that, if she failed to appear, sanctions could be imposed, citing 29 C.F.R. §§ 18.57(d)(1)(i)(A) (ALJ may impose sanctions on motion when a party fails to attend her own deposition). I stated that the sanctions were generally the same of those for failing to comply with the order compelling discovery (which includes a dismissal). *See* 29 C.F.R. § 18.57(d)(3) (sanctions are the same as in 29 C.F.R. § 18.57(b)(1)).

To be certain that Queen understood exactly what she was required to do to comply with the requirement that she make initial disclosures, I quoted from the regulations the exact information that Queen was required to produce. *Id.* at 3. On the interrogatories, I explained that Queen had to answer each question fully in writing and under oath. I provided language she should type at the end of her answers so that her signature would be under oath. On the requests for production, I explained that, for each request, Queen must state in writing that she would produce the requested documents or that, after diligent search, she had no responsive documents in her possession, custody, or control.³ I required Queen to produce all responsive documents at the same time she served her answers to the requests for production. For each of these items on which I was compelling Queen to make disclosures or respond to discovery, I repeated that Queen must comply within 14 days of the date the Order compelling production issued.

On January 10, 2019, Wells moved for a dismissal sanction. It presented these facts: Wells noticed Queen's deposition for January 9, 2018. On December 31, 2019, Queen left a voicemail for defense counsel. She was concerned that defense counsel might have responded to a dating ad she had online or might have hacked into her phone. She stated: "I'm just gonna show up at the hearing and I really don't, um, plan on having any, uh, conversations with Mr. Krupicka without an attorney." The deadline for Queen's production of the initial disclosures, answers to interrogatories, responses to requests for production, and for the production of the responsive documents was three days later, on January 3, 2019. That day came and went. Queen produced nothing; she offered no excuse; she did not request additional time.

On January 4, 2019, defense counsel wrote to Queen. He stated that he understood from her statement (that she was "just gonna show up at the hearing") that she was not going to serve disclosures or discovery responses and was not going to appear for her deposition as noticed for January 9, 2019. If he misunderstood, he asked Queen to state that she would comply with the Order compelling the disclosures and discovery responses and would appear for the deposition. He stated that, absent confirmation from Queen, Wells would file a motion for sanctions and seek a dismissal.

² The applicable rules do not require a party who is noticing a deposition to confer with opposing counsel or parties about the date, time, and place. *See* 29 C.F.R. § 18.64. The statute and implementing regulations involved in this case are silent on this as well. It is a good practice to attempt to agree on the date, time, and place for a deposition, but it is not required in cases of this kind.

Still, my order requires that if Wells noticed the deposition, it had to provide Queen with at least 14 days' notice (consistent with 29 C.F.R. § 18.64(b)) and that the deposition had to be on a non-holiday weekday, sited no more than 75 miles from Queen's residence, be set during ordinary business hours, and be limited to one day of seven hours.

³ I held that Queen waived or forfeited any objections to the discovery when she failed to raise the objections timely.

Queen responded with several voicemails. She stated that she would not be appearing for her deposition. According to defense counsel, Queen included the following:

- “I am reporting you and that court in Portland to a federal agency”;
- “I don’t have to share that with a male chauvinist pig like you”;
- “You are a sick man”;
- “You are ruthless”;
- “You are low class”;
- “You are trash and I believe that you are a bigot”; and
- “You can go fuck yourself, to be honest with you.”

But Queen never stated that defense counsel misunderstood her earlier message; she never assured counsel that she would produce the items that the order compelled her to produce or that she would attend the deposition, she never produced the disclosures or discovery responses, and she did not appear for the deposition.

With Wells’ motion for sanctions pending, on January 15, 2019, I vacated the hearing previously set for March 4, 2019. In the same order, I required Queen to show cause why a sanction, including a dismissal sanction, should not be imposed for her failure to comply with the order of December 20, 2018, and her failure and refusal to attend her deposition. I recited Queen’s history of failure to meet her disclosure and discovery obligations that led me to issue the order of December 20, 2018, compelling her to meet those obligations. I reminded her that I had warned her about the sanctions I might impose if she failed to comply with the order of December 20, 2018, and that I had warned her that the possible sanctions included a dismissal of the proceeding. I explained that Wells had filed a motion, stating that Queen had failed to meet each and every obligation that the order imposed. For this, Wells was seeking a sanction dismissing the case.

I required in the order to show cause that, on or before February 4, 2019, Queen file a written statement showing why I should not impose one of the sanctions listed at 29 C.F.R. § 18.57(b)(1), including a dismissal. I explained that a dismissal would end the litigation with a decision favorable to Wells Fargo and unfavorable to Queen. I described the possibility of a dismissal as “very real.” Order, Jan. 15, 2019 at 3. I explained that the sanctions would be imposed for Queen’s failure to comply timely or at all with each requirement in the Order of December 20, 2018. I reminded Queen that I had supplied her in that order with detailed direction on what she was required to do to comply, the regulatory basis, the applicable deadlines, and what sanctions might be imposed if she failed to comply.

I stated that, when responding to the order to show cause, Queen “should include specific evidence to support any assertions, allegations, or contentions [she had] concerning any factor that might have affected [her] ability or [her] decision not to comply with the order of December 20, 2018.” I advised her to recite any facts on which she relied in a declaration signed under penalty of perjury; to include copies of any documents on which she relied; and to include statements from other persons if relevant. I gave examples of possible third-party statements.

I advised Queen that she might want to argue that, even if I imposed a sanction, I should select a lesser sanction than a dismissal. I stated that, if she wished to make that argument, she should explain why a lesser sanction would be adequate and appropriate. I urged her to cite legal precedent (which I described). I also advised Queen on how she could request additional time to respond.

Finally, I advised Queen of her obligation to serve defense counsel with anything she filed with this Office. I explained how she was to serve the papers on defense counsel and that she was required to include with her filing of the papers with this Office a certificate of service that she signed. I wrote: “No papers received at this Office without a certificate of service will be accepted for filing.”

Queen purported to file a faxed letter with this Office on January 18, 2019.⁴ There is no certificate of service and no other indication that Queen served a copy on defense counsel. There is a fax cover sheet that shows the letter was faxed to my legal assistant, Vivian Chan, and to me. There is no mention of any copy to anyone else.

The applicable regulations provide that, “Unless these rules provide otherwise, all papers filed with OALJ or with the judge must be served on every party.” 29 C.F.R. § 18.30(a)(1). Among other methods, service may be accomplished by mail or, if the person being served consents in writing, by electronic means. 29 C.F.R. § 18.30(a)(2). The certificate of service must include certain specified information, state that the paper was served on all parties, and be signed. 29 C.F.R. § 18.30(a)(3). From the beginning of the litigation, I advised Queen where she could find and review the applicable procedural rules. She is charged with knowing about those rules. And, as stated above, in the order to show cause, I advised her that: “No papers received at this Office without a certificate of service will be accepted for filing.”

Nonetheless, I will cure the *ex parte* purported filing by including with the service copies of this Order a copy of Queen’s letter, thereby effectuating service on Wells and all others on the service list.

In the letter, Queen seeks two things: (1) that I “keep” the (already vacated) hearing on calendar for March 4, 2019, and (2) that I allow her to participate in the hearing by telephone. I construed the first request as for reconsideration of the order vacating the hearing date. In an order issued on January 29, 2019, I denied both requests.

⁴ The letter is dated “January 17, 2018” (emphasis added). It appears that the year is a typographical error and that Queen meant 2019, not 2018.

Queen gave no reason that I should reconsider the order vacating the hearing date. As to the request to participate in the hearing by telephone, she based this on allegations that defense counsel was engaged in “continued harassment” of herself and her 18-year-old daughter “through third parties.” She said this made her “unable to sustain or find long term employment.” She accused defense counsel of “unethically or illegally utilizing [her] social security number.” She accused defense counsel of trying “to find out where [her] children are and trying to find out about a civil case previously that has nothing to do with [defense counsel].” She accused defense counsel and Wells Fargo as being “part of [her] not being able to locate an attorney.” She said this left her uncomfortable about speaking with defense counsel if she didn’t have an attorney and left her concerned about her safety.⁵

As I explained in the order denying Queen’s requests, I could not allow a hearing to go forward after Queen failed to meet any of her disclosure and discovery obligations. In my view, a hearing under those conditions would be inconsistent with the due process allowed under the applicable procedural regulations. Queen offered nothing to refute this or to explain why a continuance was inappropriate. I also explained in detail why I denied Queen’s request that she participate in the hearing (if there was a hearing) by telephone.

Most relevant here, however, is that I was uncertain whether Queen intended this as her answer to the order to show cause. In her letter, Queen had many allegations against defense counsel and a variety of allegations against Wells Fargo. The allegations against Wells appear to be unrelated to any claim Queen could make under the statutes on which she relies here. Queen alleges that, while working at Wells Fargo, she was verbally harassed, her rights under Title VII of the Civil Rights Act [of 1964] (including the Act’s anti-retaliation provision) were violated, and that an employee injured her. She said that she understood the case pending before me to be “an OSHA hearing.” As she wrote: “My safety was compromised at Wells Fargo and I would like the opportunity to present this at the hearing on March 4, 2019.”

But Queen stated nothing to deny or refute her failure to comply with the order of December 20, 2018, which compelled her to make the disclosures and supply the discovery responses. She said nothing to excuse or mitigate those failures. She said nothing to suggest that a sanction less harsh than a dismissal would be more appropriate.

I therefore stated (while denying Queen’s requests) that it was unclear if this was Queen’s answer to the order to show cause. I stated that I would wait until the deadline on February 4, 2019, for an answer to the order to show cause to see if Queen filed anything more. I reminded Queen again that she must include evidence, not mere allegations. As to Queen’s allegations against defense counsel, I alerted her to her right to file a motion for protective order. I explained that these orders are “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense,” citing 29 C.F.R. § 18.52(a).

On the February 4, 2019 deadline, Queen filed another letter (dated February 3, 2019).⁶ Addressing the discovery issues, she writes that she does not understand what discovery is or

⁵ Complainant Queen also stated that she’d filed a complaint against defense counsel with the “FTC” (which usually refers to the Federal Trade Commission) and with the “IRS” (which usually refers to the Internal Revenue Service).

⁶ This time, Queen indicated on an attachment that she served the letter on defense counsel.

what defense counsel is requesting. She asks for time to find an attorney. She states that she has approached three attorneys, none of whom would take her case. She states: “I am observing blackballing.” She comments that one of the attorneys “might have been paid under the table not to represent [her].” Apparently attempting to show that her claim has merit, Queen states:

I was injured at work and abused mentally and physically while being an employee at Wells Fargo. I filed a safety complaint at Wells Fargo to address this. . . . My health was compromised at a Wells Fargo call center. I have medical records to prove that. . . . My hair was cut at Wells Fargo also by trashy, racist employees! At the same time my daughter’s back was injured and her hair was cut also by savages! . . . And this hearing is a priority because my health was compromised! . . . No one injures my back or my daughter’s back and act like it is a minor issue! *This is my only reason for reaching out to OSHA* and I filed the OSHA complaint when I was still an employee with Wells Fargo! I was terminated after that which is retaliation! (Emphasis added.)

It also appears that, without expressly mentioning a protective order, Queen is moving for one. Queen asserts that defense counsel has requested her social security records, that he has “harmed” her daughter, and that he is a bully. She states that defense counsel has called four (named) employers from whom she had job offers after the termination at Wells Fargo.⁷

Discussion

“A pro se litigant’ cannot generally be permitted to shift the burden of litigating his case to the courts, nor avoid the risks of failure that attend his decision to forego expert assistance.” *Witbeck v. CH2M Hill Ltd.*, ARB No. 15-077 (Mar. 15, 2017), slip op. at 6, quoting *Pik v. Credit Suisse AG*, ARB No. 11 -034, slip op. at 4-5 (May 31, 2012). “Thus, although an ALJ has some duty to assist pro se litigants, a judge also has a duty of impartiality and must refrain from becoming an advocate for the pro se litigant. In the end, pro se litigants have the same burdens of proving the necessary elements of their cases as litigants represented by counsel.” *Id.*

When a party fails to comply with an administrative law judge’s orders and fails to show good cause for such failure, the judge has discretion to dismiss the case. 29 C.F.R. §§ 18.12(b)(7), 18.57(b)(1)(v); *see also*, 5 U.S.C. § 556. “If an ALJ is to have any authority to enforce prehearing orders, and so to deter others from disregarding these orders, sanctions such as

⁷ Queen also has allegations against me, as the ALJ. She asserts that I am giving defense counsel “special privileges and permissions also because he was a law clerk.” She states that “[my] manipulative judicial system” is “prying” into her medical records “so that [I] could manipulate [her] daughter’s health.” She states that, if I “decide to take this off calendar,” she will file a judicial complaint against both me and defense counsel.

For the record, I have extended no privileges or special treatment to defense counsel. I have no knowledge of defense counsel’s previously serving a judicial law clerk. I have been an ALJ at this Office for over a decade, and I have never heard of defense counsel before this case. To my knowledge, neither of these attorneys has clerked with the Office of Administrative Law Judges. As I stated in the order of January 29, 2019, if Complainant believes that Wells Fargo is seeking discovery into private information and that she is entitled to an order prohibiting that discovery, her option is to file a protective order. She would need to state specifically what Wells Fargo is seeking and why I should not permit it.

dismissal or default judgments must be available when parties flagrantly fail to comply.” *Matthews v. Labarge, Inc.*, ARB No. 08-038 (ARB Nov. 26, 2008), slip op. at 2 (affirming dismissal when complainant failed to comply with order compelling discovery and with order requiring pre-hearing submission), quoting *Yarborough v. U.S. Dep’t of the Army*, ARB No. 05-117, slip op. at 6 (ARB Aug. 30, 2007) and citing cases at fn. 7.

“ALJs have ‘inherent authority’ to ‘manage their own affairs so as to achieve the orderly and expeditious disposition of cases.’” *Walia v. The Veritas Healthcare Solutions, LLC*, ARB No. 14-002 (ARB Feb. 27, 2015) (affirming dismissal after prosecuting party failed to comply with order compelling discovery and requiring attendance at a deposition and, despite warnings of sanctions including dismissal, failed to respond to an order to show cause), quoting *Newport v. Fla. Power & Light, Co.*, ARB No. 06-110, slip op. at 4 (ARB Feb. 29, 2008); *see also, Butler v. Anadarko Petroleum Corp.*, ARB No. 12-041 (ARB June 15, 2012), slip op. at 3 (affirming dismissal based on Complainant’s repeated and contumacious failure to appear for her own deposition); *In re Supervan, Inc.*, ARB No. 00-0008, (ARB Sept. 30, 2002), slip op. at 7 (affirming default judgment against self-represented party for failure to comply with two orders compelling discovery).

As the Ninth Circuit has stated of dismissal sanctions in the district courts:⁸

District courts have inherent power to control their dockets. In the exercise of that power they may impose sanctions including, where appropriate, default or dismissal. Dismissal, however, is so harsh a penalty it should be imposed as a sanction only in extreme circumstances. We have repeatedly upheld the imposition of the sanction of dismissal for failure to comply with pretrial procedures mandated by local rules and court orders. However, because dismissal is such a severe remedy, we have allowed its imposition in these circumstances only after requiring the district court to weigh several factors: (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions.

Thompson v. Housing Authority of City of Los Angeles, 782 F.2d 829, 831 (9th Cir. 1986) (affirming dismissal when plaintiff failed to prepare for pre-trial conference and for trial despite being warned that another failure would result in a dismissal).

On the present record, there is no dispute that the regulations, the Notice of Docketing, and the Pre-Trial Order each required Queen to provide to Wells information falling into three specified categories. *See* 29 C.F.R. § 18.51(c)(1)(i). Queen does not come within any exception to the requirement. *See id.* § 18.51(c)(1)(ii). The Pre-Trial Order explicitly stated that the requirement applied to self-represented parties as well as those with counsel. There is no dispute that, when Queen failed to comply, Wells’ counsel reminded her of her obligation to provide the initial

⁸ The Ninth Circuit is controlling in this Oregon-based case.

disclosures and that her response was to refuse, stating that she was “not turning anything in right now.”

There is no dispute that Wells propounded requests for production and interrogatories as the applicable regulations allow, that the time for Queen’s responses ran without her making any response, that Wells made efforts to get Queen’s responses voluntarily, that these efforts failed, and that Wells then filed a motion to compel both the initial disclosures and the discovery responses.

It is undisputed that, when Wells moved to compel, Queen filed nothing to oppose the motion and that I granted the motion as to the disclosures, the interrogatories, and the requests for production. I did not simply order Queen to make the disclosures and produce the discovery; I gave her a detailed explanation of exactly what she had to do to comply. I gave her a specific deadline. I cited authority that she could review. I warned her that her failure to comply with the order could result in the imposition of sanctions, including a dismissal of her claim. I explained what the implications of a dismissal are.

There is no dispute that Queen failed and refused to comply with any of the requirements in the order compelling her to make the initial disclosures and provide the responses to the interrogatories and requests for production. Instead of complying with the order, she told defense counsel that she was “just gonna show up at the hearing.”

It is undisputed that Wells noticed Queen’s deposition in the manner required in the procedural rules and consistent with my order of December 20, 2019. That order warns Queen that, if she failed or refused to attend her deposition, I might impose sanctions of the same kind as for a failure to comply with the order compelling discovery and disclosures. Those sanctions include a dismissal of the claim. Nonetheless, Queen refused to attend her deposition and did not appear at the scheduled date, time, and place.

Although Queen insists that the (now vacated) hearing go forward on March 4, 2019, she does not dispute that she has failed and refused to permit Well Fargo access to information to which it is entitled under the regulations so that it may prepare for the hearing: the initial disclosures, interrogatory answers, requested documents, and Queen’s deposition testimony. Queen does not dispute that the rules, of which she’s been repeatedly informed and reminded, allow every party to disclosures and discovery of these kinds. *See* 29 C.F.R. §§ 18.50 (initial disclosures), 18.51 (scope of discovery), 18.53 (supplemental disclosures), 18.60 (interrogatories), 18.61 (requests for production), 18.64 (depositions).

Queen offers as an excuse for her failures that she does not understand what discovery is; she would need a lawyer to do that.⁹ I reject this excuse. Not only was Queen required to familiarize herself with the rules to which she was repeatedly referred, but more importantly, the order compelling her disclosures, answers to interrogatories, and production of documents more than sufficiently notified Queen what she was required to do.

In particular, Queen did not need further explanation to comply with the following on initial disclosures:

Within 14 days of the date this Order issues, Complainant Queen must . . . disclose the following:

(A) The name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(B) A copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment; and

(C) A computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under § 18.61 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered.

Order of Dec. 20, 2018 at 2-3. Queen never requested, either from defense counsel or from this Office, any further explanation of these requirements, which were verbatim included in the order compelling her to make the initial disclosures.

As to the interrogatories, Wells served these on Queen on November 6, 2018. They were entitled, “Wells Fargo Bank’s First Interrogatories to Complainant.” When Wells moved to compel answers to these interrogatories, it attached another copy of them to its motion. Wells thus twice served Queen with a document entitled, “Interrogatories to Complainant.” The same is true of the requests for production. They were entitled, “First Requests for Production of Documents to Complainant.” They were served on November 6, 2018. A copy was attached to Wells motion to compel.

⁹ At the same time, Queen insists that she has a right to represent herself. But, as I discussed in the text above, that requires her ultimately to meet the same burden as a represented party, even if with some assistance from the ALJ—assistance that here, Queen received. *See Witbeck v. CH2M Hill Ltd.*, ARB No. 15-077 (Mar. 15, 2017), slip op. at 6, quoting *Pik v. Credit Suisse AG*, ARB No. 11 -034, slip op. at 4-5 (May 31, 2012).

I conclude that Queen knew or should have known to what Wells and I were referring when either Wells' counsel or I discussed Wells' interrogatories or its requests for production. Queen has never stated that she did not know what these documents were or where she could find the interrogatories or requests for production she was supposed to respond to.

The order compelling Queen to produce the discovery explained exactly what she had to do to comply. On the interrogatories, it stated:

Within 14 days of the date this Order issues, Complainant Queen must serve on Wells Fargo (through its counsel) answers to each and every interrogatory that Wells served on her on or about November 6, 2018. The answers must be without objection. (Queen waived all objections by failing to raise them timely.) Each interrogatory must be answered separately and fully in writing. Complainant Queen must sign the answers. Above her signature must appear the following: "I swear (or affirm) under penalty of perjury under the laws of the United States and of the State of Oregon that the answers above are true and correct to the best of my knowledge, information, and belief."

Order of Dec. 20, 2018, at 3. On the requests for production, the Order stated:

Within 14 days of the date this Order issues, Complainant Queen must respond (in a writing served on Wells Fargo through its counsel) to each and every of Wells' requests for production served on or about November 6, 2018. The responses must be made without objection. (Queen waived all objections by failing to raise them timely.) Complainant Queen must state either (1) that she will produce a copy of each document that the request for production describes, or (2) that, after searching diligently, she has in her possession, custody, or control no documents that the request for production described. Complainant must include with the responses a complete set of photocopies of all the documents she is producing.

Id.

Queen does not need extensive training on discovery practice to understand what the Order of December 20, 2018, required of her. From her written submissions, it is plain that Queen is literate. She could have complied with the Order of December 20, 2018 – or at least some of it; she simply chose not to comply with any of it. She was "just gonna show up at the hearing" without "turning anything in."

It is possible that Wells' discovery into third-party information exceeded what I would have allowed on a properly supported motion for a protective order. If the litigation were going to continue, I would allow further briefing on a potential protective order, or I might exclude from evidence at the hearing certain material that Wells obtained. But, if Wells was over-zealous on third-party discovery – and I make no finding that it was – that does not excuse Queen from complying with her disclosure and discovery obligations or with an order compelling her to do so.

Queen also asks for more time to find an attorney. Queen has had since July 2018 to find an attorney. The procedural rules, to which Queen has been repeatedly referred, detail how a litigant may be represented by an attorney or, with the ALJ's permission, a non-attorney representative. *See* 29 C.F.R. § 18.22. Queen understands that she may retain an attorney. She states that she has approached three attorneys to represent her. All three refused. Queen apparently believes she is ready to try her case without representation; she is insistent that the hearing date (which I have already vacated) not be vacated. I do not believe that extending additional time for Queen to find an attorney would be productive.¹⁰

I therefore turn to the Ninth Circuit's five-factor framework to determine whether a dismissal sanction is appropriate.

The public's interest in expeditious resolution of litigation. This factor must be given additional weight. The applicable implementing regulations expressly require that cases of this kind be brought to hearing "expeditiously, except upon a showing of good cause or unless otherwise agreed to by the parties." 29 C.F.R. §§ 1980.107(b), 1985.107(b).

This matter has been in litigation since Queen's request for a hearing before an ALJ on July 17, 2018, or nearly seven months. Initial disclosures are aimed at expediting and reducing the need for costly and time-consuming discovery. They do this by requiring each party within about three weeks after the case begins to disclose a list of persons with knowledge of relevant facts, to produce documents the party believes are relevant, and for plaintiffs (or complainants such as Queen) to detail their calculations of alleged damages. Queen's failure to provide comply with the initial disclosure requirement has delayed the resolution of the case. Together with her failure to make discovery, it resulted in the need to vacate the hearing date.

Moreover, as I will discuss below, this case could well be one that could be decided on motion – indeed, could have been decided months ago – had Queen given a deposition and responded to Wells' other discovery. But without Queen's testimony detailing exactly what her theory of recovery is, Wells could not file a dispositive motion.

Really, Queen's failures to meet each and all of her pre-hearing obligations has stymied the litigation so that it cannot move forward from its starting point last July (2018).

The court's need to manage its docket. It will come as no surprise that the press of cases at this Agency has increased significantly while resources have decreased. Twenty years ago, the San Francisco District Office of OALJ had twice as many ALJs with a total caseload for all the judges together far smaller than the present total caseload. Today's cases involve remedies to widows and orphans of civilian contractors killed in the nation's war efforts. They include workers who report nuclear hazards, air and rail safety hazards, risks to safe drinking water, shareholder fraud, and other serious safety and security concerns affecting thousands of people, and are then terminated from employment in retaliation. The Office adjudicates cases arising under more than 80 federal statutes.

¹⁰ Queen states that she believes somewhat might have "blackballed" her with attorneys or that maybe someone paid an attorney to decline her case. I advised Queen that she must offer evidentiary support for contentions such as these. She offered nothing, and I reject her speculation about possible wrongdoing by unnamed persons.

While this Office and I make special effort and take extra time to inform self-represented litigants about our procedures, about what is required of parties, and about how our hearings work, we cannot become advocates for self-represented parties, advising them what motions to file or what evidence to present; that would defeat the central requirement that judges be neutral. The pressing caseload must be managed by devoting the necessary and appropriate time to cases and not more; otherwise, other litigants will suffer delays because of excessive effort spent on a single litigant.

The risk of prejudice to the defendants. The Secretary's implementing regulations for Sarbanes-Oxley and the other statutes relevant here expressly provide that "proceedings will be conducted in accordance with the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges, codified at subpart A of part 18 of [29 C.F.R.]." 29 C.F.R. §§ 1980.107(a), 1985.107(a).

Those procedures include the initial disclosure and discovery regime at issue on this motion. Queen's failures to comply with ALJ orders and with her required disclosures and discovery responses have precluded Wells from obtaining the information (and evidence) that those procedures allow to opposing parties. It would be highly prejudicial to Wells Fargo were I to require it to proceed with the litigation (including through a hearing) without access to this information and evidence.

The applicable procedures also permit parties to file case dispositive motions such as for summary decision or motions to dismiss. *See* 29 C.F.R. §§ 18.70(c) (motion to dismiss), 18.72 (motion for summary decision). In my view, it would be a denial of due process to deprive Wells of its opportunity to file these motions.

The public policy favoring disposition of cases on their merits. Of course this factor, in every case, tends to weigh against a dismissal. But nothing about this case suggests any additional weight be given this factor here than would be given in any ordinary case. If anything, the limited information suggests that Queen might be pursuing claims under a mistaken legal theory and that her more properly pleaded claims do not come within the jurisdiction of OALJ.

I cannot evaluate the merits of the case based on the record before me. Neither party has been given an opportunity to present its evidence. I note, however, that Queen has repeatedly stated in pleadings filed in this Office that the gravamen of her claim is that she was mentally and physically injured while working at Wells, that her co-workers injured her, that Wells (or someone working for Wells) discriminated against her in violation of the Civil Rights Act of 1964, that she filed a safety complaint with OSHA concerning this, and that Wells terminated the employment in retaliation for her complaining about these unsafe conditions.

These are serious allegations and conceivably, if proven in an appropriate forum, could result in a remedy being awarded to Queen or, at the least, in a remedial order being imposed on Wells. I make no determination whether there is merit to any such claim.

But, if this is really Queen's theory of recovery, her claim is not, as alleged here, under Sarbanes-Oxley, Dodd-Frank, or the Consumer Financial Protection Act. The employee protection ("whistleblower") provisions in those statutes are intended to protect workers who report financial and certain other fraud or securities law violations (e.g., mail fraud, securities fraud, wire fraud, bank fraud, consumer fraud, and violations of the rules and regulations of the Securities and Exchange Commission).

Retaliation claims for complaining about unsafe work conditions in violation of the Occupational Safety & Health Act arise under section 11(c) of that Act and are administered at OSHA; there is no appeal to this Office (OALJ). Discrimination complaints such as Queen's (including retaliation) are administered at the U.S. Equal Employment Opportunity Commission as well as at state agencies such as the Oregon Bureau of Labor & Industries Civil Rights Division. OALJ has no jurisdiction to adjudicate these claims.¹¹ Workplace injury claims might also come within the jurisdiction of agencies such as the Oregon Workers' Compensation Division. Again, OALJ's jurisdiction for workers' compensation is narrowly limited and does not extend to bank employees working within the U.S.¹²

I make no determinations on the merits. Rather, I find that Queen presented nothing on the merits that would weigh against a dismissal more than the generally applicable consideration that favors reaching the merits.

The availability of less drastic sanctions. I find no useful option among the list of sanctions allowed or similar sanctions. That list is:

- (i) Directing that the matters embraced in the order or other designated facts be taken as established for purposes of the proceeding, as the prevailing party claims;
- (ii) Prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
- (iii) Striking claims or defenses in whole or in part;
- (iv) Staying further proceedings until the order is obeyed;
- (v) Dismissing the proceeding in whole or in part; or
- (vi) Rendering a default decision and order against the disobedient party.

29 C.F.R. § 18.57(b)(1).

¹¹ This Office's jurisdiction on these kinds of discrimination claims (race, sex, religion, disability, etc.) is limited to claims that the Department of Labor, Office of Federal Contract Compliance Programs, brings against federal contractors.

¹² This Office's jurisdiction for workers' compensation claims is limited to certain longshore and harbor workers, civilian employees of government contractors working abroad under certain conditions, workers on offshore oil platforms, coal miners suffering from Black Lung, and other, similarly narrowly limited other workers. Jurisdiction at this Office would not extend to a worker at Wells Fargo such as Queen.

Sanctions (i), (ii), and (iii) as applied to these facts would effectively result in a decision for Wells Fargo and against Queen; there would be no real difference from a dismissal. This is because Queen has failed and refused to make disclosures and discovery going to the entirety of her claim. The order excluding evidence would have to extend to the entire scope of the case. It would be insufficient to exclude a witness or two or a group of selected exhibits; I would have to exclude all of Queen's witnesses and exhibits. As Queen has the initial burden of going forward, if she is allowed no evidence, I would have to dismiss her claim before the defense even began its case.

The only facts that I could deem established in Wells' favor would be a finding that Queen did not engage in protected activity or that, even if she did, the protected activity did not contribute to her termination from employment. As Queen has the burden to establish both of these by a preponderance of the evidence, were I to deem Queen to have failed to establish either of them, I would have to dismiss the case for Queen's failure to make out a *prima facie* case.

Similarly, I cannot strike a part of Queen's claim. This is not like a civil case with multiple alleged causes of action, some of which might be separable from others. Essentially, Queen has a single claim of retaliatory discharge. I cannot strike part of it without striking all of it. Even were that possible, I would have no way of knowing what must be stricken, as Queen has failed to produce any discovery or make any disclosures on any part of her claim.

Sanction (vi) – a default decision – applies to a defendant or respondent; it is not available here. If it applied, it would be the same as a dismissal.

That leaves as an alternative to dismissal only the possibility of a stay, which is sanction (iv). A stay in a case arising under these statutes raises a conflict with the implementing regulations that I cited above: 29 C.F.R. §§ 1980.107(b), 1985.107(b). These regulations require cases to proceed to hearing expeditiously absent good cause or the agreement of the parties. *Id.* This is consistent with the urgency associated with issues that whistleblower statutes address; generally these involve safety or security potentially affecting the public at large or at the least a significant number of people. A party who has failed to comply with an ALJ's discovery and disclosure orders cannot be said to have good cause for further delay. And Wells has not agreed that Queen somehow is entitled to a delay.

Moreover, I have no confidence that a stay will prompt Queen to comply with the orders I have issued or to proceed to a hearing without the need for more motions and orders to comply with other litigation requirements.¹³ This Agency's responsibility to decide cases expeditiously and manage its dockets cannot support an open-ended stay of proceedings.

¹³ For example, the parties must supply 30 days before the hearing a pre-hearing statement that requires her to address information falling into nine categories. The categories include a list of disputed facts, a witness list, and an exhibit list. The parties also have an ongoing duty to supplement her disclosures and discovery responses, such as by providing an update to her calculation of damages. *See* 29 C.F.R. § 18.53(a).

A dismissal is proper under the applicable factors. In the Order to Show Cause I stated that Queen might wish to argue that, if any sanction should be imposed, a lesser sanction than dismissal was sufficient. Queen offered no such argument. Nonetheless, I will consider the Ninth Circuit's factors.

Weighing the factors, I find almost nothing that weighs against a dismissal. For nearly seven months, Queen's recalcitrance has been ubiquitous. Queen has entirely obstructed the progress of a case she brought. Since requesting a hearing, she has not complied with a single one of her obligations under the applicable statutes and regulations. She has frustrated the Secretary's mandate that cases of this kind be heard expeditiously. She has created a persistent burden on this Office's crowded dockets.

Of more importance is that her failures have been highly prejudicial to the defense. If Queen was permitted to go to hearing without making the required disclosures and discovery, she would have succeeded in depriving the defense of due process; at the least, she would have put Wells at a huge disadvantage that is inconsistent with the applicable procedural regulations and contrary to the ALJ's orders. She might also have deprived Wells of a meaningful opportunity to conserve its resources (while protecting the judicial resources of this Office) by filing a case dispositive motion.

Nothing about this case suggests that concerns about the merits rise to anything more than the admittedly real concern that applies on all motions for sanctions. But, if standing alone, that could preclude a dismissal, an ALJ could never dismiss a claim as a discovery sanction: that concern applies in every case. And that cannot be the result, for the regulations state that a dismissal is among the options for an ALJ's discretion, and the case law agrees. *See* 29 C.F.R. § 18.57(b)(1)(v).

Order

For the foregoing reasons, Complainant DieDre Queen's complaint is DENIED and DISMISSED. Complainant shall take nothing by reason of her complaint.

A copy of Queen's letter erroneously dated January 17, 2018, and filed January 18, 2019, will be included with the service of this Decision and Order.

SO ORDERED.

STEVEN B. BERLIN
Administrative Law Judge

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

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. §§ 1980.110(a), 1985.110(a). Your Petition should identify the legal conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. §§ 1980.110(a), 1985.110(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 on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor. *See* 29 C.F.R. §§ 1980.110(a), 1985.110(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. §§ 1980.109(e), 1980.110(b), 1985.109(e), 1985.110(b). 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. § §§ 1980.110(b), 1985.110(b).