

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

United States of America Complainant, v. Soft Touch Carwash
Respondent; 8 U.S.C. Section 1324A Proceeding; Case No. 88100070.

**ORDER GRANTING COMPLAINANT'S MOTION FOR ENLARGEMENT OF TIME TO FILE
ANSWER TO INTERROGATORIES AND PRODUCE DOCUMENTS
AND DENYING RESPONDENT'S MOTION FOR PROTECTIVE ORDER, SANCTIONS AND
DISMISSAL**

Procedural Background and Position of the Parties

On July 26, 1988, a Complaint Regarding Unlawful Employment was filed against Soft Touch Carwash, herein called Respondent. On August 10, 1988, the Office of the Chief Administrative Hearing Officer issued a Notice of Hearing on Complaint Regarding Unlawful Employment scheduling the hearing in this matter to be held on January 30, 31, and February 1, 1989.

On August 30, 1988, Respondent served Complainant by mail with Respondent's First Set of Interrogatories and First Request For Production of Documents with a production date of October 5, 1988. Complainant did not serve its Answers to the Interrogatories or produce the requested documents until October 7, 1988.

On October 14, 1988, Respondent filed a Motion For Sanctions, Protective Order and Dismissal alleging that by failure to timely respond, Complainant has shown wanton disregard for the rules of procedure. In its Motion, Respondent requests (1) that the Complaint be dismissed or, in the alternative, that Complainant not be allowed to introduce or otherwise rely on the untimely presented evidence; and (2) that attorneys fees be awarded in the amount of \$750 and cost in the amount of \$17.50. In support thereof, Respondent relies on the sanction provisions of 28 C.F.R. Part 68.19(c)(3) and Rule 37(d) of the Federal Rules of Civil Procedure.¹

¹Respondent requests oral argument on its Motion. However, I find no circumstances herein which would justify directing oral argument and pursuant to 28 C.F.R. 68.7(c), Respondent's request is denied.

On October 25, 1988, Complainant filed a Motion For Enlargement Of Time To File Answers To Respondent's First Set Of Interrogatories and First Request For Production Of Document seeking approval for its October 7 response. Complainant's Motion is supported by a sworn declaration which asserts that the untimely production of documents and Answers to Interrogatories was caused by computer problems in Complainant's office.

Supporting Facts Submitted by the Parties

It is undisputed that in a telephone conversation initiated by counsel for Respondent, counsel for Complainant made reference to the computer problems and indicated that it was anticipated that service of the documents would be made later that day. There is some dispute as to exactly what was said as to the method of service. Counsel for Respondent asserts that he was told service would be by certified mail. Counsel for Complainant asserts that he said it was anticipated that the computer problems would be solved and service by mail could be effected that afternoon but that because of the computer problem, personal service would be used so that Respondent would receive the documents within the same timeperiod it would have if service had been by mail. It is undisputed that counsel for Complainant made no direct request to counsel for Respondent for an extension, or waiver, of time limitations. It is also undisputed that counsel for Respondent expressed no opposition to counsel for Complainant's expressed plans for service of the documents.

Conclusions

Section 68.19 provides, inter alia:

(a) If a deponent fails to answer a question propounded, or a party upon whom a discovery request is made pursuant to Sections 68.14 through 68.18, fails to respond adequately or objects to the request or to any part thereof, or fails to permit inspection as requested, the discovering party may move the Administrative Law Judge for an order compelling a response or inspection in accordance with the request....

* * * * *

(c) If a party or an officer or agent of a party fails to comply with an order, including, but not limited to, an order for the taking of a deposition, the production of documents, or the answering of interrogatories, or responding to request for admissions, or any other order of the Administrative Law Judge, the Administrative Law Judge, for the purposes of permitting resolution of the relevant issues and disposition of the proceeding without unnecessary delay

despite such failure, may take such action in regard thereto as is just, including but not limited to the following:

* * * * *

(2) Rule that for the purposes of the proceeding the matter or matters concerning which the order was issued be taken as established adversely to the non-complying party;

(3) Rule that the non-complying party may not introduce into evidence or otherwise rely upon testimony by such party, officer or agent, or the documents or other evidence, in support of or in opposition to any claim or defense;

* * * * *

(5) Rule that a pleading, or part of a pleading, or a motion or other submission by the non-complying party, concerning which the order was issued be stricken, or that a decision of the proceeding be rendered against the non-complying party, or both;

FRCP 37(d) provides that if a party fails to serve answers or objections to interrogatories or to serve a written response to a request for inspection of documents, the court:

may make such orders in regard to the failure as are just... In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

It is apparent that 28 C.F.R. Part 68.19 contemplates, as set forth in 68.19(a) that in the event of a failure to respond to a discovery request, the party seeking discovery will move for an order compelling a response or inspection in accordance with the request. Section 68.19 provides for sanctions if a party fails to comply with an order. Here no such order has been sought or issued. Accordingly, I conclude that sanctions under 28 C.F.R. 68.19(c) are inappropriate.

As to Respondent's request for attorneys fees and cost under FRCP 37(d), Complainant did respond to Respondent's discovery request, albeit 2 days late. Respondent has cited no cases which interpret the rule as applying to a delinquency of such short duration nor has it made a showing that it suffered any prejudice by reason of the 2-day delay or that any attorneys fees or cost would have been incurred by reason of the delay aside from that related to the preparation and filing of Respondent's Motion herein which cost was incurred despite Respondent's knowledge of the reason for the delay and that the delay would be of very short duration. Based on the above, I find that there existed good cause for Complainant's 2-day delay in responding to the discovery request and that such delay did not indicate a disregard for discovery procedures. In

these circumstances I find that an award of expenses would be unjust.

Accordingly, IT IS ORDERED that Respondent's Motion For Protective Order, Sanctions and Dismissal be, and it hereby is, denied. IT IS FURTHER ORDERED that Complainant's Motion For Enlargement Of Time To File Answer To Interrogatories And Produce Document is granted.

Dated: November 17, 1988

EARLDEAN V.S. ROBBINS
Administrative Law Judge