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

April 14, 2022

ANA MARIA RAVINES DE SCHUR, Complainant, v. EASTER SEALS-GOODWILL NORTHERN ROCKY MOUNTAIN, INC., Respondent.	)	8 U.S.C. § 1324b Proceeding OCAHO Case No. 2020B00093

Appearances: Ana Maria Ravines de Schur, pro se, for Complainant
Jean E. Faure, Esq., for Respondent

ORDER IMPOSING DISCOVERY SANCTIONS ON COMPLAINANT AND UPDATING CASE SCHEDULE

I. BACKGROUND

On October 15, 2021, the Court issued an Order on Respondent's Renewed Motion to Compel (Order on Renewed MTC). *Ravines de Schur v. Easter Seals-Goodwill N. Rocky Mountain, Inc.*, 15 OCAHO no. 1388d (2021).[1] The Court ordered Complainant to produce certain discovery responses within thirty days. *Id.* at 14. The Court warned "that failure to comply with this Order

[1] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database "FIM-OCAHO," or in the LexisNexis database "OCAHO," or on the website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders.

may result in sanctions pursuant to 28 C.F.R. § 68.23(c)." *Id.* (quoting *Ogunrinu v. Law Resources*, 13 OCAHO no. 1332e, 10 (2020)).
On December 6, 2021, Respondent filed a Motion for Sanction of Dismissal for Complainant's Failure to Comply (Motion for Sanction) with this Court's Order of October 15, 2021 and Brief in Support. To date, Complainant has not filed a response to the Motion for Sanction.

On January 14, 2022, the Court issued an Order to Show Cause requiring Complainant submit a filing in which she explained why she did not produce the discovery responses, and provide the aforementioned discovery responses. Order Show Cause 3; *see also Ehrenhaus v. Reynolds*, 965 F.2d 916, 919 (10th Cir. 1992) (discussing procedural history of trial court issuing an order to show cause why the pro se plaintiff's case should not be dismissed for failure to comply with a discovery order). Once again, the Court warned Complainant that failure to respond may result in sanctions, such as dismissal of her case. *Id.* at 3–4. Complainant did not file a response.

On February 16, 2022, Respondent filed a Renewed Motion for Sanction of Dismissal for Complainant's Failure to this Court's Order of January 14, 2022 (Renewed Motion for Sanction). To date, the Court has not received Complainant's response to this motion.

This matter is ripe for adjudication.

II. PARTIES' SUBMISSIONS

A. Respondent's Motion for Sanction

First, Respondent argues Complainant abandoned her complaint and thus, the case should be dismissed pursuant to 28 C.F.R. § 68.37(b). Mot. Sanction 4. Alternatively, Respondent asserts the case should be dismissed as a discovery sanction under 28 C.F.R. § 68.23(c) because Complainant failed to comply with the Order on Renewed MTC. *Id.* at 5. Complainant "has not provided information or documents responsive to [Respondent's] Discovery Request Nos. 1, 6, 8, 9, 13, 14, 18, 20, 21, and 22, as ordered." *Id.* at 2.

Respondent analogizes 28 C.F.R. § 68.23(c) to Federal Rule of Civil Procedure Rule 37(b), and cites factors the Tenth Circuit evaluates in determining whether dismissal is warranted under Rule 37(b). *Id.* at 6–7 (first citing *Ehrenhaus*, 965 F.2d at 921; and then citing *Gripe v. City of Enid*, 312 F.3d 1184, 1188 (10th Cir. 2002)). Respondent contends the weight of the factors warrant dismissal of the case because "Complainant's actions have prejudiced Respondent by completely thwarting its ability to defend the case, willfully causing delay and creating significant attorney's fees . . . [and Complainant's] actions are willful and constitute intentional disobedience[.]" *Id.* at 7–10. Further, Respondent highlights that the Court warned Complainant of the consequences of failure to comply and argues that a sanction less than dismissal would not deter future non-compliance. *Id.* at 9–10.

B. Respondent Renewed Motion for Sanction

In addition to incorporating law and argument from its initial Motion for Sanction, Respondent notes that Complainant has neither provided the discovery responses nor filed her responses to the Court's Order to Show Cause. Renewed Mot. Sanction 1–2. Additionally, Respondent "certifies that it has had no contact or communication from Complainant since August 2021[.]" *Id.* at 1.

III. LEGAL STANDARDS

A. Abandonment

The Court "may" dismiss a case upon abandonment if "[a] party or his or her representative fails to respond to orders issued by the Administrative Law Judge[.]" 28 C.F.R. § 68.37(b)(1). In *Rodriguez*, the court dismissed the pro se complainant's case for two separate, but related reasons: because the complainant abandoned his case and as a discovery sanction. 9 OCAHO no. 1109, at 3.

B. Dismissal as a Discovery Sanction

28 C.F.R. § 68.23(c) provides a list of sanctions the Court "may" impose upon a party that:

> fails to comply with an order, including, but not limited to, an order for the taking of a deposition, the production of documents, the answering of interrogatories, a response to a request for admissions, or any other order of the Administrative Law Judge . . . for the purposes of permitting resolution of the relevant issues and disposition of the proceeding and to avoid unnecessary delay[.]

Sanctions outlined in the regulation range from an "infer[ence] and conclu[sion] that the admission, testimony, documents, or other evidence would have been adverse to the non-complying party" to "a decision of the proceeding be rendered against the non-complying party[.]" § 68.23(c)(1), (c)(5).

The Court's "discretion to choose a sanction is limited in that the chosen sanction must be both 'just' and 'related to the particular "claim" which was at issue in the order to provide discovery.'" *Ehrenhaus*, 965 F.2d at 920 (quoting *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707 (1982)). In determining whether to dismiss a case as a discovery sanction, the Tenth Circuit dictated that trial courts should consider the following factors:

> (1) the degree of actual prejudice to the defendant; (2) the amount of interference

> with the judicial process; (3) the culpability of the litigant; (4) whether the court warned the party in advance that dismissal of the action would be a likely sanction for noncompliance; and (5) the efficacy of lesser sanctions.

Id. at 921. In *Ehrenhaus*, the Tenth Circuit affirmed the dismissal of the pro se plaintiff's case as a sanction for the plaintiff's violation of the trial court's order to appear for a deposition. *Id.* at 922.

Applying the *Ehrenhaus* factors, the *Rodriguez* court dismissed the complainant's case because he failed to comply with orders "to serve and file his exhibit and witness lists and to answer [the r]espondent's interrogatories and requests for production." *Rodriguez*, 9 OCAHO no. 1109, at 6.

IV. DISCUSSION

A. Abandonment

In *Rodriguez*, the Court dismissed the complaint because that complainant abandoned his complaint pursuant to § 68.37(b). 9 OCAHO no. 1109, at 6. There, the Court noted: "[the complainant] ha[d] done nothing to advance this litigation." *Id.* at 3. That complainant failed to comply with three orders and "failed to submit any kind of written communication with [OCAHO] indicating that he intends to comply, or that he intends to continue with his lawsuit." *Id.* at 4.

Here, this Complainant failed to respond to the Order on Renewed MTC (requiring her to produce discoverable responses) and failed to respond to the Order to Show Cause. However, and distinguishable from *Rodriguez,* she has submitted numerous filings since the commencement of her case.

In light of her pro se status and her previous interactions with the Court, the undersigned exercises her discretion in not deeming Complainant to have abandoned her complaint (at least not at this juncture). However, Complainant has certainly started down the path of the *Rodriguez* complainant.

While the Court will not conclude the Complainant has already abandoned her case, Complainant's actions demonstrate a real possibility that she may no longer desire to pursue her case. If it is in fact Complainant's intent to ghost the forum, then concerns of judicial economy and preservation of parties' resources all but compel the Court to require Complaint file a submission clarifying her intentions.

Complainant is ORDERED to submit a filing indicating whether she intends to continue her case or whether she seeks to voluntarily dismiss it. Recognizing Complainant's pro se

status, the Court proposes that her filing may simply state: "It is/is not my intent to continue my case." Failure to respond to this instant order will be construed as abandonment of her complaint pursuant to 28 C.F.R. § 68.37(b)(1).

This filing must be received by the Court by May 27, 2022. Complainant is also reminded to serve the filing upon Respondent's counsel.

B. Discovery Sanction

The Court adopts and utilizes the *Erenhaus* factors in this case. A balance of the factors does not warrant outright dismissal; however, Complainant's actions merit sanction, as further explained below.

1. Degree of Actual Prejudice to Respondent

Complainant's refusal to comply with the Court's Order on Renewed MTC has prejudiced Respondent "by causing delay and mounting attorney's fees." *Ehrenhaus*, 965 F.2d at 921; *e.g., Rodriguez*, 9 OCAHO no. 1109, at 5. Respondent argues its reputation may be "negatively affected by this lawsuit charging employment discrimination," a valid concern. Mot. Sanction 8, *see Rodriguez*, 9 OCAHO no. 1109, at 5. However, delay, alone, is insufficient to warrant dismissal. *Ehrenhaus*, 965 F.2d at 921; *e.g., Rodriguez*, 9 OCAHO 1109, at 5.

2. Amount of Interference with the Judicial Process

Complainant has refused to comply with two of the Court's orders, the Order on Renewed MTC and Order to Show Cause. These failures have interfered with the judicial process. *See Ehrenhaus*, 965 F.2d at 921; *e.g., Rodriguez*, 9 OCAHO no. 1109, at 5.

3. Culpability of the Litigant

Sufficient time has passed since the Order on Renewed MTC and the Order to Show Cause such that the undersigned could find Complainant's failures to comply to be willful acts of intentional disobedience made in bad faith. *See Rodriguez*, 9 OCAHO no. 1109, at 5 (citing *Ehrenhaus*, 965 F.2d at 921). Here, though, the Court is mindful of Complainant's pro se status and the possibility that her pro se status impacts her ability to comprehend the gravity of her failure.

4. Prior Warnings

Complainant has been warned on numerous occasions that failure to comply with the Court's orders may result in dismissal of her case. *See Ravines de Schur*, 15 OCAHO no. 1388d, at 14; Order Show Cause 4.

5. Efficacy of Lesser Sanctions

Although the weight of the factors thus far does not preclude dismissal as a sanction, due consideration must be given to this last factor. *See Ehrenhaus*, 965 F.2d at 921–22 (noting that the trial court "did not consider the efficacy of lesser sanctions as fully as [the Tenth Circuit] would have liked" in the trial court's decision to dismiss the case as a sanction). "When imposing discovery sanctions against a pro se litigant, the court should carefully consider whether some sanction short of dismissal is appropriate so that the litigant does not unknowingly lose his right of access to the courts because of a technical violation." *Okla. Federated Gold & Numismatics, Inc. v. Blodgett*, 24 F.3d 136, 139 (10th Cir. 1994) (citations omitted).
The undersigned finds the *Rodriguez* complainant to be a helpful comparator. In *Rodriguez*, the Court concluded that complainant's behavior was "even more egregious" than the plaintiff's behavior in *Ehrenhaus*. *Rodriguez*, 9 OCAHO no. 1109, at 5. The *Ehrenhaus* plaintiff "failed to comply with only one court order, and the failure only concerned one discovery event (his deposition)" whereas the *Rodriguez* complainant "failed to comply with several orders and has failed to respond to three discovery requests." *Id.* Moreover, the *Rodriguez* complainant refused to respond to the respondent's communications. *Id.* Finally, in deciding that dismissal was the only appropriate sanction, the court in *Rodriguez* noted that the complainant's continued noncompliance with orders rendered the respondent unable to prepare for trial. *Id.* at 6.

Here, Complainant has failed to respond to several orders and failed to produce responses to ten discovery requests. Similar to the unresponsive complainant in *Rodriguez,* Complainant refuses to communicate with Respondent. Renewed Mot. Sanction 1; *see Ravines de Schur v. Easter Seals-Goodwill N. Rocky Mountain, Inc.*, 15 OCAHO no. 1388e, 2 (2021).

However, unlike the *Rodriguez* respondent who was unable to prepare for trial, Respondent is not similarly affected. To the extent that the discovery responses at issue were necessary to continue litigation, appropriate sanctions can be imposed to facilitate litigation. Section 68.23(c)(1) provides that one discovery sanction is to "[i]nfer and conclude that the admission, testimony, documents, or other evidence would have been adverse to the non-complying party[.]" This sanction is appropriately tailored to the present case because it serves to reprimand Complainant without depriving her of her day in court,[2] and it permits Respondent to prepare and defend itself effectively in the present litigation.

Because lesser sanctions can be just as efficient, the Court DENIES Respondent's motions to

[2] In reaching this decision, the undersigned is mindful that "[a] party's loss of the right to contest a matter on the merits is not to be treated lightly[,]" that there is a strong preference for cases to be decided on the merits, and that there are constitutional limitations on sanctions. *Iron Workers Loc. 455 v. Lake Constr. & Dev. Corp.*, 7 OCAHO no. 964, 632, 674 (1997) (citations omitted).

dismiss the case as a discovery sanction.

The Court now imposes the following sanction:

> Discovery Requests Nos. 1, 6, 8, 9, 13, 14, 18, 20, 21, and 22 (subject to the limitations outlined in *Ravines de Schur*, 15 OCAHO no. 1388d, at 4–13) would have been adverse to Complainant. *See* § 68.23(c)(1).[3]

In order to construct a clear record, when Respondent utilizes an adverse inference fact, Respondent must annotate the discovery request number as the source, and if appropriate, explain the way in which the evidence would have been adverse to Complainant.

IV. CONCLUSION AND UPDATED CASE SCHEDULE

Respondent's Motion for Sanctions and Renewed Motion for Sanctions are DENIED insofar as the case will not be dismissed as a discovery sanction.

The Court does concur with Respondent that the Complainant's behavior merits a sanction, and thus Complainant will be sanctioned as follows:

> It is inferred and concluded that Discovery Requests Nos. 1, 6, 8, 9, 13, 14, 18, 20, 21, and 22 (subject to the limitations outlined in *Ravines de Schur*, 15 OCAHO no. 1388d, at 4–13) would have been adverse to Complainant. *See* § 68.23(c)(1).

Further, Complainant is ORDERED to submit a filing indicating whether she intends to continue her case or voluntarily dismiss it. Recognizing Complainant's pro se status, the Court proposes that her filing may simply state: "It is/is not my intent to continue my case."

This filing must be received by the Court by May 27, 2022. Complainant is also reminded to serve the filing upon Respondent's counsel.

In light of the foregoing, the Court provides the updated case schedule as follows:

> Motion for summary decision: July 20, 2022
> Response to motion for summary decision are due thirty days after filing of the underlying motion
>
> Hearing: October/November 2022

[3] In arriving at this decision, the Court has "tried to put the parties in the same relative positions they would have been in but for the noncomplying party's failure." *Iron Workers Loc. 455*, 7 OCAHO no. 964, at 675.

SO ORDERED.

Dated and entered on April 14, 2022.

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Honorable Andrea R. Carroll-Tipton
Administrative Law Judge