

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

HAYDEN VINCENT PHEBUS,)	
)	
Plaintiff,)	
)	
vs.)	No. 03-2672-MaV
)	
CITY OF MEMPHIS, TENNESSEE;)	
MEMPHIS POLICE DEPARTMENT;)	
W. W. HERENTON, Individually)	
and in His Official Capacity as)	
Mayor of the City of Memphis,)	
Tennessee; WALTER CREWS,)	
Individually and in His)	
Official Capacity as Police)	
Director of the City of Memphis,)	
Tennessee; OFFICER JOSEPH BYERS,)	
Individually and in His)	
Capacity as a Police Officer of)	
the Memphis Police Department;)	
OFFICER M. WARREN, Individually)	
and in His Official Capacity as)	
a Police Officer of the Memphis)	
Police Department; and JOHN)	
DOES I-X and JACK DOES I-X,)	
Individually and in Their)	
Official Capacity as Police)	
Officers of the Memphis Police)	
Department,)	
)	
Defendants.)	

ORDER ON DEFENDANT'S MOTION TO COMPEL, OR IN THE ALTERNATIVE, TO
DISMISS

Before the court is the October 22, 2004, motion of the defendant, City of Memphis ("City"), pursuant to Rule 37 of the Federal Rules of Civil Procedure to compel the plaintiff, Hayden

Phebus, to comply with the court's order of August 11, 2004 requiring the plaintiff to file responses to the City's discovery requests, or in the alternative, to dismiss the plaintiff's claim with prejudice for failure to comply with the court's order of August 11, 2004. The motion was referred to the United States Magistrate Judge for determination. Phebus has not responded to the motion, and the time for response has expired. For the reasons that follow the motion to compel is granted, and it is recommended that the motion to dismiss be denied at this time.

The City served interrogatories and requests for admissions on Phebus on May 25, 2004. Phebus failed to respond by July 16, 2004. On that date, the City sent a letter to Phebus informing him that his response was overdue. On August 9, 2004, the City moved for an order compelling Phebus to respond to Defendant's First Set of Interrogatories and First Request for Production of Documents. The court granted that motion on August 11, 2004 stating that Phebus should fully and completely respond to discovery requests on or before September 9, 2004. Phebus failed to respond to the motion to compel. On September 23, 2004, the City informed Phebus again that he had failed to comply with the court's order. At that time, the City agreed to give Phebus an additional week or until September 30 to respond. Phebus failed to respond once again. On October 22, 2004, the City filed a second motion to compel

discovery, or in the alternative, to dismiss the complaint. Phebus has failed to file a responsive pleading to the City's motion and the time for responding has expired.

Pursuant to Local Rule 7.2(a)(2), responses to motions in civil cases are to be filed within fifteen days after service of the motion. Phebus has not filed a response to this motion, and the time for responding has now expired. Rule 7.2(a)(2) further provides that "[f]ailure to respond timely to any motion, other than one for requesting dismissal of a claim or action, may be deemed good grounds for granting the motion." In the absence of any response by the plaintiff, defendant's motion to compel the plaintiff to comply with the court's August 11, 2004 order is granted. Mr. Phebus shall file full and complete responses to the City's discovery requests within eleven days of the entry of this order.

If a party fails to serve answers to interrogatories or produce documents after proper service of discovery requests, the court "may make such orders that are just" including the imposition of any of the sanctions listed in Rule 37(b)(2)(A),(B), & (C), among which is dismissal of the action. FED. R. CIV. P. 37(d). The Sixth Circuit regards the sanction of dismissal under Rule 37 for failure to cooperate in discovery to be "the sanction of last resort." *Beil v. Lakewood Eng'g and Mfg. Co.*, 15 F.3d 546, 552 (6th Cir. 1994). Dismissal may be imposed "only if the court

concludes that a party's failure to cooperate is due to willfulness, bad faith or fault." *Regional Refuse Sys. v. Inland Reclamation Co.*, 842 F.2d 150, 154 (6th Cir. 1988). In determining whether to dismiss an action for failure to cooperate in discovery, the court should consider (1) whether the party acted with willfulness, bad faith, or fault; (2) whether prejudice resulted from the discovery violation; (3) whether the party had been warned that her conduct could lead to extreme sanctions; and (4) whether less drastic sanctions were previously imposed or should be considered. *Freeland v. Amigo*, 103 F.3d 1271, 1277 (6th Cir. 1997); *Bass v. Jostens, Inc.*, 71 F.3d 237, 241 (6th Cir. 1995); *Bank One of Cleveland, N.A. v. Abbe*, 916 F.2d 1067, 1073 (6th Cir. 1990).

Here, it is unnecessary to consider all four factors because Phebus has not been sufficiently warned before that his conduct could lead to dismissal of his lawsuit. Accordingly, the City of Memphis' motion to dismiss the complaint for plaintiff's failure to completely respond to discovery is denied. Plaintiff is warned that, henceforth, failure to comply with proper discovery requests and orders of the court will lead to dismissal of his complaint.

IT IS SO ORDERED this 22nd day of November, 2004.

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE