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

REX ALAN BARKER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No: 02-2835-BV
	)	
AM-RAIL CONSTRUCTION INC.,	)	
	)	
Defendant.	)	

REPORT AND RECOMMENDATION ON DEFENDANT'S RENEWED MOTION TO DISMISS

Before the court is the renewed motion of the defendant, Am-Rail Construction Inc. ("Am-Rail"), filed March 9, 2004, to dismiss the plaintiff's complaint pursuant to Rule 37(b) of the Federal Rules of Civil Procedure as a result of the plaintiff's failure to comply with the court's October 30, 2003 order.[1] The motion was referred to the United States Magistrate Judge for report and recommendation. The plaintiff filed a reply to Am-Rail's renewed motion on May 25, 2004. For the following reasons, it is recommended that this action not be dismissed if the plaintiff pays the $500.00 sanction imposed by the court's October 30, 2003 order within ten (10) days of the entry of this order.

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[1] Am-Rail originally styled its motion as one in opposition to the plaintiff's objection to the magistrate judge's report and recommendation of March 2, 2004. In substance, Am-Rail's motion is essentially a renewed motion to dismiss and accordingly shall be treated as such.

The procedural posture of this case is quite muddled due to the substitution of counsel for plaintiff and several revised scheduling orders and stays. Thus, the posture of the case will not be repeated here in its entirety because it has been summarized by this court in previous orders. *See* Report and Recommendation on Def.'s Mot. to Dismiss, *Barker v. Am-Rail Constr.*, Civil Case No. 02-2835-BV at 1-4 (W.D. Tenn., March 1, 2004). Nevertheless, a partial summary of events leading up to the filing of the defendant's renewed motion to dismiss is required for clarification purposes.

This is an employment discrimination and breach of contract case in which the plaintiff, Rex Barker, claims that his employment was wrongfully terminated. Barker filed his complaint in October of 2002. On August 15, 2003, Am-Rail served its first set of interrogatories and first set of requests for production of documents. Barker failed to respond to the interrogatories or produce responsive documents. On October 20, 2003, Am-Rail filed a motion to compel Barker to respond fully to its discovery requests. After Barker failed to file a response, this court entered an order granting the defendant's motion to compel and directing the plaintiff to "file full and complete responses to Am-Rail's first set of interrogatories and requests for production of documents on or before December 1, 2003." Order Granting Def.'s Mot. to Compel, *Barker v. Am-Rail Construction, Inc.*, Civil Case

No. 02-2835 BV (W.D. Tenn., Oct. 30, 2003). The court also granted Am-Rail's request for reasonable expenses, including attorney fees, and directed Barker to pay Am-Rail the sum of $500.00 on or before December 1, 2003. *Id.* In closing, this court warned Barker that "henceforth, failure to comply with proper discovery requests will lead to dismissal of his complaint." *Id.*

December 1, 2003 came and went, and Barker failed to comply with this court's October 30, 2003 order, either by way of filing full responses to the defendant's discovery requests or by paying the defendant the sum of $500.00. Therefore, on January 9, 2004, Am-Rail filed a motion pursuant to Rule 37(b) of the Federal Rules of Civil Procedure seeking dismissal as a sanction for Barker's failure to prosecute and to comply with this court's order. That motion was referred to the magistrate judge for a report and recommendation, and the magistrate judge entered an order on Am-Rail's motion on March 2, 2004, recommending that the plaintiff's complaint be dismissed without prejudice.

Unbeknownst to the magistrate judge however, United States District Judge J. Daniel Breen had conducted a telephonic status conference with the parties on January 15, 2004 wherein he granted Barker leave to appeal this court's October 30, 2003 ruling after the deadline for an appeal had passed. In that conference, the district judge denied Am-Rail's motion to dismiss in order to allow Barker's potential appeal.

On January 28, 2004, Barker appealed this court's October 30, 2003 order. The order was subsequently affirmed by the district court on February 19, 2004. On March 3, 2004, Barker objected to this court's March 2, 2004 report recommending that Am-Rail's motion to dismiss be granted on the grounds that the district court had denied the defendant's motion to dismiss during the parties' January 15, 2004 status conference. In response to the objection, Am-Rail informed the court that Barker had not yet complied with this court's October 30, 2003 order compelling discovery and that the district judge should affirm the magistrate judges report recommending dismissal. On May 19, 2004, the district court denied this court's report and recommendation of March 2, 2004 but expressed concern over the plaintiff's failure to comply with the magistrate judge's previous discovery ruling. Accordingly, the district court directed this court to submit a second report and recommendation as to whether the plaintiff's current noncompliance should be the basis of a dismissal.

Under the present circumstances, this court is of the opinion that the sanction of dismissal is not yet warranted. Barker has represented to the court that he served his responses to Am-Rail's First Set of Interrogatories and First Request for Production of Documents on May 24, 2004 and had previously provided the information requested in those discovery requests during his deposition that was taken on April 9, 2003. (Pl.'s Reply to Def.'s

Opp'n to Pl.'s Objection to Report and Recommendation on Def.'s Mot. to Dismiss at 1-2.) Thus, it appears that the plaintiff has substantively complied with this court's October 30, 2003 order even if his responses were not timely. However, it remains unclear whether the plaintiff has paid the $500.00 that this court directed him to pay as a sanction under the previous discovery order. If the plaintiff pays that sanction within ten (10) days of the entry of this order, this court recommends that this action not be dismissed and that the defendant's renewed motion should be denied. On the other hand, this court recommends dismissal if the sanction is not paid within the time frame set forth above.

Respectfully submitted this 8th day of June, 2004.

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DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE

NOTICE

ANY OBJECTIONS OR EXCEPTIONS TO THIS REPORT MUST BE FILED WITHIN TEN (10) DAYS AFTER BEING SERVED WITH A COPY OF THE REPORT. 28 U.S.C. § 636(b)(1)(c). FAILURE TO FILE THEM WITHIN TEN (10) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND FURTHER APPEAL.