

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

EDWARD L. RUDD,

Plaintiff,

v.

No. 2:08-cv-02654-STA-cgc

ACCREDO HEALTH GROUP, INC.,

Defendant.

**REPORT AND RECOMMENDATION ON DEFENDANT’S MOTION TO DISMISS OR,
IN THE ALTERNATIVE, MOTION TO COMPEL PLAINTIFF’S APPEARANCE AT
DEPOSITION, AND FOR SANCTIONS**

Before the Court is Defendant Accredo Health Group, Inc.’s Motion to Dismiss or, in the Alternative, Motion to Compel Plaintiff’s Appearance at Deposition and for Sanctions. (D.E. #26). The motion seeks dismissal of Plaintiff’s claims pursuant to Rules 30 and 37 of the Federal Rules of Civil Procedure for Plaintiff’s failure to appear at his deposition. In the alternative, the motion requests an order extending the discovery and dispositive motion deadlines and compelling Plaintiff to appear at future depositions. Additionally, Defendant seeks an award of attorney’s fees and expenses as provided by Rule 30(d)(2) and 37(d)(3). On January 27, 2010, Defendant filed a Motion to Dismiss pursuant to Fed. R. Civ P. 41 for failure to prosecute. (D.E. # 29) The motions were referred to United States Magistrate Charmiane G. Claxton for Report and Recommendation. (D.E. #26 and 30).

Pursuant to Local Rule 7.2(a)(2), the opposing party shall file a response within fifteen days¹ after service of the motion, and failure to respond timely may be deemed good grounds for granting the motion. Plaintiff failed to file a timely response to the instant motion.

On January 6, 2010, the Court entered an order directing Plaintiff to show cause within fourteen days as to why the Court should not issue a Report and Recommendation that the instant motion be granted. Pursuant to Rule 6(a) of the Federal Rules of Civil Procedure, Plaintiff's response to the Court's Order to Show Cause was due January 20, 2010. This deadline is stated on the docket entry on the Court's Electronic Case Filing system ("Show Cause Response due by 1/20/2010") (See D.E.#28). To date, no response to the instant motion or to the Order to Show Cause has been filed.

If a plaintiff fails properly to prosecute an action, it can be dismissed either pursuant to the Court's inherent power to control its docket, or involuntarily under Fed.R.Civ.P. 41(b). *Link v. Wabash R. Co.*, 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962); *Boudwin v. Graystone Insurance Co.*, 756 F.2d 399 (5th Cir.1985). The Sixth Circuit has held that dismissal for failure to prosecute is warranted where the Court affords a plaintiff a reasonable period of time to comply with orders before the dismissal occurs, see *Harris v. Callwood*, 844 F.2d 1254 (6th Cir.1988); *Sepia Enterprises, Inc. v. City of Toledo*, 462 F.2d 1315 (6th Cir.1972) (per curiam). Dismissal may also be an appropriate sanction for failing to comply with an order compelling discovery. See Fed.R.Civ.P. 37.

Here, the Plaintiff has ignored the Court's orders and has failed to participate in discovery.

¹ Because the motion sought dismissal as a sanction pursuant to Rule 37 of the Federal Rules of Civil Procedure rather than Rule 12(b) or Rule 56, the respondent must file a response within fifteen days rather than thirty days in order to comply with Local Rule 7.2(a).

During the course of a telephonic hearing on Plaintiff's former counsel's Motion to Withdraw (D.E. # 24, September 3, 2009), Plaintiff was ordered to retain new counsel within thirty (30) days of the date of the hearing and was ordered to attend his deposition. To date, the docket does not reflect the appearance of counsel on behalf of Plaintiff. Further, Plaintiff has not appeared for properly noticed depositions. Dismissal is appropriate pursuant to the Court's inherent power to control its docket and as a sanction pursuant to Fed. R. Civ. P. 37(d) for failing to cooperate with discovery.

Accordingly, the Court RECOMMENDS that Defendant's Motion to Dismiss Plaintiff's Complaint be GRANTED and that Defendant's request for attorney's fees be GRANTED. The Court further RECOMMENDS that Defendant's Motion to Dismiss for Lack of Prosecution be DENIED as MOOT.

IT IS SO ORDERED this 4th day of February, 2010.

s/ Charmiane G. Claxton
CHARMIANE G. CLAXTON
UNITED STATES MAGISTRATE JUDGE

ANY OBJECTIONS OR EXCEPTIONS TO THIS REPORT MUST BE FILED WITHIN FOURTEEN (14) DAYS AFTER BEING SERVED WITH A COPY OF THE REPORT. 28 U.S.C. § 636(b)(1)(C). FAILURE TO FILE SAID OBJECTIONS OR EXCEPTIONS WITHIN FOURTEEN (14) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND ANY FURTHER APPEAL.