

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

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ELEANOR ROBIN BELL-FLOWERS,            )  
  )  
      Plaintiff,                            )  
  )  
vs.    )  
  )  
PROGRESSIVE INSURANCE COMPANY,        )  
  )  
      Defendant.                            )

No. 04-3026 B/P

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REPORT AND RECOMMENDATION

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Before the court is defendant Progressive Casualty Insurance Company's ("Progressive") Renewed Motion to Dismiss Under Rule 37 and Supporting Memorandum of Facts and Law, filed June 28, 2006 (D.E. 52). Plaintiff Eleanor Robin Bell-Flowers, *pro se*, did not file a response to Progressive's Renewed Motion to Dismiss within the time allowed under Local Rule 7.2(a)(2). On July 25, 2006, the court entered an Order to Show Cause directing Bell-Flowers to file a response within eleven days from the date of the order and warning her that "failure to comply with this order shall result in a recommendation to the District Judge that the defendant's motion to dismiss be granted and/or the case be dismissed for failure to prosecute." The time for Bell-Flowers to respond to the court's show cause order has passed, and to date, Bell-Flowers has still not filed a response.

The motion was referred to the Magistrate Judge for a report and recommendation. For the reasons below, the court recommends that Progressive's renewed motion to dismiss be granted, and that Bell-Flowers's complaint be dismissed with prejudice. The court further recommends that Progressive's request for additional sanctions, including attorney fees, be denied.

**I. PROPOSED FINDINGS OF FACT**

Bell-Flowers filed a *pro se* complaint against Progressive on December 17, 2004, alleging that she was discriminated against on the basis of her race in the course of her employment with Progressive, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. On March 29, 2005, the court entered an Order to Issue and Effect Service of Process. In that order, the court warned Bell-Flowers that "[f]ailure to comply with these requirements, or any other order of the Court, may result in this case being dismissed without further notice." On October 20, 2005, the court conducted a scheduling conference with Bell-Flowers and Progressive's counsel, and on that same day, entered a scheduling order requiring each party to complete discovery by April 14, 2006 and file dispositive motions by May 31, 2006.

On October 31, 2005, Progressive served Bell-Flowers with a Notice to Take Plaintiff's Deposition, First Set of Interrogatories to Plaintiff, and First Request for Production of Documents. Progressive noticed Bell-Flowers's deposition for Monday, December

19, 2005, at 9:00 a.m. On Friday, December 16, 2005, at approximately 4:57 p.m., Bell-Flowers attempted to contact Progressive's counsel, who was unavailable. She left a voice-mail message indicating that she wished to discuss her upcoming deposition, but did not inform counsel that she would be unable to be deposed on December 19. At 6:37 p.m. on December 17, Bell-Flowers's physician faxed Progressive's counsel a letter which stated that Bell-Flowers would be unable to attend her upcoming deposition due to medical treatment that Bell-Flowers was receiving. The letter did not explain plaintiff's "medical condition" or why that condition prevented plaintiff from appearing for her deposition. Counsel for Progressive first received Bell-Flowers's voice-mail message and faxed letter at 8:30 a.m. on December 19, 2005, thirty minutes before Bell-Flowers was scheduled to be deposed. Bell-Flowers did not appear for her deposition on December 19, 2005.

Progressive noticed Bell-Flowers's deposition for a second time for February 8, 2006. Bell-Flowers did not appear for her deposition on February 8, and did not contact Progressive's counsel concerning her deposition.<sup>1</sup> Moreover, despite having been served with Progressive's First Set of Interrogatories and Progressive's First Request for Production of Documents on October 31, 2005,

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<sup>1</sup>At the April 13, 2006 hearing, discussed *infra*, Bell-Flowers stated that she never received any notice of the February 8 deposition.

Bell-Flowers had not responded to either of these discovery requests.

On December 27, 2005, Progressive filed a motion to dismiss the complaint based on Bell-Flowers's failure to appear at her December 19 deposition and her failure to respond to Progressive's discovery requests. Progressive filed a supplemental memorandum on February 10, 2006, after Bell-Flowers did not appear for her February 8 deposition. Bell-Flowers did not file a response to Progressive's motion to dismiss until after the court entered an order to show cause on February 8.<sup>2</sup>

On April 13, 2006, the court held a hearing on the motion to dismiss. On May 19, 2006, the court entered an order denying Progressive's motion to dismiss. Although the court found that Bell-Flowers's failure to appear at her December 19 deposition and failure to provide complete discovery responses were serious violations of the court's scheduling order and the rules of discovery, the court concluded that the extreme sanction of dismissal was not warranted at that time. The court ordered Bell-Flowers to respond to Progressive's First Set of Interrogatories and Progressive's First Request for Production of Documents within two weeks from the date of that order. The court further ordered

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<sup>2</sup>In addition to its Motion to Dismiss Due to Plaintiff's Failure to Appear at Deposition or Respond to Interrogatories and Document Requests, filed December 27, 2005, Progressive also filed a motion to dismiss the amended complaint on March 29, 2006.

Bell-Flowers to appear for her deposition at a date and location to be determined by Progressive. Finally, the court warned Bell-Flowers "that any violation of this order, failure to participate in discovery, or failure to appear at a noticed deposition shall result in a recommendation to the District Judge that her case be dismissed with prejudice."

Pursuant to the court's May 19 order, Bell-Flowers's responses to Progressive's First Set of Interrogatories and First Request for Production of Documents were due June 2, 2006. To date, she has not provided Progressive with her discovery responses. On June 20, 2006, Bell-Flowers faxed a hand-written letter to counsel for Progressive acknowledging that she had not responded to the outstanding discovery requests, and further stating that "I will not pursue a claim with Progressive at this time." (6/20/06 letter from Bell-Flowers attached as exhibit 6 to Def.'s Renewed Mot. to Dismiss).

On May 25, 2006, Progressive noticed Bell-Flowers's deposition for the third time for June 27, 2006. (5/25/06 letter and deposition notice attached as exhibit 2 to Def.'s Renewed Mot. to Dismiss). On June 6, 2006, counsel for Progressive called Bell-Flowers to remind her of the deposition. On that same day, Progressive's counsel also faxed Bell-Flowers another copy of the deposition notice. (6/6/06 letter and deposition notice attached as exhibit 5 to Def.'s Renewed Mot. to Dismiss). Plaintiff,

however, did not appear for her deposition on June 27, 2006, nor did she provide Progressive with any explanation as to why she could not appear. (6/27/06 deposition transcript attached as exhibit to Def.'s Renewed Mot. to Dismiss). As a result of Bell-Flowers's noncompliance with this court's orders and failure to participate in discovery, Progressive filed its renewed motion to dismiss on June 28, 2006.

## II. PROPOSED CONCLUSIONS OF LAW

Federal Rule of Civil Procedure 37 empowers the court, upon motion, to sanction a party for failing to cooperate in discovery. See Fed. R. Civ. P. 37(b)(2),(c),(d). The rule provides in part as follows:

**(b)(2) Sanctions by Court in Which Action is Pending.** If a party . . . fails to obey an order to provide or permit discovery, . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following: . . . (C) An order . . . dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party; . . .

**(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection.** If a party . . . fails (1) to appear before the officer who is to take the deposition after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule.

Id. Thus, Rule 37(b)(2)(C) and (d) expressly authorize the court to dismiss an action for a party's failure to comply with a court order compelling discovery, to respond to interrogatories and document requests, or to appear for her deposition. Id.; see also Tech. Recycling Corp. v. City of Taylor, Nos. 04-1798, 04-2205, 2006 U.S. App. LEXIS 16590, at \*15 (6th Cir. June 28, 2006) (unpublished) (affirming order of dismissal pursuant to Rule 37(b)(2)); Bullard v. Roadway Express, No. 99-6497, 2001 U.S. App. LEXIS 2251, at \*7-8 (6th Cir. Feb. 5, 2001) (unpublished) ("When dismissal is based upon the failure to provide discovery, the Supreme Court has indicated that dismissal is properly brought under Fed. R. Civ. P. 37(b)") (citing Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers, 357 U.S. 197, 210, 2 L. Ed. 2d 1255, 78 S. Ct. 1087 (1958)).

In determining what type of sanctions are warranted under Rule 37, the court should consider the following four factors:

The first factor is whether the party's failure to cooperate in discovery is due to willfulness, bad faith, or fault; the second factor is whether the adversary was prejudiced by the party's failure to cooperate in discovery; the third factor is whether the party was warned that failure to cooperate could lead to the sanction; and the fourth factor in regard to a dismissal is whether less drastic sanctions were first imposed or considered.<sup>3</sup>

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<sup>3</sup>The court notes that these same four factors should be considered when deciding whether to dismiss a case for failure to prosecute pursuant to Fed. R. Civ. P. 41(b). See Tung-Hsiung Wu v. T.W. Wang, Inc., 420 F.3d 641, 643 (6th Cir. 2005).

Freeland v. Amigo, 103 F.3d 1271, 1277 (6th Cir. 1997); Hayman v. PricewaterhouseCoopers, LLP (In re Telxon Corp. Secs. Litig.), Nos. 98-2876, 01-1078, 2004 U.S. Dist. LEXIS 27296, at \*67 (N.D. Ohio July 16, 2004) (unpublished); Jack Tyler Eng'g Co. v. ITT FLYGT Corp., No. 03-2060, 2004 U.S. Dist. LEXIS 26155, at \*12-13 (W.D. Tenn. June 9, 2004)(unpublished).

It is recommended that Progressive's renewed motion to dismiss be granted due to Bell-Flowers's failure to comply with this court's May 19 order, failure to respond to defendant's interrogatories and document requests, and failure to appear for her properly noticed deposition. First, it is submitted that Bell-Flowers's discovery violations are willful. Despite being ordered by this court in its May 19 order to provide responses to Progressive's interrogatories and document requests, which were served on her in October 2005, to date Bell-Flowers has not complied with this order. Bell-Flowers also failed to appear for her deposition on June 27, 2006, despite being ordered by the court to do so.

Second, Progressive is prejudiced by Bell-Flowers's discovery violations. The current deadlines of April 14, 2006 for completing discovery and May 31, 2006 for filing dispositive motions have expired under the scheduling order, and to date, Bell-Flowers has not appeared for her deposition and has not responded to any of the outstanding discovery requests. Thus, Progressive has been denied



the opportunity to conduct discovery to defend against plaintiff's claims.

Third, the court has warned Bell-Flowers multiple times that failure to cooperate in discovery or obey court orders would result in dismissal of her complaint. Specifically, when the court entered an Order to Issue and Effect Service of Process, the court warned plaintiff that "[f]ailure to comply with these requirements, or any other order of the Court, may result in this case being dismissed without further notice." In the May 19 order, the court warned Bell-Flowers that failure to comply with the court's order, to participate in discovery, or to appear for her deposition would result in a recommendation to the District Judge that her case be dismissed with prejudice. Moreover, in the July 25, 2006 order to show cause, the court again warned Bell-Flowers that her failure to respond to the show cause order "shall result in a recommendation to the District Judge that the defendant's motion to dismiss be granted and/or the case be dismissed for failure to prosecute."

Fourth, the court has considered imposing other, less drastic sanctions, such as reimbursement of attorney fees and other available sanctions under Fed. R. Civ. P. 37. It is submitted, however, that the sanction of dismissal is appropriate under the circumstances. Progressive has made numerous attempts to obtain the outstanding discovery materials and to take plaintiff's deposition, but has been unsuccessful due to Bell-Flowers's

conduct. Bell-Flowers's repeated failure to respond to discovery requests, appear for her deposition, and comply with this court's orders, including the scheduling order and the May 19 order, warrants the sanction of dismissal.

### III. RECOMMENDATION

For the reasons above, the court recommends that Progressive's Renewed Motion to Dismiss Under Rule 37 be granted, and that the case be dismissed with prejudice. The court further recommends that Progressive's request for additional sanctions, including attorney fees, be denied, as an order of dismissal with prejudice sufficiently addresses the discovery violations at issue.

Respectfully Submitted.

S/ Tu M. Pham

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TU M. PHAM  
United States Magistrate Judge

August 15, 2006

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Date

### 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 ANY FURTHER APPEAL.