

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

MARGIE ROBERTSON,)
)
 Plaintiff,)
)
 vs.) No. 03-2672-MaV
)
 CITY OF MEMPHIS, TENNESSEE,)
 and ANDREA JAYE MOSBY-WHARWOOD,)
 individually)
 Defendants.)

REPORT AND RECOMMENDATION
THAT DEFENDANT'S MOTION TO DISMISS BE GRANTED

Before the court is the September 24, 2004, motion of the defendant, Andrea Jaye Mosby-Wharwood, to dismiss plaintiff's complaint for failure to comply with the court's orders of July 1, 2004 and September 16, 2004, requiring the plaintiff to file responses to Mosby-Wharwood's discovery requests. The motion was referred to the United States Magistrate Judge for determination. The plaintiff, Margie Robertson, has not responded to the motion, and the time for response has expired. For the reasons that follow, it is recommended that the motion to dismiss be granted.

Defendant City of Memphis served interrogatories and requests for admissions on Robertson on May 20, 2004. Robertson failed to respond by June 22, 2004. The City of Memphis then moved for an order compelling Robertson to respond. Robertson failed to respond

to the motion to compel. The court then ordered Robertson to file responses within twenty days of the date of entry of the court's order. Robertson again failed to comply with the court's order and has failed to file full and complete responses to the City of Memphis' requested discovery. On August 11, 2004, Mosby-Wharwood filed a motion to compel discovery, or in the alternative, to dismiss the complaint. This court, on September 16, 2004, entered an order granting Mosby-Wharwood's motion to compel but denying Mosby-Wharwood's motion to dismiss on the grounds that Robertson had not been sufficiently warned that her conduct in refusing to comply with discovery requests would lead to dismissal. Again, Robertson failed to respond to this latest order which required her to file responses to discovery requests. Robertson has also failed to file a responsive pleading to Mosby-Wharwood's second motion to compel filed September 24, 2004.

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, the court, in its September 16, 2004 order, sufficiently warned Robertson that her failure to comply with proper discovery requests and orders of the court would lead to dismissal of her complaint. Robertson has ignored the orders of the court and has continuously failed to comply with discovery requests. Accordingly, it is recommended that Robertson's complaint be dismissed.

Respectfully submitted this 13th day of October, 2004.

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE

