

tempted to reach his client and only got his answering machine, and was unable to reach Mr. Dorf on his car phone.

4. Complainant admits that he had no real justification for missing the deposition and states that he simply forgot about it.

Respondent seeks an order dismissing the complaint and rendering judgment by default against the complainant, an award of attorney fees and costs associated with the failure to attend the deposition and an award of attorney fees and costs involved in producing the motion to dismiss. Pursuant to §804.12(4), Stats.:

If... a party fails... to appear before the officer who is to take the party's deposition, after being served with a proper notice... the court in which the action is pending may make such orders in regard to the failure as are just, and among others, it may take any action authorized under sub. (2)(a)1, 2 and 3. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising the party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The remedies set forth in §804.12(2)(a)1, 2 and 3 are:

1. An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
2. An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the disobedient party from introducing designated matters in evidence;
3. An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

The complainant suggests that the appropriate remedy when a party forgets to attend a deposition is "simply rescheduling the deposition for another time." This suggestion either ignores the possibility that costs were incurred by the opposing side in convening the deposition or would place the

burden of those costs on the shoulders of respondent, which properly provided complainant with notice of the deposition.

The Commission concludes that some sanctions should be imposed against the complainant. His failure to appear was unjustified and caused the respondent to incur costs which it otherwise would not have incurred. However, the failure to appear at the deposition, by itself, does not justify the extremely harsh sanction of dismissing the complaint. Dismissal, typically, would only be appropriate where there has been repeated misconduct.

In its May 9, 1994, letter, respondent indicates that complainant, through counsel, had agreed in mid-April to settle the issue of discovery sanctions by reimbursing respondent for certain costs and appearing at a deposition on May 6th. Respondent states that the "re-take" of the deposition had to be cancelled when, on May 5th, complainant's counsel informed respondent that the complainant was refusing to sign a settlement agreement that had been reached verbally. The most that can be said for these events is that the complainant apparently changed his mind regarding settlement of this issue. There is nothing in the file to suggest that he was served with notice of the May 6th deposition and again did not appear.

Having found under §804.12(4), Stats., that the complainant's failure to appear on January 26, 1994, was not substantially justified and the complainant having identified no circumstances which would make an award of expenses unjust, the Commission issues the following

ORDER

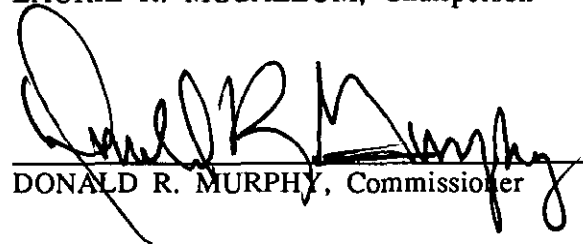
Respondent's motion to dismiss this matter is denied. Respondent is granted reasonable expenses, including attorneys fees as a consequence of complainant's failure to appear at his deposition. Respondent is provided 15 days from the date of this ruling in which to file a listing of fees and expenses arising from the complainant's failure to appear at deposition scheduled for the January 26, 1994. The complainant will then have 10 days in which to file a written response to the request.

Dated: May 27, 1994

STATE PERSONNEL COMMISSION


LAURIE R. MCCALLUM, Chairperson

KMS:kms
K:D:temp-7/94 Dorf


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner