IN THE
SUPREME COURT OF THE UNITED STATES

DAVID JOHNSON,
Petitioner,
v.

STEVEN MNUCHIN, SECRETARY DEPARTMENT OF THE TREASURY, SERGIO ARELLANO, SUSAN J. KASS, DAVID OYLER, LARRY G. KOTTKE, JAMES M JOHNSON, LYNN G. GANZ, PATRICK WOZEK, FRED SAVAGLIO, ROBERT TRZAKUS, and DARLENE MCVEY,
Respondents.

APPENDIX A

Activity in Case 1:14-cv-02233 Johnson v. Lew et al Nonprecedential Disposition

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Docket Text:
NONPRECEDENTIAL DISPOSITION from the USCA for the 7th Circuit; Argued/Submitted 10/23/2020; Decided 10/26/2020 in USCA case no. 19-2825; The district court's judgment is AFFIRMED. Johnson's motion for a summary reversal is DENIED as irrelevant. (jh,)

1:14-cv-02233 Notice has been electronically mailed to:

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United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted October 23, 2020*
Decided October 26, 2020

Before

MICHAEL B. BRENNAN, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

No. 19-2825

DAVID M. JOHNSON,
Plaintiff-Appellant,

v.

STEVEN MNUCHIN, Secretary of the Treasury,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

14 C 2233

John Z. Lee
Judge.

ORDER

David Johnson, a former employee of the Internal Revenue Service, appeals the dismissal of his employment-discrimination suit as a sanction for abusing the judicial process. We affirm.

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* We have agreed to decide this case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. Fed. R. App. P. 34(a)(2)(C).

After being fired from his job, Johnson sued the Secretary of the Treasury, currently Steven Mnuchin, for a litany of claims, including race discrimination, hostile work environment, many state-law claims, and retaliation for filing a complaint with the Equal Employment Opportunity Commission. The district court later granted summary judgment against Johnson on several claims but allowed him to proceed to trial on Title VII claims of retaliation and disparate treatment. *See* 42 U.S.C. § 2000e–e17.

The proceedings in the district court were protracted. Over the course of five years, Johnson peppered the court with filings, often staking out frivolous positions in motions and pleadings. He also refused to cooperate in the discovery and pretrial processes. He repeatedly failed to make required court appearances and delayed the progress of the case through vexatious litigation tactics (e.g., filing motions to compel discovery even before effectuating proper service on the defendant; prematurely seeking judgment on the pleadings before the defendant had filed an answer; and filing baseless motions, often in disregard of the court's timeline for the case). He obstructed the pretrial process by seeking continuances, pursuing positions that the court characterized as unreasonable, issuing baseless subpoenas or ignoring the court's standing orders, and failing to participate in the court's efforts to craft an agenda for the final pretrial conference.

In September 2019, the district court ordered Johnson to show cause why the case should not be dismissed based on his intractable conduct. Two days later, Johnson filed "objections" that the court described as "barely responsive." (Johnson challenged the court's order, for example, as "void without jurisdiction.") Johnson blamed the defendant for his noncompliance with the court's standing orders.

After repeated warnings, the district court decided to dismiss Johnson's case as a sanction for his conduct. The court justified its decision based on its need to manage its docket, Johnson's willful and bad-faith conduct throughout the litigation, the likely ineffectiveness of lesser sanctions, the prejudice to the defendant as a result of Johnson's conduct, and the need for deterrence and punishment.

On appeal, Johnson does not engage with the district court's reasons for dismissing his case and instead argues the merits of his claims. We could affirm on that basis alone. *See* FED. R. APP. P. 28(a)(8); *Anderson v. Hardman*, 241 F.3d 544, 545 (7th Cir. 2001). For completeness, however, we emphasize that this case's record demonstrates unmistakably Johnson's intransigence, vexatious conduct, and flouting of court orders, all of which amply justify dismissal as a sanction. *Brown v. Columbia Sussex Corp.*,

664 F.3d 182, 190–91 (7th Cir. 2011). Johnson regularly missed required court hearings, defied court orders, pressed frivolous arguments, and pursued this litigation in bad faith. This bad faith conduct continued during the time that Johnson was represented by counsel. Rather than complying with the district court's request that all filings go through his lawyer, Johnson continued to make his own filings, without consulting his attorney. The court warned Johnson of the consequences of his continued misconduct, and, after waiting patiently, issued a show-cause order directing him to explain why his case should not be dismissed for noncompliance with court orders, and his response did not address the court's concerns. Providing such notice and the opportunity to be heard was all that the court needed to give Johnson. *See Fischer v. Cingular Wireless, LLC*, 446 F.3d 663, 664–66 (7th Cir. 2006); *Shaffer v. Lashbrook*, 962 F.3d 313, 316 (7th Cir. 2020). Judge Lee demonstrated remarkable patience throughout the course of this litigation, and the district court acted well within its discretion to dismiss the case as a sanction.

The district court's judgment is AFFIRMED. Johnson's motion for a summary reversal is DENIED as irrelevant.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DAVID JOHNSON,	)	
	)	
Plaintiff,	)	
	)	**14 C 2233**
v.	)	
	)	**Judge John Z. Lee**
STEVEN MNUCHIN, U.S. Secretary of the Treasury,	)	
	)	
Defendant.	)	

ORDER OF DISMISSAL WITH PREJUDICE

For over five years, Plaintiff David Johnson has willfully ignored this Court's orders, taken frivolous positions in motions and pleadings, and refused to engage cooperatively in the discovery and pretrial processes. His bad-faith and vexatious conduct has rendered it all but impossible for the Court to set a jury trial, or, once set, to manage such a trial. Johnson's refusal to participate in the most recent status hearing is just the latest example. For the reasons detailed below, the Court dismisses this case with prejudice as a sanction for his conduct. Civil case terminated.

Background

Plaintiff filed this case in March 2014, setting forth his claims in an eighteen-count complaint alleging race discrimination; a hostile and abusive work environment; retaliation; violations of the Fifth and Thirteenth Amendments; discrimination in violation of the Americans with Disabilities Act ("ADA"); spoliation of evidence; and a variety of state-law claims on behalf of himself and a putative class of African-American employees of the Department of the Treasury ("the Department"). *See generally* Compl., ECF No. 1. Soon thereafter, he filed an amended complaint ("FAC"), adding claims under the Racketeering Influenced & Corrupt Organizations Act ("RICO") and the Labor Management Relations Act ("LMRA"). *See generally* 1st Am. Compl., ECF No. 9. Plaintiff originally named as Defendants U.S. Treasury Secretary Jacob Lew,[1] as well as a number of individual employees of the Department.

Defendants filed a motion to dismiss the FAC, ECF No. 115, which the Court granted. *See* 12/4/15 Order, ECF No. 147. The Court then allowed Plaintiff to file a Second Amended Complaint ("SAC"). *Id.* In his SAC, Plaintiff eliminated his class-action allegations and asserted claims for retaliation; "investigative detention" in violation of the Fourth Amendment and the Stored Communications Act ("SCA"); deprivation of property in violation of due process; race discrimination in violation of the Fifth Amendment and Title VII; a hostile work environment; and

[1] Steven Mnuchin has replaced Lew as Treasury Secretary, and, accordingly, has been substituted for Lew on the docket of this case. *See* ECF No. 350.

breach of contract. *See generally* 2d Am. Compl., ECF No. 154. Defendants again moved to dismiss. ECF No. 159. The Court granted Defendants' motion in large part, dismissing the claims against all the individual Defendants and permitting Plaintiff to proceed only on his Title VII claims against the Department. *See generally* 8/10/16 Mem. Op. & Order, ECF No. 198.

After discovery had concluded, the parties filed cross-motions for summary judgment; Plaintiff also filed a motion for sanctions. The Court denied Plaintiff's motions, and granted in part and denied in part Defendant's motion. 3/28/18 Order, ECF No. 390. In particular, the Court dismissed Plaintiff's retaliation claim to the extent it was based on a denial of training; Plaintiff's disparate-treatment race-discrimination claim to the extent it was based on being screamed at by an instructor, James Johnson; Plaintiff's disparate-impact race-discrimination claim; and Plaintiff's hostile-work-environment claim. *See generally id.*

Accordingly, Plaintiff's case is set to proceed to trial on Plaintiff's retaliation and disparate-treatment claims as to the following adverse actions: termination, failure to promote, and fabrication of performance evaluations. *Id.* at 17.

Discussion

The Court has inherent authority to rectify abuses to the judicial process by sanctioning offending conduct. *Dotson v. Bravo*, 321 F.3d 663, 667 (7th Cir. 2003). The choice of appropriate sanctions is "primarily the responsibility of the district court," *Patterson v. Coca-Cola Bottling Co. Cairo-Sikeston, Inc.*, 852 F.2d 280, 283 (7th Cir. 1988), but "the sanction selected must be one that a reasonable jurist, apprised of all the circumstances, would have chosen as proportionate to the infraction," *Salgado v. Gen. Motors Corp.*, 150 F.3d 735, 740 (7th Cir. 1998).

"The sanction of dismissal with prejudice must be infrequently resorted to by district courts in their attempts to control their dockets and extirpate nuisance suits." *Schilling v. Walworth Cty. Park & Planning Comm'n*, 805 F.2d 272, 275 (7th Cir. 1986). Still, "when the interests of justice are best served by dismissal," this sanction may be appropriate. *Id.* Dismissal as a sanction is particularly appropriate where "the noncomplying party acted with willfulness, bad faith[,] or fault." *Long v. Steepro*, 213 F.3d 983, 987 (7th Cir. 2000) (quoting *Marrocco v. Gen. Motors Corp.*, 966 F.2d 220, 224 (7th Cir. 1992)). Such a situation exists "when there is a clear record of delay or contumacious conduct, or when other less drastic sanctions have proven unavailing." *Schilling*, 805 F.2d at 275 (quoting *Webber v. Eye Corp.*, 721 F.2d 1067, 1069 (7th Cir. 1983)). Although such a sanction is within the Court's discretion, the Court must "consider less severe sanctions and explain, where not obvious, their inadequacy for promoting the interests of justice." *Id.* The choice between dismissal and lesser sanctions requires the Court to weigh three main considerations: (1) prejudice to Defendant as a result of Plaintiff's conduct; (2) prejudice to the judicial system; and (3) deterrence and punishment. *Id.* Additionally, such a sanction "requires that the party to be sanctioned receive notice of the possible sanction and the opportunity to be heard." *Johnson v. Cherry*, 422 F.3d 540, 549 (7th Cir. 2005) (quoting *Larsen v. City of Beloit*, 130 F.3d 1278, 1286 (7th Cir. 1997)).

Plaintiff has engaged in repeated examples of conduct meeting the standard for dismissal with prejudice throughout this litigation, much of which has subjected him to repeated warnings

by the Court. Still, in deference to Plaintiff's *pro se* status, the Court has given Plaintiff numerous chances to litigate this case in compliance with the Federal Rules of Civil Procedure, the Court's Local Rules, and the Court's standing orders. After reviewing the history of the case—including Plaintiff's failure to participate in court hearings, his unreasonable approach to the litigation and discovery, and his obstruction of the pretrial process—as well as Plaintiff's response to the Court's show-cause order—the Court finds that Plaintiff has exhausted his chances and that dismissal of this action with prejudice is appropriate.

I. Plaintiff's Willful Ignorance of Required Court Appearances

Plaintiff has shown a willful ignorance of required court appearances, which is particularly egregious given that the Court typically allows Plaintiff to appear telephonically for status and motion hearings.

The first such example was on November 6, 2014, shortly after the case was filed. At that time, the Court noted that Plaintiff did not appear for the status hearing and had not yet properly served Defendants. *See* ECF No. 45. The Court explained that, if Plaintiff failed to serve Defendants by the next status hearing, the case would be dismissed pursuant to Federal Rule of Civil Procedure 4(m). *Id.*

Next, on March 31, 2015, Plaintiff again did not appear for a status hearing. *See* ECF No. 76. The Court ordered him to appear at the next status hearing "or risk the case being dismissed for want of prosecution." *Id.*

Later, after the Court largely granted Defendants' motion to dismiss the SAC, it set a status hearing for August 18, 2016. ECF No. 197. Plaintiff moved to reset that status hearing to August 30. ECF No. 199. Furthermore, Plaintiff noticed three additional motions for August 30. ECF No. 205. On August 26, Plaintiff withdrew his motions, ECF No. 208, and then did not appear for the August 30 status and motion hearing. ECF No. 209.

Discovery proceeded, and the Court referred general discovery supervision to Magistrate Judge M. David Weisman. ECF No. 259. On Monday, June 5, 2017, Plaintiff failed to appear for a status hearing before Magistrate Judge Weisman, after providing notice on the preceding Saturday "of his inability to attend." ECF No. 351. Magistrate Judge Weisman explained to Plaintiff that "court appearances are not invitations to attend and appearance is mandatory." *Id.* Yet, at the next status hearing before Magistrate Judge Weisman, Plaintiff again did not appear. ECF No. 355.

The problem persisted as the Court attempted to schedule a pretrial conference and trial. On July 17 and 23, 2018, the Court was unable to reach Plaintiff by telephone for status calls. ECF Nos. 399, 407. The Court set a date for a final pretrial conference and ordered Plaintiff to appear in person. ECF No. 407. The Court reiterated that requirement twice more during the pretrial process. ECF Nos. 419, 448.

Despite these warnings, one day before the most recently scheduled status hearing (for September 10, 2019), Plaintiff emailed the courtroom deputy stating that he would be "unable to

participate in the status hearing due to a prior commitment." ECF No. 476. In other words, rather than filing a motion to reset the status hearing, he simply informed the Court the day before the status hearing that he would not be attending. *Id.* This refusal to treat court appearances as required is inexcusable in light of the previous warnings and admonishments Plaintiff has received.

II. Plaintiff's Unreasonable Litigation and Discovery Positions

Plaintiff has also taken a vexatious, unreasonable, and often frivolous approach to this litigation—including during the discovery process—with the result of substantially delaying the progress of this case.

First, before Plaintiff had even effectuated proper service on Defendants, he filed a motion to compel Defendants to confer pursuant to Federal Rule of Civil Procedure 26(f), and, failing that, for sanctions pursuant to Rules 16(f), 26(f), and 37(b) and (c). *See* ECF Nos. 29, 35. Defendants correctly noted that service had not been effectuated, and that in any event, a Rule 26(f) conference was premature. *See* ECF No. 33. The Court denied Plaintiff's motions and ordered him to effectuate service pursuant to Rule 4(i). ECF No. 36.

Next, following Defendants' motion to dismiss the FAC, Plaintiff filed a motion for judgment on the pleadings. *See* ECF Nos. 62, 64. As Defendant had not yet filed an answer, the Court struck Plaintiff's motion as premature. ECF No. 65. In response, Plaintiff filed a notice of appeal. ECF No. 67. The Court certified Plaintiff's appeal as having not been taken in good faith, given that (1) the case was ongoing, (2) Plaintiff had not moved for an interlocutory appeal, and (3) the Court did not see a basis for such an appeal at that time. ECF No. 74.

Still, after Defendants filed a renewed motion to dismiss the FAC, Plaintiff filed both a motion for partial summary judgment and a motion for leave to amend. ECF Nos. 118, 122. The Court struck both motions, stating that Plaintiff should stick with the current schedule and respond to the pending motion to dismiss. ECF No. 126. Plaintiff, apparently ignoring that order, immediately filed another motion for leave to amend. ECF No. 127. The Court, giving Plaintiff the benefit of the doubt, elected to rule on Plaintiff's motion along with the pending motion to dismiss. ECF No. 130.

Although the Court allowed Plaintiff to file his SAC after granting Defendants' motion to dismiss the FAC, Plaintiff, apparently dissatisfied with this opportunity, filed "Objections" to the Court's order of dismissal. ECF No. 166. Although the filing of Plaintiff's SAC rendered the Court's dismissal of the FAC moot, the Court construed Plaintiff's "Objections" as a motion to reconsider and set a briefing schedule. ECF No. 173. In response, Plaintiff filed additional "Objections." ECF No. 178.

Similarly, after Defendants moved to dismiss Plaintiff's SAC, Plaintiff again responded by filing a partial motion for summary judgment. ECF Nos. 161, 163, 164, 165. The Court again struck this motion as premature and ordered Plaintiff to respond to the motion to dismiss. ECF No. 173. Later, Plaintiff filed "Objections" to Defendants' reply brief in support of their motion to dismiss, without seeking leave to file a sur-reply. ECF Nos. 188, 190, 192.

Next, as described in the preceding section, after the Court largely granted Defendants' motion to dismiss the SAC, Plaintiff filed a slew of motions, but did not appear to present them to the Court. *See* ECF No. 209. The Court denied Plaintiffs' motions, *id.*, and Plaintiff again attempted to bring an interlocutory appeal from the Court's order. ECF Nos. 212, 214. Furthermore, although Defendant had by then filed an answer, Plaintiff moved for entry of a default. ECF Nos. 215, 216. And Plaintiff moved to disqualify this Court. ECF No. 211. At a status hearing on November 9, 2016, the Court denied these motions, explaining that Plaintiff had not set forth any sound or reasonable basis for disqualification, that Defendant had filed a responsive pleading, and that there was no basis for an interlocutory appeal. *See* ECF No. 218.

Shortly after that status hearing, and despite the Court's rulings, Plaintiff again moved for recusal, ECF No. 219, and filed a notice of appeal from the Court's previous order, ECF No. 220. The Court denied Plaintiff's motion for recusal for the same reasons as before. ECF No. 226. Plaintiff voluntarily dismissed his appeal. ECF No. 243.

In addition, Plaintiff repeatedly took unreasonable positions during the discovery process. For instance, at one point, Plaintiff "stated on the record that he planned to answer Defendant's interrogatories by producing his EEOC file, contending that all of the answers to the interrogatories are contained in the file." ECF No. 276. Magistrate Judge Weisman explained why this was not a reasonable approach and ordered that Plaintiff must respond with specific citations to the relevant portions of the file. *Id.* Next, Plaintiff moved to compel Defendant to disclose insurance agreements, which Magistrate Judge Weisman denied because there were "no insurance policies that could possibly be covered by Rule 26." ECF No. 285. Furthermore, Magistrate Judge Weisman granted multiple motions to compel filed by Defendants to force Plaintiff to more fully respond to discovery and warned Plaintiff of the consequences of failing to do so. ECF Nos. 306, 322. Defendant also had to move to compel Plaintiff to attend his deposition; Magistrate Judge Weisman granted this motion, noting that if Plaintiff failed to attend, he would be subject to sanctions ranging from fees to dismissal of this case. ECF No. 330. Plaintiff filed several objections to Magistrate Judge Weisman's orders, all of which the Court denied as meritless. ECF Nos. 350, 354, 359.

Plaintiff's response to Defendant's summary judgment motion also required the Court to intervene. First, Plaintiff filed a forty-nine-page brief entitled "Notice of Motion and Motion *in Limine*, Motion to Strike, Motion for Protective Order, and Sanctions." ECF No. 367. The Court struck this motion for violating Local Rule 7.1, which specifies that no brief may exceed 15 pages without prior approval, and for failing to move separately for sanctions. ECF No. 370. Plaintiff filed "Objections" to the Court's order, as well as his own motion for partial summary judgment. ECF Nos. 371, 373. The Court was then required to issue an order noting that Plaintiff had not responded to Defendant's motion for summary judgment by the deadline set for his response; the Court construed Plaintiff's partial motion for summary judgment "as indicating that Plaintiff does not intend to file a response to Defendant's motion for summary judgment." ECF No. 375. The Court set a new briefing schedule on Plaintiff's cross-motion, and denied Plaintiff's objections to the Court's order as lacking any basis. *Id.* Later, Plaintiff moved for leave to file a belated response to Defendant's motion for summary judgment, which the Court permitted. ECF No. 384.

After the Court ruled on the cross-motions for summary judgment, Plaintiff filed a motion for entry of an order setting a trial and final pretrial conference. ECF No. 391. The Court denied the motion, as the parties first needed an opportunity to exchange expert reports pursuant to Rule 26(a)(2). ECF No. 393. Dissatisfied, Plaintiff filed "Objections" to the Court's order. ECF Nos. 394, 395. The Court overruled the objections, explaining that Plaintiff need not serve expert reports if he did not so choose, but that, in that case, he would not be permitted to present expert testimony at trial. ECF No. 396. Furthermore, the Court explained that, to the extent Plaintiff believed the Court could not set a schedule for disclosures, that argument was meritless. *Id.* Plaintiff then filed more "Objections," ECF No. 397, which the Court denied. ECF No. 399. Soon thereafter, Plaintiff filed additional pretrial documents without leave or instruction by the Court. ECF Nos. 400, 401, 402.

Throughout the case, Plaintiff filed additional motions that were procedurally improper, based on frivolous argument, or both. Rather than holding these motions against Plaintiff, the Court evaluated them and generally denied them without much discussion. *See* Pl.'s Mot. Order to Show Cause why U.S. Marshal Serv. Should Not Be Held in Contempt, ECF No. 51; Pl.'s Mot. R. 37 Sanctions, ECF No. 171; Pl.'s Mot. Appoint Statistician, ECF No. 191; Pl.'s Mot. Entry of J., ECF No. 320; Pl.'s Mot. Set Trial Date or Dismiss, ECF No. 333; Pl.'s Mot. Sanctions, ECF No. 340; Pl.'s Mot. Vol. Dismiss, ECF No. 346; Pl.'s Mot. *in Limine*, ECF No. 367. Furthermore, the Court warned Plaintiff multiple times of the requirement that Plaintiff meet and confer with Defendant prior to filing motions. *See* ECF Nos. 301, 330, 423.

Additionally, Plaintiff adopted a practice of filing excessive motions—some of which similarly had no basis in law or fact—only later to withdraw them. *See* Pl.'s Mot. Compel Arb., ECF Nos. 234, 273; Pl.'s Mot. J. on Pleadings, ECF Nos. 237, 273; Pl.'s Mot. Sanctions, ECF Nos. 249, 301; Pl.'s Mot. Leave to File 3d Am. Compl., ECF Nos. 252, 294; Pl.'s Mot. Dismiss Lack of Jurisdiction under the Federal Magistrate Act, ECF Nos. 262, 301; Pl.'s Mot. Att'y Rep., ECF Nos. 266, 301; Pl.'s Mot. Compel, ECF Nos. 295, 306; Pl.'s Mot. Compel, ECF Nos. 297, 306; Pl.'s Mot. Withdraw Mot. Compel, ECF Nos. 298, 306; Pl.'s Objs., ECF Nos. 331, 339; Pl.'s Objs., ECF Nos. 332, 339; Pl.'s Mot. Withdraw Appearance, ECF Nos. 403, 410; Pl.'s Mot. Entry Final J., ECF Nos. 405, 410; Pl.s Mot. Rule to Show Cause, ECF Nos. 433, 436. This practice increased the burden of this case on the Court and wasted the Court's time. These motions wasted Defendant's time as well, particularly where Plaintiff withdrew them after the Court ordered Defendant to respond. *See* Def.'s Resp. Opp. Pl.'s Mot. Compel Arb., ECF No. 244; Def.'s Resp. Opp. Pl.'s Mot. J. on Pleadings, ECF No. 245. In one instance, after the Court granted multiple of Plaintiff's motions to withdraw prior motions, Plaintiff filed inexplicable "Objections" to the Court's order, ECF Nos. 302, 303, which the Court overruled, ECF No. 350.

The Court is aware that Plaintiff has proceeded *pro se* for much of this case, and *pro se* litigants are entitled to some lenience. Still, "those appearing *pro se* are not absolved from following procedural rules." *Dixon v. City of Rockford*, 299 F. App'x 590, 591 (7th Cir. 2008) (citing *Pearle Vision, Inc. v. Romm*, 541 F.3d 751, 758 (7th Cir. 2008)); *see also McNeil v. United States*, 508 U.S. 106, 113 (1993) ("[W]e have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel."). In other words, "[t]he essence of liberal construction [given to *pro se* parties] is to give a *pro se* plaintiff a break when, although he stumbles on a technicality, his pleading is otherwise

understandable," *Hudson v. McHugh*, 148 F.3d 859, 864 (7th Cir. 1998). This rule does not compel the Court to excuse willful ignorance of its orders and procedural rules. *See Downs v. Westphal*, 78 F.3d 1252, 1257 (7th Cir. 1996) ("[B]eing a *pro se* litigant does not give a party unbridled license to disregard clearly communicated court orders. It does not give the *pro se* litigant the discretion to choose which of the court's rules and orders it will follow, and which it will willfully disregard."). Plaintiff's conduct during this litigation cannot be characterized as simple mistakes based on faulty understanding of the rules; rather, he has deliberately ignored this Court's orders and attempted to circumvent its procedures. Given Plaintiff's long history of willful and vexatious behavior, the Court does not find that his *pro se* status absolves him of responsibility.

III. Plaintiff's Obstruction of the Pretrial Process

The Court ruled on the cross-motions for summary judgment in March 2018, yet—a year and a half later—the Court still has not been able to conduct a pretrial conference. Much (though not all) of this delay is attributable to Plaintiff's conduct during the pretrial process. This delay and Plaintiff's continued advocacy of unreasonable positions throughout the process have made it all but impossible to schedule this case for a final pretrial conference and trial.

In July 2018, this Court first scheduled a final pretrial conference for March 14, 2019. ECF No. 407. In December 2018, however, the federal government shut down due to a budgetary crisis, and the Court suspended all civil litigation in which the United States was a party. General Order 18-0028, ECF No. 411. In January 2019, the stay was lifted, General Order 19-0004, ECF No. 417, but Defendant moved to continue the trial, explaining that defense counsel's wife was expected to give birth the week of the final pretrial conference, *see* ECF No. 414. Accordingly, the Court reset the final pretrial conference for June 28, 2019, and the trial for July 22, 2019. ECF No. 419.

The Court ordered the following:

> Mr. Johnson must be present in person for the final pretrial conference and trial. A proposed final pretrial order is due by 5/30/19 and should be submitted to the Court's proposed order mailbox and not filed on the docket. Motions *in limine* are due by 5/23/19; responses are due by 5/30/19. The parties must comply with the Court's standing order regarding the preparation and submission of proposed final pretrial orders . . . available on the Court's website.

Id. Additionally, the Court had previously explained to the parties that "[a]lthough a plaintiff typically has the responsibility to provide a draft of the proposed final pretrial order to the defendant, because Plaintiff is *pro se*, the Court asks the government to provide the first draft to Plaintiff within the time specified in the standing order." ECF No. 407.

Despite the Court's order, within a week, Plaintiff had filed on the docket proposed jury instructions and a memorandum in support of his proposal. ECF Nos. 420, 421, 422. The Court struck these submissions and ordered the parties to meet and confer and submit a joint final pretrial order by the deadline of May 30, 2019. ECF No. 423.

A month later, Plaintiff retained an attorney, Arthur R. Ehrlich. ECF No. 424. But shortly before the deadline for the proposed pretrial order and motions *in limine*, Mr. Ehrlich moved to withdraw. ECF No. 425. Mr. Ehrlich explained that "irreconcilable differences" had arisen between him and Plaintiff, including "Plaintiff's failure to cooperate by providing various documents, insisting that legal claims be included for trial that cannot be appropriately raised at this juncture . . . insisting that his attorney limit cooperation with Defendant['s] attorney despite needing to do so to prepare the final pre-trial order, and not to file any pre-trial order despite repeated efforts to explain the importance of the pre-trial order for this case." *Id.* at 1.

The Court entered and continued Mr. Ehrlich's motion, preferring to see if Plaintiff and his attorney could salvage their relationship. ECF No. 429. The Court also extended the deadline for Plaintiff to file a response to Defendant's previously filed motion *in limine*. *Id.* But soon thereafter, and despite the fact that he was still represented by counsel, Plaintiff filed on the docket an exhibit list, proposed *voir dire*, proposed pretrial order, and a motion for a "rule to show cause" against Defendant for allegedly failing to meet, confer, and prepare a joint final pretrial order. ECF Nos. 430, 431, 432, 433.

Plaintiff soon filed a notice withdrawing his motion for a rule to show cause, indicating that he had "no matters to be pending before the district court other than the appearance at the final pre-trial hearing and the trial." ECF No. 436. The Court reminded Plaintiff that he was required to appear telephonically for the following date to which his counsel's motion to withdraw had been continued. ECF No. 437. If Plaintiff failed to appear, the Court warned Plaintiff that it would consider sanctions "up to and including dismissal for want of prosecution." *Id.*

At the motion hearing on June 4, 2019, Plaintiff "repeatedly confirmed on the record that he want[ed] his current counsel to represent him at trial." ECF No. 438. Accordingly, the Court admonished Plaintiff that "because Plaintiff is represented by counsel, Plaintiff must understand that filings and submissions to the Court are required to go through his counsel." *Id.* The Court prohibited Plaintiff "from filing any further submissions or issuing subpoenas *pro se* while he remains represented by counsel without first obtaining permission from the Court." *Id.* Finally, the Court reiterated that the dates for the trial and final pretrial conference would "not change." *Id.* The Court again extended the time to file the final pretrial order and Plaintiff's response to Defendant's motion *in limine*. *Id.* The Court warned the parties that "[i]f either side fails to comply with these deadlines or with the Court's standing orders, the Court will impose appropriate sanctions up to and including dismissal with prejudice of any remaining claims and defenses." *Id.*

Within three days, the Court received correspondence from Plaintiff in the Court's proposed order inbox, asking for leave not to appear for the final pretrial conference and attaching a draft motion for default judgment. *See* ECF No. 439. The Court repeated that Plaintiff was ordered to attend the pretrial conference and explained that failure to appear would result in sanctions "up to, and including, dismissal of Plaintiff's claims." *Id.* The Court further reiterated that Plaintiff was not permitted to file his draft motion *pro se*. *Id.*

Mr. Ehrlich filed Plaintiff's response to Defendant's motion *in limine* on June 14, 2019. But on June 17, after continuing to receive correspondence directly from Plaintiff in the Court's proposed order inbox, the Court was compelled to issue the following order:

> On 6/4/19, the Court issued an order prohibiting Plaintiff from . . . filing any further submissions or issuing subpoenas pro se while he remains represented by counsel without first obtaining permission from the Court. Since that date, Plaintiff has sent various emails to the Court's staff regarding matters related to this case. The Court will NOT recognize these emails as motions and will NOT take any actions in response to them. If Plaintiff wishes to file a motion, he may [1] file one through his counsel, or (2) file a separate motion seeking permission from the Court to file a motion *pro se*. Plaintiff should not send any more emails to the Court's staff (or copy them on any emails) regarding this matter. With respect to his relationship with his counsel, Plaintiff has two choices: (1) he may terminate his counsel and proceed to trial *pro se*, or (2) he can continue to work with his current counsel for the remainder of these proceedings. Furthermore, if Plaintiff's counsel believes that his relationship with Plaintiff has deteriorated to such an extent that he can no longer represent Plaintiff, counsel may file a motion for leave to withdraw[ ] after first providing a copy of the motion to Plaintiff and consulting with him. In any event, as the Court has repeatedly noted, in light of Plaintiff's conduct in this case, Plaintiff is ordered to appear at the final pre trial conference previously scheduled on 6/28/19. Plaintiff is warned that failure to appear will result in a dismissal of the case.

ECF No. 443.

Mr. Ehrlich then again moved to withdraw as counsel. ECF No. 444. Plaintiff responded by filing a pro se "Motion for Clarification," in which he again blamed Defendant's counsel for failing to comply with the Court's orders calling for preparation of a final pretrial order. ECF No. 447. Furthermore, Plaintiff apparently continued to flout the Court's order that he not file motions or issue subpoenas while represented, as the docket thereafter reflected several returns of subpoena filed by Plaintiff. ECF Nos. 449, 450, 451, 452.

On June 25, 2019—three days before the scheduled pretrial conference—the Court found it necessary to grant Mr. Ehrlich's motion to withdraw. *See* ECF No. 448. Because of the obvious impossibility of proceeding with the trial dates as scheduled—and despite the Court's earlier admonition that the dates would "not change," ECF No. 438—the Court was forced to reset the final pretrial conference to September 27, 2019, and the trial to November 4, 2019, to provide Plaintiff with an opportunity to present his remaining claims. ECF No. 448. The Court ordered as follows:

> Mr. Johnson must be present in person for the final pretrial conference and trial. A proposed final pretrial order is due by 9/6/19 and should be submitted to the Court's proposed order mailbox and not filed on the docket. Motions *in limine* are due by 9/6/19; responses are due by 9/13/19. The parties must comply with the Court's standing order regarding the preparation and submission of proposed final pretrial orders as amended by the Court [and] available on the Court's website.

Id.

At that point, Plaintiff's filings began to reflect his intent to pursue claims at trial that have long since been dismissed. For instance, in "Plaintiff's Notice of Filing Supplemental Exhibits to Plaintiff's Verified Complaint at Law and Plaintiff's Declaration in Opposition to Defendant's Motion," Plaintiff submitted over one thousand pages of exhibits, apparently intended to be "presented at trial as evidence to prove the liability and damages that Plaintiff has suffered because of the "negligen[t] supervision by Defendant Agency . . . . in violation of the Federal Tort Claims Act." ECF No. 453 at 2; *see also* Pl.'s Notice of Filing Suppl. Exs. Supp. Pl.'s Negligent Spoliation of Evidence Claim, ECF No. 461.

Additionally, Plaintiff issued subpoenas that the Court was required to quash, both because the subpoenas listed the July 2019 trial date and because they sought evidence despite document discovery having closed in June 2017. *See* ECF No. 460.

On August 23, 2019, again in contravention of the Court's order, Plaintiff filed on the docket an exhibit list, witness list, proposed jury instructions, and a proposed pretrial order. ECF Nos. 463, 464, 465, 466. Because of Plaintiff's lack of compliance with the Court's standing orders, and because the content of the documents clearly reflected that they were not joint work product, the Court struck them. *See* ECF No. 467. The Court again warned Plaintiff "that the parties must jointly submit a proposed pretrial order by the deadline of 9/6/19, or Defendant may file a motion seeking sanctions up to, and including, dismissal of Plaintiff's claims. The parties must comply with the Court's standing order regarding the preparation and submission of proposed final pretrial orders as amended by the Court at the June 25, 2019 status hearing." *Id.*

Plaintiff filed "Objections" to the Court's order, stating that he "will not be waiving his negligence claims" against Defendant and indicating that "[t]he Seventh Circuit has jurisdiction pursuant to the Federal Tort Claims Act." ECF No. 468 at 1. Furthermore, he claimed that Defendant had concealed evidence and stated that "Plaintiff will not be waiving his Negligent Spoliation of Evidence claim." *Id.* Plaintiff also objected to the Court's previous order as "void without jurisdiction," and stated that he had "provided Defendant Agency and its defense counsel with the final PTO that they can mail to Judge Lee outside of the record." *Id.* at 2. Plaintiff stated that he would be "seeking sanctions against Defendant Agency, defense counsel, or both for the time wasted on the noncompliance with Judge Lee's mailbox PTO." *Id.* at 3.

In response, Defendant clarified the parties' communications regarding the final pretrial order, providing exhibits supporting his explanation. *See* ECF No. 471. Essentially, as shown by Defendant's exhibits, lead counsel for Defendant (Prashant Kolluri) sent a draft pretrial order, exhibit lists, and jury instructions to Plaintiff on August 15, 2019. *Id.*, Ex. A, ECF No. 471-1. Mr. Kolluri asked Plaintiff to "respond in writing by . . . August 23, 2019, with any objections, changes, and additions to the attached documents." *Id.* But rather than responding (as he was ordered to do), Plaintiff unilaterally filed his own version of the documents on the docket. Then, after the Court struck those filings, Mr. Kolluri again reached out to Plaintiff, asking him to respond in writing with changes to Defendant's drafts by September 3. *Id.*, Ex. B, ECF No. 471-1.

Plaintiff, rather than responding to Mr. Kolluri, emailed a different attorney at Mr. Kolluri's office, Linda Wawzenski. *Id.*, Ex. C, ECF No. 471-1; *see also* Pl.'s Ex. A, ECF No. 469. He

indicated that this email was his "final attempt to resolve any matter(s) regarding the Pre-Trial Order." *Id.* Furthermore, he stated that he would be sending the proposed pretrial order on September 9, 2019. *Id.* Plaintiff also advised that he would be "seeking summary judgment on the legal claims dismissed by Judge Lee without reaching the merits and sanctions on appeal to the Seventh Circuit . . . [since] the Supreme Court has unequivocally held that Judge Lee does not have the authority to tell a plaintiff which legal claims to pursue." *Id.* Plaintiff did not send any changes or additions to Defendant's draft pretrial order. Mr. Kolluri responded, indicating that he was the lead attorney, was available to meet and confer on the pretrial filings, and still needed Plaintiff to respond with any additions and objections to the draft pretrial order. *Id.*

On September 3, the Court set a status hearing for September 10, intending to discuss with the parties the difficulties they were having in meeting and conferring to submit a joint pretrial order. ECF No. 470.

On September 5, one day before the final pretrial order was due, Plaintiff filed "supplemental objections" to the Court's September 3 and August 29 orders. ECF No. 472. There, he "demand[ed] the entry of a default judgment" against Defendant for his "failure to prepare the proposed Final Pre-trial Order." *Id.* at 1. He further objected to some of Defendant's positions as stated in his motion *in limine*. *See generally id.*

On September 6, the Court received in its proposed order inbox a draft pretrial order from Defendant. In the email, Defendant indicated that he was submitting the draft—which Plaintiff had not responded to—in an effort to comply with the Court's deadlines. Plaintiff was copied on this email.

On September 8, Plaintiff filed another email that he had sent to Ms. Wawzenski the same day, asking her to "inform [him] when the PTO is final for mailing." ECF No. 474. He stated several objections he had to Defendant's draft pretrial order, and concluded: "I am not aware of any reasons for your office to speak with Plaintiff at all." *Id.*

The Court reviewed the draft pretrial order submitted by Defendant and the version filed on the docket by Plaintiff. Upon review, it appeared that Plaintiff had taken the version submitted to him by Defendant, made changes, and filed it on the docket without further consultation with Defendant. In Plaintiff's version, he continued to assert claims that are not a part of this case. For example, Plaintiff asserted that the Court has "original jurisdiction pursuant to the Fifth, and Thirteenth Amendments to the Constitution . . . and 28 U.S.C. § 1346(b) (Federal Tort Claims Act)." Pl.'s Proposed Pretrial Order at 1, ECF No. 466. Furthermore, Plaintiff indicated that he would be asserting claims of racial harassment, negligent supervision, and negligent spoliation of evidence under the Federal Tort Claims Act. *Id.* at 2–5. Still, after revisiting the parties' respective pretrial materials, the Court decided that it would try to address whatever differences the parties had at the scheduled final pretrial conference to narrow the issues for trial. Accordingly, the Court ordered:

> [A]s the parties have been unable to come to an agreement on a joint proposed pretrial order, the Court will draft the final pretrial order. To the extent there are

> differences between the documents submitted by both sides, the Court will resolve those differences at the pretrial conference.

ECF No. 475. The Court was aware that it previously had scheduled a status hearing for the next day (September 10) and intended to use the hearing to speak with the parties to formulate an agenda for the final pretrial conference—a task the Court anticipated would require cooperation from both parties. But, as noted, even though Plaintiff was granted leave to participate telephonically, Plaintiff emailed the courtroom deputy the afternoon of September 9, noting he would be "unable to participate in the status hearing due to a prior commitment." ECF No. 476. This indicated to the Court that it would be impossible to count on Plaintiff's cooperation in crafting an agenda for the trial or ruling on the parties' competing pretrial submissions.

IV. Dismissal is an Appropriate Sanction

On September 9, 2019, the Court ordered Plaintiff to show cause why this case should not be dismissed for his intractable conduct, citing many of the examples described above. ECF No. 476. In particular, the Court noted that Plaintiff had refused or failed to appear for court proceedings on at least nine occasions; had repeatedly taken frivolous and vexatious positions; and had violated the Court's orders governing the pretrial process. *Id.* at 2. As noted by the Court, "Plaintiff's continued flouting of the Court's orders has substantially impeded the ability of this Court to effectively manage and direct this litigation and has significantly prejudiced Defendant by causing unnecessary delay and by requiring Defendant to waste needless resources to address Plaintiff's bad-faith tactics." *Id.* at 3.

On September 11, Plaintiff filed "Objections," which the Court construes as his response to the Court's show-cause order. ECF No. 477. Although these objections are barely responsive to the Court's order, a few themes emerge. First, Plaintiff continues to blame Defendant for failing to comply with the Court's standing orders governing the pretrial process. This argument is frivolous in light of the evidence submitted by Defendant, showing that Mr. Kolluri repeatedly sent drafts to Plaintiff, asking him to submit written amendments or objections, to no avail.

Plaintiff also appears to belatedly request that the September 10 status hearing be reset to a more convenient time. He "objects to the issue raised [by the Court] about his 'commitment,'" which he explains was work-related. *Id.* at 3. He asks the Court to reset the status hearing to "a time convenient for the district court . . . taking into consideration Plaintiff's work commitment at his new employer." *Id.* But this request is too little, too late. Plaintiff does not explain why he could not have filed such a motion *before* the September 10 status—which the Court scheduled on September 3. And since Plaintiff had already been warned that "court appearances are not invitations," ECF No. 351, he should have known that emailing the courtroom deputy a day before the status hearing to declare his unavailability would be insufficient.

Plaintiff's response does not address the other issues identified in the show-cause order or otherwise raise any reason why his case should not be dismissed.

After considering the entire history of the case; the Court's need to manage its docket; the likely ineffectiveness of lesser sanctions; the prejudice to Defendant as a result of Plaintiff's

conduct; the prejudice to the judicial system; and the need for deterrence and punishment, the Court concludes that dismissal of this case is the most appropriate option. First, Plaintiff's recent conduct during the pretrial process is not aberrant behavior; rather, it is entirely in line with his willful and bad-faith conduct throughout the entire litigation. And this conduct has substantially prejudiced both Defendant and the Court. Even the most routine motions took significantly longer to resolve, given Plaintiff's propensity to file excessive and unreasonable motions and "objections." Defendant was required to respond to many of these motions and objections, the vast majority of which were denied as lacking any basis in law or fact.

Discovery and the pretrial process were even worse. During both phases, Plaintiff refused to cooperate, necessitating multiple motions to compel and requests for assistance from the Court. Although civil litigation is an adversary system, the Court is entitled to expect some amount of cooperation from the parties during these two phases. Yet Plaintiff stymied Defendant's efforts at cooperation at every turn. Because of this, discovery (which should have been fairly limited in scope) took over a year; similarly, the pretrial process has taken over eighteen months with no tangible results.

Numerous courts have approved of dismissal as a sanction for conduct equally or less severe than Plaintiff's. *See Downs*, 78 F.3d at 1257 (sanctioned parties failed to engage in discovery and encouraged other parties to be uncooperative); *Salgado*, 150 F.3d at 740–42 (plaintiff failed to meet expert discovery deadlines or meet the requirements of Rule 26); *Roland v. Salem Contract Carriers, Inc.*, 811 F.2d 1175, 1179 (7th Cir. 1987) (sanctioned parties failed to respond fully to discovery requests and ignored other court orders); *Woods v. Chi. Transit Auth.*, No. 04 C 2460618, 2006 WL 2460618, at *3–5 (N.D. Ill. Aug. 18, 2006) (sanctioned party failed to participate in discovery or to follow court orders); *Toney v. Rosewood Care Ctr., Inc.*, No. 98 C 693, 2002 WL 992642, at *3–4 (N.D. Ill. May 15, 2002) (sanctioned parties failed to engage in pretrial preparation process after having previously failed to comply with other orders and deadlines). Like those cases, this is not a case that can be "characterized merely as mistake or carelessness." *Marrocco*, 966 F.2d at 224. Rather, here, "there was a pattern of knowing and . . . willful non-compliance with the Court's orders." *Toney*, 2002 WL 992642, at *4.

What is more, the Court is at a loss as to how a trial could be held in this case. The Court was already prepared to draft a pretrial order using the parties' submissions, but it cannot do so without cooperation from Plaintiff, which (if history is any indication) he is not likely to provide. The Court has considered lesser sanctions, such as ordering Plaintiff to pay Defendant's attorneys' fees or striking his pretrial filings and evidence—but these sanctions would not address the Court's concerns about Plaintiff's continuing efforts to stymie this litigation or the likelihood that Plaintiff will continue his noncompliance given his history. Accordingly, the Court finds that dismissal with prejudice is the only appropriate sanction now.

Conclusion

For the reasons noted, the Court dismisses this case with prejudice. All pending motions, deadlines, and hearings are stricken. The jury trial set for 11/4/19 is stricken.

Plaintiff need not bring a motion to reconsider this Court's ruling to preserve his appellate rights. However, if he seeks the Court to reconsider its judgment, he may file a motion under Federal Rule of Civil Procedure 59(e) or 60(b). Any Rule 59(e) motion must be filed within 28 days of the entry of this judgment. *See* Fed. R. Civ. P. 59(e). The time to file a motion pursuant to Rule 59(e) cannot be extended. *See* Fed. R. Civ. P. 6(b)(2). A timely Rule 59(e) motion suspends the deadline for filing an appeal until the Rule 59(e) motion is ruled upon. *See* Fed. R. App. P. 4(a)(4)(A)(iv). Any Rule 60(b) motion must be filed within a reasonable time and, if seeking relief under Rule 60(b)(1), (2), or (3), must be filed no more than one year after entry of the judgment or order. *See* Fed. R. Civ. P. 60(c)(1). The time to file a Rule 60(b) motion cannot be extended. *See* Fed. R. Civ. P. 6(b)(2). A Rule 60(b) motion suspends the deadline for filing an appeal until the Rule 60(b) motion is ruled upon only if the motion is filed within 28 days of the entry of judgment. *See* Fed. R. App. P. 4(a)(4)(A)(vi).

If Plaintiff wants to appeal this dismissal, he may file a notice of appeal in this Court within thirty days of the entry of judgment. Fed. R. App. P. 4(a)(1)(A). If Plaintiff chooses to appeal, and unless he files a motion in this Court seeking leave to proceed *in forma pauperis* on appeal, he will be responsible for paying the $505 appellate filing fee irrespective of the outcome of the appeal. *Evans v. Ill. Dep't of Corr.*, 150 F.3d 810, 812 (7th Cir. 1998).

IT IS SO ORDERED.

ENTERED: 9/19/19

JOHN Z. LEE
United States District Judge