

Three Strikes and You're Out: Tenth Circuit Dismisses Case as a Sanction for Discovery Noncompliance in *Lee v. Max International*

May 10, 2011

Discovery, in this age of cheap data storage and voluminous communication, can be a daunting and expensive prospect. As deadlines loom and hours accumulate, it is tempting to settle for “good enough” and hope for leniency. That was the tack taken by the plaintiff in *Lee v. Max International*, No. 10-4129 (10th Cir. filed May 3, 2011). For a time, the strategy worked, as plaintiff Markyl Lee (Lee) was given chance after chance to meet his discovery obligations. When the court finally had enough, Lee’s suit was dismissed, and when he appealed, the Tenth Circuit affirmed the lower court’s judgment. With few appellate courts having chosen to wade into the discovery fray, the Tenth Circuit’s decision affirming the lower court’s ruling sends a clear message—discovery gamesmanship has consequences.

In *Lee v. Max International*, Lee was given three opportunities to produce documents in response to the defendant’s discovery requests—first in response to a discovery request and then as a result of two court orders. Taking up the motion to compel after Lee failed to comply with the first order, the magistrate judge “confirmed that [Lee] had ‘blatant[ly]’ and without apparent excuse flouted the . . . order.” *Lee v. Max International*, D.C. No. 2:09-CV-00175-DB (D. Utah Jan. 12, 2010). Even after this ruling, Lee was given another chance, along with a warning that noncompliance could result in dismissal. A few more documents were forthcoming in response to the second order, along with a “declaration certifying that [Lee] had now produced *all* the requested documents.” The defendant then filed a motion for sanctions, alleging that there were still documents outstanding, including, for example, Lee’s tax returns. After another small production, the court granted the defendant’s motion to dismiss because of Lee’s discovery misconduct.

Lee appealed the dismissal on two grounds: (1) that the court had erred in its finding that Lee had violated the second court order compelling discovery (he did not contest the fact that he had violated the first order); and (2) that the court had erred by not listing all of the reasons for the dismissal as required by *Ehrenhaus v. Reynolds*, 965 F.2d 916, 921 (10th Cir. 1992) (*Ehrenhaus*).

The Tenth Circuit noted in its decision to uphold the lower court’s ruling that the Supreme Court has warned appellate courts to watch out for the tendency to forgive discovery lapses, and to remember that “it is the district court judge who must administer (and endure) the discovery process (citing *Nat’l Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 642 (1976)). In cases such as this one, multiple failures to comply with court orders are “strong evidence of willfulness and bad faith, and . . . is easily fault enough . . . to warrant dismissal or default judgment.” Lee asserted that he did not violate the second court order because documents *were* produced prior to that order’s deadline. However, prior to the documents’ production, Lee certified that *all* documents had already been produced. The Tenth

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