NONPRECEDENTIAL DISPOSITION
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United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Argued January 24, 2023
Decided February 15, 2023

Before

DAVID F. HAMILTON, *Circuit Judge*

THOMAS L. KIRSCH II, *Circuit Judge*

CANDACE JACKSON-AKIWUMI, *Circuit Judge*

No. 20-3204

MICHAEL K. GREGORY,
Plaintiff-Appellant,

v.

SAMUEL BYRD,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Terre Haute Division.

No. 2:20-cv-00445-JRS-MJD

James R. Sweeney II,
Judge.

O R D E R

Indiana prisoner Michael Gregory sued Samuel Byrd, a doctor at Indiana's Wabash Valley Correctional Facility, for deliberate indifference to his serious medical needs in violation of the Eighth Amendment. When Byrd's lawyer deposed Gregory, Gregory thought some questions—particularly about why he is in prison—were invasive and irrelevant, and he became non-cooperative before leaving the deposition. Byrd moved for sanctions, asking for dismissal with prejudice under Rule 37 of the Federal Rules of Civil Procedure. The court, citing Rule 37(b), granted the motion. But this was Gregory's first discovery mishap, and such a harsh sanction, without a

warning, was not proportionate under the circumstances. Accordingly, we vacate the dismissal and remand for further proceedings.

Background

In his pro se complaint under 42 U.S.C. § 1983 (which has not been tested and is assumed to be true at this stage), Gregory alleges that two correctional officers at Indiana State Prison beat him shortly before he was transferred to Wabash, where he then saw Byrd for treatment. But Byrd disbelieved that he was in pain, would not examine him, and ultimately asked him to leave without providing aid. Gregory therefore sued Byrd, seeking damages for the pain that Byrd allegedly exacerbated by not treating his injuries.

The district court screened the complaint and determined that it stated a claim against the doctor. At first, discovery went smoothly, and the court granted Byrd the necessary leave to depose the incarcerated Gregory. *See* FED. R. CIV. P. 30(a)(2)(B).

As the COVID-19 pandemic began affecting the operation of both prisons and courts, Wabash stopped allowing in-person depositions. Byrd's lawyers worked with the prison to set up a deposition by videoconference and issued Gregory a deposition notice. Gregory objected to the video deposition, explaining that he did not trust the unfamiliar technology. In response, Byrd moved for permission to conduct the deposition through videoconference—as required when a deponent does not consent to be deposed through remote means. *See* FED. R. CIV. P. 30(b)(4). The court noted Gregory's objections but granted the motion, saying: "Gregory objects to the deposition being taken [by video] because he is concerned that it will not be fair, adequate, or trustworthy. While the court appreciates Gregory's concerns, the current pandemic makes it unreasonable to conduct the deposition in person."

Later that month, Gregory appeared for the video deposition. He expressed reluctance to participate but said, "I guess under the circumstances the court has ordered me, so I have no other choice." He answered several background questions about other lawsuits he had initiated and his education. But after answering over 60 questions Gregory became upset when Byrd's counsel, Marilyn Young, began asking about his criminal convictions, which he viewed as irrelevant. Prior to his deposition, Gregory asked Byrd to produce any records (criminal or otherwise) related to any past misconduct. In a letter to Gregory, Byrd urged that those requests were inappropriate and irrelevant, and threatened sanctions if Gregory continued to seek such records.

After Young moved on to a different line of inquiry, Gregory said that the questions about his convictions were still "sticking in [his] craw." He protested that Young tried to "infuse" the record with his criminal conduct even though he was still fighting his convictions. When Gregory saw Young smiling, he was fed up:

> "I just think it's outrageous that you would do something like that, and it's not funny. While you're smiling—make sure it's on the record she is smiling and grinning as if this is some type of—as a matter of fact, I'm done with this. I'm done with this. It's over with. Take me back.
>
> [Young:] Sir, please, would mind staying so we can ask these questions?
>
> [Gregory:] No, absolutely not, absolutely not. It's over with.
>
> [Young:] Madam Court Reporter, can we put on the record—
>
> [Gregory:] Let me out. I'm done talking to her.
>
> [Young:] I'm sorry. I am not laughing at you.
>
> [Gregory:] I don't have any more for you. There's no more conversation, period.
>
> [Young:] Yes, sir. The offender has left the room and has refused to come back. We will try to reschedule this at a different time, if that's possible. Again, I apologize that he was offended by anything I said or did."

Byrd's counsel did not try to reschedule, however; instead, Byrd moved for sanctions under Federal Rule of Civil Procedure 37(b)(2)(A)(v), seeking dismissal with prejudice based on Gregory leaving the deposition, allegedly in bad faith. Just before this, however, Gregory had filed what he captioned as a "Motion for Appointment of Counsel," in which he explained that he had ended the deposition because he felt disrespected and mocked. Then, in responding to the sanctions motion, Gregory, incorporated his argument from that motion and further asserted that he never disobeyed a court order, that the transcript of the truncated deposition wasn't accurate, and that Byrd, Young, and the court reporter were setting him up.

The district court dismissed the case with prejudice under Rule 37(b), which provides for that sanction if a party willfully or in bad faith disobeys a discovery order. *In re Thomas Consolidated Indus. Inc.*, 456 F.3d 719, 724 (7th Cir. 2006). The district court determined that Gregory left his deposition without good reason and failed to offer any

mitigating circumstances. The court concluded that other sanctions, such as a fine or a dismissal without prejudice, were insufficient because they would not impact Gregory.

Gregory appealed, and we decided to recruit counsel for Gregory and hold argument. *Gregory v. Byrd*, No. 20-3204 (7th Cir. Dec. 17, 2021).

Analysis

Among his other arguments, Gregory contends that dismissal of his case under Rule 37 without a warning was not proportionate to his one instance of non-cooperation with discovery, which he contends resulted from a misunderstanding and not bad faith. Sanctions for discovery misconduct must be proportionate, and to determine if a district court abused its discretion in its choice of sanction we "look to the entire procedural history of the case." *Long v. Steepro*, 213 F.3d 983, 986 (7th Cir. 2000). Additionally, dismissals under Rule 37(b) require both willfulness or bad faith *and* disobeying a targeted order. *See Evans v. Griffin*, 932 F.3d 1043, 1046 (7th Cir. 2019). If there is no predicate Rule 37(a) order, a Rule 37(b) dismissal cannot be proper. But even assuming there was a targeted discovery order (a decision we do not make today), the sanction here was not proportionate so that is the focus of our ruling.

We conclude that dismissing the case with prejudice, without any prior warning or progressive sanction, was not proportionate here. The deposition dispute was Gregory's first discovery hiccup: he was cooperative until the abandoned deposition, and this dispute should have been resolved without resorting to such a harsh penalty. *Cf. Collins v. Illinois*, 554 F.3d 693, 696 (7th Cir. 2009) (affirming dismissal where the plaintiff missed one deposition, abandoned another, and committed other misconduct). The district court reasoned that a fine or a dismissal without prejudice would be "ineffective" because Gregory was proceeding in forma pauperis. But dismissal with prejudice should not be based on a "de facto rule" that it is the only effective sanction for an indigent litigant. *Ebmeyer v. Brock*, 11 F.4th 537, 546 (7th Cir. 2021).

In these circumstances, an admonition or reprimand and a warning (for example) might have been fitting. *See, e.g.*, *DJM Logistics, Inc. v. FedEx Ground Package Sys., Inc.*, 39 F.4th 408, 415 (7th Cir. 2022) (admonishment as sanction to pro se litigant); *Redwood v. Dobson*, 476 F.3d 462, 470 (7th Cir. 2007) (censure and admonishment imposed as alternatives to monetary sanctions). Generally, a warning should precede dismissal with prejudice for discovery misconduct, and dismissal without one is more appropriate when a litigant commits multiple discovery violations. *See Brown v. Columbia Sussex Corp.*, 664 F.3d 182, 192 (7th Cir. 2011). A warning is not a strictly

required before a dismissal under Rule 37(b), but the lack of warning informs our proportionality analysis. Abandoning the deposition was Gregory's first misstep, and proceeding pro se, he may not have understood the importance of the district court's obligation to manage its docket and ensure good faith litigation. *See Schilling v. Walworth Cnty. Park & Planning Comm'n*, 805 F.2d 27, 275 (7th Cir. 1986) (explaining that courts should exercise great care when selecting sanctions against pro se litigants).

An admonition to Gregory that he was out of line would have been appropriate for the additional reason that he did not appear to understand the nature of his misconduct. *See, e.g., Long*, 213 F.3d at 987 (mistakes and errors in judgment not grounds for dismissal with prejudice). (Indeed, the parties' principled debate over whether there was any violation of a "targeted" discovery order suggests that the issue is not straightforward.) Byrd insists that Gregory waived any argument that his conduct was not in bad faith because he did not supply a good-faith explanation in response to the motion for sanctions. This is a somewhat stingy view of the record; Gregory did communicate to the court that he thought he was justified in ending the deposition. Both during the deposition (the transcript of which was provided to the court) and in his motion to appoint counsel (which was referenced in his response to the sanctions motion), he explained that he had ended the deposition because he thought the questions were improper and that he was being mocked. Thus, the court and Byrd were on notice of Gregory's explanation for his conduct.

That does not mean that Gregory's stated reason is a good one. Contrary to Gregory's objections, counsel's deposition questions about his felony convictions were relevant to, at a minimum, issues of credibility, see Fed. R. Evid. 609(a), and as matter relevant to a claim or defense, the information was discoverable under Federal Rule of Civil Procedure 26(b)(1). Further, moving for a protective order or to exclude evidence, not storming out of the deposition, is the proper response to improper questions. If Gregory had been so informed, then any subsequent acting out would have merited a harsh sanction. As it stands, there is no evidence that Gregory's reasoning, though misguided, was anything but genuine. Therefore, a proportional response would have been something more in line with a reprimand and a warning that dismissal with prejudice would result from any further lack of cooperation.

Byrd offers two alternative grounds for affirmance: either Rule 37(d) or the court's inherent power to dismiss an action as a sanction. But Byrd did not present either ground in his motion to dismiss, and the district court did not rely on either of these grounds. This court can affirm on any ground supported by the record only when

the losing party had a fair opportunity to be heard on that ground. *Burke v. Boeing Co.*, 42 F.4th 716, 723 (7th Cir. 2022); *Regains v. City of Chicago*, 918 F.3d 529, 533 (7th Cir. 2019). This is not such a case.

Neither of Byrd's post-hoc justifications is persuasive, in any event. First, we have suggested that appearing at a deposition but not fully participating typically does not rise to the level of the non-appearance that allows for Rule 37(d) sanctions. *Evans v. Griffin*, 932 F.3d 1043, 1046 (7th Cir. 2019) (citing *Stevens v. Greyhound Lines, Inc.*, 710 F.2d 1224, 1228 (7th Cir. 1983)). *Evans* carefully distinguished *Collins*, the case Byrd relies upon; it involved a protracted discovery dispute and two missed depositions. *Evans*, 554 F.3d at 1046. Second, a court's inherent sanctioning powers "should be employed sparingly and only when there is a record of delay, contumacious conduct, or when other, less drastic sanctions prove unavailing." *Dotson v. Bravo*, 321 F.3d 663, 667 (7th Cir. 2003). There is no record of delay or contumacious conduct here.

Our remarks put Gregory on notice that his conduct was unacceptable, no matter how upsetting he thought the deposition questions were. But because the sanction was disproportionate, we VACATE the judgment and REMAND for further proceedings.