IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

MATTHEW J. CASEY,

Plaintiff,

v.

CUNA MUTUAL GROUP,

Defendant.

ORDER

12-cv-261-slc

On February 1, 2013, defendant CUNA Mutual Group filed a motion pursuant to F.R. Civ. Pro. 37(b)(2)(A) to dismiss plaintiff Matthew J. Casey's employment discrimination and retaliation lawsuit with prejudice for serial discovery abuse and failure to obey this court's orders. *See* dkt. 38. I am granting this part of the motion based on plaintiff's willfulness and fault in his ongoing failure to meet his discovery obligations and his disobedience of this court's orders regarding discovery. *See Brown v. Columbia Sussex Corp.*, 664 F.3d 182, 190 (7th Cir. 2011). I am denying defendant's request for additional sanctions, although I am granting defendant's combined application for cost shifting on its two previous discovery motions. *See* dkt. 26.[1] From the documents in the case file, I find the following facts to be relevant to the court's decision on defendant's motion to dismiss:

On April 10, 2012, plaintiff, who is represented by counsel, filed this Title VII and ADEA discrimination and retaliation lawsuit against his former employer, claiming generally that defendant had treated him less favorably than other employees based on his gender and his age

[1] On February 1, 2013, defendant also filed a motion for summary judgment and supporting documents. *See* dkts. 41-49. Because I am dismissing this case as a Rule 37(b) sanction, the summary judgment motion falls by the boards, undecided. Even though defendant's summary judgment motion is unopposed due to plaintiff's failure to file a timely response, this court cannot automatically grant the motion but would have to find facts and determine if defendant is entitled to judgment as a matter of law. *See, e.g., Johnson v. Gudmundsson*, 35 F.3d 1104, 1112 (7th Cir. 1994).

and that defendant also retaliated against plaintiff for opposing discriminatory practices, ultimately firing him for these improper reasons. Plaintiff attached and incorporated by reference his more detailed complaint form that he had previously filed with the Wisconsin Department of Workforce Development's Equal Rights Division (ERD). *See* dkt. 1.

On June 12, 2012, in the absence of any proof of service by plaintiff, the court set a July 13, 2012 telephonic status conference to ask plaintiff's attorney, Pursuant to Rule 1, why this case was not moving forward. This notice apparently spurred plaintiff to serve his complaint on defendant, although he waited until July 11, 2012 to do so (within the 120 day limit of Rule 4(m) but three months after filing the complaint). *See* dkt. 5.

On July 23, 2012, defendant appeared and filed a motion for a more definite statement, claiming that it was unable to respond adequately to plaintiff's complaint: defendant was willing to admit to some of plaintiff's allegations set forth in his appended ERD complaint but defendant intended to deny others. To do so, defendant asked for a more rigorous presentation of numbered paragraphs in the actual complaint. *See* dkt. 3. Plaintiff opposed this motion, dkt. 6; on September 12, 2012 (after the preliminary pretrial conference), the court granted this motion, finding that plaintiff's complaint did not comport with the requirements of Rule 8 or Rule 10(b). *See* dkt. 12.

Backing up on the time line, on August 24, 2012, the parties submitted their Rule 26(f) report to the court and suggested that the court set trial for June 2013, and allow discovery to proceed until April 2013. *See* dkt. 10 at 6. On August 30, 2012, the court held a telephonic preliminary pretrial conference and gave the parties more time than they requested: discovery would continue until June 7, 2013, and the jury trial would begin on July 8, 2013. *See* dkt. 11.

In its August 30, 2012 preliminary pretrial conference order, the court set forth these requirements:

> The parties and their attorneys must at all times treat everyone involved in this lawsuit with courtesy and consideration. The parties must attend diligently to their obligations in this lawsuit and must reasonably accommodate each other in all matters so as to secure the just, speedy and inexpensive resolution of each proceeding in this matter and required by Fed. R. Civ. Pro. 1. Failure to do so shall have consequences.
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> Absent written agreement of the parties or a court order to the contrary, all discovery must conform with the requirements of Rules 26 through 37 and 45.
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> * * *
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> A party may not file a motion regarding discovery until that party has made a good faith attempt to resolve the dispute. All efforts to resolve the dispute must be set forth in any subsequent discovery motion filed with this court. By this order, the court requires all parties to a discovery dispute to attempt to resolve it quickly and in good faith. Failure to do so could result in cost shifting and sanctions under Rule 37.
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> Dkt. 11 at 1, 4.

On September 28, 2012, plaintiff timely filed his amended complaint, dkt. 13, which included a claim for damages for past and future pecuniary losses and nonpecuniary losses (emotional pain, suffering, inconvenience and mental anguish) that plaintiff claimed to have suffered as a result of defendant's unlawful employment practices. *Dkt.* 13 at 7-8.

On week later, on October 5, 2012, defendant mailed its first set of discovery to plaintiff's attorney. As of November 7, 2012, plaintiff had neither provided any discovery nor requested an extension. On Wednesday, November 14, 2012, defendant's attorney left a voice mail for plaintiff's attorney; plaintiff's attorney did not respond in any fashion. On Friday,

November 16, 2012, defendant's attorney sent an email to plaintiff's attorney regarding the overdue discovery and volunteered an additional extension to November 23, 2012 (the Friday after Thanksgiving) for counsel to provide plaintiff's responses. Plaintiff's attorney did not response until Wednesday, November 21, 2012 and then asked for an additional extension until December 5, 2012 to provide plaintiff's discovery responses.

Defendant's attorney was uncomfortable with this request because plaintiff was scheduled to be deposed on December 20, 2012, which meant there would not be much lead time to review plaintiff's discovery. That same day (November 21, 2012), defendant's attorney offered a production deadline of Monday, December 3, 2012 as a compromise. Plaintiff's attorney did not response until November 26, 2012 (the Monday after Thanksgiving) and state that he would "make every effort at providing complete discovery responses by December 3rd."

Disconcerted by this equivocal response, on November 28, 2012, defendant's attorney sent an email acknowledging that plaintiff's attorney might be very busy, but even so, defendant wanted complete answers by December 3, 2012 or it would take "appropriate action." On November 29, 2012, plaintiff's attorney emailed back and indicated that he would "do every thing in my power to get the response to you on the 3rd."

On December 3, 2012, plaintiff's attorney did not provide any discovery to defendant; instead, counsel sent an email stating that he hoped to have the responses ready by December 4, 2012.

On December 4, 2012, plaintiff provided responses to defendant's request for production of documents but he did not provided any responses to defendant's interrogatories. Plaintiff's attorney simply reported that the plaintiff was gathering additional information, which counsel

expected to have later that evening. As of December 7, 2012, plaintiff had not provided any responses to defendant's interrogatories.

On December 7, 2012, defendant filed its first motion to compel plaintiff to provide discovery. *See* dkt. 17. In a December 13, 2012 response to this motion, plaintiff's attorney did not challenge defendant's characterization of plaintiff's discovery practice. Plaintiff's attorney reported that he had provided responses to the interrogatories earlier that same day (not quite ten weeks after defendant had served its first discovery requests) and had offered to push back plaintiff's deposition date. Plaintiff's attorney gave two reasons for this tardiness: he had been extraordinarily busy over the past several months, and the plaintiff recently had moved his residence, which had made it extremely difficult to review documentation necessary for responding to defendant's interrogatories. Dkt. 19.

At a December 14, 2012 telephonic hearing on defendant's motion to compel, the court granted the motion and entered this text-only order:

> At a December 14, 2012 telephonic hearing, the court granted defendant's motion to compel discovery, mainly as a placeholder at this juncture. If plaintiff fails to meet any discovery obligations again in this lawsuit, then the court will impose sanctions under Rule 37(b). Costs are shifted on this motion pursuant to Rule 37(a)(5).
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> Dkt. 21.

On December 26, 2012, defendant filed its second motion to compel discovery. Dkt. 28. Defendant complained that plaintiff's December 4, 2012 production of documents had been incomplete, and that he had not provided some of the documents that he had previously testified (at his September 2011 deposition in the ERD proceeding) were in his possession. Plaintiff also had not produced his tax returns as he had promised to do. In its motion,

defendant reported that on December 13, 2012 (the day before the hearing on defendant's first motion to compel discovery), defendant had sent plaintiff's attorney a letter demanding that he cure these deficiencies by December 18, 2012 so that defendant's attorney could review these documents prior to plaintiff's December 20, 2012 deposition. On December 18, 2012, plaintiff's attorney did not provide the documents; instead he sent an email suggesting that plaintiff's deposition be rescheduled to December 27, 2012. Defendant's attorney agreed to postpone the deposition on two conditions: (1) That plaintiff provide all outstanding documents by 2:00 p.m. on Friday, December 21, 2012, and that if he didn't, then plaintiff would sit for a second deposition. Plaintiff's attorney accepted this offer.

On December 21, 2012, plaintiff did not send any documents. Instead, his attorney sent an email claiming that plaintiff either did not have or could not locate the documents that defendant had requested in discovery.

This caused defendant to file its second motion on December 26, 2012, in which defendant specified which documents were still missing, how plaintiff's excuses for not producing them kept shifting and why these documents were important to defendant's defense in this s lawsuit. *See* dkt. 28 at 3-8. For instance, when deposed in September 2011 during the ERD proceeding, plaintiff claimed to have handwritten notes, a calendar and copies of emails that commemorated his version of events; now, in December 2012, plaintiff was claiming that he had lost all of these materials when he moved in December, 2012, which, defendant noted, was a month *after* plaintiff's responses to defendant's October 5, 2012 discovery requests were due. Also, plaintiff now claimed that he had not filed tax returns in the years 2009-11, explaining that he had not receive a W-2 form from the defendant. But defendant reported that on

September 21, 2012, after this lawsuit was filed, it *had* provided W-2's to plaintiff, including email versions to plaintiff's attorney.

On December 28, 2012, defendant filed a letter (dkt. 30) in which it narrowed its second motion to compel discovery, reporting that plaintiff had explained at his December 27, 2012 deposition that he really had possessed notes, emails and a calendar in September 2011, but that he had since lost them all, and he testified that he had not filed tax returns in 2009, 2010 or 2011. As a result of this testimony, defendant modified its motion to request that plaintiff produce any and all documents he possessed that demonstrated his income from 2009-11.

In his response to defendant's second motion to compel, plaintiff did not dispute any of this. He reported that he was seeking to obtain his missing records of transactions with American Express directly from American Express. Dkt. 31.

At a January 16, 2013 telephonic motion hearing, the court concluded that plaintiff again has failed to meet his discovery obligations in this lawsuit, this time in violation of the court's December 14, 2013 order. Specifically, plaintiff has not produced the relevant American Express Records responsive to defendant's RFP 22; apparently, he possessed only three monthly statements (from November 2009 through January 2010) but did not have any subsequent statements, and the timing of this production did not accord with the time line promised in December, 2012. Further, plaintiff had not produced all information summarizing, referring to or concerning his income from 2009 to 2011 responsive to RFP 30; plaintiff's attorney had provided some IRS Schedule K-1s from 2009 to 2011, but reported that he was aware that plaintiff claimed to have other responsive documents that plaintiff had not yet provided to

counsel for disclosure to defendant. The court granted defendant's motion to compel discovery as follows:

> It is ORDERED that:
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> (1) Defendant's second motion to compel discovery, dkts. 28 & 30, is GRANTED. Not later than January 23, 2013, plaintiff must produce all documents responsive to defendant's discovery requests.
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> (2) If this court determines that plaintiff has failed to obey Paragraph (1) of this order, then this court shall dismiss plaintiff's lawsuit with prejudice.
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> (3) Not later than February 1, 2013, defendant may file its specific request for sanctions under Rule 37(b)(2)(A) and all support, along with its itemized request for expenses pursuant to Rule 37(a)(5)(A). Plaintiff's response to both is due February 8, 2013, with any defense reply due by February 15, 2013.
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> Dkt. 35 at 2.

As noted at the beginning of the instant order, defendant filed a host of dispositive motions on February 1, 2013, including those invited by the court in its January 16, 2013 order. Defendant also filed a combined application for attorney's fees under Rule 37(a) (5) on both successful discovery motions (dkt. 36) claiming 8.5 hours of attorney time @ $225/hr. on the first motion and 6.0 hours of a attorney time @ $225/hr. on the second motion for a total request of $3,262.50 to cover defendants costs on both motions.

Defendant did not file a response by February 8, 2013, nor did he ask for an extension. This prompted defendant's attorney to write to the court on February 11, 2013, *see* dkt. 50, noting that this failure "simply adds to the list of failures." In light of plaintiff's failure to respond, defendant did not file a reply in support of its sanction motions.

Nine days later, on February 20, 2013, plaintiff's attorney filed a motion to extend all of his deadlines by 14 days, due to an unspecified grave illness that struck him on February 6, 2013 and caused counsel to be hospitalized from February 13-15. *See* dkts. 51-52. The court granted this motion in a text-only order:

> Plaintiff's motion to extend his various response deadlines due to his attorney becoming "gravely ill" is GRANTED. Any further requests for extensions based on medical issues must be supported by a report from the treating health care professional on the provider's letterhead. Requests for extensions on other grounds will be denied.
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> Dkt. 53.

The court extended all of plaintiff's response deadlines–including those that already had passed–to Friday, March 8, 2013, fifteen days after his February 21, 2013 deadline to respond to defendant's summary judgment motion.

March 8, 2013 passed with no filings by plaintiff on any motion and no request for an another extension.

At 12:10 a.m. on Saturday, March 9, 2013, plaintiff filed a response to defendant's proposed findings of fact on summary judgment. On Monday, March 11, 2013 at 1:00 p.m., plaintiff filed his other documents in opposition to summary judgment. *See* dkts. 54-57. Plaintiff did not file responses to defendant's motions for discovery sanctions and cost-shifting.

Defendant noted this in a March 11, 2013 letter in which defendant waived its substantive reply on these motions but pointed out what it viewed as the puzzling lack of notice from the law firm for plaintiff's attorney at the time counsel fell ill, and pointed out that the illness struck plaintiff's attorney on Day Six of his original eight day response deadline, but that

plaintiff's attorney still asked for two more weeks, and still failed to file any response whatsoever. Dkt. 58.[2]

Dkt. 38: Defendant's Motion for Sanctions

Defendant has moved for dismissal of this lawsuit with prejudice as a sanction for plaintiff's history and pattern of discovery abuse, including spoliation. Defendant also seeks a monetary fine against plaintiff and his attorney in the amount of $10,000 and cost-shifting on defendant's motion for sanctions.

In its supporting brief, defendant sketches the time line set forth above and adds some interstitial detail: at his December 27, 2012 deposition, plaintiff testified that he had moved his residence on December 22, 2012 and that his last move prior to that had been in September 2012. Plaintiff testified that he never had contacted "Deb Withey" and never had attempted to obtain from her a copy of the email he claimed to have lost during his move, even though his attorney had represented that plaintiff was in the process of doing so. Plaintiff testified that he had not filed any tax returns at all since 2008. Plaintiff had not requested copies of his credit card statements from American Express until the week of December 17, 2012, even though defendant had, requested their production in defendants' October 5, 2012 request for production of documents. Further (as noted in the next paragraph), although American Express would have mailed these records to plaintiff the same week that he requested them, plaintiff did not produce them despite his promise to immediately produce them once received.

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[2] Defendant also filed a motion to strike plaintiff's late-filed documents in response to defendant's summary judgment motion (dkt. 59) which the court granted in a text-only order (dkt. 60). That issue, however, is academic because the court is not deciding defendant's summary judgment motion.

Defendant also reports that, following the court's January 16, 2013 order promising dismissal if plaintiff did not fully comply with defendant's discovery requests, plaintiff did not comply. Specifically, plaintiff provided only portions of four months of the 17 months of American Express records requested. One document so produced was a December 22, 2012 cover letter from American Express enclosing the records that plaintiff had requested earlier that same week. This letter established that plaintiff had possessed these records before the court ordered him to produce them, that he probably had possessed them at the time of his December 27, 2012 deposition, and that plaintiff certainly had quick access to these records once he actually got around to requesting them from American Express.

In another violation of the court's order, defendant contends that plaintiff failed to produce any additional documents showing his income for the years following his termination by defendant. Plaintiff did produce records from various checking accounts, which showed deposits and withdrawals, but these records did not provide information from which defendant could derive plaintiff's income during this period.

Finally, defendant claims spoliation by plaintiff, observing that plaintiff, at his September 19, 2011 ERD deposition, testified that he had notes with the names of several witnesses that contained the sum and substance of his evidence that defendant's proffered reason for firing him was pretextual, that he had an email from another employee of defendant's (Withey, mentioned above) about her firing, and that he (plaintiff) kept both handwritten and electronic calendars. Defendant asked for production of all these documents, both during his ERD deposition and in writing; plaintiff never provided them. Then plaintiff voluntarily dismissed his ERD claim and filed this lawsuit. As noted earlier in this order, on October 5, 2012 defendant served plaintiff

with discovery for all of these documents; on December 4, 2012, plaintiff claimed that he was unable to locate any of them because he recently had moved his residence and would be providing them immediately upon locating them; by December 21, 2012, he was reporting that he could not locate them. At his December 27, 2012 deposition, plaintiff confirmed that he used to have these documents but now was unable to locate any of them.

Dismissal of a lawsuit under Rule 37 requires a finding of willfulness, bad faith or fault on the part of the defaulting party. *Brown v. Columbia Sussex Corp.*, 664 F.3d 182, 190 (7th Cir. 2011). If the record supports such a finding–based on clear and convincing evidence[3]–then the court may dismiss a case even without a clear record of delay, contumacious conduct or prior failed sanctions. *Id.* Willful delay and avoidance of discovery obligations can meet this standard; so can a party's repeated failures to meet court-ordered deadlines despite several extensions, including "one final extension and a warning that dismissal was impending." *Id., citing Aura Lamp & Lighting Inc. v. International Trading Corp.*, 325 F.3d 904, 904-06 (7th Cir. 2003) In *Aura Lamp*, the district court, in dismissing the case scolded the plaintiff: "You brought the case, and the plaintiff has to prosecute a case when they bring it, and the plaintiff hasn't. And I think to allow this to go on anymore would just compound all the problems that have occurred by really doing something that's unfair to the defendants." *Id.* at 906. *See also Dickerson v. Bd. of Ed. of Ford Heights, IL,* 32 F.3d 1114, 1117 (7th Cir. 1994) (in a Rule 41(b) dismissal, "a court is permitted to infer a lack of intent to prosecution a case from a pattern of failure to meet court-imposed deadlines. Where the pattern of dilatory conduct is clear, dismissal need

[3] The evidentiary burden is not entirely clear. *See Brown*, 664 F.3d at 919, n.8; *Maynard v. Nygren*, 332 F.3d 462, 468 (7th Cir. 2003). I will use the higher threshold.

not be preceded by the imposition of less severe sanctions.") The court in *Brown* also noted with approval an unpublished case in which the reviewing court upheld a Rule 37(b) dismissal as warranted due to plaintiff's failure to meet deadlines despite several extensions, failure to heed a warning of dismissal and submission of incomplete interrogatories. 664 F.3d at 191, citing *Watkins v. Nielson*, 405 Fed. Appx. 42, 43 (7th Cir. 2010).

The discovery and motions practice outlined in this order clearly and convincingly demonstrates plaintiff's repeated, willful violations of his discovery obligations in this case, as well as his violation of two court orders, the second of which explicitly warned plaintiff that failure to comply would cause the court to dismiss his lawsuit.

It may be that plaintiff's attorney was attempting to be candid with opposing counsel and the court when he repeatedly made representations regarding discovery that turned out to be not only incorrect but provably false. This alone would support a finding of fault. But if, *arguendo*, plaintiff's *attorney* was being candid, then perforce, plaintiff was not. One of them or both of them engaged in willful discovery misconduct by repeatedly making untrue representations to defendant's attorney and then to the court in response to defendant's discovery demands and motions. Plaintiff and his attorney presented the defendant, then this court, with a constantly shifting set of excuses for why plaintiff had not met his obligations along with misleading and untrue proffers as to what plaintiff was doing to rectify the situation and how soon the requested information would be provided.

Enough is enough. Defendant's attorney and this court both have cut plenty of slack for plaintiff and his attorney. Nobody was angling to dispose of this case on procedural grounds. When plaintiff's attorney asked for deadline extensions, he got them. When counsel alerted the

court to his health issues, the court left the door wide open for additional extensions, so long as they were adequately supported. But each extension simply led to more delays.[4] We have passed the fish-or-cut-bait point in the discovery process. Defendant has a right to know the factual basis underlying plaintiff's serious claims of discrimination and retaliation as well as the amount of the compensatory damages being claimed. Here we are, not quite six months after defendant served its discovery demands in early October 2012, and defendant still does not know which documents and what evidence plaintiff possesses or can adduce regarding his claims in this lawsuit.

Finally, I note that although defendant claims that plaintiff should be sanctioned for destroying relevant evidence–a claim that is well-supported by plaintiff's own admissions at his deposition–defendant does not strenuously argue this as a basis for dismissal. Perhaps this reticence is due to the case law concluding that proof of intentional destruction of evidence in bad faith usually results in an "adverse inference" jury instruction rather than dismissal. *See Bracey v. Grondin*, ___ F.3d ___, 2013 WL 1007709 (7th Cir., March 15, 2013); *Norman-Nunnery v. Madison Area Technical College*, 625 F.3d 422, 428-29 (7th Cir. 2010). Defendant implicitly concedes as much in its brief, arguing that dismissal is appropriate at this juncture so as not to delay the inevitable outcome of this lawsuit. *See* dkt. 39 at 17.

Defendant also asks this court to impose a monetary sanction, but argues this pretty much as a one-paragraph afterthought. I decline to impose this sanction, and I decline to shift

[4] In the category of other acts evidence relevant to prove intent, knowledge and absence of mistake, I note that plaintiff's attorney asked for and received an extension of his deadline to respond to defendant's summary judgment motion, then blew it off and filed most of his documents three days late without explanation and without asking leave.

defendant's costs of filing its motion for dismissal, partly for equitable reasons but mainly for a pragmatic one. Equitably, dismissing plaintiff's lawsuit seems to be punishment enough, and it is a sanction that, on these facts, is amply supported by the case law. Adding a monetary penalty would seem to be piling on, notwithstanding the contumaciousness of plaintiff's resistence to defendant's fair discovery requests. As a pragmatic matter, it is not clear that plaintiff would be able to pay any monetary sanction, and this court is not interested in revisiting this case every six months to see if plaintiff has scraped together a few more bucks to pay defendant. For the same reasons, I'm not going to hit a two-lawyer firm with a monetary sanction when it's not clear how knowledgeable or complicit counsel was in his client's conduct. As a pragmatic matter, it seems sufficient to make counsel and the plaintiff jointly and severally liable to defendant for the costs of the two discovery motions.

The bottom line is that defendant has shown by clear and convincing evidence that plaintiff has repeatedly violated his discovery obligations and this court's discovery orders with willfulness and fault. Dismissal of this lawsuit is the appropriate sanction.

Dkt. 36: Defendant's Motion for Cost Shifting

On February 1, 2013, defendant filed its combined application for attorney's fees under Rule 37(a) (5) on both successful discovery motions (dkt. 36) claiming 8.5 hours of attorney time @ $225/hr. on the first motion and 6.0 hours of a attorney time @ $225/hr. on the second motion for a total request of $3,262.50 to cover defendants costs on both motions. "The great operative principle of Rule 37(a)[5] is that the loser pays. . . . A loser may avoid payment by establishing that his position was substantially justified." *Rickels v. City of South Bend, IN*, 33

F.3d 785, 786-87 (7th Cir. 1994). As is clear from the first 14 pages of this order, plaintiff's position on discovery was not substantially justified. Defendant showed appropriate restraint before filing its two discovery motions and its claim for cost-shifting, both in terms of time spent and hourly rate, is reasonable and justified. Accordingly, I am granting the motion.

ORDER

It is ORDERED that:

(1) Defendant's motion to for sanctions, **dkt. 38** is GRANTED IN PART and DENIED IN PART. Plaintiff's lawsuit is DISMISSED WITH PREJUDICE. No other sanctions are imposed.

(2) Defendant's combined motion for cost shifting under Rule 37(a)(5), **dkt. 36** is GRANTED. Plaintiff Matthew J. Casey and McDonald & Kloth LLC are jointly and severally liable to pay $3,262.50 to Constangy, Brooks & Smith, LLP not later than May 2, 2013.

Entered this 2nd day of April, 2013.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge