

Accordingly, I have decided to rule on the Motion on its merits.¹

Complainant requests sanctions for the Agency's failure to turn over a copy of the HRMIS database which its expert, Dr. Harpe, referred to and relied upon in writing her expert report. Interrogatory No. 6 required it to state in detail all evidence relied upon to support its rejection of Complainant's allegations of class discrimination. As noted in the Motion, the Agency was at least obliged and in fact compelled by the March 22, 2007 Bench Order to describe the HRMIS database, its use and the expert's methodology since this was evidence it used to show that a class should not be certified. March 22, 2007 Bench Order, Tr. 29-30. The Agency failed to obey my order requiring this type of detailed disclosure, including timely supplementation in its compelled response to Interrogatory No. 6. The failure to respond in detail prevented Complainant and me from fully and effectively analyzing the Agency's expert report regarding statistical runs using the HRMIS database. The Agency has failed to show good cause for its failure to obey this Order. As set forth in the March 22, 2007 Bench Order, the Agency was require to show good cause for failing to obey the order by the due date for compliance. March 22, 2007 Bench Order, Tr. 54. Instead, although all of its objections had been overruled, it objected that I was improperly compelling it to state legal conclusions and argument and stated generally that Complainant could not prove the alleged class had commonality, typicality or numerosity. Further, as recounted in the Motion and Shannon J. Carson Affidavit, the Agency has a long history of refusing and failing to obey my orders. Motion, pp. 2-3; Carson Aff., ¶¶ 16-19. Accordingly, pursuant to 29 C.F.R. § 1614.109(f)(3), sanctions are in order. I find that the least severe effective sanction requires me to disregard Harpe's expert report regarding her HRMIS statistical runs. Accordingly, the Commission will disregard the opinions about the HRMIS evidence that the Agency's expert, Lisa Harpe, and the Agency offered for the purpose of opposing class certification.

Complainant has also requested an award of attorney's fees for his successful prosecution of the Motion. Administrative Judges possess the authority to order a party to pay attorney's fees and costs to prevent a party's misconduct in the future, and they must tailor their orders to each situation to respond to the party's failure to show good cause for its actions, as well as to equitably remedy the opposing party. Waller v. Transportation, EEOC Appeal No. 0720030069, *10 (May 25, 2007). Given the Agency's history of disobedience and misconduct and in this instance, an award of attorney's fees and costs is appropriate in order to deter the Agency's future misconduct. Accordingly, the Agency shall pay Complainant his attorney's fees expended in bringing this Motion and also that portion of the Carson Affidavit written in support of the Motion. The Commission will issue a separate Order setting a briefing schedule on the amount of fees to be awarded.

Complainant also refers in its Reply to a Request for Production of Documents (RFP) No. 4 of Complainant's May 28, 2008 Document Requests Concerning the Agency's Proposed Expert, Lisa Harpe, Ph.D. which asked that the Agency produce an electronic copy of any raw

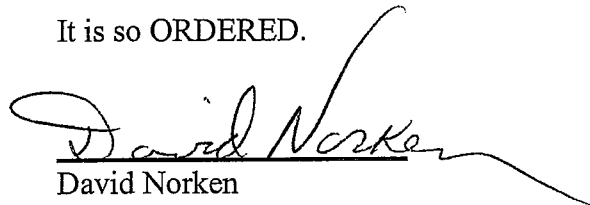
¹Complainant is hereby admonished for failure to file the Motion in a timely manner.

data reviewed by or relied upon by [Lisa Harpe] in connection with this case, and identify the source of the data. This RFP was sent after discovery had ended, except for expert depositions. I never authorized the sending of this RFP and, thus, the Agency need not reply to it. Moreover, Complainant never filed a timely motion to compel with respect to the Agency's obligation to supplement Harpe's expert report after her deposition pursuant to Fed. R. Civ. P. 26(b). The Motion was not sent until August 27, 2008. If Complainant did not file a timely motion to compel regarding production of the actual raw data, there is no point in considering sanctions. Accordingly, the Motion, to the extent Complainant requests sanctions for failure to produce the actual HRMIS database upon which Harpe relied, is hereby DENIED. This partial denial of the Motion in no way minimizes or undercuts the sanctions granted in the previous paragraphs regarding the Agency's failure to comply with my orders regarding Interrogatory No. 6.

ORDER GOVERNING MOTIONS

This Order governs motions other than motions to compel discovery or motions for decision without a hearing or for summary judgment.² The moving party is expected to state all grounds for the motion in the initial submission. The opposition to a motion must be filed no later than 15 calendar days from the date of receipt of the motion. There is no right of reply. A moving party's request to file a reply will be granted only if it is made promptly and upon a showing of good cause.

It is so ORDERED.


David Norken
Administrative Judge

For The Commission:

²Motions to compel discovery and motions for decision without a hearing or for summary judgment are governed by Management Directive 110 (MD-110), Ch. 7 and the Acknowledgment and Order.