

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

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WENDY FOSTER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	No. <u>03-2689 BP</u>
QUENTIN COOPER and CITY OF	)	
MEMPHIS,	)	
	)	
Defendants.	)	
	)	
	)	

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**REPORT AND RECOMMENDATION**

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Before the court is the Joint Motion of Defendants for Sanctions Including Dismissal, filed by defendants Quentin Cooper and the City of Memphis (collectively "Defendants") on November 3, 2005 (dkt# 33). Plaintiff filed a response on November 23, 2005. The motion was referred to the United States Magistrate Judge for report and recommendation. On December 19, 2005, the court held a hearing on the motion. Counsel for all parties were present and heard. For the reasons below, the court recommends that Defendants' motion be granted, and the case be dismissed with prejudice.

**I. PROPOSED FINDINGS OF FACT**

Plaintiff Wendy Foster filed a complaint in this case on September 12, 2003, alleging that Defendants violated 42 U.S.C. §

1983 et seq. On January 20, 2004, Defendant Cooper propounded his first set of interrogatories and his first request for production on Foster. Defendant City of Memphis served its first set of interrogatories and its first request for production on Foster on March 30, 2005. Foster has never responded to any of the Defendants' discovery requests.

On April 27, 2004, the court granted Defendants' motion to stay all proceedings in this case pending the resolution of criminal charges arising out of the actions that are the subject of this case. The stay was lifted in early 2005, and a status conference was conducted on March 22, 2005. At the conference, the court set a deadline of October 1, 2005 to complete all discovery. The discovery deadline was later extended to November 1, 2005, pursuant to a joint request by all parties. The court set March 6, 2006, as the trial date.

Thereafter, the parties scheduled depositions for Foster and Cooper for September 27, 2005. Although Cooper appeared and gave his deposition on that day, Foster did not appear. On September 28, Defendants again noticed Foster's deposition for October 28, 2005, to be taken at plaintiff's counsel's law office. On October 28, Foster again failed to appear for her scheduled deposition. Defendants filed the present motion on November 3, 2005, asking the court to dismiss Foster's complaint for failure to prosecute her claim.

At the December 19 hearing, plaintiff's counsel told the court that he has completely lost all contact with Foster since the stay was entered on April 27, 2004, despite making numerous attempts to locate her. Counsel has sent correspondence to Foster's last known address, as well as the address of Foster's mother, and has been unable to contact Foster at any of the telephone numbers in Foster's file. In addition, counsel told the court that he has conducted a search through Accurint, a computer search firm, and several public databases, and has been unable to find Foster.

## II. PROPOSED CONCLUSIONS OF LAW

Federal Rule of Civil Procedure 41 authorizes the court to dismiss a complaint based upon the plaintiff's failure to prosecute her claim. Fed. R. Civ. P. 41(b). "The authority to dismiss a case under Rule 41(b) 'is available to the district court as a tool to effect management of its docket and avoidance of unnecessary burdens on the tax-supported courts and opposing parties.'" Cox v. Cambridge Air Sys., No. 04-2004, 2005 U.S. Dist. LEXIS 8206, at \*2-3 (W.D. Tenn. 2005) (Breen, J.) (unpublished) (quoting Knoll v. American Tel. & Tel. Co., 176 F.3d 359, 363 (6th Cir. 1999)). The Sixth Circuit has established four factors to consider in determining whether dismissing a claim for failure to prosecute is appropriate:

(1) whether the party's failure is due to willfulness, bad faith, or fault; (2) whether the adversary was prejudiced by the dismissed party's conduct; (3) whether the dismissed party was warned that failure to cooperate

could lead to dismissal; and (4) whether less drastic sanctions were imposed or considered before dismissal was ordered.

Knoll v. AT&T, 176 F.3d 359, 363 (6th Cir. 1999).

Here, Foster's failure to respond to discovery, appear for her depositions, and to otherwise prosecute her claim is due solely to her own failure to communicate with her counsel and to participate in her case. Foster has provided counsel with no means to contact her, has repeatedly failed to respond to Defendants' discovery requests, and has made no effort to "move this case forward." Cox, 2005 U.S. Dist. LEXIS 8206, at \*4-5. Further, Defendants have been prejudiced by Foster's inactivity, as Defendants have been unable to conduct any discovery to prepare a defense for trial, which is set to begin in two months. In addition, "the necessity of monitoring a case that the Plaintiff has dilatorily permitted to languish indefinitely works some hardship on the Defendant[s]." Cox, 2005 U.S. Dist. LEXIS 8206, at \*5.

Although the Sixth Circuit "has repeatedly 'reversed district courts for dismissing cases because litigants failed to appear or to comply with pretrial orders when the district courts did not put the derelict parties on notice that further noncompliance would result in dismissal,'" the court submits that such a warning here would be futile and would unnecessarily prolong this case. Tung-Hsiung Wu v. T.W. Wang, Inc., 420 F.3d 641, 644 (6th Cir. 2005) (quoting Harris v. Callwood, 844 F.2d 1254, 1256 (6th Cir. 1988)). Counsel has not been in contact with Foster since April, 2004.

Although at the December 19 hearing he requested an additional 60 days to try to find Foster, counsel was unable to provide the court with any basis to suggest that he would be able to locate Foster during the requested extension period. Thus, even if the court were to now warn Foster that her continued absence would result in the dismissal of her claims, only Foster's counsel - and not Foster herself - would receive such a warning. The court, therefore, submits that the absence of a prior warning, under the facts of this case, does not preclude the dismissal of Foster's complaint for failure to prosecute. Finally, the court submits that under the circumstances, no sanction short of dismissal will adequately address Foster's failure to prosecute this matter.

### **III. RECOMMENDATION**

For the reasons above, the court recommends that Defendant's Joint Motion for Sanctions Including Dismissal be GRANTED. The court further recommends that Defendant's request for any other sanctions, including attorney's fees, be DENIED.

Respectfully Submitted.

S/ Tu M. Pham

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TU M. PHAM

United States Magistrate Judge

January 6, 2006

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Date

NOTICE

ANY OBJECTIONS OR EXCEPTIONS TO THIS REPORT MUST BE FILED WITHIN TEN (10) DAYS AFTER BEING SERVED WITH A COPY OF THE REPORT. 28 U.S.C. § 636(b)(1)(C). FAILURE TO FILE THEM WITHIN TEN (10) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND ANY FURTHER APPEAL.