

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

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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

Circuit held that once such a certification has been made, a court and all parties should be able to rely on it, and a party cannot then produce further documents with impunity. In this case, Lee did not protest the assertions that the documents were relevant, that the document requests were appropriate, or that the documents in question were in his control. Nor did he protest the assertion that the documents were not produced prior to his certification that they were. These facts were enough to allow the lower court to find that its order had indeed been violated—even though the documents were ultimately produced prior to that order's deadline.

Lee then claimed that the dismissal was invalid because the issuing court did not provide its reasoning under the five-factor test provided in *Ehrenhaus*. The Tenth Circuit determined that the *Ehrenhaus* factors are just that—factors that a court can use to determine whether a dismissal is warranted. Not all of the factors must be present—the list does "not represent a rigid test." So long as a court does not abuse its discretion, its decision to dismiss a case as a sanction for discovery noncompliance will be upheld. In this case, there were multiple violations of court orders despite stern warnings. It was well within the trial court's discretion to dismiss the case.

Flouting court orders and discovery deadlines only serves to frustrate the goal of a "just, speedy, and inexpensive determination of every action." Fed. R. Civ. Proc. 1. In the future, knowing that appellate courts will give their decision broad deference, courts may be more willing to apply even severe sanctions in cases of discovery misconduct. As the Tenth Circuit states in its decision:

Discovery is not supposed to be a shell game, where the hidden ball is moved round and round. . . [T]here is such thing as discovery karma. Discovery misconduct may seem tactically advantageous at first. But just as our good and bad deeds eventually tend to catch up with us, so do discovery machinations.

This decision underscores the importance to companies of being especially diligent in responding to discovery requests and fulfilling obligations the right way and within the requested timeframe; it will not be sufficient to produce something and hope for the chance to correct any omissions. It is especially important that companies ensure the accuracy of any certification that discovery is complete, as future production of documents will show such a certification as a false statement.

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