UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

LORI LUDOVICI, Plaintiff,	:	
v.	:	CA 11-89 S
THE TOWN OF SMITHFIELD, DENNIS G. FINLAY, in his capacity as Town Manager of the Town of Smithfield, RANDY R. ROSSI, in his capacity as Finance Director of the Town of Smithfield, JOSEPH P. MOLLO, III, in his capacity as Fire Chief of the Town of North Smithfield, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO, LOCAL 2050, Defendants.	:	

REPORT AND RECOMMENDATION

David L. Martin, United States Magistrate Judge

For the reasons stated herein, I recommend that this action be dismissed without prejudice for lack of prosecution. Plaintiff has failed to show cause why such action should not be taken, and she has also failed to comply with two orders of this Court.

Facts

This is an employment discrimination case involving allegations of a hostile work environment. See Complaint ¶¶ 27e, 47-50. The action was filed on January 28, 2011, in the Providence Superior Court. See State Court Record (Docket ("Dkt.") #3). Defendants Town of Smithfield, Dennis G. Finlay, Randy R. Rossi,

and Joseph P. Mollo, III, removed the case to this Court on March 8, 2011. See Petition for Removal (Dkt. #1).

On March 5, 2011, the Court took two actions in this matter. It issued a Standard Rule 16(b) Scheduling Conference Notice (Dkt. #5), scheduling the matter for a pretrial conference on May 24, 2011. The Court also issued a Notice and Order to Lori Ludovici (Dkt. #6) ("Notice and Order"), notifying her that the attorney who had represented her in the state court was suspended from practice in this Court and that she must attend the pretrial conference on May 24, 2011, "unless she has arranged for a new attorney and that attorney will appear at the conference," Notice and Order at 2. Plaintiff did not appear for the May 24th pretrial conference, and no attorney appeared for her. Counsel for Defendants, however, did appear for the conference.

Because of Plaintiff's failure to comply with the Notice and Order, the Court issued an order for Plaintiff to appear at 10:00 a.m. on June 24, 2011, and "**show cause why this Magistrate Judge should not recommend that her action be dismissed for failure to comply with the Notice and Order and also for lack of prosecution**." Order for Lori Ludovici to Show Cause Why Action Should Not Be Dismissed (Dkt. #8) ("Show Cause Order") at 2. In an attempt to ensure that Plaintiff received the Show Cause Order, the clerk was directed to mail copies of that order to:

a) Ms. Ludovici at her last known address;[1]

b) Ms. Ludovici in care of Attorney Damon D'Ambrosio;[2] and

c) Attorney Damon D'Ambrosio.

Id. at 2. Despite these additional steps to obtain Plaintiff's appearance, she failed to appear for the Show Cause Hearing, although counsel for Defendants once again were present. After waiting ten minutes beyond the scheduled time for the hearing, the Court took the bench and announced that it would recommend that the action be dismissed.

Law

Federal Rule of Civil Procedure ("Fed. R. Civ. P.") 41(b) expressly authorizes a district court to dismiss a case with prejudice for failure of the plaintiff to prosecute or to comply with any order of the court. Fed. R. Civ. P. 41(b); see also Figueroa Ruiz v. Alegria, 896 F.2d 645, 647 (1st Cir. 1990). Dismissal with prejudice is a harsh sanction, which runs counter to the strong policy favoring the disposition of cases on the merits. Figueroa Ruiz, 896 F.2d at 647. The Court of Appeals for the First Circuit has indicated "that such an option should be employed only

[1] At the May 24, 2011, Rule 16 Conference the Court asked Defendants' counsel if they had an address for Ms. Ludovici. The address which they provided was from April of 2009 and matched the address which the Clerk had on record.

[2] Attorney D'Ambrosio is the attorney who represented Plaintiff in the state court.

when a plaintiff's misconduct has been extreme." Id. Thus, a finding of extreme misconduct is warranted in the face of "extremely protracted inaction (measured in years), disobedience of court orders, ignorance of warnings, contumacious conduct ..., or some other aggravating circumstance such as prejudice to the defendant, glaring weaknesses in the plaintiff's case, and the wasteful expenditure of a significant amount of the district court's time." Id. at 648 (internal citation and quotation marks omitted); see also Ortiz-Anglada v. Ortiz-Perez, 183 F.3d 65, 67 (1st Cir. 1999)("This court, and federal courts generally, have warned that the drastic sanction of dismissal for want of prosecution should be employed only when the district court, in the careful exercise of its discretion, determines that none of the lesser sanctions available to it would truly be appropriate.")(internal quotation marks omitted); id. ("[I]n all the cases in which we have upheld dismissal for want of prosecution, we have found either extremely protracted inaction (measured in years), disobedience of court orders, ignorance of warnings, contumacious conduct, or some other aggravating circumstance."); cf. Corujo v. Eurobank, 299 F. App'x 1, 2 (1st Cir. 2008)(indicating that where there was "no pattern of the plaintiffs repeatedly flouting court orders" dismissal of case with prejudice was "a doubtful proposition").

Application

Applying the above law to the facts of this case, I find that while dismissal is warranted because of Plaintiff's failure to comply with the Notice and Order and the Show Cause Order, and such non-compliance has brought this case to a virtual halt, Plaintiff's conduct is not so extreme as to warrant a dismissal with prejudice. The Court recognizes that defense counsel appeared for the Show Cause Hearing and that as a result Defendants have incurred a needless expense. However, the amount of time consumed by this proceeding, even including the ten minutes the Court waited for Plaintiff to appear, was quite brief. Considering all the circumstances, especially the fact that the Court cannot be absolutely certain that Plaintiff received the two orders, I am unable to find that her conduct is so extreme as to warrant dismissal with prejudice. A dismissal without prejudice will still require Plaintiff to re-start the action and bear all the costs associated therewith. This is a significant sanction. Accordingly, I recommend that the action be dismissed without prejudice because of Plaintiff's failure to comply with the Notice and Order and the Show Cause Order and because of her failure to prosecute this action.

Conclusion

For the reasons stated above, I recommend that this action be dismissed without prejudice. Any objection to this Report and

Recommendation must be specific and must be filed with the Clerk of the Court within fourteen (14) days of its receipt. See Fed. R. Civ. P. 72(b); DRI LR Cv 72(d). Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district court and the right to appeal the district court's decision. See United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

/s/ David L. Martin
DAVID L. MARTIN
United States Magistrate Judge
June 30, 2011