Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2018-143

DECEMBER TERM, 2018

Christian Cornelius* v. North Country Health Systems, Inc. & North Country Hospital & Health Center	}	APPEALED FROM:
	}	Superior Court, Orleans Unit, Civil Division
	}	DOCKET NO. 177-9-16 Oscv
		Trial Judge: Robert R. Bent

In the above-entitled cause, the Clerk will enter:

Plaintiff appeals the civil division's decision granting sanctions against plaintiff and summary judgment in favor of defendants in this wrongful termination action. We affirm.

In September 2016, plaintiff Christian Cornelius sued his former employer North Country Hospital for negligence, wrongful termination, malicious prosecution, invasion of privacy, and defamation. The court granted defendants' motion to dismiss all claims but permitted plaintiff to amend his complaint. In his amended complaint, filed in May 2017, plaintiff only asserted wrongful termination. Plaintiff worked for defendant as a datacenter administrator for approximately one year in 2012 and 2013. In the amended complaint he alleged that in early 2013, he became aware that a physician employed by defendants was engaged in activities that constituted improper quality of patient care. He reported the matter to "the proper executive authority" at the hospital, and the physician and other staff were discharged. Soon afterward, he alleged, defendants unlawfully retaliated against plaintiff by terminating his employment without cause or explanation. Plaintiff claimed that his termination violated 21 V.S.A. § 507, which protects a hospital employee from retaliation for reporting an act or omission by a hospital or its agents that the employee reasonably believes constitutes improper quality of patient care.

Defendants again moved to dismiss. The court denied the motion in October 2017. On October 26, 2017, defendants filed their answer, which they served upon plaintiff along with a notice of their intent to depose him at the Orleans County courthouse on December 1, 2017. Plaintiff did not appear for the deposition.

Defendants then filed a motion for sanctions against plaintiff, asking the court to dismiss the action with prejudice and award them attorney's fees. Defendants also moved for summary judgment. According to the affidavit of defendants' vice president of human resources, plaintiff never reported an issue involving improper quality of patient care to anyone at the hospital, and he was fired for engaging in inappropriate and threatening conduct toward coworkers. Thus, defendants argued, his claim under 21 V.S.A. § 507 failed as a matter of law. Defendants further asserted that plaintiff's whistleblower claim was barred by a severance agreement and release that plaintiff signed on July 16, 2013, after he was discharged. Under the agreement, plaintiff was paid

$4185.60 in two installments, in exchange for which he agreed to release any and all claims related to his employment and termination, "including, but not limited to . . . whistleblower claims." Defendants noted that plaintiff had claimed in response to their previous motions to dismiss that he revoked the severance agreement by letter within seven days of executing it, as permitted by the terms of the agreement. Defendants denied receiving plaintiff's letter, which they suggested was fabricated. They further argued that even if the letter was authentic, it did not operate to rescind the severance agreement and release because plaintiff did not return or offer to return the payments he accepted. Defendants provided a transcript of plaintiff's September 2013 unemployment compensation hearing, in which plaintiff admitted that he carefully considered the severance agreement, decided to sign it, and received and accepted the payments. He did not claim at that hearing that he had revoked the agreement.

Plaintiff opposed the motion for summary judgment. He argued that there was a genuine dispute regarding whether he ever reported an issue of patient care and whether the payments he accepted were intended as consideration for his release. In support of his assertion that these facts were disputed, he cited his own affidavit and his purported revocation letter.

The court scheduled a hearing on February 26, 2018 on defendants' motion for sanctions and ordered plaintiff to attend in person to show cause why the action should not be dismissed. The court had permitted plaintiff to participate in previous hearings by telephone. In its entry order regarding the motion for summary judgment and sanctions, the court noted that plaintiff had maintained this suit, all the while having an outstanding arrest warrant in place. Plaintiff asked to participate by telephone at the February 2018 hearing. The court denied the request, stating that it was requiring personal attendance because it anticipated the need to take evidence from both parties about their allegations of failure of service. The court stated that the existence of a warrant for plaintiff's arrest was not a valid reason for him not to attend the hearing. The day before the hearing, plaintiff filed a belated response to the motion for sanctions. He asserted that he had never received the motion and that he was unable to attend the February 26 hearing "due to restraints on his personal liberty." He argued that defendants should have filed a motion to compel before seeking sanctions against him for his failure to appear at the deposition. Plaintiff did not appear at the sanctions hearing.

Following the hearing, defendants moved to strike plaintiff's opposition to their motion for summary judgment as untimely and because plaintiff did not serve defendants with a copy. They also argued that the opposition should be stricken as a sanction for plaintiff's failure to appear for his deposition, which prevented them from testing plaintiff's allegations. Plaintiff opposed the motion to strike, arguing that there was no legal basis for such relief. Defendants responded that they were entitled to seek sanctions, including dismissal, under Vermont Rule of Civil Procedure 37(d).

The court issued a written decision on all motions in March 2018. As a sanction for plaintiff's failure to attend the December 2017 deposition and the February 2018 hearing, the court struck the portions of his opposition to defendants' motion for summary judgment that challenged defendants' factual assertions. The court held that in the absence of that evidence, defendants were entitled to summary judgment because it was undisputed that plaintiff did not make a complaint that would qualify him for whistleblower protections under 21 V.S.A. § 507. Further, it was undisputed that plaintiff was fired for threatening and inappropriate conduct and had executed a release of any whistleblower claim against defendants. The court awarded defendants attorney's fees of $3672 and costs of $317 for their attendance at deposition and litigation of the subsequent motions. It denied defendants' motion to strike plaintiff's opposition to their motion for summary judgment as moot. Plaintiff appealed.

On appeal, plaintiff argues that the civil division abused its discretion in granting defendants' motion for sanctions and erred in granting summary judgment. We review the imposition of discovery sanctions for abuse of discretion. John v. Med. Ctr. Hosp. of Vt., Inc., 136 Vt. 517, 519 (1978). We review an award of summary judgment de novo, applying the same standard as the trial court: summary judgment is appropriate if there is no genuine dispute as to material facts and the moving party is entitled to judgment as a matter of law. Sheldon v. Ruggiero, 2018 VT 125, ¶ 14; V.R.C.P. 56(a).

The civil division has "inherent authority to enforce" the discovery rules "by excluding evidence, granting a continuance, or by taking other appropriate action." Greene v. Bell, 171 Vt. 280, 283 (2000). Rule 37(d) specifically provides that if a party fails to appear for his or her properly noticed deposition, the court may order that certain facts are taken to be established, prohibit the disobedient party from supporting claims or introducing designated matters in evidence, strike out pleadings, dismiss the action, or enter judgment by default against the disobedient party. V.R.C.P. 37(b)(2), (d). In addition to these sanctions, the court may award reasonable expenses, including attorney's fees, caused by the party's failure to appear. Id.

The court acted within its discretion by striking plaintiff's statement of disputed facts and associated exhibits as a sanction for his failure to appear at his own deposition. Rule 37(d) allows a court to impose sanctions under these circumstances even if a party has not violated a court order, because such behavior demonstrates "especially serious disregard of the obligations imposed by the discovery rules." C. Wright & A. Miller, Federal Practice & Procedure Civil § 2291 (3d ed. 2018). Thus, the sanction does not have to be preceded by a motion to compel or discovery order. See id. ("No court order is required to bring Rule 37(d) into play. It is enough that a notice of the taking of a deposition . . . has been properly served on the party."). Plaintiff does not deny that he was properly served with the notice of deposition. Indeed, he filed a motion to strike defendants' affirmative defenses, indicating that he received defendants' answer, to which the notice was attached. He did not object to the notice of deposition, request a protective order, or offer any excuse for his absence on the appointed date. Although plaintiff claimed that he informed defendants' counsel by letter that he would be willing to appear by telephone at the deposition, he did not present this alleged letter to the trial court, and defendants denied receiving any such communication from plaintiff. Even if they had, they were not required to accommodate plaintiff's request. See V.R.C.P. 30(b)(7) (stating parties may stipulate to take deposition by telephone, but if no stipulation, court order is required); see also Wright, supra, § 2112 ("[A] party must attend at the place stated in the notice . . . unless the party . . . obtains an order of the court changing the place."). Finally, plaintiff did not personally appear at the noticed hearing on the motion for sanctions so that he could present the court live testimony to support his claims concerning his nonattendance at the noticed deposition. The court therefore did not err in sanctioning plaintiff.

Plaintiff argues that because the sanction amounted to a dismissal,[*] the court was required to find bad faith or deliberate and willful disregard for the court's orders as well as prejudice to defendants. See John, 136 Vt. at 519. However, "[o]ur cases have carefully distinguished those cases where a sanction of dismissal or default is imposed from situations where the sanction effectively results in dismissal. Although a sanction may have a similar effect, no special findings are required when there is no outright dismissal or default." Stella ex rel. Estate of Stella v. Spaulding, 2013 VT 8, ¶ 22, 193 Vt. 226 (citation omitted); see also State v. Howe Cleaners, Inc.,

[*] We recognize that the trial court stated at the end of its decision that dismissal was "similarly appropriate under Rule 37(d) and Rule 41(b)(2)" because plaintiff did not appear at the hearing when ordered. However, we view this as dicta because the court had already ruled that defendants were entitled to summary judgment on the merits.

2010 VT 70, ¶ 22, 188 Vt. 303 (explaining that "no special findings of bad faith or prejudice, or exhaustion of lesser sanctions, are required for anything less than the ultimate sanctions of dismissal or default"). Where, as here, the sanction "precluded plaintiff from offering certain evidence, but was not a dismissal, no special findings were required." Stella, 2013 VT 8, ¶ 22.

Because plaintiff was precluded from offering his statement of disputed facts and attached exhibits, it was undisputed that plaintiff did not make a protected report of improper quality of patient care to anyone at the hospital. See 21 V.S.A. § 507(b)-(c) (prohibiting retaliatory action against hospital employee who reports violation of law or improper quality of patient care, but requiring employee to first report alleged violation to hospital or its designated agent and give hospital reasonable opportunity to address violation). Further, it was undisputed that plaintiff specifically gave up his right to bring such an action by signing the severance agreement and accepting the severance payments. The trial court therefore properly concluded that defendants were entitled to summary judgment as a matter of law.

Affirmed.

BY THE COURT:

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice