

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF KENTUCKY  
CENTRAL DIVISION  
AT LEXINGTON  
CASE NO.: 5:18-cv-00351-KKC

NICHOLAS CHARLES BREINER

PLAINTIFF

v.

**RESPONSE IN OPPOSITION TO**  
**PLAINTIFF'S MOTION FOR SANCTIONS**  
*Electronically Filed*

BOARD OF EDUCATION OF MONTGOMERY COUNTY

DEFENDANT

\* \* \* \* \*

MAY IT PLEASE THE COURT:

Comes the Defendant, Montgomery County Board of Education, by and through counsel, and for its Response to Plaintiff's Motion for Sanctions states as follows.

The Trial Court gave the Defendant up to and including the 25<sup>th</sup> of July, 2023, to file a Response to Plaintiff's Motion for Sanctions. See Court Document No. 48. This Response addresses that Order.

The Defendant does not deny that it has been late in filing answers to Plaintiff's written discovery. However, the Defendant has now filed their Answers to Plaintiff's Interrogatories and Requests for Production of Documents, and provided voluminous documents responsive to Plaintiff's discovery request.

The delay on accomplishing this, following the Court's last hearing on this matter dated April 12, 2023, was due both to a prior Trial, which both counsel for Plaintiff and this Defendant was involved in, along with this Defendant losing his associate who was working this matter with counsel. As a result, not only in this case, but in many other matters counsel for the Defendant has been behind.

The lateness of the answers to the written discovery was not out of any disregard for the Court's Order, nor done with the intention to delay the matter, but rather, due to competing multiple matters and losing a productive associate.

The Defendant recognizes that this matter is controlled by Federal Rule of Civil Procedure "FRCP" 37(b)(2), which allows the Court to issue Orders regarding a party's failure to obey discovery. The circumstances are solely within the Court's discretion and vary in severity.

The factors for imposing the sanctions and determining whether the delay is harmful would be such things as (1) the surprise to the party against whom the evidence would be offered; (2) the ability of that party to cure the surprise; (3) the extent to which the evidence would disrupt the Trial; (4) the importance of the evidence; and (5) the non-disclosing party's failure to disclose the evidence.

In this case, the Defendant has indicated the reason why the discovery is late and it does not appear that the elements of a surprise to the party against whom the evidence would be offered is at issue, as the Trial Date in this matter has yet to be set, and any information provided in the responses to discovery, that may require any additional information is not an issue; and lastly, the late answering of discovery is not disruptive to any Trial as no Trial is pending.

To the extent that sanctions are mandated, this Defendant does not believe that the most draconian of all sanction, the dismissal of the Complaint is merited. If the Court believes a sanction is appropriate, it should be Plaintiff being allowed their attorney's fee in seeking the Motion to Compel. However, to prejudice the Defendant for the omission of the Defendant's counsel should not be imposed.

WHEREFORE, the Defendant respectfully requests that the Court overrule the Motion for Sanctions as there was no ill intent, bad faith, or intentional disregard of the Court's Order.

Respectfully submitted,

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BY: /s/ JOHN G. MCNEILL  
ATTORNEY FOR DEFENDANT  
MONTGOMERY COUNTY BOE

### **CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the foregoing has this 25<sup>th</sup> day of July, 2023, been electronically mailed to the following:

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BY: /s/ JOHN G. MCNEILL  
ATTORNEY FOR DEFENDANT  
MONTGOMERY COUNTY BOE

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**ORDER**

BOARD OF EDUCATION OF MONTGOMERY COUNTY  
And JON LEDFORD, in his individual and official capacity

DEFENDANTS

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This matter having come before the Court on the Plaintiff's Motion for Sanctions, and the Court having reviewed the Briefs submitted, and having reviewed the record and heard oral arguments by and between counsel, and being otherwise sufficiently advised, it is hereby Ordered that the Motion for Sanctions is OVERRULED.

Dated this \_\_\_\_ day of \_\_\_\_\_, 2023.

BY:

\_\_\_\_\_  
JUDGE, US DISTRICT COURT

PREPARED BY:

\_\_\_\_\_  
JOHN G. MCNEILL  
COUNSEL FOR DEFENDANT

**NOTICE OF SERVICE**

This is to certify that a true and correct copy of the foregoing has this \_\_\_\_ day of \_\_\_\_\_, 2023, been mailed to the following:

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CLERK, US DISTRICT COURT