

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL REMBERT : CIVIL ACTION
 :
 v. :
 :
 ALLSTATE INSURANCE CO. : NO. 00-848

MEMORANDUM ORDER

Defendant has moved for dismissal as a sanction for conduct by plaintiff which it characterizes as a fraud upon the court.

It appears that plaintiff falsely claimed during discovery that he did not work during a period in which he did work for an automobile dealership. Defendant would be entitled to an offset of the \$36,000 plaintiff earned at that job against lost income were liability established and economic damages awarded in this case. This conduct is reprehensible, but nevertheless not comparable in magnitude or scope to the conduct resulting in the extreme sanction of dismissal in the four cases cited by defendant.

In Nichols v. Klein Tools, Inc., 949 F.2d 1047 (8th Cir. 1991), plaintiff lied about "the pivotal issue" in the case which went to the heart of liability. He lied about using defendant's product at the time of his accident. Id. at 1049. Once this was finally acknowledged, his claim was dismissible on the merits aside from the fraudulent conduct which the Court addressed.

In Perna v. Electric Data Systems Corp., 916 F. Supp. 388 (D.N.J. 1995), one plaintiff removed privileged documents from defense counsel's briefcase and copied them during a lunch break while another plaintiff acted as lookout. Id. at 393. The Court characterized this conduct as "unthinkable and extraordinary." Id. at 399. The Court in Perna noted that dismissal even for misconduct is an extreme sanction generally appropriate only in extraordinary circumstances. Id. at 398.

In Vargas v. Peltz, 901 F. Supp. 1572 (S.D. Fla. 1995), plaintiff engaged in a plethora of misconduct characterized by the Court as "a litany of lies" and "numerous acts of perjury, fabrication of evidence [and] obstruction of justice." Id. at 1578. In Derczak v. County of Allegheny, 173 F.R.D. 400 (W.D. Pa. 1996), plaintiff not only lied under oath about his business activity but presented completely fabricated business and personal income tax returns for several years manufactured for use in the litigation. Id. at 405.

Defendant will be permitted to examine plaintiff regarding any employment and earnings at the supplemental deposition ordered by the court, and may subpoena all pertinent payroll information from the dealership which employed plaintiff.

While very serious, the conduct in question does not warrant the dismissal of plaintiff's liability claim in lieu of a resolution on the merits. Plaintiff appears to have very limited

means, and no lesser alternative sanction has been suggested. Should it appear hereafter, however, that plaintiff is not fully forthcoming at his supplemental deposition or has engaged in any other conduct which threatens to impede the truth seeking process, regarding liability or the extent of any damages, the court would then not hesitate to revisit this matter.

ACCORDINGLY, this day of January, 2002, **IT IS HEREBY ORDERED** that defendant's Motions for Sanctions and to Dismiss (Doc. #40, all parts) are **DENIED**.

BY THE COURT:

JAY C. WALDMAN, J.