UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

SIMEON ROBINSON v. ALTERNATIVE COMMODITY TRADERS d/b/a LEE HOWARD SEID; RANDY FARBER; LFG, L.L.C.; RICHARD STUART SEID, and LEE HOWARD SEID	CFTC Docket No. 00-R080 OPINION AND ORDER

Simeon Robinson ("Robinson") appeals from the dismissal of his complaint against introducing broker Alternative Commodity Traders ("Alternative"), and its associated persons Lee Howard Seid, Richard Stuart Seid and Randy Farber.[1] The presiding Administrative Law Judge ("ALJ") dismissed the complaint as a sanction for Robinson's refusal to participate in two scheduled telephone conferences and his insistence on allowing a nonlawyer to represent him. Robinson argues that the ALJ was biased and that the sanction of dismissal is unwarranted. Respondents have not answered Robinson's appeal. Based on our independent review of the record, we conclude that complainant's refusal to attend conferences is a sufficient reason to warrant dismissal of the complaint, and we affirm the result reached below on that basis.

BACKGROUND

Robinson filed a reparations complaint in May 2000 seeking $467,159 in damages (an amount later reduced to $359,400), alleging churning, unauthorized trading, misrepresentation

[1] Robinson's complaint also named LFG, LLC ("LFG"), a futures commission merchant ("FCM") that guaranteed Alternative, a registered introducing broker. The ALJ dismissed the complaint against LFG pursuant to Commission Regulation 12.24 when LFG became the subject of a bankruptcy proceeding. Robinson's appeal does not challenge this ruling.

and nondisclosure. In their answer, respondents denied liability, raised affirmative defenses and asserted a counterclaim for $402.52, representing the unpaid debit in Robinson's account.

The parties' pleadings and the account statements attached to the complaint show that Robinson aggressively traded a range of commodity options over the life of the account, which traded from September through December 1999. He opened his account with $2,500 and deposited a total of about $28,000. A key transaction occurred on October 5, when Robinson liquidated 55 gold options purchased in late September, realizing a profit exceeding $125,000. On the morning of October 6, 300 gold options were purchased for the account, a trade Robinson alleges was unauthorized. The gold options remained in the account for several weeks. They gained value during the first few days after their purchase, and declined thereafter. Robinson traded in and out of other options before and after the transactions of October 5-6, but none of his other trades were of comparable magnitude.

The case went forward, and on February 13, 2001, the ALJ scheduled a prehearing conference, to be held by telephone on February 21, 2001. The scheduling order stated:

> The parties must participate in the conference in person or by counsel. The Court **CAUTIONS** that any party's failure to participate may result in the imposition of sanctions, including the dismissal of the complaint or issuance of a default order as appropriate.

Order at 1. The day before the conference, the Commission's Office of Proceedings received a letter from Robinson indicating that he would not participate because of an unexplained scheduling conflict. Robinson said that he would be available in early March. The ALJ convened the conference anyway, stating on the record that he had spoken to Robinson earlier in the day and directed him to defer his conflicting engagement. The ALJ said that Robinson gave a "vague excuse" for why he could not participate, refused to participate and hung up when the

judge attempted to question him about his delay in reporting the conflict. *See* Prehrg. Conf. Tr. at 4-6.

On February 23, 2001, the ALJ ordered Robinson to show cause why his complaint should not be dismissed and LFG's counterclaim granted as a sanction for his "willful misconduct." He scheduled a second telephone conference for March 6, 2001 to consider Robinson's response. The order contained the same cautionary language as the above-quoted passage from the February 13, 2001 order. February 23, 2001 Order at 6.

On March 2, 2001, the Office of Proceedings received a motion from Robinson asking the ALJ to disqualify himself, which the ALJ immediately denied as frivolous. March 2, 2001 Order at 1. On March 5, 2001, the Office of Proceedings received a letter from Robinson stating that he would be unable to participate in the next day's conference because he was "under medical recuperation as a result of a severe emergency medical situation" that occurred on February 26, 2001, and which caused him to be "transported by emergency vehicle" to a Philadelphia hospital. Robinson attached to the letter a medical record from the hospital emergency department, which included discharge instructions but did not note the nature of the condition being treated. Robinson's letter added, "[a]t this time, and in the near foreseeable future, I shall be under . . . medical care until complete recovery and therefore unavailable for a telephonic conference until further notice."

The ALJ convened the telephone conference as scheduled, and Robinson did not appear. The ALJ declined to credit Robinson's claim of medical incapacitation. *See* March 6, 2001 Hrg. Tr. at 10. At the close of the hearing, the ALJ stayed the case while he considered respondents' motion to dismiss the complaint and enter judgment on LFG's counterclaim. *Id.* at 36. Several weeks thereafter, LFG filed for bankruptcy and

was dismissed. Four months after the hearing, the ALJ dismissed the complaint, citing Robinson's refusal to participate in the February 21 and March 6 conferences while offering incredible excuses at the last minute.[2] *Robinson v. Alternative Commodity Traders*, [2000 - 2002 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,585 (July 2, 2001) ("I.D.").

* * *

On appeal, Robinson argues that the ALJ's conduct establishes disqualifying bias, as shown by arbitrary decisions to conduct telephone conferences despite notice that he could not participate, degrading comments made about him by the ALJ, and misrepresentation of his words. Robinson also challenges the ALJ's rulings with respect to assistance he received from a business associate in presenting his case. In addition, he suggests that the ALJ's alleged bias reflects racial animus.

Robinson asserts that a motion to dismiss was no longer pending when the ALJ dismissed the case, and argues that none of his conduct amounted to disregard of a specific provision of the Commission's reparation rules. Among other relief, Robinson seeks reversal of the initial decision and an award of compensatory and punitive damages of nearly $1.1 million. Alternatively, he requests a remand for a hearing before a new presiding officer. Respondents filed no answering brief.

---

[2] Between the ALJ's March 6, 2001 order staying the case and the ALJ's July 2, 2001 order dismissing it, the Office of Proceedings received seven documents from Robinson: (1) an application for interlocutory review of the ALJ's order denying Robinson's motion to recuse, received on March 14; (2) a supplement to the interlocutory appeal, received on March 19; (3) a statement opposing the dismissal of respondent LFG, received on April 25; (4) an objection to respondent's counsel's motion for leave to withdraw, received on May 1; (5) a motion to compel respondents to produce evidence, received on May 14; (6) a letter notifying the ALJ that he was available to resume proceedings, received on May 17; and (7) an objection to respondents' request for time to find a new attorney, received on June 6. Robinson's illness was addressed only in the notice of availability, which did not describe the nature of his medical condition.

DISCUSSION

Commission precedent reflects a strong preference for decisions on the merits of disputes. *Marlow v. Oppenheimer Rouse Futures, Inc.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,904 at 34,212 (CFTC Sept. 9, 1987). Consequently, presiding officers may impose especially severe sanctions such as a default judgment or dismissal of a complaint only when the record establishes that a party's misconduct was willful or in bad faith. *Dick v. Chicago Commodities, Inc.*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,934 at 31,738 (CFTC Feb. 3, 1986).[3] They must also consider whether a lesser sanction would be practical or effective in the circumstances presented. *Jenne v. Painewebber, Inc.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24, 329 (CFTC Aug. 31, 1988).

The circumstances of this case warrant the extreme sanction of dismissal. Robinson acted willfully and in bad faith by failing to participate in the telephone conferences. On the eve of the February 21 hearing, Robinson notified the Office of Proceedings of his unavailability, without adequately explaining the nature of his scheduling conflict or why he waited until the last minute to make the conflict known. Nor did he formally request that the conference be rescheduled, noting only that he would be available in early March. When the ALJ called him to press for details, Robinson apparently hung up on him.

The circumstances material to Robinson's failure to attend the March telephone conference are yet more troubling. Again, on the eve of the hearing, the Office of Proceedings was notified that Robinson could not participate because of an unspecified medical condition that arose a week earlier. Robinson did not say why he failed to notify the judge of his condition

[3] Willfulness means conscious disregard or deliberate malfeasance. *Id.* When the sanctioned party appears pro se, the Commission looks to whether the ALJ provided notice that a future failure to comply with obligations could result in severe sanctions. *See, e.g, Radden v. Futures Trading Group, Inc.*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,281 at 42,425 (CFTC Dec. 12, 1994); *Marlow*, ¶ 23,904, at 34,212.

between February 26 and March 5, nor did he explain how his alleged incapacity prevented him from participating in the March 6 conference, but permitted him to prepare the motion to recuse that he filed on March 2 and the application for interlocutory review filed on March 14. These circumstances support an inference that Robinson made a conscious choice not to attend the hearing for other than medical reasons, despite having received timely notice of the schedule and ample warning of the potential consequences of failing to participate.

We cannot fault the ALJ's conclusion that no lesser sanction would be effective, given Robinson's complete failure to cooperate with the ALJ and to pursue his claim in a responsible way. In these circumstances, dismissal was appropriate.

We find no evidence of disqualifying bias. A judge's rulings standing alone "almost never constitute a valid basis for a bias or partiality motion." *Nixon v. Lind Waldock & Co.*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,935 at 44,517 (CFTC Jan. 17, 1997). "Adverse rulings should be appealed; they do not form the basis for a recusal motion." *In re Huntington Common Associates,* 21 F.3d 157, 158 (7th Cir. 1994). Nor have we held that, as a general matter, critical remarks by a presiding officer, even when intemperate, impatient, or inappropriate, are sufficient to warrant disqualification. *Ferriola v. Kearse-McNeill*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,172 at 50,153 (CFTC June 30, 2000).

Disqualification of a presiding officer is appropriate only when the record establishes the existence of a personal bias stemming from an extrajudicial source or a deep-seated favoritism or antagonism that makes fair judgment impossible. *In re Nikkhah*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,635 at 43,671 (CFTC Mar. 1, 1996). Robinson has presented no evidence to support his contention that the ALJ's rulings were the product of racial animus or had another extrajudicial basis, and no inference to that effect can be drawn from the record.

Among the ALJ's rulings alleged to reflect bias are those concerning assistance that Robinson received from Ray Pratt, a friend and business associate. Pratt, a nonlawyer, appeared on the record as Robinson's representative early in this proceeding, signing documents filed with the Office of Proceedings and contacting Commission staff. In June 2000, the staff informed Robinson that Pratt could not represent him and that thereafter, it would communicate only with Robinson himself. Pratt then began drafting documents filed under Robinson's signature.

Under Commission Regulation 12.9, "an individual may appear pro se (on his own behalf)," or may be represented by an attorney admitted to practice in any state or the District of Columbia. *See Martaglafonso, S.A. v. Merrill Lynch Futures, Inc.*, [1992-1993 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,685 at 40,261 (CFTC May 4, 1993). The rule contains two prohibitions: (1) a party cannot be represented by anyone who is not a member of the bar; and (2) hybrid representation is not permitted, *i.e.*, there is no right to simultaneously proceed pro se *and* with a representative. The latter prohibition applies to civil proceedings generally. *See, e.g., Brasier v. Jeary*, 256 F.2d 474, 478 (8th Cir. 1958), *cert. denied*, 358 U.S. 867 (1958).

While we do not interpret the rule to foreclose a pro se litigant from obtaining help from others, Pratt's activity went well beyond any reasonable amount of assistance. The legal theories, tactics, and the distinctive, voluminous pleadings were palpably his handiwork, and, as the ALJ found, many of these pleadings were frivolous and vexatious.[4] The ALJ clearly developed a negative opinion of complainant during the course of the proceeding, in part based on Pratt's assistance, but negative views that arise from a presiding officer's oversight of

[4] The ALJ stated in the initial decision that despite "multiple warnings," Robinson "openly flouted . . . orders barring Pratt's participation in this case, continued to file ridiculous pleadings in support of his bloated damage claim, refused to attend . . . conferences and hearings, [and] brought discovery to a screeching halt." I.D. at 52,057-58 (footnotes omitted). Earlier, the ALJ observed that "Pratt's handiwork . . . has included the formulation of Mr. Robinson's unclear legal theories, the drafting of a raft of impenetrable pleadings and frivolous court papers, and the orchestration of a set of litigation tactics that is both dilatory and vexatious." March 6, 2001 Hrg. Tr. at 5.

adjudication generally are deemed insufficient to warrant disqualification. *Nikkhah*, ¶ 28,129 at 49,883. When viewed in context, the ALJ's rulings and remarks support neither an inference of personal bias nor a deep-seated antagonism of the sort that makes a fair judgment impossible.[5]

CONCLUSION

In light of the foregoing, we affirm the ALJ's dismissal of Robinson's complaint for his failure to appear at scheduled conferences. Pratt's request to participate in Robinson's appeal as *amicus curiae* is denied. We have considered all issues raised and relief requested by Robinson. Any issue or request not specifically addressed herein is denied as lacking merit and not warranting extended discussion.

IT IS SO ORDERED.[6]

By the Commission (Chairman JEFFERY and Commissioners LUKKEN, BROWN-HRUSKA, HATFIELD and DUNN).

Catherine D. Daniels
Assistant Secretary of the Commission
Commodity Futures Trading Commission

Dated: November 4, 2005

[5] Pratt's efforts on behalf of Robinson have drawn criticism in other forums, including a related case stemming from the LFG bankruptcy proceeding. *See In re LFG*, 104 Fed. Appx. 571 (unpublished opinion), *reported at* [2003-2004 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,786 (7th Cir. June 17, 2004), *cert. denied, Pratt v. LFG*, 125 S. Ct. 663 (2004).

[6] Under Sections 6(c) and 14(e) of the Commodity Exchange Act, 7 U.S.C. §§ 9 and 18(e) (2000), a party may appeal a reparation order of the Commission to the United States Court of Appeals for only the circuit in which a hearing was held; if no hearing was held, the appeal may be filed in any circuit in which the appellee is located. The statute also states that such an appeal must be filed within 15 days after notice of the order and that any appeal is not effective unless, within 30 days of the date of the Commission order, the appealing party files with the court a bond equal to double the amount of any reparation award.