

01-1173

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ANDREW PICKHOLTZ,

Plaintiff-Appellant,

v.

RAINBOW TECHNOLOGIES, INC. and SOFTWARE SECURITY, INC.,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of California in 98-CV-2661,
Judge Charles R. Breyer

BRIEF OF *AMICUS CURIAE*
HALT – An Organization of Americans for Legal Reform

Supporting Reversal of the District Court

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1. The full name of every party or *amicus* represented by me is:

HALT, Inc. – *An Organization of Americans for Legal Reform*

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

[none]

3. All parent corporations and any publicly held companies that own ten percent or more of the stock of the party or *amicus curiae* represented by me are:

[none]

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INTRODUCTION

The key issue presented in this case is whether the federal courts can treat a *pro se* litigant as a second class citizen. In circumstances where an award of attorneys fees is an appropriate sanction for discovery abuse, they should be awarded to a litigant proceeding *pro se*, just as they would be awarded to a litigant who is represented by counsel. *Amicus curiae* HALT -- *An Organization of Americans for Legal Reform* submits that the court below erred in its sweeping ruling that attorneys fees can never be awarded to a *pro se* litigant.

For tens of millions of Americans who cannot afford to hire a lawyer, litigating *pro se* is often their only option. There is an overriding public interest in ensuring that these *pro se* litigants have full access to the protections of our judicial system. Particularly in the context of discovery, where the award of attorneys fees is an integral component of the prophylactic system that protects a party against misconduct by another party, the courts cannot deny attorneys fees solely on the ground that a party is proceeding *pro se*.

Finally, failing to apply full sanctions against parties who have committed discovery abuses, simply because the opposing party is not represented by counsel, perversely undermines the entire system of sanctions. If a party knows that it can commit discovery abuses against a *pro se* litigant with a large degree of impunity,

the courts are actually fostering the kind of dilatory misconduct that occurred in this case.

I. There is a fundamental right to proceed *pro se* in a civil case.

The Judiciary Act of 1789 provides that: “In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct cases therein.” 28 U.S.C. § 1654. This ancient protection is rooted in the fundamental principles of our jurisprudence. As the Eleventh Circuit said,

[T]he right to proceed *pro se* under 28 U.S.C. § 1654, is a fundamental statutory right that is afforded the highest degree of protection. It is a right which is deeply rooted in our constitutional heritage, and although statutory in origin, “its constitutional aura is underscored by the proposal the very next day of the Sixth Amendment” to the U.S. Constitution.

Reshard v. Britt, 819 F.2d 1573, 1579 (11th Cir. 1987) (vacated on other grounds) (quoting United States v. Dougherty, 473 F.2d 1113, 1123 (D.C. Cir. 1972)).

The Supreme Court underscored the historical importance of the right to self-representation in Faretta v. California, 422 U.S. 806 (1975), noting that

Thomas Paine, arguing in support of the 1776 Pennsylvania Declaration of Rights said: “Either party ... has a natural right to plead its own cause; this right is consistent with safety, therefore it is retained; but the parties may not be able, ... therefore the civil right of pleading by proxy, that is, by a council [sic], is an appendage to the natural right [of self-representation]”

Faretta, 422 U.S. at 830 n.39, quoting *Thomas Paine on a Bill of Rights*, 1777, reprinted in 1 B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 316 (1971).

If, as Faretta holds, a criminal defendant has the right to proceed *pro se*, the right applies with even greater force in a civil context. This is because, while impecunious criminal defendants are entitled to representation by counsel at no charge, Gideon v. Wainwright, 372 U.S. 335 (1963), no comparable right exists for civil litigants. However, civil litigants, like criminal defendants, often cannot afford counsel. The American Bar Association estimates that thirty-eight million American households are actually denied access to the civil justice system because they cannot afford a lawyer. See American Bar Association Consortium on Legal Services and the Public, *Agenda for Access: The American People and Civil Justice – Final Report on the Implications of the Comprehensive Legal Needs Study* (1996). For such persons to have access to the courts, their fundamental right to self-representation in civil cases must be afforded the greatest protection.

II. Pro se litigants must have equal access to the discovery process.

Given that a party to a civil action has the right to proceed *pro se*, it follows that these litigants must be given the same procedural protections and devices that are afforded to a litigant who is represented by counsel. Without the benefit of

those same procedural safeguards, the right to proceed *pro se* is rendered meaningless. The Second Circuit noted as much when it stated that “[i]mplicit in the right to self-representation is an obligation on the part of the court to make reasonable allowances to protect *pro se* litigants from inadvertent forfeiture of important rights because of a lack of legal training.” Tragath v. Zuck, 710 F.2d 90, 95 (2d Cir. 1983).

Because a civil litigant is not afforded an absolute right to counsel, Lassiter v. Dep’t of Soc. Serv., 452 U.S. 18, 26-27 (1981), a *pro se* litigant in a civil court must be given an equity of arms or she will be denied any effective opportunity to vindicate her rights in court. Degan v. United States, 517 U.S. 820 (1996). Julie M. Bradlow, Procedural Due Process Rights of *Pro Se* Litigants, 55 U. CHI. L. REV. 659 (1988). Fundamental to one’s ability to litigate is the ability to obtain discovery of the opposing party’s evidence. Without access to sanctions of an equal deterrent effect as those afforded a represented party, a *pro se* litigant cannot effectively obtain discovery and therefore is denied the tools necessary to litigate. Tragath, 710 F.2d at 95.

A. Equal access to discovery is inherent in the right to procedural due process.

Procedural due process requires that no one be denied a liberty or property interest without both notice and the opportunity to be heard. Mullane v. Cent.

Hanover Bank and Trust Co., 339 U.S. 306, 313 (1950). The doctrine is not rote in application. As stated by Chief Justice Burger in Little v. Streater, 452 U.S. 1, 5 (1981):

Due process, "unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." Joint Anti-Facist Refugee Comm. v. McGrath, 341 U.S. 123, 162 (1951) (concurring opinion). Rather, it is "flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

In this case, denial of sufficient sanctions interfered with the appellant Pickholtz's ability to vindicate his rights. Indeed, without discovery, any litigant would find himself incapable of successfully pursuing his rights in court. As noted in Montalvo v. Hutchison, 837 F. Supp. 576 (S.D.N.Y. 1993), "discovery is a particularly critical means of securing justice when information is exclusively in the hands of an adversary," as are the circumstances in this case. Because of the critical role played by discovery in the litigation process, courts readily impose sanctions upon parties that fail to comply with proper discovery requests. For a litigant's ability to prove her case almost invariably depends on court-moderated cooperation from the opposing party. In its absence, most cases — if not all — would collapse.

As the Supreme Court noted in Logan v. Zimmerman Brush Co., "due process has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be

‘the equivalent of denying them an opportunity to be heard’” 455 U.S. 422, 437 (1982) *citing* Boddie v. Connecticut, 401 U.S. 371, 380 (1971). In this case, defendant’s misconduct denied appellant Pickholtz’s “opportunity to be heard” for one full year, and sanctions must be applied with full force to vindicate this right.

The district court is asked to do nothing more than to sanction with the same force as it does when a similar request is made by a party represented by counsel. The court should respond to requests for sanctions without regard for whether the requesting party is *pro se* or not.

In addition, under Haines v. Kerner, 404 U.S. 519 (1972), courts are required to liberally construe the pleadings of *pro se* litigants. In the present case, though, the court is not even asked to apply a more lenient standard to a request for discovery sanctions by a *pro se* litigant – only to apply an equal one. That is, the court need only treat a request for sanctions by a *pro se* litigant the same as it would any sanction request by a represented party. Particularly in light of the Supreme Court’s recognition in Haines of the judiciary’s special obligation to protect the rights of *pro se* litigants, this court must maintain equity between parties during the course of discovery process. *See also* Tragath, 710 F.2d at 95 (2d Cir. 1983).

B. *Pro se* litigants must have access to sanctions of equal deterrent effect as those afforded to litigants represented by counsel.

It is not enough that a court impose sanctions when a party fails to comply with a discovery request. For procedural due process rights to be fully protected, the court must swing the procedural hammer with sufficient force to compel compliance *and* deter future noncompliance — and both to the same degree for *pro se* litigants as for represented parties. National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976) (*per curiam*). To do less affords litigants with the relative luxury to be represented in court greater power to compel discovery than their *pro se* counterparts. Such unequal treatment of parties to a litigation wholly undermines the essential purpose of Rule 37, “to hold the scales of justice even.” See 8A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE, §2284, at 614-615 (1994).

III. The district court abused its discretion by failing to impose a sanction sufficient to deter misconduct by those litigating against a *pro se* party.

Since *pro se* litigants have a fundamental right to self-representation which includes access to meaningful sanctions in the case of misconduct by their opponents, it is the duty of the courts to impose sanctions sufficient to deter misconduct against them. A failure to apply meaningful sanctions allows such litigation abuse to go unpunished, and invites its continuation. A sweeping denial of one of the most potent sanctions to *pro se* litigants, solely because they are not

represented by counsel, constitutes a denial of their due process rights as well as a clear abuse of a court's discretion.

A. The sanctions imposed by the district court were insufficient to deter discovery misconduct committed against an unrepresented party.

In imposing sanctions upon the defendants-appellees, the magistrate judge found that “[n]o substantial justification exists for the approximate year that it took defendants to produce the source code and supporting documentation in electronic format.” Order Imposing Sanctions (April 24, 2000) (hereinafter, “Order”), p. 1, J.A. at 0032. Despite this twelve-month delay in producing documents that were subject to initial disclosure requirements, the sole sanctions imposed by the magistrate judge upon defendants-appellees were (1) to order the production of documents (whose production was previously required); and (2) to order an award of “reasonable expenses and costs” (excluding attorney’s fees) to appellant Pickholtz. Id. at 2-4, J.A. at 0033-0035.

As noted above, the court has an obligation to “hold the scales of justice even” between litigants. *Pro se* litigants are held accountable for discovery abuses by imposition of monetary sanctions, including attorneys fees. Robinson v. Eng, 148 F.R.D. 635 (D. Neb. 1993). The threat of such a sanction acts as an effective deterrent to discovery misconduct. If appellant Pickholtz had engaged in discovery abuse similar to that committed by opposing counsel, there would be no basis for summarily rejecting an application for attorneys fees. In sharp contrast, the

minimal sanction against defendants-appellees has no significant deterrent effect. Granting a *pro se* litigant the right to discovery without enforcing that right with the same sanctions available to protect parties who are represented eviscerates and effectively nullifies that right. *Amicus curiae* HALT submits that this inequality of sanctions violates the due process right of appellant Pickholtz to equal access to discovery.

B. Failure to grant attorneys fees to a *pro se* litigant for discovery abuses committed by an opposing party violates the due process rights of the *pro se* party.

There is no sanction that fulfills the deterrent goal of Rule 37 of the Federal Rules of Civil Procedure more effectively than the imposition of attorneys fees. The Advisory Committee Notes on the most recent 1970 amendment to the Rule explicitly state that the goal of the amendment to Rule 37(a)(4) was to require courts to impose monetary sanctions that will effectively deter future discovery abuses. “And the potential or actual imposition of expenses is virtually the sole formal sanction in the rules to deter a party from pressing to a court hearing frivolous requests for or objections to discovery.” FED. R. CIV. P. 37(a)(4) advisory committee’s note. The lion’s share of such expenses inescapably consists of attorneys fees. Moreover, Rule 37 “requires that expenses be awarded unless the conduct of the losing party or person is found to have been substantially justified.” *Id.* (emphasis supplied).

The magistrate in this case found that the opposing party presented no substantial justification for its misconduct, and ordered the production of discovery and an award of expenses. Nevertheless, the court failed to award attorneys fees to *pro se* plaintiff Pickholtz, solely because he was not represented by counsel. Order, p. 1, J.A. at 0032. However, absent an award of attorneys fees, the nominal expenses imposed against opposing counsel fail to fulfill the deterrent objectives of Rule 37.

In addition to inadequately deterring future misconduct, the court's decision infringes upon *pro se* litigants' due process rights to self-representation by depriving them of the most effective sanctioning mechanism to ensure discovery compliance. In other cases between represented parties, courts have awarded attorneys fees for failure to timely respond to written interrogatories, National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976); for failing to inquire into the accuracy of discovery documents, Business Guides v. Chromatic Communications Enters., 498 U.S. 533 (1991); and have even awarded amounts upwards of \$1 million dollars against a party engaging in a series of meritless motions and depositions and refusing to permit discovery, Chambers v. NASCO, 501 U.S. 32 (1991).

The abusive conduct in this instance is no less egregious than that which required an award of attorneys fees in National Hockey League, Business Guides

and Chambers. Appellant Pickholtz was forced to wait for a full year before opposing counsel produced the requested evidence. Order, p. 1, J.A. 0032. Further, opposing counsel deliberately and in bad faith produced dozens of boxes of computer encoded print-outs, when the request for the computer code itself (in electronic form) was clear and unambiguous. Plaintiff's Motion Requesting Sanctions, J.A. 0131-32. In addition, opposing counsel attempted to preclude experts and consultants from reviewing the discovery material handed over to plaintiff by sending letters to Mr. Pickholtz's technical experts and consultants, falsely claiming that Mr. Pickholtz could not legally disclose the facts of the case to them in anticipation of litigation. Plaintiff's Motion Requesting Sanctions, J.A. 0133-34.

Had appellant Pickholtz been represented by an attorney when he was forced by the defendant's misconduct to secure court intervention to compel discovery, his request for an award of attorneys fees would not have been summarily denied by the court below. *Amicus curiae* HALT respectfully submits that this disparity of treatment between *pro se* parties and represented parties deprives *pro se* litigants of meaningful due process during the critical discovery phase of litigation.

In denying attorneys fees, the magistrate judge asserted that there was "no authority that would permit [him] to award plaintiff, as a *pro se* litigant, attorney's fees." Order, p. 2, J.A. at 0033. Not only is there such authority under the broad

sanctions provisions of Rule 37 discussed above, but federal courts also exercise inherent power to control the course of litigation before them and to punish misconduct that abuses the judicial process. Chambers, 501 U.S. at 43-46.

A court cannot simply throw up its hands and claim that no remedy is available to the *pro se* litigant when his rights have been violated. It is the duty of the trial court to exercise its authority and to even-handedly apply the same sanctions to protect the due process rights of its litigants whether they are represented by counsel or are proceeding *pro se*. That is precisely the course followed by the Northern District of Illinois in In re Napier, Bank. No. 96 B 00559 (N.D. Ill. 1997), where the court imposed monetary sanctions against a represented party for discovery violations, **including compensation to the *pro se* plaintiff for his time spent preparing motions before the court.**

In sum, the court below clearly erred when it concluded that there was “no authority that would permit it to award plaintiff, as a *pro se* litigant, attorney’s fees” (Order, p. 2, J.A. at 0033), and abused its discretion in denying attorneys fees on this erroneous basis.

CONCLUSION

For the foregoing reasons, *amicus curiae* HALT – *An Organization of Americans for Legal Reform* respectfully requests that this Court reverse the decision of the United States District Court for the Northern District of California

denying attorney fees to plaintiff Andrew Pickholtz, and remand this case with instructions to determine an appropriate attorneys fees award.

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