State of Wisconsin
Labor and Industry Review Commission

Kofi A. Ogbujiagba, Complainant **REM Wisconsin, Inc.**, Respondent **c/o Katharine A. Crawford** **The Mentor Network** **d/b/a National Mentor, LLC** ERD Case No. CR201600161	**Fair Employment Decision**[1] **Dated and Mailed:** February 22, 2019

The decision of the administrative law judge is **affirmed**. Accordingly, the complainant's complaint is dismissed.

By the Commission:

/s/
Georgia E. Maxwell, Chairperson

/s/
David B. Falstad, Commissioner

[1] **Appeal Rights**: See the green enclosure for the time limit and procedures for obtaining judicial review of this decision. If you seek judicial review, you must name the Labor and Industry Review Commission as a respondent in the petition for judicial review. Appeal rights and answers to frequently asked questions about appealing a fair employment decision to circuit court are also available on the commission's website http://lirc.wisconsin.gov.

Procedural History

On January 26, 2016, the complainant filed a complaint with the Equal Rights Division ("Division") of the Department of Workforce Development alleging that the respondent retaliated against him for engaging in conduct protected by the Health Care Worker's Protection Act, in violation of the Wisconsin Fair Employment Act. On June 16, 2016, an equal rights officer for the Division issued an initial determination finding no probable cause to believe that discrimination occurred. The complainant appealed, and the case was certified to hearing.

A prehearing conference was held in this matter on November 16, 2016, after which the administrative law judge sent a "Prehearing Telephone Conference Memorandum" to both parties, which indicates, among other things, that the deadline for concluding discovery, including the receipt of all discovery responses, was set for May 19, 2017, in anticipation of a June 29, 2017 hearing date.[2]

On March 23, 2017, the respondent served its first set of interrogatories and requests for production of documents on the complainant. The respondent notified the complainant that his responses were due by April 24, 2017.[3] The complainant did not respond. On July 21, 2017, the respondent sent the complainant an email notifying him that his discovery responses were "long overdue" and asking him to provide responses by July 28, 2017. Again, the complainant did not respond. On August 10, 2017, the respondent sent the complainant another email indicating it still needed the discovery responses and asking him to forwarded the completed discovery right away. The complainant did not do so.

On August 18, 2017, the respondent filed a motion to compel discovery with the administrative law judge. Thereafter, on August 30, 2017, prior to any ruling by the administrative law judge with respect to the motion to compel discovery, the respondent filed a motion to postpone the hearing. On September 5, 2017 the administrative law judge issued an order granting the respondent's motion to postpone the hearing. The administrative law judge's order also addressed the complainant's failures to respond to discovery and indicated that another prehearing telephone conference would be held in order to discuss issues surrounding the hearing, including any pending discovery issues and motions.

On October 19, 2017, prior to the prehearing conference, the respondent's attorney sent an email to the administrative law judge indicating that it was moving to dismiss the complaint because the complainant had not provided a response to its discovery requests and, further, did not reply to the respondent's attempts to contact him about his responses. The respondent's attorney also notified the

[2] The hearing was later rescheduled for September 14, 2017, at the complainant's request.

[3] The correspondence to the complainant contains a typographical error and erroneously indicates that the discovery responses were due on "April 24, 2016."

administrative law judge that the complainant's telephone number appeared to no longer be in service. On December 19, 2017, the administrative law judge sent the parties an email in which he indicated that he was denying the respondent's motion to dismiss, but cautioned the complainant that continued non-responsiveness to the respondent's discovery requests may result in the dismissal of his case.

On February 2, 2018, the respondent notified the administrative law judge that the complainant had not produced any responses whatsoever to its discovery requests served in March of last year and, further, that the respondent wanted to take the complainant's deposition. Shortly thereafter, on February 7, 2018, the complainant sent the respondent's attorney an email stating that he had repeatedly requested that the respondent provide him with communication logs, binders and copies of the correspondence between both parties and that he had not yet received them. The complainant's email did not address his failure to respond to the respondent's discovery request.

On February 7, 2018, the administrative law judge convened another prehearing telephone conference and, on February 9, 2018, he sent the parties a "Prehearing Telephone Conference Memorandum" summarizing that conference. In his memorandum the administrative law judge noted that, although the complainant was made aware of the prehearing conference, the administrative law judge was not able to reach the complainant at the telephone number provided and the conference therefore proceeded without him. The administrative law judge indicated that, during the conference, the respondent's attorney stated that the complainant had yet to respond to outstanding discovery requests and had filed no response to its motion to compel discovery. The administrative law judge granted the motion to compel and gave the complainant 20 days in which to respond to the respondent's discovery requests. In his memorandum the administrative law judge indicated that, subsequent to the prehearing conference, the complainant telephoned him and claimed that he had not received a call from the administrative law judge during the scheduled conference time. The administrative law judge indicated that he notified the complainant he had granted the respondent's discovery motion and that the respondent had agreed to resend its discovery request to him. The administrative law judge advised the complainant that if he did not reply to the discovery request in 20 days his complaint may be dismissed.

That day, February 9, 2018, the respondent's attorney sent an email to the complainant and the administrative law judge detailing the history regarding its discovery requests and informing the complainant that, per the administrative law judge's ruling, he had until February 27, 2018 to respond to those requests. The respondent also stated that it wanted to take the complainant's deposition and would give him several dates to choose from. Finally, the respondent stated that it was treating the complainant's email from February 7, 2018, in which he referenced

communication logs, binders and copies of the correspondence between both parties, as a formal discovery request and would provide a response within 30 days.

On February 14, 20108, the administrative law judge issue an order formally granting the respondent's motion to compel discovery (originally filed on August 18, 2017). The administrative law judge's order specified that the complainant would have 20 days to respond to all outstanding discovery requests and that failure to do so may result in sanctions being imposed against him, including, potentially, the dismissal of his complaint.

On February 18, 2018, the complainant submitted a response to the respondent's first set of interrogatories and requests for production of documents. However, the complainant's responses to the interrogatories were incomplete or unresponsive--the complainant referred the respondent to other documents that were not provided or made vague assertions that did not include the information the respondent sought. Further, the complainant failed to produce any documents in response to the request for production of documents. On February 26, 2018, the respondent's attorney sent a letter to the complainant notifying him that it regarded his discovery responses as evasive and incomplete. In its letter the respondent detailed how and why it considered each response to be deficient. It requested that the complainant provide proper responses to the interrogatories as well as the requested documents no later than March 6, 2018. The respondent's attorney apprised the complainant that if he did not do so the respondent would request an order dismissing the complaint. The complainant did not respond to the February 26 letter and, on March 9, 2018, the respondent sent the administrative law judge an email asking him to dismiss the complaint.

Also on March 9, 2018, the respondent responded to the complainant's request for documents, which he had made by email on February 7, 2018. The respondent indicated that it considered the complainant's request for "communication logs, binders and copies of correspondence between the parties" to be vague and ambiguous, that it did not specify a time period, and that the complainant was seeking information that was not relevant or likely to lead to the discovery of admissible evidence. The respondent nonetheless provided 89 pages of documents, including, among other things, copies of memos and emails between the parties, performance reviews, work rules and policies, training materials, and a copy of administrative rules related to the reporting and investigation of caregiver misconduct.

In the mean time, the respondent had scheduled a deposition for the complainant to be held on March 26, 2018 in Milwaukee. The complainant was served with notice of the deposition on February 27, 2018, prior to the respondent's filing its motion to dismiss. In an email sent the same day, the respondent's attorney indicated that if the scheduled date did not work for the complainant he should provide an alternate

date and the respondent would attempt to accommodate him. The respondent's attorney also indicated that the deposition could be held in Madison, rather than Milwaukee, if the complainant preferred. The complainant did not communicate with the respondent upon receipt of that notice. He did not attempt to reschedule the deposition and did not notify the respondent that he would be unable to attend. However, the complainant did not appear at the deposition. After waiting for the complainant for a period of time, the respondent's attorney telephoned him and discovered that he was in California. Later that day the complainant sent the administrative law judge an email, with a copy to the respondent's attorney, complaining that the respondent's attorney had treated him rudely when it called him on the telephone to find out where he was. The respondent's attorney in turn sent an email denying rudeness and notifying the administrative law judge that the complainant had failed to appear at his scheduled deposition.

On March 27, 2018, the administrative law judge sent an email to the complainant and the respondent's attorneys in which he indicated that the respondent could supplement its motion to dismiss with information and arguments regarding the complainant's failure to appear at the deposition and that the complainant would then be afforded an opportunity to respond. The respondent was given until March 30, 2018, to file the supplemental material and the complainant was given until April 11, 2018 to respond.

On March 30, 2018, the respondent submitted a supplement to its motion to dismiss indicating that it had served a notice of deposition on the complainant and that at the scheduled date and time, the respondent's attorney, a court reporter, and a representative from the respondent were present and ready to proceed, but the complainant did not appear. In its motion the respondent explained that it telephoned the complainant, who was in California and responded that it was early there and he had things to do. In addition to dismissal of the complaint, the respondent requested that it be awarded fees and costs related to the complainant's deposition.

Thereafter, the parties exchanged a number of emails, culminating in an email from the complainant on April 10, 2018, in which the complainant indicated that the motion to dismiss should not be granted because he has medical conditions that limit his ability to travel, because he believed he had replied adequately to the respondent's interrogatories, and because the respondent had not supplied him with the documents he had requested of it.

On July 31, 2018, the administrative law judge issued an order granting the respondent's motion to dismiss, but denying the request for attorney's fees and costs. The complainant has filed a petition for commission review of the dismissal order.

The commission has considered the petition and the positions of the parties, and it has reviewed the information that was before the administrative law judge. Based on its review, the commission agrees with the decision of the administrative law judge, and it adopts the findings and conclusions in that decision as its own.

Memorandum Opinion

As reflected in the procedural history set forth above, the complainant in this matter failed to adequately respond to the respondent's discovery requests and failed to appear at a scheduled deposition, and his complaint was dismissed as a result. The issue presented in this appeal is whether the administrative law judge erred in dismissing the complainant's complaint based upon his failures to comply with the respondent's discovery requests.

In a recent case involving a similar set of facts the commission stated, as follows:

> Dismissal of an action or proceeding, while permitted by statute,[4] is a harsh sanction for a discovery failure, appropriate only if the non-complying party's conduct was egregious and evinced an intent not to cooperate with the discovery process. *Xiong v. Logistics Health, Inc.*, ERD Case No. CR201601970 (LIRC Oct. 24, 2017). In the context of review of an administrative law judge's order imposing a sanction for non-compliance with a discovery order, the standard applied is whether the commission finds the administrative law judge's decision on the issue to have been an abuse of discretion. *Xiong*, citing *Kutschenreuter et ano. v. Roberts Trucking*, ERD Case No. 200501465 (LIRC April 21, 2011). Further, in deciding whether dismissal is an appropriate sanction to impose on an unrepresented party, the commission will take into account whether the administrative law judge made adequate efforts to assist the party in understanding and complying with the discovery process prior to dismissing. *Duncan v. International Union of Operating Engineers Local 139*, ERD Case No. CR201002723 (LIRC Sept. 11, 2012).

Belizaire v. Sweet Additions, LLC, ERD Case No. CR201604037 (May 30, 2018).

The commission has also held that the failure of a party to attend his own deposition is a very serious default, as evidenced by the fact that it is singled out in the statutes as being a potential grounds for sanctions up to and including the dismissal of a complaint the first time it happens, even absent a "warning," such as an order to compel. *Griffin v. Manor Care Health Service*, ERD Case No. CR200700667 (LIRC March 23, 2010).

[4] *See*, Wis. Admin. Code ch. DWD § 218.14(3), Wis. Stat. § 814.12(2)(a)3.

In this case, the complainant spent a full year ignoring the respondent's discovery requests, and then, after being ordered to respond by the administrative law judge, submitted interrogatory responses that were so limited and unresponsive as to be of little or no use to the respondent in preparing its case. Although the respondent explained in detail why it considered the complainant's responses inadequate, the complainant made no attempt to submit additional, responsive information. In addition, the complainant submitted none of the documents requested by the respondent. Finally, the complainant failed to appear at a scheduled deposition or to notify the respondent that he was unable to attend.

The complainant has offered two explanations for his actions. First, he maintains that the respondent did not provide him with the documents he sought from it. This argument fails for several reasons. To begin with, the case file does not support a conclusion that the respondent refused to provide the complainant with the information he sought. To the contrary, the respondent responded to the complainant's request within 30 days, and although the complainant's request was vague as to both subject and time frame, the respondent attempted to provide him with those documents which it had available to it.[5] Further, and more to the point, a failure by the respondent to adequately respond to the complainant's discovery requests, even if proven, would not justify the complainant's decision to disregard the administrative law judge's order compelling him to reply to discovery, nor would it excuse his actions in failing to attend a scheduled deposition or notify the respondent he could not be there. The complainant's remedy for the respondent's alleged failure to respond to his discovery requests is not to shirk his own discovery obligations, but rather, to ask the administrative law judge to compel the respondent to comply.

Second, the complainant argues that his failures to cooperate with discovery were due to his poor health. He maintains that the respondent and its attorneys and the administrative law judge were all duly informed of his medical condition and of his need to consult with his physician before embarking on trips, but that the respondent scheduled a meeting for him to appear in Milwaukee without ascertaining whether it was medically possible for him to do so. The complainant asserts that the respondent made unreasonable demands on him to provide answers to interrogatories and force him to undertake unsafe interstate trips from his residence in California. This argument also fails. The complainant never informed the respondent's attorney or the administrative law judge that he had health problems that prevented him from responding to the respondent's written discovery

[5] In an email sent to the administrative law judge on April 4, 2018, a copy of which went to the complainant, the respondent explained that it disposes of its "communication logs" every month and that the logs relating to the time period in which the complainant made his complaint no longer exist. The respondent further asserted that the logs consist of communications between staff members so that, even if the logs in question were still in existence, they would not contain anything relevant to the complainant's complaint. It indicated that it was not clear what the complainant's request for "binders" was meant to include.

requests, and the commission can see no reason to believe that this was the case. The complainant was able to provide interrogatory responses, but simply chose not to do so in a timely or complete manner.

With respect to his deposition, the commission notes that the complainant's first mention of medical limitations making it difficult to travel came after he had already failed to appear at the scheduled deposition. The complainant never contacted the respondent's attorney prior to the deposition and made no effort to change the date or the location of the deposition. Further, while the complainant indicates in his petition that he managed to make "travel and medical plans" in order to appear at the hearing, it does not appear that he attempted to do the same in order to attend his deposition, and he has not provided any explanation as to why he could not have done so.

Finally, the complainant makes a number of arguments that are unrelated to his failures to respond to discovery. He contends that the respondent has failed to prove beyond a reasonable doubt that his complaint was not true, and states that he requested that the respondent invite the relevant state supervisory and licensing agencies to investigate his claim, but the respondent refused to do so. The complainant also states that the respondent offered to settle this matter with him and suggests that it would not have done so if it was "innocent." These arguments fail. The question of whether the respondent discriminated against the complainant in the manner he alleged is not now before the commission. Rather, the sole question presented in this appeal is whether the case was properly dismissed based upon the complainant's failure to comply with prehearing discovery. Based upon all of the facts set forth above, the commission believes that the complainant's conduct was egregious and evinced an intent not to cooperate with the discovery process. The commission is satisfied that the administrative law judge made adequate efforts to assist the complainant to comply with the discovery process and that his dismissal of the complaint--which occurred only after the complainant had been repeatedly put on notice that continued failure to comply with discovery could lead to this result--amounted to a reasonable exercise of his discretion. Accordingly, the dismissal of the complaint is affirmed.

cc: David Froiland
Mark Johnson