State of Wisconsin
Labor and Industry Review Commission

Crystal Moore, Complainant **Dairy Queen**, Respondent ERD Case No. CR201701303 EEOC Case No. 26G201700930C	**Fair Employment Decision** **Dated and Mailed:** March 11, 2019

The decision of the administrative law judge is **set aside** and this matter is **remanded** to the Division for further proceedings in accordance with this decision.

By the Commission:

/s/
Georgia E. Maxwell, Chairperson

/s/
David B. Falstad, Commissioner

Procedural History

On May 8, 2017, the complainant filed a complaint with the Equal Rights Division ("Division") of the Department of Workforce Development, alleging that the respondent discriminated against her based upon her race, color, disability, arrest record, and in retaliation for having opposed discrimination in the workplace and for having filed a previous discrimination complaint. On September 22, 2017, an equal rights officer for the Division issued an initial determination finding probable cause on all issues raised by the complainant. The matter was therefore certified to hearing on the merits.

On September 29, 2017, the respondent's attorney submitted a notice of retainer and, pursuant to Wis. Admin. Code § DWD 218.14(2), provided notice of its intention to seek discovery.

On December 21, 2017, the respondent served the complainant with a first set of interrogatories, requests for production of documents, and requests for admissions. The responses to the respondent's discovery requests were due by January 20, 2018. In addition, the respondent served the complainant with a notice of deposition indicating that she was scheduled to be deposed on January 30, 2018.[1]

On January 25, 2018, the complainant contacted the Division asking to reschedule her deposition because she wanted time to find an attorney. For reasons not explained in the case file the deposition was not rescheduled.

On January 29, 2018, at which point the complainant had yet to submit any discovery responses, the respondent's attorney sent the complainant a letter asking when her discovery responses would be filed. A copy of this letter, as well as all subsequent correspondence from the respondent's attorney to the complainant, was sent to the administrative law judge.

On January 30, 2018, the complainant appeared for her deposition. During the deposition the complainant stated that she had witnesses who could testify about discrimination on the part of the respondent, but refused to provide their names. The complainant told the respondent that she did not have an attorney but had spoken with legal counsel who advised her not to disclose the names of her witnesses. In a follow up telephone call with the respondent's attorney the complainant again refused to provide the names of her witnesses. On February 12, 2018, the respondent's attorney wrote the complainant a letter advising her that it was entitled to the names of any witnesses she intended to call at the hearing or who had relevant information regarding her claim. The complainant was told that if she did not provide the information within five days, the respondent would be filing a motion to compel.

[1] The document stated that the deposition would be held on January 30, 2017, but this was clearly a typographical error.

On February 14, 2018, a prehearing conference was held with the administrative law judge, the respondent's attorney, and the complainant. A prehearing conference report issued by the administrative law judge on February 20, 2018, indicates that during the prehearing conference a hearing date of August 18, 2018, was scheduled and general information about the discovery process was given.

On February 19, 2018, the respondent's attorney sent a letter to the complainant in which it notified her that if she did not provide responses to its discovery requests by March 12, 2018, it would be filing a motion to compel.

On March 6, 2018, the complainant advised the respondent, by telephone, that she had two witnesses and provided their first names, but not their last names or addresses. That day the respondent's attorney sent the complainant a letter indicating that if it did not receive the full names and addresses of the complainant's witnesses within 7 days it would be filing a motion to compel.

On March 21, 2018, the respondent's attorney sent the complainant addresses of former employees that she had apparently requested during a March 15 telephone call. The respondent's attorney indicated that it did not have contact information for some of the employees the complainant was asking about.

On May 22, 2018, the respondent filed several pre-hearing motions with the administrative law judge: a motion to compel discovery, a motion for summary judgment, and a motion to dismiss. On June 25, 2018, the administrative law judge issued a decision denying the respondent's motions for summary judgment and to dismiss, but granting the motion to compel discovery. The administrative law judge indicated that it was unclear whether the complainant fully understood the nature of her obligation to cooperate in discovery efforts and that it was premature to dismiss her complaint at that point. The complainant was directed to provide full and complete responses to the respondent's requests for discovery within 10 days and to provide the respondent with answers to outstanding deposition questions by July 13, 2018. In her order the administrative law judge notified the complainant that failure to comply "may, and most likely will result in the imposition of sanctions, including monetary sanctions and/or dismissal of the complaint."

On July 3, 2018, the respondent sent the complainant another copy of its discovery requests (interrogatories and requests for production of documents) and reminded her that the administrative law judge had ordered her to respond no later than July 13, 2018.[2] On July 16, 2018, in response to a telephone call from the

[2] Although the respondent's original discovery request also included requests for admissions, the respondent did not send the complainant copies of the requests for admissions and that matter was not raised again.

complainant, the respondent sent her a letter indicating that it was re-sending the discovery materials to the complainant at a new address. However, the complainant still did not respond to the requests. Consequently, on July 30, 2018, the respondent filed another motion to dismiss.

On August 1, 2018, prior to any ruling by the administrative law judge on the motion to dismiss, the complainant submitted handwritten responses to the respondent's discovery requests. Many of the complainant's responses to the respondent's interrogatories were incomplete and, in one instance, the complainant indicated that she preferred not to answer the question. In some instances the complainant indicated that she either did not have the information the respondent was seeking or did not understand the question. The complainant did not provide any of the requested documents. Instead, the complainant provided written responses to some of the document requests and left others blank. In one case the complainant stated that she had enclosed a document, when apparently she had not. At the bottom of the last page of written responses the complainant signed her name and wrote, "P.S. if you have any more questions please do feel free to ask. Thank you for your time and consideration."

On August 2, 2018, the respondent renewed its motion to dismiss on the ground that the complainant had not provided any documents in responses to its request and because her interrogatory responses were incomplete, not executed, not notarized, and inconsistent with testimony given at her deposition. In its motion the respondent explained why it considered each of the interrogatory responses to be deficient.

On August 10, 2018, the administrative law judge issued a letter indicating that she was not granting the motion to dismiss, and was giving the complainant until August 20, 2018, to provide full and complete answers to the respondent's interrogatories and full and complete responses to the requests for production of documents. The administrative law judge elaborated: "With respect to each and every interrogatory as to which the complainant has no further information to provide, the complainant will provide as much information as is available, and will specifically state that no further information is available where that is the case." The complainant was advised that this was a final chance and that failure to provide full and complete answers would "almost certainly" result in the imposition of sanctions that may include monetary sanctions and/or the dismissal of the complaint. Finally, the administrative law judge indicated that, if the case was not dismissed, the hearing would be rescheduled to September 19, 2018.

On August 21, 2018, having heard nothing more from the complainant, the respondent again renewed its motion to dismiss. The respondent also requested that the administrative law judge order the complainant to reimburse it for its costs associated with attempts to obtain discovery answers.

On August 31, 2018, prior to any response from the administrative law judge, the complainant submitted additional handwritten answers to the respondent's interrogatories. The answers included additional information to that provided previously, although there were still some questions that were not answered fully. In response to some of the questions the complainant indicated that she did not know what the question meant or that she was answering to the best of her ability. The complainant did not produce any of the documents requested by the respondent, indicating in some instances that she would do so in court. The respondent again renewed its motion to dismiss.

On September 4, 2018, the administrative law judge received a letter from the complainant asking that her case not be dismissed. In a 6-page handwritten letter the complainant argued the merits of her case. The only reference the complainant made to the discovery issue was in a final postscript, in which she stated that she had answered the questions to the best of her ability.

On September 14, 2018, the administrative law judge issued a letter indicating that she was going to grant the motion to dismiss, but denying the respondent's request for monetary sanctions. An order granting the motion was issued on September 18, 2018. The complainant filed a timely petition for commission review of that order, and the matter is now before the commission.

Memorandum Opinion

The Division's rules provide that the administrative law judge has the same authority to compel discovery, to issue protective orders and to impose sanctions as a court has under ch. 804, Stats. *See*, Wis. Admin. Code DWD § 218.14(4).

Wis. Stat. § 804.12 states in relevant part:

> (1) MOTION FOR ORDER COMPELLING DISCOVERY. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:
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> (a) Motion. If . . . a party fails to answer an interrogatory submitted under s. 804.08, or if a party, in response to a request for inspection submitted under s. 804.09, fails to produce documents. . ., the discovering party may move for an order compelling an answer . . . or an order compelling inspection in accordance with the request. . .
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> (2) FAILURE TO COMPLY WITH ORDER.
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> (a) If a party . . . fails to obey an order to provide or permit discovery, including an order made under sub. (1). . . the court in which the action is

> pending may make such orders in regard to the failure as are just, and among others the following:
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> . . .
>
> 3. An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof.

The commission has repeatedly stated that dismissal of an action as a sanction for a discovery failure is appropriate only if the non-complying party's conduct was egregious and evinced an intent not to cooperate with the discovery process. *See*, *for example*, *Xiong v. Logistics Health, Inc.*, ERD Case No. CR201601970 (LIRC Oct. 24, 2017); *Duncan v. International Union of Operating Engineers Local 139*, ERD Case No. CR201002723 (LIRC Sept. 11, 2012); *Betts v. Bay Area Medical Center*, ERD Case No. CR200701640 (LIRC Sept. 19, 2008). The commission does not believe that the complainant's discovery failures met that standard, for the reasons set forth below.

The complainant appeared at her deposition and, although she initially refused to provide witness information (stating that an attorney had advised her not to do so), she ultimately did provide the requested witness information to the best of her ability. While the complainant was delinquent in responding to the respondent's interrogatories and requests for production of documents and missed many discovery deadlines, as the administrative law judge indicated in her initial order compelling discovery, it did not appear that the complainant fully understood her obligations to participate in discovery. The complainant did ultimately provide handwritten answers after being ordered to do so by the administrative law judge. Then, after being advised by the administrative law judge that her first set of responses were incomplete and that she must submit complete responses, the complainant provided a second set of handwritten discovery responses. After the respondent argued that these responses were still not complete and moved to dismiss, the complainant told the administrative law judge that she had responded to the best of her ability. Upon careful review of all the information in the case file, the commission is inclined to agree.

Throughout these proceedings the complainant has contended that she has a learning disability, and the commission sees no reason to doubt her assertions in this regard. Many of the interrogatories to which the complainant was asked to respond are complex and contain multi-part questions. For example, Interrogatory No. 3 asks: "Have you been employed at any point since April 28, 2017, including, but not limited to, employment by a private or public employer, self-employment or work as an independent contractor? If so, for each such employment position, identify the employer or provider of compensation or money; identify your direct

supervisor; identify the dates of your employment and/or receipt of compensation or money; and describe your title, your job duties and responsibilities, your wages and benefits, and whether the job ended and why." In response to this question, the complainant provided a list of her interim employers, explained that she did not have dates of employment but that she worked for them during 2017, and stated that she quit because the wages were too low. The complainant's response appears to be a genuine, if incomplete, attempt to respond to a question that is lengthy and multi-faceted. Other interrogatories, while not involving compound questions, were drafted in ways that may not have been completely clear. For example, in Interrogatory No. 9, the respondent asked the complainant to detail the damages she sought to recover, and the complainant responded that she wanted an apology and compensation. While the complainant did not specify the amount of damages she wanted or how she determined what damages she was entitled to, it may not have been clear to her that the respondent was asking her to do so. In general, although the complainant's responses to the respondent's interrogatories were not as complete or responsive as one might wish, the commission is satisfied that the complainant made a good faith effort to comply and, given her learning deficits, it believes that she did so to the best of her ability.

Regarding the complainant's failure to produce any documents,[3] it is not clear to the commission that the complainant actually had documents that she could have produced but did not. The complainant originally indicated that she had no documentary evidence of her disability, and while in her second set of responses she contended she would bring that proof to the hearing, given her previous responses, in which she explained that she was diagnosed with a learning disability as a child and told about it by her mother much later, and considering that her disability is a learning disability and not a medical disability, it is questionable whether the complainant has any documentation to provide. Similarly, although the complainant indicated that at the hearing she could present written documents that she provided to her employers regarding her disability, a previous statement by the complainant that she did not provide that information to her employers but simply mentioned that it takes her longer to learn things seems to suggest that there is no documentation to provide. Regarding the requests for documents and communications relating to her employment, the complainant indicated that her complaints to her employers were made verbally, and although it appears that the complainant may have had some text messages on her phone, it is not clear whether the complainant was able to print those or understood that she was being asked to do so. As with the interrogatories, the commission believes that the complainant responded to the document requests to the best of her understanding and ability and it is not persuaded that her failure to produce documents evinced an intent to not cooperate.

[3] The administrative law judge's letter explaining her decision to dismiss the complaint references only the complainant's failure to produce documents and is silent on the question of whether her responses to interrogatories were adequate.

In deciding whether dismissal of the complaint 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). The standard to apply when reviewing an administrative law judge's order imposing a sanction for non-compliance with a discovery order is whether the commission finds the administrative law judge's decision on the issue to have been an abuse of discretion. *Kutschenreuter et ano. v. Roberts Trucking*, ERD Case No. 200501465 (LIRC April 21, 2011).

In this case, the commission believes that the administrative law judge could have made greater efforts to assist the complainant. The administrative law judge's order indicates that she directed the complainant to provide full and complete responses or, in the alternative, to explain that she had no further information to provide. However, that direction presupposes that the complainant actually understood what was expected of her and knew what information the respondent wanted her to provide, such that she need only provide it. As discussed above, the commission does not believe this was the case. There are several approaches the administrative law judge could have taken to assist the complainant in complying with discovery, including holding a telephone conference during which the administrative law judge went over the outstanding discovery requests one by one and specified what information was missing from the complainant's responses in order to ensure that the complainant actually understood them and to determine whether there was any additional information or documents the complainant could provide. If, after making such attempts, the complainant refused to answer questions and/or provide documents that were available to her, then a dismissal might be appropriate.

Conclusion

Where, as here, an unrepresented complainant had a learning disability and had received limited direction regarding how to respond to the respondent's discovery requests, but was nonetheless actively attempting to comply with discovery, the commission finds that dismissal of her complaint as a sanction for failing to adequately respond to discovery requests was not an appropriate exercise of the administrative law judge's discretion. Accordingly, this matter is remanded for further proceedings.

cc: Attorney James Boll