

**State of Wisconsin
Labor and Industry Review Commission**

Beau Ellenbecker
Complainant

Infinity Food Group
3975 Tall Pine Drive
Plover, WI 54467
Respondent

ERD Case No.CR201700070
EEOC Case No.26G201700394C

Fair Employment Decision¹

Dated and Mailed:

June 10, 2019

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

By the Commission:

/s/

Michael H. Gillick, Chairperson

/s/

David B. Falstad, Commissioner

/s/

Georgia E. Maxwell, Commissioner

Procedural History

The complaint in this matter alleges discrimination in employment based on disability, and refusal to reasonably accommodate a disability. After investigation by the Equal Rights Division, an initial determination was issued finding no probable cause to believe that the respondent-employer had violated the Wisconsin Fair Employment Act (WFEA). The complainant filed a timely appeal for a hearing on probable cause before an administrative law judge.

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>.

The appeal was certified for hearing on October 20, 2017, and at that point the parties were allowed to engage in discovery. On December 5, 2017 the respondent, through its attorney, sent a letter advising the complainant that the respondent intended to serve discovery on the complainant. On January 9, 2018, it served Interrogatories, Requests for Admission and Requests for Production of Documents. The complainant's due date for serving responses to this discovery was February 12, 2018.

By February 12, 2018, the respondent had received no communication from the complainant at all in response to its discovery requests. The respondent's attorney sent an email about this to the complainant on February 27, 2018, and received an emailed response the same day recommending that the respondent obtain the case file from the ERD, adding "I don't believe it's my responsibility to help your organization formulate an argument against me."

The respondent's counsel replied that the complainant was obligated to respond to discovery requests pursuant to the Wisconsin Administrative Code, and gave the complainant an additional 30 days to respond to the requests. The complainant made no response to discovery by the new due date, March 30, 2018. Counsel for the respondent sent emails to the complainant on April 3 and April 4 asking whether any responses would be forthcoming but received no reply. The respondent's counsel also called the complainant twice on April 16, 2018 at the telephone number listed in the complainant's complaint, but both times got no answer and no opportunity to leave a voice message. On April 16, 2018, the respondent filed a motion asking the administrative law judge to dismiss the complaint for the complainant's failure to comply with his discovery obligations, or in the alternative, to compel the complainant to provide discovery responses.

On May 17, 2018, the administrative law judge held a telephone conference with the complainant and the respondent's attorney, to discuss the respondent's motion. The administrative law judge explained to the complainant that he was required to respond to the respondent's discovery requests. The administrative law judge did not make a ruling on the respondent's motion during the telephone conference, but she did set a deadline of September 28, 2018 for the completion of all discovery, and a deadline of October 5, 2018 for the filing of pre-hearing motions.

On June 12, 2018, while the motion to compel or dismiss was pending, the complainant provided some discovery responses to the respondent. The respondent's counsel notified the complainant on or about June 20, 2018 that he believed the complainant's discovery responses continued to be deficient in several respects, including the complainant's failure to admit or deny most of the respondent's Requests for Admissions.

On July 17, 2018, the administrative law judge issued a ruling on the respondent's motion. She ruled that the complainant's responses of June 12, 2018 were insufficient and provided several examples of how they were insufficient. In granting the respondent's motion to compel discovery responses, she stated:

The Complainant is hereby ordered to provide complete straightforward responses to the Respondent's requests for discovery.

The Complainant's obligation to respond to the Respondent's requests for discovery includes but is not limited to the requirement that he provide an answer indicating that he "admits" or "denies" the information in each of the Respondent's Requests for Admissions.

The Complainant is ordered to provide full and complete responses to the Respondent's requests for discovery within 10 days of the date of this letter.

The Complainant's failure to comply with this order by immediately providing full and complete responses to the Respondent's requests for discovery may result in the imposition of sanctions, including the imposition of fees and costs and/or dismissal of the complaint.

The administrative law judge denied the motion to dismiss, stating:

While the Complainant has been dilatory in his responses to the Respondent's discovery requests, he is unrepresented and appears to be learning how to comply with the discovery process, and it would be premature to dismiss the case at this juncture.

The complainant did not make any response to the respondent's discovery by July 27, 2018, the 10th day after the administrative law judge's order to compel.

The respondent's counsel became aware that the complainant lived both in Wisconsin and Florida. From mid-July to mid-September 2018, respondent's counsel sent emails to the complainant to confirm the complainant's current mailing address, to ensure timely service of pleadings and correspondence. The complainant did not confirm his mailing address in response to these emails. On September 19, 2018, respondent's counsel requested the scheduling of a deposition of the complainant either September 27 or 28, and again asked for the complainant's mailing address. The complainant refused to confirm his current residence and sent an email to the respondent's counsel stating that he would not attend a deposition until he received certain phone records and a video that he had requested from the respondent. The respondent earlier had denied possession of the video and had objected to the request for phone records as unduly burdensome.

On October 4, 2018, the respondent filed a second motion to dismiss, on the grounds that the complainant: 1) had failed to comply with the administrative law judge's order compelling discovery responses by July 27, 2018, and in fact had not complied to date; 2) had admitted facts that necessitated dismissal of his discrimination complaint, due to his failure to timely deny them in response to the respondent's Requests for Admissions;² and 3) had refused to have his deposition taken.

On October 8, 2018 the administrative law judge acknowledged receipt of the second motion to dismiss and sent a letter to the complainant giving him until October 17, 2018 to reply.

The complainant did not respond to the motion to dismiss. He did, however, file on October 15, 2018 a motion to subpoena video footage, a motion to subpoena phone records, and a motion to extend the date for exchanging exhibits. The administrative law judge denied the motions, noting that they were filed after the deadlines she had set for completing discovery (September 28, 2018) and for filing pre-hearing motions (October 5, 2018).

By letter dated October 19, 2018, the administrative law judge granted the respondent's motion to dismiss. After reciting much of the procedural history of this case, the administrative law judge provided the following rationale for her conclusion:

An administrative law judge may dismiss a complaint where a non-complying party's conduct is egregious or where a complainant engages in a course of conduct evincing a lack of any serious intention to cooperate in the discovery process. See, Josellis v. Pace Industries (LIRC, 06/21/02); Rodriguez v. Milwaukee Christian Center (LIRC, 08/26/09).

The Complainant's failure to comply with discovery obligations by refusing to provide adequate responses to requests for discovery, and by failing, after three months, to have taken any steps to comply with the Administrative Law Judge's order compelling discovery responses, is egregious.

Memorandum Opinion

In employment discrimination hearings, an administrative law judge may compel discovery consistent with the civil discovery statute applicable in court. Wis. Stat. ch. 804; Wis. Admin. Code § DWD 218.14. If an administrative law judge grants a motion to compel and orders the noncompliant party to provide the discovery requested, the

² For example, it would be deemed admitted that the complainant did not have a disability, that the respondent did not perceive him as having a disability, that the respondent did not fail to accommodate any disability, and that the complainant voluntarily resigned his employment.

party must do so or face the possibility of being sanctioned. The administrative law judge has the authority to make such orders as are just regarding a failure to obey an order compelling discovery, which could include an order dismissing an action. Wis. Stat. § 804.12(2)(a)3; Wis. Admin. Code § DWD 218.14(4).

Although the dismissal of an action is a harsh penalty for a failure to comply with discovery, it is appropriate if the non-complying party's conduct was egregious and showed an intent not to cooperate with the discovery process. *Xiong v. Logistics Health, Inc.*, ERD Case No. CR201601970 (LIRC Oct. 24, 2017). The standard to be applied by the commission is whether the administrative law judge's decision was an abuse of discretion. *Kutschenreuter v. Roberts Trucking, Inc.*, ERD Case No. 200501465 (LIRC Apr. 21, 2011). In deciding whether to uphold a dismissal against an unrepresented party, the commission will consider whether the administrative law judge made adequate efforts to assist that 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 Sep. 11, 2012).

In this case the administrative law judge appropriately exercised her discretion in dismissing the complainant's case. It is clear from the record that the administrative law judge made adequate efforts to assist the complainant in understanding and complying with the respondent's discovery requests. She held a pre-hearing telephone conference with the parties on May 17, 2018, and followed it with a written summary dated May 22, 2018, noting that in response to the complainant's statement that he did not understand his discovery-related obligations, she explained those obligations, specifically with regard to the complainant's failure, up to that point in time, to respond at all to the respondent's discovery requests served in January 2018. She stressed that an unreasonable failure to comply with discovery requests would result in sanctions, which could include dismissal. She also took a telephone call from the complainant on May 30, 2018 and answered his additional questions about discovery. In July 2018, the administrative law judge did not grant the respondent's first motion to dismiss, noting the fact that he was unrepresented and still learning how to comply with discovery. She did, however, grant the motion to compel, and explained to the complainant that many of the discovery responses he made on or about June 12, 2018, were insufficient. She paid particular attention in her ruling to the complainant's failure to straightforwardly admit or deny many of the respondent's Requests for Admissions, making reference to the process whereby a failure to properly admit or deny a matter results in a deemed admission of that matter. (See Wis. Stat. § 804.11). Her ruling of July 17, 2018 reasonably allowed the complainant an additional 10 days to respond to the respondent's discovery and warned him that the failure to provide full responses could result in dismissal of the complaint.

After the July 17th order, the complainant continued to fail to comply with his discovery obligations. The respondent filed a second motion to dismiss on or about October 4, 2018, alleging that it had received no additional discovery responses after

July 17th, and that the complainant had obstructed the respondent's ability to take the complainant's deposition by refusing to confirm whether he was living at his address in Florida or Wisconsin. The administrative law judge advised the complainant to file a response to the respondent's second motion to dismiss by October 17, 2018. The complainant failed to do so. In the absence of any response by the complainant, the administrative law judge reasonably accepted the factual allegations of the respondent's second motion to dismiss.

Given this sequence of events, the commission concludes that the administrative law judge's dismissal of the complaint was appropriately based on a determination that the complainant's conduct was egregious and showed an intent not to cooperate with the discovery process. By July 17, 2018, the complainant surely understood that he was required to respond fully to the respondent's discovery, and he knew that if he failed to respond fully, he risked having his complaint dismissed either due to his violation of the administrative law judge's order, or through the deemed admission of facts that would completely undercut his claim. A lack of a timely discovery response by the complainant under these circumstances would clearly support a finding that the complainant's conduct was egregious and willful. Given the complainant's failure to object to the allegations of the second motion to dismiss, the administrative law judge had no reasonable alternative to concluding that the complainant had intentionally and egregiously failed to respond to discovery after being ordered to do so on July 17, 2018. A dismissal is warranted due both to the intentional refusal to comply with the administrative law judge's order, and to the deemed admission of facts that make it impossible for the complainant to prevail in his claim of discrimination. (See *Gross v. Sodexo Marriott Management, Inc.*, ERD Case No. 200003458 (LIRC June 21, 2002)). The complainant's conduct obstructing the respondent's attempt to take his deposition was not an independent ground for dismissal because the complainant did not fail to appear after having been served a notice of the time and place of his deposition (see Wis. Stat. § 804.12(4)), but the complainant's refusal to agree to a deposition until he received what he deemed to be satisfactory responses to his discovery requests was a further indication that he lacked a serious intent to engage in discovery in good faith.

In his petition for review, the complainant claimed to have sent "revised discovery answers" to the respondent's counsel "within the allotted time frame."³ It is not clear whether the complainant is saying that he in fact complied with the administrative law judge's July 17, 2018 order, but even if he is, that statement does not change the above analysis. The complainant's failure to assert to the administrative law judge that he had complied with the July 17th order, in response to the allegations of the

³ The complainant also asserted that if the respondent's counsel did not receive his revised answers it was his responsibility to bring that to the complainant's attention before bringing a motion to dismiss. There is no such obligation. The complainant was under a direct order from the administrative law judge compelling him to make complete responses to discovery within 10 days. The respondent's requirement to consult with the opposing party regarding discovery disputes applies to disputes arising prior to making a motion to compel. Wis. Admin. Code § DWD 218.14(4).

second motion to dismiss, left no reasonable alternative to the administrative law judge but to accept the respondent's allegation that the complainant made no revised answers within the time limits placed on him by the order. The question before the commission is whether the administrative law judge acted within her discretion, given the information she had. The commission will not address new factual assertions by the complainant which were not made to the administrative law judge, when the administrative law judge gave the complainant ample opportunity to do so before deciding the case.

cc: Attorney Mitchell W. Quick