State of Wisconsin

Labor and Industry Review Commission

Mary Hamilton, Complainant **Froedtert Medical College Memorial Hospital,** Respondent ERD Case No. CR201701043 EEOC Case No. 443201700471C	**Fair Employment Decision**[1] **Dated and Mailed:** April 29, 2020 hamilma_rsd.doc:103

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/

Michael H. Gillick, Chairperson

/s/

David B. Falstad, Commissioner

/s/

Georgia E. Maxwell, 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

This case is before the commission following a dismissal of the complainant's complaint as a sanction for her failure to comply with discovery. On February 10, 2017, the complainant filed a complaint of discrimination. On September 28, 2018, the Equal Rights Division (the "Division") of the Wisconsin Department of Workforce Development issued a finding of no probable cause. The complainant appealed the no probable cause determination and the case was certified to hearing.

On November 19, 2018, the respondent served discovery on the complainant via her attorney. Shortly thereafter, the complainant's attorney gave notice that he was resigning from the case. On December 10, 2018, the respondent filed with the Division a copy of a letter sent to the complainant, containing the respondent's discovery request.[2]

On January 2, 2019, the Division received a 16-page handwritten letter from the complainant in an envelope addressed to:

> Von Briesen & Roper
> Hearing Section Chief
> Hearing and Mediation Section
> Equal Rights Division
> 819 N 6th Street, Room 723
> Milwaukee, WI 53203

The complainant began her letter as follows:

> My name is Mary Hamilton. I am writing an appeal about the case of Froedtert Memorial Hospital Inc and myself. I do believe that the allegations brought against me is false and untrue. Therefore I'm appealing the decision that was made in this statement.
> 1. Admit that Kelly Acker was my supervisor.
> 2. No, I don't agree that on August 24, 2016 I incorrectly documented vital signs on a patient.
> ….

The form of the complainant's filing, in numbered paragraphs that correlate with the content of the respondent's requests to admit, makes it clear that her letter was meant to be a response to the requests to admit. However, the opening paragraph which stated that the complainant was appealing the decision indicates that the

[2] The Division's records do not show that the actual discovery request was included in the copy of the letter filed with the Division. However, the respondent provided a copy to the Division as an attachment to its eventual May 17, 2019 motion for sanctions.

complainant misunderstood what she had received; she apparently mistook the discovery request for a decision in her case.

To further complicate the matter, the Division mis-dated the complainant's filing in its recordkeeping system. The "received" date was recorded as January 2, 2018, rather than January 2, 2019. As a result, it appears that the administrative law judge did not see the complainant's January 2, 2019 letter. In addition, the complainant's letter does not indicate that a copy was sent to the respondent.

On January 21, 2019, the respondent sent a letter to the complainant asking her to comply with its discovery request. The next day, the Division sent the complainant a letter which stated that the complainant had failed to call in to a prehearing scheduling conference and directing her to respond within 20 days, or her case would be dismissed.

On February 5, 2019, the Division received a letter from the complainant addressed to "all parties." In that letter, the complainant appeared to be attempting to respond to both the January 21 letter from the respondent and the January 22 letter from the Division. The complainant stated that she "did mail all information to Von Briesen, Attorneys at Law. I did mail all documents in a timely manner." The complainant went on to state that she has caller ID and never received a telephone call from a law firm, and that she "just received documents five days ago stating this."[3] The complainant indicated that she received a letter dated January 21, 2019, and had mailed "all information" about her discrimination case, yet you say you haven't received and then you called me. That never happened." The February 5 letter, like the January 2 letter, was not copied to the respondent.

On February 22, 2019, and again on March 28, 2019, the respondent filed motions to dismiss the complaint based on what it asserted was a lack of any communication from the complainant in response to the administrative law judge's 20-day letter. The March 28 motion also referenced the complainant's alleged lack of response to discovery. The administrative law judge emailed the respondent's attorney on April 1, attaching a copy of the complainant's February 5 letter. Also on April 1 the respondent's attorney requested a postponement of the hearing date. The administrative law judge granted the request and the hearing was postponed to October 24, 2019.

On April 16, 2019, the respondent's attorney spoke with the complainant by telephone and the complainant agreed to respond to discovery and to appear for a deposition on May 14. Three days later, on April 19, the complainant again answered the respondent's 52 requests to admit, this time numbering all 52 answers in separate

[3] This is an apparent reference to the Division's January 22 letter, referencing the missed prehearing call, although that call would have come from the Division, not from a law firm.

paragraphs in her response. The complainant's response to the requests to admit was received by the respondent on April 22.

On May 14, 2019, a half hour after the complainant's deposition was to begin, at which point the complainant had not yet arrived, the respondent's attorney spoke with the complainant by telephone. The complainant contends that the respondent's attorney told her "it was too late to come although I wanted to come. " The complainant asserts that she asked if she could reschedule, but that the respondent's attorney told her that it was too late and that her case would be dismissed. The respondent offers a different version of events. The respondent's attorney contends that he contacted the complainant by telephone and asked whether she would be arriving at her deposition soon, but that the complainant communicated that she was not on her way and not aware of her scheduled deposition. According to the respondent, the complainant stated that she had not read the entirety of the Notice of Deposition and thus did not realize she was required to attend at the scheduled time.

On May 17, 2019, the respondent filed a motion for sanctions or, in the alternative, to compel discovery. On July 11, the complainant mailed an answer to the motion, in which she stated that she would like to appeal her case because she "missed [her] hearing appointment April 14, 2019." On July 11, the administrative law judge issued an order compelling the complainant to answer the respondent's interrogatories and requests for production of documents, and to make herself available for deposition by no later than August 9, 2019.

A new deposition date was scheduled for August 5, 2019. The complainant appeared and was deposed at the office of the respondent's attorney. At that time, the respondent's attorney inquired about her responses to the interrogatories and requests for production of documents. The complainant stated that she would provide responses immediately. Ten days later, on August 15, at which point the complainant had not yet submitted her responses to the respondent's interrogatories and requests for production of documents, the respondent renewed its motion to dismiss.

On August 20, 2019, the administrative law judge sent a letter to both parties giving the complainant "until September 6, 2019, to file a response to the Complainant's [sic] request." The administrative law judge's letter concluded, "If no response is received by that date, I will consider the Respondent's request on its own accord."

During the last week of August 2019, the administrative law judge received a voicemail from the complainant expressing confusion about the respondent's motion to dismiss. In response, the administrative law judge left a voicemail for the complainant on September 10 giving her until September 13 to file a response. On September 13, the complainant mailed her response. In her letter, the complainant stated that she "would like to appeal the decision." The complainant stated she was

only given two weeks to gather information and needed more time, and that she was hoping to find another lawyer to represent her.

On September 20, 2019, the administrative law judge issued an order dismissing the complainant's complaint as a sanction for her failure to comply with discovery. The complainant filed a timely petition for commission review of that order.

Memorandum Opinion

Wisconsin Stat. § 804.12 provides, 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: (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. (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.

Dismissal of a complaint as a sanction for a discovery shortcoming is only appropriate if the non-complying party's conduct was egregious and evinced an intent not to cooperate with the discovery process. *See*, for example, *Moore v. Dairy Queen*, ERD Case No. CR201701303 (LIRC March 11, 2019); *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); *Reed v. Wurth USA*, ERD Case No. CR200004147 (LIRC Sept. 25, 2001). "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." *Moore, supra*; *Kutschenreuter et ano. v. Roberts Trucking,* ERD Case No. 200501465 (LIRC April 21, 2011).

In *Roen v. Allen Bradley Rockwell Automation Inc.*, ERD Case No. CR2006022025 (LIRC Aug. 19, 2008), the commission affirmed the dismissal of a complaint based upon the complainant's failure to comply with discovery, where the administrative

law judge had carefully guided the complainant through the discovery process, specifying in detail what she was required to provide and giving her numerous opportunities to provide it, and explaining in explicit terms what the consequence would be for her failure to do so. Conversely, the commission overturned a dismissal of a complaint for failure to comply with discovery where the administrative law judge had failed to make a reasonable effort to guide an unrepresented complainant through the discovery process, and where it did not appear that the administrative law judge had provided the complainant with an opportunity to respond to the motions to compel and the motion to dismiss. *Betts, supra.*

In a similar case, *Moore v. Dairy Queen, supra*, the commission was unwilling to affirm a dismissal where the complainant's actions showed that she was attempting, to the best of her ability, to comply with a complex discovery request. In *Moore,* the commission found that the complainant did not fully understand her obligations to participate in discovery and was attempting to respond to interrogatories that were complex and contained multi-part questions. The commission found that, although the discovery responses were incomplete, the complainant had made "a good faith effort to comply," that she did so "to the best of her ability," and that her failure to comply with discovery therefore did not evince "an intent not to cooperate." The commission noted that, in deciding whether dismissal is an appropriate sanction to impose on an unrepresented party, it takes 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. *Moore,* citing *Duncan, supra.* The commission concluded that the administrative law judge had not done so and that her dismissal of the complaint constituted an abuse of discretion.

In her decision in this case, the administrative law judge found that the complainant:

> was made aware of the rules of discovery that governed her case – and that failure to comply with reasonable discovery requests could result in the dismissal of her case – at least two times: (1) in a letter from the undersigned ALJ dated January 22, 2019, and (2) in an order compelling discovery dated July 11, 2019.

However, the January 22 letter was a form letter that encouraged litigants to review the statutes, and that contained an overview of the discovery process in general, but did not explain in plain terms the complainant's obligations to respond to specific discovery requests in her case. Similarly, the July 11, 2019 order compelling discovery identified the alleged missing discovery and set deadlines to comply with discovery but did not explain what those documents were or what was expected of the complainant in order to comply.

Throughout this process, the complainant's behavior has evinced an intent to answer discovery, a good faith belief that she had done so, and what appears to be honest

confusion about the discovery process. The complainant did provide a significant, albeit incomplete, response to the respondent's first discovery request and did so in a timely manner. She initially provided answers to the first 16 of 52 requests to admit in numbered paragraphs relating to the interrogatory number and answered the bulk of the remaining requests to admit in narrative form. The complainant tried to explain her attempt at compliance in her February 5, 2019 letter.[4] The complainant subsequently provided a more thorough response to the respondent's requests to admit, this time answering all 52 requests in numbered paragraphs. Although she did not attend her initially scheduled deposition, after some guidance she did attend her deposition as rescheduled. Finally, although the complainant did not provide any responses to the interrogatories or requests for production of documents, given her thorough answers, completed twice, to the requests to admit portion of the respondent's discovery request, it appears that she was attempting to at least partially comply with the respondent's voluminous and complex discovery requests.

The discovery request at issue was 17 pages long, contained 52 requests to admit, 15 interrogatories (most with at least 7 sub-parts) and 11 requests for production of documents. As stated above, the complainant answered the requests to admit twice and appeared for her deposition the second time it was scheduled. She responded repeatedly to the Division's correspondence, attempting to explain herself. These were not the actions of a party trying to evade an obligation to comply with discovery. Rather, the complainant's numerous communications with the administrative law judge evidenced confusion about her obligations. In one instance, the administrative law judge even noted the complainant's confusion in an email to the respondent, but then simply extended the deadline for complying without attempting to assist the complainant or provide her with further guidance. If the complainant was confused about the process or her obligations, giving her more time to meet those obligations, with no more information on how to do so, could not reasonably have been expected to help. The commission believes that the administrative law judge should have made greater efforts to assist the complainant, who appeared to be genuinely confused about the discovery process.

[4] The contents of the complainant's February 5 letter would have made no sense to the administrative law judge if she had not seen the complainant's January 2 letter which, as was explained in the Procedural History above, was misfiled in the Division's records. Knowing now, however, that the complainant did file a timely, though incomplete, discovery response, her allegations reveal that she was confused, but not untruthful.

Where, as here, an unrepresented complainant received limited direction regarding her obligations to respond to discovery, but nevertheless attempted to comply with the discovery to the best of her ability, the commission believes that dismissal of her complaint as a sanction for failing to completely respond to the respondent's discovery requests was not an appropriate exercise of the administrative law judge's discretion. Accordingly, this matter is remanded for further proceedings.

cc: Doris E. Brosnan
Devin S. Hayes