State of Wisconsin

Labor and Industry Review Commission

Tori J. Vandenbusch, Complainant **The Bay at North Ridge Health & Rehab Center**, Respondent ERD Case No. CR202002712 EEOC Case No. 26G202100193C	**Fair Employment Decision** **Dated and Mailed:** July 31, 2023 vandeto_err.doc:149

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

By the Commission:

/s/
Michael H. Gillick, Chairperson

/s/
Georgia E. Maxwell, Commissioner

/s/
Marilyn Townsend, Commissioner

Procedural History

On December 18, 2020, the complainant, through her attorney, filed a complaint with the Equal Rights Division (hereinafter the "Division") of the Department of Workforce Development alleging that the respondent discriminated against her based upon her disability, in violation of the Wisconsin Fair Employment Act (hereinafter "Act"). On July 13, 2021, the Division issued an initial determination finding probable cause on the complainant's claims that the respondent refused to reasonably accommodate her disability, terminated her employment because of her disability, and discriminated against her in terms or conditions of employment (benefits) because of her disability, and finding no probable cause on the complainant's claim that the respondent discriminated against her in terms and conditions of employment (harassment) because of her disability. On August 13, 2021, the case was certified to a hearing on the issues for which probable cause was found and was assigned to administrative law judge (hereinafter "ALJ") John Gelhard.

In late January of 2022, both parties agreed to engage in mediation through the Division and, on February 8, 2022, the case was assigned to a different ALJ, Maria Selsor, for the purposes of mediation. On March 25, 2022, the respondent's attorney filed a Notice of Appearance with the Division and served the complainant, through her attorney, with a first set of written interrogatories, requests for production of documents, and requests to admit. The responses to the respondent's discovery requests were due within 30 days of the time service was made upon the complainant's attorney, per Ch. 804, Wis. Stats.

On May 20, 2022, the respondent's attorney contacted the complainant's attorney via email to inquire about her responses to discovery, noting that the complainant had not yet responded and that her response was due three weeks ago. On the same day, the complainant's attorney sent the following email in response:

> I just recently returned to work full-time after almost 2 mos. of medical leave. You evidently served these while I was out and I did not see them. I will work to get responses to you ASAP.

On July 8, 2022, the case was reassigned to a different ALJ, Stephanie Brown, for the purposes of mediation. On the same day, ALJ Brown contacted both parties' attorneys regarding potential dates for mediation. Both parties' attorneys agreed to telephone mediation but did not confirm a date or time for the mediation. The issue of the respondent's pending discovery requests was not discussed.

On July 28, 2022, ALJ Brown again reached out to both parties' attorneys regarding potential dates for mediation. On the same day, the respondent's attorney indicated that he would discuss mediation with his client but noted that he had still not received a response from the complainant to his discovery requests. In an email addressed to ALJ Brown and the complainant's attorney, the respondent's attorney stated:

> Respondent's participation in mediation is conditioned upon Complainant providing a full and complete substantive response to the Respondent's first set of interrogatories and document requests that it served on Complainant on March 25, 2022. To date, we have not received any response or request for extension despite my follow-up correspondence requesting the response. (The requests for admission are deemed admitted by Complainant's non-responsiveness and need not be answered at this time.)

On the same day, the complainant's attorney sent an email in response to both the respondent's attorney and ALJ Brown apologizing for the delay and stating that she had been on medical leave for several months.

On August 5, 2022, the complainant sent the following email to the Division asking for assistance with her case:

> I was writing to see if I could get a referral or some advice. I have an active wrongful termination suit that was found to be a violation of ADA and is in the settling stage. However the lawyer I have been working with has not returned any of my original documents even after several attempts to get them from her and refuses to communicate with me about the process. I spoke with the judge assigned to mediation of the case and she contacted my lawyer and requested she communicate details with me but she still has not. I also searched deeper about her since I was getting a bad feeling due to her lack of communication and constantly getting the run-around when I ask for updates. She has been disciplined before for misappropriation of client funds from ADA cases before. What are my options here? I'm honestly really confused and anxious by this whole situation. Thank you for your help.

On August 11, 2022, ALJ Brown sent the complainant an attorney referral list and advised her that if she contacted another attorney, he or she may be willing to represent her or assist her in obtaining her records from her current attorney. ALJ Brown also stated that she would let the complainant know if she received communications from either her attorney or the respondent's attorney about scheduling mediation.

On October 26, 2022, ALJ Brown sent both parties' attorneys another email indicating that she had delayed scheduling mediation so that the parties could engage in the discovery process. ALJ Brown once again inquired about the parties' readiness for mediation. On the same day, the complainant's attorney responded to both ALJ Brown and the respondent's attorney with the following email:

> I am preparing the final responses to Respondent's discovery requests. I got sidelined for a few weeks for illness, currently pneumonia, but I should be back in shape next week.

The same day, the respondent's attorney responded with the following email addressed to both the complainant's attorney and ALJ Brown:

> I appreciate the current response but am concerned about the ongoing lack of communication and responsiveness where I served you with the Respondent's first set of discovery more than 7 months ago and have received no communications or responses. I am hopeful I will have the responses to interrogatories and document requests by Wednesday of next week so we can get the mediation scheduled. There is no need to answer the requests for admissions as they are deemed admitted.

On November 7, 2022, the respondent's attorney sent an email to the complainant's attorney and ALJ Brown, stating:

> If I do not receive by Wednesday of this week [complainant's] full and complete substantive responses to Respondent's first set of interrogatories and document requests that were served on you and Complainant on March 25, 2022, then I will be filing a motion to dismiss as a sanction for discovery abuse or in the alternative to compel discovery. To date, I have not received any response.

On November 10, 2022, the complainant's attorney sent the following email to the respondent's attorney and ALJ Brown:

> Folks,
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> I am finishing up discovery responses in the next few days but was out with pneumonia and complications until early this week. I apologize for the delay.

On November 29, 2022, ALJ Brown once again emailed both parties' attorneys to inquire about their availability for mediation. On the same day, the respondent's attorney responded via email and stated:

> Unfortunately, [the complainant's attorney] remains non-communicative without any action or communication since our last communication and her promise to deliver very late discovery responses. I have tried to avoid formal action but I am going to be filing a motion to dismiss as a sanction for discovery abuse or in the alternative to compel discovery.

The complainant's attorney responded the same day, stating that she would check with the complainant. She also claimed that everyone in her household got the flu and that she had to handle an emergency room appointment for her son.

On January 6, 2023, ALJ Brown informed both parties' attorneys via email that she had returned the case file to ALJ Gelhard to move forward with scheduling a hearing on the merits. That same day, the complainant's attorney sent the following response:

> Thank you, ALJ Brown. I'm sorry that I've been unavailable so long. I came down with pneumonia, then Influenza A, then pneumonia against, and finally stomach flu, and I spent November and December sick in bed. Good news, I'm well again and will get discovery responses hopefully next week.

On February 2, 2023, the respondent filed a Motion to Dismiss based in part on the complainant's failure to respond to its discovery requests on March 25, 2022. On February 17, 2023, ALJ Gelhard informed both parties' attorneys via email that he had received the respondent's Motion to Dismiss, and that he had not received any responsive pleading from the complainant. He provided the complainant's attorney a deadline of March 3, 2023, at 4:30 p.m. to submit a response to the respondent's motion.

On March 7, 2023, the respondent's attorney sent an email to ALJ Gelhard and the complainant's attorney stating that he had received nothing in response to the respondent's motion. On the same day, ALJ Gelhard 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

In reviewing an ALJ's procedural rulings, the commission asks whether the ruling was a reasonable exercise of discretion or an abuse of discretion. *Garrison v. Neenah Foundry Co.*, ERD Case No. CR201702712 (LIRC Dec. 29, 2021) (citing *Shi v. UW System Board of Regents*, ERD Case Nos. CR201101274 & CR201203088 (LIRC Sept. 11, 2015)). Under this standard, the question before the commission is whether the ALJ "examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." *Gallardo v. Accurate Specialties Inc.*, ERD Case No. 201501205 (LIRC Sept. 6, 2019) (citing *Loy v. Bunderson*, 107 Wis. 2d 400, 415, 320 N.W.2d 175 (1982)).

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

Wisconsin 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:

> (a) *Motion.* If a deponent fails to answer a question propounded or submitted under s. 804.05 or 804.06 . . . or 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 or fails to respond that inspection will be permitted as requested or fails to permit inspection as requested . . . the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request.
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> . . .
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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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> . . .
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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, or rendering a judgment by default against the disobedient party.

The authority to sanction a party, including the authority to dismiss an action, also arises if a party has failed to serve *any* responses to properly served interrogatories or requests for inspection of documents, regardless of whether the party seeking discovery has made a motion to compel. *Meyer v. Spectrum Brands*, ERD Case No. CR201104462 (LIRC July 31, 2014) (citing Wis. Stat. § 804.12(4)).

Dismissal is the most serious step that can be taken as a sanction; it is "an extremely drastic penalty that should be imposed only where such harsh measures are necessary." *Hudson Diesel Inc. v. Kenall*, 194 Wis. 2d 531, 541, 535 N.W.2d 65, 69 (Ct. App. 1995) (citing *Trispel v. Haefer*, 89 Wis. 2d 725, 732, 279 N.W.2d 242, 245 (1979)). Accordingly, 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. *Hamilton v. Froedert Med. Coll. Mem'l Hosp.*, ERD Case No. CR201701043 (LIRC Apr. 29, 2020).

In *Welke v. Luther Hosp. Mayo Health Sys.*, ERD Case No. CR201200652 (LIRC May 30, 2014), the commission noted that the Wisconsin Supreme Court in *Industrial Roofing Services, Inc. v. Marquardt*, 2007 WI 19, ¶ 61, 299 Wis. 2d 81, 103-04, 726 N.W.2d 898 further restricted judicial discretion to dismiss a matter by holding that ordering dismissal with prejudice based on the conduct of a party's attorney would be

an abuse of discretion by a judge if the attorney's client is blameless in the discovery failing. Consistent with the Supreme Court's holding, the commission held that, "when the party failing to make discovery is represented by legal counsel: 1) an administrative law judge must determine whether the party is blameless in the discovery failure when considering an appropriate sanction under Wis. Stat. ch. 804; and 2) it is an abuse of discretion to order dismissal of a complaint without having made a determination that the party, as opposed to the attorney, was at least partially to blame." *Id. See also Romero v. Boumatic LLC,* ERD Case No. CR201104198 (LIRC June 27, 2014).

In this case, the ALJ's decision to dismiss the complainant's complaint as a sanction for failing to respond to the respondent's discovery requests was not an appropriate exercise of his discretion. The ALJ's opinion was entirely focused on the conduct of the complainant's attorney and included no determination as to whether the complainant herself was or was not to blame for the discovery failure. Absent a conclusion that the complainant was at least partially to blame for the failure to comply with the respondent's discovery requests, dismissal of the complaint as a sanction for failing to comply with discovery amounted to an abuse of discretion.

The commission, therefore, remands this matter to the Division so that the ALJ can make a determination as to whether the complainant was blameless in the discovery failure and, based upon that determination, decide whether dismissal of the complaint is an appropriate sanction. If the ALJ concludes that dismissal is not appropriate, then the matter shall be rescheduled for a hearing on the merits of the complainant's complaint. It should be noted that concluding that dismissal was not warranted would not change the fact that the complainant has not responded to the respondent's discovery request and is obligated to do so within 30 days of the date of the ALJ's determination, if the ALJ does conclude that dismissal is not appropriate. The complainant has advised the Division that she is no longer represented by her attorney, although the case file contains nothing in writing to this effect. If the complainant continues as an unrepresented party, the obligation to respond to discovery requests will rest with her personally and, should she fail to provide timely responses, dismissal may become appropriate.

cc: Atty. Janet L. Heins
Atty. Troy D. Thompson