

State of Wisconsin



Labor and Industry Review Commission

Angela G. Ford, Complainant

Milwaukee Board of School Directors,
Respondent

ERD Case No. CR202201262
EEOC Case No. 26G202200886

Fair Employment Decision

Dated and Mailed:

February 20, 2025

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

By the Commission:

/s/

Michael H. Gillick, Chairperson

/s/

Georgia E. Maxwell, Commissioner

/s/

Marilyn Townsend, Commissioner

Procedural History

On May 2, 2022, the complainant, by her attorney, filed a complaint with the Equal Rights Division (hereinafter “Division”) of the Department of Workforce Development, alleging that the respondent discriminated against her based upon her race, sex, and because she opposed discrimination in the workplace, all in violation of the Wisconsin Fair Employment Act. On March 10, 2023, an equal rights officer for the Division issued an initial determination finding probable cause to believe that the complainant was discriminated against as alleged. Consequently, the matter was certified to hearing before an administrative law judge.

In a pre-hearing conference report and scheduling order issued on May 2, 2023, the administrative law judge notified the parties that the hearing in this matter was scheduled for November 7 through 10, 2023, and that all pre-hearing discovery must be completed no later than September 8, 2023, with any pre-hearing motions, including motions to compel discovery, filed by September 15. The pre-hearing order specified that, if motions were filed, briefs in response to those motions would be due within 14 days of the date the motion was filed.

On May 17, 2023, the respondent served on the complainant a “First Set of Interrogatories and Requests for Production of Documents.” The discovery request consisted of seven interrogatories and ten document requests. The complainant was notified that responses were due no later than 30 days from the date of service. On June 16, the respondent’s attorney sent an email to the complainant’s attorney agreeing to extend the discovery deadline by a week.

On August 1, 2023, the respondent’s attorney sent a letter to the complainant’s attorney stating that the discovery responses were five weeks overdue from the date of the extension and indicating that he had called the complainant’s attorney on two occasions and left messages, but was still waiting to learn when the discovery responses would be provided. On August 8, the complainant’s attorney informed the respondent’s attorney by email that he had just returned from vacation and would submit his discovery responses by August 11.

On August 16, 2023, at which point no discovery responses had been received, the respondent filed a “Motion to Compel” discovery. In the motion and supporting brief the respondent’s attorney requested that the administrative law judge compel the complainant to produce answers to its discovery request, that she extend the discovery deadline in order to give the respondent an opportunity to conduct additional discovery based upon the answers supplied by the complainant, and that she award the respondent reasonable attorney’s fees and costs associated with bringing the motion. On August 18, the complainant’s attorney sent an email to the respondent’s attorney indicating that he was surprised by the motion to compel discovery because “I’ve sent you two USBs in the mail now.” The complainant’s

attorney indicated that he believed he sent the USBs “last week and the first of July” and that he would now arrange for hand delivery of them.

On September 1, 2023, the respondent’s attorney sent a letter to the administrative law judge indicating that the complainant had failed to file a reply brief to its motion to compel discovery¹ and asking the administrative law judge to issue an order granting the motion.

Also on September 1, 2023, presumably after receiving a copy of the respondent’s attorney’s letter, the complainant’s attorney sent an email to the administrative law judge acknowledging that “we owe the respondent discovery” and stating that he attempted to send discovery responses “by USPS which did not work.” The complainant’s attorney stated that his paralegal had been sick all week, but “he will I’m sure deliver this discovery as soon as he is able.” The complainant’s attorney also asserted that, because the respondent had filed a motion to compel without first conferring with him, the motion was moot.

On October 2, 2023, the respondent’s attorney sent another letter to the administrative law judge indicating that he had attempted to confer with the complainant’s attorney, who stated on two occasions that the complainant would provide a written discovery response. However, the respondent had received no discovery responses nor any response to his motion to compel discovery. The respondent’s attorney requested an order that the complainant respond to the discovery requests.

On October 10, 2023, the administrative law judge sent a letter to the parties and their attorneys by both regular mail and email addressing the respondent’s motion to compel discovery.² In her letter the administrative law judge noted that the respondent’s attorney had provided the necessary information in support of its motion to compel discovery, including a statement indicating that sincere attempts had been made to resolve the matter. However, rather than ruling on the motion to compel, the administrative law judge instead ordered the complainant to respond to the respondent’s discovery motion. The complainant was instructed that this response must include an explanation for the complainant’s failure to comply with discovery or to attempt to work out problems with the respondent’s attorney and should demonstrate that the complainant “has now complied with the Respondent’s request for discovery, and/or [has attempted] to resolve any discovery disputes with the Respondent’s attorney, since the filing of the Respondent’s motion.” The complainant was advised that she must submit this response by October 16, 2023,

¹ Although no briefing schedule was issued, the May 2, 2023 pre-hearing order specified that all responsive briefs would be due in 14 days, giving the complainant until August 30, 2023 in which to have filed a responsive brief.

² The letter was misdated as December 10, 2023. A subsequent email from the administrative law judge indicates that the correct date was October 10, 2023.

or the complaint would be dismissed. The complainant was further ordered to “take immediate steps” to respond to the respondent’s discovery requests and to resolve any discovery issues with the respondent’s attorney.

The administrative law judge’s order concluded with the following:

If the Complainant fails to respond to the Respondent’s discovery request and fails to respond to the Respondent’s motion by October 16, 2023, then the Complainant’s complaint will be dismissed because (1) the Complainant failed to comply with the Respondent’s written discovery request, and (2) because the Complainant has failed to comply with my Order to respond to the Respondent’s discovery motion.

If the Complainant files a response to the Respondent’s discovery motion, the Administrative Law Judge will consider the Complainant’s response and make a decision on the Respondent’s motion regarding attorneys’ fees and extending any discovery deadline.

(emphasis in original)

On October 11, 2023, the complainant’s attorney responded that he was happy to comply but needed an additional two days. The administrative law judge responded, as follows:

As for your request of 2 days to respond to the order, it is hereby granted. The Complainant now has until 4:30pm on October 18, 2023 to respond to the Respondent’s discovery motion. However, it is still my expectation that the Complainant will take immediate steps to comply with the Respondent’s discovery requests.

At 4:46 p.m. on October 18, 2023, the respondent’s attorney received an email from the complainant’s attorney containing discovery responses. The discovery responses were not signed and were numbered pages 1 through 40. A minute later, at 4:47 p.m., the complainant’s attorney faxed discovery responses that were not signed and were numbered pages 1 through 44. Both sets of responses included a signed medical records authorization form for an individual other than the complainant. A few minutes later, at 5:00 p.m., the complainant, by her attorney, submitted signed discovery responses, this time marked as pages 1 through 46. The final submission again contained the incorrect medical release.

The following day, on October 19, 2023, the complainant’s attorney sent an email to the administrative law judge indicating that the respondent had received signed responses to all discovery requests and new medical records recently received by the

complainant and that, therefore, the complainant had complied with the administrative law judge's order.

On the same day, October 19, 2023, the respondent's attorney sent a letter to the administrative law judge requesting that she dismiss the complaint. In his letter, the respondent's attorney stated that the complainant had failed to submit a response to the motion to compel, that at 4:46 p.m. and 4:47 p.m. on October 18 the respondent received unsigned discovery responses that were incomplete and that included a medical authorization for the wrong employee, and that at 5:00 p.m. it received signed discovery responses, which also included the incorrect medical release. The respondent argued that, because the complainant had failed to submit a response to its motion to compel and failed to submit discovery responses prior to the 4:30 p.m. deadline, her complaint should be dismissed.

On October 24, 2023, the administrative law judge sent a letter to the parties describing several ways in which she believed the complainant's response was deficient and indicating that the complaint would be dismissed. Specifically, the administrative law judge noted that the complainant had:

- 1) Responded to the respondent's discovery requests after the deadline of October 18, 2023 by 4:30 pm;
- 2) Failed to submit a response to the respondent's motion to compel;
- 3) Failed to explain the complainant's failure to comply with the respondent's discovery request which necessitated the motion;
- 4) Failed to explain the complainant's failure to attempt to work out any discovery problems with the respondent's attorneys; and
- 5) Failed to submit any response to indicate that the complainant has now fully complied with the respondent's request for discovery.

Later that day, the administrative law judge issued an order of dismissal. In her order the administrative law judge indicated that:

. . . the Complainant has willfully failed to timely comply with the Respondent's reasonable discovery requests and the Administrative Law Judge's Discovery Orders regarding the Respondent's attempts to obtain discovery responses from the Complainant and the resulting discovery motion by the Respondent.

On or about October 25, 2023, the complainant filed a motion for reconsideration. On October 30, 2023, the administrative law judge issued a letter denying the motion for reconsideration and indicating that the motion would be treated as a petition for commission review.

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).

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. . . .

(2) **FAILURE TO COMPLY WITH ORDER.**

(a) If a party . . . fails to obey an order to provide or permit discovery, . . . 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:

. . .

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 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 to have been an abuse of discretion. *Moore, supra*, citing *Kutschenerter et ano. v. Roberts Trucking*, ERD Case No. 200501465 (LIRC April 21, 2011). Under this standard, the question before the commission is whether the administrative law judge "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).

In this case, the complainant's attorney repeatedly failed to cooperate in the discovery process or to provide timely discovery responses upon request. Nor has the complainant's attorney provided any reasonable explanation for these failures. However, notwithstanding the complainant's attorney's conduct, the commission

nonetheless concludes that the administrative law judge's dismissal of the complainant's complaint as a sanction for failure to comply with discovery was not a reasonable exercise of her discretion.

As noted above in the Procedural History section of this decision, the administrative law judge received a Motion to Compel from the respondent, but failed to rule on the motion, in spite of the fact that the respondent's attorney had provided the necessary information in support of the motion, including a statement indicating that sincere attempts had been made to resolve the matter. Instead, the administrative law judge issued an order requiring the complainant to file a response to the motion to compel and instructing her to "take immediate steps" to respond to the discovery request, two directives that were inconsistent. If the administrative law judge was considering the merits of the motion, as her requirement that the complainant file a response to the motion suggests was the case, then simultaneously ordering the complainant to take steps to respond to the discovery requests was premature. If, on the other hand, the administrative law judge intended to grant the motion and require the complainant to comply with discovery, as the portion of the order stating that she must take steps to do so suggests, then the complainant's explanation for failing to provide discovery responses earlier was no longer relevant.

In addition to the fact that requiring the complainant to both respond to the motion and to submit discovery requests was inconsistent, the commission is not persuaded that it was appropriate to *require* the complainant to file a response to the respondent's motion to compel discovery. Although the May 2, 2023 scheduling order issued by the administrative law judge contemplated that each party would receive 14 days in which to file responsive briefs if a motion was filed, the filing of a responsive brief by the complainant was not a requirement or mandate. Rather, submitting a brief to the administrative law judge would have been an opportunity for the complainant to be heard on the issue; the complainant's failure to submit a responsive brief simply meant that the administrative law judge received no explanation for the complainant's actions and could rule on the motion to compel without the benefit of hearing the complainant's side of the story. Once the respondent submitted its motion to compel, complete with sufficient information to allow the administrative law judge to rule on the motion--and the complainant was given an opportunity to respond to that motion--the administrative law judge should have been able to issue an order specifically addressing the motion to compel and resolving the discovery dispute. A brief from the complainant was not a necessary prerequisite for the administrative law judge to do so.

Even assuming, however, that the administrative law judge *could* properly require the complainant to submit a brief in response to the discovery motion, the statute that permits dismissal of a complaint as a sanction for failure to comply with a discovery order does not permit dismissal of a complaint as a sanction for failing to

do so. Administrative law judges have only such authority as is given to them by statute. *Peterson v. Natural Resources Board*, 94 Wis.2d 587, 592, 288 N.W.2d 845, 848 (1980); *Stephens v. Renaissance Place*, ERD Case No. CR201103558 (LIRC Dec. 12, 2013). The authority to dismiss a complaint as a sanction for failing to comply with discovery is contained in Wis. Stat. § 804.12(2)(a), cited in more detail above, which provides that dismissal may be appropriate if a party “fails to obey *an order to provide or permit discovery*.” The administrative law judge’s order requiring that the complainant respond to the motion to compel was not an order to “provide or permit discovery,” and the commission is unpersuaded that the administrative law judge had the authority to dismiss the complaint as a sanction for the complainant’s failure to supply such response.

It must also be noted that the complainant did provide discovery responses on October 18, 2023, the date on which the administrative law judge directed her to respond to the motion to compel and, as indicated above, while the complainant did not comply with the directive to respond to the respondent’s motion to compel, once she supplied her discovery responses such a response was essentially moot. Having provided the requested discovery materials, any explanation as to why the complainant had not responded sooner or what steps she undertook to resolve discovery issues with the respondent was of no consequence.

Nor is the commission persuaded that the fact the complainant’s discovery materials were submitted after 4:30 p.m. justified a dismissal of her complaint. The administrative law judge’s order was that the complainant must file a *response* to the motion to compel discovery no later than 4:30 p.m. on October 18, 2023, and that she must additionally take steps to respond to discovery. On this point, the administrative law judge’s October 11 email to the complainant’s attorney specified:

As for your request of 2 days to respond to the order, it is hereby granted. The Complainant now has until 4:30pm on October 18, 2023 to respond to the Respondent’s discovery motion. However, it is still my expectation that the Complainant will take immediate steps to comply with the Respondent’s discovery requests.

Neither the October 11, 2023 email nor the administrative law judge’s original order required the complainant to submit her discovery responses at any specific date or time. Rather, the complainant’s attorney was instructed to “take immediate steps” to respond to the discovery requests. The order contained no explanation as to what was meant by “steps,” but the fact that the complainant’s attorney submitted her discovery responses³ between 4:46 p.m. and 5:00 p.m. on October 18,

³ Although the respondent’s attorney has indicated that the discovery responses supplied by the complainant’s attorney on the complainant’s behalf were incomplete, the respondent has not explained how the responses are deficient. The only matter that the respondent’s attorney pointed out was that the complainant’s attorney submitted a medical release pertaining to the wrong

2023, the date on which the complainant's response to the discovery motion was due, would appear to put her in compliance with the administrative law judge's directive. Further, while as indicated above, the administrative law judge's order did not require a discovery response by any date or time certain, even if it had, it would be difficult to justify dismissal of the complaint where the requested discovery materials were received within half an hour of the deadline.

Finally, it should be noted that the commission has held that, when the party failing to make discovery is represented by legal counsel, the 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 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. *Welke v. Luther Hosp. Mayo Health Sys.*, ERD Case No. CR201200652 (LIRC May 30, 2014). See, also, *Romero v. Boumatic LLC*, ERD Case No. CR201104198 (LIRC June 27, 2014) and *Vandenbusch v. The Bay at North Ridge Health & Rehab Center*, ERD Case No. CR202002712 (July 31, 2023). This holding is based upon the Wisconsin Supreme Court's decision in *Indus. Roofing Servs, Inc. v. Marquardt*, 2007 WI 19, ¶ 61, 299 Wis. 2d 81, 103-04, 726 N.W.2d 898, in which the Court 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 was blameless in the discovery failing. Thus, even if the commission were to conclude that the complainant's attorney violated an order of the administrative law judge requiring the complainant to provide discovery, dismissal of the complaint as a sanction would be inappropriate absent a conclusion that the complainant shared some of the blame.

For all the reasons set forth above, the commission finds that the dismissal of the complaint as a sanction for failure to comply with discovery was not a reasonable application of discretion on the part of the administrative law judge. The administrative law judge's decision is therefore set aside and the matter is remanded to the administrative law judge for the completion of pre-hearing discovery and--presuming that the complainant will fully and expeditiously cooperate in the discovery process--for a hearing on the merits of the case.

cc: Attorney Ben Hitchcock Cross
Attorney Christopher Riordan

individual. However, while it does appear that the complainant's attorney sent the wrong medical release, it does not appear that the respondent's discovery request contained a specific request for a medical release.