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JAMES A. La ROSE,

 Complainant,

v.

Chancellor, UNIVERSITY OF
WISCONSIN - Milwaukee,

 Respondent.

Case No. 94-0125-PC-ER

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RULING ON
RESPONDENT'S
MOTION TO COMPEL

The University of Wisconsin (UW) filed a motion to compel discovery, by cover letter dated January 4, 1996. A briefing scheduled was established with the final brief due by February 6, 1996. The UW filed additional materials by cover letter dated February 12, 1996, to bring a newly-issued supreme court decision to the Commission's attention.

The facts recited below are undisputed, unless specifically noted to the contrary. These findings are made for the sole purpose of resolving the pending motion.

FINDINGS OF FACT

1. The UW served interrogatories on Mr. La Rose on June 30, 1995. His answer was dated August 17, 1995, and was received by the UW on August 21, 1995. The UW discovered that Mr. La Rose signed his answer to the interrogatories, but was not administered an oath to attest to the truthfulness of his answers before signing.
2. By letter dated August 25, 1995, respondent sent Mr. La Rose the following notice (showing the same emphasis as appears in the original document):

On August 21, 1995, I received your response dated August 17, 1995, to the Respondent's First Set of Interrogatories. As you will note, the respondent requested that you fully answer each interrogatory, "in writing and under oath." The answers provided in your response of August 17, 1995, were not made under oath. Furthermore, s. 804.08 (1)(b), Stats., states that

"[e]ach interrogatory shall be answered separately and fully in writing and under oath . . ." Therefore, the Respondent requests that you resubmit a notarized copy of your response of August 17, 1995, within 7 days of receipt of this letter. In addition, your response to the Second Set of interrogatories must also be notarized. Thank you for your anticipated prompt attention given to this matter.

3. By letter dated October 4, 1995, the UW notified Mr. La Rose of his failure to have the second set of interrogatories notarized. The letter text is shown below with emphasis as it appears in the original document.

On September 22, 1995, I received your answer dated September 21, 1995, to the Respondent's Second Set of Interrogatories. As you will note, the Respondent requested that you fully comply with s. 804.08 (1)(b), Stats., by answering each interrogatory, "in writing and under oath." The answers provided in your answer of September 21, 1995, were not made under oath. Therefore, the Respondent requests that you resubmit a notarized copy of your answer within seven (7) days of receipt of this letter. Thank you for your anticipated, prompt attention given to this matter.

4. The UW sent Mr. La Rose a third letter dated November 30, 1995, which specifically stated why the UW felt Mr. La Rose's answers to the interrogatories were unacceptable. The UW stated in the letter, as shown below. The emphasis noted appears in the original document.

Today, I received your answer dated November 17, 1995, to the Respondent's Second Set of Interrogatories, Interrogatory No. 2. As you will note, we had requested that you fully answer each interrogatory "under oath." Your answer to Interrogatory No. 2 was not made under oath. Further, s. 804.08 (1) (b), Stats., states that "[e]ach interrogatory shall be answered separately and fully in writing and under oath . . ."

As you most likely know, a notarial act means:

any act that a notary public of this state is authorized to perform and includes taking an acknowledgment, administering an oath or affirmation, taking a verification upon oath or affirmation, witnessing or attesting a signature, certifying or attesting a copy, and noting a protest of a negotiable instrument. s. 706.07 (1)(c), Stats.

The notarial act performed by Ms. Tracy C. Bould merely constitutes witnessing or attesting that your signature is authentic. To fully comply with the statutory requirements regarding answering Interrogatories, you must submit your answer under verification upon oath or affirmation; therefore, subjecting you to a penalty for false swearing (footnote omitted) if your answer is found to be untruthful. The form such an oath takes, for your information, appears after your answer and before your signature and the signature of the notary public, and is as follows:

I declare, under a penalty of perjury and/or false swearing, that the above information is true and correct.

The Respondent, therefore, requests that you resubmit your answers of August 17, 1995, September 21, 1995, and November 17, 1995, signed and verified upon oath, within 7 days of receipt of this letter. If you do not comply with this request, we will submit another motion to compel discovery and aggressively pursue a motion for costs.¹

5. Mr. La Rose perceived the above requests as harassment and so informed the Commission by letter dated December 7, 1995. The text of his letter is shown below.

In each [instance] I have complied with the respondent's request. I have had the interrogatories notarized under oath. (See attached respondent's letters dated August 17, 1995 and September 21, 1995)

On November 30, 1995, the respondent sent me a letter stating that my interrogatories were not made under oath and only attest to the verification of my signature. These statements are inaccurate. The respondent now is asking that I not only have my answers of November 17, 1995, notarized again, but also the answers I submitted under oath on August 17, 1995, and September 21, 1995. If the respondent believed that they were not properly notarized why did they wait until November 30, 1995, to request that I resubmit the documents. As I have stated, each set of interrogatories was notarized after I was sworn under oath by the notary.

The respondent then threatens. "If you do not comply with this request, we will submit another motion to compel discovery and aggressively pursue a motion for costs."

¹ The UW's reference to submitting "another motion to compel discovery" is to a prior contest between the parties which was resolved by Commission ruling mailed to the parties on July 25, 1995.

As the commission knows I am not an attorney and I am representing myself. I have done my best to comply with the respondent's requests. I view this letter as harassment and an attempt to intimidate me to drop my age discrimination charge.

I am asking the Commission to deny the respondent's request because it is redundant and is a waste of everyone's time, and to inform me of what my legal remedies are concerning these motions.

6. On December 15, 1995, the Commission responded to Mr. La Rose's letter referenced in the prior paragraph. The Commission noted that the UW had filed no motion relating to the adequacy of his signature on interrogatories and that it would be premature for the Commission to act without first having a motion to resolve.
7. On January 4, 1996, the UW sent Mr. La Rose a letter which explained that the request to have his interrogatory answers sworn to was an attempt to further the purpose of discovery and was not intended as harassment. The letter provided a more detailed explanation of the deficiencies which the UW perceived in his signing of his answer to the interrogatories, as shown below. The noted emphasis appears in the original document.

Notarial officers perform whatever notarial act that is requested by a client. Your answer of August 17, 1995, was acknowledged, one of several acts that a notarial officer is authorized by law to perform, as evidenced by the notarial certificate. An acknowledgment is a formal declaration made by a person stating that at the time the document was signed, it was signed voluntarily and with an understanding of its nature and purpose. It is not an oath. When a notarial officer acknowledges a document, they do not administer an oath because the client is not swearing to the truth of the statements contained therein. When a notarial officer administers an oath, s/he is required not only to sign and seal the document, but also is required to include a special notarial certificate commonly called a "jurat." None of your answers contain a proper jurat which further leads us to believe that the notarial officers did not administer an oath at the time you signed the answers. . . . As a side note, please refer to our answer to your interrogatories dated September 6, 1995. As you will note, an oath was administered, as evidenced by the jurat and Mr. Wilmot swore to the truth of the statements contained therein.

* * *

We provide this letter in hopes of clarifying our position so that we can resolve this issue short of an order from the commission and to address your concerns. Again, we regret you have the impression that we are harassing you. That was not our intent nor our purpose.

8. Mr. La Rose responded to the UW by letter dated January 27, 1996, as shown below.

I take exception with your statement. "Please understand that I as an attorney and the individuals who work with me in my office have an ethical and legal responsibility to zealously defend any action filed against our client, that being the University; to do otherwise, we would be remiss in our responsibilities."

[Y]ou and I both know as a practical matter that Age Discrimination has occurred here. I believe you also know that the University does not have to defend employees when they act outside the scope of their employment. Age Discrimination clearly falls in this area. It would appear that you are not under any ethical or legal responsibility to defend Mr. Wilmot and Mr. Hamann. I believe that you have a moral and ethical responsibility to do what is right. It is apparent that our definitions of ethical and legal responsibilities are not the same.

Your explanation of the different notarial functions was informative. If this information had been provided with your early requests, we would not be in the present dilemma.

As I have stated in my correspondence of December 7, 1995, to the Commission, I swore to the notaries under oath. The notaries both asked me why I was having my document notarized. I explained to them what the documents were and that I had to swear under oath that the content was true. I did what you asked me to do in good faith; to swear under oath that the content was the truth. There was no reason for me to believe that the notaries may not have properly performed their duties. However, because they did not use a "jurat" does not mean that they did not administer the oaths to me. There was no reason for me to believe that I was not fully complying with your request.

Apparently you found my notarized statements of August 17, 1995 and September 21, 1995, acceptable until November 30, 1995, when you requested that I have them notarized again. I view this action as harassment and a delaying tactic to diffuse the real issue of Age Discrimination.

9. The UW filed the present motion on January 8, 1996. Mr. La Rose's response to the UW's motion is dated January 27, 1996. The text is shown below.

My response to this motion is stated in my letter to the Commission, dated December 7, 1995. I have done what the respondent and the Commission have asked me to do. I have taken an oath and sworn before the notaries that my answers are true. Counsel can confirm this by checking with the notaries that have attested to this.

This is another attempt by the respondent to intimidate me and obfuscate the real issue, the charge of Age Discrimination. Further, the respondent has not offered any proof that my statements were not sworn under oath.

I respectfully request the Commission to accept my notarized answers as sworn statements and to deny the respondent's Notice of Motion and Motion to Compel Discovery and reimbursement of alleged costs.

The notary signatures at issue.

10. Mr. La Rose's interrogatory answer dated August 17, 1995, is in letter format addressed to UW's counsel and signed: "Respectfully, James A. La Rose". The document bears the notary public seal of Dorothy H. Sprong, with a clause which appears to be stamped on the letter and which indicates that Mr. La Rose's signature was "acknowledged" by the notary.
11. Mr. La Rose's interrogatory answer dated September 21, 1995, is in letter format addressed to UW's counsel and signed: "Respectfully, James A. La Rose". The document bears the notary public seal of Tracy C. Bould, without any language describing the nature of the notary act. In other words, only the notary seal and signature appear on this document.
12. Mr. La Rose's interrogatory answer dated November 17, 1995, is in letter format addressed to UW's counsel and signed: "Respectfully, James A. La Rose". The document bears the notary public seal of Tracy C. Bould, without any language describing the nature of the notary act. In other words, only the notary seal and signature appear on this document.

DISCUSSION

The question for resolution is whether the discovery responses filed by Mr. La Rose are sufficient, or whether he must resubmit the same with a notary seal and accompanying notary language showing that he swore to the truth of the discovery responses in the presence of the notary. If Mr. La Rose's responses are found to be insufficient, a second question exists whether he should be relieved of the need to resubmit his discovery responses due to the fact that he says he swore to the contents of the documents before the notaries and made a good-faith attempt to comply with the requirements.

The administrative rules of the Commission provide authority for the UW to seek discovery in Mr. La Rose's case. Specifically, the text of s. PC 4.03, Wis. Adm. Code, is shown below.

PC 4.03 Discovery. All parties to a case before the commission may obtain discovery and preserve testimony as provided by ch. 804, Stats. For good cause, the commission or the hearing examiner may allow a shorter or longer time for discovery or for preserving testimony than is allowed by ch. 804, Stats. For good cause, the commission or the hearing examiner may issue orders to protect persons or parties from annoyance, embarrassment, oppression or undue burden or expense, or to compel discovery.

Section 804.08, Stats., contains the requirements for interrogatories which is the form of discovery at issue here. Responses to interrogatories are governed by s. 804.08(1)(b), Stats., the text of which is shown below.

(b) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under s. 804.12(1) with respect to any objection to or other failure to answer an interrogatory. (Emphasis added.)

There are many different types of actions which a notary may perform, as set forth in s. 706.07 (1)(c), Stats., as shown below:

(c) "Notarial act" means any act that a notary public of this state is authorized to perform, and includes taking an acknowledgment, administering an oath or affirmation, taking a verification upon oath or affirmation, witnessing or attesting a signature, certifying or attesting a copy, and noting a protest of a negotiable instrument. (Emphasis added.)

Due to the variety of possible notarial acts, Wisconsin law requires the notary to include a statement describing the type of notarial act performed. s. 706.07 (7), Stats. The notary failed to do so in regard to Mr. La Rose's interrogatory responses dated September 21, 1995 and November 17, 1995.

A notary acknowledged Mr. La Rose's signature on his interrogatory response dated August 17, 1995. However, a difference exists under Wisconsin law between a notary "acknowledgment" and a notary "verification upon oath or affirmation." The differences are detailed in ss. 706.07 (1)(a) and (3), and s. 706.07 (2)(a), Stats., as shown below.

s. 706.07 (1)(a), Stats.: "Acknowledgement" means a declaration by a person that the person has executed an instrument for the purposes stated therein and, if the instrument is executed in a representative capacity, that the person signed the instrument with proper authority and executed it as the act of the person or entity represented and identified therein.

s. 706.07 (2)(a), Stats.: In taking an acknowledgment, the notarial officer must determine, either from personal knowledge or from satisfactory evidence, that the person appearing before the officer and making the acknowledgment is the person whose true signature is on the instrument.

s. 706.07 (1)(e), Stats.: "Verification upon oath or affirmation" means a declaration that a statement is true made by a person upon oath or affirmation.

The difference between an acknowledgement and a verification upon oath or affirmation is further illustrated by the standard short forms contained in the statute. The pertinent statutory short forms for acknowledgement in an individual capacity (s. 706.07 (8)(a), Stats.) and for verification upon oath or affirmation (s. 706.07 (8)(c), Stats.) are shown below.

- (a) For an acknowledgment in an individual capacity:

State of . . .

County of . . .

This instrument was acknowledged before
me on (date) by (name(s) of person(s)).

. . . (Signature of notarial officer)

(Seal, if any)

. . . Title (and Rank) [My commission
expires: . . .]

- (c) For a verification upon oath or affirmation:

State of . . .

County of . . .

Signed and sworn to (or affirmed) before
me on (date) by (name(s) of person(s)
making statement).

. . . (Signature of notarial officer)

(Seal, if any)

. . . Title (and Rank) [My commission
expires: . . .]

The Commission concludes from the foregoing information that Mr. La Rose's interrogatory response dated August 17, 1995, was notarized but does not meet the requirement that his response be "in writing and under oath", within the meaning of s. 804.08 (1)(b), Stats.

The second question is whether the defects discussed previously were "cured" by Mr. La Rose's swearing before the notary as to the accuracy of the statements in his discovery responses. A similar argument was rejected by the Wisconsin Supreme Court in Kellner v. Christian, 197 Wis.2d 183, 539 N.W.2d 685 (1995). The plaintiffs in Kellner were required to file a notice of injury claim to commence their action against the State. Section 893.82 (5), Stats., governed the transaction and is shown below.

The notice . . . shall be sworn to by the claimant and shall be served upon the attorney general at his or her office in the capitol by certified mail. Notice shall be considered to be given upon mailing for the purpose of computing the time of giving such notice. (Emphasis added.)

The Kellner plaintiffs served the claim notice on the attorney general. However, the notice was executed before a notary who merely verified that the signers were known to her to be the persons who signed the notices.

The Kellner plaintiffs argued that the notary defect was "cured" by plaintiffs' attorney who asked them to read the notice and inquired as to whether they understood it and whether the contents were true. The Supreme Court disagreed stating as follows:

We agree with the State and hold that, in order for a notice to be properly "sworn to" under Wis. Stat. s. 893.82(5), a claimant must make an oath or affirmation as to the truthfulness of the contents of the notice. In addition, the notice must contain a statement showing that the oath or affirmation occurred. . . .
Kellner v. Christian, 539 N.W. 2d at 688.

The statute involved in Kellner, of course, is not the same as the discovery statute involved here but the Commission is persuaded that the result should be the same. The discovery process in Wisconsin is intended to encourage a full exchange of information between the parties with assurance that the information provided is reliable. The statute governing interrogatories (s. 804.08 (1)(b), Stats.) furthers this purpose by requiring that answers be given "under oath". There is no ambiguity in the statutory language. Furthermore, interrogatories as a form of discovery are an alternative to taking an oral deposition. There can be no dispute that Mr. La Rose would have had to answer questions under oath at an oral deposition because the requirement is specifically stated in the statutes. (See ss. 804.03 (1) and 804.05 (4)(a), Stats.) The degree of truthworthiness created by responding under oath at an oral deposition should be the same where interrogatories are used as an alternative discovery tool.

While the Commission understands that Mr. La Rose represents himself, the UW is well within its rights in requesting that Mr. La Rose resubmit his interrogatory answers. One way he could accomplish this requirement is to xerox his prior interrogatory responses, take the copies to a notary, tell the notary he needs to swear to the contents under oath with the notary seal and appropriate language from s. 706.07 (8)(c), Stats. He might wish to show the notary this ruling to the notary to clarify the type of notarial act he needs.

UW's Request for Costs

The UW requested the Commission to order Mr. La Rose to reimburse the UW for its costs associated with drafting, filing and arguing the merits of the motion. The Commission declines to award costs for several reasons. First, the Commission has no reason to doubt Mr. La Rose's statement that he made a good-faith effort to reply to the interrogatories at issue. Second, the question raised by the UW is one which the Commission has not had an opportunity to review previously and, in fact, the only case law cited by the UW is the recently-issued Kellner case. It therefore appears that the legal issue presented was not well established previously. Of course, the Commission would consider awarding costs and/or imposing sanctions if Mr. La Rose fails to comply with the following order. Such sanctions could have severe consequences to Mr. La Rose, including dismissal of his complaint.

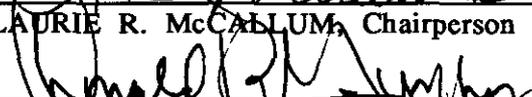
ORDER

Mr. La Rose must resubmit to respondent his interrogatory responses dated August 17, 1995, September 21, 1995, and November 17, 1995, and such resubmission must contain a notary seal and notary language consistent with notary verification upon oath or affirmation as detailed in this ruling. (A simplified method to accomplish this is described in the final paragraph on the preceding page.) The Commission will consider his resubmission to be completed on a timely basis only if respondent receives the resubmitted responses by 4:30 p.m. on April 22, 1996. The Commission retains jurisdiction to proceed with the investigation of this complaint.

Dated March 22, 1996.

JMR


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

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