

STATE OF WISCONSIN

PERSONNEL COMMISSION

KATHRYN J. READY,
Complainant,

v.

**President, UNIVERSITY OF WISCONSIN
SYSTEM (La Crosse),**
Respondent.

**RULING ON
DISCOVERY DISPUTE**
(with related status
conference scheduled)

Case No. 95-0123-PC-ER

Complainant filed two motions to compel discovery. Complainant's attorney sent the Commission a letter dated April 23, 1998, which stated in regard to the First Motion that the parties had resolved most disputes. Complainant's attorney further explained in regard to the Second Motion that respondent agreed to produce the information but complainant's attorney reserved the right to renew her motion if the material produced was deemed insufficient. No further objections have been raised in regard to the Second Motion. Accordingly, the only matter for resolution at this time relates to the First Motion. The final brief was filed on May 22, 1998.

FINDINGS OF FACT

1. The parties agreed to the following statement of issue for hearing at a prehearing conference held by telephone on September 4, 1997:

Whether respondent discriminated against complainant on the basis of sex when it did not select her for the Strategic Management Policy position (#7210) in the College of Business, UW-LaCrosse.

2. The disputed items in the First Motion involve interrogatory #13, and request for production of documents #11.

OPINION

Interrogatory #13:

The text of this interrogatory is shown below:

Interrogatory No. 13: List the names and ages of all employees at UW-L who have been hired or promoted in the last 10 years, within the College of Business. Please state what position each individual was hired for.

Respondent contends this interrogatory is not relevant to the subject matter of the case and is not reasonably calculated to lead to the discovery of admissible evidence. Respondent further contends the request is over broad and production would cause an undue burden on respondent. Respondent's detailed argument is shown below (p. 2, brief dated May 18, 1998):

Interrogatory No. 13 requests the names and ages of all employees hired or promoted in the College of Business for a ten-year period. There is no limitation as to the type of position within the College, or how any such positions are at all comparable to the one complainant sought. There is also no showing that the same decision-makers have been involved in all personnel transactions for the requested period of time, and that time period is itself far beyond the time period relevant to the position that is in issue in this case. Under these circumstances, the information requested is not relevant, and is unlikely to lead to the discovery of admissible evidence on the issue of whether this complainant was discriminated against based on her sex when she was not chosen for position #7210. There is simply no link between the information sought and the issue in this case. Further, to require respondent to produce this information creates an undue burden, since it would require respondent to review and assemble numerous records. Accordingly, the respondent should not be required to produce this information. See, *Asadi v. UW*, 85-0058-PC-ER, 4/10/92); *Jaques v. DOC*, 94-0124-PC-ER, 3/31/95.

Complainant, in effect, amended her interrogatory request to include only faculty hires or promotions in the College of Business for a ten-year period. (See, complainant's brief dated 5/21/98, p. 2, 1st paragraph.) Complainant's arguments with this amendment in mind, are shown below (from pp. 1-2 of her brief):

This information is highly relevant to Complainant since this case involves a failure to hire regarding a position within the College of Business at Respondent, a College that Complainant has worked in. It is a contention of Complainant relevant to her gender discrimination claim that Respondent has a pattern or practice of discriminating against highly qualified women in the College of Business. Complainant is entitled to the discovery of the information requested in Interrogatory No. 13 . . . which will allow her to assess these hiring and promotion practices of Respondent; evidence that is relevant to Respondent's motivation to discriminate. It is highly relevant to evaluate who has been hired and/or promoted within the last 10 years within the College of Business when evaluating the hiring practices of an employer. Respondent did deviate from its past practices throughout its hiring for the position in question in this case . . .

It appears that the main crux of Respondent's refusal to respond to this Interrogatory is that it is either not relevant which is simply not true and/or that the request is overly burdensome which it is not. This information is relevant and will lead to the discovery of relevant information pertaining to Complainant's claim based on sex discrimination and there is no undue burden placed on Respondent by this request.

Complainant's attempt to identify a pattern of discriminating in faculty hires and promotions (regardless of which individuals made the hiring decision) is an area of inquiry which could lead to the discovery of admissible evidence relevant to Ms. Ready's case. (*See, Vest v. UW System (Green Bay)*, 97-0042-PC-ER, 9/10/97, pp. 2-4.) Such inquiries must be of a reasonable period of time but are not limited solely to the time complainant was not hired. Rather, the period of time may precede and/or follow the date when complainant was not hired. *See, Asadi v. UW System (Platteville)*, 85-0058-PC-ER, 11/13/87. However, the age of the individuals hired or promoted does not bear any relationship to complainant's claim of sex discrimination. Accordingly, the Commission rules that Interrogatory #13 is a valid discovery request, as rephrased below:

List the names of all employees at UW-L who have been hired or promoted to faculty positions in the last 10 years, within the College of Business. Please state what position each individual was hired for.

The analysis does not end here, however, for respondent asserts it would create an undue burden to produce the information “since it would require respondent to review and assemble numerous records.” Respondent provides no details as to how its records are kept. It would appear reasonable to presume that the College of Business’ personnel office would have access to hiring and promotion information without much difficulty. Respondent cited the case of *Asadi v. UW (Platteville)*, 85-0058-PC-ER, 4/10/92, as support for its contention that the request was overly burdensome. The case appears to be incorrectly cited as there is no discussion of what constitutes an overly burdensome request. In fact, respondent in that ruling voluntarily agreed to share information from about fifty files.

It could be that respondent is referring to the ruling in *Asadi v. UW-Platteville*, 85-0058-PC-ER, 11/13/87. This ruling concerned Mr. Asadi’s request for information about cases or claims of discrimination filed against UW-Platteville and involving the same individuals who decided not to rehire him. UW-Platteville contended it did not maintain a list of the type sought by Mr. Asadi and that it would require respondent’s staff “countless hours reviewing files at numerous locations” to comply with the request. The Commission rejected the argument noting as follows:

It would appear likely that there are persons employed at UW-Platteville who would be sufficiently familiar with any litigation involving that campus to respond accurately to the discovery request. If that is not the case, the respondent’s attorney should contact the hearing examiner so that a method can be agreed upon for providing this information to the complainant.

Again, the above-discussed case does not support respondent’s arguments in Ms. Ready’s case. (Compare, *Balele v. DER, DMRS & DOC*, 97-0012-PC-ER, 7/23/97, pp. 3-4, where details were provided by respondent as to why the process to obtain the requested information would create an undue burden.) Specifically, respondent has presented insufficient information about its record-keeping system to conclude that answering the interrogatory would create an undue burden. Respondent also cited the

case of *Jaques v. DOC*, 94-0124-PC-ER, 3/31/95, as support of its contention that Ms. Ready's interrogatory request creates an undue burden. Once again, the rulings made in the cited decision do not relate to the "undue burden" issue presently before the Commission in Ms. Ready's case.

The Commission has ruled previously that the responding party is not required to gather and create a document of the requested information at the responding party's own expense. *Balele v. DER, DMRS & DOC*, 97-0012-PC-ER, 7/23/97, and *Vest v. UW (Green Bay)*, 97-0042-PC-ER, 9/10/97. Rather, the responding party has an obligation to produce what exists and if a requested compilation does not exist, the responding party must make available to the requesting party the documents from which the requested compilation could be derived.

Request for Production of Documents #11:

The text of this production request is shown below:

Request for Production of Documents No. 11: The complete personnel files of Dr. Kathryn Ready and any and all individuals hired by UW-L in the College of Business during the last five years, including, but not limited to, evaluations and employment contracts.

Respondent contends complainant is not entitled to the documents requested, with the exception of complainant's own personnel file. Respondent's detailed argument is shown below (respondent's brief dated 5/18/98, pp. 2-3).

Document Request No. 11, with the exception of complainant's own personnel records, is similarly problematic (to the problems associated with Interrogatory #13). Again, it is a request for information for a period of time that extends beyond the relevant period for the transaction in question. There is, too, the same lack of limitation as to the type of positions about which the information is requested, and there is no showing that the selection choices have been made by the same individuals as those involved in the position for which Ms. Ready applied. Further, the subsequent evaluations and employment contracts of all these individuals could have had no bearing on the processes by which they were hired, or on the process that resulted in Ms. Ready's nonselection.

This information is completely irrelevant to Ms. Ready's case, and to whether she was discriminated against because of her sex. Thus, again, the information requested is not reasonably calculated to lead to the discovery of admissible evidence, and production creates an undue burden on respondent. Therefore, respondent seeks a ruling from the Commission denying this request too.

Complainant's detailed reply to respondent's objections is shown below (complainant's brief dated 5/21/98, pp. 2-3):

The second area of dispute from this first set of discovery is Document Request No. 11 which requests the complete personnel files of (complainant) and any and all individuals hired by UW-L in the College of Business during the last five years, including, but not limited to, evaluations and employment contracts. Again, this information is highly relevant in Complainant's assessment as to the hiring practices of UW-L in the College of Business. She is entitled to review the credentials of those persons hired within the last five years in order to evaluate the pattern or practice of UW-L in hiring for this particular college. The position in question is a position within the College of Business. This request will lead to information that is admissible at hearing. Dr. Ready was employed by Respondent, her file contains student evaluations and professional evaluations. Complainant is entitled to compare her performance with those of other faculty within this College of Respondent to establish her performance, credentials, and experience at Respondent. It is irrelevant whether selection choices were made by the identical group of people when assessing the pattern or practice of this division/college of Respondent. Complainant is entitled to review this information and depose Respondent's witnesses regarding this information because the hiring practices of Respondent are at issue in this case. A key aspect of this case is the deviation by Respondent in its past hiring practices and its motivations to keep highly qualified female candidates out of the College of Business. Complainant is not only an accomplished tenured professor at another institution within this very University system, she was an accomplished professor at Respondent. Yet, a lesser qualified male candidate was chosen after a discriminatory process which illegally excluded Complainant from employment with Respondent.

The Commission first notes that the production request is over broad because it has not been limited to the personnel hires *into faculty positions*. Complainant's attempt to identify a pattern and practice of discriminating in faculty hires is an area of inquiry,

which could lead to the discovery of admissible evidence. Information in the personnel files prior to and associated with each of the individual hires could lead to the discovery of admissible evidence. The same is untrue for information in the personnel files which post-date each individual hire, as post-dated documents could not have played any part in the hiring or promotional decision made.

Based upon the foregoing discussion, production request 11 is valid, as amended below:

Request for Production of Documents No. 11: The complete personnel file of Dr. Kathryn Ready. Also the personnel files of each individual hired to a faculty position by UW-L in the College of Business during the last five years, subject to the following restrictions: a) documents pre-dating the individual's hire must be produced including but not limited to evaluations and employment contracts, and b) all documents relating to the specific individual's hiring must be produced whether they pre- or post-date the hiring decision.

Sanctions Requested

Complainant requested the following relief in her first motion to compel (dated February 10, 1998):

Complainant moves the Court for the following:

1. Sanctions against Respondent;
2. An order for the immediate production of all documents responsive to Complainants' production requests and complete answers to all interrogatories;
3. An Order awarding Complainant reasonable costs and attorneys' fees incurred in connection with this Motion.

If the first request for sanctions is made under §804.12(2), Stats., it is premature. The referenced statute authorizes imposition of sanctions if the Commission rules in favor of a motion to compel and yet, thereafter, the responding parties fails to comply. Respondent has had no opportunity to fail to comply with this ruling.

The request for an award of reasonable costs and attorneys' fees under §804.12(1), Stats., is denied. The Commission lacks authority to order a state agency

to pay costs and attorney fees for discovery motions filed by a complainant in a proceeding under the Wisconsin Fair Employment Act. *Dept. of Transportation (Beaver-son) v. Wis. Pers. Comm.*, 176 Wis.2d 731, 500 N.W.2d 545 (1993).

Complainant's request for prompt production of the requested discovery is appropriate. Respondent must complete the task of gathering the requested documents within 2 weeks of the date this ruling is mailed to the parties (as stated on the affidavit of mailing sent with each party's copy of this ruling). The information requested in interrogatory #13, must be shared with complainant's attorney within 2 working days after the materials are gathered (which could be sooner than 2 weeks if it takes less than 2 weeks to gather the materials).

The materials related to document request #11, are protected from public disclosure under §§103.13 and 230.13, Stats. It is standard procedure under these circumstances for the party responding to discovery to request a **protective order** prior to turning the materials over to the requesting party. The Commission attaches to this ruling a proposed statement of the protective order. A conference call is scheduled for 1:00 a.m. on July 14, 1998, to finalize the language of the protective order. The Commission will expect to reach Attorney Harris at (608) 785-2740, and Attorney Brady at 262-6497. Respondent shall share the requested information with complainant's attorney within 2 working days after the date the Commission issues a protective order.

ORDER

Complainant's motion to compel discovery is granted in part and denied in part, as detailed in this ruling. Respondent is ordered to produce the requested materials as noted in this ruling.

Dated: July 1, 1998.

STATE PERSONNEL COMMISSION

Laurie R. McCallum
LAURIE R. McCALLUM, Chairperson

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Judy M. Rogers
JUDY M. ROGERS, Commissioner