

TRACY WINTER,
Complainant,

v.

**Secretary, DEPARTMENT OF
CORRECTIONS,**
Respondent.

**RULING ON
DISCOVERY DISPUTE**

Case No. 97-0149-PC-ER

The above-noted case is before the Commission to resolve a discovery dispute. Both parties filed written arguments with the final argument received by the Commission on March 3, 1998.¹

Complainant filed her complaint with the Commission on September 29, 1997, alleging that respondent discriminated against her in regard to sex (harassing atmosphere), in violation of the Fair Employment Act, Subch. II, Ch. 111, Stats. The case is pending investigation.

Complainant requested discovery of "any and all interview notes and final reports, written, typed or recorded, taken in concerns my complaint that I have filed." Disputed is whether complainant is entitled to receive the investigative materials prepared by Dee Dee Morgan, Personnel Manager of the Wisconsin Correctional Center System. Ms. Morgan's investigative materials consist of statements from party witnesses (such as employes in supervisory or managerial positions), as well as statements from non-party witnesses (which could encompass individuals not employed by respondent and respondent employees who are not in supervisory or managerial positions). Respondent claims these materials are protected from disclosure under the attorney-client privilege and under the attorney work product doctrine.

Respondent's attorney filed an affidavit with respondent's motion for a protective order which stated as follows in pertinent part:

1. That he is an Assistant Legal Counsel for the respondent and has held that position since 1990. His responsibilities in this position include representing the respondent as an attorney in actions such as that filed by the complainant in the above-captioned matter before the State Personnel Commission.

¹ The final argument was submitted by respondent but was incorrectly dated February 5, 1998, rather than the correct date of March 3, 1998.

2. That he was assigned to represent the respondent in (this) matter on or soon after the date the respondent received a copy of the complaint . . . from the State Personnel Commission.
3. That on or about October 1, 1997, the respondent's Office of Legal Counsel received a copy of the complaint . . . that the affiant immediately asked Ms. Dee Dee Morgan to investigate the complaint and report the results of the investigation to the affiant.
4. That Ms. Morgan carried out that investigation solely at affiant's request and solely to assist the affiant to prepare for litigating the above-captioned matter. That Ms. Morgan then interviewed both party and non-party witnesses and prepared a report solely for the use of the affiant and delivered the report only to the affiant.
5. That Ms. Morgan's notes of her interviews of the party and non-party witnesses as well as the balance of her report have been given to the affiant and adopted by him as his work product . . .

DISCUSSION

Attorney-Client Privilege

The attorney-client privilege is defined in §905.03, Stats., as shown below in pertinent part:

(1) **DEFINITIONS.** As used in this section:

(a) A "client" is a person . . . organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer.

(b) A "lawyer" is a person authorized . . . to practice law in any state . . .

(c) A "representative of the lawyer" is one employed to assist the lawyer in the rendition of professional legal services.

(d) A communication is "confidential" if not intended to be disclosed to 3rd persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(2) **GENERAL RULE OF PRIVILEGE.** A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client; between the client or the client's representative and the client's lawyer or the lawyer's representative . . .

(3) **WHO MAY CLAIM THE PRIVILEGE.** The privilege may be claimed by the client . . . The person who was the lawyer at the time of communication may claim the privilege but only on behalf of the client. The lawyer's authority to do so is presumed in the absence of evidence to the contrary.

The following conclusions are clear from the affidavit filed by respondent's attorney. Respondent's attorney is asserting the attorney client privilege on behalf of his client, the Department of Corrections (DOC), as permitted under §905.03(3), Stats. Ms. Morgan was acting AS a "representative of the lawyer," within the meaning of §905.03(1)(c), Stats., when she investigated the complaint, took "confidential" witness statements and wrote a "confidential" report, within the meaning of §905.03(1)(d), Stats. Further, Ms. Morgan's investigation efforts were made for the purpose of facilitating the rendition of professional legal services to respondent and, accordingly, the protection afforded under §905.03(2), Stats., apply.

The statutory protection against disclosure is not absolute. Pertinent here is the limitation that the protected disclosure must relate to a confidential communication *between the client or the client's representative and the client's lawyer or the lawyer's representative*, as required under §905.03(2), Stats. Such protection extends to statements Ms. Morgan took from party witnesses as well as the portions of her report which discuss or summarize information obtained from party witnesses. The protection does not extend to copies of statements obtained from non-party witnesses. The protection does not extend to portions of Ms. Morgan's report which do not summarize or discuss information gained from party witnesses (hereafter, referred to as the "Remaining Portions of the Report").

The statements from non-party witnesses as well as the Remaining Portions of the Report, however, may be protected under the attorney work product doctrine. This potential is discussed in the following paragraphs.

Attorney Work Product Doctrine

There is no doubt that the non-party witness statements and Remaining Portions of the Report were gathered or produced by Ms. Morgan as a representative of respondent's attorney and for the purpose of preparing for litigation. In sum, her work product is subject to the same protections as would apply to information gathered directly by respondent's attorney.

The attorney work product doctrine is described in 23 Am Jur 2d *Depositions and Discovery* §50, as noted below in pertinent part:

A party may obtain discovery of documents and tangible things otherwise discoverable and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney . . . or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation

of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of trial preparation materials where this showing has been made, a court is required to protect against disclosure of the mental impressions, conclusions, opinion, or legal theories of an attorney or other representative of the party concerning the litigation.

The above statement is a codification of the "work product" rule, as contained in the Supreme Court's decision in *Hickman v. Taylor* and that cases's progeny. . . . The Supreme Court stated in the *Hickman* decision that it is essential that a lawyer, in performing his various duties, work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel, and that proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories, and plan his strategy without undue and needless interference. This work, the court stated, is reflected in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways. Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. Thus, the purpose of the work product doctrine . . . The requirement of a special showing for the discovery of trial preparation materials reflects the view that each side's informal evaluation of its case should be protected, that each side should be encouraged to prepare independently, and that one side should not automatically have the benefit of the detailed preparatory work of the other side. . . .

The immunity or privilege accorded to work product is to some extent broader than the absolute attorney-client privilege, in that, while work product may be, and often is, that of an attorney, the concept of work product is not confined to information or materials gathered or assembled by a lawyer. Furthermore, a communication may be immune from discovery as work product even though it was not made to or by a "client" of an attorney.

Wisconsin codified the work rule doctrine in §804.01(2)(c), Stats. The cited statute is shown below along with related statutes to place it context.

(2) SCOPE OF DISCOVERY. Unless otherwise limited by order of the court in accordance with the provisions of this chapter, the scope of discovery is as follows:

(a) *In general.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . .

(c) *Trial preparation: materials.* 1. Subject to par. (d) [regarding expert testimony not pertinent in Ms. Winter's case] a party may obtain discovery of documents and tangible things otherwise discoverable under par. (a) and prepared in anticipation of litigation or for trial by or for

another party or by or for that other party's representative (including an attorney . . . or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and that the party seeking discovery is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

2. A party may obtain without the required showing a statement . . . previously made by that party. Upon request, a person not a party may obtain without the required showing a statement . . . made by that person.

Complainant asserts she needs the witness statements obtained by Ms. Morgan, as noted below (from complainant's letter dated 2/22/98, pp. 2-3):

These interviews conducted by Ms. Morgan were done under formal investigations by the DOC & Ms. Morgan. Any and all of the co-workers were obligated under the work rules to participate in the investigation or face possible discipline. These co-workers would not be under the same obligation if I were to conduct interviews or depositions from the same co-workers. I believe that this proves the same "Undue hardship" that (respondent's attorney) believes that I would be "hard-pressed" to prove, due to the fact that these co-workers had no choice but to talk to Ms. Morgan,

If respondent didn't want me to see the report then why include portions of the report in the filed Answer.

Complainant's argument above recognizes that she has the right to depose witnesses. Complainant is incorrect that the coworkers would have the right to refuse to attend a deposition if she followed the requirements of §804.05, Stats. Furthermore, deposition witnesses are sworn to tell the truth prior to taking the statement. This, coupled with the formality of a court reporter helps assure that questions will be answered truthfully. The Commission is unpersuaded by complainant's claim that witnesses would not attend a formal deposition or would not provide an accurate statement at deposition. Since these unpersuasive assertions form the basis for her claim of "undue hardship," her claim is rejected.

In summary, respondent is entitled to a protective order pursuant to §804.01(3), Stats. Ms. Morgan's statements obtained from party witnesses are protected from disclosure under the attorney-client privilege, as are the portions of her report which

discuss or summarize the information obtained in the statements. The remainder of Ms. Morgan's trial preparation materials are protected from discovery as attorney work product.

ORDER

Respondent's request for a protective order is granted. Accordingly, complainant is not entitled to discovery the materials gathered or prepared by Ms. Morgan.

Dated: March 11, 1998.

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

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