

KATHLEEN R. KALASHIAN,
Complainant,

v.

**District Attorney, OFFICE OF THE
JEFFERSON COUNTY DISTRICT
ATTORNEY,**
Respondent.

**RULING ON MOTION
TO COMPEL
DISCOVERY**

Case No. 97-0157-PC-ER

This is a complaint of discrimination on the basis of arrest/conviction record, creed, national origin or ancestry, and the use of an honesty testing device in regard to the failure to hire complainant for the position of Assistant District Attorney for Jefferson County. On January 13, 1998, complainant filed a motion to compel discovery. The parties were permitted to brief this motion and the briefing schedule was completed on February 16, 1998. The following findings are derived from information provided by the parties, appear to be undisputed unless otherwise indicated, and are made solely for the purpose of deciding this motion.

1. Some time prior to December 29, 1997, complainant filed her First Set of Interrogatories and Request for Production of Documents with respondent. The second numbered item in her request for production of documents stated as follows:

Produce all documents created prior to, during, after or in relation to any employment or reference check done on candidate Kathleen R. Kalashian.

2. On December 29, 1997, respondent filed its response to this discovery request. In response to item #2 in complainant's request for production of documents, respondent stated as follows:

Response: The only documents responsive to this request are David Wambach's handwritten notes of his telephone conversation. These are attached and marked as Exhibit C with redactions to protect the identities of those individuals who provided information because Mr. Wambach had told them that he was speaking with them confidentially.

3. David Wambach was the Jefferson County District Attorney at the time the subject hiring decision was made.

In her motion to compel discovery, complainant argues against the redaction of the names of those individuals who provided information to Mr. Wambach in his background check of complainant as a part of the subject hiring process. One of complainant's primary contentions in this case is that these individuals provided information to Mr. Wambach regarding her arrest/conviction record, creed, or national origin or ancestry upon which he relied in making the subject hiring decision. Complainant indicates that she intends to depose these individuals in an effort to discover what information they provided to Mr. Wambach which he did not record in his notes of their conversations.

Respondent essentially contends in opposition to the motion that the release of the names of these individuals would have a chilling effect on the willingness of individuals to provide information to prospective employers; that Mr. Wambach led these individuals to believe that the information they provided would be kept confidential; and that, since Mr. Wambach has indicated that he did not hire complainant because he became aware that she had failed to cooperate with a sexual harassment investigation in Washington County, complainant is foreclosed from pursuing avenues of inquiry relating to other possible reasons for his decision not to hire her.

Section PC 4.03, Wis. Adm. Code, provides that parties to actions before the Commission may obtain discovery as provided by Chapter 804, Stats. Section 804.(2)(a), Stats., provides, in pertinent part, 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, . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Respondent's policy argument appears to be better suited for a request under the open records law or a request for a protective order, neither of which is under consideration here. In addition, in the absence of a privilege, the statute requires that information which is or could be relevant be released. To be able to defeat this requirement simply upon the representation by an agent of the respondent that confidentiality had been offered or implied, would undermine both the spirit and the letter of the law of discovery. Finally, the scope of respondent's defense does not define the permissible scope of complainant's inquiry in discovery. Simply because Mr. Wambach has asserted that he based his hiring decision on information that complainant had not cooperated with an investigation in Washington County does not foreclose complainant from pursuing other theories regarding Mr. Wambach's motivation and obtaining discovery relevant to these other theories as long as the information sought to be discovered has reasonable potential relevance to the underlying issues of discrimination. Furthermore, contrary to respondent's assertion, the scope of the information complainant may obtain about the content of the telephone conversations Mr. Wambach conducted with the individuals he used as employment references should not be limited to the information Mr. Wambach created as he took notes during these conversations. If, indeed, Mr. Wambach, the alleged discriminator here, discussed or considered information relating to complainant's arrest/conviction record, creed, or national origin or ancestry as a part of these conversations, it is not surprising that he would not include references to such information in his written notes. Again, the nature of the defense offered by respondent does not define the permissible scope of complainant's inquiry.

In view of the underlying discrimination issues here and complainant's theory of her case, the motion to compel is granted.


ORDER

The motion to compel is granted. Respondent is to provide to complainant within 30 days of the date of this ruling a non-redacted copy of the notes which comprise Exhibit C attached to respondent's December 29, 1997, response to complainant's request for production of documents.

Dated: February 25, 1998

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

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