

JAN 29 1999

STATE OF WISCONSIN

CIRCUIT COURT  
Branch 6

DANE COUNTY

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**RECEIVED**

ORAS CARTER, JR.,

FEB 10 1999

Plaintiff,

vs.

**PERSONNEL COMMISSION** MEMORANDUM DECISION  
AND ORDER  
(Summ. Jdgmt.)

STATE OF WISCONSIN  
PERSONNEL COMMISSION,

Case No. 98-CV-2620

Defendant.

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Plaintiff Oras Carter, Jr., a former state employee, brings an action to enjoin defendant Personnel Commission from making an Open Records Law disclosure of an agreement between himself and his former state agency employer settling disputes arising from the termination of his employment. The matter is now before the Court on what it regards to be cross motions for summary judgment. The Court grants summary judgment to defendant Personnel Commission.

REVIEW OF RECORD

According to the Settlement Agreement which is the focus of this case, Plaintiff Oras Carter, Jr., was an employee of the University of Wisconsin-Milwaukee. He and the University became involved in an employment dispute in which the University fired him. Carter filed complaints with the Wisconsin Personnel Commission against the University, through the President of the Board of Regents, alleging that the firing was unjustified and that it violated the Wisconsin Fair Employment Act.

In June 1998, Carter and the University reached a Settlement Agreement. In it, Carter agreed to resign from his position with

the University effective November 21, 1997, and to drop all of his claims against the University. He also agreed not to seek future employment with the "University of Wisconsin." In exchange, the University agreed to provide Carter with a neutral employment reference. The University also agreed to remove three documents from Carter's personnel file--a letter of reprimand, a letter of termination for disciplinary reasons, and a performance evaluation. The three documents were not to be destroyed but were sealed and kept separate from Carter's personnel file, in the custody of the Director, Department of Human Resources, University of Wisconsin-Milwaukee. Agreement, ¶2 [second]. The parties agreed that these documents would not be shared with any other individuals, unless necessary for disclosure in other litigation or investigations. Agreement, ¶3.b. The Agreement also contained a provision that the removed documents, but not expressly the Settlement Agreement, were also subject to disclosure pursuant to a request under the Open Records Law, though Carter was to retain the right to challenge such disclosure. Agreement, ¶3.a.

On July 1, 1998, Carter was notified by defendant State of Wisconsin Personnel Commission, a custodian of a copy of the Settlement Agreement, that an undisclosed party had requested the Settlement Agreement pursuant to the Open Records Law. Cmplt., ¶4. The Commission determined that the Agreement would be released unless Carter commenced an action blocking release within 30 days of the notice.

Carter has now commenced this action seeking to block release

of the Settlement Agreement.

#### CONCLUSIONS OF LAW

The parties have not filed any formal written motions but defendant Personnel Commission did file a letter dated October 19, 1998, requesting briefing of the matter and disposition without a hearing. The Personnel Commission provided the Court with a copy of the Settlement Agreement. Carter did not object to disposing of the matter without a hearing and filed an affidavit along with his brief asking the Court to block the release of the Agreement. Because both parties agree that the matter may be disposed of on the pleadings and documentary evidence presented, the Court considers the matter to be before it on what are, effectively, cross motions for summary judgment. The Court considers the motions under the familiar standard of Grams v. Boss, 97 Wis.2d 332, 338-39 (1980), to determine whether, considering the evidence in the light most favorable to a denial of summary judgment, the absence of genuine issues of material fact entitles one side or the other to judgment as a matter of law.

In Woznicki v. Erickson, 202 Wis.2d 178, 195 (1996), the Wisconsin supreme court held that a public employee has a right to de novo judicial review to dispute the proposed release of his or her personnel records pursuant to open records requests. The Court recognized "the reputational and privacy interests that are inherent" in the personnel records of even public employees. Id.

However, it concluded that "[t]hese records are open to the public unless there is an overriding public interest in keeping the records confidential." Id. This Court's task here is to "conduct[] the appropriate balancing test. . . ," Id., reconciling those competing interests.

Woznicki gets Carter in the courthouse door but does not compel any particular disposition of this case. All personnel records implicate reputation or privacy interests to a certain extent, but Woznicki does not exempt any record from disclosure; it merely subjects personnel records to the balancing test. In addition, Woznicki does not shift the burden to those seeking release of the record, or those seeking to comply with a request for it, to establish that the balance favors disclosure. The presumption remains, as always, that the records should be disclosed. See, e.g., State ex rel. Journal/Sentinel, Inc. v. Arreola, 207 Wis.2d 496, 509-10 (Ct. App. 1996). Carter has failed to show that the reputation or privacy interests implicated here are sufficient to overcome that presumption.

The public's interest in disclosure of the Settlement Agreement is twofold; Carter was a public employee and he was engaged in public litigation, in the form of administrative proceedings, against an arm of the state government of Wisconsin.

In Journal/Sentinel v. Shorewood School Bd., 186 Wis.2d 443, 445-46, 456-59 (Ct. App. 1994), the court of appeals held that the contents of a settlement agreement ending a breach of contract and defamation litigation between a school board and its district

superintendent was subject to open records law disclosure, notwithstanding that the parties agreed to keep the terms of the settlement secret.

The court explained:

Moore's [the superintendent's] truncated tenure with the Shorewood school district is obviously a matter of public concern; at the very least it reflects on the competence of those district officials and employees who hired Moore, and on those who sought to terminate her employment with the district. All officers and employees of government are, ultimately, responsible to the citizens, and those citizens have a right to hold their employees accountable for the job they do.

Journal/Sentinel, 186 Wis.2d at 458-59 (emphasis added).

The court of appeals quoted with approval a published attorney general's opinion:

[T]he main purpose of the public records law is to enable the citizenry to monitor and evaluate the performance of public officials and employes [sic]. If information relating to a settlement and the underlying personnel dispute are kept confidential, the public is deprived of this ability. For this reason the pledge of confidentiality itself is troublesome because the custodian making the pledge is purporting to grant an exception to the public records law. This is particularly troublesome when the settlement involves the payment of money by the government. The public's interest in such information is generally great.

Journal/Sentinel, 186 Wis.2d at 459 (quoting 74 Op. Att'y Gen. 14, 16 (1985)).

Even though the settlement of the dispute between Carter and the University did not involve the direct payment of money, the public's right to know the terms of the Settlement Agreement here is just as strong. For instance, under the Settlement Agreement, Carter does not give up any benefits which may have accrued at the time his employment ended. However, the Settlement Agreement does

contains Carter's agreement that he will not seek future employment with the University. As Journal/Sentinel makes clear, the open records law advances the strong public interest in knowing the terms and conditions under which any public employee leaves office and this interest may only be overcome in the most limited situations.

Carter contends that because he was not a high level official, his employment dispute could not have been public. However, he cites no authority for the proposition that the public's interest in a dispute involving an employee paid with the taxpayer's money depends on that employee's rank. Even to the extent that the public may have a greater interest in the disposition of claims involving higher level than lower level employees, the employee must still establish an actual threat to his privacy or reputation which implicates the public's interest in keeping such matters private.

This is not achieved by Carter's purely conclusory assertion that release of the Settlement Agreement would damage his reputation. An examination of the Settlement Agreement itself reveals little which is injurious to Carter's reputation, and certainly nothing which is injurious enough to justify the denial of disclosure.

The Settlement Agreement reveals that an employment dispute existed between Carter and his supervisors at the University which led ultimately to the termination of his employment. Carter disputed the grounds for the termination and challenged it before

defendant Personnel Commission, adding his own affirmative claims that the termination was discriminatory. Under the Agreement, Carter would resign, not seek future employment with the University, drop his claims and be provided with a neutral reference. The parties also agreed that certain documents, apparently critical of his performance, would be held separate from his personnel file.

The Settlement Agreement does not reveal, either expressly or implicitly, the grounds alleged by the University for terminating him. To the extent that the Agreement does indicate that the University had alleged that Carter's performance of his duties justified his termination, the Agreement clearly states that these charges were disputed and that Carter affirmatively alleged that his discharge was not only groundless but unlawful and discriminatory. Agreement, Preamble and ¶9.

The Settlement Agreement does refer to certain documents which were to be kept separate from Carter's personnel file. These include a performance evaluation, a letter of reprimand and a letter of termination. Agreement, ¶¶2.a-c. Carter's interest in the confidentiality of these documents, the truth of which he disputes, is stronger than his interest in keeping the Settlement Agreement itself from the public. However, disclosure of those documents is not an issue before the Court here. The Settlement Agreement does not reveal the contents of the documents, merely their existence, and that is not, of itself, sufficiently injurious to Carter's reputation and privacy interests to justify non-

disclosure of the Settlement Agreement itself.

In Newspapers, Inc. v. Breier, 89 Wis.2d 417, 439-40 (1979), the supreme court, applying the same balancing test, held that the interest in protecting the reputation of arrestees, even those not ultimately charged and convicted, was not sufficient to justify non-disclosure of arrest records under sec. 19.21, Stats., the public records statute. The Court cannot see how the release of a Settlement Agreement which merely reveals that a public employee was terminated for unspecified and disputed grounds can be more injurious to his privacy or reputation than the release of the records of persons who were arrested but not charged and convicted.

Carter contends that the Agreement itself created a heightened expectation of privacy. However, as noted above, Journal/Sentinel, 186 Wis.2d at 456-59, held that settlement agreements involving governments ought to be disclosed notwithstanding agreements to the contrary between the parties to the litigation.

Additionally, Carter's assertion that the Settlement Agreement itself was intended to be kept confidential is not well-founded. Under ¶3.a of the Settlement Agreement, even the documents which were removed from the Carter's personnel file were expressly made subject to disclosure under the open records law. While that provision expressly preserves Carter's right to challenge disclosure of the removed documents, nothing in it expressly or implicitly confers confidentiality on the Settlement Agreement itself. Paragraph 3.b of the Settlement Agreement does state that the University will not disclose both the removed documents and the



Settlement Agreement during the course of investigations or third party litigation unless such is necessary but the University has the unilateral right to determine when necessity exists. In sum, nothing in the Settlement Agreement here creates any reasonable expectation of non-disclosure on Carter's part.

Moreover, since the Settlement Agreement here was filed with the Personnel Commission, the defendant and custodian of the document here, even to the extent the Agreement may be construed to tie the University's hands, nothing in the Agreement expressly or implicitly pledges the Commission to preserve the Agreement's purported confidentiality.

The court of appeals' decision of Klein v. Wisconsin Resource Center, 218 Wis.2d 487 (Ct. App. 1998), is readily distinguishable from this case. In that case, the court declined to permit disclosure of personnel records containing personal information of an employee of the Wisconsin Resource Center to inmates of that institution. The threat to the personal safety of the employee and its impact on her ability to do her job were obvious while the public's need to know the information sought was not apparent. 218 Wis.2d at 496-97.

Carter asserts that the requester of the record is the state Department of Employment Relations, which could have no valid interest in learning the terms of the Settlement Agreement other than to hold it against him in future applications for employment. Carter's basis for the requester's reason for seeking the Settlement Agreement appears to be no more than speculation. At

any rate, under sec. 19.35(1)(i), Stats., the requester is not required to provide either its identity or the reason for its request. It is the public's interest in disclosure, not the requester's specific interest, which matters.

The Court recognizes that Carter may have legitimate concerns that prospective employers, such as the Department of Employment Relations, may use the dispute between Carter and the University unjustifiably as a rationale to deny future employment to him. Nothing in this decision should be read as expressing an opinion, one way or the other, on the appropriateness of a particular party's reliance on what it gleans from the Settlement Agreement or the underlying dispute which led to it. The only issue before the Court is whether the Settlement Agreement should be public, not whether any particular party's use of it is appropriate and lawful.

In summary, the Court concludes that the public interest in revealing the terms in which legal disputes involving an arm of the State of Wisconsin, even legal disputes involving the termination of public employees, outweighs the public interest in preserving the privacy and reputation of the employee where the record sought does not reveal the nature of the conduct alleged against the employee and the record itself creates no independent expectation of privacy.


Accordingly,

O R D E R

IT IS HEREBY ORDERED that SUMMARY JUDGMENT is GRANTED to Defendant State of Wisconsin Personnel Commission and DENIED to Plaintiff Oras Carter, Jr., and the Complaint in the above-captioned matter is DISMISSED.

Dated, at Madison, Wisconsin, this 28 day of January, 1999.

BY THE COURT

  
Richard J. Callaway, Judge  
Circuit Court, Branch 6

cc: Attorney Janet L. Heins  
Assistant Attorney General Alan Lee