

STATE OF WISCONSIN

PERSONNEL COMMISSION

M. JUDITH ARCAMO,
Complainant,

v.

**Chancellor, UNIVERSITY OF
WISCONSIN-MILWAUKEE,**
Respondent.

**RULING ON
MOTION TO DISQUALIFY &
SUBSTITUTE EQUAL
RIGHTS OFFICER**

Case No. 99-0039-PC-ER

This case is before the Commission to consider complainant's motion to disqualify and substitute the equal rights officer assigned to investigate her retaliation complaint. The facts below are recounted for the purpose of deciding this motion.

FINDINGS OF FACT

1. On March 2, 1999, complainant filed a complaint alleging that respondent retaliated against her for engaging in fair employment activities. Her complaint was assigned to a Commission equal rights officer (hereinafter, assigned ERO) for investigation.

2. The assigned ERO/investigator followed the Commission's regular investigative process for complaints. This procedure includes requesting the parties, in sequence, to submit and exchange information and is initiated by a sequence of form letters to the parties.

3. The assigned ERO sent a form letter addressed to both complainant and respondent and dated May 3, 1999 which stated:

The Personnel Commission has received a response from the complainant with respect to respondent's answer to the discrimination/retaliation complaint. Complainant indicated that she sent a copy of her response to respondent. If you have not yet received it, please contact the Commission immediately. If the complainant has introduced any new or unexpected information, respondent has until May 14, 1999, to submit a reply relating only to that information.

Once May 14, 1999, has passed, the parties will presumably have submitted all the information to be considered as part of the investigation of this matter. It is

unlikely that either party will be asked by the Commission to submit any more information, or that either party will hear from the Commission until such time as the initial determination is issued.

Due to the Commission's current case backlog, there may be a substantial time lag before the initial determination is issued.

This form letter is normally the final correspondence to the parties before the issuance of an initial determination.

4. In a telephone conversation on May 6, 1999, respondent's representative spoke to the assigned ERO. The respondent's representative requested and was granted an extension of two weeks by the investigator to respond to the May 3, 1999 letter. Respondent's representative confirmed her request and granting of an extension by sending a follow-up letter to the assigned ERO and copying complainant on the letter.

5. Complainant was neither included in the May 6, 1999 telephone conversation nor was she consulted about respondent's extension request.

6. On May 19, 1999, complainant filed this Motion stating, in part:

4. [The assigned ERO] gave the respondent vague and overly broad leave to respond to the complainant's reply to the respondent's answer. In a letter dated May 3, 1999, [the assigned ERO] told the respondent, "If the complainant has introduced any new or unexpected information, respondent has until May 14, 1999, to submit a reply relating only to that information." The word 'unexpected' is overly broad and vague and is not defined in law or practice.
5. Complainant infers that [the assigned ERO] engaged in prohibited ex parte communication with the respondent under Chapter 227.50 of the *Wisconsin Statutes*. In a May 6, 1999 letter to [the assigned ERO], respondent refers to communication to which the complainant is not privy. This is a prohibited ex parte communication under Wisconsin law.
6. Complainant infers that [the assigned ERO] granted an extension to the respondent which is prejudicial to the complainant. Complainant draws this inference from the respondent's May 6, 1999 letter to [the assigned ERO].

7. Therefore, the complainant asks the Commission to disqualify [the assigned ERO] and substitute another Equal Rights Officer to the instant complaint.

7. On May 21, 1999, the Commission's equal rights unit supervisor spoke to complainant about some of the concerns expressed in her Motion and sent a letter following up the conversation.

8. After complainant submitted a written request to reply to a subsequent submission of respondent, the investigator sent complainant a letter dated June 4, 1999, responding affirmatively to complainant's request.

9. In a letter to the Commission dated June 18, 1999, complainant stated:

May 17, 1999, I filed a notice of motion and motion to disqualify and substitute Personnel Commission [assigned ERO]. June 4, 1999, I received a letter from [the assigned ERO] pertaining to my complaint. This leads me to believe that she has not been removed. As stated in my motion her actions prejudice my complaint.

Therefore, I ask that the commission remove [the assigned ERO] and substitute another Equal Rights Officer to the instant complaint.

CONCLUSIONS OF LAW

1. It is complainant's burden to establish that the assigned ERO should be disqualified and substituted.
2. Complainant has failed to meet her burden.

OPINION

Complainant filed a motion to disqualify and substitute the ERO assigned to investigate her retaliation complaint after that assigned ERO granted an extension to respondent to respond to the last form letter sent to the parties before the an initial determination is issued.

Complainant's complaint is in the investigative phase. The May 3, 1999 letter sent to complainant and respondent is a Personnel Commission form letter. It ordinarily is the last letter sent to the parties signaling the imminent completion of information gathering for the investigation. While complainant may object to one of the words in this letter, it is the same

form letter (and same language) addressed to the parties to every equal rights case filed with the Commission if the investigation reaches this phase in the process.

The *ex parte* communication law forbids discussions “relative to the merits” of the case. §227.50(1), Stats. In this case, respondent spoke to the assigned ERO about an extension of time to respond to a Commission request. The conversation addressed a scheduling matter related to the processing of the case. It did not go to the substance of complainant’s case. Such a conversation does not violate the rule against *ex parte* communications.¹

Finally, nothing in complainant’s submission demonstrates that the investigator has a conflict of interest or a bias against complainant.

The investigation of this case by the assigned equal rights officer will continue.

ORDER

Complainant’s motion to disqualify and substitute an equal rights officer is denied.

Dated: June 30, 1999.

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


JUDY M. ROGERS, Commissioner

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¹ Because of this result, the Commission does not need to reach the question of whether an investigation is subject to the prohibition in §227.50, Stats.