

STATE OF WISCONSIN

PERSONNEL COMMISSION

MICHAEL E. LOGAN,
Complainant,

v.

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

**RULING
ON
DISCOVERY
MOTION**

Case No. 99-0124-PC-ER

This complaint was filed on July 15, 1999, and alleged discrimination based on sex, retaliation for engaging in Fair Employment activities, and violation of the Family Medical Leave Act, relating to complainant's employment. Complainant contends that he was subjected to a hostile work environment because of his gender while he held the interim position of coordinator of Mini Courses, from December 14, 1998, until March 8, 1999. Complainant contends respondent's decision in March to remove him from the interim position and its decision in July of 1999, to reassign him again, constituted Fair Employment Act retaliation and violated the FMLA. Respondent filed an answer with the Commission on September 17, 1999.

Counsel for complainant prepared a discovery request consisting of 10 interrogatories and seven requests for production of documents. Complainant served respondent with the request and a cover letter on September 23, 1999. The cover letter noted, in part: "I would like to depose April Holland, Pauline Jascur, and Charmaine Clowney after I receive the information sought by the enclosed discovery request." Respondent moved for a protective order on October 25th and the parties have filed briefs.

The basic facts relevant to the complaint are as follows. Complainant worked for respondent's Division of Student Academic Development (DSAD), commencing early in 1998 as a Student Services Specialist. He was employed on a fixed-term appointment basis. During the period from December of 1998 until March of 1999, complainant served as Interim Coordinator for Mini Courses, a unit in the Pre-College

Academy within DSAD. He was placed into that position after the departure of Pauline Jascur. Respondent contends that complainant's work as Interim Coordinator was unsatisfactory. In March of 1999, complainant was relieved of his duties as Interim Coordinator and returned to complete his appointment as a Student Services Specialist. Shortly thereafter, complainant filed a complaint of gender discrimination with respondent's Office of Diversity Compliance. Respondent contends complainant's work upon return to his prior duties was also unsatisfactory. Complainant was then transferred in July of 1999 to another department. April Holland is the director of the Pre-College Academy.

Complainant contends that respondent's motion for protective order must be denied as untimely because it was filed more than 30 days after service of the discovery request. As noted by respondent, the 30 day period for responding to a discovery request, §§804.08(1)(b), 804.09(2), Stats., is subject to §990.001(4), Stats. Because the 30th day was a Saturday, respondent had until the following Monday, or October 25, 1999, to respond. Respondent complied with this requirement, so its motion for a protective order is timely.

Respondent's primary argument in support of its motion is that discovery is not available to the parties during the investigation stage of a discrimination complaint. This argument was squarely addressed and rejected by the Commission in *Germain v. DHSS*, 91-0083-PC-ER, 5/14/92. In that case, the Commission interpreted the Commission's rules¹ and granted the respondent's motion to compel discovery arising from interrogatories served during the investigation period. Respondent now contends that the ruling in *Germain* is not binding and is ill-reasoned. However, the complainant has not advanced any new arguments and the Commission sees no reason to disturb its long-standing decision in *Germain*.²

¹ Pursuant to §PC 4.03, Wis. Adm. Code: "All parties to a case before the commission may obtain discovery and preserve testimony as provided by ch. 804, Stats."

² The *Germain* ruling was preceded by the Commission's decision in *Friedman v. UW*, 84-0033-PC-ER, 8/1/84, where the complainant was required to respond completely to discovery

Respondent contends the complainant's discovery requests create an undue burden because some of the documents at issue would not be disclosed if received as a public record request or as a request under Wisconsin's employee records statute, §103.13. The question of whether certain materials are "public records" for purposes of the open records law or are subject to review under either §§103.13 or 230.13, Stats., is separate from the question of whether a party to a proceeding before the Personnel Commission may obtain the same materials via a discovery request. *See Siegler v. DNR & DER*, 82-206-PC, 3/4/83; *Balele v. DER et al.*, 97-0012-PC-ER, 7/23/97; *Duncan v. DOC*, 94-0064-PC-ER, 7/31/97; *Balele v. DOR et al.*, 98-0002-PC-ER, 7/7/98. The Commission must apply a discovery rather than an open records analysis when reviewing respondent's motion. Whether or not certain documents constitute a public record or fall within the scope of §103.13, Stats., a party may still be able to obtain them as a consequence of a proper discovery request. If appropriate, the respondent may request that a protective order be issued to restrict complainant's use of the information respondent provides.

The respondent also argues that because the investigator chose not to request the information being sought by complainant, the documents must not be necessary to the case. This argument, if adopted, would apply the wrong standard for determining the proper scope of a discovery request. As indicated in §804.01(2)(a), Stats., the correct standard is that the information sought must appear "reasonably calculated to lead to the discovery of admissible evidence."³

The Commission addresses, below, the appropriateness of complainant's individual interrogatories and document requests.

questions posed by respondent 3 months after the complaint was filed. The questions related to the timeliness of the complaint.

³ Respondent also notes that it made a good faith effort to facilitate the investigative process by filing a comprehensive answer of more than 150 pages. The length of respondent's answer is unrelated to the issue of determining the proper scope of discovery available to complainant except to the extent that the respondents' responses to discovery may incorporate portions of its answer.

Interrogatories 1 and 2 and Document Request 5: Identify persons who "contacted the UW-M Office of Diversity Compliance . . . about any employment matter involving [complainant] . . . between February 16, 1998, and March 8, 1999," and provide specific information about those contacts, including documents.

Complainant contends that Ms. Jascur and other "key witnesses for respondent" had attempted to challenge complainant's initial assignment as Interim Coordinator of the Mini Course program by complaining to respondent's Office of Diversity Compliance and that those complaints were motivated by complainant's gender. The Commission agrees that complainant is entitled to information relating to that contention, but the interrogatories extend well beyond the topic of the initial assignment of the Interim Coordinator duties to complainant. The Commission modifies the interrogatory to refer only to contacts with the Office of Diversity Compliance relating to the initial assignment of the Interim Coordinator duties to complainant.

Interrogatories 3 and 4 and Document Request 4: "Was complainant's work performance satisfactory between February 16, 1998 and February 4, 1999" and if not, "state in evidentiary detail each and every instance" his performance was not satisfactory, including the date, the name of persons with knowledge and all probative documents.

Complainant contends he has a right to know every reason respondent had for believing his work performance was unsatisfactory so that if he is able to disprove those reasons, respondent cannot shift to another set of reasons, citing *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2747 (1993). The Commission agrees that complainant is entitled to know the specifics of the poor performance allegedly relied upon by respondent when it took the personnel actions that are the subject of the complaint. However, the complainant's interrogatories refer to the period from February 16, 1998, until February 4, 1999. Complainant was not assigned the Interim Coordinator responsibilities until December of 1998. The potential relevance of individual incidents involving complainant's work performance before December of 1998 is unclear. Therefore, the Commission modifies Interrogatories 3 and 4 to refer to the period from De-

ember 1, 1998, until February 4, 1999, but otherwise denies respondent's motion as to those interrogatories.

Interrogatory 5: "Identify all students who submitted applications to the Spring 1999 Mini Course Program for whom it is alleged by the respondent that the complainant failed send confirmations to [sic]."

Respondent contends one of complainant's performance problems as Interim Coordinator of the Mini Course program was that he had failed to "send confirmation information to some students who submitted applications." (Holland affidavit, page 4) Given this contention, complainant is entitled to obtain more specific information about the basis for respondent's conclusion. Respondent states that it would be subjected to an undue burden by having to provide notice under the Family Educational Rights and Privacy Act of 1974, 20 U.S.C.A. §1232g, to all the students identified as part of interrogatories 5 and 7. Respondent must do more than merely state the conclusion that it would be subjected to an undue burden. The Commission has no basis for concluding that the number of students involved and the steps respondent would have to take to respond to this interrogatory would constitute an undue burden. Therefore, respondent's motion for a protective order is denied.

Interrogatory 6: "Identify all teachers for the Spring 1999 Mini Course Program for whom it is alleged by the respondent that the complainant failed to send contracts to."

Respondent contends another of complainant's performance problems as Interim Coordinator was that he failed to "execute accurate teacher contracts or teacher contracts at all." (Holland affidavit, page 4) Again, given this contention, complainant is entitled to obtain more specific information about the basis for respondent's conclusion.

Interrogatory 7 and Document Request 3: "Identify all students . . . for the Spring 1999 Mini Course Program for whom it is alleged that the complainant failed to satisfactorily perform any job related duty or function," identify "in evidentiary detail" the job duty involved and provide all probative documents.

Respondent contends that notification of the affected students, pursuant to the Family Educational Rights and Privacy Act of 1974, would be unreasonably burdensome. The Commission agrees that these requests generate additional issues under the privacy laws regarding student information. Some balance needs to be struck between complainant's need to know the specifics of his allegedly inadequate performance, and the time and expense associated with respondent's responsibility to notify the students.

Under certain circumstances, the identity of the particular students in the class may be unnecessary to the case, and the key allegation by respondent would be that appellant's conduct affected an entire class rather than the names of the students in that class. For example, if it is alleged that complainant failed to arrange for audio-visual equipment for a particular class, that conduct would affect all students in that class and information identifying the individual members of the class in need of audio-visual equipment would not be discoverable. There would be insufficient potential importance to overcome the burden associated with producing the information.

However, if respondent contends that complainant provided inaccurate or incomplete information during a telephone conversation with the parent of a prospective student, the identities of the student and the parent are discoverable.

Interrogatories 8 and 9: "Identify all teachers" for the Spring 1999 and 1998 Mini Course Programs.

The Commission can understand the potential relevance of the names of the 1999 teachers, but complainant has not identified any basis for his request for the names of the 1998 teachers. Therefore, the complainant is not entitled to the 1998 information, at least at this time and the Commission grants a protective order as to Interrogatory 9.

Interrogatory 10 and Document Requests 1 and 2: "Describe in evidentiary detail each instance in which it is alleged that the complainant failed to provide the Department of Public Instruction (DPI) with necessary information" and include probative documents.

Respondent contends another of complainant's performance problems as Interim Coordinator was that: "Information required by the Department of Public Instruction (DPI) was not submitted." Jascur affidavit, page 6. Complainant is entitled to obtain more specific information about the basis for this contention.

Document Requests 6 and 7: "A copy of the complete personnel file" of Ms. Jascur and Ms. Holland "including but not limited to all performance evaluations."

Complainant contends that the quality of Ms. Jascur's performance as the Mini Courses coordinator could relate to the question of whether complainant and Ms. Jascur were held to the same standards. Complainant also contends that the quality of Ms. Jascur's performance record "may be very relevant to the veracity of her allegations." Complainant's document requests are much broader than necessary for determining the quality of Ms. Jascur's performance as the Mini Courses coordinator. The Commission will limit these two discovery requests to those materials in Ms. Jascur's personnel file directly related to her performance in the Mini Courses Coordinator position, including a copy of her performance evaluations and any disciplinary actions taken against her while she was in that position. If appropriate, the respondent may request that a protective order be issued to restrict complainant's use of the information respondent provides.

The Commission acknowledges that the respondent has previously supplied substantial information to the Commission and to the complainant in the form of its answer to the complaint. To the extent respondent has previously supplied complainant with a portion of the requested documents/information, respondent is not required to provide a second copy of that same information as long as it specifies those materials it is relying on as having been previously supplied. *See Jaques v. DOC*, 94-0124-PC-ER, 3/31/95.⁴

⁴ In some cases, a party could be requesting, through a particular type of discovery, information that has already been disclosed through some other means. For example, a party may pose a question in an interrogatory that had already been addressed by the other party in some other context -- e.g., a brief on a motion. The requesting party may have a legitimate reason for wanting the question answered in an interrogatory -- e.g., to have the answer provided under

Respondent also asks that complainant not be allowed to depose three individuals referenced in the cover letter to the September 23rd discovery request. Complainant has more recently clarified that he *may* wish to depose those individuals after having received respondent's response to the interrogatories and requests for documents.

Because of this uncertainty, the Commission declines to rule on respondent's motion for a protective order with respect to depositions of Ms. Holland, Ms. Jascar and Ms. Clowney.⁵

ORDER

Respondent's motion for protective order is granted in part and denied in part as follows:

Interrogatory 1 is modified to refer only to contacts with the Office of Diversity Compliance relating to the initial assignment of the Interim Coordinator duties to complainant, and otherwise, respondent's motion for protective order as to Interrogatories 1 and 2 and Document Request 5 is denied.

Interrogatories 3 and 4 are modified to refer only to the period from December 1, 1998, until February 4, 1999, and otherwise, respondent's motion for protective order as to Interrogatories 3 and 4 and Document Request 4 is denied.

Respondent's motion for protective order as to Interrogatories 5 and 6 is denied.

oath, *see* §804.08(1)(b), Stats., or to want the answer in a format that is readily available for use at trial, *see* §8904.08(2)(a). However, a party responding to discovery may be able to incorporate by reference previously provided material, so long as the response is in a format that meets the legitimate needs of the requesting party. There is no indication that the questions before the Commission on the instant motion involve the application of these principles.

⁵ Per respondent's November 11th brief, page 7, the attorney for complainant contacted Ms. Clowney on July 14, 1999, the same day this complaint was filed with the Personnel Commission. Respondent contends this "contact with Ms. Clowney was inappropriate in that he knew or should have known that all UWM offices are represented by the Office of Legal Affairs and he should be prevented from discovery related to such a communication." The Commission understands this argument to relate to the question of whether complainant should be permitted to depose Ms. Clowney.

Interrogatory 7 and Document Request 3 are modified to require respondent to identify the students involved in complainant's alleged failures to satisfactorily perform a job related duty only where the alleged failure did not adversely affect the entire class, and otherwise, respondent's motion for protective order as to Interrogatory 7 and Document Request 3 is denied.

Respondent's motion for protective order is granted as to Interrogatory 9 but denied as to Interrogatory 8.

Respondent's motion for protective order is denied as to Interrogatory 10 and Document Requests 1 and 2.

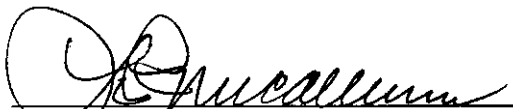
Respondent's motion for protective order as to Document Request 6 is granted to the extent that the request is modified to only include those materials in Ms. Jascur's personnel file directly related to her performance in the Mini Courses Coordinator position, including a copy of her performance evaluations and any disciplinary actions taken against her while she was in that position, and is otherwise denied.

Respondent's motion for protective order is granted as to Document Request 7.


The time period for respondent to respond to complainant's discovery request will be established in a cover letter to this order.

Dated: January 19, 2000

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

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DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner