

STATE OF WISCONSIN

PERSONNEL COMMISSION

MARY C. HANSON,
Complainant,

v.

**Secretary, DEPARTMENT OF
TRANSPORTATION,**
Respondent.

**RULING ON MOTION
FOR SUMMARY
JUDGMENT AND FOR
LEAVE TO WITHDRAW
ADMISSIONS**

Case Nos. 00-0027, 0103-PC-ER

These are complaints alleging discrimination on the basis of race and disability, and retaliation for engaging in protected fair employment and whistleblower activities. On December 26, 2000, respondent filed a motion for summary judgment. The parties were permitted to brief this motion. The following findings of fact are based on information provided by the parties, appear to be undisputed, and are made solely for the purpose of deciding this motion.

FINDINGS OF FACT

1. Counsel for respondent signed Respondent's First Request for Admissions on Friday, September 22, 2000; and has stated in an affidavit accompanying the subject motion for summary judgment that he placed them "in the mailbox at the Hilldale Station Post Office prior to the last pick-up" on that same date.

2. Counsel for complainant received the requests for admission on Wednesday, September 27, 2000; and signed and mailed a response to these requests on Friday, October 27, 2000.

3. Counsel for respondent received complainant's response to its requests for admission on Wednesday, November 1, 2000. This response denied admissions numbered 3, 4, 5, 6, 9, 10, 13, 14, and 15.

4. The requests for admission denied by complainant in her response (See Finding 4, above) relate to central issues of fact and law, as well as the disputed existence of a binding settlement agreement.

OPINION

Section 804.11, Stats., states as follows, in relevant part:

804.11 Requests for admission. (1)...

(b) Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or attorney.

(2) EFFECT OF ADMISSION. Any matter admitted under this section is conclusively established unless the court on motion permits withdrawal or amendment of the admission. The court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice the party in maintaining the action or defense on the merits.

Section 801.14(2), Stats., states as follows, in relevant part:

801.14 Service and filing of pleadings and other papers.

(2) Service by mail is complete upon mailing.

Section 801.14(5)(a), Stats., states as follows, in relevant part:

801.15 Time. ...

(5) Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the part:

(a) If the notice or paper is served by mail, 3 days shall be added to the prescribed period.

Section PC 1.05(2), Wis. Adm. Code, states as follows, in relevant part:

(2) Papers may be served either personally or by mail. Service by mail is complete upon mailing. That is, for purposes of service, the effective date is the date of mailing, not receipt. Filing is complete upon receipt.

Section PC 4.03, Wis. Adm. code, states as follows, in relevant part:

PC 4.03 Discovery. All parties to a case before the commission may obtain discovery and preserve testimony as provided by ch. 804, Stats.

Respondent argues that complainant's response to the subject requests for admission was late; that, as a result, the requests for admission are deemed admitted by operation of §804.11(2), Stats., and that, based on the substance of these admissions, summary judgment is appropriate and these cases should be dismissed. Complainant argues that her response to the subject requests for admission was not late and, in the alternative, has filed a motion, pursuant to §804.11(2), Stats., for leave to withdraw any request for admission which the Commission may deem is admitted due to a late response.

Complainant's response to the subject requests for admission was late. The service of the requests, pursuant to §§801.14(2), Stats., and PC 1.05(2), Wis. Adm. Code, was effective upon their mailing on September 22, 2000. By operation of §804.11(1)(b), Stats., and, depending upon whether 801.15(5)(a), Stats., is applicable to quasi-judicial proceedings, complainant was required to respond within 30 or 33 days of service, i.e., on or before October 22 or 25, 2000. Complainant, however, did not respond until October 27, 2000, i.e., the date the response was mailed by counsel for complainant. As a result, respondent's requests for admission are deemed admitted by operation of §804.11(2), Stats. In the absence of complainant's motion for leave to withdraw, summary judgment would be appropriate here. *See, Bank of Two Rivers v. Zimmer*, 112 Wis.2d 624 (1983).

Complainant argues that respondent has failed to show that the requests for admission were actually mailed on September 22, 2000, because there was no affidavit of mailing accompanying them. However, there is no requirement that requests for admission be accompanied by an affidavit of mailing, and complainant has failed to

adequately explain why an affidavit of mailing by counsel for respondent would be more reliable or suitable for our purposes here than the affidavit subsequently filed by counsel for respondent in which he represents that he placed the requests for admission in the U.S. Mail prior to the last pick-up on September 22, 2000.

Our analysis now turns to complainant's motion for leave to withdraw certain deemed admissions. The decision whether to allow the withdrawal of an admission is discretionary and involves consideration of the two criteria set forth in §804.11(2), Stats. See *Schmid v. Olson*, 111 Wis.2d 228, 234, 330 N. W 2d 547 (1983). This statute tracks Rule 36 of the Federal Rules of Civil Procedure (FRCP), and federal case law can be looked to for guidance. See *Schmid*, 111 Wis. 2d at 236.

The first §804.11(2) criterion is that "the presentation of the merits will be subserved" by allowing the withdrawal. In *Local Union No. 38 v. Tripoldi*, 913 F.Supp290, 294 (S. D. N. Y.1996), the court addressed this factor as follows:

[T]he court has power to excuse the defendant from its admissions "when (1) the presentation of the merits will be aided and (2) no prejudice to the party obtaining the admission will result." The presentation of the merits clearly would be served here by permitting defendant to dispute a central issue in this case—i. e., whether or not he was a member of Local 38 during the times in question. From the very outset of this litigation, defendant has asserted that he was not a member of Local 38 during the times in question and that Local 38 therefore lacked the power to fine him for the alleged violations. . . . (citations omitted)

Similarly, in the instant case, the deemed admissions go to the central factual and legal issues in these cases, as well as to the disputed existence of a binding settlement agreement. To prohibit the withdrawal of the deemed admissions would "block any consideration of the merits." *Id.*

With regard to the second criterion, respondent has the burden of showing that allowing the withdrawal of the admission would be prejudicial. Respondent has made no showing of prejudice, except to the extent that it is implicit that if the admission is withdrawn it will have to mount a defense to the appeal at a hearing. This is not a

sufficient showing of prejudice. *See Kerry Steel Inc. v. Paragon Industries, Inc.*, 106 F. 3d 147, 154 (6th Cir. 1997):

In regard to prejudice, “[t]he prejudice contemplated by [Rule 36(b)] is not simply that the party who initially obtained the admission will now have to convince the fact finder of its truth.” Prejudice under Rule 36(b), rather, “relates to special difficulties a party may face caused by a sudden need to obtain evidence upon withdrawal or amendment of an admission.” *Kerry Steel* has not shown any prejudice of the sort required by the rule. (citations omitted)

See, also, Davis v. Noufal, 142 F. R. D. 258, 259 (D. D. C. 1992) (“[T]he burden of addressing the merits does not establish prejudice under Rule 36(b).”; *Nelson v. DOT & DER*, 98-0176-PC, 8/27/99.

Respondent also argues as a part of its summary judgment motion that complainant should be held to its oral agreement to settle Case No. 00-0027-PC-ER. However, there exist material disputes of fact relating to the existence of a binding settlement agreement which would necessarily defeat a motion for summary judgment.

Finally, the parties cite to a variety of apparently unresolved discovery disputes in these cases. Although the relevance of these disputes to the motions under consideration here is not clear, the parties are advised that, if they are unable to informally resolve such disputes, the appropriate course is to file a motion to compel discovery or other appropriate motion with the Commission.

CONCLUSIONS OF LAW

1. This matter is appropriately before the Commission pursuant to §§230.45(1)(b) and (gm), Stats.
2. Respondent has the burden to show that the subject requests for admission should be deemed admitted by operation of §804.11, Stats.
3. Respondent has sustained this burden.
4. Complainant has the burden to show that the merits of these cases would be subserved by the withdrawal of the deemed admissions.

5. Complainant has sustained this burden.
6. Respondent has the burden to show that it will be prejudiced, within the meaning of §804.11, Stats., by withdrawal of the deemed admissions.
- 7 Respondent has not sustained this burden.
8. Respondent has the burden to show entitlement to summary judgment.
9. Respondent has failed to sustain this burden.

ORDER

Complainant's motion for leave to request withdrawal of the deemed admissions is granted. Respondent's motion for summary judgment is denied.

Dated: May 30, 2001

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

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JUDY M. ROGERS, Commissioner