

JOHN KOVACIK,
Complainant,

v.

**Secretary, DEPARTMENT OF HEALTH
AND FAMILY SERVICES,**
Respondent.

**RULING
ON
MOTIONS TO
COMPEL
DISCOVERY**

Case No. 97-0076-PC-ER

This matter is before the Commission on separate motions to compel by both parties. Complainant seeks discovery of a memorandum to respondent's counsel from one of respondent's employees, Sandra Catencamp. Respondent seeks discovery of complainant's personnel file and related information. The parties have filed written arguments.

In a ruling signed on January 19, 2000, the Commission established the following issue for hearing in this matter:

Whether respondent discriminated against complainant on the basis of sex, in the hiring process for the position of Personnel Manager 5 at Central Wisconsin Center in June of 1997, when it rejected the initial interview panel's recommendations.

Subissue: If so, what is the appropriate remedy?

Complainant was one of 5 candidates, from an initial list of 11, whose name was forwarded by an initial interview panel to the hiring authority, Dr. Bunck, for filling a Personnel Manager 5 vacancy. Dr. Bunck rejected the first panel's results and convened a second panel that re-interviewed all 11 candidates, ultimately selecting a female candidate who was not one of the five names forwarded by the initial panel.

In a ruling dated April 19, 2000, the Commission clarified its earlier ruling at the request of respondent:

Respondent also seeks clarification of the following language in the January 19th ruling: "Information relating to the second panel's analysis

could, conceivably, have some relevance to the rejection of the first panel's recommendation or to the question of remedy."

Complainant's position is that the first panel's results were rejected due to sex discrimination. Respondent contends the first panel did a bad job, and that the results it reached were flawed to the extent respondent opted to start over again. Respondent may be able to support its view by examining the second panel's analysis and establishing why, in contrast, those results were reliable. As a general matter, respondent will be allowed to present evidence tending to support its position that the initial process was faulty, and complainant will be allowed to present evidence tending to support his view that the decision to reject the conclusions of the first panel constituted discrimination based on sex.

I. Catencamp memo

Ms. Catencamp filed an affidavit including the following information:

a. She is employed by respondent as a Personnel Assistant 3 at Central

Wisconsin Center.

b. Her position description includes the following responsibilities:

Serve as point person for Personnel Commission and other appeals, suits, and charges of discrimination, harassment, disparate impact, etc.

Act as liaison between [respondent's] Office of Legal Counsel and EEOC for charges such as age discrimination; collect information and compose reports as required.

c. She received a written request dated June 10, 1997, from counsel for respondent regarding this matter. The memo stated, in part:

Attached is a copy of a discrimination complaint filed with the Personnel Commission.

I will be representing DHFS in this matter . . . Please contact involved or knowledgeable persons and have them respond to the specific allegations in the complaint and any other information that may relate[] to this complaint. Send your comprehensive response to me by July 10, 1997

. This response should answer each and every allegation and respond to the following questions - who was involved, what happened, where did it happen, when did it happen (this includes dates for every action taken by the complainant, witnesses and management staff), and why it happened. Be sure to send copies of all documents relating to your response. Do not write on these documents because we may use them as exhibits.

To avoid possible future retaliation charges, do not disclose to anyone that this complaint has been filed.

Counsel's memo contained the following notice in bold capital letters: "CONFIDENTIAL ATTORNEY-CLIENT PRIVILEGE".

d. Ms. Catencamp responded by a memo dated June 27, 1997. She stamped the memo "CONFIDENTIAL" and intended it to be and believed it was confidential and protected by the attorney-client privilege.

It is the June 27th memo from Ms. Catencamp that is the subject of the parties' first dispute.

Respondent seeks to invoke attorney-client privilege and also relies on the attorney work product doctrine with respect to the Catencamp memo. The attorney-client privilege is codified in §905.03(1), Wis. Stats..

(1) DEFINITIONS. As used in this section:

(a) A "client" is a person, organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer.

(b) A "lawyer" is a person authorized . . . to practice law in any state

(c) A "representative of the lawyer" is one employed to assist the lawyer in the rendition of professional legal services.

(d) A communication is "confidential" if not intended to be disclosed to 3rd persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(2) GENERAL RULE OF PRIVILEGE. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client; between the client or the client's representative and the client's lawyer or the lawyer's representative . . .

(3) WHO MAY CLAIM THE PRIVILEGE. The privilege may be claimed by the client . . . The person who was the lawyer at the time of communication may claim the privilege but only on behalf of the client. The lawyer's authority to do so is presumed in the absence of evidence to the contrary

Complainant contends the privilege is inapplicable because Ms. Catencamp "is a witness who has given a written statement" rather than an "employee whose acts or omissions are at issue" or a "managerial employee who has the authority to make critical recommendations or decisions relating to this matter." Comp. Brief, p. 2. Nothing in the materials submitted by the parties suggests that Ms. Catencamp was a witness to the personnel action that is the subject of this complaint.

Respondent's submissions make it clear that: 1) Respondent's counsel is asserting the attorney-client privilege on behalf of his client, the Department of Health and Family Services; 2) Ms. Catencamp was acting as a "representative of the lawyer," within the meaning of §905.03(1)(c), Stats.,¹ when she investigated the complaint and prepared her report; and 3) the memo was not intended to be disclosed "to 3rd persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication."

The attorney-client privilege is not absolute. It extends to statements, taken by a representative of the lawyer, from party witnesses as well as portions of the representative's report that discuss or summarize information obtained from party witnesses. It does not extend to statements obtained from non-party witnesses or to portions of the report that do not summarize or discuss information gained from party witnesses. *Winter v. DOC*, 97-0149-PC-ER, 3/11/98. In *Winter*, the Commission noted that materials not covered by the attorney-client privilege may still be protected under the attorney work product doctrine, as described in §804.01(2)(c), Stats.

(2) SCOPE OF DISCOVERY Unless otherwise limited by order of the court in accordance with the provisions of this chapter, the scope of discovery is as follows:

¹ The fact that Ms. Catencamp is employed as a Personnel Assistant 3 at Central Wisconsin Center rather than in the respondent's Office of Legal Counsel does not preclude her from serving as a "representative of the lawyer." Ms. Catencamp's responsibilities to respond to Attorney Wendorff's memo were comparable to those that were the subject of the Commission's decision in *Winter v. DOC*, 97-0149-PC-ER, 3/11/98.

(a) *In general.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action

(c) *Trial preparation: materials.* 1. [A] party may obtain discovery of documents and tangible things otherwise discoverable under par. (a) and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and that the party seeking discovery is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

2. A party may obtain without the required showing a statement . . . previously made by that party. Upon request, a person not a party may obtain without the required showing a statement . . . made by that person.

There is nothing in the materials submitted by the parties that suggests anything in Ms. Catencamp's memo is neither a summary of, nor a discussion of information gained by party witnesses, i.e. that anything falls outside the scope of the attorney-client privilege. However, even if that were the case, those materials would fall within the scope of the attorney work product doctrine because they were "prepared in anticipation of litigation" by Ms. Catencamp and because complainant has failed to show he is "unable without undue hardship to obtain the substantial equivalent of the materials by other means." Complainant argues that Ms. Catencamp's memo should be produced because it was prepared shortly after the personnel action that is the subject of the complaint so it is "the most reliable account of what really happened." This argument is an inadequate rationale for showing undue hardship. Complainant may depose the participants in the hiring decision to obtain the information directly rather than from Ms. Catencamp.

Complainant is not entitled to obtain the Catencamp memo and complainant's motion to compel is denied.

II. Complainant's personnel file and related information

The second dispute between the parties relates to whether the respondent may obtain a copy of the complainant's personnel file and other, related, materials, including information that post-dated the hiring decision in question. Appellant contends that only information that was available at the time of the selection decision is material and relevant to the case.

The specific discovery requests that are included in this dispute are as follows:

Interrogatory No. 15: With respect to your current employment.

h. identify all the work performance evaluations you have received by date, person conducting each evaluation, and the documentation pertaining to each evaluation

i. identify any and all letters of commendation, performance awards (such as "Exceptional Performance" award), or other recognition which you have received during the course of your employment with the State of Wisconsin;

j. state whether you have been subject to any type of "performance improvement program," or intensive or heightened supervision, evaluation or monitoring of your work performance, identify the person(s) conducting such program(s) or evaluation(s), explain the circumstances of such program(s) or evaluation(s), and identify and describe any and all documentation of such program(s) or evaluation(s).

Request No. 2: Copies of all your work performance evaluations, any other documents relating to the evaluation of your work performance, and any documents pertaining to any disciplinary action commenced against you in your position as Personnel Manager for the Department of Regulation and Licensing from November 1990 through the date that you respond to these Interrogatories and Request for Production of Documents.

Respondent's request to obtain complainant's state personnel file is "reasonably calculated to lead to the discovery of admissible evidence," as provided in §804.01(2)(a), Wis. Stats. Respondent correctly notes that the information in the personnel file could tend to validate, or undermine, the analysis by the two selection panels and it could also relate to the issue of remedy. The Commission agrees that informa-

tion from complainant's personnel file and his performance evaluations could bear on the reasonableness of the panelist's evaluation of complainant. The fact that the information from these sources may post-date the hiring decision does not eliminate its potential relevance.

ORDER

Complainant's motion to compel discovery of the Catencamp memo is denied. Respondent's motion to compel discovery of complainant's state personnel file is granted. Complainant is directed to respond to Interrogatory No. 15 and Request No. 2 within 20 days of the date this ruling is issued, unless a representative of the Commission agrees to modify the date the response is due.

Respondent did not request reasonable expenses under §804.12(1)(c), Stats., which requires an opportunity for hearing before expenses may be awarded. Unless respondent indicates, in writing and within 14 days of the date of this ruling, that it feels such expenses are appropriate, the Commission will assume respondent has waived any request for expenses.

Dated: September 7, 2000 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

KMS:970076Cru14


JUDY M. ROGERS, Commissioner