

LORAIN C. SAMSEL,
Complainant,

v.

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

**RULING
ON
DISCOVERY
MOTIONS**

Case No. 99-0125-PC-ER

This complaint was filed on July 19, 1999. Complainant alleges discrimination based on age, sex and sexual orientation with respect to her employment as a Program Assistant 2 at respondent's Great Lakes WATER Institute. Complainant alleges that she was denied reclassification of her position and has been pressured to move to other positions outside of the WATER Institute. The Commission provided respondent a copy of the complaint and respondent filed an answer, as directed, on August 23, 1999. Complainant was provided until September 27th to respond.

By letter to respondent dated September 2, 1999, complainant's attorney requested a copy of certain memoranda "pursuant to my and my client's full rights, including under open records procedure and all applicable procedures related to above case."

This is to confirm my request for a copy of any memoranda that were exchanged concerning my client Loraine Samsel's transfer, reassignment or other movement from her long-standing position in the Water Institute, and how that would fit in or be conditioned upon the opening up or the actual filling of other positions in the Institute. I call to your attention paragraph five of Dr. Sander's affidavit, which referred to a communication from the provost to the dean of the graduate school, and you agreed to verify whether that ever existed in writing and if so, to supply it to me. I believe there may be other items of correspondence or related memoranda involving Dr. Sander's office and that of the dean of the graduate school regarding this during the same approximate time frame of June-July 1999.

Respondent treated the letter as an open records request and responded on September 10th by denying the request. Complainant followed up with a letter dated September 25th identifying the September 2nd letter as a discovery request. Respondent responded on October 4th by moving for a protective order. On the same date, the Commission received complainant's motion to compel discovery.

After an unsuccessful effort by the Commission on October 11th to resolve the disputes informally, the parties filed written arguments regarding the opposing motions.

Respondent's underlying argument 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

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 would apply the wrong standard for determining the proper scope of a discovery request. As indicated in §804.01(2)(a), the information sought must appear "reasonably calculated to lead to the discovery of admissible evidence."³ Complainant bases her discovery request on the following sentence in an affidavit by

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 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 made a good faith effort to facilitate the investigative process by filing a comprehensive answer of more than 60 pages. The length of respondent's answer is unrelated to the issue of determining the proper scope of discovery available to complainant

Erika Sander, Assistant Vice Chancellor in charge of personnel issues, that was filed as part of respondent's answer: "Further, the Provost had indicated to the Dean of the Graduate School that Ms. Samsel would not be reassigned [within the Division of Academic Affairs] pending completion of the on-going recruitment for a Program Assistant 1 within the WATER Institute, which was still in process." Complainant is seeking discovery of the memoranda or other documents prepared by respondent during approximately a two-month period regarding complainant's reassignment. This request would include a memorandum by the Provost to the Dean of the Graduate School to the effect that complainant would not be reassigned until a Program Assistant 1 position in the WATER Institute had been filled. Such materials are "reasonably calculated" to lead to admissible evidence regarding complainant's claim of discrimination arising from the alleged reassignment process. Complainant has shown a sufficient nexus between her claims and her discovery request so that respondent's motion for protective order must be denied.

For the same reasons, complainant's motion to compel must be granted.⁴

except to the extent that the respondents' responses to discovery may incorporate portions of its answer.

⁴ The Commission lacks the authority to award costs and attorneys fees for discovery motions filed against the State under the Fair Employment Act. *Dept. of Transportation v. Personnel Commission*, 176 Wis 2d 731, 500 N W 2d 664 (1993).

ORDER

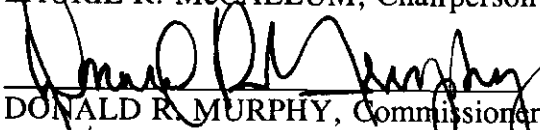
Respondent's motion for protective order is denied and complainant's motion to compel discovery is granted. The schedule for complying with this order will be set forth in a cover letter to this order.

Dated: January 19, 2000

STATE PERSONNEL COMMISSION

KMS:990125Cru11


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner