

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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NITZA PFAFF, Appellant,

vs.

OFFICE OF THE COMMISSIONER OF INSURANCE, Respondent.

Case 2  
No. 73118  
PA(sel)-104

DECISION NO. 34991-A

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**Appearances:**

Victor Arellano, Arellano & Phebus S.C., 1468 N. High Point Road, Suite 202, Middleton, Wisconsin, appearing on behalf of Appellant Nitza Pfaff.

Mark Herman, Department of Administration, 101 W. Wilson Street, 10th Floor, Madison, Wisconsin, appearing on behalf of Respondent Office of the Commissioner of Insurance

**DECISION AND ORDER ON RESPONDENT'S MOTION TO DISMISS, MOTION FOR PROTECTIVE ORDER AND MOTION FOR CONTINUANCE**

This is a denial of a promotion case involving a current employee of the Office of the Commissioner of Insurance ("OCI"). Respondent has filed a motion raising a variety of issues relating to this matter arising out of the discovery process.

**Discrimination Issues**

Several of the issues raised by OCI concern the questions of both scope of discovery and the jurisdiction of this agency to consider claims of employment discrimination based upon national origin. In 2004, when the Legislature abolished the Personnel Commission, jurisdiction over civil service appeals under § 230.44(1), Stats., went to this Agency and claims by state employees of employment discrimination under the Wisconsin Fair Employment Act went to the Equal Rights Division of the Department of Workforce Development. The Wisconsin Employment Relations Commission has no jurisdiction over claims of employment discrimination based upon any protected status enumerated in the Wisconsin Fair Employment Act. Evidence that an employee was denied a promotion based upon national origin, race, age, gender, etc., is not relevant or otherwise admissible in a § 230.44 appeal. That having been said,

however, it is important to note that often times evidence which might support a discrimination claim may also support a § 230.44(c) or (d) claim before this agency. For example, minority employees asserting that the employer's decision to promote another person was an abuse of discretion may offer proof that they have qualifications far superior than the successful candidate to a degree that the non-selection would constitute an abuse of discretion. Pursuit of discovery over the qualifications of the successful candidate would be appropriate. Discovery related to how many minorities the employer had hired would not be relevant. Likewise, to use the above hypothetical, if the successful candidate was also a member of the same protected class, the complaining employee's discrimination claim would likely be meritless. On the other hand, the employee could still prove a claim under § 230.44(d), Stats., as the minority status of the successful applicant would be irrelevant.

To summarize, evidence of differential treatment in a § 230.44(c) or (d) proceeding is relevant and discoverable without regard to the comparator(s) protected class status. Motive evidence traditionally associated with employment discrimination claims is not relevant, discoverable, or admissible in § 230.44 proceedings. Included in the term "motive evidence" is evidence of supervisors' attitudes and statistical data typically associated with proving employment discrimination claims.

Additional discovery, as well as evidence to be elicited at hearing, will be limited consistent with the preceding analysis. At page 6 of Respondent's brief, two specific discovery requests are referenced. The first seeking evidence regarding prior complaints, settlements, etc., related to age, race and/or gender is clearly inadmissible and not discoverable in this proceeding. Copies of the personnel files of other unsuccessful applicants for this position are marginally relevant and therefore discoverable. If there are privacy concerns, some redaction will be permitted.

#### Deposition of Commissioner Nickel

As Respondent notes, we have on occasion issued protective orders insulating some high ranking state officials from discovery depositions. Given the fact that many of the litigants are either unrepresented or represented by non-lawyers, we keep a close rein on discovery directed at elected officials and agency heads.

We generally assume that lawyers will not waste time deposing people who know little or nothing about a dispute. Here, the Respondent does not deny that Commissioner Nickel has firsthand knowledge of the reasons underlying the decision at issue. Basically, Respondent argues that Pfaff has (or will) depose everyone else in the Department's hierarchy and therefore should not need to depose Nickel. Pfaff, on the other hand, claims Nickel was involved in the decision and was a party to efforts to rig the results in favor of a friend's wife. Given the fact that Pfaff has the burden of proving an abuse of discretion or illegal hire, I am reluctant to rule out the deposition of Commissioner Nickel. On the other hand, deposing the entire upper hierarchy of the OCI may be a bit of overkill. I am going to permit the deposition of Commissioner Nickel, however, the deposition will be limited to 45 minutes and will take place at the Office of the Commissioner of Insurance at a mutually agreed time. I have considered alternative means but I

do not believe Pfaff should be limited to written deposition questions or interrogatories. If, however, Pfaff would prefer that approach rather than the restricted deposition, I will allow that type of discovery.

Continuance

The request for a continuance is denied. If the parties mutually agree to proceed on September 4, 2014, I will reschedule to that date; otherwise, we will proceed on August 19, 2014. If there are witnesses with unresolvable conflicts, we will take the available witnesses on August 19 and schedule another day for the two witnesses who are out of state that week.

The motion to dismiss is denied as moot in light of the entry of the protective order and clarification of issues set forth herein. Accordingly, the following Order is entered:

**ORDER**

1. Pfaff is barred from pursuing any discovery relative to evidence of employment discrimination in the decision to deny the promotion to Pfaff, as well as any evidence concerning any other forms of employment discrimination involving other employees.

2. Pfaff is barred from introducing any evidence at the hearing in this matter intended to show or otherwise prove that the denial of the promotion occurred because of Pfaff's national origin.

3. Pfaff may take the discovery deposition of Theodore Nickel, but it is limited to 45 minutes of questioning and, further, the deposition will take place at the Office of the Commissioner of Insurance unless otherwise agreed to.

4. All other motions are denied consistent with this Decision and Order.

Dated at Madison, Wisconsin, this 16th day of July 2014.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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James R. Scott, Chairman