

STATE OF WISCONSIN

PERSONNEL COMMISSION

\* \* \* \* \*

SAM AWE, \*

Complainant, \*

v. \*

Secretary, DEPARTMENT OF \*

AGRICULTURE, TRADE & CONSUMER \*

PROTECTION, \*

Respondent. \*

Case No. 89-0040-PC-ER \*

\* \* \* \* \*

INTERIM  
DECISION  
AND  
ORDER

This matter is before the Commission for consideration of the Motion for Protective Order filed by respondent DATCP on December 20, 1989. The parties, through counsel, argued the Motion before Laurie R. McCallum, Chairperson, on January 22, 1990.

On or around December 1, 1989, complainant filed with respondent DATCP documents entitled "Complainant's First Set of Interrogatories and Request for Production of Documents" (hereinafter "First Request") and "Complainant's First Request for Admissions" and requested that an answer to such be provided within 30 days. The parties subsequently agreed to extend the response deadline by an additional 30 days.

After the Motion for Protective Order was filed with the Commission, the Commission convened a status conference where the parties were able to resolve informally some of the matters raised in this motion. As a result of a stipulation reached by the parties at this status conference, complainant filed an "Amended First Set of Interrogatories and Request for Production of Documents" (hereinafter "Amended Request") with the Commission on January 22, 1990. However, several matters raised by respondent DATCP in the subject

Motion remain unresolved and will be addressed by the Commission in this Interim Decision and Order. These matters are as follows:

1. Respondent contends that complainant should not be allowed access to the requested personnel files of respondent DATCP's employees because this information is irrelevant and privileged. This objection relates to the request for production of documents substituted for Interrogatories 8 through 13 in complainant's Amended Request.

2. Respondent contends that it should not be required to provide information relating to other positions for which complainant applied but for which he was not selected, because this information is irrelevant and beyond the scope of discovery. This objection relates to interrogatory 38 in the First Request and amended Interrogatories 15 through 18 in the Amended Request.

3. Respondent contends that it should not be required to answer Interrogatories 3, 34, and 35 in the First Request because they are unreasonable and unduly burdensome.

The underlying equal rights complaint involves the termination of complainant from his position as a Meat Inspector in respondent's Food Division. Complainant alleges that he was terminated because of his race, national origin, handicap, and/or age.

The Commission has granted to parties to its proceedings "all the means of discovery that are available to parties to judicial proceedings as set forth in Ch. 804, Stats. ..." §PC 4.03, Wis. Adm. Code.

Section 804.01(2), Stats., states, in pertinent part:

(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:

(a) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The request for production of documents substituted for Interrogatories 8 through 13 in complainant's Amended Request states a request "to review the personnel files of William Mathias, Jodi Zandt, Jon Dresser, Mac Aweke, Steve Mertens and Sylvester Offer at the respondent's place of business subject to a protective order." The parties do not dispute that, during complainant's tenure as a Meat Inspector for respondent's Food Division, Mac Aweke, Steve Mertens, and Sylvester Offer were Food Division inspectors; Jodi Zandt was complainant's immediate supervisor; Jon Dresser was Ms. Zandt's supervisor; and William Mathias was the Administrator of the Food Division.

Respondent first argues that information contained in the personnel files of these DATCP employees would be irrelevant to the issues in the underlying complaint. Complainant argues that such personnel files could reveal the standards by which the work performances of other inspectors was evaluated; how such standards were applied to the performances of these inspectors; or whether inspectors similarly situated to complainant were treated in a similar fashion. Complainant further argues that such personnel

files could reveal the affirmative action records of complainant's supervisors; the attitudes towards affirmative action of complainant's supervisors; or the assessments of the supervisory performances of complainant's supervisor. In a case of this kind, where respondent contends that complainant was terminated due to inadequate work performance, the personnel records of other inspectors which may contain information relating to the performances of other inspectors, could be relevant. In addition, in a case of this kind, where complainant contends that he was terminated because of his race, national origin, handicap, and/or age, the personnel records of those individuals who made the termination decision, which may contain information relating to their attitudes or performances relating to affirmative action, could be relevant.

Respondent also contends that information contained in these personnel files is privileged pursuant to §§230.13 and 103.13(6), Stats. However, these cited statutory sections deal solely with the issue of whether certain employment records are subject to disclosure to the public or to current or former state employees. These statutory sections do not create a "privilege" within the meaning of §804.01(2), Stats., and the Commission finds no other basis upon which to conclude that a legally cognizable privilege exists in regard to these records. The scope of the statutory open records requirements is not identical to the scope of allowable discovery of these records. The Commission accepts, in view of the issue and the factual setting of this case, complainant's rationale that information relating to the work performance records of other inspectors and/or the affirmative action records of complainant's supervisors could be useful or even necessary for the prosecution of complainant's case. The Commission also decides, however, that

strict limitations on the access to and use of such information should be imposed and incorporated into its Order in this matter.

The second unresolved matter relates to Interrogatory 38 in the First Request and amended Interrogatories 15 through 18 in the Amended Request. Interrogatory 38 in the First Request states as follows:

INTERROGATORY NO. 38: Please identify and describe all facts and each and every reason upon which the following individuals based their decision to recommend that the complainant not be hired for his position as a meat inspector in 1988 and/or any other positions for which the complainant applied which are identified in Interrogatory No. 14:

- (a) Jodi Zandt;
- (b) John Dresser; and
- (c) Bill Mathias.

Interrogatory No. 14 states as follows:

INTERROGATORY NO. 14: Please identify and describe each position for which the complainant applied for employment with you and for each such position indicate whether the complainant was hired or was not hired.

Interrogatories 15 through 18 in the Amended Request state as follows:

INTERROGATORY NO. 15: Please identify and describe all facts and each and every reason upon which you based your decision not to hire the complainant for the following positions, including but not limited to considerations relating to the respondent's affirmative action goals:

- a. Meat Inspector I - Viroqua (Complainant Interviewed in September, 1987).
- b. Meat Inspector I - Green Bay (Complainant Interviewed in March, 1988).
- c. Meat Inspector Supervisor II - (Complainant Interviewed in July, 1988).
- d. Meat Inspector Supervisor II (Complainant Interviewed in January, 1989).

INTERROGATORY NO. 16: Please identify and describe all records, memorandum, interview notes, personal notes and/or tapes with

regard to the respondent's decision not to hire the complainant for each of the positions identified in Interrogatory No. 15.

INTERROGATORY NO. 17: Please identify and describe all records, memorandum, interview notes, personal notes and/or tapes with regard to the respondent's decision to hire the complainant for the position of meat inspector in 1988, including but not limited to written recommendations which either support and/or refute the decision to hire the complainant.

INTERROGATORY NO. 18: Please identify and describe all records, memorandum and/or personal notes which support and/or refute Jon Dresser's, Bill Mathias', Jodi Zandt's and/or any of the respondent's other employees' recommendations that the complainant not be hired for the position identified in Interrogatory No. 15.

Complainant stated, through counsel, in his argument presented on January 22, 1990, that the primary objective of these interrogatories is to obtain information relating to his supervisors' participation in the decision to hire him for the Meat Inspector position from which he was later terminated. Respondent answered this contention by stating that all information relating to this hiring decision had already been provided to complainant. Complainant did not take issue with respondent's representation in this regard so the Commission will assume here that respondent has responded to Interrogatory 17 and that complainant is satisfied with such response.

Complainant also stated, through counsel, in his argument presented on January 22, 1990, that the purpose of the remaining interrogatories is to discover if any of complainant's supervisors participated in these previous hiring decisions and, if so, if they did or did not recommend him for these positions. Complainant argues in this regard that such information could be used to show a discriminatory animus on the part of complainant's supervisors in regard to his employment by respondent over the course of several years and several transactions. Respondent argues that this information is not relevant to the subject termination and is beyond the scope of discovery.

The Commission agrees with respondent in this regard. The only position under consideration here is the one for which complainant was hired and from which he was terminated by respondent. The analysis here is not susceptible to the application of a continuing violation theory; i.e., the transactions involved are discrete transactions. To determine whether these other hiring decisions were motivated by a discriminatory animus against complainant on the part of his supervisors would require the Commission to conduct a complete analysis of these hiring decisions under the Fair Employment Act. In the absence of a timely complaint filed by complainant relating to these other hiring decisions, it would be inappropriate within the context of the instant case for the Commission to conduct such an analysis or to draw a conclusion. Cf. §904.03, Stats. The Commission determines, as a result, that this information is not relevant to the instant case for discovery purposes.

Finally, respondent contends that answers to Interrogatories 3, 34, and 35 should not be required because they are unreasonable and burdensome.

These Interrogatories state as follows:

INTERROGATORY NO. 3: Please set forth the basis and state all facts upon which you rely for your denial of complainant's allegation that he was discriminated against on the basis of race, age, and handicap.

INTERROGATORY NO. 34: Please identify and describe each and every reason for the complainant's termination.

INTERROGATORY NO. 35: Please identify and describe each and every reason you considered the complainant's work performance to be unsatisfactory.

Respondent argues in this regard that such questions have already been answered through the depositions of current and former DATCP supervisors and through documents which have already been provided in response to

discovery requests. However, as the Commission noted in Southwick v. DHSS,

Case No. 85-0151-PC (4/16/86):

Section 804.01(1), Stats., provides:

Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise under sub. (3), the frequency of use of these methods is not limited.

It is clear that this statutory language allows a party to utilize both depositions and interrogatories and does not prohibit seeking to elicit the same type of information through both discovery devices. Respondent offers no authority from which to conclude otherwise. Certainly, limits must be imposed to prevent unreasonable duplication. In this instance, however, the subject interrogatories go to the heart of the case, i.e., appellant's performance as director of the Bureau of Economic Assistance, and it is not unreasonable for appellant to seek to elicit this information through both a deposition and an interrogatory. As appellant points out in her brief, during a deposition, a deponent may often say they do not recall or they are answering to the best of their recollection. In preparing an answer to an interrogatory, however, an individual has an opportunity to research the question and this may result in a different answer or a more complete answer than that derived from recall.

As in the Southwick case, the instant Interrogatories go to the heart of the case, i.e., the respondent's reasons for terminating complainant, and the Commission reaches the same result, i.e., that respondent should respond to Interrogatories 3, 34, and 35.

#### Order

The motion of respondent is granted in part and denied in part in accordance with the above decision.

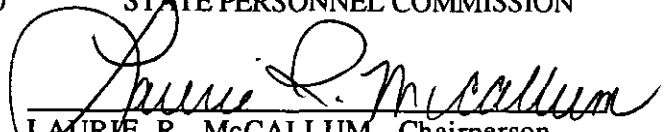
With respect to the personnel files which shall be made available to complainant pursuant to this Order, these files may be inspected and copied at



respondent's offices at the parties' mutual convenience and complainant is instructed that use of any of the information obtained from these files is to be restricted exclusively to use for purposes of the litigation of the instant case.

Dated: February 9, 1990

STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

  
GERALD F. HODDINOTT, Commissioner

LRM:gdt

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