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MARIE IWANSKI,

Appellant/
Complainant,

v.

Secretary, DEPARTMENT OF
HEALTH AND SOCIAL SERVICES,

Respondent.

Case Nos. 89-0074, 0088-PC-ER
89-0096-PC

* * * * *

RULING ON
RESPONDENT'S
MOTION TO
COMPEL ANSWERS

This matter is before the Commission on respondent's motion to compel answers filed December 20, 1989. Both parties have filed briefs.

Respondent's motion concerns complainant-appellant's response to "respondent's first set of interrogatories and first request for production of documents" dated August 23, 1989. Respondent seeks to compel answers to items 10-21. These items are reproduced as follows:

10. With respect to Case No. 89-74-PC-ER, specify all facts, as defined, including each and every act or event of retaliation, retaliatory conduct or harassment, including each unreasonable work assignment.

11. With respect to each act or event of harassment retaliation or retaliatory conduct cited in the previous answer, identify:

(a) the date of each such instance of harassment, retaliation or retaliatory conduct;

(b) the name of the state employee or employees accused;

(c) identify each and every document which pertains to each such alleged act of harassment.

(d) identify any other witness or person having information with respect to each such act or event;

12. As to each act or event of retaliatory conduct or harassment identified by you in your answers to questions Nos. 10 and 11, state all facts and each and every factual basis upon which you rely to con-

clude that the acts or events constitute harassment, retaliation or retaliatory conduct.

13. With respect to case Nos. 89-88-PC-ER and 89-96-PC, specify all facts, as defined, including each and every act of discrimination on the basis of creed you allege was perpetrated upon you by the Department or its employees.

14. With respect to each act or event specified in your answer to the previous question, identify:

- (a) the date of each such event or act;
- (b) each departmental employee involved;
- (c) the name of any other witness or person having information with respect to that event;
- (d) each and every document pertaining to that event or act;
- (e) the factual basis, reason or other information that leads you to conclude that this act was carried out in retaliation against you based on creed.

15. With respect to case Nos. 89-88-PC-ER and 89-96-PC, specify all facts, as defined, including each and every act or event allegedly perpetrated by departmental employees upon you as retaliation based on fair employment activities.

16. With respect to each act or event identified in the preceding answer, identify:

- (a) the date on which each act or event occurred;
- (b) the names of each departmental employee allegedly involved in the act of retaliation;
- (c) each and every document pertaining to each act or event;
- (d) the names of any other individuals who have information pertaining to this event or act;

17. As to each act or event allegedly perpetrated upon you and identified in your answers to questions 15 and 16, state all facts and each and every factual bases upon which you rely to conclude that the acts or events constitute retaliation based on fair employment activities.

18. Identify each and every fair employment activity you engaged in or took part in for which you believe the department or departmental employees retaliated against you.

19. As to each and every activity identified by you in your answer to question 18, identify:

- (a) the date of each activity;
- (b) each department employee involved in each activity;
- (c) each and every document pertaining or containing information pertaining to that activity;
- (d) the name of any witness or other person having information pertaining to each activity.

20. With respect to case Nos. 89-88-PC-ER and 89-96-PC, identify each act or event allegedly perpetrated upon you by a departmental employee which constituted retaliation based on whistle blowing.

21. With respect to each event or act identified in answer to the previous question, identify:

- (a) the date upon which each act or event occurred;
- (b) the names of each departmental employee allegedly involved in each such act;
- (c) the names of any other persons or witnesses having information pertaining to each such act or event;
- (d) each and every document pertaining to each act or event;
- (e) any factual basis, reason, or other information which leads you to conclude that these acts or events occurred as a result of retaliation based on whistle blowing.

Complainant-appellant's response to these questions, dated October 9, 1989, was the same for each question: "The above requested information is contained within the documents already in the Department's possession."

In support of its motion, respondent's attorney asserts in an affidavit that there are more than a thousand documents in respondent's possession that presumably are referred to by the aforesaid answer by complainant-appellant. Respondent argues that complainant-appellant's response to questions #10-21 are inadequate as a matter of law.

The complaint of discrimination in Case No. 89-0074-PC-ER alleges as follows:

On or about September 12, 1988, Complainant filed a complaint against the Department of Health and Social Services and the respon-

dents. . . and that as a result of having filed such a complaint the respondents have retaliated against complainant and that such retaliatory conduct has been in the form of constant harassment towards Complainant and that such harassment includes but is not limited to the following:

A. Issuing work assignments that are unreasonable for the sole purpose of building a case against her for failing to complete assignments which are unreasonable and for the sole purpose of harassing her.

B. Selectively surveilling complainant's conduct for purposes of building a case against her.

C. Demanding and subjecting the complainant to psychological evaluations for the sole purpose of justifying the retaliatory conduct of the Respondents.

D. Issuing an unjustified disciplinary action on or about April 10, 1989 which was specifically issued for purposes of intimidating her and also in retaliation for having filed the above-cited complainant with the Wisconsin State Personnel Commission.

The charge of discrimination/appeal in Case Nos. 89-0088-PC-ER and 89-0096-PC alleges discrimination with respect to discharge and "other" on the basis of creed and retaliation based on fair employment and whistleblower activity by checking off boxes. There is no further statement of the charge other than that it incorporates the following letter:

This letter serves as notice that we are appealing Ms. Marie Iwanski's termination on July 10, 1989 from the Department of Health and Social Services, Division of Health, Bureau of Quality Compliance. Ms. Iwanski was terminated without just cause in violation of sec. 230.34(1)(a), Stats. Furthermore, her discharge was in violation of sec. 230.83(1), Stats., as it constituted retaliation for exercising her right to file complaints under sec. 230.85(1), Stats.

A formal complaint will follow.

It is uncontested that as a general proposition, it is a legitimate source of inquiry by respondent to ask complainant to specify what she considers to have been the specific acts of retaliation and harassment against her, including the identification of the work assignments she considers to have been harassing in nature. It is likewise legitimate to inquire into the specifics of her claim that her discharge was based on creed and was in retaliation for whistleblower and fair employment activities. Complainant-appellant asserts

that her response to respondent's questions was not inappropriate because it fit within the parameters of §804.08(3), stats.:

(3) **OPTION TO PRODUCE BUSINESS RECORDS.** Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.

There are two problems with this contention. This subsection refers to situations "[w]here the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served." (emphasis added) First, complainant-appellant asserts in opposition to respondent's motion to compel:

"[R]espondent admittedly has possession of all the documents required to ascertain the answers to their interrogatories. Accordingly, complainant simply noted 'that the requested information is contained in documents already in respondent's possession.' To recopy and submit the same documents provided to complainant by the respondent would constitute a needless cost and allocation of time."

It appears that the documents to which complainant-appellant refers are documents originally in respondent's possession, copies of which were provided to complainant-appellant by respondent in earlier discovery. Section 804.08(3), stats., refers to the business records of the party from whom discovery is sought, not the business records of the party seeking discovery. Even if this problem could be considered merely technical in nature, the even more substantial problem with complainant-appellant's response to the discovery is that it is not a meaningful answer to respondent's request that she identify which assignments are considered part of the alleged harassment and retaliation, what other specific acts of alleged harassment and retaliation occurred, etc. This information has to come from complainant-appellant. The Commission cannot perceive how respondent could possibly figure out what actions complainant-appellant considers harassment from an inspection of its own business records, and complainant-appellant has not provided any explanation other than by way of totally conclusory assertions.

Complainant-appellant in her brief in opposition also objects to the interrogatories in question on the ground that it seeks attorney work product:

"If complainant's invitation to view the file is deemed to be inadequate by respondent, then we can only assume that what respondent seeks is our distillation of the facts and the circumstances which we deem relevant to your client's case, as derived from the documents respondent provided us.

If such is the case, complainant objects to interrogatories ten (10) through twenty-one (21) on the basis that the answers would compel us to disclose our work product, as such questions call for the mental impressions, conclusions, opinions and legal theories of complainant's attorneys.

* * *

. . .by way of illustration, interrogatory number ten (10) states: '...specify all facts, as defined including each and every act or event of retaliation, retaliatory conduct or harassment, including each unreasonable work assignment.' In order to fully respond to same would require that complainant's attorneys reveal information they have assembled and the mental impressions, the legal theories and strategies they have adopted as derived from documents provided to them by the respondent."

Respondent argues, with considerable force, that this objection was waived by failure to have raised it at the time of the original answers, and that the attorney work product rule applies only to "documents and tangible things," §804.01(2)(c)1., stats. Furthermore, the requirement that a party who alleges that she has been constantly harassed by action including, but not limited to, unreasonable work assignments, disclose what those acts of harassment were and which work assignments are considered to have been unreasonable does not fit within the concept of attorney work product. Respondent obviously has a right to have this information in order to prepare for and try this case. The fact that some attorney thought process and analysis may have to go into the preparation of an answer to an interrogatory does not turn the interrogatory into a request for attorney work product. Finally, in the unlikely event that the work product theory could be deemed to apply here, the criteria for disclosure set forth in §804.01(1)(c)1., would apply, because how else is respondent going to be able to discover what work assignments and other managerial actions complainant-appellant deems constituted harassment and retaliation, except to ask her?

Therefore, the Commission concludes that complainant-appellant's answers to items #10-21 are incomplete or evasive, and complainant-appellant will be ordered to answer the items in question with more specificity as sought by respondent. Pursuant to §804.12(1)(c), stats., the Commission will convene a hearing with regard to respondent's request for motion costs, unless the Commission is earlier advised that the parties have resolved that question by mutual agreement.

Along with the instant motion, respondent filed a sealed envelope which contained its answers to certain of complainant-appellant's interrogatories. Respondent has requested that in the event the Commission determined that complainant-appellant's response to items 10-21 was adequate, the Commission return its sealed answers and it would answer complainant-appellant's interrogatories in the same fashion as complainant-appellant had answered respondent's interrogatories #10-21 -- i.e., by stating that the information is contained in documents in the possession of complainant-appellant. Given the disposition of respondent's motion, the Commission will do nothing with this document except retain it in the file.

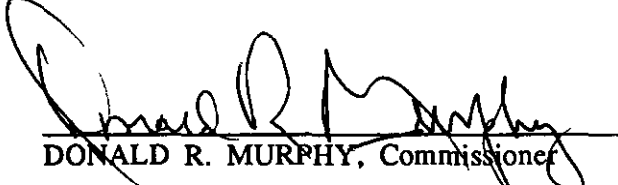
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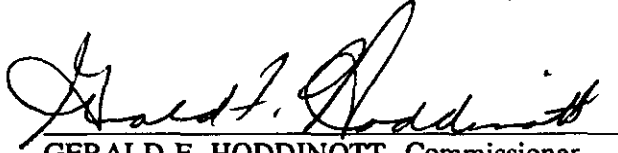
Respondent's motion to compel answers filed December 20, 1989, is granted, and complainant-appellant is directed to answer with more specificity items #10-21 in Respondent's First Set of Interrogatories and First Request for Production of Documents dated August 23, 1989, and to do so within 30 days of the date of the entry of this order.

Dated: March 21, 1990 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

AJT:gdt


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner