

STATE OF WISCONSIN

PERSONNEL COMMISSION

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SOUHIR SOLIMAN,

Complainant,

v.

Secretary, DEPARTMENT OF
 AGRICULTURE, TRADE &
 CONSUMER PROTECTION,

Respondent.

Case No. 93-0049-PC-ER,
 94-0018-PC-ER

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RULING ON:

1) RESPONDENT'S MOTION FOR
 SANCTIONS FOR FAILURE TO
 ANSWER DISCOVERY, AND
 2) COMPLAINANT'S MOTION TO
 CONSOLIDATE CASES FOR
 HEARING

Respondent's motion for sanctions is granted in part, for the reasons detailed in this ruling. Complainant's motion to consolidate cases for hearing is denied, as detailed herein.

Complainant also requested permission to withdraw her prior waiver of investigation for case #94-0018-PC-ER. Such request must be considered by the full Commission and will be placed on the agenda for its next meeting on March 16, 1994.

The following findings of fact are made solely for the purpose of resolving the present motions and are based on the pleadings and information filed by the parties.

FINDINGS OF FACT

1. On March 29, 1993, complainant filed a complaint alleging national origin or ancestry discrimination in relation to respondent's failure to hire complainant as a lab tech in June of 1992, and in relation to reducing her hours. The Commission assigned case # 93-0049-PC-ER to this complaint.
2. On August 25, 1993, an Initial Determination was issued which found probable cause to believe the allegations relating to the failure to hire and no probable cause to believe the allegations relating to reduced hours. No appeal was filed of the no probable cause portion of the determination.
3. On November 8, 1993, a prehearing conference was conducted on the probable cause portion of the determination. Hearing dates of April 6, 7, and 8, 1994, were agreed to by the parties, as was a discovery cutoff date of 30 days in

advance of hearing. The hearing issue also was agreed to by the parties as follows:

Did the respondent discriminate against the complainant on the basis of national origin when it failed to hire her for a Laboratory Technician 2 project position in June 1992?

4. On November 29, 1993, respondent sent a set of interrogatories to complainant by certified mail, which respondent received on December 2, 1993. On December 28, 1993, complainant's attorney requested an extension of time until January 18, 1994, to answer the interrogatories. Respondent's attorney granted the request upon the assurance of complainant's attorney that the response would be received by January 18, 1994. Complainant did not respond by the extended date and did not request further extension until after the extended date expired.
5. On January 20, 1994, complainant's attorney faxed a request to respondent's attorney for an extension of time to February 1, 1994. Three reasons for the extension request were recited in the faxed document. First, the difficult weather conditions (extreme cold) the same week prevented complainant from meeting with her attorney to discuss the responses. Second, complainant's attorney was scheduled for trial in another matter from January 24-28, 1994. Third, the interrogatories were extensive and required a great deal of time to prepare a response. Counsel for respondent denied the request for further extension and on January 25, 1994, filed a motion to compel with the Commission.
6. Respondent states in its motion to compel (page 2), that the extended delay in response jeopardizes respondent's opportunity to review the responses and to conduct follow-up discovery by the deadline established at the prehearing conference. (See par. 3 above.)
7. Complainant failed to deliver her discovery response by February 1, 1994. A status conference was held on February 7, 1994, to discuss respondent's motion to compel. The complainant agreed to hand deliver the discovery answers to respondent no later than Wednesday, February 9, 1994. Respondent was given until February 21, 1994, to review complainant's discovery

responses and to indicate what relief respondent would continue to seek as part of its motion to compel.

8. Complainant indicated at the February 7th status conference, that she planned to file a second complaint of retaliation against respondent. She further indicated she would request waiver of the investigation for the new complainant, consolidation of the new complaint for hearing with the existing complaint, and postponement of the consolidated hearing until July or August 1994. Respondent was to submit its position on these additional issues (consolidation and hearing postponement) by February 21, 1994.

9. On February 8, 1994, complainant mailed its first set of interrogatories, request for production of documents, and request for admissions to respondent. Such discovery was limited to the first complaint filed (case #93-0049-PC-ER).

10. Also on February 8, 1994, complainant filed a second complaint against respondent. The suspected bases of discrimination were listed as national origin or ancestry, race and FEA retaliation for filing the first complaint. The acts complained of included: reduced hours of work, rejected request for flexible hours, sudden increase of work hours to 37.5 hours, rejected request to work 20 hours per week, and termination for alleged unwillingness to work required hours and for filing a false unemployment compensation claim. Complainant was returned to work but alleged continued retaliation afterward in the forms of being required to work hours no one else worked, continued denial of flexible work schedule, and her work being subjected to close scrutiny. The Commission assigned case number 94-0018-PC-ER to this second complaint.

11. By cover letter attached to the second complaint, complainant requested waiver of investigation of the second complaint to proceed directly to a hearing on the merits. Complainant further requested consolidation of the both complaints for hearing and, if consolidation were granted, postponement of hearing until July or August 1994. Respondent objected to waiver of investigation by letter dated February 16, 1994.

12. Respondent received complainant's discovery answers on February 8, 1994. Complainant's answers, however, were incomplete as noted below.

- Answers to interrogatories 1, 7, 31 and 49, indicate complainant has used a particular device with other of respondent's employees, but fails to indicate if she did so independently.
- Answers to interrogatories 25, 46 and 55, indicate complainant studied the device in school but fails to indicate if she personally and independently used the device.
- Answer to interrogatory 70, indicates complainant has requested that certain supplies be ordered, but is unresponsive as to whether she personally and independently ordered supplies.
- Answers to interrogatories 2, 8, 11, 20, 32, 38, 41, 44, 50, 59, 62, 65, 68, 80, 86, 90, 93, 96, 103, and 113 are unresponsive as to when the work in question was performed.
- Answers to interrogatories 23, 26, 47, 57 and 106 fail to indicate when or where the work in question was performed.
- Answers to interrogatories 24, 27 and 48 are unresponsive or evasive. The response references "professors" are able to verify certain work performed but does not provide the name of those individuals.
- Answer to question 57 is unresponsive or evasive. The response references "teachers" are able to verify certain work performed but does not give the names of those individuals.
- Answers to interrogatories 3, 6, 9, 12, 15, 18, 21, 30, 33, 36, 39, 42, 45, 51, 54, 60, 63, 66, 69, 72, 75, 78, 81, 84, 87, 91, 94, 97, 100, 104, 107, 110 and 114 are unresponsive or evasive. The response references "other employees" of respondent who can verify that certain work was performed but fails to name those individuals.

13. The incomplete answers noted in paragraph 12, ask about complainant's experience with the following devices: use of a centrifuge, analytical balance, pH meter, autoclave, biologic safety cabinet, fume hood, distillation apparatus, media filtration apparatus, freeze dryer (lyophilizer), automatic glassware dishwasher, incubator, magnetic stirrer or hot plate stirrer, lighted microscope, automated pipette, manual pipette (diluter), sonicator, spectrophotometer, automatic tissue macerator (stomacher), laboratory water bath, and vortex mixer.

14. The incomplete answers noted in paragraph 12, ask about complainant's experience performing the following duties: preparation of written laboratory protocols, providing advice/consultation to laboratory users, ordering laboratory supplies, calibrating instruments, making up reagent solutions, sterilizing laboratory glasses, calculations using metric system, the checking and recording of temperature of incubators &/or refrigerators and/or freezers, identifying the cause and correction for assay problems, using biohazard/chemical hazard safety precautions, and disinfecting contaminated surfaces.

15. On February 15, 1994, the Commission received respondent's renewed motion (dated February 11, 1994) to compel discovery. The motion included a request to relieve respondent from having to answer complainant's discovery (see par. 9) until after complainant responded to its discovery.

16. At its meeting on February 16, 1994, the Commission granted complainant's request for waiver of investigation of the second complaint (case number 94-0018-PC-ER). On the same date, Judy M. Rogers was assigned as the hearing examiner for the first complaint (case number 93-0049-PC-ER), and notice of the same was mailed to the parties on March 1, 1994.

17. On February 17, 1994, the hearing examiner established a briefing schedule for respondent's motion to compel and denied respondent's request for delayed response to complainant's discovery.

18. On February 18, 1994, complainant mailed notices of video depositions of four individuals.

19. Complainant's brief in opposition to the motion to compel was received by the Commission on February 24, 1994. Respondent's additional brief was received by the Commission on February 25, 1994.

20. On March 1, 1994, the Commission received complainant's letter dated February 25, 1994, which stated as follows:

When the complainant originally requested investigation of her second charge of discrimination referenced as Case No. 94-0018-PC-ER above, she had also hoped to consolidate this complaint with the original complaint of discrimination. As it appears that the claims will not be consolidated, the complainant would have no objection to an investigation being done by the Personnel Commission if that is [respondent's] wish in this matter.

DISCUSSION

Respondent's Motion to Compel - Sanctions Granted

Complainant's answers to respondent's interrogatories were very tardy, as well as incomplete and/or evasive (as detailed in pars. 12-14 above). Also, the tardiness continued despite Commission intervention and resulting unkept promises to comply, such promises having the effect of avoiding an order to reply. Under these circumstances, some form of sanction is appropriate.

Complainant attempts to avoid sanctions by claiming that the interrogatories requesting information about complainant's qualification for the position applied for were irrelevant. The examiner disagrees. It appears from the pleadings that respondent will assert as a defense for failing to hire complainant that she was not as qualified for the job as the person hired. This defense, if established, may be sufficient to avoid a finding of discrimination and, therefore, is relevant. See, for example, Jenkins v. DHSS, 86-0056-PC-ER (6/14/89) and Jones v. DATCP & DER, 86-0067, 0151-PC-ER (4/28/89).

Complainant also attempts to avoid sanctions by claiming that the extensive interrogatories (over 100 questions) were overly burdensome. The examiner rejects this argument. The time and manner to raise such objection is by request for a protective order filed prior to the date upon which answers are due. (s. 804.08(a)(b), Stats.) The first time respondent raised this contention was as a defense to respondent's motion to compel, as raised in complainant's brief filed on February 24, 1994, which was about 3 months after complainant's receipt of the interrogatories and about 2 months after complainant's answers were due.

Respondent requests dismissal as its preferred sanction for complainant's conduct. The examiner, however, feels dismissal is too harsh a sanction here.

Respondent's alternative requested sanction is quoted below.

The alternative to complete dismissal relates to evidence which the Complainant would be permitted to submit to the Commission. Since Complainant has refused to provide information which would permit Respondent to properly evaluate Complainant's claim that she is qualified for the job, Complainant should be prohibited from presenting any evidence, other than her own testimony, which relates to her experience with or performance of any of the tasks or functions which were the subject matter of the interrogatories. This sanction would be less harsh than outright dismissal, but it would remove a substantial portion of the prejudice which Complainant's refusal to answer the interrogatories has created.

By refusing to answer the interrogatories, Complainant has prejudiced the Respondent by making it unreasonably difficult to identify persons who might have knowledge of Complainant's experience level. Since Complainant did not identify those persons when asked, Complainant should not be able to use any of them or anything which might be derived from them in Complainant's case. The entry of this order would permit the Commission to keep this hearing on track and hold the

hearing as scheduled. Since the Commission declared that to be its desire in its denial of Respondent's motion to expand the time to answer the discovery request of the Complainant, the Commission should continue to strive to attain that goal. An order as outlined above would sanction the Complainant for refusing to answer interrogatories, without denying her the opportunity to have her case considered on the merits.

The alternative sanctions described above are adopted as appropriate by the hearing examiner. Therefore, complainant may not present witnesses or evidence other than her own testimony regarding her experience with the devices identified in paragraph 13 of the Findings of Fact and with the duties identified in paragraph 14 of the Findings of Fact. Further, complainant may not use any information at hearing if such information was derived from the undisclosed individuals who have knowledge of her experience with those devices and tasks.

Request for Hearing Postponement - Denied

The parties have known of the April 1994, hearing date in case #93-0049-PC-ER ever since the dates were agreed to at the prehearing conference held on November 8, 1993. The February 1994 filing of the second complaint is insufficient as reason for postponing the hearing where, as here, the following circumstances exist: a) there is no identity of issues between the first and second complaint, b) it appears there is little, if any, overlap of witnesses for the two complaints, and c) respondent objects to postponement.

Consolidation of Cases for Hearing - Denied

The only issue scheduled for hearing on April 6-8, 1994, is whether respondent's failure to hire complainant in June 1992, was based on complainant's national origin. (See par. 3 of the Findings of Fact.) This issue is unrelated to any of the issues alleged in the second complaint (as recited in par. 10 of the Findings of Fact).

Furthermore, consolidation would "add back" the allegation of reduced hours which was rejected in the Initial Determination and such rejection was not appealed by complainant. Consolidation has the potential, therefore, to bring this unappealed issue before the examiner as if it had been appealed. Such a result is undesirable.

The examiner also believes that consolidation would create a hardship for respondent. These new issues were not raised until February 8, 1994,

leaving respondent with inadequate time to conduct discovery and prepare for hearing on the newly-alleged issues.

Revocation of Waiver of Investigation of Second Complaint - Schedule established for presentation of issue to the full Commission

On February 16, 1994, the full Commission granted complainant's request to waive investigation of case number 94-0018-PC-ER. Now complainant indicates her willingness to revoke the waiver if respondent would like to have an investigation conducted by the Commission.

Since waiver was granted by the full Commission, any subsequent action relating to the same waiver request also must be considered by the full Commission. A contrary decision from the Commission is not granted as a matter of course. Rather, the wishes of both parties are considered in reaching a decision.

Some materials in the file suggest respondent would not object to proceeding with Commission investigation of the second complaint. However, the Commission does not wish to make this assumption without first giving respondent an opportunity to clarify its position. **If respondent objects to proceeding with investigation on the second complaint, the respondent must submit its written objections to the Commission on or before March 11, 1994, for consideration at the following Commission meeting on March 16, 1994.** The Commission will conclude that respondent has no objections to proceeding with investigation if respondent chooses not to file written objections.

The prehearing conference scheduled for the second complaint on March 8, 1994, is cancelled. If the Commission grants withdrawal of the investigation waiver, no prehearing would be needed at this time. If the Commission denies withdrawal of the investigation waiver, a prehearing will be rescheduled shortly after the Commission's meeting on March 16, 1994.

ORDER

The respondent's motion for dismissal as sanction for complainant's responses to discovery is denied; however, an alternative sanction limiting complainant's presentation of certain witnesses and evidence at hearing is

granted as detailed in this ruling. Complainant's request for postponement of hearing and consolidation of cases for hearing is denied.

Further, the issues relating to investigation of the second complaint will be handled pursuant to the schedule set forth in the last discussion section of this ruling.

Dated March 2, 1994.



JUDY M. ROGERS, Commissioner

cc: Atty. Mary Kennelly
Atty. Ruth E. Heike