

MARIE J. NELSON,
Complainant,

v.

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

**RULING ON MOTION
TO COMPEL
DISCOVERY**

Case No. 97-0020-PC-ER

This is a complaint of discrimination on the basis of sex. On September 22, 1997, complainant filed a request with the Commission which has been interpreted as a motion to compel discovery. The parties were permitted to file written arguments and the schedule for doing so was completed on October 31, 1997. The following findings are based on information provided by the parties, appear to be undisputed, and are made solely for the purpose of deciding this motion.

1. In a letter to complainant dated March 4, 1997, respondent stated as follows, in pertinent part:

[Y]our complaint has been forwarded to Chancellor David Ward, to process as a complaint against a faculty member pursuant to Faculty Policies and Procedures (FPP) Chapter 9. . . .

Pursuant to the provisions of this chapter, chancellor Ward has appointed Professor Emerita June Weisberger to serve as an investigator. Professor Weisberger will conduct an impartial investigation and will report to the Chancellor, giving her findings. The Chancellor will then determine whether or not disciplinary action [against the alleged harasser] is warranted.

2. In a letter to respondent dated August 12, 1997, complainant stated as follows, in pertinent part:

Through the Discovery process, I am requesting that your office provide me with all documentation and correspondence which you can

obtain through your office pertaining to my case. I would like all notes and documents from the internal investigation which Professor Weisberger has in her possession. I am especially interested in which individuals were contacted by the investigator and when. . . .

3. In a letter to the Commission dated September 16, 1997, complainant stated as follows, as relevant to this motion:

. . . There are numerous documents that I have requested from the University in the past and have still not received. I am requesting that the Personnel Commission compel discovery for the documents that I have requested. These include all documents from my letter of August 12, 1997 and the following documents specifically: . . .

- Dr. Weisberger's notes and documentation of the investigation.

4. In a letter dated September 26, 1997, counsel for respondent stated as follows, as relevant to this ruling:

I am not willing to provide and hereby object to your request for a copy of the investigatory report and notes of Professor June Weisberger. It is my position that this material is confidential attorney-client communication and attorney work product that is beyond the scope of discovery.

In *Dyson v. Hempe*, 140 Wis. 2d 792, 413 N.W. 2d 792 (Ct. App. 1987), the Court provided the following formulation of the attorney-client privilege:

It is generally agreed that the classic statement of the lawyer-client privilege is found in *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950):

[T]he [lawyer-client] privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as lawyer; (3) the communication relates to a fact of which the lawyer was informed (a) by his client (b) without the presence of strangers (c) for the purposes of securing *primarily* either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

This decision was cited with approval by the Commission in *Iwanski v. DHSS*, 89-0074, 0088-PC-ER, 8/21/91. Relying on the respondent's characterization of Professor Weisberger's role *vis-a-vis* the investigation she conducted (see Finding 1, above), it would have to be concluded that she was acting not as a lawyer/advocate, but as an impartial investigator. As a result, it would have to be assumed that at least two of the prerequisites for recognition of the attorney-client privilege do not exist here, i.e., respondent was not acting as a client of Professor Weisberger's and Professor Weisberger was not acting as respondent's lawyer or advocate. It is incongruous to attempt to characterize Professor Weisberger's role as both a lawyer for respondent and as an impartial investigator. A lawyer providing services for a client is by definition not impartial as it relates to the subject of the services. Respondent also asserts a work product exception here. However, only those materials, information, mental impressions, or strategies collected or adopted by a lawyer after retainer in preparation of litigation come within the ambit of the work product exception. *State ex rel Dudek v. Circuit Court*, 34 Wis. 2d 559 (1967). As a result, the assertion of this exception would again require that Professor Weisberger, in conducting her investigation, was doing so as a lawyer for respondent. As concluded above, this is not the role respondent assigned to Professor Weisberger here in regard to the subject investigation.

In *Galbraith, et al. v. DOT*, 91-0067-PC-ER, etc., 12/23/91, the Commission ruled that an investigatory report prepared by respondent's affirmative action officer was subject to disclosure pursuant to discovery. In the absence of a privilege, that result would apply here as well.

ORDER


The motion to compel discovery is granted. Respondent is ordered to provide a copy of all documents used or generated as a part of the subject investigation to complainant within 30 days of the date of this ruling.

Dated: November 20, 1997

STATE PERSONNEL COMMISSION

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LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner