

**DANIEL HAWK,**  
*Complainant,*

v.

**Secretary, DEPARTMENT OF  
COMMERCE,**  
*Respondent.*

**RULINGS ON MOTION  
TO COMPEL  
DISCOVERY AND  
MOTION TO DISMISS**

Case No. 99-0047-PC-ER

This is a complaint of discrimination on the basis of race and national origin or ancestry in regard to a probationary termination. On November 2, 1999, complainant filed a motion to compel discovery, and, on November 24, 1999, respondent filed a motion to dismiss. The following findings are based on information provided by the parties, appear to be undisputed, and are made solely for the purpose of deciding these motions.

1. In a discovery request dated September 1, 1999, complainant stated as follows, in pertinent part:

Plaintiff, would like to obtain the following information:

1. Tribal Enrollment Identification Number and federally recognized tribal affiliation for Louie Cornelius. . . .
3. A list of all people, employees, etc. that attended the economic development reorganization meeting. . . .

2. Respondent, in a letter dated October 11, 1999, answered these requests as follows:

Respondent . . . is responding timely to your "Discovery Request" dated September 1, 1999. The numbered references below refer to the same numbered specific requests included in your Discovery Request.

1. The Respondent does not maintain records of tribal enrollment identification numbers or of federally recognized tribal affiliations. . . .
3. No written list was created for what is understood to be an economic development reorganization meeting held in January of 1999.

3. In a letter dated October 14, 1999, in which complainant challenged respondent's responses to discovery requests #1 and #3, he stated as follows, as relevant here:

Plaintiff discloses that any tribal information provided may be used in tribal court, relative to applicable tribal laws.

4. Mr. Cornelius was complainant's first-line supervisor during complainant's tenure as the Native American Liaison for respondent and effectively made the decision to terminate complainant's probationary employment.

5. In response to a request for information from the Commission, respondent stated that its records indicated that Mr. Cornelius's race/national origin or ancestry is Native American. This response was based on Mr. Cornelius's self-reporting. Respondent does not have a process other than voluntary self-reporting for determining the race/ethnicity of its employees. Respondent does not ask its employees to provide proof of self-reported race/ethnicity.

6. Respondent did not create a list of those individuals who attended the subject economic development reorganization meeting in January of 1999.

In his motion to compel discovery, complainant takes issue with respondent's responses to items #1 and #3 in his request of September 1, 1999. (See ¶¶ 1 and 2, above). A response to item #1 would be discoverable if Mr. Cornelius, a member of respondent's management team, were to be deposed. Simply because complainant has chosen to seek this information through an interrogatory makes it no less discoverable. Although no attendance list was created for the reorganization meeting which is the subject of item #3, the requested information could be obtained through other means such as by simply having the management representatives who were present at the

meeting attempt to recall the names of those who were in attendance. It may be appropriate, if such an approach is used, for respondent to specify how the information was collected and to explain what limitations this approach may present as to accuracy and completeness. Such an act of informal fact-gathering does not rise to the level of record creation ruled by the Commission to be outside the scope of discovery. (*See, Balele v. DOR, DER, and DMRS, 98-0002-PC-ER, 7/7/98*). However, the same can not be said of complainant's suggestion that a formal survey of all of respondent's employees be conducted to obtain this information.

Respondent's motion to dismiss is based on its interpretation of the statement made by complainant in his letter of October 14, 1999, (See ¶ 3, above) as an attempt by complainant to intimidate potential hearing witness Mr. Cornelius. The intent of this statement, however, is not as clear as respondent contends. At face value, this statement merely indicates that evidence relating to tribal membership may be admissible for certain purposes in tribal courts. An intent by complainant to bring an action in a tribal court against Mr. Cornelius based on complainant's theory that Mr. Cornelius mischaracterized his ethnicity/ancestry as Native American, could perhaps be reasonably extrapolated from this statement. It is equally or perhaps even more reasonable, however, to infer that complainant was simply pointing out that evidence relating to tribal membership/registration is admissible in tribal courts, would be admissible as well in Commission proceedings such as this one in which the common ethnicity of the complainant and his supervisor is at issue, and should, as a result, be discoverable. It is concluded, as a result, that any threat complainant may have intended is too thickly veiled to support the dismissal of complainant's charge, and that other equally reasonable interpretations of complainant's statement, which do not involve a threat against Mr. Cornelius, exist here.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.45(1)(b), Stats.
2. Complainant has the burden to show that the information he has requested from respondent through the discovery process, i.e., responses to requests #1 and #3 in his September 1, 1999, request, is discoverable.
3. Complainant has sustained this burden.
4. Respondent has the burden to show that complainant's charge should be dismissed due to improper conduct on complainant's part.
5. Respondent has failed to sustain this burden.

ORDER

Complainant's motion to compel discovery is granted, and respondent's motion to dismiss is denied.

Dated: January 19, 2000

LRM:990047Cru13

STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

  
DONALD R. MURPHY, Commissioner

  
JUDY M. ROGERS, Commissioner