

STATE OF WISCONSIN

PERSONNEL COMMISSION

**GERALD W. FONDOW,**  
*Complainant,*

v.

**Secretary, DEPARTMENT OF  
REVENUE,**

*Respondent.*

**RULING ON  
PROTECTIVE ORDER**

Case No. 99-0136-PC-ER

This case is before the Commission to resolve complainant's dispute over respondent's request for a protective order. Both parties are represented by counsel and have filed written arguments, with the final argument filed on January 5, 2000.

This case was filed with the Commission on August 16, 1999, alleging disability discrimination. On October 4, 1999, the respondent was asked to file an Answer to the complaint and to respond to specific questions prepared by a Commission Equal Rights Officer (ERO). Respondent complied, filing the requested information on November 23, 1999. Respondent's replies to two of the questions prepared by the ERO indicated that respondent would provide information concerning other disabled (questions 5, 9 and 11) and disciplined employees (question 11) under separate cover "in order to comply with confidentiality provisions." Respondent filed a motion for a protective order on November 23, 1999, regarding materials tendered in response to questions 5, 9 and 11.

Complainant opposed respondent's request by letter dated December 17, 1999, arguing as noted below:

Complainant agrees that there may be some public interest in preventing disclosure of Department of Revenue (DOR) employees' disciplinary and disability records. However, it is our position that Mr. Fondow and other DOR employees may be better protected by making those records available to the public to discourage continued discriminatory practices of the DOR, and this public interest in disclosure would outweigh any public interest there may be in non-disclosure in this case.

The employee records are public records and a balancing test to determine whether the harm to the individual employee outweighs the harm to the public interest must be applied to determine if each particular record should be withheld. *Woznicki v. Erickson*, 202 Wis.2d 178, 183-84, 549 N.W. 2d 699, 701 (1996). If the public's interest in access to such information exceed the interest of individuals in protecting their reputations and their privacy, the information must be made available to the public. *Id.* At 187, 549 N.W.2d at 703. At this time, it is impossible for complainant to assess whether the privacy concerns of those individuals outweigh Mr. Fondow's interests in this case and the public's interest in preventing and addressing discrimination by providing the public with access to the records.

At a minimum, complainant and his attorneys should have an opportunity to review the records before any kind of protective order is entered by the Commission. After such a review, it may be possible to stipulate to a limited protective order that would be acceptable to all parties.

Respondent contends that information regarding another employee's disability is protected against disclosure under §§146.82(1) and 103.13(6)(e), Stats. and that the cited statute evinces a "public policy that these types of records should be among the most revered in terms of respect for privacy rights." (See respondent's arguments dated 1/4/00). Section 146.82(1), Stats., pertains to the confidentiality of patient health care records and provides that such records shall not be released except to a limited number of entities (such as medical staff or a coroner) and then only for limited purposes. Section 103.13, Stats., pertains to records open to employees (including former employees). Section 103.13(6), Stats., enumerates exceptions to an employee's access to records including subparagraph (e), which prohibits disclosure of information "of a personal nature about a person other than the employe if the disclosure of the information would constitute a clearly unwarranted invasion of the other person's privacy."

Respondent argues in the alternative that, if the Open Records Law pertains to information about another employee's disability, the complainant has failed to show entitlement to those records. Respondent's argument is shown below (respondent's arguments dated 1/4/00):

Assuming arguendo that this was an open record case, complainant would be correct that under the Wisconsin law employment records are generally considered public documents. *Woznicki v. Erickson*, 202 Wis.2d 178, 549 N.W.2d 699 (1996). However, *Woznicki* simply requires a balancing test be conducted by the authority with the record, but there is no general requirement in *Woznicki* or elsewhere that employment records must be released. In this case had a balancing test been done the records would not be released. The interest here is an overwhelming public interest in having current employees of the DOR and applicants for employment feel free to reveal and discuss the handicap status and need for accommodation, without opening themselves to unfair public stigma, harassment or retaliation that sometimes attaches such conditions. Giving complainant unfettered access to these documents could have a chilling effect on employees willing to discuss handicap and accommodation issues. Conversely, complainant has not shown that there is any legitimate interest in releasing the documents without a protective order. Protecting persons who supply information from retaliation or other harm is an interest that may outweigh the interests in having access to public records. *Bergmann v. Faust*, 595 N.W.2d 75, 226 Wis.2d 273 (1999).

Respondent has requested a protective order to maintain confidentiality of information about employees other than complainant (hereafter, "other employees"). The question before the Commission is not whether disclosure would be appropriate under the Open Records Law. The question is whether the protective order is appropriate when such materials are divulged in the context of litigation. The policies underlying the statutes cited by the parties may be relevant to this inquiry.

The Commission reviewed the documents at issue. One document names the staff in the unit where complainant worked and indicates which staff have self-identified as having a disability. Respondent also provided a copy of the employee's self-disclosure form, which contains the employee's statement of the nature of the disability, and whether any accommodation is needed. Other documents pertain to the discipline of other employees. It does not appear that any of the other employees disciplined had a disability.

The Commission has ruled in prior cases that documents subject to disclosure protection under §230.13(1)(a), Stats., are discoverable if relevant to the issues raised. The Commission also has determined that disclosure of those documents in the context of discovery should be subject to a protective order to prohibit dissemination of the documents beyond the

confines of the litigation. *Duncan v. DOC*, 96-0064-PC-ER, 7/31/97. Disciplinary records are protected under §230.13(1)(a), Stats. Accordingly, respondent is entitled to a protective order regarding those documents.

Complainant's argument for disclosure of the records pertaining to the disability of other employees is that other DOR employees "may be better protected by making those records available . . . to discourage continued discriminatory practices of the DOR." Use of information regarding other employees' disabilities for the purpose of preparing complainant's case would further such goal, unfettered dissemination would not.

The Commission concludes that the disability of other employees should not be disclosed to complainant without a protective order. The policy arguments advanced by respondent are persuasive and result in the conclusion that such information should be released but complainant should be restricted to using the information within the confines of litigation.

#### ORDER

Based upon the foregoing, the Commission grants respondent's request for a protective order and the following terms and conditions are placed upon use of the protected information (using the Commission's standard language<sup>1</sup>):

The following materials filed by respondent and provided to complainant or his representative may be used by complainant or complainant's representative only for the purpose of litigating this case or related cases involving identical or similar issues in other forums and involving the same parties, and may not be disclosed by complainant or complainant's representative for any other purpose:

- a. information relating to the disability of other employees,
- b. information related to personnel or performance matters involving other employees, and
- c. information from the personnel files of other employees.

The complainant is directed to inform the Commission of the name and address of any expert or other witness complainant intends to consult prior to divulging any of this material to any such person, so that the Commission may


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<sup>1</sup> The language proposed by respondent was not adopted because the Commission did not understand the meaning of item numbered two.

serve copies of this order on such person prior to disclosure of the material, and any such person is directed not to disclose the materials to the public or outside the confines of this proceeding.

Dated: January 19, 2000.

STATE PERSONNEL COMMISSION

  
LARRIE R. McCALLUM, Chairperson

  
DONALD R. MURPHY, Commissioner

  
JUDY M. ROGERS, Commissioner

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