

**HALLEY H. YOUNG,**  
*Complainant,*

v.

**Secretary, DEPARTMENT OF  
TRANSPORTATION**  
*Respondent.*

Case No. 00-0025-PC-ER  
00-0123-PC-ER

**EXAMINER'S<sup>1</sup>  
RULING ON  
RESPONDENT'S  
MOTION TO COMPEL**

**ORDER TO COMPLY  
WITH CERTAIN  
DISCOVERY  
REQUESTS**

**SANCTIONS IMPOSED**

By cover letter dated November 26, 2001, respondent filed a motion to compel complainant's responses to discovery. A conference call was held on December 5, 2001, at which time both parties presented arguments. The conference call was tape-recorded.

The hearing in these matters is scheduled for January 14-16, 2002. Accordingly, a need existed to resolve the present disputes in an expeditious manner. Complainant was allowed to supplement his discovery answers based upon information provided under oath at the conference. The supplemental information is noted in this ruling. Other matters could not be resolved at the conference but timetables for specific actions were established as noted in this ruling.

I. Hearing Issues

Discovery disputes are reviewed in relation to the hearing issues. The issues for hearing are noted below (see Conference Report dated June 21, 2001):

00-0025-PC-ER: Whether complainant was discriminated against by respondent due to his age in regard to any of the following:

1. On or about May 1, 1999, complainant was allegedly told that he would not be trained and certified to sample test materials;
2. Complainant was allegedly hired as a limited term employee for the 1999 construction season significantly later in the season than others;
3. Complainant was not selected for a permanent Engineering Specialist-Transportation position in October of 1999;
4. Complainant was not selected for a permanent Engineering Technician Transportation 1 position in November of 1999.

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<sup>1</sup> The assigned hearing examiner was ill, so another of the Commission's hearing examiner's handled the conference and made rulings on behalf of the assigned hearing examiner.

00-0123-PC-ER: Whether complainant was discriminated against by respondent on the basis of age or disability with regard to failure to hire complainant on December 10, 1999, March 2, 2000, and July 17, 2000.

Case No. 00-0123-PC-ER also had included a claim of retaliation under the whistleblower law, §§230.80, et. seq., Stats. The Commission dismissed the whistleblower portion of the claim by ruling dated May 17, 2001, granting respondent's motion to dismiss for failure to state a claim.

## II. In Camera Review Schedule Established for Certain Discovery

Complainant refused to answer portions of certain interrogatories and related production requests. The discovery request and complainant's answers are shown below. (The acronym DOT has been used in place of the "Department of Transportation.")

Interrogatory #19: Identify all documents that support your charge of discrimination against the DOT. Answer: Reserving those for possible federal court action.

Interrogatory #23: Provide all of the facts supporting your belief that you were subjected to discrimination by the DOT. Answer: Reserving those for possible federal action.

The related production requests are #1 through #4 as noted below.

Request for Production #1: Produce copies of any and all documents relating to your allegations of discrimination in the Personnel Commission complaint filed against the DOT in this matter.

Request for Production #2: Produce copies of any and all documents supporting or refuting your allegation that the DOT's decision not to hire you was motivated by your alleged disability.

Request for Production #3: Produce copies of any and all documents supporting or refuting your allegation that the DOT's decision not to hire you was motivated by your age.

Request for Production #4: Produce copies of any and all documents supporting or refuting your allegation that the DOT's decision not to train and certify you in 1999 to sample and test materials was motivated by your age.

Complainant indicated that he might be filing a federal suit regarding his whistleblower activities and his safety concerns of how respondent is working with nuclear energy. He does not know when he will file the federal action. He does not wish to disclose further information or to share the related documents in his possession. He indicated that such information is protected as a public whistleblower, but had no legal authority to support the

statement. (As noted in the prior section of this ruling, the whistleblower portions of his claims in this forum have been dismissed.)

Complainant was unsure whether the information and related documents discussed here are relevant to his claims of age and disability discrimination in his cases before the Commission. I explained that if the information and documents relate to the pending cases, respondent is entitled to have its discovery answered. He was adamant that he would not share the documents.

I offered the process of an in camera review, whereby he would tender the documents to the hearing examiner and she would review them to determine if they are relevant to the pending cases. I explained that if the examiner determines that some documents are relevant, then respondent would be entitled to copies and related information. Complainant did not appear to be interested in this process. I explained that if he failed to comply (as noted in the next paragraph) that sanctions could be imposed including the dismissal of his cases. A copy of the pertinent statutory section (§804.12, Stats.) is attached to complainant's copy of this ruling.

**Complainant is ordered to tender the information and related documents noted in this section to the hearing examiner by 4:30 p.m. on December 20, 2001. Failure to do so will result in imposition of sanctions, including dismissal of his pending cases.**

III. Sanction Imposed on Certain Discovery Answered by Reference to Worker's Compensation File

Complainant answered the following discovery requests by referring respondent to its own file on his worker's compensation claim. Related production requests also are noted below.

Interrogatory #12: If your answer to Request for Admissions No. 8 was not "yes," describe what physical impairment(s) you have and how such impairment(s) limits your capacity to work.

Interrogatory #15: If your answer to Request for Admissions No. 10 was not "yes," describe how and why one or both of your arms were not fully functional.

Interrogatory #39: Describe in detail the nature of each alleged disability referenced in your complaint.

Interrogatory #40: If you have received any treatment or medical advice or have been examined with respect to the alleged disabilities identified in Interrogatory No. 39, state: (a) the name and address of each clinic/hospital at which you were treated and examined; (b) the name and address of each physician and/or other medical practitioner of any type whatsoever who has

treated or examined you, or has been consulted with in regard to your alleged disabilities; (c) the exact dates of each such examinations, treatments or consultations; (d) if applicable, the name of the person or organization which arranged for the examinations, treatments or consultations.

Interrogatory #41. Describe each medical treatment or procedure which has been performed in connection with your alleged disabilities at any clinic/hospital or by any doctor, and give the name of the clinic/hospital and the name of the doctor or doctors giving each such treatment or performing each such procedure, and each date thereof, and state the diagnosis, prognosis and restrictions related to you by attending physicians and/or other medical practitioners who have rendered treatment to you as referred to elsewhere in your Answers to these Interrogatories.

Interrogatory #44: State whether at any time in 1999 or 2000 while employed by the DOT, you were medically restricted from performing any work-related tasks. If so, identify each medical restriction, the reasons for each medical restriction, the work-related task covered by each medical restriction, the starting and ending date for each medical restriction, and the full legal name, address and telephone number of the physician or medical provider which imposed each medical restriction. Also, state how and on what dates you reported each medical restriction to the DOT and the full legal title, business address and telephone number of the DOT employees to whom you reported your medical restrictions.

Request for Production #1: Produce copies of any and all documents relating to your allegations of discrimination in the Personnel Commission complaint filed against the DOT in this matter.

Request for Production #2: Produce copies of any and all documents supporting or refuting your allegation that the DOT's decision not to hire you was motivated by your alleged disability.

Request for Production #9: Produce copies of any and all documents, including, but not limited to, reports, records and test results, relating to medical care, treatment and testing received by you from any physician or health care provider for or as a result of the alleged disabilities reference in the complaint filed with the Personnel Commission against the DOT in this matter.

Request for Production #10: produce copies of any and all documents that will be identified as exhibits in the hearing before the Personnel Commission on your charge of discrimination filed against the DOT in this matter

Request for Production #11. Produce copies of any and all documents that either supports or refutes any testimony given in response to these Requests for Admissions or Interrogatories.

Request for Production #12: Produce copies of any and all documents used, relied on or identified in responding to these admissions and interrogatories.

Complainant said he was unsure when he filed his worker's compensation claim, but would not disagree with Attorney Wisner that it could have been filed in February 2000. He

described the limitations due to his arms/hands problems as worse with the right (dominate) side than the left. He said he is unable to do sustained, repetitive lifting or motions. He experiences severe pain. He has a weak grip, which causes him to drop things all the time. He has poor dexterity and, for example, has difficulty picking up a piece of paper or a pen without dropping it, especially with his right hand. Writing aggravates his condition. Complainant clarified that he is not claiming that he is unable to perform work at DOT, just that he might need accommodations to perform some work. He acknowledged that the DOT has provided him with any requests he made for accommodations.

Complainant believes all the information relating to the problems with his arms/hands would be in respondent's file on his worker's compensation claim. Attorney Wisner indicated that he could access the file with complainant's permission and complainant gave him permission to do so.

Complainant said that the problems with his arms/hands existed prior to his DOT employment but were aggravated by the DOT employment and this was the basis for his worker's compensation claim. He said his treating physician, Dr. Carlisle, provided medical reports and opinions for the workers compensation claim. Other physicians also filed reports as a result of DOT's disputing the claim. The claim ultimately was resolve by settlement.

Complainant said that at hearing, he would rely on the report(s) of Dr. Carlisle which are in respondent's workers compensation file, but does not plan to have him appear as an expert witness at hearing despite being advised that it is his burden of proof to establish at hearing that he is an individual with a disability, within the meaning of §111.32(8), Stats.

Attorney Wisner asked whether information in respondent's file on complainant's workers compensation claim would include a description of his hearing loss including treatments, limitations and documentation of degree and nature of the hearing loss. Complainant thought this information would be in respondent's file because he had provided a blanket authorization for respondent to obtain copies of his medical records. **Attorney Wisner agreed to verify whether the file contains information about hearing loss and to let complainant know by December 20, 2001, if it does not.** Complainant indicated that he has medical documents relating to his hearing loss, which he is willing to share with Attorney Wisner. Complainant offered no explanation for not providing these documents when he submitted his discovery answers.

**I ruled that due to complainant's refusal to provide medical evidence to respondent other than as described above, that at hearing complainant will be limited to descriptions of the problems with his hands/arms to the information set forth in Dr. Carlisle's report. For example, if a witness testified that complainant's limitations were greater than set**

**forth in Dr. Carlisle's report, such testimony would be deemed stricken from the record. Similarly, the nature of his hearing loss and resulting limitations will be restricted to information consistent with that contained in respondent's file on his workers compensation claim and to any additional information complainant shares with Attorney Wisner, as noted in the prior paragraph.**

I wish to note that the above sanction was imposed knowing that complainant claimed in his letter of November 22, 2001 as follows: "Due to my disabilities I am unable to respond in the manner you (DOT) requested." His assertion was one of the first topics discussed at today's conference. He said he meant by the statement that writing aggravates the problems he has with his arms/hands, that a lot of the discovery requests were "unnecessary" and that respondent already had a lot of the requested information. Only the first concern (aggravation of his arms/hands) has the potential to relieve him of the duty he otherwise would have to answer discovery. Ultimately, this was insufficient to avoid the above-imposed sanction because he has resources to help him write discovery answers (such as his wife) and it was apparent that he simply felt it was not worth his time or effort to obtain copies of the medical records and other information requested by respondent.

#### IV Other Problematic Discovery Requests

Respondent requested in Interrogatory #21, that complainant provide a brief summary of the information relevant to his charge of discrimination known to each person identified in response to Interrogatory #20. The answer to this question was covered in today's conference except the knowledge of complainant and his wife. Similarly, Interrogatory #26, requested that complainant provide a brief summary of the testimony of each of his hearing witnesses. Based on today's discussion, complainant only plans to present himself and his wife as hearing witnesses. **He was ordered to provide a brief summary of his knowledge and testimony and his wife's knowledge and testimony to Attorney Wisner by 4:30 p.m. on December 20, 2001. Failure to abide with this order could result in sanctions, including dismissal of his cases.** Complainant noted that he has served further discovery on respondent and Attorney Wisner indicated that he received this additional discovery today. Complainant indicated that the summaries he provides by December 20, 2001, could not include any additional information, which might surface as a result of his additional discovery requests. He specifically mentioned that he intends to show that he was more qualified than the person hired, but the nature of this testimony will depend on what he receives in response to his recent discovery request.

Respondent requested in Interrogatory #27, that complainant identify all exhibits he plans to introduce at hearing. He indicated today that he plans to introduce his letters from

respondent saying that he was not hired for the positions at issue in these cases, as well as his resume, applications for those positions and the documents listed in his response to Interrogatory #34. He noted that he might have additional exhibits after respondent replies to his most recent discovery request. I reminded the parties that additional documents also could result from the in camera inspection discussed previously. No specific order was entered at this time with regard to complainant's supplemented answer to Interrogatory #27

**Production Requests #1, 8 & 11. Complainant was ordered to produce by December 20, 2001, copies of documents relating to his discrimination complaint (which were not attached to his original response to the discovery request).** This includes copies of the previously mentioned forms submitted to DER, the rejection letters he received for the positions at issue and any and all other relevant documents in his possession. Failure to meet this deadline will result in imposition of sanctions, including dismissal of his cases.

Production Request #5 was discussed. Attorney Wisner indicated that he specifically wanted complainant to identify which resume he submitted for each position at issue in these cases. Attorney Wisner suggested that different resumes were provided and respondent was unsure which resume was provided for which position. Complainant indicated that he has no specific recollection. **Attorney Wisner agreed to provide complainant with a copy of each resume by December 13, 2001, and complainant agreed to do what he could to identify which resume pertained to which job by December 20, 2001.** Complainant was not sure that copies of the resumes would be sufficient to enable him to answer the question.

V Admission Requests, Satisfactory as Supplemented

The following admission requests were covered by respondent's motion to compel. Complainant supplemented his answers as noted below. Such supplemented answers are sufficient.

Request for Admission #2: Complainant indicated that he had no records from which he could attempt to verify how many hours he worked for respondent in a LTE position in 1999.

Request for Admission #3: Complainant indicated that he would agree that about 50% of his LTE position in 1999, involved nuclear density testing when all related tasks (such as driving) are considered

Request for Admission #4: Complainant agreed that in 1998 he was provided training in nuclear density testing in the form of classroom/group training. In 1999, this same topic was covered in a 20-30 minute session which complainant felt was insufficient.

Request for Admission #5: Complainant never received an evaluation of his performance in a LTE job with respondent. He was never disciplined. As far as he knows, respondent was satisfied with his work.

Request for Admission #11: Complainant received a copy of the December 10, 1999 letter attached to respondent's discovery. He does not know if it was the only letter of the same date that he received from respondent.

VI. Interrogatories Satisfactory, as Supplemented

The following interrogatory answers were covered by respondent's motion to compel. Complainant supplemented his answers as noted below. Such supplemented answers are sufficient.

Interrogatory #5: Due to complainant's supplemented answer to admission request #2, this interrogatory was no longer at issue.

Interrogatory #6: Due to complainant's supplemented answer to admission request #3, this interrogatory was no longer at issue.

Interrogatory #7: Complainant indicated that on or about May 1, 1999, Russ Frank, Materials Manager, told complainant that he would not be trained and certified in how to sample and test materials. The only reason Frank gave for this decision was that complainant was in a LTE position. Complainant wanted the training so he could become more employable and able to do more job tasks for respondent. The parties discussed information beyond the scope of the initial interrogatory, as follows. Complainant indicated that he did material testing as party of his LTE job(s?) in 1998-1999. He conducted gradations on aggregate and he sampled some base cores. Complainant indicated that some sampling and testing required certification and he felt uncomfortable at times that he was being asked to perform tasks which only a certified person should perform. He indicated this occurred with Don Ostring once. He mentioned Leonne (last name unknown) but could not recall a specific instance. He also mentioned Dan Garvis with regard to a concrete testing task. Complainant acknowledged that he does not know which tasks require certification. However, he perceived that he was told conflicting information from one job to another.

Interrogatory #8: Complainant indicated that he informed every supervisor he worked with that he had a hearing impairment. He asked them to be patient if he needed to have verbal communications repeated and acknowledged that his requests were honored. The supervisor names he could recall included peter Kemp, Don Ostring, Charlie Paulson and Gary Schneider. Complainant indicated that he also might have spoken to co-workers about his hearing problem. Complainant said he also



has physical problems with his arms/hands. In late September or in October 1999, complainant asked Kemp for an accommodation when complainant was driving stakes into the centerline on a stretch of highway between Viroqua and La Farge. Complainant told Kemp that it was difficult to pound up to 100 stakes a day and Kemp responded that he understood because Kemp's wife also had carpal tunnel problems. Kemp allowed complainant to work on other tasks. Complainant told Ostring about the problems with his arms/hands in 1998 and 1999, in connection with Ostring's inquiries as to why complainant worked for respondent rather than for a private-sector employer. Complainant indicated that the only accommodation he requested of Ostring was for a smaller hammer and this was provided.

Interrogatory #10: Complainant previously listed his physical impairments in response to this interrogatory. He added his hearing loss to the list during today's conference.

Interrogatory #11. Complainant's prior information about talking to supervisors and co-workers about his hearing loss and to two supervisors about the problems with his arms/hands is responsive to this interrogatory as well. Complainant further indicated that the co-workers who he told about his hearing loss would have been those he worked with on a daily basis including Steve Ames, Julie Jolivette, Dan Garves, someone with the last name of Madison and others whose names he could not recall. Also, in response to Interrogatory #34, complainant indicated that he disclosed his hearing disability to Kim Smith to request an accommodation for his interviews for some of the permanent positions at issue in these cases. Specifically, as early as the September 1999, he asked Smith to make arrangements so he could have interview questions in writing during the interviews as well as asked orally.

Interrogatory #13: The information noted above with regard to Interrogatory #11, was response here as well.

Interrogatory #16: Due to complainant's supplemented answer to admission request #11, this interrogatory was no longer at issue.

Interrogatory #20: Complainant indicated that he and his wife have knowledge of facts and circumstances regarding his complainants, as do individuals mentioned previously such as supervisors, co-workers and Dr. Carlisle.

Interrogatory #25: Complainant indicated that his hearing witnesses known at this time are himself, his wife and perhaps Paul Kast. Complainant indicated that he was uncertain if Kast's testimony would be considered relevant. He explained that Kast used to work for DOT, that he asked Ostring why Kast wasn't around anymore, that

Ostring replied that "we got rid of the fucker," that he later saw Kast and Kast said respondent got rid of him because of his disability. I indicated that she did not think Kast's testimony would be considered relevant because Kast worked in a different department than complainant and where complainant worked, his "accommodation" requests were honored. I indicated that this would be a relevancy ruling for the assigned hearing examiner to resolve (rather than myself who was filling-in for the hearing examiner because she was ill). I asked if complainant planned to call as his witnesses the supervisors or co-workers he mentioned in his prior answers. I explained that he had the burden of proof at hearing. He indicated that he would rely on his own testimony and if respondent disputed it, he felt it was up to respondent to have them as witnesses.

Interrogatory #34: This interrogatory asked about handicap or disability disclosures made to DOT employees. Complainant had answered listing certain documents. He clarified that the listed "LTE Applications" would have disclosed the existence of a handicap/disability and respondent would have those documents. He supplemented his answer regarding his request to Kim Smith for an accommodation during interviews for his hearing disability (as already noted above in the discussion of Interrogatory #11). Complainant clarified that he disclosed the existence of a handicap/disability in the other documents listed but those he submitted to DER, not to DOT. One of the listed documents is the handicapped expanded certification (HEC) form. He indicated that DER requires this form to be renewed every 3-5 years. He filed a HEC form listing his hearing loss. He filed a second HEC form in 1998-1999, listing the problems with his arms/hands. Complainant also indicated that his handicap/disability status would have been noted on the certification lists DER provided to DOT for the positions at issue in this case. Complainant does not have possession of the certification lists but respondent should have them.

Interrogatory #35: This interrogatory asked complainant to identify in detail all documents provided to DOT employees in which he identified himself as disabled/handicapped. He said this would include his applications for LTE employment at DOT and maybe other forms he signed as a LTE employee. These forms already are in respondent's possession.

Interrogatory #36: Complainant was asked here to provide the name of anyone at DOT with who he "attempted to resolve the alleged discrimination." Attorney Wisner clarified the question. Complainant indicated that he only discussed settlement with Attorney Wisner and only during today's conference.

Interrogatory #37: Complainant indicated today that he did not intend to call any expert witness at hearing, but would rely on the reports from Dr. Carlisle, which are in respondent's file on his workers compensation claim.

Interrogatory #43A: Complainant said that as to his hearing loss, he has used earplugs (the kind inserted into the ear) at work when in a noisy environment. He explained that his present hearing loss was due to exposure to loud noises. He has earmuffs, which he uses outside of work in noisy environments. Medications have never been prescribed for his hearing loss. As to the problems with his hands/arms, he used armbands around his forearm in 1996, before he had surgery for carpal tunnel. He did not use these aids in 1998-2000. He has taken medication for his hands/arms problems including anti-inflammatory prescriptions from Dr. Carlisle (as reflected in the worker's compensation records) and aspirins. One anti-inflammatory medication prescribed by Dr. Carlisle was viox (phonetic spelling), which complainant took for only about a week because he could not tolerate it. Complainant appeared uncertain whether other anti-inflammatory medications were prescribed.

Interrogatory #43B: Complainant indicated that respondent had copies of all his medical records because he previously had provided a blanket release for respondent to obtain that information in relation to his workers compensation claim. He gave Attorney Wisner permission to access any and all information in respondent's workers compensation file on his claim for purposes of the pending cases at the Commission.

VII. Production Requests, Satisfactory as Supplemented

Complainant indicated in response to production requests #2 and #3, that he has no such documents in his possession yet but this could change depending upon what he receives in response to his most recent discovery request. Complainant indicated that is he unaware of any written documents responsive to production request #5.

VIII. Objections Withdrawn

Respondent withdrew its objections to interrogatories #32, 33 and 42. Respondent also withdrew production requests #6, 7,

IX. Interviewers' Knowledge About Complainant's Physical Problems or his Age

Complainant was unable to answer whether the interview panel members knew of his physical problems without knowing who the panel members were. Respondent indicated that panel members for the October 1999 hire were Sally Zein, Bill Sheppard and Jim Rohe. Complainant indicated that he did not remember Rohe being part of the panel. Respondent

indicated that they had the scoring sheets completed by Rohe. Respondent indicated that the panel members for the November 1999 hire were Susan Zielke, Robert Golde and Kory Keppel. Respondent indicated that hiring decision was made on December 10, 1999. Respondent said the panel members for the March 2, 2000 hire were Sally Zein, Jim Rohe and Dan Kleinertz. Respondent indicated that the interview panel members for the July 17, 2000 hire were Anne Grayson, Ron Egge and Steve Flottmeyer. Of all mentioned panel members, complainant indicated that perhaps Sheppard knew about the problems complainant has with his arms/hands but not with his hearing. Complainant indicated that he has no reason to believe that any of the other panel members were aware of any of his physical problems. Complainant said all panel members could tell how old he was by his appearance, by his LTE applications, by his school transcript which indicated he graduate in 1965 and by similar information contained in his resume. This completed complainant's supplemental answers to respondent's discovery.

ORDER

Respondent's motion is granted in part as noted in this ruling. Complainant must comply with the discovery orders noted in this ruling by the stated deadlines.

Dated: December 6, 2001.

STATE PERSONNEL COMMISSION

JMR:000025C + rul3

  
JUDY M. ROGERS, Commissioner