

STATE OF WISCONSIN

PERSONNEL COMMISSION

**BARTHEL HUFF,**  
*Complainant,*

v.

**President, UNIVERSITY OF WISCONSIN  
SYSTEM (La Crosse),**  
*Respondent.*

**RULING ON MOTION  
TO DISMISS**

Case No. 95-0113-PC-ER

#### NATURE OF THE CASE

This case involves a charge of age discrimination under the Wisconsin Fair Employment Act (WFEA), Subchapter II, Ch. 111, Stats. This matter is before the Commission on the bases of a discovery dispute and respondent's motion to dismiss.

In an Initial Determination dated July 11, 1997, a Commission investigator determined there was "no probable cause" to believe complainant was discriminated against by respondent, as charged, when he was rejected as a candidate for a tenure-track position in the Mathematics Department of the University of Wisconsin - La Crosse. Complainant appealed the "no probable cause" determination and a hearing was set for February 9-10, 1998.

In October 1997, during the discovery process, complainant filed a motion to compel respondent to answer certain interrogatories. Complainant's motion was granted, in part. By order dated December 17, 1997, the Commission directed respondent to provide complainant the hiring dates of current faculty members in the UW-La Crosse Department of Mathematics, a copy of the Employer Form submitted to the 1995 Mathematics Employer Register, and the resumes of all the finalists and semi-finalists for the mathematics position in issue.

On December 23, 1997, respondent filed a motion to compel complainant to answer interrogatories served on him on September 30, 1997, or levy sanctions for

failure to comply. Later, respondent filed a motion to dismiss predicated on complainant's failure to answer the interrogatories and request for documents served on him in September 1997 and, subsequently, complainant's refusal and failure to appear for oral deposition on January 5, 1998. During this same period, respondent provided complainant with a list of current UW - La Crosse Mathematics Department faculty, the dates of their receipt of a Ph.D., and the dates they were hired, and the resumes of the "semi-finalists" for the position of issue, as ordered by the Commission on December 17, 1997, in its ruling on complainant's motion to compel discovery. With respect to the Commission's order to provide complainant with a copy of an Employer Form that allegedly was required to participate in the 1995 Mathematical Sciences Employer Register, respondent advised complainant that it could not locate this form or determine the necessity for the mathematics department to submit the form to the Register, and was unable to ascertain whether such a form existed at the university. The parties filed briefs on respondent's motions to and, subsequently, the hearing scheduled to be held February 9-10, 1998 was postponed.

This was followed by three letters from complainant. The first letter, filed January 27, 1998, contends that respondent's response to the Commission's December 17, 1997 order, in which the Commission directed respondent to disclose certain information to complainant, was "incomplete and contained fraudulent information," and, in addition, that respondent failed to provide complainant information the Commission determined was relevant and EEOC regulations required employers to maintain. The second letter, filed January 30, 1998, contains a request to dismiss respondent's motion to dismiss this action, based on the assertion that said motion should be denied "because Respondent has not participated in discovery in good faith," and a reiteration of the motion to compel, decided by the Commission on December 17, 1997. This time, complainant asserted that respondent provided complainant an inaccurate faculty summary and semi-finalist resumes, inconsistent with the number of semi-finalists originally stated to the Commission, and refused to provide information about the university's participation in the Employer Register. This letter was filed ex

parte.<sup>1</sup> The Commission forwarded a copy of the letter to respondent and provided respondent time to reply. The third letter, filed ex parte on February 2, 1998 was premised on the continuing allegation that respondent has not undertaken discovery in good faith. In opposing respondent's discovery requests, complainant argues that respondent currently has all materials relevant to the issue of the pending hearing, and that respondent is "retroactively" seeking material to justify its employment decision.

On July 27, 1998, the Commission received another ex parte letter from complainant. It consisted of an inquiry as to whether "[r]espondent's blatant abuse of discovery (presenting incomplete and fraudulent information, making extortionate demands, etc.) successfully circumvented enforcement of the laws against discrimination."

Respondent argues here that complainant's failure to answer interrogatories submitted under §804.08, Stats., and failure to submit to an oral deposition as governed by §804.05, Stats., are sufficient bases for the Commission to exercise its authority and discretion provided in §804.12, Stats., to dismiss complainant's claims.

#### DISCUSSION

In support of its recent request for dismissal, respondent argues that complainant refused to answer its first Interrogatories and Requests for Production of Documents served September 30, 1997; that complainant refused to appear for oral deposition; and that, even though respondent has supplied complainant with the information he requested in discovery and in compliance with the Commission's December 17, 1997, Ruling on Complainant's Motion to Compel Discovery, complainant has not provided any further response to respondent's motion to dismiss. With this request for dismissal, respondent submitted copies of information previously provided complainant and the Commission in compliance with the Commission's December 17, 1997 discovery order.

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<sup>1</sup> By letter from the Commission dated October 30, 1997, complainant was advised that future ex parte correspondence would be treated as if not received by the Commission.

With respect to the argument that complainant failed to answer its interrogatories and failed to produce requested documents, respondent filed copies of its interrogatories and requests for documents and complainant's response thereto. These documents show, as argued by respondent, that complainant failed to respond to nineteen of twenty-two interrogatories and requests for documents. Complainant provided respondent little, if any, information, except in answer to the first interrogatory, stating his name, Social Security number, address and telephone number. Complainant's typical answer to the interrogatories was that the requested information was not requested of, or supplied by, the finalists for the subject position and played no part in the decision, or that he could not give a response because respondent "refused" to produce information during discovery, or that he had "no intention of issuing a fishing license" to obtain personal, irrelevant and non-admissible information. Respondent sent complainant a second letter requesting that he respond to the interrogatories and request for documents. The letter included a notice for oral deposition. Complainant's reply to the notice for oral deposition and second effort at discovery was "I will ignore further action on your part until you show that your actions are directed at legitimate exchange of relevant and admissible information." Complainant failed to appear at the oral deposition on January 5, 1998, and except as previously indicated, never responded to respondent's attempts at discovery through interrogatories.

Throughout the discovery process, complainant provided several reasons for not complying with respondent's discovery requests: he could not make a full and complete response to "legitimate" requests because respondent failed to respond to his legitimate discovery requests, and respondent requested irrelevant information, was not interested in a legitimate exchange of information, but was more interested in harassment, intimidation and delay. Complainant's most current assertions are: that respondent, in response to the Commission's December 17, 1997, order compelling discovery provided him incomplete and fraudulent information; that information requested by respondent is irrelevant and supports his claim; that respondent has not undertaken discovery in good faith, and that respondent has all the materials on which it

based its employment decision and relevant to the subject hearing. However, documents on file show that respondent, on January 7, 1998, in compliance with the Commission's Ruling on Complainant's Motion to Compel Discovery, dated December 17, 1997, provided complainant a list of current faculty in the University of Wisconsin - La Crosse Mathematics Department, dates of their receipt of a Ph.D. and dates they were hired into the department, and resumes of the "semi-finalists" for the position in issue, together with the Search Committee procedures. However, respondent was unable to comply with the portion of the order that required respondent to provide complainant a copy of an "Employer form that must be submitted to participate in the (1995 Mathematical Sciences Employment) Register " Respondent acknowledged that an employer form was submitted to the 1995 Mathematical Sciences Employment Register but that UW-La Crosse had no copy of the form. Contrary to complainant's assertion, there is no evidence that respondent failed to provide all information in its possession under the Commission's order

Section PC 4.03, Wis. Adm. Code, provides that all parties to an action before the Commission may "obtain discovery and preserve testimony as provided by ch. 804, Stats." Section 804.12(4), Stats., provides that if a party fails to appear before the officer who is to take the party's deposition, after being served with a proper notice, the court in which the action is pending on motion may make such orders in regard to the failure as are just. Pursuant to §804.12(2)(a)3., Stats., such orders include dismissing the action.

In *Hudson Diesel, Ins. v. Kenall*, 194 Wis. 2d 531, 535 N.W 2d 65 (Ct. App., 1995), the court articulated the following standard for dismissing a case due to "an egregious violation of discovery procedures":

In *Johnson v. Allis Chalmers Corp.*, 162, Wis. 2d 265, 273, 470 N.W 2d 859 (1991) our Supreme Court held that dismissal is appropriate only where the non-complying parties' conduct is egregious or in bad faith and without a clear and justifiable excuse....

The court, citing *Anderson v. Continental Ins. Co.*, 85 Wis. 2d 675, 691, 271 N.W. 2d 368, 376 (1978) said that “bad faith” by its nature cannot be unintentional, and that “If the trial court concludes that the non-complying party acted in bad faith, the trial court may impose those sanctions it considers appropriate.”

The record here is that complainant failed to answer interrogatories and produce documents as requested by respondent on two separate occasions, and that he failed to appear at an oral deposition in Madison, Wisconsin, on January 5, 1998. Complainant’s various arguments for not complying with respondent’s requests are exemplified by his response in a letter dated December 8, 1997, written after he received a notice of deposition and a second request to answer the interrogatories and produce the documents.

I will ignore further action on your part until you show that your actions are directed at a legitimate exchange of relevant and admissible information. In particular, I will not be available for deposition until you have provided the information I requested under discovery and have (been) provided adequate time (at least two weeks for its consideration).

The available information shows that complainant failed to answer respondent’s interrogatories or requests for production, including those that he acknowledged were “legitimate,” even after respondent had fully complied with the Commission’s order of discovery, and that he failed to appear for a properly noticed oral deposition. This conduct by complainant is egregious under the test expressed in *Hudson*. See, *Huff v. UW (Stevens Point)*, 97-0092-PC-ER, 11/18/98.

#### CONCLUSIONS OF LAW

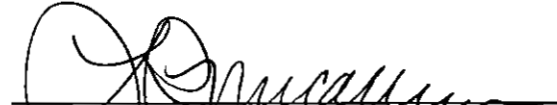
1. This matter is properly before the Commission pursuant to §230.45(1)(b), Stats.
2. Respondent has the burden to show that complainant’s participation in the discovery process justified dismissal of his claim pursuant to §804.12, Stats.
3. Respondent has sustained this burden.

ORDER

Respondent's motion is granted and this case is dismissed.

Dated: July 27, 2000.

STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

  
DONALD R. MURPHY, Commissioner

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JUDY M. ROGERS, Commissioner

Parties:

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Salt Lake City, UT 84121

Katharine Lyall  
President, UW System  
1720 Van Hise Hall  
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NOTICE

OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW  
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

**Petition for Rehearing.** Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

**Petition for Judicial Review.** Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is

requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.)

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