

CATHERINE M. LANG,
Complainant,

v.

**State Public Defender, OFFICE OF THE
STATE PUBLIC DEFENDER,**
Respondent.

**RULING ON
RESPONDENT'S
MOTION TO DISMISS**

Case No. 98-0197-PC-ER

By cover letter dated July 10, 2000, the respondent, Office of the State Public Defender (SPD), filed a motion for summary judgment or in the alternative for discovery sanctions. This case is scheduled for hearing on September 19, 2000. The hearing issue is as shown below (see Commission letter dated May 30, 2000):

Whether complainant was retaliated against by respondent for engaging in fair employment activities when in July of 1998, complainant received the minimum merit pay increase.

The facts recited below are made solely to resolve the pending motions. They appear to be undisputed by the parties unless specifically noted to the contrary:

FINDINGS OF FACT

1. Complainant is an attorney. She began employment with the SPD in November 1995. Since August 17, 1997, she worked for respondent as an Assistant State Public Defender. She voluntarily left her employment with SPD in 1999.

2. Respondent conducted discovery and received complainant's answers on May 31, 2000. Some of the discovery related to complainant's claim that she had participated in activities protected under the FEA. The pertinent discovery requests and complainant's answers are shown below:

Interrogatory #1. Identify any conversations between yourself and Deputy State Public Defender Frederick Miller, between March 30, 1998 and May 13, 1998

regarding the March 30, 1998 Langford letter to Deputy Miller regarding the certification of attorney Christopher Carson and include the following information regarding each conversation: a) date of the conversation, b) location of the conversations, c) which party initiated the conversation, d) the type of communication (e.g. Telephone, meeting) and e) the content of the conversation.

Answer: I had numerous conversations with Deputy Miller on nearly a daily basis regarding Ron Langford's March 30, 1998 letter concerning Chris Carson's decertification from the Misdemeanor fixed-fee contracting program. The conversations were only between Deputy Miller and myself and were initiated by Deputy Miller on all conversations except for the second May 14, 1998 conversation. All communications were in person conversations.

Interrogatory #2: Identify any other person that was a witness to the conversations referred to in Interrogatory #1 including the following information: a) the name and title of the OSPD employee witness, b) the name of any witness not an employee of the OSPD, c) the last known home and business address of any witness not an employee of the OSPD, and d) the last known home and business phone number of any witness not an employee of the OSPD.

Answer: May 14, 1998, Shirley Long was invited into Deputy Miller's office by Deputy Miller during one of the conversations. I have reason to believe that Ms. Long is currently on medical leave with the OSPD.

Interrogatory #3: Identify any communications you had with Miller on May 14, 1998, regarding the Langford letter of March 30, 1998, including the following information for each communication: a) location of the communication, b) which party initiated the communication, c) what the proposed subject matter of the communication was at the time the communication was initiated, d) the duration of the communication, e) the type of communication (e.g., telephone, meeting), f) the content of the communication, g) any direct references to race made by Deputy Miller during the communication, and h) any direct references to race made by you during the communication.

Answer: One discussion occurred in Deputy Miller's office early in the morning. The second occurred in the afternoon at the main copy machine. Deputy Miller initiated the first conversation in his office (he called me into his office) and the second I initiated when I saw Deputy Miller walking past. Both conversations centered on Ron Langford's March 30, 1998 letter about Christopher Carson's decertification from the Misdemeanor Fixed-Fee Contracting Program. Both in person conversations lasted about a half hour. Deputy Miller asked me in the morning conversation if I finally was able to

see Ron as a racist. In the afternoon conversation, Deputy Miller made racial comments about Ron Langford being a lousy attorney. I made a direct reference to race by pointing out Deputy Miller's blatant disparate treatment of the white first assistant in ACD and the black first assistant in ACD.

Interrogatory #5: Do you contend that the sole reason the OSPD awarded you the minimum performance award in July 1998 was because of your support of the Johnson/Langford lawsuit? Answer: Yes.

Interrogatory #7: Identify the manner in which you supported the Johnson/Langford lawsuit between May 4, 1998 and its settlement in July 1998 including the following information: a) date of each act or communication you made in support of the lawsuit, b) names of each witness to each act or communication you made in support of the lawsuit, c) last known address of each witness to each act or communication you made in support of the lawsuit, d) type of any act you made in support of the lawsuit, e) record of any act you made in support of the lawsuit, f) type of each communication you made in support of the lawsuit, g) content of each communication you made in support of the lawsuit and h) each document created indicating your support of the lawsuit.

Answer: Complainant did not answer this interrogatory.

Interrogatory #8: Identify how and when it became "crystal clear" to Miller, Berz and Chiarkas that you would not support them in the Johnson/Langford lawsuit including any of the following information: a) date when you made it "crystal clear" to Deputy Miller that you would not support the OSPD in the lawsuit, b) type of communication in which you made it "crystal clear" to Deputy Miller that you would not support the OSPD in the lawsuit, c) content of the communication in which you made it "crystal clear" to Deputy Miller that you would not support the OSPD in the lawsuit, d) date when you made it "crystal clear" to State Public Defender, Nicholas Chiarkas, that you would not support the OSPD in the lawsuit, e) type of communication in which you made it "crystal clear" to State Public Defender, Nicholas Chiarkas, that you would not support the OSPD in the lawsuit, f) content of the communication in which you made it "crystal clear" to State Public Defender, Nicholas Chiarkas, that you would not support the OSPD in the lawsuit, g) date when you made it "crystal clear" to Assigned Counsel Director, Ellen K. Berz, that you would not support the OSPD in the lawsuit, h) type of communication in which you made it "crystal clear" to Assigned Counsel Director, Ellen K. Berz, that you would not support the OSPD in the lawsuit, and i) content of the communication in which you made it "crystal clear" to Assigned Counsel Director, Ellen K. Berz, that you would not support the OSPD in the lawsuit.

Answer: I spoke with only Deputy Miller and Berz. No direct conversations were had between myself and Chiarkas. However, after each conversation with Miller or Berz, each was seen in Chiarkas' office shortly thereafter. Deputy Miller was aware of my position regarding the agency's race treatment before the lawsuit was filed. The date it was crystal clear was May 14, 1998. Immediately after my second conversation with him, I went to obtain information regarding the white first assistant in ACD, and Miller was in Chiarkas' office. When I attempted to interrupt, I was waved off. I then went to Berz' office and she did not have time either.

Interrogatory #9: Identify all communications you had with Miller, Chiarkas, Berz, or other OSPD managers between May 4, 1998¹ and August 10, 1998 regarding the agency and its alleged racial bias including the following information a) date of all such communications with Miller, b) type of all such communications with Miller, c) content of all such communications with Miller, d) date of all such communications Chiarkas, e) Type of all communications with Chiarkas, f) content of all such communications with Chiarkas, g) date of all such communications with Berz, h) type of all such communications with Berz, i) content of all such communications with Berz, j) names of any other OSPD managers with whom you had such communications, k) date of each such communication with other OSPD managers, l) type of each such communication with other OSPD managers and m) content of each such communication with other OSPD managers.

Answer: Complainant did not answer this interrogatory.

Request for Production #1. All documents which demonstrate your support of the Johnson/Langford lawsuit. Answer: Complainant supplied no such documents.

Request for Production #2: All documents which demonstrate your opposition to the alleged racial bias of the OSPD. Answer: Complainant supplied no such documents.

3. The Commission sent the parties a letter dated July 19, 2000, which established the briefing schedule for respondent's motions. The letter included the following information:

I advised Ms. Lang that it would be in her best interest to point out any dispute she has with the facts recited in respondent's brief and to provide her version of events for the disputed facts. I also indicated that if she did not disclose information in discovery, she needed to address this problem as well.

¹ May 4, 1998 was the day Mr. Johnson and Mr. Langford filed a federal lawsuit against respondent including allegations of race discrimination and FEA Retaliation.

4. Complainant's response to the present motion was filed on August 8, 2000, and included the following information:

Complainant is unable to supply documentation created for the purpose of supporting the Johnson/Langford lawsuit. Because Complainant feared reprimand from the agency for the position she held, the conversations between herself and Deputy Miller were recorded for the specific purpose of protecting herself should it ever be necessary.

Respondent interpreted the above-noted language to mean that complainant tape-recorded her conversations with Deputy Miller. Complainant clarified at a telephone conference held on August 15, 2000, that she did not tape record her conversations with Deputy Miller but she did keep notes of those conversations.

CONCLUSIONS OF LAW

1. It is respondent's burden to shown entitlement to summary judgment. Respondent has failed to meet its burden.

2. It is respondent's burden to show entitlement to an order compelling further answer to discovery. Respondent met its burden, as detailed in this ruling.

3. It is respondent's burden to show entitlement to sanctions for incomplete answers to discovery. Respondent has not met this burden because no prior Commission order was issued.

OPINION

I. Motion for Summary Judgment

The Commission utilizes the following standard in reviewing a motion for summary judgment (*Grams v. Boss*, 97 Wis.2d 332, 338-339, 282 N.W.2d 637 (1980), citations omitted):

On summary judgment the moving party has the burden to establish the absence of a genuine, that is, disputed, issue as to any material fact. On summary judgment the [Commission] does not decide the issue of fact; it decides whether there is a genuine issue of fact. A summary judgment should not be granted unless the moving party demonstrates a right to a judgment with such clarity as

to leave no room for controversy; some courts have said that summary judgment must be denied unless the moving party demonstrates his entitlement to it beyond a reasonable doubt. Doubts as to the existence of a genuine issue of material fact should be resolved against the party moving for summary judgment.

The papers filed by the moving party are carefully scrutinized. The inferences to be drawn from the underlying facts contained in the moving party's material should be viewed in the light most favorable to the party opposing the motion. If the movant's papers before the [Commission] fail to establish clearly that there is no genuine issue as to any material fact, the motion will be denied. If the material presented on the motion is subject to conflicting interpretations or reasonable people might differ as to its significance, it would be improper to grant summary judgment.

The analytical framework for a claim of FEA Retaliation is the same as laid out in *McDonnell Douglas Corp. v. Green*, 411 US 792, 93 S. Ct. 1817 (1973). This framework provides that the burden is first on the complainant to show a prima facie case. The burden then shifts to respondent to rebut the prima facie case by articulating a legitimate, non-retaliatory reason for its action. Then the burden shifts back to complainant to show that respondent's articulated reason is a pretext for retaliation. A prima-facie case of FEA retaliation is established if the record shows that the complainant engaged in an activity protected under the FEA, that respondent subsequently took an adverse action against complainant and that a "causal link" exists between the protected activity and the adverse action. *Acharya v. Carroll*, 152 Wis.2d 330, 340, 448 NW2d 275 (Ct. App. 1989).

Respondent claims entitlement to summary judgment contending that complainant has not shown through her answers to interrogatories that she engaged in an activity protected under the FEA, as required to establish a prima facie case. Respondent bases its claim on the facts that complainant provided no response to interrogatories 7 and 9, and its perception that complainant's response to interrogatory 8 was incomplete. Respondent's argument, however, fails to address complainant's answers to the first 3 interrogatories.

Complainant disclosed in answer to interrogatories #1, 2 and 3, her conversations with Deputy Miller about Mr. Langford's March 30, 1998 letter concerning Chris Carson's decertification from the Misdemeanor fixed-fee-contracting program. Complainant included a

copy of the referenced letter with her complaint and such letter (starting on page 5) includes discussion about SPD's treatment of minority staff. She further described conversations with Deputy Miller on May 14, 1998.²

In the context of a motion for summary judgment, the Commission must view these answers and inferences drawn from them in a light most favorable to the complainant. A reasonable inference from her answers is that she participated in activities protected under the FEA when she disagreed with Deputy Miller's characterization of Mr. Langford as being racist and about Deputy Miller's "disparate treatment" of Mr. Langford. Such inferences are sufficient to defeat the present motion for summary judgment.

II. Complainant's Answers to Discovery

Respondent perceives that the complainant's discovery responses were deficient. Respondent's final argument is shown below (pp. 2-3, brief filed by cover letter dated August 10, 2000) using the same emphasis as contained in the original document:

Complainant failed to answer Interrogatories 7 and 9 in any way. Complainant provided an insufficient answer to Interrogatory 8. Under §804.12(1)(b), Stats., an evasive or incomplete answer is to be treated as a failure to answer. In her response to Respondent's motion for summary judgment, Complainant states,

Because Complainant feared reprimand from the agency for the position she held, the conversations between herself and Deputy Miller were recorded for the specific purpose of protecting herself should it ever be necessary.

It appears from this statement that Complainant is in possession of recordings of some conversations relevant to Interrogatories 7, 8 and 9. Respondent has not been provided with a copy of the recordings, nor has Respondent been provided with a summary of each conversation as requested in discovery. If the recordings are in written form, Complainant may have also failed to respond as required to Respondent's request for production. The deadline for completing discovery in this matter was May 31, 2000. Respondent initially addressed

² The complainant included in her complaint a description of her conversations with Deputy Miller on May 14, 1998. Noted therein but not repeated in answer to discovery was the allegation that Mr. Miller said he was testing complainant to see where she stood "on this issue," an apparent reference to issues raised in Mr. Langford's letter dated March 30, 1998.

Complainant's failure to answer in its motion for summary judgment. Respondent proceeded at that time on the basis that the failure to answer was because Complainant did not engage in protected activity and was therefore unable to answer. Respondent only became aware of the existence of the recordings when Complainant's response to the summary judgment motion was received. Although Complainant is not represented by counsel, she is an attorney licensed to practice in Wisconsin. It appears that Complainant's failure to answer is deliberate.

Wherefore, the Respondent respectfully requests that the Personnel Commission issue an order pursuant to §804.12 dismissing the action and awarding reasonable expenses incurred by the failure to answer. In the alternative, the Respondent requests that the Personnel Commission make whatever order is fair and just under §804.12, Stats.

The Commission agrees that complainant has not responded to interrogatories #7 and #9. Respondent is entitled to an order compelling her answer.

Respondent characterized complainant's answer to interrogatory #8 as "incomplete." The Commission agrees to the extent noted in this paragraph. The interrogatory asks complainant to describe (among other things) how and when she made it clear to Ms. Berz that complainant would not support the SPD in the Johnson/Langford lawsuit. Nowhere in her response to this or any of the other discovery requests did she disclose the date(s) or content of alleged discussion(s) with Ellen K. Berz. Accordingly, complainant failed to answer the interrogatory with regard to the dates and content of alleged discussions with Ms. Berz.

Respondent also faults complainant for not disclosing in her discovery answers the existence of tape-recorded conversations between herself and Mr. Miller. As noted in ¶4 of the Findings of Fact, complainant later clarified that no tape recordings exist but that her written notes of her conversations with Deputy Miller do exist.

Complainant relies on her conversations with Deputy Miller to establish that she engaged in an activity protected under the FEA. (See her answers to interrogatories #1, #2 and #3.) Complainant should have provided copies of the written notes of her conversations with Deputy Miller in response to respondent's first or second document request (depending on the nature of topics discussed).

Respondent is entitled to an order to compel complainant to provide further information in answer to interrogatory #8, as discussed above. Respondent also is entitled to an order to compel complainant to provide copies of her handwritten notes of her conversations with Deputy Miller, as discussed above.³

III. Motion for Discovery Sanctions

Respondent requested the Commission to impose sanctions under §804.12, Stats., for complainant's discovery failures. Sanctions are available only when a "party fails to obey an order to provide or permit discovery," as noted in §804.12(2), Stats. There has been no order issued by the Commission except contemporaneous with this ruling. Accordingly, respondent's request is premature.

IV Request for Attorney Fees and Costs

Respondent requested an award of attorney fees and costs associated with bringing the motion to compel discovery. Section 804.12 (1)(c)1., Stats., provides as noted below (emphasis added):

If the motion (to compel discovery) is granted, the court shall, *after opportunity for hearing*, require the party or deponent whose conduct necessitated the motion . . . to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

The parties agreed to defer the question of respondent's entitlement to fees and costs until after the hearing on the merits (some time after September 19, 2000).

ORDER

³ On August 15, 2000, complainant agreed to and did mail copies of the handwritten notes of her conversations with Deputy Miller to respondent's counsel on the same day.

Respondent's motion for summary judgment is denied. Respondent's motion to compel discovery is granted to the extent noted in this ruling. The complainant is ordered to provide respondent with the following information no later than 4:30 p.m. on August 31, 2000:

- a) copies of her handwritten notes of conversations she had with Deputy Miller,
- b) an enumeration of the dates and contents of conversations she had with Ms. Berz to complete her answer to interrogatory #8,
- c) an answer to interrogatory #7, and
- d) an answer to interrogatory #9.

Dated: August 23, 2000.

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

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JUDY M. ROGERS, Commissioner