

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF HUMAN RIGHTS

State of Minnesota by
Velma Korbel, Commissioner,
Department of Human Rights,
Complainant,
and

Theresa Rinio, Laura Hegland,
Alicia Christensen, and Crystal Kory,
Intervenors,

**ORDER ON MOTION TO
COMPEL DISCOVERY**

v.

Checkered Flag, Inc. and
Michael Rodahl,
Respondents.

This matter is before Administrative Law Judge Steve M. Mihalchick on the motion of the Department of Human Rights (“the Department”) to compel Respondents Checkered Flag, Inc., and Michael Rodahl (collectively “Respondents”) to answer certain requests for admissions and interrogatories, or deem certain matters as admitted in this proceeding. The Department’s motion was filed on May 5, 2006. Respondents filed a reply to the motion on May 17, 2006, and an amended reply on May 18, 2006. No filing was made on behalf of the Intervenors in this matter.

Based on the contents of Respondents’ amended reply, the ALJ provided the Department an opportunity to respond to the issues around a particular item sought. The last filing on this motion was on May 22, 2006.

Erica Jacobson, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, Minnesota 55101-2127, represents the Department. John S. Raboin, Raboin Law Firm, 7343 Woida Road, Baxter, MN 56425, represents the Intervenors. Michael T. Milligan, Quinlivan & Hughes, P.A., P.O. Box 1008, St. Cloud, MN 56302, represents Respondents.

Based upon the record in this matter, the Administrative Law Judge makes the following:

ORDER

1. The Department's motion to deem admitted the Request for Admissions is denied. Respondents are directed to respond to Request No. 9 within ten days of receipt of this Order.

2. The Department's motion to compel a more complete response to Interrogatory No. 3 (Set 1) is granted. Respondents must provide each employee's name, street address, telephone numbers, the current position with Checkered Flag (if any), dates of employment, and the present employment information for the person (if no longer with Checkered Flag). Respondents are directed to provide this information within ten days of receipt of this Order.

3. The Department's motion to compel production of Michael O. Rodahl's income tax returns is granted. Respondents must provide these documents within ten days of receipt of this Order.

4. Respondents are directed to prepare a privilege log using the instructions for privileged and proprietary matter in the Department's Request for Production of Documents. Respondents must provide the privilege log and any responsive documents for which no privilege is claimed within ten days of receipt of this Order.

Dated: May 24, 2006.

/s/ Steve M. Mihalchick
STEVE M. MIHALCHICK
Administrative Law Judge

MEMORANDUM

The Complainant and Intervenors are seeking compensatory and punitive damages arising from alleged conduct by Michael Rodahl asserted to be sexual harassment in the workplace in violation of the Minnesota Human Rights Act (Minn. Stat. Chap. 363A, also know as the "MHRA"). As part of this proceeding, the Department served discovery on Respondents in the form of two sets of Requests for Admissions and two sets of interrogatories. The Department brought this motion to compel answers, to compel more complete answers, and to have some issues deemed admitted due to the untimeliness of Respondents' responses. Respondents maintain that any untimeliness was justified, that the information sought is irrelevant or constitutes hearsay, and that the information sought is privileged.

Having reviewed the discovery requests and information returned by Respondents in answering those requests, a general description of the discovery standards is in order.

The OAH rules state that “[a]ny means of discovery available pursuant to the Rules of Civil Procedure of the District Court of Minnesota is allowed” in contested case proceedings.¹ These methods include depositions, written interrogatories, document requests, physical and mental examinations, and requests for admissions.² OAH rules governing contested case proceedings place the burden of moving to compel discovery on the party seeking disclosure rather than requiring the party resisting discovery to file an objection. The moving party in a motion to compel must show that the discovery is needed for the proper presentation of the party’s case, the discovery is not sought for purposes of delay, and the issues or amounts in controversy are of sufficient significance to warrant the discovery. The party resisting discovery may raise any objections that are available under the Minnesota Rules of Civil Procedure, including lack of relevancy and privilege.³

While relevance is an available objection to discovery, the standard is not the same as that for admissibility of evidence at hearing.⁴ Relevancy in the discovery context “has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.”⁵ The Minnesota Supreme Court has established the standard for information that is not discoverable on relevance grounds as that having “no possible bearing on the determination of the action on its merits.”⁶ As summarized in the administrative process, “matters sought to be discovered in administrative law settings will be considered relevant if the information requested has a logical relationship to the resolution of a claim or defense in the contested case proceeding, is calculated to lead to such information, or is sought for purposes of impeachment.”⁷

¹ Minn. R. 1400.6700, subp. 2.

² Minn. R. Civ. P. 26.01.

³ Minn. R. 1400.6700, subp. 2.

⁴ **State by Humphrey v. Philip Morris, Inc.**, CX-98-414 and CX-98431, 1998 Minn. LEXIS 176, *3-4. (Minn. March 27, 1998)(stating “While, by operation of the subject orders of the district court, many of the documents are discoverable, there remains the inquiry as to the relevancy of these documents and their admissibility--issues which will undoubtedly be carefully considered by the district court.”)

⁵ **Oppenheimer Fund, Inc. v. Sanders**, 437 U.S. 340, 351 (1978)(citing **Hickman v. Taylor**, 329 U.S. 495, 501 (1947)).

⁶ **Jeppesen v. Swanson**, 243 Minn. 547, 560, 68 N.W.2d 649, 656 (1955).

⁷ **ITMO Superior Home Care**, OAH Docket No. 11-0900-11066-2 (Order on Motion to Compel issued August 1997)(quoting *Minnesota Administrative Procedure*, § 8.2 at 156 (G. Beck, L. Bakken & T. Muck 1987)).

Timeliness of Request for Admissions Response

The Department served the first set of Requests for Admissions (Admissions Set 1) on Respondents on March 24, 2006.⁸ On April 24, 2006, Respondents returned the responses to Admissions Set 1.⁹ The Department has moved for the contents of Admissions Set 1 to be deemed admitted, since the responses were not served within 10 days of receipt of the request as required by Minn. Rule 1400.6800. Respondents assert that the lateness in the responses was due to justifiable excuse, which is the distance between counsel and the clients. Respondents maintain that their responses should stand.

A similar issue was addressed in the administrative process regarding interpretation of justifiable excuse. In that matter, Rule 36.02 of the Minn.R.Civ.Proc. was used to interpret the meaning of “justifiable excuse.” Upon finding that the excuse was legitimate, the ALJ in that matter arrived at the following analysis:

Rule 36.02 sets forth two standards for consideration in allowing modification to (or accepting the late filing of) Answers. The first standard requires that the modification assist in the matter being heard on its merits. The second standard requires that the party requesting admissions not be prejudiced by allowing the modification. Using both of these standards to interpret the term “justifiable excuse” renders the term applicable both objectively (regarding the presentation of issues in the case) and subjectively (from the viewpoint of the requesting party, who could be harmed by a late answer).¹⁰

There is no showing by the Department of prejudice in allowing the answers. The only answer that appears to be controversial is Respondents’ response to Request No. 9, which asks Respondents to admit that Exhibit G is a true and correct copy of a criminal complaint against Michael Rodahl.¹¹ Respondent objected to the request on the grounds of relevance and hearsay.¹²

The criminal complaint that is the subject of Request No. 9 was filed by an individual who asserted that she had been inappropriately touched by “her boss, Michael Rodahl” The complainant indicated that she worked at Checkered Flag and that the touching had occurred in Rodahl’s office.¹³ Applying the

⁸ Jacobson Affidavit, Exhibit B.

⁹ Jacobson Affidavit, Exhibit C.

¹⁰ **Brener, Dept. of Labor and Industry v. Lund Martin Construction, Inc.**, OAH Docket No. 7-1901-15494-2 (Order Denying Summary Judgment issued September 11, 2003).

¹¹ The Department requested that Respondents be required to supplement the answer to Request No. 2. Respondents have indicated that they will provide a supplemental response to that request. Respondent’s Amended Brief, at 3.

¹² Jacobson Affidavit, Exhibit C.

¹³ Jacobson Affidavit, Exhibit A, (attached Ex. G).

standards for relevance in discovery, the criminal complaint is clearly relevant to the issues raised in the allegations of workplace harassment in this matter.¹⁴

Allowing the late response will assist in the matter being heard on its merits. Since the response to Request No. 9 is not complete, Respondents are directed to respond to that request within ten days of receipt of this Order. Failing to respond by that deadline will result in Request No. 9 being deemed admitted.

Adequacy of Responses to Interrogatory No. 3

In Interrogatory No. 3, the Department requested that Respondents “Identify each person employed by Checkered Flag at any time since June 1, 2004.”¹⁵ Incorporated in the interrogatories is a section entitled “Definitions” that clarifies what is being sought. For example, “identify” includes four specific subsets of information for individuals and five subsets for documents. This section also included information to be provided about answers claimed to be privileged.¹⁶

Respondents answered the interrogatories while explicitly stating that they had not followed the instructions. Interrogatory No. 3 was answered by attaching copies of employee W-2 forms from 2004 and 2005 and some information labeled “Payroll Summary” dated March 24, 2006. The Payroll Summary has names of nine employees, addresses for two and telephone numbers for seven handwritten on the document. Accompanying the Payroll Summary are three W-4 forms with addresses of persons not listed on the Payroll Summary and the application form with all the contact information requested for one person who is listed on the Payroll Summary.¹⁷ The periods of employment are not identified and the position held by any of these persons is not listed. The Department has moved for an order supplementing Respondents’ answer. Respondents maintain that the Department is not entitled to require that the answers be structured as set out in the instructions. Respondents have not clearly structured their responses to the Department’s interrogatories. Respondents did say that they were relying on “common sense” in answering the discovery.¹⁸

The Department asked for Respondents to identify all Checkered Flag employees from June 1, 2004 to the present. The meaning of the word “identify” as set out in the definitions includes each employee’s name, street address, telephone numbers, the current position with Checkered Flag (if any), dates of employment, and the present employment information for the person (if no longer with Checkered Flag). All of this information reasonably falls within the scope of

¹⁴ Respondents also objected on the basis of hearsay, but such an objection is not well taken in these matters, as hearsay is, under some circumstances, admissible.

¹⁵ Jacobson Affidavit, Exhibit E.

¹⁶ Jacobson Affidavit, Exhibit E.

¹⁷ Jacobson Affidavit, Exhibit F.

¹⁸ Jacobson Affidavit, Exhibit F, at 2.

the word “identify.” The information provided by Respondents does not provide the information requested. Respondents have cited no authority for the proposition that definitions or instructions can be ignored in responding to interrogatories

Respondents maintain that they have responded to the interrogatories despite the possibility that the total number of interrogatories (counting the definitions as subdivisions) “could exceed the 50 interrogatory limitation”¹⁹ Respondents did not identify how the total could possibly exceed 50 interrogatories. Further, Respondents expressly refused to follow the definitions, so that portion of the interrogatories could not be treated as actual interrogatories, without a conclusion that Respondents failed to answer the interrogatories.

Respondents’ answer to Interrogatory No. 3. is incomplete. Respondents must provide each employee’s name, street address, telephone numbers, the current position with Checkered Flag (if any), dates of employment, and the present employment information for the person (if no longer with Checkered Flag). This information must be provided within ten days of receipt of this Order.

Adequacy of Responses to Requests for Documents

The Department requested tax returns for both Checkered Flag, Inc. and Michael Rodahl. Respondents submitted the tax returns requested for Checkered Flag, Inc. Respondents objected to submitting Rodahl’s individual returns “as no claim has been made against him personally.”²⁰ The Department has moved to compel the production of Rodahl’s individual returns. Respondents asserted that Checkered Flag, Inc., only acts through Rodahl as CEO. For this reason, Respondents maintain that Rodahl’s tax returns cannot be relevant.

The Department noted that the Respondents’ position was similar to that of case law from 1988, but the MHRA has been amended since then to provide for individual liability by perpetrators of discrimination.²¹ Rodahl has been named personally as a respondent, not in his role as CEO. The Department noted that, under Minn. Stat. § 363A.29, subd. 4, any award of damages must take into consideration the financial position of any respondent when assessing penalties for violations of the MHRA. Rodahl’s tax returns are relevant and those documents must be produced within ten days of the receipt of this Order.

The Department also requested copies of all documents in possession of Rodahl that relate to *State v. Michael O. Rodahl*, Crow Wing County File No. K603-3004. Respondents refused to supply documents related to that request, stating that the documents requested invade attorney/client privilege, are not

¹⁹ Respondent’s Amended Brief, at 4.

²⁰ Jacobson Affidavit, Exhibit F.

²¹ Department Supplemental Brief, at 3.

relevant, and can be accessed through public documents available through Crow Wing County.²² The Department has moved for production of these documents.

The Department is entitled to production of documents, even if those documents are available from other sources.²³ Respondents asserted attorney/client privilege, but failed to describe the documents for which the privilege is claimed. Respondents maintained that this was part of the directions that they were free to ignore. But the requirements for describing privileged documents are not only found in the Request for Production of Documents. As Minn. R. Civ. P. 26.02 (e) states:

(e) Claims of Privilege or Protection of Trial Preparation Materials. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

This practice of describing the documents as required by the rule has become known as a “privilege log.” The Minnesota Court of Appeals described an adequate privilege log as:

specifically identifying the date, subject matter and nature of each document, the identity and status of each person involved in the communication, and the precise grounds on which the privilege is claimed and the manner in which the communication meets those grounds.²⁴

Respondents have claimed privilege regarding requested documents. Respondents must prepare the required privilege log with the information identified in the Department’s Request for Production of Documents. The Respondents must produce the privilege log (and any documents responding to the Request for Production for which no privilege is claimed) within ten days of the receipt of this Order.

S.M.M.

²² Jacobson Affidavit, Exhibit F.

²³ *Dunnell Minnesota Digest*, Vol. 15, Discovery § 3.01 (citing *Garrity v. Kemper Motor Sales*, 159 N.W.2d 103 (Minn. 1968)).

²⁴ *St. John’s Episcopal Church v. Brewmatic Company*, C0-99-2196 (Minn. App. August 29, 2000).