

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

State of Minnesota by
Velma Korbek, Commissioner,
Department of Human Rights,
Complainant,

**SECOND
PROTECTIVE ORDER**

v.

Chisholm Medical Clinic,
Respondent.

This matter came before Administrative Law Judge Kathleen D. Sheehy in the absence of Administrative Judge Richard C. Luis on the Respondent's Request that deposition subpoenas be issued to Kalee Fosso and Marianne Redmond. The Complainant objected to the issuance of the subpoenas and requested a protective order. The parties argued their positions during a telephone conference with the undersigned ALJ on June 19, 2008, at which time the motion record closed.

Margaret Jacot, Assistant Attorney General, appeared for the Department of Human Rights (Department). Henry M. Helgen, McGrann, Shea, Anderson, Straughn & Lamb, appeared for the Chisholm Medical Clinic (Respondent).

Based on all the files, records, and proceedings herein, and for the reasons stated in the Memorandum attached hereto,

IT IS HEREBY ORDERED: that the Complainant's request for a Protective Order is GRANTED and the proposed second depositions of Kalee Fosso and Marianne Redmond shall not take place.

Dated: June 20, 2008

/s/ Kathleen D. Sheehy
KATHLEEN D. SHEEHY
Administrative Law Judge

MEMORANDUM

In this matter the Department of Human Rights alleges the Respondent discriminated against Kalee Fosso on the basis of her sex by discharging her from her employment as a laboratory technician when she experienced problems with her pregnancy. The operative facts concern the dates of May 9-10, 2005. On May 9, 2005, Ms. Fosso saw her physician regarding dizziness and fainting she had experienced during the pregnancy. The physician wrote a note stating Ms. Fosso should be excused from phlebotomy duties for two weeks because of concerns about syncope. Ms. Fosso allegedly brought the note to her supervisor, Marianne Redmond, and they allegedly agreed that during this period Ms. Redmond would perform Ms. Fosso's phlebotomy duties and Ms. Fosso would perform Ms. Redmond's outreach scheduling. Ms. Fosso alleges she brought the physician's note to the office manager and told her that her job duties had been adjusted to meet the restriction. The office manager brought the note to Dr. Wilson. In a telephone conversation the next day, May 10, 2005, Ms. Fosso was discharged from employment with the clinic.¹

The original Complaint alleged a claim of intentional sex discrimination; the parties conducted discovery on this claim, and counsel for the Respondent took the depositions of both Ms. Fosso and Ms. Redmond in January 2008. The depositions included questioning on topics such as the timing of Ms. Fosso's problems with her pregnancy; the specific problems she was experiencing; her job duties; the May 9, 2005, visit to her physician; her discussions with and agreement by her supervisor on how they would handle the restrictions; Fosso's discussions with the office manager when she provided the note; and her recollection of the telephone conversation in which she was informed that she was terminated. Ms. Redmond was asked about these topics and more.²

In February 2008, the Respondent moved for summary disposition, which was denied in March 2008. In the Order Denying Summary Disposition, the Administrative Law Judge granted the Department's motion to compel discovery of the Respondent's payroll records for 2004 and 2005, which was aimed at determining whether the Respondent had a sufficient number of employees during that timeframe to trigger its duty to provide reasonable accommodation of a disabled employee under Minn. Stat. § 363A.08, subd. 6(a) (2006).³ The Respondent provided the requested records, and on April 10, 2008, the Department amended the Complaint to add a claim that the Respondent failed to make a reasonable accommodation of Ms. Fosso's pregnancy-related disability. The Respondent denies, among other things, that it had the requisite number of employees to trigger this obligation.⁴ On April 30, 2008, the Administrative Law Judge issued a scheduling order that provides for a discovery deadline of June

¹ See Order Denying Summary Disposition at 4-5 (Mar. 14, 2008).

² Affidavit of Margaret Jacot and attached transcripts (June 11, 2008).

³ Order Denying Summary Disposition at 10-11.

⁴ Answer to Amended Complaint (June 4, 2008).

27, 2008; another dispositive motion deadline of July 11, 2008; and a hearing on September 9-11, 2008.

On June 10, 2008, the Respondent requested deposition subpoenas for Ms. Fosso and Ms. Redmond, seeking to take their depositions again on June 25, 2008.⁵ The Respondent maintains it is entitled to conduct additional discovery on the new accommodation claim and that it has a right to “further explore and follow up on” matters addressed in the first deposition in greater detail now that the Complaint has been amended.⁶ The Department objects to the retaking of Ms. Fosso’s and Ms. Redmond’s depositions, maintaining the facts underlying both of the alleged claims are identical and that additional depositions would be costly, burdensome, and might prejudice the Complainant’s case.⁷

Under the rules governing contested cases, any means of discovery available pursuant to the rules of Civil Procedure is allowed.⁸ Under the civil rules, the frequency or extent of use of the discovery methods otherwise permitted shall be limited upon a determination that (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.⁹ An administrative law judge may issue a protective order “as justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense due to a discovery request.”¹⁰

Counsel for the Respondent extensively questioned both Ms. Fosso and Ms. Redmond about their discussions and the events of May 9 and 10, 2005, during the depositions already taken. Neither Ms. Fosso nor Ms. Redmond is a party to this proceeding, and although Ms. Fosso is the charging party, she has not retained counsel to represent her interests. Both would be required to take time off of work or arrange child care to attend a second deposition. The Respondent has failed to establish that it requires any additional information from either of them in order to adequately prepare for the hearing or that its desire to question them further would be justified by the burden or expense of a second deposition. The request to retake their depositions is unreasonably duplicative, and the burden and expense of taking the depositions again outweighs the likely

⁵ The Respondent also requested a deposition subpoena for Terri Tervo, a former clinic employee. The Department has not objected to the taking of Ms. Tervo’s deposition.

⁶ Helgen letter to OAH dated June 17, 2008.

⁷ Jacot letter to OAH dated June 18, 2008.

⁸ Minn. R. 1400.6700, subp. 2.

⁹ Minn. R. Civ. P. 26.02(a), 26.03.

¹⁰ *Id.*, subp. 4.

benefit of doing so, taking into account the needs of the case, the parties' resources, and the importance of the proposed discovery in resolving the issues. The motion for a protective order is accordingly granted.

K.D.S.