

**STATE OF CONNECTICUT
OFFICE OF PUBLIC HEARINGS
COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES**

Commission on Human Rights and Opportunities, ex rel.	:	CHRO No. 0730256
Kevin Langan, Complainant	:	
v.	:	
RCK Corporation, dba	:	January 15, 2009
J.P. Dempsey's, Respondent	:	

RULING ON MOTION TO COMPEL

On or about August 21, 2008, the complainant and the commission jointly served upon the respondent a request for production, comprising fourteen specific requests. On or about November 10, 2008, the respondent filed its objections to requests 8, 9, 11 and 13. On or about December 4, 2008, the respondent filed answers to the remaining requests but did not produce any responsive documents. Unable to resolve their discovery disputes amicably, the commission and complainant jointly filed a motion to compel on January 6, 2009. As stated in the August 21, 2008 "Hearing Conference Summary and Order," the presiding referee "may act upon the motion [to compel] without further pleading by the responding party." The four contested requests are as follows:

Request 8: Copies of documents showing the names, addresses, telephone numbers, positions held and shifts worked of all of Respondent's employees during the time period September 1, 2005 through October 23, 2006.

Request 9: Copies of documents showing the names, addresses, telephone numbers, positions held and shifts worked of any employees who worked after October 23, 2006 until the present time.

Request 11: Documentation showing all individuals whose employment was involuntarily terminated by the Respondent between September 1, 2004 and the present time, including the name, address, telephone number, position held and whether said individuals had a disability.

Request 13: Copies of all documents showing wages and benefits paid to employees in the position of "Bar Manager" at the current time.

The respondent objects to all four requests by stating that compliance would be overly burdensome, that the requests seek information not germane to this action, and that the requested information is protected by the employees' privacy rights.

When a party asserts an objection of "unduly burdensome," it must "do more than simply intone [the] familiar litany that the [requests] are burdensome, oppressive or overly broad." (Citations and internal quotation marks omitted.) *Culkin v. Pitney Bowes, Inc.*, 225 F.R.D. 69, 70-71 (D.Conn. 2004). Instead, the objecting party must demonstrate specifically how compliance with the request would be overly burdensome. *Id.*, 71; see also *Gabriele v. Federal Insurance Company*, 2008 WL 2808776, *1 (D.Conn.). The respondent provided nothing more than its bare assertion, thus rendering his objection unacceptable. In any event, production of the requested documents should not be burdensome to any employer who retains comprehensive and well-organized records.

Under the commission's rules of practice, parties are entitled to "inspect and copy relevant and material records and documents not in [their] possession..." Regulations of Connecticut State Agencies § 46a-54-89a; see also General Statutes § 4-177c. A party pursuing such inspection (or production) must be given latitude in its search, especially because direct evidence of discrimination is extremely rare and, in the case of an employee's requests, that employee must rely on circumstantial evidence to sustain his ultimate burden. See *Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 37 (2nd Cir. 1994). An employer's disparate treatment of a claimant, when compared to its treatment of employees

not in the claimant's protected class, is often crucial to the complainant's proof. *Id.*, 37; *Hollander v. American Cyanamid*, 895 F.2d 80, 84 (2nd Cir. 1990). Insofar as the respondent's compliance with requests 8, 9, 11 and 13 may yield or lead to information about the treatment of similarly situated individuals, the requests should be approved and the motion to compel granted. See *Ruran v. Beth El Temple of West Hartford*, 226 F.R.D. 165, 169 (D.Conn. 2005). The requested information is indeed relevant to this complaint (or may lead to relevant information) and it appears unobtainable by any means other than this request for production.

The most likely source of the requested information would be employee personnel files. General Statutes § 31-128f concerns the integrity and protection of employee personnel files,¹ but nonetheless sets forth several specific exceptions to the general rules governing disclosure and nondisclosure. *Giannecchini v. Hospital of St. Raphael*, 47 Conn. Sup. 148, 157-58 (Conn. Super. 2000); see also *Rosado v. Bridgeport Roman Catholic Diocesan Corporation*, 2006 WL 3756521, *10 (Conn. Super.). According to § 31-128f,

No individually identifiable information contained in the personnel file or medical records of any employee shall be disclosed by an employer to any person or entity not employed by or affiliated with the employer without the written authorization of such employee except where the information is limited to the verification of dates of employment and the employee's title or position and wage or salary or where the disclosure is made . . . (2) pursuant to a lawfully issued administrative summons or judicial order . . . or in response to a government audit or the investigation or defense of personnel-related complaints against the employer . . ."

¹ The term "personnel file," as used in General Statutes chapter 563a, means "papers, documents and reports, including electronic mail and facsimiles, pertaining to a particular employee that are used or have been used by an employer to determine such employee's eligibility for employment, promotion, additional compensation, transfer, termination, disciplinary or other adverse personnel action including employee evaluations or reports relating to such employee's character, credit and work habits. General Statutes § 31-128a (3).

(Emphasis added.) Requests for production in litigation fall within this exception; *Shah v. James P. Purcell Assoc., Inc.*, 2006 WL 988245, *2 (D.Conn.); but ultimately the decision to allow disclosure rests in the discretion of the tribunal. *Holley v. Norwalk Hospital Association*, 2006 WL 328818, *1 (Conn. Super.). The tribunal must balance the complainant's need for the material in the files with the rights of the employer and the other employees whose files may be disclosed. *Weston v. Wellcare Health Plans, Inc.*, 2006 WL 337216, *2 (Conn. Super.). For the reasons articulated above, I find that the privacy concerns of the employer and the other employees are appropriately overridden in this case. Accordingly, I grant the motion to compel as to these four requests. The respondent shall produce those portions of its employees' personnel files that satisfy those requests, as well as other responsive documents available to the respondent outside of said personnel files.

Although the respondent did not object to the remaining requests, it also failed to produce any responsive documents. For requests 1, 2, 3, 4, 5, 6, 7, 10 and 14, the respondent merely provided brief and imprecise answers such as "none," "N/A" (which typically means mean "not applicable" or "not available"), "none accumulated" and "no written documentation." It is not clear whether each of these answers means the same as the others, or if the nuanced use of four different terms has any particular significance. The respondent shall clarify its answers and produce any responsive documents. If no responsive documents exist, the respondent shall indicate accordingly.

In request 12, the commission and complainant seek documentation of wages earned by the complainant, including tip calculations between September 1, 2005 and October 23, 2006, and any benefits paid by Respondent during Complainant's employment. The respondent's answer indicates simply that "Information will be obtained from ADP and forwarded." To the extent that the respondent has not fully complied with this request, it shall do so.

The motion to compel is granted in its entirety. On or before January 30, 2009 the respondent shall provide copies of all responsive documents to the complainant and commission or shall make them available for inspection (and copying). The respondent shall submit an affidavit of compliance once it has satisfied its obligation to comply with the discovery requests and this ruling. Its failure to do so may result in appropriate sanctions as allowed by law.

David S. Knishkowsky
Human Rights Referee

c: N. Gagnon
R. Kinstler Fox
R. Pinciario