

9/6/18

STATE OF RHODE ISLAND
COMMISSION FOR HUMAN RIGHTS

RICHR NO. 18 EAG 156

EEOC No. 16J-2018-00066

Complainant

v.

Respondent

DECISION ON MOTION
TO STRIKE

INTRODUCTION

On December 15, 2017, ("Complainant") filed a charge of discrimination with the Rhode Island Commission for Human Rights ("Commission") against ("Respondent"). The charge alleged that the Respondent discriminated against the Complainant with respect to terms and conditions of employment and demotion because of her age and in retaliation for protected activity, in violation of the Fair Employment Practices Act, Title 28, Chapter 5 of the General Laws of Rhode Island ("FEPA").

On or around January 11, 2018, the Respondent filed a Motion to Strike Allegations and Exhibit I from the Complainant's charge of discrimination. On or around February 8, 2018, the Complainant filed Complainant's Objection to Respondent's Motion to Strike. On or around February 27, 2018, the Respondent filed Respondent's Reply to Complainant's Objection to Its Motion to Strike. On March 26, 2018, the Complainant filed Complainant's Response to Respondent's Reply to Complainant's Objection to Respondent's Motion to Strike.

DISCUSSION

The Respondent seeks to strike certain allegations and Exhibit I from the Complainant's charge, arguing that Rhode Island Rule of Evidence 408 requires those excisions because they relate to settlement negotiations. The Respondent cites Super. R. Civ. P. 12(f), which provides in relevant part that: "Upon motion made by a party ... the court may order stricken from any pleading any insufficient defense, or any redundant, immaterial, impertinent, or scandalous matter." The Complainant objects, arguing that Rule 408 does not apply because there was no valuable consideration offered and the materials at issue were offered as evidence of discrimination.

The Superior Court Rules of Civil Procedure govern the procedure with respect to civil suits filed in Superior Court. Super. R. Civ. P. 1(a). The Commission has Rules and Regulations governing its procedures. Those Rules explicitly adopt the Superior Court Rules of Civil Procedure (except to the extent that the Civil Rules, by their nature, would be inapplicable) with respect to discovery (Rule 14.01(B)), but do not explicitly adopt the Superior Court Rules of Civil Procedure in other areas. In past cases, when assessing its procedures in areas other than

discovery, the Commission has been guided by procedures and standards used in the Superior Court, but has not found itself to be bound by them. Similarly, the Commission, even in the course of an administrative hearing on the merits, is not bound by, but is guided by, the Rhode Island Rules of Evidence. See Commission Regulations, Rule 10.06(A) which provides in relevant part that:

In passing upon the admissibility of evidence, the hearing officer or hearing Commission member or members shall give consideration to, but (except to the extent required by law) shall not be bound to follow the rules of evidence governing civil proceedings, in matters not involving trial by jury, in the Superior Court of the State of Rhode Island.

See also R.I. Gen. Laws § 28-5-21, which provides that: "In any proceeding pursuant to this chapter the commission, its member, or its agent shall not be bound by the rules of evidence prevailing in the courts."

The Respondent argues that Rhode Island Rule of Evidence 408 substantiates its argument that statements in the charge, as well as Exhibit I attached to the charge, should be stricken. Rhode Island Rule of Evidence 408 provides that:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

The FEPA also contains a provision which stresses the importance of preserving the confidentiality of settlement negotiations. See R.I. Gen. Laws §28-5-17(b), which provides in applicable part:

(b) If the commission determines after the investigation that it is probable that unlawful employment practices have been or are being engaged in, it shall endeavor to eliminate the unlawful employment practices by informal methods of conference, conciliation, and persuasion, including a conciliation agreement. ... Nothing said or done during these endeavors may be used as evidence in any subsequent proceeding.

Exhibit I to the Complainant's charge is labeled: "RULE 408 COMMUNICATION FOR SETTLEMENT PURPOSES ONLY". Such a label is insufficient to transform any communication into a document covered by Rule 408, but it is sufficient to start the review into the purpose of the document and the purpose for which it is offered by the Complainant. See,

e.g., BTG Int'l Inc. v. Bioactive Labs., No. CV 15-04885, 2016 WL 3519712, at *10 (E.D.Pa. 2016) (a party cannot insulate itself from an abuse of process claim by "labeling as settlement discussions its purportedly improper and possibly illegal demands." [Footnote omitted.]

Proceeding to examine the process for granting a Rule 12(f) motion in the Superior Court, it is evident that the standard is high. See McGlaulin v. RCC Atlantic Inc., 269 F.R.D. 56, 58 (D. Maine 2010):

A Rule 12(f) motion is directed to the discretion of the court. Morell v. United States, 185 F.R.D. 116, 118 (D.P.R. 1999); 5C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1381 (3d ed. 2004) (Wright & Miller) In general, a motion to strike should be denied unless it is clear that the challenged matter "can have no possible bearing on the subject matter of the litigation." Berke v. Presstek, Inc., 188 F.R.D. 179, 180 (D.N.H. 1998) (citation omitted); Wright & Miller § 1382.

The parties agree that the Complainant and Respondent entered into an employment agreement for the 2017-2018 school year. At some point before August 24, 2017, the date of Exhibit I, both parties were represented by attorneys and there appeared to be communications as to the scope of the Complainant's duties in the coming year. The Commission has no information that either party mentioned a potential lawsuit, but it is reasonable to infer that the Respondent was seeking to avoid litigation such as a breach of contract suit or a discrimination matter. The Complainant argues that these discussions did not fall under the coverage of compromise. Black's Law Dictionary defines "compromise" as: "1. An agreement between two or more persons to settle matters in dispute between them; an agreement for the settlement of a real or supposed claim in which each party surrenders something in concession to the other." COMPROMISE, Black's Law Dictionary (10th ed. 2014). It defines a "settlement offer" as: "An offer by one party to settle a dispute amicably (usu. by paying money) to avoid or end a lawsuit or other legal action..... — Also termed *offer in compromise*; *offer of compromise*; *offer of settlement*." SETTLEMENT OFFER, Black's Law Dictionary (10th ed. 2014). The circumstances surrounding at least some of the portions of Exhibit I seem to fall within the definition of "compromise", as an attempt to avoid a lawsuit. The first two paragraphs of Exhibit I concern background and a proposal for the Complainant's duties in the 2017-2018 school year. The Complainant argues that there is no valuable consideration in this proposal. Black's Law Dictionary defines "consideration" as:

1. Something (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee; that which motivates a person to do something, esp. to engage in a legal act. • Consideration, or a substitute such as promissory estoppel, is necessary for an agreement to be enforceable. See Restatement (Second) of Contracts § 81 (1979).

CONSIDERATION, Black's Law Dictionary (10th ed. 2014). It appears to the Commission that a clarification of duties without the burden of initiating litigation constitutes consideration. The Commission does not see these paragraphs as anything other than a settlement proposal, nor does it see another purpose for considering them that would take them outside the scope of Rule 408.

As the circumstances appear at this point, the third paragraph of Exhibit I does not warrant exclusion under Rule 408. This paragraph, in essence, provides that if the Complainant does not accept the Respondent's proposal and sign a release of all claims, she will no longer be an employee. So far as the evidence and arguments provided to the Commission at this point are concerned, the parties had not previously mentioned termination. Thus, it does not appear that the parties were negotiating the terms of a proposed termination. This appears to be the first time that the Respondent brought up an intent to terminate the Complainant's employment. The threat of termination appears to come within the *res gestae* of the case. The threat of termination appears to be a separate adverse action which the Complainant can attempt to prove was motivated by discrimination or retaliation. As the Complainant notes, an employer cannot exclude evidence of adverse actions by providing notice of an adverse action within unrelated settlement discussions. *See, e.g., Carney v. Am. Univ.*, 151 F.3d 1090, 1095-96 (D.C. Cir. 1998):

Second, although settlement letters are inadmissible to prove liability or amount, they are admissible "when the evidence is offered for another purpose." Fed. R. Evid. 408. In particular, such correspondence can be used to establish an independent violation (here, retaliation) unrelated to the underlying claim which was the subject of the correspondence (race discrimination). *See ... Resolution Trust Corp. v. Blasdel*, 154 F.R.D. 675, 681 (D.Ariz. 1993) (evidence of settlement negotiations admissible to prove retaliatory motive); *see also* 23 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5314, at 282 (1980) ("Rule 408 is [] inapplicable when the claim is based upon some wrong that was committed in the course of settlement discussions; e.g., libel, assault, breach of contract, unfair labor practice, and the like."). *Carney* offered the settlement correspondence not to prove that the University discriminated against her, but to show that the University committed an entirely separate wrong by conditioning her benefits on a waiver of her rights. The letters were therefore admissible.

See also Begin v. City of Dearborn, No. 07-13253, 2008 WL 11355316, at *2 (E.D. Mich. June 4, 2008).

... Plaintiff is correct that Rule 408 does not protect tortious conduct undertaken during settlement negotiations²....

² For example, if in settlement negotiations, Defendant had told Plaintiff that she would be denied her next promotion if the litigation continues, Rule 408 would not apply to that evidence and Plaintiff could properly bring a claim of retaliation.

As noted above, "a motion to strike should be denied unless it is clear that the challenged matter 'can have no possible bearing on the subject matter of the litigation.' *Berke v. Presstek, Inc.*, 188 F.R.D. 179, 180 (D.N.H. 1998) (citation omitted); Wright & Miller § 1382". *McGlaufflin, supra.* at 58. The Commission cannot find, based on the evidence before it, that Paragraph 3 of Exhibit I has no possible bearing on the instant charge.

Therefore, the first two paragraphs of Exhibit I must be redacted and the third paragraph can remain. The charge must also be amended to remove specifics of the Respondent's settlement proposal contained within the first two paragraphs of Exhibit I.

Since the Commission has accepted some of the Complainant's arguments, the Commission finds it inappropriate to grant the Respondent's request that the Commission sanction the Complainant by ordering the Complainant to pay the Respondent's attorney's fees.

ORDER

The Respondent's Motion to Strike is granted in part and denied in part. The Complainant shall file an amended charge and an amended Exhibit I in compliance with the discussion above.

The Respondent's request that the Complainant be sanctioned and ordered to pay the Respondent's attorney's fees is denied.

Entered this 6th day of September, 2018

Cynthia M. Hiatt

Cynthia M. Hiatt
Preliminary Investigating Commissioner