

IDAHO FEDERAL DISTRICT COURT HOLDS INFORMATION OBTAINED DURING STATE AGENCY'S CONCILIATION PROCESS IS PRIVILEGED AND PROTECTED FROM DISCLOSURE

By Sarah Klebo*

A United States District Court in Idaho issued a 2007 memorandum decision and order, in *Duarte v. City of Nampa*, denying disclosure of information obtained during the conciliation process.¹

Steven Duarte ("Duarte") sued the City of Nampa and the Nampa Police Department (collectively referred to as "Defendants").² The complaint alleged that Duarte was wrongfully discharged from the Nampa Police Department after he suffered an anxiety attack and after a series of reassignments to "light-duty" positions within the Nampa Police Department proved unsuccessful.³ In addition to wrongful discharge, Duarte alleged violations of the Americans with Disabilities Act ("ADA"), the Idaho Human Rights Act ("IHRA"), intentional and negligent infliction of emotional distress, negligent training, libel, slander, and loss of consortium.⁴

Prior to filing the lawsuit, Duarte had filed a charge of discrimination with the Idaho Human Rights Commission ("IHRC") against the Nampa Police Department.⁵ The IHRC determined there was evidence of discrimination and proceeded with a conciliation between Duarte and the Nampa Police Department.⁶ The purpose of the conciliation effort was to correct the police department's violation of the law, as IHRC perceived it. While the IHRC attempted conciliation, the parties also scheduled a mediation, but the mediation never took place.

Shortly before the (subsequently cancelled) mediation was scheduled to begin, the Defendants asked the IHRC for the entire file regarding its investigation of Duarte's charges.⁷ Based on Idaho Rules of Evidence 408⁸ and 507,⁹ the IHRC denied Defendants' request as to certain documents because it considered the contents to be privileged.¹⁰ The withheld documents included handwritten notes and email correspondence between Duarte's attorney and the IHRC that occurred during the conciliation process.¹¹

Duarte requested that the IHRC dismiss the charges of discrimination against the Nampa Police Department and then filed a lawsuit.¹² The Defendants' attorney again requested disclosure of the previously withheld information.¹³ The IHRC again denied the request and maintained that it still considered the documents to be privileged information.¹⁴ Subsequently, during the course of the lawsuit, the Defendants subpoenaed the IHRC to produce the documents.¹⁵ Objecting to the subpoena, the IHRC again cited Idaho Rules of Evidence 408 and

507 and added an objection based upon Fed. R. Civ. P. 26(b)(1), which provides that, "Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim . . ."¹⁶

Defendants argued that I.R.E. 408 was inapplicable because they only wanted to discover the information and not admit it into evidence.¹⁷ Additionally, Defendants asserted that I.R.E. 507 was inapplicable because the IHRC was not acting as a mediator, but as a partial party advocating on behalf of the Plaintiff.¹⁸ Defendants further argued that I.C. § 9-340B(8) of the Idaho Public Records Act was inapplicable because the documents were requested pursuant to a federal subpoena and not pursuant to a public records request.¹⁹ Lastly, because Defendants were parties to the charge of discrimination with the IHRC and were parties in the judicial proceeding regarding that charge, there was no need to show public interest as required under the Idaho Public Records Act.²⁰

In response to Defendants' arguments, the IHRC changed its claim from privileged information to "official information" under federal common law privilege as the reason for objecting to disclosure of the information to the Defendants. The IHRC asserted that disclosure of those documents would be contrary to the public interest because the IHRC's conciliation efforts are significant in the scheme of anti-discrimination law and require open and candid communication with the alleged victim.²¹ The IHRC asserted there was no legitimate benefit deriving from the disclosure of the documents to the Defendants, but there would be a "chilling effect on communications between the IHRC and victims, and an adverse effect on the process as a whole."²² Duarte likewise opposed enforcement of the subpoena and argued that, under 42 U.S.C. § 2000e-5(b), conciliation communications are privileged and that disclosure of conciliation efforts would have a chilling effect on the conciliation process. This federal statute provides that, "nothing said or done . . . may be made public . . . or used as evidence in a subsequent proceeding without the written consent of the persons concerned."²³

Defendants argued that protection of the information was not warranted by the statutes cited by Duarte and the IHRC because (1) 42 U.S.C. § 2000e-5(b) applies only to the Equal Employment Opportunity Commission ("EEOC") and not to the

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IHRC, and (2) I.C. § 67-5907(4) applies only to offers, counteroffers, and terms of agreement, none of which were made during IHRC's investigation.²⁴

The court first looked to I.C. § 67-5907(4) and concluded that the statute, while unclear on its breadth of application, does evince "an intention by the Idaho Legislature to safeguard the conciliation process" and the need to ensure nondisclosure to the public.²⁵ The court also determined that I.C. § 9-203(5) likewise would protect these communications from disclosure in providing that a public officer "cannot be examined as to communications made to him in official confidence, when the public interests would suffer by disclosure."²⁶ Most of the public interests lie in nondisclosure of such communications between the IHRC and a party during the conciliation process.²⁷ The court further stated that disclosure of these communications, when parties are divulging information candidly, "could have a chilling effect on future conciliation communications and lead to a deterioration of the entire process."²⁸

The court also found that IHRC's claim of "official information" under federal common law privilege was valid considering the potential disadvantages of disclosing the communications.²⁹ The court held that the disadvantages more than outweighed any benefit that could be obtained from such disclosure.³⁰ The court cited the Fifth Circuit Court of Appeals case of *Branch v. Phillips Petroleum Co.*, which discussed the common law privilege and upheld the EEOC's withholding of information related to proposals and counter-proposals made during the conciliation process.³¹ Finally, the court found that although 42 U.S.C. § 2000e-5(b) is only binding on the EEOC, the Idaho Supreme Court has held that courts can look to federal law for guidance in interpreting the IHRA and, thus, the federal statute was further evidence of a policy against disclosure of conciliation matters in order to protect the delicate and candid conciliation process.³² As a result, the Defendants' effort to enforce the subpoena as to the IHRC was denied.³³

The court's decision found that the conciliation process is best served by protecting information derived during that process. Respecting the candid exchange of information between administrative agencies such as the IHRC and victims is crucial to maintaining confidence in the process as a whole for future conciliation and mediation efforts. Disclosing privileged information will unquestionably undermine the trust and confidentiality of conciliation communications and the integrity of the conciliation process as a whole. This ruling may be subject to appeal.



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ENDNOTES

- ¹ *Duarte v. City of Nampa*, No. CV 06-480-S-MHW, 2007 WL 1792325 (D. Idaho, June 20, 2007). (Williams, Mag.).
- ² *Id.* at *1.
- ³ *Id.*
- ⁴ *Id.*
- ⁵ *Id.*
- ⁶ *Id.*
- ⁷ *Id.* at *2.
- ⁸ IDAHO R. EVID. 408 (providing in relevant part: "...Evidence of conduct or statements made in compromise negotiations is likewise not admissible.")
- ⁹ IDAHO R. EVID. 507(2) (providing in relevant part: "A client has a privilege...to refuse to disclose and to prevent any other person from disclosing confidential communications made in the furtherance of the rendition of mediation services to the...persons who are participating in the mediation...")
- ¹⁰ *Duarte*, 2007 WL 1792325 at *2.11 *Id.*
- ¹² *Id.* at *1-2.
- ¹³ *Id.* at *2.
- ¹⁴ *Id.*
- ¹⁵ *Id.*
- ¹⁶ FED. R. CIV. P. 26(b)(1).
- ¹⁷ *Duarte*, 2007 WL 1792325 at *2.
- ¹⁸ *Id.*
- ¹⁹ *Id.*
- ²⁰ *Id.*
- ²¹ *See*, I.C. § 67-5907(4) (the IHRC "shall endeavor to eliminate such discrimination by informal means such as conference, conciliation and persuasion.")
- ²² *Duarte*, 2007 WL 1792325 at *3.
- ²³ 42 U.S.C. § 2000e-5(b).
- ²⁴ *Duarte*, 2007 WL 1792325 at *3.
- ²⁵ *Id.* at *4.
- ²⁶ *Id.*
- ²⁷ *Id.*
- ²⁸ *Id.*
- ²⁹ *Id.*
- ³⁰ *Id.*
- ³¹ *Id.* (citing *Branch v. Phillips Petroleum Co.*, 638 F.2d 873, 880 (5th Cir.1981)).
- ³² *Id.* at *5.
- ³³ *Id.*