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Ombudsperson privilege decisions from the Federal Department of Labor, 1995

MGS 10/20/95

# Alyeska pipeline

SERVICE COMPANY

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October 17, 1995

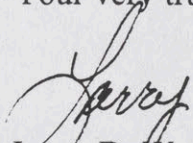
*copy to Joint Shield  
Law Committee*

The Ombudsman Association Board of Directors  
The Ombudsman Association Standards Committee

Dear Ombuddies:

I am delighted to share with you a copy of a recent decision from the federal Department of Labor. As you will read, the administrative law judge has recognized the Ombudsman privilege and has granted our corporation's motion for protective order against discovery of Ombudsman records and communications. Other decisions which you have reported, examples of legal memoranda (including TOA's work in this area), and your persistent encouragement all contributed to this important outcome. Of course, there may be an appeal, but I would like to share with you this order in hopes that it might be helpful elsewhere. Best wishes.

Your very truly,



Larry D. Wood  
Ombudsman

LDW/mh

ldw073.doc

## U.S. Department of Labor

Office of Administrative Law Judges  
Seven Parkway Center  
Pittsburgh, Pennsylvania 15220  
412 644-5754



Date: October 4, 1995

Case No.: 95-TSC-4

In the Matter of

RICHARDO ACORD,  
Complainant

v.

ALYESKA PIPELINE SERVICE CO.,  
Respondent

and

ARCTIC SLOPE INSPECTION  
SERVICES, INC.,  
Respondent

DECISION AND ORDER DENYING MOTION TO  
COMPEL AND GRANTING MOTION FOR PROTECTIVE ORDER

Complainant, Richardo Acord, moves for an order pursuant to 29 C.F.R. § 18.21 compelling respondent, Alyeska Pipeline Company ("Alyeska"), to produce documents held in the files of Larry Wood, Alyeska ombudsman. Complainant asserts that respondent has repeatedly objected to requests to produce relevant information from Wood's files citing an ombudsman privilege. Respondent responds to complainant's motion by moving for the entry of a protective order preventing complainant from taking any discovery involving Wood which would involve disclosure of identities of individuals who have raised confidential concerns under the Alyeska ombudsman program or that would reveal any confidential communication or information provided under the auspices of the in the Alyeska ombudsman program.

In response, complainant files a Supplement To Complainant's Motion To Compel And Complainant's Opposition To Alyeska Pipeline Service Company's Motion For A Protective Order. In his motion and opposition, complainant asserts that an Ombudsman privilege is not applicable to this case in as much as Alyeska has not met a four prong test for finding the privilege applicable set out in Kientzy v. McDonnell Douglas Corp., 133 F.R.D. 570 (E.D.Mo.1991).

ENTERED IN ALYESKA LITIGATION  
FILE SYSTEM

Date: 10-4-95

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Respondent answered by a Reply To Complainant's Supplement To Motion To Compel And Complainant's Opposition To Alyeska Pipeline Service Company's Motion For A Protective Order and complainant supplied the final pleading on September 25, 1995 with his reply to Alyeska Pipeline Service Company's Reply.

Ombudsman Wood submitted an affidavit in opposition to the motion to compel.

The issue as joined by the aforesaid pleadings is whether complainant is precluded from obtaining discovery from Wood, an Alyeska employee, because of an ombudsman privilege of confidentiality. Complainant acknowledges that the privilege has been recognized in other forums. The issue is whether it should be applied to the facts of this case.

Alyeska's ombudsman program was established in 1992. Its stated purpose is to provide an effective internal mechanism for employees and contractors who work for Alyeska to raise issues of health, safety, or the environment. Its origin was a growing awareness by Alyeska that a number of its employees were raising allegations of environmental wrongdoing by going directly to Congress and governmental agencies. Wood has served as Ombudsman since the inception of the program. Some concerns that were raised by complainant in the course of his employment as a contract worker on Alyeska programs and in Alyeska facilities were referred to Wood per his position as ombudsman. Wood investigated some of the complainant's concerns. Wood's efforts at resolution were not successful.

Complainant's discovery propounds interrogatories to Wood asking the identification of documents relating to discussions regarding the complaint, the subject matter of the complaint, and the complainant. The discovery requests Wood to produce files and documents maintained on complainant.

Complainant has offered to accept in satisfaction of his request redacted documents to protect the anonymity of others. This offer is unsatisfactory to respondent.

Rule 501 of the Federal Rules of Evidence provides that any privilege claimed by a witness shall be governed by the principles of the common law as such principles may be interpreted by the federal courts in light of reason and experience. Evidentiary privileges are not favored, and where recognized, are to be narrowly construed because they exclude potentially relevant evidence. Memorial Hospital for McHenry County v. Shadur, 664 F.2d 1058 (7th Cir. 1981); and Hansen v. Allen Memorial Hospital 141 F.R.D. 115 (1992).

The parties reference four federal court decisions addressing the issue of whether an ombudsman privilege exists.

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Jones v. McDonnell Douglas Corp., No. 4:94-CV-355 (E.D. Mo. May 22, 1995); Monoranian Roy v. United Technologies Corp., No. H-89-680 (D. Conn. May 29, 1990); Shabazz v. Scurr, 662 F. Supp. 90 (S.D. Iowa 1987); and Kientzy, *supra*. All four decisions recognize the privilege and preclude discovery. Three of the decisions applied the four part test set out in Kientzy. The four prong test espoused by Kientzy incorporated Wigmore's formulation of conditions for recognition of a testimonial privilege: (1) the communication is one made in belief that it will not be disclosed; (2) confidentiality is essential to the maintenance of the relationship between the parties; (3) the relationship is one that society considers worthy of being fostered; and (4) the injury to the relationship incurred by disclosure would be greater than the benefit gained in the correct disposal of litigation. Kientzy, 133 F.R.D. at 571. If each of the four factors is present, the communication is privileged and is not subject to discovery.

If the information set forth in the Declaration Of Larry D. Wood and the other exhibits attached to Alyeska's Motion To Compel describing the purpose of the ombudsman program and the procedures developed therefore are accepted, the privilege would be found to apply as the program meets the four prong test of Kientzy.

1. Communications made in confidentiality

Alyeska's ombudsman program as described by Wood's Declaration and documents submitted as exhibits to Alyeska's Opposition To Motion To Compel satisfies the first requirement. The program considers confidentiality to be a key component. Employees are to be assured that communications will remain confidential in order to encourage the reporting of violations of law by Alyeska operations. Procedures have been developed to protect the confidentiality of information. Those procedures include an off-site location, secure and confidential telephone and facsimile communications, dedicated post office box. Confidential records can be accessed only by the ombudsman or persons under his control. Wood is a member of The Ombudsman Association. The Association's Code of Ethics and Standards of Practice do not allow an ombudsman to divulge names of individuals without their permission. Wood proffers that if he was required to produce files relating to employee concerns it would undermine the effectiveness of Alyeska's ombudsman program.

2. Confidentiality as essential to ombudsman program

The second requirement is that respondent show that confidentiality is essential to the maintenance of the relationship between the Alyeska employees and the Ombudsman. Clearly, the effectiveness of the ombudsman program is dependent

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on confidentiality of communications. The ombudsman's ability to compile information outside the conventional confines and to facilitate and mediate solutions is dependent upon the confidential nature of the program. Requiring the ombudsman to produce files relating to employee concerns or disclose the content of any statement, or document relating to his investigation or efforts to resolve disputes undermine the effectiveness of an ombudsman program. Thus, confidentiality is clearly essential to Alyeska's ombudsman program.

3. There is a societal interest in maintaining the confidentiality of the ombudsman program

The Court in Kientzy held that an ombudsman program implemented by McDonnell Douglas Corporation is worthy of societal support because McDonnell Douglas is a very large federal government contractor in aircraft, space and other industries, and that it is important to the employees and possibly the nation for the employees to receive confidential information and aid to remedy workplace problems.

Complainant argues that the Kientzy rationale does not apply here because Alyeska is not similarly situated to McDonnell Douglas in as much as Alyeska does not produce military products for the United States, or contract with the government for the purposes of producing a product, but rather "is simply a consortium of oil companies for the purpose of maintaining and operating the Trans Alaska Pipeline." However, an ombudsman program which improves work conditions by facilitating the resolution of disputes with management, and encouraging the reporting of safety and environmental concerns, thus promoting the safe and efficient transportation of an American-produced oil supply, is also important to society. Moreover, effective ombudsman programs that address concerns of employees, protect whistleblowers and minimize their need, are also important to society. Accordingly, it is determined that Alyeska's ombudsman program as depicted by Alyeska has a definite societal benefit that is worth protecting.

4. Injury to the ombudsman program incurred by disclosure compared to the benefit gained in the correct disposal of litigation

Respondent argues that the harm caused by disclosure of confidential communications by the ombudsman would outweigh the benefit to the complainant by disclosure. Respondent contends that requiring the ombudsman to disclose confidential information would damage its credibility and reputation for confidentiality and destroy the foundation of the ombudsman program as confidentiality is its most important and defining attribute. Respondent contrasts the harm to the ombudsman program with lack of real harm to complainant as complainant has the capability of

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obtaining the same information from deposing other witnesses. The Court in Jones v. McDonnell Douglas Corp., supra, faced with the same question reasoned:

Because [the ombudsman] seeks only to protect the content of discussions relating to plaintiff's participation in the ombudsman program and any documents, records or files generated as a result thereof, alternative means of discovering relevant facts which resulted in the termination of plaintiff will not be foreclosed or impeded. If, on the other hand, [the ombudsman] is compelled to disclose the contents and nature of conversations relating to the particular issue presented by plaintiff to the ombudsman office, the reputation and principle of confidentiality of defendant's ombudsman program will be destroyed. Id. at p. 5

Complainant, on the other hand, argues that his right to the discoverable information is not outweighed by the harm discovery would cause to Alyeska's ombudsman program because the program is not meaningful and not worth protecting. Complainant characterizes Alyeska's ombudsman program as "a masquerade disguising a fox in the henhouse." Complainant argues that Wood has not satisfied the role of impartial player/mediator because the "evidence reveals numerous pieces of correspondence, unbeknown to Mr. Acord, that were signed by Alyeska corporate officials as formal responses to Mr. Acord's concern." Rather, argues complainant, Woods actions with respect to him advance the position of management.

Complainant supports his argument by reference to: 1. a memo from Alyeska CEO David Pritchard to complainant that was drafted by Wood with the exception of only two sentences; 2. a letter from complainant to Wood and William Howitt, Vice President of Human Resources, that ended up in the printer room at the Quality Services Department; 3. deposition testimony of John Dayton, Senior Vice President of Operations and Engineering, that an eight page response to complainant dated December 27, 1993 was prepared for his signature by Wood; and 4. allegation that ASIS management, acting at the request of Alyeska, directed complainant to communicate with Wood about his protected activity, and that ASIS subsequently used complainant's failure to interact with Wood as grounds for finding fault with his performance.

Alyeska does not dispute that Wood drafted a suggested response for Pritchard to send to complainant, but argues that it was only an attempt to ensure that complainant's concerns were addressed by the appropriate person. The memo drafted by Wood for Pritchard's signature is innocuous. It does not indicate that Wood has not assumed a neutral position or is not involved

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in facilitating solutions to complainant's concern. The letter merely expresses gratitude to complainant for bringing forth concerns, states that the issues are serious, assures that corrective action will be taken, and outlines a plan of action to resolve the concerns.

Alyeska denies that Wood authored the December 27, 1993 letter to complainant. Alyeska replies that Dayton's deposition testimony wherein he recalled that Wood drafted the letter for his signature was incorrect; that his memory was inaccurate. It contends that inquiries made since the deposition show that Wood only prepared a list of open concerns for complainant and Dayton, that those open concerns were addressed by Dayton in his September 27, 1995 letter and that Dayton's response was drafted at Dayton's request by Susan Murto of Alyeska's law department. Alyeska supports its reply with affidavits by Wood and Dayton. Alyeska's response is accepted. The statements in the affidavits were provided with more certainty than Dayton's deposition testimony. Dayton testified: "As I recall Larry Wood [prepared the memo]."

Alyeska denies complainant's allegation that Wood breached the confidentiality promise by forwarding a letter from complainant to Howitt, and points out that complainant, himself, sent the letter to Howitt. See July 16, 1993 letter to complainant from Howitt wherein Howitt apologizes to complainant for sending his letter to a third person but mentions that complainant copied the letter to him without indicating that complainant wanted the communication to remain confidential.

Finally, to support his allegation that ASIS management used complainant's failure to interact with Woods as grounds for finding fault with complainant's performance, complainant refers to deposition testimony of Swink, a July 30, 1993 memo from Wood to complainant and two other persons, an August 20, 1993 E-mail message from Newcomer to M. Swink, and an August 25, 1993 log entry of Swink. However, the deposition testimony is not available for review and the other documents do not support complainant's allegations.

The July 30, 1993 memo sets forth actions that the participants at a July 28, 1993 meeting including complainant agreed to undertake in order to resolve issues. The August 30, 1993 E-mail message expresses frustration by Newcomer over complainant's failure to meet his commitment dates. Newcomer voices the desire to bring to closure items raised by complainant and requests that the providing of the information promised be

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'Exhibit 2 to Complainant's Supplement To Motion To Compel;  
p. 34, line 20.



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made complainant's top priority so that complainant's allegations could be investigated. The August 25, 1993 log entry states that Swink informed complainant that performance of items 1, 6 & 7 of the July memo were his top priority. These exhibits do not indicate that Wood is "per se an arm of management," or that Wood deviated from the ombudsman's mission of helping Alyeska's President to be kept informed of issues that relate to business ethics and government regulations and of providing a confidential, neutral process to fairly and equitably resolve work-related concerns. Rather, they depict exasperation on the part of Newcomer and Swink that complainant raised concerns with the ombudsman but failed to provide information to allow for an investigation of the allegations.

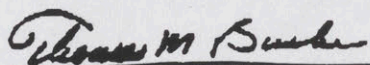
It is determined that Alyeska has established that the four criteria set forth in *Kiantzy* are present here. Further, complainant has not shown that ombudsman Wood is not neutral, that employees in general can not depend on their communications being held in confidence, or that complainant's dependance on confidentiality has been betrayed by Wood. Accordingly, Alyeska's motion for a protection order is granted.

This protective order only excludes discovery relating to complainant's participation in the ombudsman program. Complainant's interest in discovering this information is minimal compared to Alyeska's interest in preserving confidentiality in its ombudsman program.

ORDER

It is hereby ORDERED that:

1. Richardo Acord's motion to compel is denied; and
2. Alyeska Pipeline Service Company's motion for a protective order preventing discovery involving the Alyeska Ombudsman, Larry Wood, or his records, that could involve disclosure of the identities of individuals who have raised confidential concerns under the Alyeska Ombudsman Program or that could reveal any confidential communication or information provided under the auspices of the Alyeska Ombudsman Program is granted.

  
THOMAS M. BURKE  
Administrative Law Judge

TMB:mr

SERVICE SHEET

Case Name: RICHARDO ACORD v. ALYESKA PIPELINE SERVICE COMPANY  
AND ARCTIC SLOPE INSPECTION SERVICES, INC.

Case No.: 95-TSC-4

Title of Document: DECISION AND ORDER DENYING MOTION TO COMPEL  
AND GRANTING MOTION FOR PROTECTIVE ORDER

I hereby certify that on October 4, 1995, a copy of the above-  
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