*Carman v. McDonnell Douglas Corp.**

I. INTRODUCTION

The use of ombudsmen to settle corporate disputes is on the rise, with increasing numbers of corporations realizing the benefits of this alternative dispute resolution method.[1] Few courts have considered the issue of whether a privilege exists for communications made to corporate ombudsmen. The Eighth Circuit Court of Appeals, the only federal appellate court to have considered the issue, held in *Carman* that a blanket privilege for corporate ombudsmen does not exist.[2] How this decision will affect the recognition of the privilege in other federal circuits is uncertain. In addition, some fear that the lack of privilege may reduce the role of ombudsmen in resolving corporate disputes, due to the fear that confidentiality of communications made to ombudsmen cannot be guaranteed.[3]

II. THE ROLE OF OMBUDSMEN IN RESOLVING CORPORATE DISPUTES

A corporate ombudsman is employed by a corporation to assist other employees in resolving workplace disputes.[4] The ombudsman is a neutral party who ordinarily is a member of the upper management staff and reports directly to the chief executive officer or to other top management

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* 114 F.3d 790 (8th Cir. 1997).

[1] As of 1986, nearly 200 ombudsmen were employed by corporations in the United States, and by 1992, more than 1000 corporate ombudsmen were practicing. *See* Brenda V. Thompson, *Corporate Ombudsmen and Privileged Communications: Should Employee Communications to Corporate Ombudsmen Be Entitled to Privilege?*, 61 U. CIN. L. REV. 653, 656 (1992–1993).

[2] *See Carman*, 114 F.3d at 794–795.

[3] *See* Kevin L. Wibbenmeyer, *Privileged Communication Extended to the Corporate Ombudsman-Employee Relationship Via Federal Rule of Evidence 501*, 1991 J. DISP. RESOL. 367, 379: "The ombudsman-employee relationship rests squarely on the employee's belief that information divulged to the ombudsman will remain confidential. Destroying the employee's confidence in that confidentiality will likely result in destroying the ombudsman program itself."

[4] *See* Thompson, *supra* note 1, at 653 (citing Lee P. Robbins & William B. Deane, *The Corporate Ombuds: A New Approach to Conflict Management*, 2 NEGOTIATION J. 195, 197 (1986)).

staff.[5] The role of corporate ombudsmen may vary. Their duties usually involve "responsive listening," investigation, upward feedback to management, direct resolution of controversies, advocacy, mediation and arbitration.[6] Titles may vary as well as the levels of authority granted to ombudsmen.[7] The typical ombudsman may handle 200-300 cases per year, many of which involve employment concerns including salaries, termination, sexual harassment and discrimination.[8]

One benefit of the ombudsman's role is the avoidance of litigation.[9] To achieve this, the ombudsman must be neutral in dealing with all parties.[10] Also, the ombudsman relies on the confidential nature of her office to encourage employees to come forward and air disputes.[11] When disputes cannot be resolved at this level, however, the issue of the ombudsman privilege arises.

III. PRIOR CASES THAT HAVE ADDRESSED THE CORPORATE OMBUDSMAN PRIVILEGE

A. Roy v. United Techs. Corp.[12]

In *Roy*, a former employee filed suit alleging race and age discrimination under Title VII and the Age Discrimination in Employment Act.[13] The plaintiff sought to depose the corporate ombudsman and also served a request to produce the ombudsman's documents, and the corporation filed a motion for a protective order.[14] The court granted the

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[5] *See id.* at 656.

[6] *See id.* (citing Robbins & Dean, *supra* note 4, at 198-199).

[7] *See id.* at 657 (citing William H. Gregory, *Industry Grapples with Challenges Posed by Contract Compliance*, AVIATION WEEK & SPACE TECH., Feb. 2, 1987, 84, 85; Robbins & Dean, *supra* note 4, at 201).

[8] *See id.* at 657 (citing Mary P. Rowe, *The Corporate Ombudsman: An Overview and Analysis*, 3 NEGOTIATION J. 127, 135 (1987)).

[9] *See id.* at 653.

[10] *See id.*

[11] *See id.* at 654.

[12] Civil Cause No. H89-680 (JAC) (D. Conn. 1990), unreported, *discussed in* Thompson, *supra* note 1, at 660-661.

[13] *See* Thompson, *supra* note 1, at 660-661.

[14] *See id.*

protective order, recognizing an ombudsman privilege limited to the facts of the case.[15]

The court considered four factors in its determination: "(1) whether the parties believed that the communications were confidential, (2) the need for confidentiality, (3) whether society would recognize the value of the confidential relationship, and (4) a comparison of the benefits of disclosure to the injury that might result."[16] The court concluded that the need for confidentiality outweighed the plaintiff's need to obtain the information in that manner.[17]

B. Kientzy v. McDonnell Douglas Corp.[18]

In this case, the first reported case to come to trial on the issue of the existence of an evidentiary privilege for corporate ombudsmen, the United States District Court for the Eastern District of Missouri granted a motion to protect from discovery the communications made to a corporate ombudsman.[19] The plaintiff had filed a sex discrimination suit and sought to depose the ombudsman, whom the plaintiff had consulted after learning that the company planned to terminate her employment.[20] In response, the ombudsman sought a protective order under Federal Rule of Civil Procedure 26(c)(1).[21]

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[15] *See id.*

[16] *Id.* at 661.

[17] *See id.*

[18] 133 F.R.D. 570 (E.D. Mo. 1991).

[19] *See id.* at 571.

[20] *See id.*

[21] *See id.* The rule states as follows:

> Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending, or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make an order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the disclosure or discovery not be had.

FED. R. CIV. P. 26(c)(1).

The court evaluated the same four factors applied in the *Roy* decision, emphasizing that confidentiality is essential to maintaining the neutrality of the ombudsman's office.[22] The court argued that confidentiality is essential to ombudsman-employee relationships because the function of that relationship is to "receive communications and to remedy workplace problems, in a strictly confidential atmosphere."[23] Furthermore, without such confidentiality, "the [ombudsman's] office would be just one more nonconfidential opportunity for employees to air disputes. The ombudsman's office provides an opportunity for complete disclosure, without the specter of retaliation, that does not exist in the other available, nonconfidential grievance and complaint procedures."[24]

IV. *CARMAN*—FACTS AND PROCEDURAL HISTORY

In October 1992, McDonnell Douglas Aircraft Corporation laid off Frank Carman as part of a reduction in force of its management staff.[25] Carman then sued McDonnell Douglas, claiming that his termination violated the Age Discrimination in Employment Act, the Missouri Human Rights Act and the Employee Retirement Income Security Act of 1974.[26] During discovery, Carman requested the production of fifty-four sets of documents from McDonnell Douglas.[27] Among the requested documents were all notes and documents reflecting data known to the company ombudsman[28] concerning Carman and other individuals, including meeting notes regarding layoffs in Carman's division as well as meeting notes

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[22] *See Kientzy*, 133 F.R.D. at 571. The *Kientzy* court also emphasized the importance of the nature of the defendant corporation's business—governmental contracting in the aerospace and defense industries—in weighing the societal interest in the relationship between the parties. *See id.* at 572. This was not a factor addressed by the court in *Carman*, and accordingly will not be discussed here.

[23] *See id.*

[24] *Id.*

[25] *See Carman,* 114 F.3d at 791.

[26] *See id.*

[27] *See id.*

[28] The company ombudsman was an employee outside of the corporate chain of command whose job it was to investigate and mediate workplace disputes. The ombudsman was paid by the corporation but purported to be an independent and neutral party who promised strict confidentiality to all employees. In addition, the ombudsman was bound by the Code of Ethics of the Corporate Ombudsman Association, which requires an ombudsman to keep communications confidential. *See id.* at 792–793 n.1.

involving Carman himself.[29] McDonnell Douglas objected to this and other requests as vague, overbroad and irrelevant, and further objected to production of the documents possessed by the ombudsman "because her activities as an 'ombudsman' were considered confidential and any information and documents relating to her activities are immune from discovery."[30]

The district court denied the discovery request pertaining to the documents held by the ombudsman, holding that the documents were protected by the "Ombudsman Privilege."[31] The court also held that McDonnell Douglas was not required to produce adverse impact analyses prepared in anticipation of litigation about the company's past reductions in force to the McDonnell Douglas Aircraft Company, the component company of McDonnell Douglas where Carman worked.[32]

In February 1996, the court granted summary judgment in favor of McDonnell Douglas.[33] The court assumed that Carman had established a prima facie case of age discrimination, but it held that Carman had failed to present evidence sufficient to prove that McDonnell Douglas's proffered reasons for laying him off were pretextual.[34] Carman appealed this decision to the Eighth Circuit Court of Appeals.[35]

Carman alleged several errors on appeal. He contended that the district court erred in granting summary judgment before McDonnell Douglas complied with two document requests with respect to which the district court had granted a motion to compel.[36] The Eighth Circuit Court of Appeals held that the lower court's decision with respect to these requests was not erroneous, but noted that Carman should be given the opportunity on remand to explain why he needed certain information.[37] The court also held that the district court did not err in limiting Carman's request for information about past reductions in force to the division in which he worked.[38] The court stated that company-wide statistics are not usually helpful in establishing pretext in employment discrimination cases because

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[29] *See id.* at 791.

[30] *Id.* (citing Appellant's App. at 358).

[31] *See id.* at 792.

[32] *See id.*

[33] *See id.*

[34] *See id.*

[35] *See id.* at 790.

[36] *See id.*

[37] *See id.*

[38] *See id.*

those who make employment decisions vary across divisions.[39] The court's decision to reverse and remand centered on its holding that no privilege exists for corporate ombudsmen.[40]

V. THE EIGHTH CIRCUIT'S DISCUSSION OF THE CORPORATE OMBUDSMAN PRIVILEGE[41]

In its discussion on the creation of evidentiary privileges, the court analyzed the text of Federal Rule of Evidence 501, which states that federal courts should recognize evidentiary privileges according to "the principles of common law" interpreted "in the light of reason and experience."[42] The court stated that "the beginning of any analysis under Rule 501 is the

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[39] *See id.*

[40] *See id.* at 794–795.

[41] As the first step in its discussion of the creation of a new evidentiary privilege, the court decided to apply a *de novo* standard of review. Although neither party addressed the issue, McDonnell Douglas apparently seemed to argue that the privilege was reviewable only for an abuse of discretion. The court held, to the contrary, that the scope of a privilege and the decision whether to establish a new privilege involved mixed questions of law and fact that should be reviewed *de novo*. *See id.* at 793 n.2.

[42] *Id.* at 793. The rule states as follows:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

FED. R. EVID. 501. Privileges that have historically been recognized at common law include the attorney-client privilege and spousal privileges. *See* Trammel v. United States, 445 U.S. 40 (1980); Edmund M. Morgan, FORWARD TO THE AMERICAN LAW INSTITUTE'S MODEL CODE OF EVIDENCE, 24–28 (1942). In addition, nearly two-thirds of the states have enacted statutory provisions recognizing the physician-patient and psychotherapist-patient privileges. *See* United States *ex rel.* Edney v. Smith, 425 F. Supp. 1038, 1040 (E.D.N.Y. 1976).

principle that 'the public has a right to every man's evidence.'"[43] The court then discussed the burden on the party seeking to establish a new evidentiary privilege: "A party that seeks the creation of a new evidentiary privilege must overcome the significant burden of establishing that 'permission of a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'"[44]

Working within this framework, the court balanced the interests at stake in creating a new privilege. According to the court, the first factor to consider with regard to a new evidentiary privilege is the importance of the relationship that the privilege will foster.[45] McDonnell Douglas argued that ombudsmen help resolve workplace disputes, heading off costly and time-consuming litigation. Although the court recognized that fair and efficient alternative dispute resolution techniques are worthy of encouragement because they benefit society, it determined that more is required to justify the creation of a new evidentiary privilege.[46]

In the court's view, McDonnell Douglas failed to present evidence on two important issues that would weigh in favor of recognizing a privilege for corporate ombudsmen.[47] First, the company failed to present evidence —or even to argue—that the ombudsman method is more successful in resolving workplace disputes than other alternative dispute resolution methods.[48] The company also failed to present evidence to establish that its own ombudsman program was especially successful in resolving workplace disputes prior to the commencement of litigation.[49] Second, McDonnell Douglas failed to convince the court that most of the advantages afforded by the ombudsman method would be lost in the absence of a privilege.[50]

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[43] *Carman*, 114 F.3d at 793 (citing Hardwicke, L.C.J., *quoted in* 12 COBBETT'S PARLIAMENTARY HISTORY 675, 693 (1742), *quoted with approval in* United States v. Bryan, 339 U.S. 323, 331 (1950)).

[44] *Carman*, 114 F.3d at 793 (quoting *Trammel*, 445 U.S. at 50).

[45] *See Carman*, 114 F.3d at 793.

[46] *See id.*

[47] *See id.*

[48] *See id.*

[49] *See id.* Here, the court distinguished *Kientzy*, *supra* note 18, at 572, where the district court found that the office had received approximately 4800 communications since 1985. McDonnell Douglas presented no such evidence in the instant case. *See Carman*, 114 F.3d at 793.

[50] *See id.*

The court noted that even without a privilege, corporate ombudsmen have much to offer in the way of confidentiality, because they could make and keep a promise to keep employee communications confidential from management.[51] The court concluded that the denial of the privilege would not affect an ombudsman's ability to convince an employee that she is neutral, and the creation of an ombudsman privilege for civil litigation would not alleviate the employee's fear that the communications will be reported to management.[52]

The court also concluded that the denial of the privilege would not deter employees from bringing their complaints to corporate ombudsmen.[53] McDonnell Douglas argued that "no present or future [McDonnell Douglas] employee could feel comfortable in airing his or her disputes with the Ombudsman because of the specter of discovery."[54] This argument failed to persuade the court. The court stated that an employee with a meritorious complaint that he would prefer not to litigate would generally feel that he had nothing to hide and would be undeterred by the prospect of civil discovery from sharing his complaint with the ombudsman.[55] The court concluded that the "dim prospect" that the employee's complaint might again someday surface in an unrelated case was an "unlikely deterrent."[56]

In addition, McDonnell Douglas argued that failure to recognize the privilege would disrupt the relationship between management and the ombudsman's office.[57] The court was also unpersuaded by this argument. The court reasoned that a disruption in the management-ombudsman relationship would be unlikely in cases in which management had nothing to hide, and the court acknowledged that management would probably be less likely to share damaging information with an ombudsman in the

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[51] *See id.* at 793–794. The court stated its belief that an aggrieved employee's greatest concern, in deciding whether to confide in a company ombudsman, is not likely to be that the statement will someday be disclosed in civil discovery. Instead, most employees would fear that the ombudsman would be biased in favor of the company, and that the ombudsman would report the employee's statements back to management. *See id.* at 794.

[52] *See id.*

[53] *See id.*

[54] *Id.* (citing Appellee's Br. at 45).

[55] *See id.*

[56] *See id.*

[57] *See id.*

absence of a privilege.[58] However, McDonnell Douglas did not present evidence to this effect.[59] Accordingly, the court concluded that there is no reason to recognize an ombudsman privilege if the chilling of management-ombudsman communications would occur only in cases that would not have been resolved at the ombudsman stage anyway.[60]

Finally, the court distinguished *Kientzy*.[61] In *Kientzy*, the court based its decision on its view that confidentiality is essential to the function of the ombudsman's office because without that confidentiality, the ombudsman's office would be "just one more nonconfidential opportunity for employees to air disputes."[62] This reasoning did not persuade the Eighth Circuit Court of Appeals, which concluded that the corporate ombudsman would still be able to promise confidentiality in most circumstances, even without the privilege.[63]

Finally, the court stated the balancing test to be applied in determining whether to create a new privilege:

> To justify the creation of a privilege, McDonnell Douglas must first establish that society benefits in some significant way from the particular brand of privilege that confidentiality affords. Only then can a court decide whether the advantages of the proposed privilege overcome the strong presumption in favor of disclosure of all relevant information.[64]

The court then stated that "[t]he creation of a new evidentiary privilege is a big step" that it was not convinced to take based upon the record.[65]

VI. ANALYSIS

Prior to *Carman*, the only federal courts to have addressed the issue of the corporate ombudsman privilege were willing to recognize such a

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[58] *See id.*

[59] The court noted that McDonnell Douglas did not provide any reason to believe that management was eager to confess wrongdoing to ombudsmen when a privilege exists, or that ombudsmen are helpful at resolving disputes that involve violations of the law by management or supervisors. *See id.*

[60] *See id.*

[61] 133 F.R.D. 570 (E.D. Mo. 1991).

[62] *Id.* at 572.

[63] *See Carman,* 114 F.3d at 794.

[64] *Id.*

[65] *Id.*

privilege based upon the specific facts of the particular cases.[66] Neither court extended the protection to create a blanket privilege for communications made to corporate ombudsmen.[67] These courts did, however, establish a clear framework for the analysis of ombudsman privilege cases.[68] The four-factor test established in *Roy*[69] and applied in *Kientzy* provides courts with a framework in which to balance the conflicting interests between the strong public policy in the admissibility of relevant evidence[70] and the need for confidentiality in ombudsman-employee relationships.[71]

Viewed in this light, *Carman* may be seen as a case in which the defendant simply failed to produce enough evidence to swing the balance in favor of protecting the confidentiality of the communications. Although the *Carman* court paid only cursory attention to these prior cases and did not discuss the four factors set out in *Roy* and applied in *Kientzy*, the balancing test the *Carman* court created emphasizes the same issues. The court's main concern was the importance of the relationship that the privilege would foster. The *Roy* and *Kientzy* courts were convinced that the privilege was essential to maintaining the employee-ombudsman relationship. The *Kientzy* court recognized the importance of the ombudsman's office in resolving corporate disputes, and it concluded that the confidentiality afforded by the privilege was necessary to serve that purpose.[72]

However, McDonnell Douglas did not convince the *Carman* court that the ombudsman's office was necessary to resolving corporate disputes. The company failed to convince the court that the ombudsman method was more successful in resolving workplace disputes than other alternative dispute resolution methods, or that its own ombudsman program was especially successful in resolving workplace disputes prior to the

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[66] *See Roy,* Civil Cause No. H89-680 (JAC) (D. Conn. 1990); *Kientzy,* 133 F.R.D. at 570.

[67] *See Roy,* Civil Cause No. H89-680 (JAC) (D. Conn. 1990); *Kientzy,* 133 F.R.D. at 570.

[68] *See* Thompson, *supra* note 1, at 677. *See also* Garstang v. Superior Court of Los Angeles, 46 Cal. Rptr. 84, 88 at n.4 (Cal. Ct. App. 1995). (finding the *Kientzy* reasoning useful in considering whether, and under what circumstances, a qualified privilege should be extended to communications made before an ombudsman employed by a private educational institution).

[69] *See supra* note 16 and accompanying text.

[70] *See* Hardwicke, *supra* note 43.

[71] *See* Thompson, *supra* note 1, at 654.

[72] *See Kientzy*, 133 F.R.D. at 572.

commencement of litigation.[73] In addition, the court was not convinced that the creation of an evidentiary privilege was necessary to foster the employee-ombudsman relationship. The court emphasized in its opinion that the corporate ombudsman would still be able to guarantee confidentiality in many circumstances, even without the privilege.[74] In balancing the competing interests at stake, the court found that in this instance, the creation of a new evidentiary privilege was not justified.[75]

In all three cases, the courts applied a balancing test weighing similar issues. On that basis, the three cases can be reconciled. However, what the cases also show is that applying a balancing test to determine whether a privilege exists for corporate ombudsmen will yield different results based upon the evidence presented and the particular views of the court hearing the case. This introduces uncertainty into the relatively new and rapidly developing practice of using ombudsmen to resolve corporate disputes.[76] It has been argued that because ombudsmen serve varying roles in different corporations and resolve different types of disputes, a case-by-case analysis should be performed each time the issue of privilege is raised.[77] However, it has also been argued that the effectiveness of corporate ombuds programs rests on an employee's belief that information divulged will remain confidential, and destroying the employee's confidence in that confidentiality will destroy the corporate ombudsman program itself.[78]

VII. CONCLUSION

In light of the *Carman* decision and those preceding it, each court considering the ombudsman privilege will be forced to apply a balancing test and weigh the interest in disclosing relevant information against the interest in fostering the employee-ombudsman relationship in resolving corporate disputes. Without a clear legal standard on the existence of the

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[73] *See Carman*, 114 F.3d at 793.

[74] *See id.* at 794.

[75] *See id.*

[76] *See, e.g.*, Thompson, *supra* note 1, at 655–656.

[77] *See id.* at 677–678 (arguing that although the ombudsman-employee relationship is worthy of public interest and should be protected, a blanket privilege should not be created but each corporate ombudsman program should be reviewed on a case-by-case basis to ensure that it meets the requirements of public interest, neutrality and confidentiality).

[78] *See* Wibbenmeyer, *supra* note 3, at 379.

privilege, corporations will be forced to weigh the risk of disclosure of sensitive information during discovery against the benefit of internal resolution of corporate disputes. Employees will be forced to weigh the benefit of an efficient and economical means of resolving employment disputes against the possible disclosure of personal information to management in preparation for or during litigation.

Any corporation that hopes to invoke the ombudsman privilege will have to convince the court first that the ombudsman program is essential to resolving in-house disputes, and that this relationship is one that benefits society as a whole. In addition, any party hoping to invoke the privilege will need to prove that confidentiality is an essential component of this relationship. Finally, a court must be convinced that the benefits of confidentiality outweigh the strong policy interest in disclosure of relevant information. Only time will tell what effect this decision has on other federal courts that will be faced with the issue, as well as what impact the *Carman* decision will have on the future of corporate ombuds programs. As the programs continue to develop, so undoubtedly will this area of the law, as the privilege is recognized or denied on a case-by-case basis.

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