STATE OF WISCONSIN PERSONNEL COMMISSION

MAMIE JONES,

Complainant,

v.

DEPARTMENT OF NATURAL RESOURCES,

Respondent.

Case No. 78-PC-ER-12

INTERIM DECISION AND ORDER

This case is before the Commission on a complaint alleging discrimination with respect to conditions of employment and with respect to termination of employment, both based on complainant's handicap. Respondent has filed a motion opposing Commission jurisdiction and seeking dismissal of the complaint. The issue has been briefed by the parties. This Decision and Order goes only to the question of jurisdiction.

FINDINGS OF FACT

1. On April 11, 1978, complainant filed a charge of race and sex discrimination with the Equal Rights Division of the Department of Industry, Labor and Human Relations, which was forwarded to the State Personnel Commission for action.

2. On or about August 4, 1978, complainant was terminated by respondent.

3. On or about August 25, 1978, complainant and respondent were parties to an arbitration proceeding in which complainant grieved the

termination of her employment with respondent; sometime in late 1978 the arbitrator upheld the termination.

4. On May 21, 1979, Equal Rights Officer George Callan-Woywod issued an Initial Determination in which he found no probable cause to believe that race or sex discrimination had occurred but found probable cause to believe that discrimination based on handicap had occurred.

5. On July 24, 1979, respondent filed and served a motion to dismiss for lack of subject-matter jurisdiction.

6. On July 31, 1979 complainant filed with the State Personnel Commission a charge of discrimination identified as an amended complaint to the complaint dated April 5, 1978.

OPINION

I Position of the Parties

Respondent raises four major arguments against Commission jurisdiction. The first argument asserts that the original complaint had been dismissed by operation of law pursuant to Wis. Admin. Code § Ind 88.035 (1), when complainant failed to appeal within thirty days the equal rights officer's Initial Determination of no probable cause as to the race and sex discrimination issues. Therefore, the purported amendment of July 29, 1979 was, of necessity, a new, separate and untimely complaint. The second argument is that under the 1977-79 WSEU collective bargaining agreement, covering complainant and respondent, arbitration was the exclusive procedure for redress of complainant's discrimination claims. This assertion is based on the language of the

grievance procedure, Article IV, §41 et seq., and on Article XI, §1, "Discrimination," as these articles operate pursuant to §111.93(3), Stats., to supercede Commission jurisdiction. Respondent further argues that the race and sex issues were raised in the arbitration proceeding under the agreement, after complainant's dismissal from her job; the handicap issue was raised only after complainant lost her case in arbitration. The final argument is that respondent was prejudiced by the July 29, 1979 complaint because the original complaint did not set forth facts which supported a handicap discrimination charge. Respondent was therefore impossibly burdened in providing countervailing facts in the course of the equal rights officer's investigation of the complaint.

Complainant's position that this Commission has jurisdiction is based on four arguments. The amended complaint of July, 1979, arose out of the same continuing relationship and conduct as did the April, 1978 complaint. Respondent has not been actually prejudiced by the Initial Determination of probable cause as to handicap discrimination. The handicap issue was not presented to the arbitrator so that collateral estoppel does not apply here. The declared policy of the Fair Employment Act is to discourage discriminatory practices statewide. Therefore, arbitration cannot be the exclusive remedy in administering a statute which is not related to the general welfare of the state and which is not limited to employer-employe relations governed by collective bargaining agreements.

II. Discussion

A. Timeliness of Amended Complaint

Respondent's assertion that the complaint was dismissed by the operation of law pursuant to Wis. Admin. Code § Ind. 88.035(1), is incorrect in this case. While dismissal of a complaint may occur when no appeal is filed within 30 days from a finding of no probable cause, in this case there was a probable cause finding in the Initial Determination. Therefore, the handicap issue survived the failure to appeal the no probable cause findings as to the race and sex issues. The next question to consider is whether the July, 1979, amended complaint relates back to the original complaint of April, 1978.

Complainant relies on the concept that amendments relate back in time to the original pleadings where cause of action alleged in the later pleading arose from the same circumstances or transactions as those alleged in the earlier one. Respondent argues, however, that the original complaint of April, 1978,"does not indicate any statement which can be reasonably construed to indicate discrimination on grounds of handicap." (Respondent's Response Brief). A comparison of allegations in the two complaint forms and examination of the findings in the Initial Determination show a common thread of factual allegations and findings. The Initial Determination includes findings of fact which occurred after the April, 1978 complaint was filed and the amended complaint of July, 1979 also contain some of those facts. The additional facts arise, however, from the continuous transaction or circumstance of complainant's relations with her supervisor and with the personnel

staff of the agency. Both complaints allege a regular pattern of confrontations with complainant's supervisor, allegations of unequal disciplinary treatment with resultant nervousness, headaches, and other symptoms which led complainant to seek medical help. Complainant also alleges in both complaints that personnel employes in her agency were aware of her problems with her supervisor but that suggestions for alternating the problems were never implemented. The additional facts alleged in the July, 1979, complaint include continuation of these general conditions during the time of complainant's mother's death and funeral, and include disciplinary action taken shortly after her mother's funeral; and later an episode in which police were summoned to remove complainant from her workplace. The termination of complainant's employment was the last act alleged. Respondent claims that the initial complaint was based on race and sex discrimination and did not set forth facts supporting handicap discrimination charges so that respondent had an "impossible burden" to provide countervailing facts during the investigation of the case, respondent also pleads that witnesses' memories are dimmer and less able to rebut the factual allegations. These arguments are not sufficient to show any prejudice to respondent from proceeding on a charge of handicap discrimination. First of all, the additional facts were uncovered in the course of the equal rights officer's investigation, when all parties presumably had witnesses available. Secondly, the respondent's conclusory statement that complainant's facts do not support a charge of handicap discrimination is at this stage of the proceedings premature. The equal rights officer concluded after

investigation that the facts supported a finding of probable cause to believe handicap discrimination occurred. A hearing on the merits is the method for determining whether the facts are sufficient to support the charge.

The theoretical framework for permitting amendment of the complaint is well stated in several federal cases involving challenges to allegedly late amendments to EEOC complaints. Respondent argues that the results in EEOC cases can be differentiated from the state statute involved here because the Civil Rights Act of 1964 has a broad "relation back" provision for complaints which is not contained in the Wisconsin Fair Employment Act. The language of the federal decisions strongly suggests, however, that it is the policy concern of encouraging private settlement of employment discrimination cases and providing a forum for complaints acting on their own behalf that is the moving force in the liberal construction of amendment provisions. In this connection, complainant has cited Sanchez v. Standard Brands, Inc., 431 F. 2d 455 (C.A.5, 1970), where defendant challenged complainant's amendment of her original complaint by subsequently checking another box to indicate the type of discrimination she believed she had suffered. The court of appeals found that objections of this sort were merely legal technicalities constituting technical defects or omissions. The crucial element is the factual statement contained in the change, not whether the complainant supplies the correct legal conclusion. 431 F. 2d at 462. If the original complaint was timely, the later correction of technical defects refers back to the date

of original filing. The analogy from EEOC case to the investigation-conciliation model under the Wisconsin FEA is apt. The court in Sanchez emphasized the investigative function and the attempts to obtain voluntary compliance with the law. To accomplish this end, courts of law permit a wide scope of investigation based on a charge of discrimination; so that the underlying problems are identified and hopefully resolved.[1] Administrative hearings are generally more informal than judicial hearings, and the area of lay people's enforcement of anti-discrimination statutes is an area where liberality in procedural matters is particularly encouraged. The only new issue raised in the amended complaint is the inclusion of a possible legal conclusion omitted from the original complaint, complainant is not to be penalized for her inability to draw legal conclusions as to which box to check on the complaint form. This rationale is also the foundation for rejecting respondent's contention that complainant is estopped from raising the handicap discrimination issue now, because she failed to raise it along with other claims at the arbitration hearings.

B. Operation of §111.93(3), Stats., to Determine Commission Jurisdiction

The full text of Article XI, §1, paragraph 150, of the WSEU collective bargaining agreement provides that "[e]mployees covered under this agreement shall be covered by Wis. Stats., 111.31-111.37

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[1] A more recent case citing Sanchez for the proposition of broad statutory construction and liberal procedures where enforcement is often by means of complaint forms filled in by laymen who are not penalized for technical errors and omissions: Jenkins v. Blue Cross Mutual Hospital Insurance, Inc., 538 F. 2d 164 (CA 7 1976).

(State Fair Employment Act) as amended by Chapter 31, Laws of 1975." This language, for reasons discussed below, does not confer exclusive jurisdiction on an arbitrator under the agreement to administer the FEA for covered employes.

Under §111.93(3), Stats., a collective bargaining agreement supercedes applicable statutes, a) only as they relate to wages, hours and conditions of employment; and b) "whether or not the matters contained in the statutes are set forth in such labor agreement."

The phrase "wages, hours and conditions of employment" has evolved through administrative and judicial interpretation and application, into a term of art referring to mandatory subjects of bargaining.[2] Specific Labor Relations Act, §111.91(1), Stats. (SELRA).[3] The Wisconsin Supreme Court has stated that areas of mandatory bargaining under MERA are those primarily related to wages, hours and conditions of employment.[4] Subjects which have been held to be mandatory subjects of bargaining procedures followed in teacher evaluations; scope of and access to teacher personnel files; just cause standard for discipline

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[2]This interpretation has been applied in numerous declaratory rulings by the Wisconsin Employment Relations Commission under the Municipal Employment Relations Act, §111.70 through 111.77, Stats. (MERA).

[3]Although the relevant language of SELRA is more specific than that of MERA with respect to enumeration of certain subjects of bargaining, SELRA does also permit bargaining to the point of impasse with respect to wages, hours, and conditions of employment.

[4]Unified School District No. 1 of Racine Co. v. WERC, 81 Wis. 2d 89 (1977); Beloit Education Association v. WERC, 73 Wis. 2d 43, 54 (1976).

and dismissal; layoff and recall procedures; impact of proposed school programs and of class size on teachers' wages, hours and conditions of employment;[5] and the contracting out of work performed by bargaining unit employes.[6] Although these determinations have been made with reference to MERA, there is no persuasive reason to limit the rationale of these decisions to MERA alone, and there is good reason to maintain a certain uniformity of policy in administering public sector employe bargaining statutes. The major difference between MERA and SELRA with respect to the present case is that there is no counterpart in MERA to §111.93(3), Stats. Therefore, when there appears to be a conflict between a municipal agreement provision relating to wages, hours and conditions of employment and a municipal ordinance, administrative agencies and courts attempt to harmonize the two, rather than give effect to one over the other as a matter of law.

The sample listing of subjects primarily related to wages, hours and conditions of employment is included here to show the type of provisions which are considered in that category. The fact that Article XI, §1, paragraph 150, is set out in the collective bargaining agreement suggests only that the language was bargained for, not that it necessarily relates primarily to wages, hours and conditions of employment and therefore supercedes the Fair Employment Act. It is a difficult

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[5] Beloit Education Association, 73 Wis. 2d at 55-66.

[6] Unified School District No. 1 of Racine, 81 Wis. 2d at 103.

task to categorize a particular matter as to whether it is related to wages, hours and conditions of employment, because in certain ways almost everything an employer decides to do impacts to a degree on employes. This is why it is particularly important in the public sector to draw a line in each case, so that when "the governmental or policy dimensions of a decision predominate, the matter is properly reserved to decision by the representatives of the people."[7] Comparison of the nature of the subjects of bargaining listed above with the nature of the subject at issue here, coverage under the Fair Employment Act, shows a great difference in the kind of matter involved. The Fair Employment Act is a statutory enactment of "the public policy of the state to encourage and foster to the fullest extent practicable the employment of all properly qualified persons ...," §111.31(3), Stats. The Act sets up a comprehensive administrative scheme, including rule-making authority in the administering agency, investigatory and conciliatory authority and powers, and decision-making power in individual complaint cases. The decision to carry out public policy in this manner on a unified state-wide basis for all state agencies and employes was a decision of the state legislature "primarily related to the formulation or management of public policy."[8]

Respondent contends that the language of the collective bargaining agreement confers upon an arbitrator the exclusive authority to administer the FEA for all employes covered by the agreement. Respondent further

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[7] Id. at 102

[8] Id.

contends that the agreement language confers upon some person or persons unknown (possibly the arbitrator) the investigatory powers and resources as well as the conciliation powers and resources specified by statutes, so that an employe such as appellant has available under the collective bargaining agreement all rights and remedies otherwise available under the FEA. This conclusion is offered as argument to indirectly show that §111.93(3) operates to give effect to the agreement over the statute. The deciding question, however, is whether the statutory requirement for the operation of §111.93(3) has been met in this case. The requirement is that the provisions of the collective bargaining agreement be related to wages, hours and conditions of employment. If that condition is met, it is irrelevant whether greater or lesser rights and remedies are available under the agreement. The condition has not been met, however, and respondent's argument therefore, has no effect.

CONCLUSIONS OF LAW

1. The amended complaint dated July 29, 1979 was a timely amendment and relates back to the date of filing of the original timely complaint.

2. The WSEU 1977-79 collective bargaining agreement does not supercede, by operation of §111.93(3), Stats., the jurisdiction of the State Personnel Commission to hear the complaint on the merits.

ORDER

The respondent's motion to dismiss the complaint for lack of subject-matter jurisdiction is denied.

Dated: Nov. 8, 1979. STATE PERSONNEL COMMISSION

Charlotte M. Higbee
Commissioner

CMH:jmg

11/6/79