

STATE OF WISCONSIN -- -- --
BEFORE THE
DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS

Dr. P. V. N. Acharya,
Complainant-Appellant,

v.

Case #78-PC-ER-53
ORDER OF THE DEPARTMENT OF INDUSTRY,
LABOR AND HUMAN RELATIONS

Personnel Commission,
Respondent

This is an appeal to the Secretary of the Department of Industry, Labor and Human Relations, pursuant to Sec. 111.33(2), Stats. (1977), of a decision of the State Personnel Commission. That decision adopted a Hearing Examiner's Proposed Decision and Order which held that there was no probable cause to believe that the University of Wisconsin had engaged in unlawful discrimination against the Complainant, Dr. P. V. N. Acharya, by declining to consider him for employment as a Professor of Pathology in retaliation for his having filed an earlier charge of discrimination against the University.

Several years ago Dr. Acharya, an Indian national, filed charges of national origin discrimination against the University of Wisconsin after he was discharged from his position as Associate Scientist in the Department of Pathology. On February 5, 1975, this charge was the subject of a formal settlement agreement between the parties. On May 2, 1978, the faculty of the University of Wisconsin-Madison, Department of Pathology met and considered, among other items, a motion that it discuss the possibility of considering Dr. Acharya for an appointment as Professor of Environmental Biochemistry. The vote on the motion was 1 in favor and 16 opposed. On September 13, 1978, Dr. Acharya filed a complaint with the State Personnel Commission alleging that this decision by the Department of Pathology was taken in retaliation for his having filed the complaint which was resolved by the February 1975 settlement agreement, in violation of the Wisconsin Fair Employment Act.

On December 4, 1978, a Personnel Commission Equal Rights Officer made an Initial Determination that there was no probable cause to believe that the University had discriminated against the Complainant in retaliation for his past discrimination charge. Complainant appealed this no probable cause finding to the Personnel Commission, pursuant to Sec. 88.035, Wis. Adm. Code. On March 9, 1979, a Hearing Examiner for the Commission issued a Pre-Hearing Order which provided that (1) the Complainant would bear the burden of proving that there was probable cause to believe that he was unlawfully discriminated against in May of 1978, and (2) that the only issue before the Hearing Examiner was the charge of retaliation, and not the validity of the 1975 settlement agreement. A hearing to review the Initial Determination of no probable cause was held on May 17 and June 4, 1979. The Hearing Examiner issued a Proposed Decision and Order finding no probable cause on January 6, 1981. The Hearing Examiner's Proposed Decision and Order were adopted by the Commission on February 13, 1981.

On April 8, 1981, the Department of Industry, Labor and Human Relations, on Complainant's motion, remanded this matter to the Commission for the purpose of allowing the parties the opportunity to present arguments regarding Complainant's objections to the Proposed Decision and Order. These arguments were heard on August 20, 1981. On September 1, 1981, the Commission readopted its February 13, 1981 Order finding no probable cause. On October 2, 1981, Complainant filed this appeal on the merit, pursuant to Sec. 111.33(2), Stats. (1977).

Sec. 111.33(2), Stats. (1977), provides that the review of a Decision of the Personnel Commission by the Department shall be confined to the record and that the scope of review shall be the same as judicial review under 227.20, Stats. Sec. 227.20, Stats., provides that a court shall set aside an agency decision only where (1) it finds that the agency has erroneously interpreted a provision of law; or (2) it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record.

"Substantial evidence," as defined by the Wisconsin Supreme Court, is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Bucyrus-Erie Company vs. ILHR Department, 90 Wis. 2d 408, 418, 280 N.W. 2d 142 (1979), quoting Bell vs. Personnel Board, 259 Wis. 602, 609, 49 N.W. 2d 889 (1951). Substantial evidence does not mean preponderance of the evidence. In Robertson Transportation Company vs. PSC, 39 Wis. 2d 653, 658, 159 N.W. 2d 636 (1968), the Court stated

"Substantial evidence is not equated with preponderance of the evidence. There may be cases where two conflicting views may each be sustained by substantial evidence. In such a case, it is for the agency to determine which view of the evidence it wishes to accept."

An agency determination being reviewed under Chapter 227 will not be overturned because it is against the great weight and clear preponderance of the evidence. City of Superior vs. ILHR Department, 84 Wis. 2d 663, 666, 267 N.W. 2d 637 (1978). Rather, the agency's decision may be set aside on review only where, "upon an examination of the entire record, the evidence, including the inferences therefrom, is found to be such that a reasonable person, acting reasonably, could not have reached the decision from the evidence and its inferences." Bucyrus-Erie, supra, at 418, cited with approval in Hamilton vs. ILHR Department, 94 Wis. 2d 611, 618-19, 288 N.W. 2d 857 (1980).

The issues before the Department on this appeal are:

1. Did the Personnel Commission erroneously interpret any provision of law in concluding that there is no probable cause to believe the Complainant has been unlawfully discriminated against?
2. Is there substantial evidence in the record to support the Commission's finding that there is no probable cause to believe that Complainant has been unlawfully discriminated against?

"Probable cause" is defined in Sec. 1ND. 88.03(2), Wis. Adm. Code, which states:

"Probable cause exists when there is reasonable ground for belief supported by facts and circumstances strong enough in themselves to warrant a prudent person in the belief that discrimination probably has been or is being committed."

In order to establish that there is probable cause to believe that a respondent has engaged in unlawful discrimination by retaliation, a complainant must demonstrate a reasonable ground for belief that:

- (1) He participated in a protected activity (e.g., that he previously filed a discrimination complaint),
- (2) There was an adverse employment action (e.g., a refusal to hire complainant), and
- (3) There is a causal connection between complainant's participation in the protected activity and the adverse employment action.

Once a prima facie case of retaliation has been established, the burden of proof considerations set down in McDonnell-Douglas Corp. vs. Green, 411 U.S. 792, 802-803 (1973), apply. Aguirre vs. Chula Vista Sanitary Service, 542 F. 2d 779, 781 (9th Cir. 1976). In other words, the burden of proof then shifts to the respondent to come forward with a legitimate, non-discriminatory explanation for its conduct. If respondent succeeds in establishing such a non-discriminatory explanation, the complainant has the further burden of demonstrating that this supposed non-discriminatory reason for the action was in fact pretext.

In this case it is undisputed that the first two elements of a prima facie case of retaliation have been met, i.e. that (1) Dr. Acharya had filed an earlier discrimination charge against the University of Wisconsin, and (2) that he was not hired by the University as a Professor of Pathology in 1978. In order to determine whether the third element of proof has been met, i.e., whether there is probable cause to believe that there is a causal connection between these two acts, we must examine the evidence presented in the record.

In order to establish that there was a retaliatory motive behind the refusal to hire him, Complainant first had to establish that those who voted on considering him for employment in 1978 were aware of his earlier discrimination complaint against the University. Our examination of the record shows that of the 17 faculty members who voted on considering Dr. Acharya's request for employment, 16 testified at the hearing held in this matter. Of those 16, only 7 testified that they were aware of, or had heard rumors of, Dr. Acharya's earlier complaint. (The 7 witnesses who so testified were Drs. Inhorn, Lalich, Bloodworth, Gilchrist, Clifton, Huntington and Burkholder.) While Dr. Gilchrist did testify that she thought the fact that Dr. Acharya had at one time filed a complaint against the University was brought up at the May 2, 1978 meeting (Tr. 1-176), other witnesses stated that this fact was not mentioned at all during the meeting (e.g. Dr. Horbach's testimony at Tr. 1-192). Therefore it was permissible for the Commission to infer that the previous complaint was not discussed at the meeting. Moreover, of the 7

witnesses who testified that they were aware of, or had heard rumors of, the fact that Dr. Acharya had filed the complaint, four testified that this knowledge was not a factor in their decision on whether or not to consider employing him as a Professor of Pathology. (Dr. Inhorn, Tr. I-67; Dr. Lalich, Tr. I-100; Dr. Bloodworth, Tr. I-139; and Dr. Burkholder, Tr. II-167. Drs. Gilchrist, Clifton and Huntington were not questioned directly on this point.) This evidence supports the Commission's conclusion that Dr. Acharya's previous complaint was probably not a cause for the negative vote at the May 2, 1978 faculty meeting.

There is also ample evidence in the record from which the Commission could infer that the vote at the May 1978 meeting was unaffected by either (1) the University's 1976 rejection of a WIN proposal by Dr. Acharya, or (2) the University's denial of research space to Dr. Acharya in 1977. Further, each faculty member except Dr. Hartmann testified that they had received no communication from the University administration to the effect that Dr. Acharya should not be considered for appointment as a Professor of Pathology. Dr. Hartmann, who was incidentally the one faculty member who voted in favor of considering Dr. Acharya for employment, testified that he had received such a communication from the Dean of the Graduate School, but that this negative recommendation was based on factors other than Dr. Acharya's complaint against the University (Tr. II-192).

Dr. Acharya argues that the reasons put forth by the various faculty members of the Department of Pathology for not hiring him are merely pretextual. We find no evidence in the record to support this assertion. Drs. Goldfarb, Zurheim and Larson each testified that there were very limited opportunities for Professorial positions in the Department of Pathology. They further testified that the Department had established a priority system for new hirings which, at that time, did not include a position for Professor of Environmental Biochemistry (Tr. I-119, II-99 and II-105). Drs. Inhorn, Clifton, Zurheim and Gilbert each testified that at the time they voted on whether or not to consider employing Dr. Acharya, there were two positions available in the Department of Pathology and that both these positions required individuals with M.D. degrees. The Department was currently advertising for (1) a surgical Pathologist and (2) a Pediatric Pathologist (Tr. I-59, II-86, II-96, and II-172). It is undisputed that Dr. Acharya does not possess an M.D. Further, there was testimony by several of the faculty members that funds were very limited and that space was too limited to consider increasing the faculty beyond the two positions advertised (Tr. I-100, I-136, I-127). No evidence was adduced to suggest that these considerations of money and space and higher priorities were pretextual.

Dr. Hartmann testified that the reason he made the original motion to consider hiring Dr. Acharya was that he wanted to sound out the department as to the need for adding a new subdivision in Environmental Biochemistry. Dr. Hartmann testified that once it was decided there was not a need for such a new subdivision, Dr. Acharya's qualifications were not discussed in detail (Tr. II-180 to II-187). Dr. Bloodworth also testified that there was no detailed discussion of Dr. Acharya's qualifications since there was no position available in his field at that time (Tr. I-115).

The only evidence put forth by Complainant in the record that indicates a possible retaliatory motive on the part of the Department of Pathology is a statement made by Dr. Inhorn at the time Dr. Acharya was applying for a fellowship in 1977. Dr. Coleman testified that Dr. Inhorn stated to him at that time that Dr. Acharya would not get laboratory facilities at the University because he had "burned his bridges with regard to the University." However, there is no evidence in the record to support Dr. Acharya's assertion that this reference was made in regard to Dr. Acharya's earlier complaint of national origin discrimination against the University. A statement by Dr. Carl U. Smith regarding Dr. Acharya's troubled relationship with researchers at the McArdle Cancer Research Laboratory suggests that this relationship and not the earlier discrimination complaint, may have been the basis for Dr. Inhorn's "burned bridges" comment. We believe that it was permissible for the Commission to infer that this quote, standing alone, was not sufficient to establish that the reasons set forth above by the various faculty members for not hiring Dr. Acharya were pretextual.

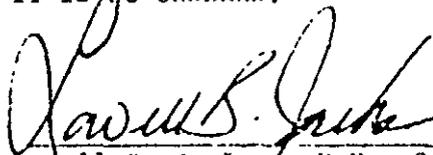
Based upon the foregoing, we conclude that Dr. Acharya has failed to establish that there is a probability that the vote not to consider him for employment as a Professor of Pathology was causally connected to his earlier discrimination complaint. We further conclude that there is substantial evidence in the record to support the Commission's determination that there was no probable cause to believe that Dr. Acharya had been lawfully discriminated against in retaliation for his having filed an earlier charge of discrimination against the University of Wisconsin. Finally, we also find that the Commission has correctly interpreted and applied the law regarding retaliatory discrimination. Therefore, the Commission's determination that there is no probable cause to believe the Complainant was discriminated against by the Respondent because of retaliation on account of having filed a previous charge of national origin discrimination in connection with the failure of the Department of Pathology on May 2, 1978 to hire Complainant must be sustained.

FR:cs/010911

APPEAL RIGHTS

Pursuant to s. 111.33(2), Laws of 1977, this decision may be appealed to the Labor and Industry Review Commission by filing an appeal with the Commission's office in Madison within 20 days from the date that this decision is mailed.

IT IS SO ORDERED:



Lowell B. Jackson, P.E., Secretary
Department of Industry, Labor & Human Relations

Signed and mailed this 20th day of November, 1981 to the following parties:

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