STATE OF WISCONSIN PERSONNEL COMMISSION

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CLIVE ADAMS,

Complainant,

v.

Secretary, DEPARTMENT OF NATURAL RESOURCES, and Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS,

Respondents.

Case No. 80-PC-ER-22

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INTERIM DECISION AND ORDER

This matter is before the Commission pursuant to s.111.36(3), Wis. Stats., after the issuance of a probable cause determination.

Complainant filed a Charge of Discrimination with the Commission on March 3, 1980. Complainant alleged that he had been discriminated against by respondents on the basis of race and color. Complainant charged that respondents' failure to interview or select him for various Program Analyst II positions during the period from June 1979 through August 1979 was improper.

On September 21, 1981, an Equal Rights Officer issued an initial determination that there was "probable cause to believe that complainant was discriminated against due to race." During the course of his analysis, the Equal Rights Officer stated:

> Though complainant did not file such a charge, it should be noted that the evidence is the type which could also support a charge of retaliation under the Fair Employment Act.

In preparation for hearing, a prehearing conference was held on December 14, 1981. The proposed issues for hearing were stated in the prehearing conference report as follows:

> 1. Did the respondent discriminate against the complainant on the basis of race, as set out in the charge of discrimination.

2. Did the respondent discriminate against the complainant on the basis of retaliation?

The respondents objected to the second issue as set forth above on the following grounds:

a. The Initial Determination makes no determination of Probable Cause for discrimination on the basis of retaliation; and

b. Retaliation is distinct from the other causes of discrimination alleged in appellant's complaint. Retaliation was not part of the original charge and the charge may not be amended now since the 300 day time limit has expired.

The parties agreed to have the Commission rule on the objection to the second issue without the submission of briefs.

The Commission obtains its jurisdiction over discrimination complaints pursuant to s.230.45(1)(b), Wis. Stats., which requires the Commission to "[r]eceive and process complaints of discrimination under s.111.33(2)." The latter provision merely indicates that only those discrimination complaints against a state agency as the employer are to be handled by the Commission.

Procedures for the Commission's equal rights cases are found in Chapter PC 4, Wis. Adm. Code. The rules indicate that a hearing can only be held after an initial determination has been made:

> When there is an initial determination of no probable cause ... ... the complainant may petition the commission for a hearing on the issue of probable cause wherein the commission may affirm or reverse the initial determination. [s.PC 4.03(3), WAC]
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> If, after a determination of probable cause, the commission is unable to eliminate the alleged discriminatory practice or act through conciliation, it shall issue and serve a written notice of hearing. The notice shall require that the respondent answer the allegations in the complaint at a hearing before the commission. [s.PC 4.07(1) WAC]

Although the rules do not expressly address the particular question raised by the instant appeal, there are strong policy considerations preventing a complainant from unilaterally expanding the scope of his discrimination charge during the hearing stage. Allowing a complainant to completely bypass the investigation stage would both increase the likelihood of unnecessary hearings and decrease the opportunity for conciliation.

If the Commission were to rule on the merits of the second (retaliation) issue proposed at the prehearing conference, it would be going beyond the scope of the initial determination. For the reasons outlined above, the Commission restricts the scope of the hearing in this matter to those charges of discrimination for which a probable cause determination has been issued.

Even though complainant is not allowed to broaden the scope of the hearing at this time, he would appear to have the right to amend his discrimination complaint to include a retaliation charge. The effect of the amendment would be to allow an initial determination to be issued on the additional charge of retaliation. Depending upon the conclusion reached in that initial determination, consolidation into one hearing for disposition of the entire matter may prove to be appropriate.

Pursuant to s.111.36(1), Wis. Stats., a discrimination complaint must be filed "no more than 300 days after the alleged discrimination ... occurred." That provision was satisfied by the filing of the original complaint in this matter on March 3, 1980.

Amendment of a complaint is specifically provided for in s.PC 4.02 (4), WAC:

> Subject to the approval of the commission, a complaint may be amended or withdrawn.

No other provision of either the statutes or rules would appear to restrict the amendment of a discrimination complaint, even after an initial determination has been issued.

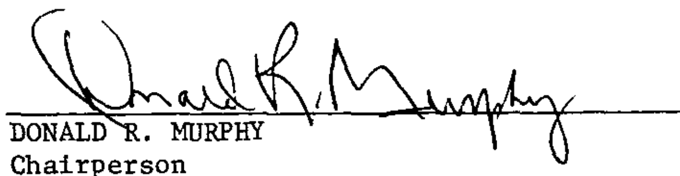
In this particular case, the complainant would be amending his charge to include another <u>cause</u> of discrimination without expanding upon the complaint's factual allegations. These circumstances are similar to those addressed by the court in <u>Bernstein v. National Liberty International Corp.</u>, 407 F. Supp. 709, 11 EPD ¶10,923 (DC Pa, 1976). In Bernstein, the plaintiff had sought to amend the original charge of discrimination due to religion by adding a sex discrimination charge, <u>after</u> the period for filing an original complaint had run. The court concluded that the failure to designate a discrimination charge as sex discrimination was a technical defect correctable by an amendment to the complaint where the amendment could "relate back" to the original charge of religious discrimination for time limit purposes. Based upon the court's conclusion in <u>Bernstein</u> as supported by the EEOC relation-back regulation (29 C.F.R. s1601.11(b)), it would appear that Mr. Adams should be allowed to amend his original complaint to include a charge of retaliation. See also <u>Sanchez v. Standard Brands, Inc.</u>, 431 F. 2d 455 (5th Cir., 1970).

ORDER

Unless an initial determination is issued on an added charge of retaliation, the issue in this matter shall read as follows:

> Did the respondent discriminate against the complainant on the basis of race, as set out in the charge of discrimination.

Dated: Jan 8, 1982 STATE PERSONNEL COMMISSION



DONALD R. MURPHY
Chairperson

KMS:ers

Parties

Clive Adams
1714 Northport Dr., #3
Madison, WI 53704

Carroll Besadny
5th Floor, GEF 2
101 S. Webster St.
Madison, WI 53702

Hugh Henderson
149 E. Wilson St.
Madison, WI 53702