STATE OF WISCONSIN PERSONNEL COMMISSION

KAREN A. CHADWICK,

Complainant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 81-PC-ER-14

DECISION
AND
ORDER

NATURE OF THE CASE

This is a complaint of discrimination pursuant to §230.45(1)(b), stats.

FINDINGS OF FACT

1. This complaint, filed in 1981, is with respect to a transfer between shifts at the Mendota Mental Health Institute (MMHI).

2. In discrimination complaints filed with the Equal Rights Division of the Department of Industry, Labor and Human Relations (DILHR) in 1977, certain employes of MMHI (Allen, Garro, and Sadler), not including the complainant in this case, alleged that the then current MMHI policy of requiring males only for certain positions (this policy will be referred to as the first BFOQ) constituted sex discrimination in violation of the Wisconsin Fair Employment Act. Respondents were the DHSS, the State Affirmative Action Office (in DER), and the Union (Local 13, Council 24). Similar charges alleging violation of Title VII were filed with the United States Equal Employment Opportunities Commission (EEOC). Additionally, the U. S. Law Enforcement Assistance Agency (LEAA) threatened to cut off funds as a result of the implementation of the first BFOQ.

3. The complainants and respondents, DER and DHSS entered into a prehearing Settlement Agreement and General Release dated January 30, 1980, Respondent's Exhibit 1.

4. This settlement agreement was incorporated by reference in an order entered February 14, 1980, by the Equal Rights Division dismissing the complaints. See Respondent's Exhibit 2.

5. In a "Determination" entered by the EEOC on May 21, 1980, it was indicated that the matter in controversy had been successfully settled by the settlement agreement, concluded that the remedies and relief granted were comparable in scope to the remedies and relief mandated by Title VII, and stated that the EEOC's processing of the charge was concluded. See Respondent's Exhibit 3.

6. The aforesaid settlement agreement included in part the following provisions (these provisions constitute what will be referred to as the second BFOQ):

> SECOND: The Department of Health and Social Services, Mendota Mental Health Institute (hereinafter "MMHI") shall, at the request and with the consent of the Complainants, submit to the department of Employee Relations, Division of Personnel, an amendment to MMHI's November 1976 approved Male and Female Bonafide Occupational Qualification Staffing Plan, as amended, as follows:
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> A. The BFOQ Plan shall apply to Institution Aid classifications only.
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> B. That the plan shall provide that approximately fifty percent of the Institution Aid positions shall be and have a Bonafide Occupational Qualification as male and approximately fifty percent of the Institution Aid positions shall be and have a Bonafide Occupational Qualification as female. MMHI is not required to change full time positions to two half time positions to meet this requirement.
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> C. That the 50/50 ratio of male to female BFOQ positions shall continue to apply if there is an increase or decrease in the number of Institution Aid positions. MMHI is not required to change full time positions to two half time positions to maintain their ratio.
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> THIRD: MMHI reserves the right to assign and reassign its Institution Aid positions among several treatment units. MMHI also reserves the right to determine the method of deployment of the BFOQ positions to the several treatment units in the most appropriate and efficient manner possible and in the best interests of

> safe, therapeutic nursing care. The reassignment of a person of the "correct" sex to a position shall be in all other respects governed by the provisions of the agreement between the State of Wisconsin and the Wisconsin State Employes Union and the Local Agreement.
>
> FOURTH: Notwithstanding MMHI's right to assign and reassign the BFOQ Institution Aid positions among several treatment units, in the event that it is necessary to provide temporary coverage or additional coverage for any unit or any shift, said coverage will be obtained without adhering to the designated BFOQ ratio for that unit, but according to management's best judgment about patient care needs at that time. Should overtime be necessary, that overtime shall be offered and paid pursuant to the provisions of the contract between the State of Wisconsin and the Wisconsin State Employes Union and the Local Agreement.
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> FIFTH: In order to implement the provisions of this Settlement Agreement in a fair and equitable manner and to insure a continuation of the appropriate care and treatment provided for MMHI's residents, it is agreed:
>
> A. That the change in the current overall ratio of male to female BFOQ Institution Aid positions to the ratio authorized by the amended BFOQ plan and this Agreement shall be accomplished by attrition and the filling of vacant Institution Aid positions.
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> B. That all vacancies in the Institution Aid classification shall be filled by females until the 50/50 ratio of males to females authorized by the approved BFOQ plan and this Settlement Agreement is achieved.
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> C. If an Institution Aid vacancy cannot be filled by transfer or reinstatement of a female Institution Aid, the vacancy shall be filled by appointment after selective certification of an approved register.
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> D. That after the ratios of male to female Institution Aids set forth in the approved BFOQ plan have been achieved, Institution Aid vacancies shall be filled by appointment of persons of the sex necessary to insure the maintenance of the approved ratio.

7. The shift changes which precipitated the filing of this complaint by Ms. Chadwick were the result of respondent's efforts to comply with the aforesaid settlement agreement which included the second BFOQ.

8. Ms. Chadwick was transferred to a night shift position in January 1981. She continued on the night shift until April 18, 1981, when she commenced maternity leave. She returned from maternity leave on June 29, 1981, whereupon she was reassigned to a daytime shift.

9. The background to the first BFOQ is as follows:

a. The work force at MMHI in the institution aide and licensed practical nurse classifications was becóming increasingly female.

b. It was necessary for effective programs at MMHI to have available some employes of the same sex as patients for purposes of privacy in bathing, toilet functions, etc., role modeling and counseling.

c. In this regard, it was desirable to have at all times at least one member of each sex available on each unit.

d. To attempt to accomplish the aforesaid goal, the first BFOQ involved a calculation of the number of males and females needed in the aide/LPN work force to ensure the presence of at least one member of each sex on each unit at all times. This calculation resulted in the designation of 50% of the aide/LPN positions as male and 50% female, with a 10% permissible variation in either directions.

10. The first BFOQ differs from the second BFOQ mainly in that the latter applies only to Institution Aid positions, and not to LPN positions.

11. As a result of the second BFOQ, it was impossible to have at least one employe of each sex on all units at all times. If an employe of a particular sex was not available on a unit when needed, one had to be called temporarily from another unit.

12. The second BFOQ, as set forth in Respondent's Exhibit 1, and excerpted in Finding #6, is no longer in effect at MMHI.

CONCLUSIONS OF LAW

1. This complaint is properly before the Commission pursuant to §§230.45(1)(b) and 111.33(2), stats.

2. The respondent is an employer within the meaning of §111.32(3) stats.

3. The settlement of the complaints filed by Allen, Garro, and Sadler does not act as a bar to consideration by the Commission of the merits of the instant complaint.

4. The complainant has the burden of proving that the shift transfer affected by the institution was made pursuant to a BFOQ plan invalid under §111.32(5)(g)5., stats., and hence discriminatory under §111.32(5)(g), stats.

5. The complainant has not sustained her burden of proof.

6. The shift transfer or transfers effected by the institution was not made pursuant to a BFOQ plan invalid under §111.32(5)(g)5., stats., and hence was not discriminatory under §111.32(5)(g), stats.

OPINION

In this case, certain employes filed discrimination complaints, attacking the first BFOQ at MMHI, with agencies which had jurisdiction over such complaints.[FN] As a result of settlement agreements which were approved by both the EEOC and the Equal Rights Division, the respondent altered the BFOQ and effected the transfer at issue. The respondent argues to this Commission that this complaint constitutes a collateral attack on the settlement agreement and should be rejected on this basis.

Prate v. Freedman, 430 F. Supp. 1373, 16 FEP Cases 524 (W.D.N.Y. 1977); affirmed, 573F.2d 1294, 16FEP Cases 532 (2d Cir. 1977), involved a Title VII

[FN] State jurisdiction over such equal rights complaints against state agencies as employers was transferred from the Equal Rights Division to the Personnel Commission by Chapter 196, Laws of 1979, effective February 16, 1978.

"reverse discrimination" claim challenging certain hiring practices utilized by the Rochester, New York, police department. These practices had been implemented as a result of a consent decree entered in an earlier Title VII case, in which the Prate plaintiffs had not participated. The defendants in Prate argued that the suit constituted an impermissible collateral attack on the final order in the earlier litigation. The court agreed with the respondent's argument:

> I must follow the line of legal precedent cited in Oburn and Construction Industry. This suit constitutes an impermissible collateral attack on Judge Burke's ruling in Howard. The plaintiffs in this case should properly have sought timely intervention in the Howard case, but failed to do so as ruled in my June 22, 1976 decision. To permit further challenge of the Howard consent decree would clearly violate the policy under Title VII to promote settlement, Otis v. Crown Yellerbach Corp., 398 F.2d 496, 498, 1FEP Cases 328, 329, 68 LRRM 2782 (5th Cir. 1968). This would also result in continued uncertainty for all parties involved and render the concept of final judgments meaningless. (f. Class v. Norton, 505 F.2d 123, 125 (2d Cir. 1974).

A similar question in the Title VII context was discussed in Dennison v. City of Los Angeles, 26 FEP Cases 1739, 1740-41 (9th Cir. 1981):

> The union contends that the [district] court erred in refusing to compensate non-minority employes denied promotions as a result of an affirmative action program established pursuant to a consent decree between the Department and Division. The district court held that the IBEW action was barred as a collateral attack on the consent decree.
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> * * *
>
> It is settled that a consent decree is not subject to collateral attack ... IBEW contends, however, that it is not contesting the validity of the decree, rather it seeks monetary relief for those non-minority employes adversely affected by the affirmative action provision. The district court properly rejected this argument as substantively, albeit not formally, an impermissible collateral attack.
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> * * *

> Awarding compensatory relief to the non-minority employes would impose conflicting or inconsistent obligations on the Department ... The decree established who was entitled to promotion, and the present action indirectly seeks to confer the benefits of promotion on others. The relief sought in the present action is accordingly in conflict with the decree.
>
> Moreover, we feel that permitting the IBEW to sue for compensation would be inimical to the policy underlying Title VII of promoting settlements... The Department would in effect be forced to walk a tightrope. If it refused to enter into the consent decree, it would be potentially liable to the Division class plaintiffs. If it did enter into the agreement, it would be subject to suits for compensation by non-minority employes."

These decisions well describe the problems caused by a collateral attack on a consent decree, or, for that matter, any employment practices effected as a result of litigation or administrative proceeding. The employer potentially is subject to a whipsaw effect as new groups of employes adversely affected by mandated changes challenge those changes, perhaps before different agencies with overlapping jurisdiction, which may reach different conclusions about the challenged practice.

The instant case vividly illustrates this type of problem. A decision by this Commission that the latest BFOQ offends the Wisconsin Fair Employment Law would place the respondent squarely between conflicting agency mandates. The anomaly is exacerbated by the fact that this Commission is the successor agency to ERD, which approved the BFOQ in question.

There are countervailing factors. Although the new BFOQ was approved by the agencies, this occurred before a hearing and the opportunity for the agencies to scrutinize completely all of the facts therefore was somewhat limited. Also, the complainant in this matter was not parties to the earlier proceedings which lead to the settlement agreement. If the settlement agreement is considered binding and conclusive, they will have been

denied the opportunity to have challenged in a substantive manner the new BFOQ, which has had an adverse effect on them. This result appears to run counter to well-settled legal principles. See 2 AM Jur 2d Administrative Law §504:

> The general rule, applicable to judgments, that a prior determination operates as res judicata or collateral estopped between the parties to the prior proceeding or those in privity with them, but not as to strangers, applies to administrative determinations. But also, as in the case of judgments, the strict rules are sometimes expanded so as to include persons bound by an administrative determination those who were not technically parties to the prior proceeding but who are connected therewith by their interest and a right to participate therein.

There is no indication on this record that the the complainant had a common interest with any party to the earlier proceeding. There is no indication as to what Local 13's position was, and, for reasons not apparent on this record, it did not sign the settlement agreement. In this connection, it is noted that in Prate v. Freedman the court specifically noted that "...the plaintiffs had notice of the terms of the consent decree but failed to act at that time." 16 FEP Cases at 525.

There is no indication that the complainant here had any comparable notice. Similarly, in Dennison v. City of Los Angeles, the party contesting the consent decree on appeal had had an opportunity to and did participate in the proceeding before the district court and to present its objections to the consent decree.

Given the fact that the complainant was not afforded an opportunity to be heard in the prior proceeding, it also appears that a reliance on that settlement agreement to foreclose their right to be heard on the merits here would violate their rights under the Administrative Procedure Act, see

§227.07(1), stats.: "In a contested case, all parties shall be afforded an opportunity for hearing after reasonable notice." See also §227.064(1), stats.

For these reasons, the Commission concludes that, despite the obvious burden that this places on the respondent, the complainant is entitled to challenge the BFOQ that resulted from the consent decree. Therefore, the Commission will address the merits of this controversy.

The Wisconsin Fair Employment Law (Subchapter II of Chapter 111, stats.) explicitly sets forth the prerequisites for a bona fide occupational qualification (BFOQ). See §111.32(5)(g) 5.:

> For the purposes of this paragraph, sex is a bona fide occupational qualification where all of the members of one sex are physically incapable of performing the essential duties required by a job, or where the essence of the employer's business operation would be undermined if employes were not hired exclusively from one sex.

The first prerequisite obviously is not present here. As to the second prerequisite, an initial question is whether the undermining "of the essence of the employer's business operation" can apply to a state agency. The dictionary definition of "business" does not restrict the term to the carrying on of commerce, but also includes the following:

> one's work, occupation, or profession, a special task, duty, or function; rightful concern or responsibility; a matter, affair, activity, etc." Webster's New World Dictionary (Second College Edition), p. 192.

Thus, if the essence of a program of a state agency would be undermined if employes were not hired exclusively from one sex, presumably a BFOQ would be justified.

The record in this matter was quite limited. The respondent presented only one witness, the then director of MMHI. He testified that there was a requirement of at least a minimal number of patient-care employes of the same sex as patients in order to meet privacy needs and for effective role modeling and counseling. While Ms. Chadwick testified that it had never been necessary for her to have called on a male employe to assist in these areas with male patients, she also testified that the male employes she escorted to the bathrooms were able to enter the bathrooms by themselves and perform toilet functions without assistance. On this record, the basic need for BFOQ was not rebutted.

The second BFOQ was based on the same needs as the first BFOQ but reduced the number of positions subject to a sex-based qualification. This record reflects that as a result of the second BFOQ, there no longer was at least one employe of each sex on each unit at all times, but if needed an employe of a particular sex could be called from another unit. The second BFOQ may be said to be narrower in the sense that it affected fewer positions, while at least attempting to meet the basic needs identified as the rationale for the BFOQ in general. Again, on this record, it cannot be concluded that the second BFOQ did not meet the criteria of §111.32(5)(g) 5., stats., because of the changes from the first BFOQ.

ORDER

The Commission having found that the respondent did not discriminate against the complainant, this complaint of discrimination hereby is dismissed.

Dated: April 2, 1982 STATE PERSONNEL COMMISSION

AJT:jmf

DONALD R. MURPHY, Chairperson

JAMES W. PHILLIPS, Commissioner

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