

STATE OF WISCONSIN

PERSONNEL COMMISSION

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FREDDIE A. LOTT

Complainant,

v.

Secretary, DEPARTMENT OF
REVENUE,

Respondent.

Case No. 81-PC-ER-71

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INTERIM
DECISION
AND
ORDER

This complaint of discrimination is before the Commission on respondent's objection to subject matter jurisdiction.

This matter involves a charge that the complainant was retaliated against because he had filed previous charges of discrimination on the basis of race. The respondent contends that the statutes in question, Subchapter II, Chapter 111, Stats., (1979-80), do not prohibit discrimination on the basis of retaliation for having opposed discriminatory practices as to race, or for having filed a complaint of race discrimination.

This subchapter, which was in effect at the time the instant complaint was filed on July 6, 1981, defines "discrimination" generally as follows, §111.32(5)(a):

'Discrimination' means discrimination because of age, race, color, handicap, sex, creed, national origin, ancestry, arrest record or conviction record ... against any employe or any applicant for employment ... in regard to hire, tenure or term, condition or privilege of employment....

The statute goes on to define more specifically discrimination because of age, handicap, sex, and arrest record. There is no further definition of discrimination because of race. The definitions of age and sex discrimination include specific definitions of discrimination on the basis of retaliation:

, §111.32(5)(b) It is discrimination because of age:

* * *

3. For any employer ... to discharge or otherwise discriminate against any person because he has opposed any discriminatory practices under this section or because he also made a complaint, testified or assisted in any proceeding under this section.

* * *

(g) It is discrimination because of sex:

* * *

2. For an employer ... to discharge or otherwise discriminate against any person because he has opposed any discriminatory practices under this section or because he also made a complaint, testified or assisted in any proceeding under this section.

The Commission rules provide at §PC 4.02(3), Wis. Adm. Code, as follows:

Retaliation. Complaints of harassment and retaliation because of previously filed complaints, testimony or assistance in any proceeding under subch. II ch. 111, will be received and processed in the same manner as other complaints.

In interpreting these provisions, the Commission must keep in mind the mandate of the legislature set forth in §111.31(3), Stats.:

In the interpretation and application of this subchapter, and otherwise, it is declared to be the public policy of the state to encourage and foster to the fullest extent practicable the employment of all properly qualified persons regardless of their age, race, creed, color, handicap, sex, national origin or ancestry. This subchapter shall be liberally construed for the accomplishment of this purpose. (emphasis supplied)

The definition of race discrimination set forth in §111.32(5)(a), Stats., is extremely broad. After setting forth the subject of discrimination, the statute states who is covered ("by an employer or licensing agency individually or in connect with others, against any employe or any applicant for employment or licensing") and what employment transactions are covered ("in regard to hire, tenure or term, condition or privilege of employment or licensing....") In a fundamental sense, the essential, operative meaning of discrimination is undefined.

For example, the discharge of an employe solely because of his or her race undoubtedly would fall within the definition of discrimination but the statute does not say that discrimination because of race includes an adverse personnel action taken because of the employe's race.¹ Rather, such a transaction is included because it fits within the general statutory concept of discrimination because of race, inasmuch as it is an adverse personnel action with a causal racial element.

To take another example, if an employe were discharged solely because of a non-work relationship with a member of another race, would this fall within the definition of race discrimination set forth within §111.32(5)(a), Stats.? Again, it would appear to the Commission that this falls within the concept of an adverse personnel action with a causal racial element and so would be within the coverage of §111.32(5)(a), Stats.

¹ Compare, 42USC §2000e (Title VII of the 1964 Civil Rights Act), §703(a)(1) "It shall be an unlawful employment practice for an employer... to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual ... because of such individual's race (emphasis supplied)

To reach the case at hand, where an employer allegedly denies employment to a person because he or she had filed a complaint of race discrimination, this appears to be an adverse personnel action with a causal racial element--the complainant's prior complaints of alleged racial discrimination.

The respondent's argument that §111.32(5)(a), Stats., does not cover retaliation in connection with a person's involvement in opposing race discrimination, and that the Commission's rule, §PC 4.02(3), Wis. Adm. Code, is invalid as in excess of the Commission's statutory authority, is summarized in its brief at page 4:

The Commission by rule is attempting to make all retaliation unlawful. If the legislature had intended to make all retaliation unlawful, it could have easily done so. It did not. At the time of the alleged action, the only retaliation that was unlawful was the retaliation in regards to practices relating to sex and age.

Implicit in the respondent's argument is the theory that because only the provisions defining sex and age discrimination specifically set forth prohibitions against retaliation, that the definition of race discrimination does not cover retaliation.

As discussed above, in the Commission's opinion the general definition of race discrimination, §111.32(5)(a), Stats., includes retaliation in connection with opposition to race discrimination. Furthermore, it has been observed that because of:

...the innumerable amendments to the original 1945 statute... the traditional maxims of statutory construction cannot be applied to the statute as if it were a coherent whole passed by one legislature with full consideration of the interrelationship of the parts. 1975 Wis. L. Rev. 696.

The approach to statutory analysis urged by the respondent would be to apply the maxim of expressio unius est exclusio alterius (the mention of one thing implies the exclusion of another) to foster uncertainty, and

to produce an absurd result--the Fair Employment Act, as interpreted by the respondent, would prohibit retaliation in connection with opposition to age and sex discrimination, but not with respect to race discrimination. In this connection, see Wis. Environmental Decade v. Public Service Commn., 84 Wis . 2d504, 528-529, 267 N.W. 2d 609 (1978):

Statutes are to be construed to avoid an unreasonable or absurd result... This court will always reject an unreasonable construction of a statute where a reasonable construction is possible.

Therefore, the Commission concludes that it has jurisdiction over this complaint of discrimination and that the respondent's objection to subject matter jurisdiction should be overruled.

ORDER

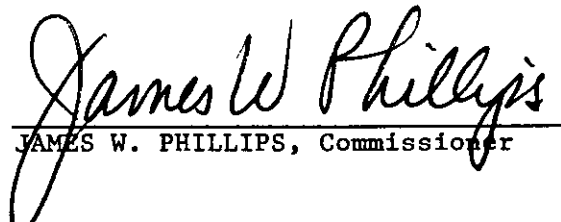
The respondent's objection to subject matter jurisdiction is overruled.

Dated: March 4, 1983 STATE PERSONNEL COMMISSION


DONALD R. MURPHY, Chairperson

AJT:jmf


LAURIE R. McCALLUM, Commissioner


JAMES W. PHILLIPS, Commissioner

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