

STATE OF WISCONSIN

PERSONNEL COMMISSION

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CECIL HARRIS, \*  
\*  
Complainant, \*  
\*  
v. \*  
\*  
Secretary, DEPARTMENT OF \*  
HEALTH AND SOCIAL SERVICES, \*  
\*  
Respondent. \*  
\*  
Case Nos. 84-0109-PC-ER \*  
85-0115-PC-ER \*  
\*  
\* \* \* \* \*

DECISION ON  
MOTION FOR STAY

This matter is before the examiner on respondent's motion for a stay of proceedings filed July 17, 1987. Complainant opposes the motion.

These are consolidated cases under the Wisconsin Fair Employment Act (FEA), Subchapter II, Chapter 111, Stats., which were heard before the examiner on May 19-21, 1987, pursuant to the following notice of issues for hearing:

85-0015-PC-ER  
Whether there is probable cause to believe respondent discriminated against complainant on the basis of retaliation with respect to harassment resulting in a forced resignation/constructive discharge.

84-0109-PC-ER  
Whether respondent discriminated against complainant on the basis of age and handicap with respect to failure to accommodate, and whether there was any resulting forced resignation discharge.

At the close of the hearing the parties elected to file post-hearing briefs with the examiner. However, the briefing schedule has been suspended pending the resolution of respondent's motion for a stay of proceedings.

Attached to respondent's motion is a copy of a complaint complainant filed in the U. S. District Court for the Western District of Wisconsin

under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S. C. 3621 et seq., on March 6, 1987, and which was served on counsel for respondent on May 26, 1987. In that complaint it is alleged, inter alia, that respondent DHSS through its agents intentionally and willfully denied complainant a scheduling officer position at Lincoln Hills School because of his age, and that this was a determining factor in his constructive discharge from employment at said school

The legal basis for respondent's is found in 29 USC 633:

(a) Nothing in this chapter shall affect the jurisdiction of any agency in any state performing like functions with regard to discriminatory practices on account of age except that, upon commencement of action under this chapter such action shall supercede any state action.

In opposing the motion, complainant argues that if the motion is granted it will virtually ensure a duplication of effort, since the Commission cases have been heard, and the matter will have to be heard by the federal court if the Commission has not disposed of the case. He contends that 29 USC 633(a) was not intended to stay state proceedings as far advanced as these.

The closest case on point appears to be National Cash Register v. Riner, 413 A. 2d 890, 892-893 (Del. 1979). This case involved an issue as to the effect of 29 USC 633(a) on a state age discrimination complaint which had been finally decided by the Equal Employment Review Board of Delaware and which was pending on appeal therefrom in state court when the ADEA action was filed in federal court by the Secretary of labor.

The Delaware Court held that 29 USC 633(a) did not require that the appeal of the Board decision be stayed as a result of the commencement of the ADEA action. The Court cited Pandis v. Sikorsky Aircraft Divn. of U.T.C., 431 F. Supp. 793 (D.C. 1977) as follows:

Congress has stated in §633(a) of ADEA that the filing of a federal age discrimination lawsuit... supersedes any state action in process.... (emphasis added)

The Court reasoned that since the Board had fully adjudicated the complainant's state age discrimination complaint and therefore there was no state "action" to be superseded or stayed through the filing of the ADEA proceeding in federal court:

Therefore, this Court finds that 'action', as used in §14(a) of ADEA, refers to a trial on the merits and does not encompass appeals.

As Mr. Justice Brennan stated in Oscar Meyer, supra:

'§14(b)... is intended to screen from the federal courts those discrimination complaints that might be settled... in state proceedings.'

A dismissal or stay of this action would result in federal litigation of the entire issue on the merits for a second time. A common sense reading of the language of ADEA and the cases indicates that Congress had no such intention.

Had the federal action been filed prior to the Board's resolution of this matter, a different result may have been appropriate. At this appeal stage, however, the matter should not be so stayed....

While that part of the Court's opinion that a retrial of the matter in federal court would not be in keeping with congressional intent supports complainant's position, the Court also suggested that if a final decision had not been reached by the Board, there probably would be a different result.

In the final analysis, the language of 29 USC 633(a) clearly requires that complainant's state proceeding be stayed as a result of the initiation of the federal action. While as a matter of policy, it seems unwise to stay a proceeding after it has been fully heard and partially briefed, when to do so will apparently ensure another hearing in federal court, the obvious rejoinder is that Congress could have excepted state cases in which

a hearing had been held from the stay requirement of 29 USC 633(a), but it did not choose to do so.<sup>1</sup>

While so much of this matter that involves a state claim of age discrimination must be stayed, the question remains whether proceedings as to the other claims that allege handicap discrimination and retaliation also should be stayed. Respondent argues that these claims are so "inextricably interwoven" with the age discrimination claim that they also should be stayed. Although much of the evidence in this case is common to all three claims, the elements of each claim are not completely the same. If the Commission were to proceed with the decision of the non-age claims, this would not be dispositive of the age claim, nor can the Commission perceive how this could prejudice the age claim in any material fashion. Finally, while some economy might be effected by staying the non-age claims,<sup>2</sup> such economy is uncertain. If a total stay were granted, complainant would still have the right at some point to return to this forum to obtain a resolution of his non-age claims, and these matters have already been fully heard and partially briefed here.

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<sup>1</sup> For example, 29 USC 633(b) includes this provision:

...no suit may be brought... before the expiration of sixty days after proceedings have been commenced under the state law, unless such proceedings have been earlier terminated. (emphasis added)

Presumably Congress would have added similar language, such as "unless a hearing on the merits of the state action shall have been completed," to 29 USC 633(a), if that had been its intention.

<sup>2</sup> For example, if the age claim under the ADEA were first tried in federal court, some of the federal findings might have a collateral estoppel effect with respect to certain facts relevant to the state non-age claims.

Therefore, while the Commission feels constrained by 29 USC (633)(a) to grant a stay as to complainant's FEA age claim, it will not stay his remaining claims. The parties are urged to consult in an attempt to find ways to reduce the amount of further time and effort needed to resolve these matters.

ORDER

Respondent's motion for a stay of proceedings filed July 17, 1987, is denied as to No. 85-0115-PC-ER and in part as to No. 84-0109-PC-ER. Said motion is granted in part as to No. 84-0109-PC-ER, and so much of No. 84-0109-PC-ER as involves a claim of age discrimination under §§111.325, 111.33, Stats., is stayed during the pendency of complainant's ADEA claim filed in federal court, docket #87 C143C. The posthearing briefing as to the non-stayed claims is to proceed on the schedule discussed at the August 5, 1987, hearing on the motion.

Dated: August 18, 1987 STATE PERSONNEL COMMISSION

  
ANTHONY J. THEODORE, General

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