STATE OF WISCONSIN PERSONNEL COMMISSION

ROBERT P. KESTERSON,

Appellant/Complainant,

v.

Secretary, DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, and Administrator, DIVISION OF MERIT RECRUITMENT AND SELECTION,

Respondents.

Case Nos. 85-0081-PC
85-0105-PC-ER

DECISION
AND
ORDER

This dispute involves a complaint of race discrimination with respect to hire for a position classified as Boiler Safety Inspector 1, Boiler Section, Bureau of Technical Services, Safety and Building Division, Department of Industry, Labor and Human Relations (DILHR). On December 29, 1986, the Commission issued a decision and order rejecting the decision of the respondent in not appointing the appellant to the Boiler Safety Inspector 1 position. That decision did not establish amounts attributable to back pay, attorney's fees or costs. By letter on the same date, the Commission requested that the parties attempt to reach a stipulation as to those remaining matters.

The parties subsequently reached agreement on attorney fees. On October 8, 1987, appellant filed a "Notice of Motion and Motion to Tax and Allow Costs, Fees, Disbursements, Expenses and Other Items." The parties completed their briefing schedule on the motion on November 9, 1987.

Complainant waived hearing on his aforesaid motion and the facts necessary to decide this matter, found in the record as well as the parties' briefs, appear undisputed.

RETIREMENT AND FRINGE ROLL-UP

Section 111.39(4)(c), Stats., reads in relevant part:

> If, after hearing, the examiner finds that the respondent has engaged in discrimination or unfair honesty testing, the examiner shall make written findings and order such action by the respondent as will effectuate the purpose of this subchapter, with or without back pay.

The Commission, in a previous non-selection case, has awarded not only back pay but "all rights, benefits and privileges to which" the employe would have been entitled from the date said employe could have begun employment with the agency. Wolfe v. UW-Stevens Point, 84-0021-PC-ER, (10/22/86). In the instant case, the respondent has offered no persuasive reason why the Commission should not grant complainant's request for retirement and fringe roll-up in order to "effectuate the purpose" of the Fair Employment Act. In fact, such relief is consistent with the prior Decision and Order in this case issued December 29, 1986, wherein respondent was directed "to offer appellant the next available Boiler Inspector 1 position or an equivalent position and to give him all rights, benefits and privileges to which he would have been entitled from...."; and is particularly appropriate since complainant has accepted employment with DILHR effective February 1, 1988.

BACK PAY

Complainant is entitled to back pay running from May 26, 1985, the first date on which he could have begun employment with respondent. In accordance with Hollinger v. UW-Milwaukee, 84-0061-PC-ER, (7/11/86), the back pay should be computed on a quarterly basis. Under this method, earnings in one quarter can affect only back pay due within the same calendar

quarter. Complainant should provide a breakdown of his earnings by quarters since May 26, 1985, to respondent so that respondent can compare those figures to the quarterly back pay liability to determine any amount owing to the complainant. Respondent's liability for back pay shall not continue if the complainant rejects a valid job offer. Anderson v. LIRC, 111 Wis.2nd 245 (1983). It also ends once complainant accepts a valid job offer. Since appellant has accepted an appointment to the Department of Industry, Labor and Human Relations as a Boiler Inspector 1 effective February 1, 1988, respondent's liability for back pay ended as of that date.

FRONT PAY

Generally, awards of "front pay," or pay beyond the date of the remedial order are made in two situations: one, when placement in a position cannot occur immediately because of the lack of availability of a position or the undesirability of "bumping" other employes; and two, where reinstatement is not appropriate due to hostility between the parties. 2 A. Larson, Employment Discrimination §55.39 (1987)

The record is clear that the instant dispute falls into the former category.

The leading case of this type is Patterson v. American Tobacco Co., 535 F.2d 257, 12 FEP 314 (4th Cir 1976), cert. denied 429 U.S. 920 (1976) In this case the Court applied the "make whole" purposes of Title VII to conclude that when, because of seniority considerations, victims of discrimination are unable to move immediately into jobs to which they are entitled, it is appropriate for the Court to include in the award an amount equal to the "estimated present value of lost earnings which are reasonably likely to occur between the date of judgment and the time when the employe can assume his proper position."

A number of other circuits have approved the use of such front pay to make plaintiffs whole for the losses caused by discrimination. See, e.g., Thompson v. Sawyer, 678 F.2d 257 (D.C.Cir. 1982); United States v. Lee Way Motor Freight, Inc., 625 F.2d 918, 932 (10th Cir. 1979); James v. Stockham Valves & Fitting Co., 559 F.2d 310, 358 (5th Cir. 1977), cert. denied, 434 U.S. 1034, 98 S.Ct. 767, 54 L.Ed.2d 781 (1978); Equal Employment Opportunity Comm'n. v. Enterprise Association Steamfitters, Local 638; 542 F.2d 579, 590 (2d Cir. 1976), cert. denied, 430 U.S. 911, 97 S.Ct. 1186, 51 L.Ed.2d 588 (1977).

Awards of front pay are to be judged by the standards applied to all Title VII relief: whether they will further the goals of ending illegal discrimination and rectifying the harm it causes. Thompson v. Sawyer, Supra at 292. In the instant case there was an unlawful affirmative action hire under the Fair Employment Act despite respondent's compliance with its departmental and division affirmative action plans in hiring a qualified minority instead of a white male for the boiler inspector position. (White males historically filled the position.) However, there is no indication in the record that respondent is continuing to use a faulty affirmative action plan to accomplish legitimate affirmative action goals. Affirmative action to remedy the effects of past discrimination is an approved course of action in Wisconsin. The Wisconsin Legislature has set forth a strong commitment to affirmative action in the state civil service in Chapter 230, State Employment Relations, and the principle has been recognized with approval by the Personnel Commission. Christensen v. DHSS, No. 77-62 (9/13/78); Paul v. DHSS/DMRS, 82-156-PC and Paul v. DHSS/DMRS, 82-PC-ER-69 (6/19/86) The Commission recently reiterated "that from a policy standpoint it is keenly aware of the social and moral necessity for affirmative

action programs. However, such programs must be conducted in accordance with statutory requirements." Kesterson v. DILHR & DMRS, Cases Nos. 85-0081-PC & 85-0105-PC-ER (12/30/86).

In view of the foregoing, and absent any persuasive evidence by complainant to the contrary, the Commission finds it reasonable to conclude that an award of front pay herein would not further the goal of ending illegal discrimination at DILHR. A question remains as to whether front pay would rectify the harm caused complainant in the instant dispute.

Complainant herein secured interim alternative employment in Illinois. In its brief, respondent stated it "has information that the complainant's total earnings since May 26, 1985 exceed the total back pay liability," and "the complainant has had substantial employment since the date of the challenged hiring." In Sims v. Mme. Paulette Dry Cleaners, 638 F. Supp. 224, 41 FEP 193 (S.D. N.Y. 1986) the Court refused to award front pay where the plaintiff had obtained a better salaried job and had not shown she was damaged by losing the seniority she had achieved at her former position. The Court noted that front pay "generally is awarded when reinstatement is not feasible but the plaintiff has not secured comparable employment." 41 FEP at 199 Based on this precedent, appellant's interim employment and appellant's appointment to a Boiler Safety Inspector 1 position with respondent effective February 1, 1988, the Commission finds that front pay is not necessary to rectify the harm done by respondent's failure to hire the complainant for the disputed position.

COSTS OF RELOCATION

Complainant requests costs of relocation including, but not limited to meals, laundry, gas, hotels, etc. However, complainant was unable to cite any authority in support of this request. The Fair Employment Act,

although specifically providing for make whole remedies like back pay, does not mention costs of relocation such as travel, meals, hotel, etc., as a proper remedy. At least one court has held that travel expenses incurred in seeking employment after a discriminatory discharge may not be recovered, Culp v. General American Transfer Corp., 8 FEP 460 (N.D. Ohio 1974) although another court disagreed. Singleton v. Vance County Board of Education, 8 FEP 205 (E.D. N.C. 1973) remanded 495 F.2d 1370 (4th Cir. 1974). The latter case was brought under 42 USC §1981 and 1983 and involved constitutional issues while the former case was a Title VII action.

In light of the absence of any persuasive precedent in support of this request, and based on the foregoing, the Commission rejects this claim by complainant.

EMOTIONAL TRAUMA, STRESS, HUMILIATION, IMPAIRED REPUTATION, ETC.

As noted above, the Fair Employment Act provides for "make whole" type remedies such as back pay. There is no provision in the Act for damages like emotional distress. Nor was complainant able to cite any Wisconsin cases in support of this proposition. To the contrary, the Court of Appeals in Bachand v. Connecticut General Life Insurance Company, 101 Wis. 2d 617, 632 (1981) found that the Fair Employment Act does not provide a remedy for emotional distress, i.e., "mental distress, humiliation and the like." The federal cases cited by complainant are not Title VII cases. They are cases brought under 42 USC sec. 1983, for which a type of tort liability exists. They are far removed from anything authorized by the Fair Employment Act concerning damages, and do not have any precedential value herein. Therefore, based on the above, the Commission rejects this claim by complainant.

BREAKUP OF MARRIAGE FOLLOWED BY DIVORCE

The complainant cited no authority for his request for the award of

costs and damages attributable to the breakup of his marriage. The Commission can find no authority for such items to be considered in fashioning a remedy under either Title VII or the Fair Employment Act. Such an award would go well beyond the concept of making a prevailing complainant "whole" as called for by the Fair Employment Act. The Commission has rejected such reaching before in fashioning a remedy when it denied complainant's request for relief for "potential harm suffered by the complainant in terms of fewer promotional opportunities in the future," as too speculative. Holmes v. DILHR, 85-0049-PC-ER (4/15/87) Likewise, the Commission rejects this request by complainant.

ORDER

The respondent is ordered to provide such relief as set forth in this decision.

Dated: April 4, 1988 STATE PERSONNEL COMMISSION

DENNIS P. McGILLIGAN, Chairperson

DONALD R. MURPHY, Commissioner

LAURIE R. McCALLUM, Commissioner

DPM:rcr
RCR02/2

Parties:

Robert Kesterson
5209 Autumn Lane
McFarland, WI 53558

John Coughlin
Secretary, DILHR
P.O. Box 7946
Madison, WI 53707

Dan Wallock
Acting Administrator
DMRS
P.O. Box 7855
Madison, WI 53707