STATE OF WISCONSIN PERSONNEL COMMISSION

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EDWARD A. AMES,

Complainant,

v.

Chancellor, UNIVERSITY OF WISCONSIN - MILWAUKEE,

Respondent.

Case Nos. 85-0113-PC-ER
86-0123-PC-ER

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DECISION AND ORDER
ON
PROBABLE CAUSE

NATURE OF THE CASE

These cases involve complaints of discrimination on the bases of sexual orientation and arrest record with regard to denial of reinstatement to two positions at the University of Wisconsin-Milwaukee (UW-M). An investigation found "no probable cause" as to these and a companion case (86-0124-PC-ER), and complainant appealed that determination. The Commission entered an order on May 5, 1988, pursuant to complainant's request, dismissing the companion case (No. 86-0124-PC-ER) and the allegation of sexual orientation discrimination as to No. 86-0123-PC-ER. In a subsequent order entered June 7, 1988, the Commission denied respondent's petition for rehearing which objected to the aforesaid dismissals. These matters are now before the Commission for a ruling on probable cause after an evidentiary hearing.

FINDINGS OF FACT

1. Complainant was employed at UW-M as a Facilities Repair Worker 3 (FRW 3) from November 3, 1980 through January 14, 1983, when he resigned.

8. A coemploye and leadworker (Robert Lalie) either knew or suspected that complainant was homosexual and made a number of disparaging remarks to complainant about homosexuality.

9. Subsequent to his resignation from employment with respondent, complainant applied in July 1984 for reinstatement to a FRW 3 position that had been vacated by a former coworker with whom complainant had worked closely. Complainant had performed all of the functions associated with this position.

10. Complainant was interviewed for this position on August 7, 1984, by Loren Kohel, Manager of Operations, but was not hired by Mr. Kohel.

11. The person hired (James Tucker) had 17 years of relevant experience that was more extensive than complainant's experience, although he had never worked at UW-M.

12. Respondent's articulated reasons for hiring Tucker rather than complainant were:

a) He (Kohel) considered Tucker to be better qualified by virtue of greater and more extensive experience;

b) He had not been overly impressed by his observations of complainant's work habits during his employment at UW-M, notwithstanding complainant's generally favorable performance evaluations;

c) He was concerned about complainant's marijuana arrest and collateral work rule violation.

13. Mr. Lalie originally was to have participated in the interviewing and hiring process for this position. However, after he missed one of the interviews, Mr. Kohel excluded him from further involvement. Mr. Lalie was present only for Mr. Tucker's interview, and his sole involvement in the selection process was to give his impressions of Mr. Tucker to Mr. Kohel.

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of sexual orientation in violation of the Fair Employment Act in connection with its failure to reinstate him to the BMH 2 vacancy.

5. With respect to Case No. 85-0113-PC-ER, there is no probable cause to believe respondent discriminated against complainant on the basis of sexual orientation in violation of the Fair Employment Act when it failed to reinstate him to the FRW 3 vacancy, but there is probable cause to believe respondent discriminated against complainant on the basis of arrest record in violation of the Fair Employment Act when it failed to reinstate him to the FRW 3 vacancy.

DISCUSSION

These matters are before the Commission for a determination as to probable cause. As such, the complainant's burden of proof is lighter than it would be at a hearing on the merits, § PC 1.02(16), Wis. Adm. Code; Winters v. DOT, Wis. Pers. Commn. Nos. 84-0003-PC-ER, 84-0199-PC-ER (9/4/86).

In cases under the Fair Employment Act (FEA), Subchapter II, Chapter 111, Stats., the Commission usually utilizes the method of analysis set forth in McDonnell Douglas v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed. 2d 668, 5 FEP 965 (1973), and its progeny. Since the parties in their briefs have focused solely on issues as to pretext and direct evidence of discrimination, the Commission will follow that approach in this decision.

With respect to the FRW 3 position, Mr. Kohel's testimony was consistent with an admission that he considered the arrest as a factor in not reinstating complainant:

> Q: You, of course, are familiar with the fact that your hiring decision has been investigated by at least two people, one a local investigator from the Equal Opportunity Office, and one Barbara Bastien, and they both say, in the words of Barbara Bastien, both earlier today and in her report, that you took Ed's marijuana arrest into consideration. You don't dispute that, do you?

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In a case where the employer disciplines or takes other adverse employment action against an employe who was arrested for on-the-job misconduct which would provide an independent, legitimate, non-discriminatory basis for the employer's action, the inquiry should not stop at that point. At least one of the purposes of the FEA is to address the situation where an employe is punished simply because of an arrest, due to the associated opprobrium, suspicions about his or her overall integrity, etc. Even if there is an independent basis for the adverse employment action, such as on-the-job misconduct, it must be determined whether the employer was in fact also motivated by the arrest per se. Under the Wisconsin FEA, an adverse employment action is illegal even if it is only partially motivated by discriminatory animus. Smith v. UW, Wis. Pers. Commn. 79-PC-ER-95 (6/25/82); Conklin v. DNR, Wis. Pers. Commn. 82-PC-ER-29 (7/21/83); Lohse v. Western Express, ERD Case No. 8432123 (LIRC 2/4/86). Therefore, if an employer is motivated even in part by the arrest itself, as opposed to the underlying job-related misconduct, this should result in a conclusion of liability.

Now, reviewing the foregoing testimony in this context, complainant contends that Mr. Kohel admitted that complainant's arrest played a role in his decision to hire someone else for the FRW 3 vacancy. On the other hand, it is possible that in his testimony Mr. Kohel simply was not making any distinction between the arrest and the conduct underlying the arrest. However, that this arrest itself was a factor is underscored by the following testimony concerning certain statements Mr. Kohel made to an investigator:

> Q: All right. Did you ever tell -- do you remember talking to a Mary Kearny from the UW-M Equal Opportunity Office?

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Mr. Kohel deliberately discriminated. Therefore, analyzing Mr. Kohel's rationale for evidence of pretext is not going to throw any light on whether Mr. Lalie had any legally significant role in the process.

Based on this record, it would be speculative to conclude there was any connection between complainant's sexual preference and his failure to get this job. Mr. Lalie's role was extremely limited, and there is no evidence he influenced Mr. Kohel's decision in any way. This record certainly does not give rise to "a reasonable ground for belief, supported by facts and circumstances strong enought in themselves to warrant a prudent person to believe that discrimination ... probably has been ... committed." § PC 1.02(16), Wis. Adm. Code.

With regard to the BMH 2 position, the only issue is as to arrest record. There is some testimony by Mr. Kazmierski that arguably constitutes direct evidence that his action as effective appointing authority was motivated by complainant's arrest record, but the Commission concludes that this contention is not viable. Mr. Kazmierski testified, in part, as follows:

Q: Did you review his job record as a previous employe at UW-M?

A: Yes, I did.

Q: Did that include a review of his job performance evaluations?

A: That was the review.

Q: O.K. So you looked at the job performance evaluations. And, what was your impression of those evaluations?

A: They did not impress me.

Q: Are you aware of the fact that the job performance evaluations rated him as "very good"?

A: I'm aware that in one area of that evaluation it was indicated he had received a reprimand.

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A: They did not impress me.

Q: Are you aware of the fact that the job performance evaluations rated him as "very good"?

A: I'm aware that in one area of that evaluation it was indicated he had received a reprimand.

Q: O.K., was that a significant factor in your evaluation of Mr. Ames?

A: It was one of the significant factors, yes.

Q: O.K., and that letter of reprimand involved an arrest for possession of marijuana, did it not?

A: Yes, it did.

Q: Why did you consider that significant?

A: He had received legitimate disciplinary action while he was an employe here at the university, and it is our policy as an employer that, if somebody has worked for the university before, and has had problems with discipline, we do not consider them for hire unless there are extenuating circumstances. And the severity, at least in my estimation, of that work rule violation, I felt gave us -- I felt at that point that he was probably not qualified for the job.

Q: Are you aware of the fact that he was never convicted of possessing marijuana?

A: I had questioned him about the situation, allowing him to tell me if there were any extenuating circumstances, and he was evasive and would not answer the question, and I just moved on ... to the rest of the interview.

Q: O.K., but you were aware of the fact that he had been arrested for possession of marijuana, correct?

A: That's what he told me. I asked him about the discipline, I said what was this about, and he explained it to me.

Q: O.K., how did you know that he had been disciplined?

A: It said in his evaluation.

Q: O.K., were you aware of the fact that the letter of reprimand itself had been removed from his file, had been purged?

A: I wasn't aware of that.

Q: Did Mr. Ames tell you that?

A: No.

Q: If you had known that might that have made a difference in your consideration at his being qualified or not?

A: No, because he was no longer an employe at the university.

Q: So, if a person is a current employe and has a current work rule violation, it doesn't matter as to their qualifications for a position in your department?

A: I don't understand your question.

Q: Well, your response to my question about whether or not the purging of a record would make a difference was that Mr. Ames was no longer an employe. Why would that make a difference?

A: It's never come up. I've never had an employe come for promotion with a purged record that I was aware of. I can't --.

Q: So the fact that Mr. Ames was no longer employed at UW-M wasn't the issue, it was the fact that he -- that you found out about an old work rule violation, correct?

A: Right.

Q: Is it fair to say that had Mr. Ames not been arrested for possession of marijuana and resultant letter of reprimand, he would have received more consideration for the job?

A: More consideration?

Q: Would it have helped his chances?

A: It would have been one less thing that I was considering for not recommending him for hire, sure.

Q: O.K. But the marijuana arrest and the letter of reprimand were certainly the primary reason that you didn't consider him, correct?

A: It was one of the major reasons.

It is clear from this testimony that Mr. Kazmierski's concern was with complainant's prior discipline. In fact, he had not even been aware of complainant's arrest until complainant himself brought it up when Mr. Kazmierski questioned him about the reprimand. In his testimony at the probable cause hearing about his decision, Mr. Kazmierski focused solely on the work rule violation and reprimand. It was only after complainant's counsel introduced the subject of the reprimand and asked certain questions in conjunctive format that there was any testimony that arguably connected the arrest to respondent's decision:

"Q: Is it fair to say that had Mr. Ames not been arrested for possession of marijuana and resultant letter of reprimand he would have received more consideration for the job?

A: More consideration?

Q: Would it have helped his chances?

A: It would have been one less thing that I was considering for not recommending him for hire, sure.

Q: O.K. But the marijuana arrest and the letter of reprimand were certainly the primary reason that you didn't consider him, correct?

A: It was one of the major reasons." (emphasis added)

Put in context, it cannot be concluded that Mr. Kazmierski was concerned about the arrest per se. This point is reinforced by the fact that Mr. Kazmierski delved into the disciplinary action before he even knew of the arrest, and only learned of the arrest when complainant mentioned it.

With respect to pretext, complainant contends that respondent's reliance on the work rule violation and the reprimand was "unfounded" because the letter of reprimand had been purged from his file by operation of the contract. This contention is somewhat incongruous, since Mr. Kazmierski never looked at complainant's personnel file at all. Rather, complainant himself brought copies of his evaluations, which contained mention of the reprimand, to his interview. In any event, it is undisputed on this record that Mr. Kazmierski was applying a policy of respondent's that former employes with disciplinary records were not rehired in the absence of extenuating circumstances. He testified as to several other occasions where he had applied this policy to other applicants for reinstatement. Whether or not his action might be viewed as problematic under the collective bargaining agreement, this would not make it pretextual.

Complainant also argues in his post-hearing brief as follows:

> "The effect of the respondent's contract with the complainant and of the assurances of the respondent's supervisory employee to the complainant are to make the letter of reprimand a nullity on which the respondent could not legally base a hiring decision. Accordingly, it would be against public policy for the Commission to consider the letter of reprimand as a justification for the respondent's decision against hiring the respondent [sic]."

It would be contrary to McDonnell Douglas and probably outside the Commission's purview to decline to consider an agency's rationale for a hiring decision on the ground that it involved an alleged violation of a collective bargaining agreement. Presumably the only possible theory that would result in the Commission refusing to consider an employer's rationale for an employment decision might be some form of equitable estoppel, and there has been neither an allegation nor an apparent basis for equitable estoppel in this matter.

Complainant further contends that respondent's reliance on the letter of reprimand was "unfounded" because in his view of the facts there was no actual work rule violation. However, the letter of reprimand was issued long before the transactions here in question, and was never grieved. Even if complainant's contention that the factual basis for the reprimand were lacking, this would not make respondent's reliance on the reprimand pretextual.

Finally, complainant asserts that he was well-qualified for the position, and Mr. Kazmierski's claim that complainant's evasiveness in discussing the disciplinary action indicated that he lacked the communication skills needed for the job was pretextual. He argues in his post-hearing brief:

> "... As to the evasiveness allegation, considering the fact that the letter had been purged, any reluctance to discuss the document would be understandable on the part of the complainant, and is certainly an insufficient basis upon which to determine that the complainant lacked communication skills necessary to be a janitor...."

The problem with this is that while it is arguably "understandable" after-

STATE OF WISCONSIN PERSONNEL COMMISSION

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JOHN E. BORKENHAGEN,

Appellant,

v.

Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS,

Respondent.

Case No. 85-0076-PC

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DECISION
AND
ORDER

The Commission adopts the proposed decision and order in the above matter with the following clarification.

In a letter regarding the proposed decision and order, the appellant stated:

> After reading your decision, it is obvious that the Personnel Commission did not have the authority to act on my appeal in the first place. DER had put the nursery manager in the NRS-2 level and used the Hayward Nursery manager position as an example representative position. This, in itself, put the appeal out of the authority of the Commission, according to your decision. My testimony was all directed toward proving that my position was put in too low a classification by DER.

Although the appellant may have focused his arguments on the use of the nursery manager position as a NRS 2 representative position, this case is broader than that issue.

The determinative fact in this case is that the 50% of the appellant's duties that exist outside the scope of the representative position for "manager of a major state nursery" are at or below the NRS 2 level. Given this conclusion, it is not necessary for the Commission to reach the question of whether it has the authority to review an appeal brought by a person whose position is very specifically described as a "representative