STATE OF WISCONSIN PERSONNEL COMMISSION

JOHN LOUIS,

Complainant,

v.

Secretary, DEPARTMENT OF TRANSPORTATION,

Respondent.

Case No. 85-0126-PC-ER

INTERIM DECISION AND ORDER

This matter is before the Commission on respondent's motion in limine and complainant's motion to amend the complaint. The parties have submitted briefs.

FINDINGS OF FACT

1. On August 26, 1985, complainant filed a complaint of discrimination with the Commission. The complainant had checked the boxes on the complaint form for discrimination based on race and retaliation in reference to hire. The original complaint form also had a check in the box for handicap discrimination. However, the first initial determination was based on a copy of the complaint on which the check mark for handicap discrimination had been obliterated by correcting fluid. The complaint also included the following description of the alleged discrimination:

> I have worked three summers for the Wisconsin Department of Transportation as an Engineering Aide - LTE. I have taken the State Civil Service exam and passed it on two occasions. This year, I have received another layoff notice without being considered for a permanent in District #1. There have been several people hired in permanent positions, all non-minority hires. I have been the subject of racial slurs and derogatory statements regarding my race. I have complained to the Department A.A. Office many times. George Meyer and Jack Reed have lied about my evaluations and work record in order not to hire me at D.O.T.

> (see attached documents). They did not like it when I made complaints about my working conditions. They have not lived up to the agreements and arrangements worked out by Arnie Mohlman and Adrian McCullom, the former A.A. Officer at D.O.T. (see attached documents).** I believe they do not intend to hire me or any other black man in District #1. I further believe that the Dept. of Transportation continues to deny me employment based solely on my race and on the fact that I have filed complaints in the past. SPECIFICALLY, the memo dated 11/8/84.

2. In an initial determination dated September 3, 1986, an investigator found no probable cause to believe that complainant was discriminated against "on the bases of race and retaliation in regard to his not being hired." The initial determination addressed complainant's efforts to obtain permanent employment at DOT. It found that the complainant had declined to continue employment as an LTE in 1986. The initial determination specifically referred to complainant's arguments that:

a. In July of 1984, he complained to his supervisors that a co-worker called him a "dumb nigger."

b. He was the victim of occasional name-calling of a racial nature by his co-workers.

c. He was given an evaluation (i.e., separation report) on October 29, 1984, that was subsequently revised after intervention by Adrian McCullom, respondent's Affirmative Action Officer.

d. Mr. McCullom found that the evaluation was a deliberate attempt to preclude complainant's future employment and that the complainant had been promised a permanent position with the respondent as a consequence of McCullum's intervention.

3. In his letter appealing the initial determination, complainant contended that his claim of handicap discrimination had not been addressed.

4. By order dated October 19, 1986, the Commission construed complainant's contention as a request to amend his complaint to include an allegation of handicap discrimination and granted the request.

5. An amended initial determination was issued on January 6, 1987, finding no probable cause to believe that complainant was discriminated against on the basis of handicap in regard to his not being hired as an Engineering Aide 1 or 2. The amended initial determination was not appealed.

6. Complainant appeared pro se in this matter until after the amended initial determination was issued.

OPINION

On April 15, 1987, respondent filed a motion in limine to exclude from the probable cause hearing any evidence:

> 1. Related to any alleged act, omission or discrimination occurring prior to October 30, 1984, specifically including but not limited to alleged racial slurs or defamatory remarks made by or to Mr. Louis in July 1984.
> 2. Related to John Louis' employment by the Department as a limited term employee, specifically including all separation reports and evaluations of his job performance and revisions thereof.
> 3. Related to Adrian McCullom's alleged investigation of Mr. Louis' complaint about a separation report originally dated October 29, 1984, specifically including a memorandum to John Louis allegedly from Adrian McCullom dated November 8, 1984.
> 4. Related in any way to a contract or agreement complainant alleges exists between the Department or one of its employees, or former employees, and the complainant, allegedly involving promises of permanent employment or of disciplinary action against Department employees.

Then in a brief filed on May 22, 1987, complainant asked to amend his complaint:

> Complainant desires to amend the complaint to allege that the discriminatory acts of the respondent (which already have been investigated, documented, and set forth in the Commission's findings), be considered in respect to both "hire" and "other."
> Complainant does not seek to add new evidence, or surprise respondent by suggesting an unrelated cause of action.

> Complainant seeks only to suggest that the facts of the case are not limited to hiring discrimination.
>
> The theory of Mr. Louis when he filed the complaint (without the benefit of legal counsel) was that he was discriminated against by not being hired and he was discriminated against during the course of his employment. However, the investigation of the Department shows the discrimination by the Department went further than merely not hiring Mr. Louis. The Department discriminated against Mr. Louis in respect to his evaluations, and in respect to its decision not to consider him for future limited term employment and permanent employment. These are directly related to hiring, but do go beyond hiring in some respects. Now that counsel have had the benefit of the full investigation, both complainant and respondent should be able to argue the entire case without being artificially confined.
>
> It would be a waste of time to argue whether a racially motivated evaluation is done for the purpose of discrimination in a later hire, considering that the evaluator knew that Mr. Louis was a limited term employee. Complainant therefore requests that we argue the real issue, which is: Did the Department discriminate against Mr. Louis in any of the incidents cited in his complaint?
>
> In conclusion, it would serve the interest of justice and promote fairness to have the parties be prepared to argue all the issues of discrimination described in the complaint. The fact that the complainant, a non-lawyer, did not check the "other" box at the beginning of the complaint should not restrict his opportunity to show that he was discriminated against by the Department because he did cite the discriminatory evaluation in his complaint.

Each motion is discussed separately, below.

Motion to Amend

The scope of complainant's motion is not altogether clear. The best indication is in complainant's suggestion for the issue for hearing: "Did the Department discriminate against Mr. Louis in any of the incidents cited in his complaint?" The Commission interprets complainant's motion as seeking to amend his complaint so that he can ultimately obtain relief for the following alleged incidents of discrimination:

1. July, 1984 racial comment by co-worker;

2. Occasional name-calling of a racial nature at other unspecified times;

3. The October 29, 1984 evaluation; and

4. The failure to rehire him as an LTE in 1985.

The time limit for filing complaints of discrimination under the Federal Employment Act is 300 days. The instant complaint was filed on Monday, August 26, 1985. Due to the effect of §990.001(4), Stats., the 300 day period prior to filing would include discrimination occurring on or after October 28, 1984. Therefore, the 1985 complaint would be untimely as to the July, 1984 comment.

As to the other matters, amending the complaint would required the issuance of an additional amended initial determination. As noted in Adams v. DNR & DER, 80-PC-ER022, 1/8/82,

> [T]here are strong policy consideration preventing a complainant from unilaterally expanding the scope of his discrimination charge during the hearing stage. Allowing a complainant to completely bypass the investigation stage would both increase the likelihood of unnecessary hearings and decrease the opportunity for conciliation.

The Commissions' rules specifically permit the amendment of complaints: "Subject to the approval of the commission, a complaint may be amended or withdrawn." §PC 4.02(4), Wis. Adm. Code. Because there have already been two initial determinations issued in this matter, an amendment that requires a third ID is a close question. Clearly it would have been preferable had the complainant raised all of his concerns immediately after the first ID was issued. However, here the complainant was not represented by an attorney until after the issuance of the second ID. In light of this fact, it would be unfair to preclude amendment at this time.

Therefore, the complainant will be provided 10 days to formally amend his complaint to add the following alleged incidents of discrimination:

1. Occasional name-calling of a racial nature at times within the 300 day time limit;

2. The October 29, 1984 evaluation;

3. The failure to rehire complainant as an LTE in 1985.

Once an amended complaint is filed, the Commission will contact the parties to see whether they can agree to proceed to hearing without the issuance of an initial determination on the new claims.

In its brief, respondent requested that, in the event the motion to amend was granted, the proceedings "be bifurcated to separate the original cause of action from the newly created cause of action." Even if the parties cannot agree to proceed to hearing without the issuance of another initial determination, the Commission does not anticipate that the new claims will require any substantial further investigation or delay in these proceedings. Given the interrelated nature of the original complaint and the new claims, bifurcation would be inappropriate.

Motion in Limine

There are four areas of evidence covered by respondent's motion in limine. Each area is treated separately, below.

a. Acts occurring prior to October 30, 1984, including the alleged racial slur in July of 1984.

As noted above, the cut off date relative to the 300 day time limit is October 28 rather than October 30. In addition, the alleged racial slur could be relevant to the new claim of "occasional name calling of a racial nature."

b. Evaluations of complainant's performance as an LTE.

The Commission has already indicated that complainant may amend his complaint to include a claim relating to the October 29, 1984 evaluation, so evidence on this topic will clearly be relevant.

c. Mr. McCullom's investigation of the October 29, 1984 evaluation.

Again, this evidence would be relevant given a specific claim regarding the evaluation.

d. Alleged promise of permanent employment.

The respondent contends that complainant is seeking to enforce an alleged contract or promise of employment and that the Commission lacks subject matter jurisdiction over such an action. However, the presumed purpose of the complainant's allegations regarding a promise of employment will be to show discrimination under the Fair Employment Act relative to a hiring decision. An alleged promise of employment is clearly relevant to such a claim.

ORDER

Complainant's motion to amend is granted as set out above. Complainant has 10 days to formally amend his complaint. The Commission will then contact the parties regarding possible waiver of the issuance of another Initial Determination. Respondent's motion in limine is denied.

Dated: August 26, 1987 STATE PERSONNEL COMMISSION

DENNIS P. McGILLIGAN, Chairperson

DONALD R. MURPHY, Commissioner

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