

STATE OF WISCONSIN

PERSONNEL COMMISSION

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STEVEN L. KLOEHN,
 Complainant,

v.

Secretary, DEPARTMENT OF HEALTH
AND SOCIAL SERVICES

 Respondent.

Case No. 86-0009-PC-ER

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INTERIM
DECISION
AND
ORDER

This is a complaint of discrimination on the basis of sex in regard to the termination of complainant's employment as a probationary lieutenant in an Officer 5 position at respondent DHSS's Wisconsin Resource Center. Complainant has requested that he be allowed to amend his complaint and the respondent has objected to the proposed amendment. Neither party requested an evidentiary hearing in this regard. The parties were permitted to file briefs and the final brief was filed on December 15, 1989. The following facts are drawn from information provided by the parties and appear to be undisputed:

1. On January 14, 1986, complainant filed the subject charge of sex discrimination with the Commission alleging that he was sexually harassed by his supervisor, Judy Lyon, and terminated as a result of his rebuff of her sexual advances.

2. On September 10, 1987, one of the Commission's equal rights investigators issued an initial determination finding no probable cause to believe that complainant had been discriminated against as alleged.

3. On or before February 18, 1988, complainant retained the services of attorney Robert Gregg to represent him in this matter.

4. At a prehearing conference convened by the Commission on March 10, 1988, the parties agreed to the following issue for hearing:

Is there probable cause to believe that complainant was discriminated against on the basis of sex in regard to his termination as an Officer 5?

5. In a letter dated April 12, 1988, Mr. Gregg stated as follows, in pertinent part:

I also want to address the "issue" of appeal. The recent pre-hearing conference report stated the issue as "sex discrimination".

This is a sex case, however it may be wise to state the issue with more specificity. This case is based upon a complaint of sexual harassment. Mr. Kloehn's charge is that he was unjustly discharged because he rejected the solicitation for dates by one of his superiors. The more exact statement of the issue may prevent some confusion later.

6. On July 12, 1988, a second prehearing conference was convened by the Commission to set the date for hearing.

7. On August 17, 1988, depositions of Ms. Lyon; Kathy Karkula, Assistant Personnel Director for the Wisconsin Resource Center; and Dolores Borreson, Personnel Director for the Wisconsin Resource Center, were taken by Mr. Gregg as counsel for complainant.

8. During this same period of time, Mr. Gregg, on complainant's behalf, had filed discovery interrogatories and a request for production of documents with respondent, including a request for the personnel files of others who had

served as probationary lieutenants at the Wisconsin Resource Center during all or part of complainant's tenure as a probationary lieutenant there. This discovery request named some of the individuals whose personnel files were requested. Included among these names was that of Joan Schaefer, a female who had served as a probationary lieutenant during all or part of the relevant time period. Prior to August 3, 1988, respondent advised Mr. Gregg that performance-related documents would be removed from these personnel files before making the files available to complainant in response to his discovery request. Mr. Gregg inspected these files on August 3, 1988. On August 25, 1988, Mr. Gregg filed a Motion to Compel Discovery of those performance-related documents which respondent had removed from the requested personnel files before making them available to Mr. Gregg in response to complainant's discovery request. On September 14, 1988, respondent agreed to make these performance-related documents available to complainant.

9. A hearing on the issue quoted in 4., above, was held on November 10, 11, and 15, 1988. Posthearing briefs were filed by the parties and a proposed interim decision and order was issued by the hearing examiner on July 18, 1989. An interim decision and order was issued by the Commission on September 8, 1989, finding probable cause to believe that complainant had been discriminated against as alleged.

10. On September 1, 1989, complainant, through Mr. Gregg, filed a request with the Commission to amend the subject complaint which stated, as follows, in pertinent part:

Now comes the complainant Steve Kloehn, and his attorneys Tomlinson, Gillman, Travers & Gregg, S.C., and AMENDS his complaint of discrimination to, also, specifically include a charge of sex discrimination in that he was discharged from a position as probationary Lieutenant while his performance was equal or better than a female probationary Lieutenant who was not discharged. In fact that female probationary Lieutenant was

not even criticized on her performance evaluations, while for similar or better performance the Complainant was severely castigated and failed on his evaluations.

P.C. 2.02(3), Wis. Adm. Code, provides for Amendment of complaints in order to

"amplify allegations . . . or to set forth additional facts or allegations related to the subject matter of the original charge, and those amendments shall relate back to the original filing date."

Evidence and testimony at the November 1988 hearing as to probable cause showed the sex discrimination alleged herein. The proposed decision and order of probable cause in this matter describes the unequal treatment of complainant in comparison to the female probationary lieutenant, and reaches the conclusion that it was, in fact, unequal treatment.

11. Joan Schaefer is the probationary lieutenant referenced in complainant's request to amend his complaint.

12. At a prehearing conference convened by the Commission on October 10, 1989, respondent filed an objection to the proposed amendment to the subject complaint.

In reference to its objection to the proposed amendment to the subject complaint, respondent argues as follows in its brief filed with the Commission on November 27, 1989:

This objection is based upon the reasoning in Ferrill v. DHSS, Case No. 87-0096-PC-ER, an interim decision and order dated August 24, 1989. In this case, there has been an extensive opportunity to amend before the issuance of the initial determination and probable cause decision. Amendment now would cause further lengthy and unjustified delay. The appellant has provided no good reason for failure to amend much sooner than this. Appellant has been represented by counsel for a year or two.

In the Ferrill case, an unrepresented complainant filed a charge of handicap discrimination with the Commission on July 31, 1987, in regard to an allegedly coerced resignation. On December 11, 1987, the complainant added to

this charge an allegation of sex discrimination in relation to the allegedly coerced resignation. On July 6, 1989, one of the Commission's equal rights investigators issued an initial determination finding no probable cause to believe that discrimination had occurred as alleged by complainant. In his appeal of the initial determination, complainant requested an amendment of the charge to include race discrimination. On July 26, 1989, he filed a proposed amendment which referenced discrimination based on handicap and race as well as retaliation based on Fair Employment Act activities. Complainant provided no reason for the request other than he felt that, in retrospect, it was appropriate to consider race as a factor in the subject personnel action. In its decision in this case, the Commission stated as follows, in pertinent part:

As provided in §PC 2.02(3), Wis. Adm. Code, the Commission may exercise its discretion and not approve the amendment of a complaint:

A complaint may be amended by the complainant, subject to approval by the commission, to cure technical defects or omissions, or to clarify or amplify allegations made in the complaint or to set forth additional facts or allegations related to the subject matter of the original charge, and those amendments shall relate back to the original filing date. (emphasis added)

To the extent that the complainant was alleging that he was discriminated against based on race and retaliated against for fair employment activities when the respondent gave him an option of resigning or being fired, the proposed amendment relates to the subject matter of the original charge. However, the complainant has given no reason why he did not raise the new allegations earlier in the investigative process. To permit amendment now would require the Commission to conduct an investigation of all new allegations, unless the parties both agreed to waive that investigation. Adams v. DNR & DER, 80-PC-ER-22, 1/8/82. The potential for delay, the existence of a prior amendment and the extensive opportunity to amend before the issuance of the initial determination all militate against permitting a widening of the scope of this proceeding at this time.

The rationale underlying the Commission's decision in the Ferrill case is even more compelling in the instant case. Here, the Commission, prior to receiving complainant's request to amend, had not only issued an initial determination but had also already held a hearing on the issue of probable cause and issued a proposed decision and order; the complainant is represented by an attorney and has been since early in 1988; the complainant conducted extensive discovery prior to the hearing, including discovery as to the employment records of other probationary lieutenants, including Joan Schaefer; the complainant urged the narrowing of the sex discrimination issue in April of 1988 in order to consider only the allegations of sexual harassment; and the complainant has offered no basis for the amendment other than an after-the-hearing realization that another theory could apply to the facts of this case. This is a clearly insufficient basis for the Commission to rely upon in granting approval of the proposed amendment particularly in view of the advanced stage of the proceedings; the ample opportunity the complainant had to amend prior to this stage; and the fact that an allegation of disparate treatment could have and should have been obvious to the complainant and/or his attorney at the point that discovery was completed, if not before, in view of the common application of a disparate treatment analysis in cases of this nature and in view of the nature of the discovery done in this case.

Complainant argues in support of his request to amend that the information pointing the way to an allegation of disparate treatment first came to light during discovery "too late for any effective amendment just before hearing." This is not persuasive since the information to which complainant is alluding was made available to complainant by respondent on

or around September 14, 1988, nearly two months prior to the date of the scheduled hearing.

Complainant also argues that the factual record of the probable cause hearing is already complete as to that evidence relating to the alleged disparate treatment of complainant and that the Commission's Interim Decision and Order finding probable cause already makes a finding as to this allegation of disparate treatment. On the basis of this representation, complainant argues that granting his request to amend will not necessitate any further investigation or hearing or decision on the issue of probable cause. First of all, simply because complainant may feel that the factual record is complete as to the allegation of disparate treatment of complainant, this does not mean that respondent agrees, and, as a result, it is not possible for the Commission to conclude that no further investigation or hearing on the issue of probable cause will be required. In addition, even though it is true that the Commission, in its Interim Decision and Order on the issue of probable cause, did make certain comparisons between the work record of complainant and certain other probationary lieutenants, including Ms. Schaefer, this was done for the sole purpose of determining whether sufficient nexus existed between complainant's termination and the alleged rebuff by complainant of Ms. Lyon's romantic overtures to support a finding of probable cause to believe that sexual harassment of complainant had occurred. It is clear from the language of this Interim Decision and Order that the Commission did not intend to and did not decide that complainant's termination of complainant resulted from respondent's disparate treatment of complainant on the basis of sex outside the context of complainant's claim of sexual harassment. It is possible that this distinction may have no practical significance but the Commission is not able to draw that conclusion on the basis of available information.

It is clear that complainant wants to assure that, even if he does not prove that he rejected Ms. Lyons' romantic overtures or that his termination resulted from such rejection, his sex discrimination case will still have life. However, for the reasons stated above, the Commission concludes that complainant's request for the amendment of his complaint should be denied.

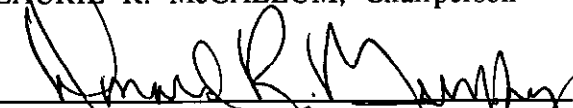
Order

The complainant's request to amend his charge of discrimination is denied.

Dated: January 10, 1990

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

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