STATE OF WISCONSIN PERSONNEL COMMISSION

LYNN OESTREICH,

Complainant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 87-0038-PC-ER

INTERIM DECISION AND ORDER

NATURE OF THE CASE

This is a complaint of discrimination on the basis of handicap and honesty testing device with respect to promotion that was filed on April 13, 1987. Respondent filed a motion to dismiss on March 1, 1988, and the parties have filed briefs on said motion. The following findings are limited to the purpose of deciding the motion, and are based on matter that appears to be undisputed from a perusal of the parties' briefs and related documents.

FINDINGS OF FACT

1. Complainant passed a departmental (DHSS) promotional examination for Institutional Residential Care Director (IRCD) 2, and was ranked 6th. The register from this exam was created in November, 1986.

2. This register was used to fill an IRCD 2 position at Kettle Moraine Correctional Institution (KMCI) and an Institution Security Director (ISD) 1 position (same pay range) at Waupun Correctional Institution (WCI).

3. Complainant's exam score was not high enough for certification for either of these vacancies.

4. An identical certification was made for each vacancy. These certifications included three candidates who had scored lower than complainant but who were certified on a handicapped expanded certification basis pursuant to §230.25(1n)(a) 3 & (b), Stats. The certification date for the IRCD 2 position at KMCI was November 18, 1986. The certification date for the ISD 1 position at WCI was December 1, 1986.

5. The person appointed to the IRCD 2 position at KMCI, effective December 7, 1986, was not among those certified under the handicapped expanded certification. The person who was appointed to the ISD 1 position at WCI, effective January 18, 1987, was one of those who had been certified on a handicapped expanded certification basis.

6. The person appointed to the IRCD 2 position at KMCI transferred to an Administrative Officer (AO) 1 (same pay range) vacancy at Columbia Correctional Institution (CCI) effective December 21, 1986. The person who held the AO 1 position at CCI transferred to the IRCD 2 position at KMCI, effective the same date.

7. No honesty testing device was used or figured in any of the foregoing transactions.

8. Complainant is not handicapped and advances no claim of being handicapped or of having been perceived by respondent as handicapped.

9. Complainant filed this complaint of discrimination on April 13, 1987.

DISCUSSION

To begin with, complainant concedes that the charge of the improper use of an honesty testing device is misplaced, and therefore the motion to

dismiss will be granted as to that aspect of the complaint.

With regard to the AO 1 vacancy at CCI that was filled by transfer, there does not appear to be any basis for a claim that complainant was affected by any type of discrimination on the basis of handicap by the manner in which it was filled, and complainant in his brief in effect concedes that it was mentioned in his complaint not as a separately cognizable transaction but as part of the overall evidence relating to the two other vacancies: "...the facts shown in the AO 1 are incidental and lead up to the reverse discrimination in the ISD 1 selection. They are there to show I should have been certified." Therefore, so much of the complaint as relates to the AO 1 position at CCI as a separately cognizable matter will be dismissed.

Respondent contends that jurisdiction is lacking as to the charge of handicap discrimination because complainant is not alleging he is either handicapped or perceived to be handicapped. Respondent argues that the Fair Employment Act (FEA) does not cover a case like this where an employe charges what amounts to "reverse discrimination" on the basis of handicap with respect to the use of handicapped expanded certification.

American Motors Corp. v. LIRC, 114 Wis. 2d 288, 293, 388 N.W. 2d 518 (Ct. App. 1983), states that one necessary element of a claim of discrimination because of handicap is that "the complainant must be handicapped within the meaning of the Act. . .". However, in that case the question of whether a person claiming discrimination because of the absence of handicap was not before the court. Rather, the Court was dealing with the question of whether lack of stature could be considered a handicap. Therefore, it is necessary to exercise care in applying the aforesaid language to a case like this, which raises a completely different issue.

Section 111.321, Wis. Stats., provides:

> "... no employer ... may engage in any act of employment discrimination as specified in s. 111.322 against any individual on the basis of ... handicap...".

Section 111.322 provides, inter alia:

> "... it is an act of employment discrimination to do any of the following:
> (1) To refuse to hire, employ, admit or license any individual, to bar or terminate from employment ... any individual, or to discriminate against any individual in promotion, compensation or in terms, conditions or privileges of employment ... because of any basis enumerated in s. 111.321."

By its terms, this part of the FEA is not directed solely at discrimination against an individual because of the individual's handicap, but rather runs to discrimination simply "on the basis of ... handicap." This is of particular significance when compared with the provisions of the federal law on employment discrimination, Title VII, which provides that it is unlawful for an employer:

> "... to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin ...." (emphasis added).

Even more significantly, language in other parts of the Wisconsin FEA, rather than using the broad language set forth in §§111.321 and 111.322 use language similar to that found in Title VII. For example, §111.34(1), Wis. Stats., provides:

> (1) Employment discrimination because of handicap includes but is not limited to:
> (a) Contributing a lesser amount to the fringe benefits, including life or disability insurance coverage, of any employe because of the employe's handicap .... (emphasis added).

This makes it clear that it is employment discrimination for an employer to contribute a lesser amount to the fringe benefits of an employe because of

the employe's handicap. It is perhaps possible that it permits an employer to, in effect, contribute a lesser amount to an employe's fringe benefits because of another employe's handicap, as, for example, in a plan calling for more extensive health insurance for handicapped employes. In a situation like this, where the legislature utilized a broad definition of handicap discrimination not explicitly tied to the discriminated-against individual's own handicap, and then in certain more specific areas explicitly used such provisions, there obviously is a strong presumption that, except for those explicit provisions, the legislature did not intend to restrict the coverage of the handicap discrimination law to situations involving adverse employment actions against an individual because of that individual's handicap.

This approach to the law is reinforced by the legislative history of §111.34(1)(a), Stats. The current version set forth above, was created by Laws of 1981, chapter 334. The predecessor version of the law read as follows:

> "(f) It is discrimination because of handicap:
>
> * * *
>
> 2. For an employer to contribute a lesser amount to the fringe benefits, including life or disability insurance coverage, of any employe because of a handicap." §111.32(5)(f)2., Wis. Stats. (1979-80) (emphasis added)

By changing the term "because of a handicap", to read "because of the employe's handicap," the legislature not only narrowed the coverage of the law, but also demonstrated an awareness of the significance of this language while not similarly changing other significant provisions, particularly the general provisions prohibiting handicap discrimination, §§111.321 and 111.322, Stats.

The legislature effected a somewhat similar change by Laws of 1981, c.334, that is of particular significance for the instant case. Section 111.31(3), Wis. Stats. (1979-80) had provided as follows:

> "In the interpretation and application of this subchapter, and otherwise, it is declared to be the public policy of the state to encourage and foster to the fullest extent practicable the employment of all properly qualified persons regardless of their age, race, creed, color, handicap, sex, national origin or ancestry. This subchapter shall be liberally construed for the accomplishment of this purpose." (emphasis added)

By the Laws of 1981, c.334, the legislature removed the word "their" from this provision, so that it now reads "...regardless of age, race, creed, color, handicap, sex, national origin or ancestry...." §111.31(3), Wis. Stats. (1983-1984). Again, this change in the liberal construction clause of the FEA is inconsistent with the notion that the law's prohibition against handicap discrimination only runs to discrimination against a person because of his or her handicap.

Respondent cites the FEA's limited coverage of age[1]:

> This [alleged non-applicability of the FEA to complainant] is not a unique situation."

However, the fact that the legislature saw fit to state specifically that the FEA prohibition of age discrimination does not apply to everyone arguably reinforces the theory that no such restriction was intended with respect to handicap discrimination, since there is no parallel or similar language in that portion of the act dealing with handicap discrimination, except for the particular restriction with regard to fringe benefits set forth in §111.34(1), Stats., discussed above.

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[1] "The prohibition against employment discrimination on the basis of age applies only to discrimination against an individual who is age 40 or over." §111.33(1), Stats.

Respondent also contends that complainant lacks standing because he was not certified for any of the positions in question, and therefore he was not eligible for appointment. However, complainant did suffer an "injury in fact" from the overall selection process. He applied for these vacant positions when he took the examination. He was not selected for, and in effect was denied appointment to, both positions. While he was told he could not be considered further for these positions because his examination scores were not high enough, three other individuals who scored lower than complainant were allowed to proceed further in the selection process because of their handicapped status. In other words, in the context of the use of expanded certification to certify people who had lower exam scores than complainant, it could be said that he was denied the opportunity to advance in the selection process because he was not handicapped. Therefore, respondent's handling of the selection processes for the IRCD 2 position at KMCI and the ISD 1 position at WCI satisfy the first stage of the analysis set forth in Milwaukee Brewers v. DHSS, 130 Wis. 2d 56, 387 N.W. 2d 245 (S. Ct. 1986), by directly causing injury to complainant's interest. The second step, that the interest asserted is recognized by law, has been covered in the foregoing discussion concerning the extent of the FEA's coverage or handicap discrimination.

Finally, respondent has made the point that the complaint was filed more than 30 days after the effective dates and the dates of notice of these transactions, and therefore pursuant to §230.44(3), Stats., to the extent this matters could be considered as a civil service appeal under §230.44(1), Stats., it is untimely filed. This has not been contested. However, while some of the language in the complaint is consistent with a civil service appeal, this matter has never been processed as such, and

there is no indication in the file that complainant has sought to have this matter considered as a civil service appeal. Therefore, this part of respondent's motion at this point seems to be a case of overkill, and no order will be entered with regard to so much of the complaint as conceivably could be construed as a civil service appeal under §230.44(1), Stats.

ORDER

Respondent's motion to dismiss filed March 1, 1988, is granted in part and denied in part. So much of this complaint which alleges discrimination on the basis of honesty testing devices, and so much of the complaint which relates to the AO 1 position at CCI as a separately cognizable matter, is dismissed.

Dated: June 29, 1988 STATE PERSONNEL COMMISSION

AJT:jmf
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DONALD R. MURPHY, Commissioner

LAURIE R. McCALLUM, Commissioner