STATE OF WISCONSIN PERSONNEL COMMISSION

THERESE M. DUELLO,

Complainant,

v.

Chancellor, UNIVERSITY OF WISCONSIN - Madison,

Respondent.

Case No. 87-0044-PC-ER

DECISION
AND
ORDER

NATURE OF THE CASE

This case involves a charge of discrimination on the basis of sex and retaliation, with respect to a pattern of alleged harassment culminating in nonrenewal and refusal to reconsider this decision. This charge was filed with this Commission on April 30, 1987. On October 9, 1989, the Commission received a letter dated October 9, 1989, from counsel for respondent which states, in part, as follows:

> The Commission has placed the processing of this case on "hold" pending the University's internal review procedures to resolve the matter. Those procedures have been completed and, at your request, I am forwarding the final resolution of Dr. Duello's complaints. Dr. Duello has accepted the resolution, reserving only the right to pursue the payment of her legal fees in connection with her internal appeals. I have enclosed a July 27, 1989 letter from Dean Sussman to Dr. Duello, which also bears her signature and statement accepting the remedies. The University requests the Commission to dismiss the complaint.
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> * * *
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> In response to her claims, the University has not only continued her employment and provided her with an additional probationary period in another department, it has also provided substantial research support and a new laboratory. I have enclosed correspondence which summarizes the results of the negotiations on these issues. All of these matters have been resolved in a manner acceptable to Dr. Duello.
>
> Based on the successful resolution of her complaints, and Dr. Duello's acceptance of the remedies offered, the University requests that

> the Commission dismiss her complaint. Dr. Duello reserved only the right to pursue the matter of non-payment of her legal fees for the internal review process. The Commission does not have jurisdiction to enforce payment of attorney fees for internal agency reviews. Its authority regarding payment of attorney fees extends only to fees incurred in the prosecution of a contested case claim before the Commission. §227.485, Stats.

On November 16, 1989, the Commission received a letter from complainant dated November 13, 1989, which states, in part, as follows:

> On April 24, 1987, a sexual discrimination complaint was filed with the Personnel Commission on my behalf by Attorney Cheryl Weston. The following damages have been incurred as a result of the failure to resolve this complaint:
>
> $13,215.49 in attorney's fees and associated expenses
>
> Despite the fact that the University has paid legal fees in a past case involving an internal review process, Chancellor Donna Shalala has already clearly indicated her unwillingness to pay my legal expenses (letter attached). Therefore this complaint can not be resolved and will not be withdrawn.
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> In the letter from Attorney Gail Snowden to Ms. Bastien dated October 9, 1989, Ms. Snowden specifically states that "Dr. Duello reserved the right to pursue the matter of non-payment of her legal fees for the internal review process". Given Ms. Snowden's comments, it is apparent that the University clearly understands that I was not waiving my rights to pursue a remedy through the Personnel Commission. I therefore ask that the Personnel Commission intercede at this point to resolve this case contested under §227.845, Stats. [sic][1]

By letter dated November 17, 1989, the Commission established a briefing schedule on what it construed to be a motion to dismiss set forth in respondent's letter of October 9, 1989, and both parties have submitted briefs.

DISCUSSION

Complainant has taken the position that this complaint has not been resolved because respondent has refused to pay her legal fees and associated expenses. Respondent has taken the position that as a matter of law the Commission can not award the attorney's fees and costs incurred in the

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[1] There is no §227.845, Stats. The Commission assumes complainant means to refer to §227.485 (Costs to certain prevailing parties.").

proceeding in question. If, as a matter of law an award of attorney's fees, the only remedy which remains in question, is precluded, then this case would be considered moot and the charge should be dismissed, see, e.g., In re Marriage of Sumby v. Sumby, 116 Wis. 2d 347, 351, 341 N.W. 2d 725 (Ct. App. 1983):

> 'A case is moot when a determination is sought which, if rendered, could have no practical effect upon a then-existing controversy,' State ex rel. McDonald v. Douglas Cty. Cir. Ct., 100 Wis. 2d 569, 572, 302 N.W. 2d 462, 463 (1981). The business debts which should have been included in the marital estate have been discharged, and neither Frederick nor Patricia are liable for their payment. Frederick's reaffirmation of his debt to Patricia is invalid, so that whether the amount of the debt was improperly determined is irrelevant. Any determination by this court as to whether the trial court should have included the business debts in the marital estate will therefore have no effect on an existing legal controversy. The appeal is moot.

That is, if the Commission can not award the only remedy which complainant is seeking (attorney's fees and costs), this case would be moot because the Commission could not render any kind of decision that would have a "practical effect on a then-existing controversy," id. Therefore, the Commission will address the issue raised by respondent's motion to dismiss. The underlying material facts do not appear to be in dispute.

In addition to filing her charge of discrimination with this Commission, complainant also appealed her nonrenewal to the UW-Madison Committee on Faculty Rights and Responsibilities (CFRR). The authority for such an appeal to this body is set forth at § UWS 3.08, Wis. Adm. Code:

> (1) The faculty and chancellor of each institution, after consultation with appropriate students, shall establish rules and procedures for the appeal of a nonrenewal decision. Such rules and procedures shall provide for the review of a nonrenewal decision by an appropriate standing faculty committee upon written appeal by the faculty member concerned. . . . The burden of proof in such an appeal shall be on the faculty member, and the scope of such review shall be limited to the question of whether the decision was based in any significant degree upon one or more of the following factors, with material prejudice to the individual:

(a) Conduct, expressions, or beliefs which are constitutionally protected, or protected by the principles of academic freedom, or

(b) Factors proscribed by applicable state or federal law regarding fair employment practices, or

(c) Improper consideration of qualifications for reappointment or renewal. For purposes of this section, "improper consideration" shall be deemed to have been given to the qualifications of a faculty member in question if material prejudice resulted because of any of the following:

1. The procedures required by rules of the faculty or board were not followed, or

2. Available data bearing materially on the quality of performance were not considered, or

3. Unfounded, arbitrary or irrelevant assumptions of fact were made about work or conduct.

(2) The appeals committee shall report on the validity of the appeal to the body or official making the nonrenewal decision and to the appropriate dean and the chancellor.

(3) Such a report may include remedies which may, without limitation because of enumeration, take the form of a reconsideration by the decision maker, a reconsideration by the decision maker under instructions from the committee, or a recommendation to the next higher appointing level. Cases shall be remanded for reconsideration by the decision maker in all instances unless the appeals committee specifically finds that such a remand would serve no useful purpose. The appeals committee shall retain jurisdiction during the pendency of any reconsideration. The decision of the chancellor will be final on such matters.

The applicable part of the Faculty Policies and Procedures, UW-Madison, provides as follows:

7.10 APPEAL OF A NONRENEWAL DECISION. (See UWS 3.08.)

A. By written request, within twenty days, the faculty member may appeal an adverse reconsideration of a nonrenewal decision in accordance with the provisions of UWS 3.08(1). The appeal shall be heard by the Committee on Faculty Rights and Responsibilities no later than twenty days after the request, except that this time limit may be enlarged by mutual consent of the parties, or by

order of the committee. The faculty member shall be given at least ten days notice of such review.

B. The Committee on Faculty Rights and Responsibilities shall report on the validity of the appeal to the faculty member, the departmental executive committee, the appropriate dean, and the chancellor, in accordance with the provisions of UWS 3.08(3).

C. The Committee on Faculty Rights and Responsibilities shall retain jurisdiction pending the resolution of the appeal.

The CFRR issued its final report on complainant's appeal on October 27, 1988. This report contained the following summary of the committee's recommendations at p. 21:

> We have concluded that the challenged nonretention decision did not violate any standard formal norms of procedure or due process, and we have discovered no evidence that it resulted from sexual discrimination. Nevertheless, it failed to meet the standards of fairness that the University of Wisconsin is committed to uphold. CFRR has found no actionable or malicious misconduct on the part of any faculty member or administrator, but there is nonetheless plenty of culpability to be shared. Lack of colleague sympathy and assistance, unfortunate and insensitive statements susceptible to misinterpretation, an investigation by AAO which distressed and angered the Anatomy Department Executive Committee and Dr. Duello, and apparently insufficient oversight by the Medical School Administration, conjoined with a tense and unfriendly work environment, prevented a fair evaluation of Dr. Duello's accomplishments and likely future performance. Her own heightened sensitivity did nothing to ameliorate these conditions, and probably only exacerbated them. Under the circumstances, CFRR believes that Dr. Duello is entitled to another chance to be judged on her merits as a scholar, the same opportunity to succeed that is routinely extended to all assistant professors. (footnote omitted)

The Committee then set forth a series of specific recommended steps that would provide complainant with a new contract and various other changes in her status that would result in another opportunity to obtain tenure. The Committee also recommended that the University reimburse complainant for fifty percent of her legal expenses.

By a memo dated February 10, 1989, Chancellor Shalala set forth her decision on complainant's appeal. While she disagreed with the CFRR

conclusion that there were proper grounds for appeal under § UWS 3.08(1), Wis. Adm. Code, she noted that the Anatomy Department and complainant agreed on most of the CFRR's recommendations, and she adopted most of these recommendations. She noted that since she found:

> [T]hat CFRR and each of the parties have a tenable reason for supporting the recommended remedies, it is not necessary for me to resolve their disagreements concerning gender discrimination and on what conditions prevailed within the Anatomy Department.

She reserved judgment on the question of attorney's fees. Subsequently, by letter dated July 10, 1989, Chancellor Shalala advised of her conclusion that "there is no legal or policy basis to approve the payment of attorney's fees in matters before the CFRR."

There are only two bases for the Commission to direct the payment of attorney's fees. Section 227.485(3), Stats., provides:

> (3) In any contested case in which an individual, a small nonprofit corporation or a small business is the prevailing party and submits a motion for costs under this section, the hearing examiner *shall award the prevailing party the costs incurred in connection with* the contested case, unless the hearing examiner finds that the state agency which is the losing party was substantially justified in taking its position or that special circumstances exist that would make the award unjust.

This provision does not give the Commission the authority to award costs for a proceeding before another agency. Section 227.485(2)(a) defines "hearing examiner" as "the agency or hearing examiner conducting the hearing." Since this Commission did not conduct the hearing before the CFRR, this Commission lacks the authority under § 227.485(3) to award the attorney's fees incurred by complainant in connection with that proceeding.

The other basis for this Commission to award attorney's fees is the Fair Employment Act, Subchapter II, Chapter 111, Stats. While there is no explicit provision in that law for attorney's fees awards, the Wisconsin Supreme Court

has found implied authority in the law for such awards. In Watkins v. LIRC, 117 Wis. 2d 753, 765, 345 N.W. 2d 482 (1984), the Court held as follows:

> We therefore hold that under §111.36(3)(b), Stats. 1975, DILHR[2] has the authority to award reasonable attorney's fees to a complainant who prevails in an action brought pursuant to the Fair Employment Act.

Laying to one side the question of whether complainant can be said to have "prevailed" in her appeal under § UWS 3.08, Wis. Adm. Code, that proceeding clearly was not "an action brought pursuant to the Fair Employment Act," id. The only possible basis for a conclusion that the Commission has the authority under the FEA to award attorney's fees with respect to complainant's § UWS 3.08 appeal would be to analogize to a line of cases decided under Title VII (42 U.S.C. §§ 2000e-2000e-17), the federal analogue of the Wisconsin FEA, holding that under certain circumstances attorney's fees can be awarded to complainants in connection with proceedings outside of, but connected in *certain ways to, the Title VII process.*

The seminal case here is New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 64 L.Ed. 2d 723, 100 S.Ct. 2024 (1982). Under Title VII, a charge of discrimination filed with the EEOC must be cross-filed with the state equal rights agency. In that case, after complainant's Title VII discrimination charge was deferred to the New York State Division of Human Rights, she incurred legal fees in processing her charge with that agency and in subsequent state administrative and judicial review proceedings, in all of which she prevailed. While judicial review was pending in state court, the EEOC, in reliance on the state probable cause finding, found reasonable cause

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2 Pursuant to §111.375(2), Stats., this Commission has jurisdiction over charges of discrimination brought against state agencies (such as UW-Madison) as employer, and the Commission's powers under the Fair Employment Act are coextensive with those of DILHR, 68 Op. Atty. Gen. 403 (1979).

to believe discrimination had occurred and issued a "right-to-sue" letter. After complainant filed suit in federal court, the state judicial proceeding was finally resolved, as the employer agreed to comply with the state agency's order. The Title VII action then was settled as to all issues except attorney's fees. The Supreme Court concluded that Title VII authorized the award of attorney's fees under the circumstances.

Title VII provides for attorney's fees at § 706(k), 42 U.S.C. § 2000e-5(k), as follows:

> In any action or proceeding under this title the court, in its discretion, may allow the prevailing party other than the Commission or the United States, a reasonable attorney's fee as part of the costs.

In its holding, the Court relied heavily on the fact that deferral to state proceedings was a statutorily-mandated integral part of the Title VII process:

> It is clear from this scheme of interrelated and complementary state and federal enforcement that Congress viewed proceedings before the EEOC and in federal court as supplements to available state remedies for employment discrimination. Initial resort to state and local remedies is mandated . . . . Only authorization of fee awards ensures incorporation of state procedures as a meaningful part of the Title VII enforcement scheme. 447 U.S. at 65, 64 L.Ed. 2d at 735.

While the Court thus construed Title VII to cover the award of attorney's fees for proceedings in another forum where resort to that forum was explicitly mandated by Title VII, it has declined to extend the reach of that (or similar) attorney's fee provisions to outside forums where resort to those forums was not so mandated. For example, Webb v. Dyer Co. Bd. of Education, 471 U.S. 234, 85 L.Ed. 2d 233, 105 S.Ct. 1923 (1985), involved a discharged elementary school teacher who engaged in an administrative proceeding before the Board of Education, which resulted in the Board deciding to adhere to its discharge decision. He then filed an action in federal court under 42 U.S.C. §§ 1981, 1982, 1983 and 1985, charging that his discharge had been

racially discriminatory. This action was settled by reinstatement and an award of damages. It was agreed to reserve the matter of attorney's fees for resolution by the parties or the court. The parties ultimately stipulated that the employe was a "prevailing party" entitled to an award of attorney's fees but were in disagreement as to whether he was entitled to fees with respect to the Board proceedings. The Supreme Court addressed alternate theories of entitlement to a fee award for the Board proceedings.

The Court held that the employe was not entitled to fees on the theory that the administrative proceedings were "proceedings to enforce a provision" of § 1983 within the meaning of § 1988, which provides:

> In any action or proceeding to enforce a provision of §§ 1981, 1982, 1983, 1985 and 1986 . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

While the Court noted this language was similar to the relevant language in Title VII, it distinguished New York Gaslight Club because in that case Title VII had required the employe to engage in the state administrative process, while there was no similar requirement under § 1983:

> Because § 1983 stands 'as an independent avenue of relief' and petitioner 'could go straight to court to assert it' . . . the School Board proceedings in this case simply do not have the same integral function under § 1983 that state administrative proceedings have under Title VII.
>
> Congress only authorized the district courts to allow the prevailing party a reasonable attorney's fee in an 'action or proceeding to enforce [§ 1983].' Administrative proceedings established to enforce tenure rights created by state law simply are not part of the proceedings to enforce § 1983, and even though the petitioner obtained relief from his dismissal in the later civil rights action, he is not automatically entitled to claim attorney's fees for time spent in the administrative process on this theory. (footnotes omitted)

The employe also argued that attorney's fees could be awarded on the theory that:

> [A]ll of the hours spent by his attorney in the School Board proceedings were 'reasonably expended' to enforce the rights protected by § 1983. More specifically, since witnesses were examined and opposing arguments considered and refuted in those proceedings, the work was analogous to discovery, investigation, and research that are part of any litigated proceeding, and therefore should be compensable as though the work was performed after the lawsuit was actually filed. 'In sum,' petitioner concludes, 'Hensley requires that fees for work done from the onset of any attorney-client relationship be awarded if that work was reasonably related to the enforcement of federal civil rights unless the hours spent would not, in the exercise of normal billing judgment, be properly billed to one's client.' Brief for Petitioner 19 (quoting Hensley v. Eckerhart, 461 US, at 434, 76 L Ed 2d 40, 103 S Ct 1933). 471 U.S. at 242, 85 L.Ed. 2d at 241-242.

The Court rejected this argument:

> The Court's opinion in Hensley does not sweep so broadly. The time that is compensable under § 1988 is that 'reasonably expended on the litigation.' Id. at 433, 76 L.Ed. 2d 40, 103 S.Ct. 1933 (emphasis added) . . .
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> The petitioner [employe] made no suggestion below that any discrete portion of the work product from the administrative proceedings was work that was both useful and of a type necessary to advance the civil rights litigation to the state it reached before settlement. (emphasis added) 471 U.S. at 242-243, 85 L.Ed. 2d at 242.

In the instant case, complainant was not required by anything in the FEA to have pursued the appeal of her nonrenewal pursuant to § UWS 3.08, Wis. Adm. Code, before the CFRR. These circumstances are not analogous to New York Gaslight Club where the Title VII system of referral and deferral to state agencies required the employe to pursue state administrative proceedings.

With respect to the second argument made in Webb, a prerequisite to an award of attorney's fees in connection with proceedings before another agency (here, the CFRR) would be a determination that the attorney work product from the other proceedings "was both useful and of a type necessary to advance the civil rights litigation." id. It is undisputed from the parties' submissions that the only issue left unresolved by complainant's § UWS 3.08 appeal is the matter of attorney's fees. Therefore, this proceeding before the

Commission is essentially akin to an action for attorney's fees. The Commission cannot discern, given these circumstances, how the attorney work product from the § UWS 3.08 appeal can or could possibly be characterized as "both useful and of a type necessary to advance the civil rights litigation."

A further reason why the Commission is unable to award attorney's fees in connection with complainant's § UW 3.08 appeal is that complainant was not successful in establishing that she had been discriminated against as she had alleged. See e.g., Grubbs v. Butz, 548 F. 2d 973 13 FEP Cases 245 (D.C. Cir. 1976), Hanrahan v. Hampton, 446 U.S. 754, 64 L.Ed. 2d 670, 100 S.Ct. 1987 (1980). This result is in keeping with one of the concepts underlying fee award provisions, see Independent Federation of Flight Attendants v. Zipes, 491 U.S. ___, 105 L.Ed. 2d 639, 648-649, 109 S.Ct. 2732 (1989):

> It is of course true that the central purpose of § 706(k) is to vindicate the national policy against wrongful discrimination by encouraging victims to make the wrongdoers pay at law -- assuring that the incentive to such suits will not be reduced by the prospect of attorney's fees that consume the recovery . . . In every lawsuit in which there is a prevailing Title VII plaintiff there will also be a losing defendant who has committed a legal wrong.

There are certain categories of cases where attorney's fees can be awarded in the absence of a decision on the merits of the discrimination claim against the employer. One example is a case resolved by a voluntary consent decree or settlement agreement, such as in Maher v. Gagne, 448 U.S. 122, 129, 65 L.Ed. 2d 653, 661, 100 S.Ct. 2570 (1980) (42 U.S.C. § 1983 lawsuit concluded by a settlement and a consent decree). Another category of cases involves the circumstance where a charge of discrimination is one of several claims, one of the non-discrimination claims is the basis for the resolution of the dispute favorably to the employe, but the court can not determine that the charge of discrimination contributed materially to the ultimate outcome. See Smith v.

Robinson, 468 U.S. 992, 82 L.Ed. 2d 746, 104 S.Ct. 3457 (1984). However, in the instant case it is not simply a situation where for one reason or another no decision was rendered on the employe's discrimination claim. Rather, the CFRR found that there was no evidence that the alleged discrimination had occurred. These circumstances obviate any possible argument that complainant's discrimination claim contributed in a material way to the chancellor's resolution of the controversy.

Complainant responded in her brief to respondent's argument that she had not prevailed on her discrimination claim as follows:

> Ms. Snowden states in her letter of December 18, 1989 that the CFRR did not find any discrimination or harassment on the basis of sex. What the report actually states is that "...we uncovered no probative evidence of gender discrimination....". This is not to say that gender discrimination did not exist, but rather that that this investigative body did not uncover it. They are in no way trained to make this determination. The determination of whether sexual discrimination took place laid solely with the Federally mandated Office of Affirmative Action and Compliance. Even if determinations regarding sexual discrimination did lie with CFRR, their ability to detect sexual discrimination or harassment would have been totally precluded by the events surrounding the investigation by the Office of Affirmative Action and Compliance, which included objections by members of the Department of Anatomy.

This contention ignores the fact that the Wisconsin Administrative Code specifically authorizes the CFRR to make determinations regarding gender discrimination:

> [T]he scope of such review shall be limited to the question of whether the decision was based in any significant degree upon one or more of the following factors, with material prejudice to the individual:
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> * * *
>
> (b) Factors proscribed by applicable state or federal law regarding fair employment practices.... § UWS 3.08(1).

Furthermore, § UWS 3.08(1) specifically states that the "burden of proof shall be on the faculty member...." Since complainant had the burden of proof, she

had to produce sufficient evidence to support her allegations that her "'rights under fair employment law have been violated,'" CFRR Report, p. 11, and the CFRR statement that "we have uncovered no probative evidence of gender discrimination," id., p. 12, is equivalent to a finding that no gender discrimination occurred.

Finally, complainant's argument concerning the events surrounding the Office of Affirmative Action and Compliance investigation is outside the scope of this inquiry. In determining whether it can award attorney's fees for the CFRR proceeding, the Commission can only consider whether complainant in fact was successful on the gender discrimination issue before the CFRR and not whether certain circumstances allegedly prevented the committee from making such a finding.

In her brief, complainant makes a number of assertions as to why and how respondent's handling of the § UWS 3.08 appeal compelled her to retain counsel. These points are not material to the question of whether as a matter of law the Commission can award attorney's fees for the proceedings before the CFRR. As discussed above, the only possible bases for such an award would be either that those proceedings were required by the FEA or that the attorney's work product involved was both useful and of a type necessary to advance the Commission proceeding. If neither element is present, there is no potential basis for the Commission to award fees, regardless of whether complainant was forced to retain counsel by respondent's alleged misconduct.

In conclusion, since there does not appear to be any possible basis for an award of attorney's fees incurred in connection with complainant's § UWS 3.08 appeal, and this is the only matter in controversy between the parties, this case must be dismissed as moot.

ORDER

This proceeding is dismissed as moot.

Dated: March 9, 1990

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

AJT:rcr

Parties:

Therese M. Duello, Ph.D.
3913 Priscilla Lane
Madison, WI 53705

Donna E. Shalala
Chancellor, UW-Madison
158 Bascom Hall
500 Lincoln Drive
Madison, WI 53706