STATE OF WISCONSIN PERSONNEL COMMISSION

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PASTORI M. BALELE, *
FRANK A. HUMPHREY, *
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Complainants, *
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v. *
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Secretary, DEPARTMENT OF *
EMPLOYE TRUST FUNDS, *
Administrator, DIVISION OF *
MERIT RECRUITMENT & SELECTION, *
Secretary, DEPARTMENT OF *
EMPLOYMENT RELATIONS, *
*
Respondents. *
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Case Nos. 87-0047, 0048-PC-ER *
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DECISION AND ORDER ON MOTION TO DISMISS FOR LACK OF STANDING

These are charges of discrimination on the basis of race (Humphrey) and race and national origin (Balele) under the Fair Employment Act (FEA) (Subch. II, Ch. 111, Stats.) with respect to certain hiring processes. These matters are before the Commission on the motion of respondents DER/DMRS to dismiss for lack of standing, filed October 6, 1987. Both sides have filed briefs.

For the purpose of resolving a motion of this nature, the Commission will assume the allegations of the charges are true and will accord them a liberal construction in favor of complainants. See Wisconsin's Environmental Decade, Inc. v. PSC, 69 Wis. 2d 1, 8, 230 N.W. 2d 243 (1975).

The following factual framework is provided by the charges that were filed as well as certain additional facts provided in respondents' brief and not disputed by complainants.

In March 1987, Mr. Balele, who is black and of African national origin, was interviewed for a vacancy in an Administrative Officer 4,

Director of Benefit Plan Operations (Pay Range 19) position in DETF. This position was in the Career Executive Program, §230.24, Stats.; Chapter ER-Pers 30, Wis. Adm. Code. Mr. Balele was not in the Career Executive Program. He was not examined directly for this position, but was able to be considered because he earlier had passed an exam and had been certified on a minority expanded certification basis, §ER-Pers 12.05, Wis. Adm. Code, for another Career Executive position, and that register was approved as a related register for the Director of Benefit Plan Operations position. He again was certified for the Benefit Plan Operations position under Minority Expanded Certification. A white applicant who was in the Career Executive program was chosen for reassignment to this position. Under the Career Executive Program, a current Career Executive can be reassigned to a Career Executive vacancy without the necessity of taking an examination, §§ER-Pers 30.07, and 30.08, Wis. Adm. Code. Complainant Balele alleges that the use of the Career Executive Program in this manner is discriminatory in that it has a disparate impact on blacks due to their underrepresentation in the ranks of Career Executives.[1]

Complainant Humphrey, who is black, also was considered and not selected for this position on the basis of the same related register. The only difference in the facts relating to his charge is that he had not been certified for the earlier position under expanded certification, but rather was certified solely on the basis of his rank on the register.

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[1] Complainants also allege that there was racially-motivated disparate treatment in the actual decisions to appoint the white candidates, both as to this position and the AO 2 position discussed below, but this motion does not run to this aspect of the charges.

Both complainants were certified for a vacant AO 2 position, Director of Retirement and Survivor Benefits, in DETF. This position was outside the Career Executive Program. While both complainants were interviewed, the vacancy was filled by transfer of a white employe from DHSS pursuant to §ER-Pers 15.01, Wis. Adm. Code. Complainants allege that utilization of the transfer option to fill this position involved what amounts to word-of-mouth recruitment and had a disparate impact on blacks.

Respondents' objection does not run to complainant's standing with respect to the ultimate decision of non-appointment. Rather, respondents contend that because complainants were among the final group of candidates who were interviewed and given consideration for appointment, they lack standing to challenge respondents' decisions to consider, or include in the final pool of candidates, Career Executives and transfer candidates who had not taken the particular competitive civil service exam involved.

In WED v. PSC, supra, the Court held:

> The Wisconsin rule of standing envisions a two-step analysis conceptually similar to the analysis required by the federal rule. The first step under the Wisconsin rule is to ascertain whether the decision of the agency directly causes injury to the interest of the petitioner. The second step is to determine whether the interest asserted is recognized by law... (1) Does the challenged action cause the petitioner injury in fact? and (2) is the interest allegedly injured arguably within the zone of interests to be protected or regulated by the statute ... in question?... 69 Wis. 2d at 10.

In the instant case, it initially appears that complainants satisfy these elements of standing. Respondent's decisions to consider career executives and transfer candidates not on the register had the effect of requiring complainants to compete against a larger number of candidates -- i.e., it reduced their odds of appointment.[2] Complainants further contend

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[2] In fact, the persons ultimately appointed to the positions in question were a career executive and a transfer candidate.

that those candidates had the advantage of not having had to have taken the competitive examination and that the Career Executive candidates had an added advantage in that they were perceived (allegedly incorrectly) by the appointing authority as being better qualified by virtue of their very status as career executives.

As to the second element, complainants have alleged that respondents' utilization of these alternatives (consideration of Career Executives and transfer candidates) had a disparate impact on blacks. This appears to take the matter into the area protected by the FEA.

In its brief, respondent DMRS makes the following argument on the "statistical dilution" theory:

> His or her [minority applicant] chances may have been reduced from 1 out of 5 to 1 out of 15, but so were the chances of the other 4 nonminority certified candidates. The minorities and the nonminorities would be affected in exactly the same way....

This argument does not run to "injury in fact." Both the white and the minority certified candidates may be said to have suffered injuries by the employer's decisions to consider the non-certified Career Executive and transfer candidates. Whether a particular individual suffered adverse treatment because of race, and how his or her treatment compared to other individuals of different race(s), is a question as to the merits of the particular charge of discrimination.

Furthermore, if an employer commits a racially discriminatory employment action that adversely affects black employes, the fact that nonminority employes also were adversely affected should not be material to the standing of a black employe to bring a charge of discrimination. For example, suppose a promotional examination resulted in a certification of four black employes and one white employe, and the employer, because it

wanted to be able to consider more white employes, decided to also consider all employes, black and white, who achieved a minimal passing score on the exam, and appointed a white employe from among this latter group. There is no reason to think that one of the black certified employes who could successfully prove these facts would be precluded from establishing liability because there was one white employe who also was disadvantaged by the employer's decision to expand the pool of candidates that would be considered for appointment. This hypothetical relies on a disparate treatment situation, whereas the complainants in the instant case rely on a disparate impact theory, but this should not make any difference as to the conclusion about the materiality of the presence of a similarly situated non-minority employe.

Respondent also argues that if an order were entered restricting competition to positions such as these to persons who passed a competitive exam, it is predictable that additional candidates -- those who had previously been eligible for consideration as career executives or transfer eligibles without the necessity of passing the exam -- would take the exam, and therefore the likelihood that complainants would be certified and receive further consideration would be less. Respondent contends that this underscores the "conjectural or hypothetical" nature of the injury claimed by complainants.

While there are other remedies that could be hypothesized, it is not clear that these predicted results would ensue from the foregoing remedy. As complainants point out in their brief, it is possible that many of the people who are eligible for consideration for vacancies under the Career Executive and transfer options by merely expressing an interest would not want to bother to take an examination. The complainants then would not

have to compete against these people at all. In any event, while a complainant's case in favor of standing would certainly be undermined if no remedy could be perceived that would have a positive effect on his or her situation, it does not follow that because a remedy can be hypothesized that could have a "boomerang" effect on his or her ultimate interests that there is no "injury in fact."

As to the second element of standing ("is the interest allegedly injured arguably within the zone of interests to be protected"), an argument can be made that complainants are not charging racial discrimination against themselves by respondents' consideration of the Career Executive and transfer candidates, because they are not among the group on whom the disparate impact falls, since they were able to be considered through the civil service (competitive) process. However, the fact remains that complainants have alleged that an employment action which has caused them "injury-in-fact" is illegal under the FEA.

For example, Allen v. American Home Foods, Inc., 644 F. Supp. 1553, 42 FEP Cases 407 (N.D. Ind. 1986), involved a Title VII sex discrimination claim that the employer had decided to close down a particular plant because there was a predominance of women at that plant, as compared to its other plants. The Court addressed the question of the standing of the five of the 51 plaintiffs who were male and who had contended "that they lost their jobs due to American Home's discrimination against their fellow female employes; thus, they suffered an injury directly related to American Home's sexual discrimination...." 42 FEP Cases at 408. The Court held as follows:

> ... the scope of the language 'person aggrieved' confers standing to all persons injured by an unlawful employment practice. These male plaintiffs allege such an injury, and thus have standing. This is as it

> should be. These males suffered the same injury as did the females that lost their jobs; the injuries of the males and females were occasioned by the same corporate decision; and if, as the plaintiffs allege, considerations of sex motivated the corporate decision to close the La Porte plant, the corporate decision that injured the male plaintiffs constituted an unlawful employment practice under Title VII.
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> Perhaps the male plaintiffs' remedies may be limited in light of the nature of the suit and the proof, but the Court cannot find that the male plaintiffs could prove no set of facts at trial that would entitle them to relief. 42 FEP Cases at 410.

This kind of approach to standing seems even more appropriate under the Wisconsin FEA, given not only the Supreme Court's pronouncement in Wisconsin's Environmental Decade, Inc. v. PSC, 69 Wis. 2d 1, 13, 230 N.W. 2d 243 (1975), that "the law of standing in Wisconsin should not be construed narrowly or restrictively...," but also the liberal construction language in the FEA at §111.32(3), Stats., and the fact that the proscription of discrimination in the FEA is set forth in broader language than in Title VII. Title VII provides at sec 703 (42 USC 2000e-2):

> (a) It shall be an unlawful employment practice for an employer --
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> (1) 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 or national origin.... (emphasis added)

The FEA provides at §111.321, Wis. Stats., that no employer may engage in an act of employment discrimination "against any individual on the basis of age, race, creed, color...," without the additional language found in Title VII referring to "such individual's" race, color, etc., and this is consistent with a broader approach to standing under the FEA than under Title VII.

ORDER

The motion to dismiss for lack of standing filed by DER/DMRS on October 6, 1987, is denied.

Dated: December 3, 1987 STATE PERSONNEL COMMISSION

DENNIS P. McGILLIGAN, Chairperson

DONALD R. MURPHY, Commissioner

LAURIE R. McCALLUM, Commissioner

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