STATE OF WISCONSIN PERSONNEL COMMISSION

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JOHN W. ELMER,

Complainant,

v.

Chancellor, UNIVERSITY OF WISCONSIN - MADISON,

Respondent.

Case No. 88-0184-PC-ER

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INTERIM DECISION AND ORDER

NATURE OF THE CASE

This case involves a complaint of handicap discrimination with respect to refusal to hire.[1] On June 15, 1989, respondent filed a motion to dismiss on the ground that the claimed handicap involves injuries which "arose incidental to and only as the result of his performance of an integral part of his job," and therefore, that the Commission's jurisdiction is pre-empted by the exclusivity provision of the Workers Compensation law, §102.03(2), Stats., and complainant's exclusive remedy is pursuant to §102.35, Stats., which prohibits an employer from refusing to rehire without reasonable cause an employe injured in the course of employment. Both parties have filed briefs.

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[1] Complainant also checked the box on the charge for "retaliation based on Fair Employment Activities." However, he has not alleged in his charge that he engaged in any fair employment activities, and apparently this box was checked erroneously.

DISCUSSION

The charge of discrimination, filed November 29, 1988, contains the following (as relevant):

> On November 7, I was interviewed by Mr. Gerber and Ms. De Garmo. I feel that they were reluctant to hire me for a MVO I position because I had a back injury, also I have a certified vocational handicap from the D.V.R. because of limited motion in my right ankle. I also have three permanent pins in my right heal [SIC] bone making it difficult to return to my previous job at the U.W. which involved climbing and extensive lifting. The MVO I position I was denied was perfect for my limitations. Hired instead of me was non handicapped nonminority already working full time. They told me they would let me know in writing if I would get the job, I found out I wasn't hired on November 16th when I called them. It is now November 22nd and I still have not received a letter from them. I am currently working 1/2 time & want to return to the U.W. full time because I still am covered by the U.W.'s worker's comp & that is where I worked when I got hurt. All this was explained by letters and verbally to them as well as showing them the verified certificate from the D.V.R. I also have a doctors excuse saying it is o.k. to go to full time.

Section 102.03(2), Stats., provides in relevant part:

> "Where such conditions exist [establishing the employer's liability for worker's compensation] the right to the recovery of compensation under this chapter shall be the exclusive remedy against the employer ...." (emphasis supplied)

Section 102.35(3), Stats., provides:

> (3) Any employer who without reasonable cause refuses to rehire an employe who is injured in the course of employment, where suitable employment is available within the employe's physical and mental limitations, upon order of the department and in addition to other benefits, has exclusive liability to pay to the employe the wages lost during the period of such refusal, not exceeding one year's wages."

As a result of these provisions, where an employer refuses to rehire an employe who has suffered a compensable injury, the employe's exclusive remedy for the failure to rehire is under the Worker's Compensation law Cornejo v. Polycon Indus., Inc., 109 Wis. 2d 649, 327 N.W.2d 183 (Ct.App.1982); Schachtner v. DILHR, 144 Wis.2d 1, 422 N.W. 2d 906 (Ct.App.1988). Implicit in the law is the principle that exclusivity comes into play only when the refusal to rehire has a causal relationship

to the work-related injury. See Franke v. Durkee, 141 Wis.2d 172, 176, 413 N.W. 2d 667 (Ct.App.1987); "Section 102.03(2), Stats., which provides that the terms of the act constitute an employee's exclusive remedy against his or her employer for work-related injuries, has been held to bar any action by the employee against the employer for such injuries ...." (emphasis supplied, citations omitted)

For example, an employe who suffers a work-related injury and subsequently is denied rehiring because of national origin would not be precluded from pursuing a charge of discrimination under the FEA based on national origin. In the same vein, if an employe suffered a work-related leg injury and recovered, and the employer refused to rehire because of that injury, the employe could not proceed with a handicap discrimination claim under the FEA. However, if the employer found out that this employe also had an arm condition and refused to rehire on that basis, the employe would not be precluded from pursuing a claim of handicap discrimination under the FEA with respect to the failure to rehire because of the arm condition.

In this particular case, the medical report dated December 1, 1988, submitted by respondent in support of its motion to dismiss, includes the following:

> Comment: Clinically, the patient did not have pre-existing symptomatology relating to low back pain. He denies any pre-existing injuries, etc., that may have caused him to develop low back pain. Subclinically however, the patient does have a documented spinal defect that is spondylolisthesis. Many authorities believe that such defects predispose those individuals to the development of low back pain. This is a genetic defect that is unrelated to any acute injury. The patient's acute lifting injury of October 13, 1987, resulted in the development of acute low back pain and caused the patient to be unable to work. Such acute injuries are generally self limiting and resolve with several weeks to months. It would be my opinion to a reasonable degree of medical certainty that patient's healing from this acute injury has plateaued. Any residual problem that the patient continues to have with his back is probably related to the presence of his spinal defect and not to his acute injury.

> Furthermore and as already alluded to above, because of the presence of this spinal defect, he is at higher risk for developing further episodes of more acute back pain.

This comment raises the question of whether the alleged refusal to rehire was based at least in part on a condition which pre-existed both the work-related back and ankle injuries. If it were established the employer acted at least partially on the basis of a reason (the spondylolisthesis) with respect to which the exclusivity portions of the unemployment compensation law do not apply, this raises the question of whether the Commission then should apply a "mixed motive" type of analysis. Under this approach, once it was established that the spondylolisthesis played a role in the decision not to rehire, the employer would have to prove by a preponderance of the evidence that it would have reached the same decision relative to non-reappointment even if the spondylolisthesis had not figured in the decision. See Jenkins v. DHSS, 86-0056-PC-ER (6/14/89); Price Waterhouse v. Hopkins, 57 U.S. Law Week 4469, 104 L.Ed. 2d 268(1989). In the Commission's view, this is the appropriate approach to take. Neither conceptually nor from a policy standpoint does there appear to be any reason to distinguish the situation where an employer acts on multiple bases, some of which are legal and some illegal under the FEA, and the situation where the employer acts on multiple bases, all of which are illegal under the FEA, but some of which are shielded from FEA liability by the exclusivity provision of the worker's compensation law.

In light of the foregoing legal conclusions and because obviously some of the facts with respect to causation are unresolved, respondent's motion to dismiss must be denied. Inasmuch as some of the material filed by respondent suggests that complainant may be pursuing a claim under the worker's compensation law with respect to his failure to have been rehired,

the Commission will consult with the parties in an effort to determine the best way to proceed logistically under such circumstances.

ORDER

Respondent's motion to dismiss filed June 15, 1989, is denied without prejudice to renewal at such time as the underlying facts have been developed.

Dated: August 24, 1989 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

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