STATE OF WISCONSIN PERSONNEL COMMISSION

PREMA ACHARYA,

Complainant,

v.

Secretary, DEPARTMENT OF ADMINISTRATION,

Respondent.

Case No. 88-0197-PC-ER

INTERIM DECISION AND ORDER

On December 28, 1988, complainant filed a charge of discrimination with the Commission alleging that respondent DOA had discriminated against her on the basis of her national origin in relation to DOA's termination of complainant's participation in a van pool. On March 7, 1989, respondent filed a motion to dismiss complainant's charge for lack of subject matter jurisdiction. On March 10, 1989, complainant filed a motion for summary judgment. Neither party requested an evidentiary hearing on either of such motions. The parties were permitted to file briefs in regard to these motions and the briefing schedule was completed on March 30, 1989. The following findings derive from information provided by the parties in relation to this case and are made only for the purpose of deciding the above-referenced motions:

1. As of December 20, 1988, complainant was employed as a limited term employee at the Wisconsin Department of Revenue (DOR).

2. Beginning some time in 1987, complainant had participated in a contract group transportation program administered by respondent DOA. Complainant utilized this program to travel between her home in DeForest, Wisconsin, and her DOR work site.

3. On December 21, 1988, complainant received a letter which stated as follows:

> "As of January 1st, 1989, the Van will no longer be stopping to pick you up."

The "Van" referenced in this letter was the vehicle utilized by complainant through her participation in the subject group transportation program.

Motion to Dismiss for Lack of Subject Matter Jurisdiction

Section 111.322, Stats., provides, in pertinent part:

> ". . . It is an act of employment discrimination to do any of the following:
> (1) to refuse to hire, employ, admit or license any individual. . . or to discriminate against any individual in promotion, compensation or in terms, conditions or privileges of employment. . . "

Section 16.82(5), Stats., provides, in pertinent part:

> "[The Department of Administration s]hall develop and implement a comprehensive ride-sharing program for state employes. . . and . . . shall promote and encourage alternate means of transportation for state, municipal and federal employees and other persons in the private sector including but not limited to. . . car pooling and van pooling; and may provide contract group transportation of state employees from designated pickup points to work sites and return in the absence of convenient and public scheduled transportation. . . No person is deemed to be in the course of employment while utilizing the group transportation."

Respondent argues in support of this motion that ". . . the Commission has no jurisdiction to hear this matter because Complainant was not in the course of her employment while utilizing the group transportation. . . "

However, the dispositive issue in regard to this motion is whether the contract group transportation program administered by respondent and in which complainant was participating was a "term, condition, or privilege of employment" within the meaning of §111.322(1), Stats. As the Commission noted in McFarland/Joubert v. UW-Whitewater, Case Nos. 85-0167-PC-ER and 86-0026-PC-ER (9/4/86), there is little authority from any jurisdiction dealing

with the meaning of this or similar language. In McFarland/Joubert, the Commission, citing the legislative admonition to liberally interpret the Fair Employment Act in §111.31(3), Stats., decided that participation in a faculty exchange program between the UW-Whitewater and the University of Zululand in the Republic of South Africa was a term, condition, or privilege of employment for the faculty members involved. Title VII, in 42 USC §2000e-2, uses language identical to that under consideration here. In interpreting such language, the U.S. Supreme Court in Hishon v. King & Spalding, 467 U.S. 69, 81 L. Ed. 2d 59, 104 S. Ct. 2229, 34 FEP 1406 (1984), stated as follows:

> "An employer may provide its employees with many benefits that it is under no obligation to furnish by any express or implied contract. Such a benefit, though not a contractual right of employment, may qualify as a privilege of employment under Title VII. A benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free under the employment contract simply not to provide the benefit at all. Those benefits . . . that form 'an aspect of the relationship between the employer and employees' Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 178, 78 LRRM 2974 (1971), may not be afforded in a manner contrary to Title VII."

In the instant case, participation in the subject transportation program was offered to complainant as a result of her employment by the State of Wisconsin. It was an "aspect of the employment relationship" between complainant and the State of Wisconsin. If respondent's position in regard to this motion were to be adopted, the State of Wisconsin as an employer could offer participation in the subject transportation program to only certain of its employees, e.g., to only those of a certain race, sex, age, creed, national origin, etc. To sanction such a practice by granting the subject motion would contravene the legislative admonition that the provisions of the Fair Employment Act, including the provision relating to the extent of its coverage, be liberally construed. Respondent's argument that complainant was not "in the course of her

employment" and, therefore, not within the coverage of the FEA, while she was utilizing the group transportation is not convincing. The Commission interprets the "course of employment" language to mean that the employee is not to be regarded as on work status while he or she is riding in a vehicle under the group transportation program. Simply because an employee is not on work status does not mean that he or she may not at that time be enjoying a privilege of his or her employment. For example, an employee may not be on work status when being examined by a physician but that doesn't mean that the health insurance benefits provided by his or her employer which cover the cost of the visit to the physician are not a privilege of his or her employment. The Commission concludes that complainant's participation in the group transportation program administered by respondent DOA pursuant to §16.82(5), Stats., is a "privilege" of her employment within the meaning of §111.322, Stats., and as such confers jurisdiction on the Commission to hear and decide this matter.

Motion for Summary Judgment

Summary judgment is appropriate only when there is no genuine issue as to any material fact. Thompson v. DMRS & DNR, Case No. 87-0204-PC, (6/29/88). It is clear from the pleadings in the instant case that there many disputed issues of fact. In advancing this motion, complainant states that respondent "did not dispute the material fact that the action taken by the van pool to terminate her ridership as of January 1, 1989, is not only discriminatory but also the failure of the respondent to stop such an action is wanton disregard and callousness on the part of the respondent towards the rights of the plaintiff." Complainant mischaracterizes the ultimate issue of law of the case as an issue of material fact in this statement. Regardless of this, it is clear that

the simple fact that respondent did not renew its position on each of the issues of fact and of law presented by this case in its briefs on the motions under consideration here does not operate as a waiver of the defenses presented by respondent to date or as an implicit adoption by respondent of complainant's version of the facts. Respondent has continued to vigorously defend this case and has done nothing to lead the Commission to conclude that it no longer disputes many of the complainant's factual assertions. As a result, the complainant's motion for summary judgment must necessarily fail.

Order

Complainant's motion for summary judgment and respondent's motion to dismiss are both denied.

Dated: May 3, 1989

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

LRM/lrm

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