

PREMA ACHARYA,

Complainant,

v.

Secretary, DEPARTMENT OF
REVENUE,

Respondent.

Case Nos. 89-0014, 0015-PC-ER

INTERIM
DECISION
AND
ORDER

These matters are before the Commission on the respondent's motion to dismiss for failure to state a claim and as a result of a dispute between the parties as to the appropriate issue for hearing.

On February 14, 1989, complainant filed a charge of discrimination alleging that respondent failed to hire her for two Clerical Assistant 1 positions because of her national origin. The charge included the following summary statement:

I feel the Department of Revenue did not hire me for a permanent Clerical Assistant 1 position, Central Files Section in August 1988, because of my national origin (Indian National). During the interview process, I was never [sic] informed that my walk was different and I feel that this statement was unwarranted. My mobility may have appeared to be awkward but this could be due to that I wear a saree. The respondent never formally interviewed me but after the hiring transaction was made, the respondent stated that they had interviewed me. I feel that I should have been entitled to a formal interview.

Also on February 14th, complainant filed a second charge alleging that the termination of her limited term employment was due to her national origin. That charge included the following statement:

I feel that my termination from a limited-term position in Central Files Section was based upon my national origin (Indian National). One of my co-workers, Lyenett asked me "Why was I wearing a saree - Why don't you go and buy your clothes at Goodwill." I received three different sets of instructions on how to perform the job duties. I received conflicting instructions from Janet,

Gary and Barb H. I feel that the conflicting job instructions resulted in my productivity not being as high. On January 20, 1989, I was informed that during the first 30 minutes you can do which activities that you preferred to do. The other employees were aware of this policy but I was not advised of it until my last day of employment. If I would have been advised of this earlier, I could have improved my productivity.

On June 27, 1989, after the complainant had filed an appeal of an initial determination of "no probable cause", the respondent filed a motion for an order dismissing the complainant's claims, contending that there were no facts showing the respondent had discriminated against the complainant as had been alleged in the charges of discrimination. The parties were provided an opportunity to file arguments regarding the respondent's motion. Complainant is not represented by counsel.

In ruling on the respondent's motion, the Commission must analyze the complainant's allegations liberally in favor of the complainant and only grant the motion if it appears with certainty that no relief can be granted. Canter-Kihlstrom v. UW-Madison, 86-0054-PC-ER, 6/8/88. Here, the respondent's motion is supported by an affidavit by respondent's counsel stating that the comments by complainant's co-worker Lenita (referred to by the complainant as Lyenett) were not discriminatory, that there were no other facts alleged which related to complainant's claims of discrimination, that the respondent did not discriminate against the complainant and that the Equal Rights Officer who investigated the complaints found no probable cause to believe that discrimination occurred.

Respondent's affidavit is insufficient to provide a basis for dismissing the complaints. The complainant alleges that discrimination can be inferred from certain actions of her employer and her co-workers. The mere existence of respondent's affidavit does not permit the Commission to ignore the complainant's allegations and to adopt the respondent's version of events. The charges of discrimination were drafted without benefit of counsel. In light of this fact and the liberal analysis that is required, the respondent's motion must be denied.

At a prehearing conference held in these matters on June 28, 1989, the parties were unable to agree on an issue for hearing. The respondent proposed the following issue:

Whether there is probable cause to believe that respondent discriminated against the complainant based on national origin as set forth in her complaints of discrimination and, accordingly, whether the initial determination of "no probable cause" should be affirmed or reversed.

The complainant's proposal was modified after the prehearing conference to read:

Did the respondent proffer legitimate non-discriminatory reasons for not hiring the plaintiff as Clerical Assistant 1 initially and later terminating her job as LTE?
If any such legitimate non-discriminatory reason is proffered, is it only a pretext?


The complainant's proposal fails to reflect the probable cause context of the forthcoming hearing. It also fails to reflect the traditional analysis applied to a charge of discrimination in which the complainant must first establish a prima facie case. The investigator's conclusion that there was a prima facie case as to one of complainant's charges is not binding on the Commission¹. The Commission is not precluded from reaching an opposite conclusion depending on the nature of the evidence presented at the hearing. Therefore, the complainant's statement of issue is found to be inappropriate. The respondent's proposal is consistent with the procedure described in §PC 2.07, Wis. Adm. Code, for appeals from initial determinations of no probable cause.

¹As to the complainant's charge arising from the termination of her limited term employment, the investigator concluded that the complainant failed to establish a prima facie case.


ORDER

The respondent's motion to dismiss for failure to state a claim on which relief can be granted is denied. The issue for hearing proposed by the respondent and set forth above is adopted as the issue for hearing in these matters.

Dated: July 14, 1989 STATE PERSONNEL COMMISSION


LAURIE R. MCCALLUM, Chairperson

KMS:kms


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner