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GARY INGRAM, *

Complainant, *

v. *

Chancellor, UNIVERSITY OF *

WISCONSIN - MILWAUKEE, *

Respondent. *

Case No. 89-0020-PC-ER *

* * * * *

INTERIM
DECISION
AND
ORDER

This is a complaint of discrimination on the basis of race. On May 26, 1989, respondent filed a motion to dismiss for failure to state a claim for relief. Complainant was given an opportunity to file a brief in response to the motion but he did not. The following findings of fact, which appear to be undisputed, are derived from documents provided by the parties and are made only for purposes of deciding this motion.

1. On February 24, 1989, complainant filed a charge of discrimination with the Commission alleging the following:

I was discriminated against because of my race (black) in regard to conditions of employment, wages, promotion and discharge in violation of Wisconsin Statutes 111.31-111.395 for the following reasons:

1. I started my employment with the Respondent on February 5, 1985. I have been employed as an LTE for my entire employment. My current job is Laborer/Helper in the Duplication Department.
2. During the course of my employment, I have not been allowed to apply for 4 or 5 permanent positions I was interested in. I was told by Sally Berg, Campus Director (white) and John Sheffield (white), Supervisor that I could not apply for these positions until they had tapped the entire UW-System statewide for transfers.

3. I do not believe this policy has been followed. In 1987 Gary Tebbes (white) was hired for a job in the media department that I was interested in. He was a part time security guard on campus, but I don't think he had permanent status.

4. In March 1988, John Wood (white) was hired for a position in Maintenance. He was hired from outside the UW System. I confronted Ms. Berg about this and about not being given a chance to apply for permanent positions. Her response was "Oh, you wouldn't have wanted that job anyway." She would not say why I couldn't be considered.

5. From February 1987 to September 1988, I held the position of Community Outreach worker. In October 1988, I found out that position was actually an Ad Hoc Academic Staff position, even though I was told I had LTE status at that time and was paid only \$5.00 per hour.

6. Community Outreach worker is considered a professional level position. Persons in counterpart Academic Staff (Ad Hoc) positions were being paid about \$10.00 or more per hour.

7. In November 1988, I again talked to Sally Berg, Campus Director about not being considered for full time positions. She stated I would never get a full time position there. She stated I was a fool to work hard in my LTE job to establish a good work record. She gave no other explanation for her actions.

8. For the last 4 years, during the summer, some of the permanent staff (white) have had their sons and daughters working at Respondent's 40 hours per week. This has resulted in my hours being cut from 40 to 20 or 30 hours per week and resulted in a considerable loss of earnings.

9. From 1985-1988, I had problems getting my paychecks. This happened on 20 or more occasions. I repeatedly complained to Mr. Sheffield and Ms. Burg. They refused to take action saying the payroll person was too difficult to deal with. When Mary Radomski, Assistant Dean started in March 1988, I complained to her. She corrected the problem immediately and stated it should have been dealt with long ago.

10. There have been errors in the amount of some paychecks which resulted in errors in state and federal taxes which has created hardship and much inconvenience for me in meeting my expenses.

11. In October, 1988, Michelle McCormick, Supervisor, Duplicating Department saying (sic) she objected to my "competing" with her for her job. Shortly after that, I was reprimanded for doing work without checking with the Supervisor first, in other words for working independently. Three weeks later, I was reassigned to the mail department 50% time. There I was reprimanded and discharged (from the 50% position) for asking the Supervisor ques-

tions and not working independently by Mr. Weller. He has not reprimanded or discharged white employees for such reasons.

12. After that, I was assigned to work for Michelle McCormick 32 hours per week while she was on vacation for two weeks. After that, I was cut to 16 hours a week only in Duplicating Department.

13. In January 1989, I filed a complaint with the UW-Office of Equal Opportunity Programs with Ms. Elaine Beige. Since I filed the complaint Michelle McCormick, Supervisor, and some of the other employees (white) have not been speaking to me. She has complained to me about filing "that damned EEO complaint." She had asked me to look for another job saying it's time for me to leave, I've outgrown the job.

14. On about February 5, 1989, Ms. McCormick put a brochure on my desk for a workshop entitled Rites of Passage: Black Manhood Development. When I said it wasn't mine and asked why she put it there, she stated she thought it was something I should look into. I found this offensive. Brochure date was 1984.

15. Since I filed the EEO complaint, I have only been scheduled 16 hours per week resulting in considerable loss of earnings.

16. Recently, I applied to be rehired at a former employer, Xerox Corporation. I think Ms. McCormick sabotaged my application and chances for re-employment on January 24, 1989 when she met with Michelle the Director of Xerox. I did not get rehired and I think her contact was a factor.

17. I believe I was discriminated against on the basis of my race (black) in regard to conditions of employment, wages, promotion, discharge and retaliation (in) violation of Wisconsin Fair Employment Law.

2. A conciliation conference was held on March 29, 1989, to attempt to reach a settlement of the instant complaint.

3. At such conference, it became apparent that some of the allegations in complainant's charge of discrimination concerned events which occurred more than 300 days prior to the date the charge was filed and, as a result, were not filed on a timely basis. These allegations included all or part of those numbered 2, 3, 4, 8, 9, and 10 on the subject charge of discrimination.

4. At such conference, complainant requested that allegations numbered 5 and 6 in his charge of discrimination no longer be considered part of such charge.

5. At such conference, information was exchanged relating to each of the allegations in the subject charge of discrimination but no record was created.

6. In the subject motion to dismiss, respondent states the basis of the motion to be the following:

This motion is based upon facts discovered and statements made by the Complainant during a conciliation conference on March 19, 1989. See attached affidavit.

1) At the conciliation conference, the Complainant withdrew the allegations contained in paragraphs 5 and 6 of his complaint without explanation.

2) When confronted at the conference with inaccurate statements made in his complaint, the Complainant stated that he had not typed the complaint. When presented with the fact that he had signed the complaint he said he had not read it carefully first.

3) One allegation - that the Complainant has not been allowed to apply for specific permanent positions - is patently absurd. He has not shown how he was restrained except that he did not take affirmative steps himself to apply. He stated at the conference that he has only applied for testing once and was not certified. See also Exhibit 1.

4) With regard to his allegation about his hours being cut to 16 hours per week since he filed his complaint, the Complainant was asked at the conference to explain why he had that impression in view of a letter to him assigning a schedule of 20 hours per week and why he would call in sick one day per week if he thought he was not scheduled to work. He denied that he said he was sick when he called in. See also Exhibit 2.

The Complainant wants a permanent, full-time position. This cannot be a remedy since it is something he never had nor has been certified for. The Complainant was encouraged to apply for another temporary part-time position which would increase his work to 40 hours per week. He agreed at the conciliation conference that he would apply but did not do so and then he resigned entirely.

7. Some time after the conciliation, complainant resigned from his position at the UW-Milwaukee.

In considering whether to grant or deny a motion to dismiss for failure to state a claim on which relief may be granted, the underlying complaint must be read liberally in favor of the complainant and the motion will be granted only if it appears to certainty that no relief can be granted. (State v. American TV and Appliance of Madison, Inc., 140 Wis. 2d 353 (1987)). In the instant case, it is clear that some of complainant's original allegations in his charge of discrimination are no longer part of the complaint in view of the fact that they were not filed on a timely basis or were withdrawn by the complainant. It is also clear that many of the original allegations remain, including those relating to two reprimands, a discharge, statements made by co-workers and those in management, and hours of work. Potential forms of relief could include removal of documents relating to the reprimands or discharge from complainant's personnel file; reinstatement to the position from which complainant was discharged; back pay in relation to the discharge or to the reduction in work hours; and a cease and desist order relating to statements made by co-workers and those in management. It is clear that, if it is assumed that complainant were to prevail in regard to those allegations which still form the basis of the subject charge of discrimination, relief could be granted.

What respondent has asked the Commission to do in its motion is to use the information provided by the parties at the conciliation conference to decide that complainant's allegations are not meritorious. A conciliation conference is not designed to provide due process safeguards to the parties in order to generate a record from which findings of fact and conclusions of law can be made and, in the absence of such safeguards and such a record, the Commission is unable to decide the merits of this complaint.

Respondent also argues by implication that, since complainant has limited his requested remedy to appointment to a permanent, full-time position and this is not an allowable remedy, the motion should be granted. The Commission has broad authority to fashion appropriate remedies and is not constrained to consider only those remedies requested by a complainant. As stated above, there are several potential remedies in the instant case and, as a result, respondent's argument in this regard is not convincing.

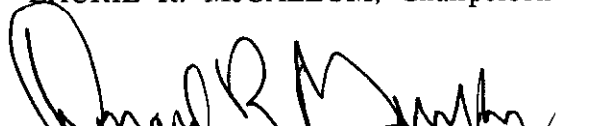
Order

Respondent's motion to dismiss is denied.

Dated: July 14, 1989

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

LRM:irm