STATE OF WISCONSIN PERSONNEL COMMISSION

GARY A. KOHL,

Complainant,

v.

Secretary, DEPARTMENT OF TRANSPORTATION, and Administrator, DIVISION OF MERIT RECRUITMENT AND SELECTION,

Respondents.

Case No. 89-0064-PC-ER

DECISION AND ORDER

This matter is before the Commission on respondent's motion to dismiss filed February 12, 1991. The basic facts necessary for the decision of this motion do not appear to be disputed, thus presenting an issue of law.

This case involves a charge of handicap discrimination. Complainant alleges that he participated in a hearing examination for the position of enforcement cadet and then was informed by respondent on May 27, 1989, he had been removed from the enforcement cadet register because he did not meet the minimum hearing standard. In connection with its motion to dismiss, respondent submitted an affidavit of the Chief of the Personnel and Management Services Section of DOT which includes the following:

> 4. In 1989 I coordinated the hiring process for the 38th class of Enforcement Cadets at the State Patrol Academy who would be trained for positions as law enforcement officers with the State Patrol. The class would begin on July 5, 1989.
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> 5. The general practice of the Division of Merit Recruitment and Selection of the Department of Employment Relations is to provide a group referral of the first 200 applicants on the register for each Enforcement Cadet class.
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> 6. Based on the number of Enforcement Cadet positions in the training class, the number of persons estimated to be sufficient from the group referral are given employment interviews and physical agility and hearing tests; however, certification of candidates does not occur until after the interviews and other screening process is completed. It is normal for more persons to

be interviewed and tested than are eventually certified for the available positions.

7. Mr. Gary Kohl was one of the two hundred persons in the group referral from a register dated February 6, 1989 for appointing Enforcement Cadets for the 38th class at the State Patrol Academy and he was among those interviewed and tested.

8. The rank of the last person certified from the group referral was #168. Individuals with ranks of # 169 to #200 were not certified based solely on the application of civil service statutes and regulations relating to certification. The performance of individuals ranked #169 to #200 in the employment interview or other screening tests was not a factor in determining that these individuals would not be certified.

9. Gary A. Kohl was ranked #194 and was not a certified candidate for a position in the 38th class of Enforcement Cadets.

10. The register of February 6, 1989 on which Gary A. Kohl ranked #194 was used only once to certify candidates for the 38th class of Enforcement Cadets.

Respondent's motion is based primarily on the contention that complainant suffered no adverse employment action or "injury" as a result of having been excluded from the selection process because of the DOT hearing standard, and therefore his complaint does not contain the elements of an act of handicap discrimination under the Fair Employment Act (FEA) (Subchapter II, Chapter 111, stats.). Alternatively, respondent argues that it has an affirmative defense in that even if it discriminated against complainant on the basis of handicap in removing him from the register, it can demonstrate it would have reached the same result — i.e., nonhire — in the absence of discrimination because complainant was not high enough on the register to have been certified, see Jenkins v. DHSS, 86-0056-PC-ER (6/14/89).

With respect to respondent's first contention, §111.322(1), stats., provides that it is an act of employment discrimination "[t]o refuse to hire, employ, admit or license any individual, to bar or terminate from employment . . . any individual . . . ." When respondent caused complainant to be removed from the enforcement cadet register for failing to meet the minimum hearing standard, this had the effect at that point in the staffing process of making him ineligible for further consideration for employment, and at that point was an adverse employment action. Even if, as apparently would have been the case, complainant's rank on the register ultimately would have been too low for his

certification, this is at the most an affirmative defense, which is the second prong of respondent's position.

With respect to that affirmative defense, the Commission addressed this area in Jenkins v. DHSS, 86-0056-PC-ER (6/14/89), which in turn relied on the U.S. Supreme Court decision in Price Waterhouse v. Hopkins, 490 U.S. 228, 244-245, 104 L.Ed. 2d 268, 284 (1989):

> '[o]nce a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving [by a preponderance of the evidence] that it would have made the same decision even if it had not allowed gender to play such a role.' (footnote omitted)

This principle is applicable to the facts of this case. That is, it appears that even if respondent had practiced unlawful handicap discrimination in its exclusion of complainant from the selection process because of his hearing acuity, it would have reached the same decision — i.e., nonhire — because his rank on the register was too low for him to have been certified. Therefore, it appears to the Commission that this complaint would have to be dismissed on the basis of respondent's motion unless this result is to be avoided by analogizing to the approach to a mootness issue used in Watkins v. ILHR Department, 69 Wis. 2d 782, 793-796, 233 N.W. 2d 360 (1975).

Watkins involved a charge that complainant had been denied a job on the basis of race. Respondent DILHR argued that the case had been mooted because complainant had received a transfer to the position in question several months after she had filed her discrimination complaint. The Supreme Court held that the case had not been rendered moot. Notwithstanding that there was no possibility of an order requiring back pay or transfer, there remained the possibility of an order requiring non-discriminatory treatment of complainant with respect to future transactions.[1] The Court also expressed the opinion that complainant was entitled to know whether the initial transfer denial had been racially-motivated:

> Moreover, it is harsh to suggest that a finding on discrimination would serve no purpose. For more than two years Watkins was denied the kind of job she desired and for which she deemed

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[1] There also was the possibility of an order directed to the union, an additional respondent, regarding future non-discriminatory processing of grievances.

> herself qualified. She was denied the satisfaction of giving the closer attention to clients which a service zone caseworker customarily gives. She was denied the opportunity of making an intra-service zone transfer before the restriction on such transfers was imposed. She was denied the chance of learning the different skills required of a service zone caseworker. She is entitled to know whether or not this was due to racial discrimination or to some other cause. It would be inequitable to hold that a person who must have suffered deep personal frustration over an extended period of time is not entitled to a determination of the cause of that frustration, while a person who failed to receive a minor pay differential because he or she was not transferred is in all cases entitled to a full legal determination. Id., 69 Wis. 2d at 793-794.

There is a significant distinction between Watkins and this case. In Watkins, respondent's mootness argument ran to the issue of whether, if complainant received a favorable decision on liability — i.e., a conclusion respondent had illegally discriminated against her on the basis of race when it denied her a transfer — there would be any real remedy available in light of the fact that complainant eventually had received a transfer. In this case, if respondent establishes that it would have made the same decision (nonhire) even if there had been no consideration at all of complainant's hearing, it completely avoids a finding of liability:

> '[o]nce a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving [by a preponderance of the evidence] that it would have made the same decision even if it had not allowed gender to play such a role.' (emphasis added) (footnote omitted).

Jenkins v. DHSS, 86-0056-PC-ER (6/14/89) (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 104 L.Ed. 2d 268, (1989)). In the absence of a finding of liability — i.e., discrimination — the Commission lacks the authority to enter any kind of remedial order:

> If, after hearing, the [commission] finds that the respondent has engaged in discrimination or unfair honesty testing, the [commission] shall make written findings and order such action by the respondent as will effectuate the purpose of this subchapter, with or without back pay. (emphasis supplied). §111.39(4)(c), stats.

Since the Commission could not enter any remedial order at all, the situation is unlike Watkins, where an order could be entered that at least would have an effect on any future attempts by complainant to secure a transfer. While in Watkins the Court noted the inequity of denying the complainant the opportunity for a determination as to whether the initial transfer denial had been discriminatory, it is doubtful whether a perception of unfairness of this nature could constitute an independent basis for a conclusion that a case would not be considered moot. Furthermore, even if a complainant's personal interest in obtaining a ruling on whether discrimination occurred could provide an independent basis for concluding that a case is not moot, it does not follow that this factor would entitle a complainant to a hearing in a case which does not involve a mootness theory but rather where respondent has a valid affirmative defense that will enable it to avoid liability altogether.[2] This point is illustrated by looking at an example of another kind of case involving an affirmative defense. If a complainant files his or her charge of discrimination outside the 300 day time limit set forth in §111.39(1), Wis. Stats., this constitutes an affirmative defense for the employer. Milwaukee County v. LIRC, 113 Wis. 2d 199, 335 N.W. 2d 412 (Ct. App. 1983). Under such circumstances the complainant is not entitled to a hearing to determine if discrimination occurred, and the Court does not consider the merits of complainant's claim or the impact of the alleged discrimination on complainant. Cf. Hilmes v. DILHR, 147 Wis. 2d 48, 433 N.W. 2d 251 (Ct. App. 1988). In short, one cannot take the language from an opinion on mootness (Watkins) discussing the inequity of not allowing an employe who allegedly has been discriminated against the opportunity to obtain a determination on whether that discrimination in fact occurred, and apply this to a situation where the employer has an affirmative defense that will foreclose a finding on liability against the employer and in favor of the complainant. To do so would mean a complaint would virtually always be entitled to a hearing regardless of defects such as untimely filing, res judicata, etc., that would preclude any remedy whatsoever for the complainant.

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[2] Compare Hatcher v. Greater Cleveland Regional Transit Authority, 746 F. Supp. 679, 688, n.1 (N.D. Ohio 1989) (aff'd., 911 F. 2d 732 (6th Cir. 1990)) ("If the defendant suggests at least one plausible nondiscriminatory motive that stands unrefuted, it need not identify and persuade with respect to its true motives.")

ORDER

Inasmuch as respondent has demonstrated that as a matter of law it has an effective affirmative defense that would enable it to prevail on the issue of liability, its motion to dismiss filed February 12, 1991, is granted and this complaint is dismissed.

Dated: May 1, 1991 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

AJT/gdt/2

Parties:

Gary A. Kohl
3651 S 76th St
Milwaukee WI 53220

Ronald R. Fielder
Secretary DOT Rm 120B
4802 Sheboygan Ave
P O Box 7910
Madison WI 53707

Robert Lavigna
Administrator, DMRS
137 East Wilson Street
P.O. Box 7855
Madison, WI 53707