STATE OF WISCONSIN PERSONNEL COMMISSION

PAUL J. PELLITTERI,

Complainant,

v.

Secretary, DEPARTMENT OF REVENUE,

Respondent.

Case No. 90-0112-PC-ER

INTERIM DECISION AND ORDER

This matter is before the Commission to resolve the motion filed by complainant's counsel which requested the Commission to add the State of Wisconsin (STATE) as a party. The Motion is denied for the reasons discussed below. However, the hearing scheduled for November 18-19, 1993, will proceed to resolve the remaining issues.

Background: Complainant was employed by respondent as a Shipping and Mailing Clerk 2 (SMC2), a position which required lifting heavy objects. In September 1987, complainant was in a car accident (not related to his employment) in which he suffered injury to his right ankle and heel. On or about March 8, 1990, respondent determined that: a) complainant could no longer perform his job as SMC2 due to his medical restrictions and b) there were no positions within the Department of Revenue (DOR) to which complainant could transfer or demote. Complainant, therefore, was terminated.

Motion Request: Complainant contends that accommodation of a handicap under the Fair Employment Act (FEA) requires either the appointing authority or the STATE to conduct a statewide search of all available civil service positions to determine if a vacancy exists for which the complainant is capable or fit to perform. In other words, a statewide search by DOR (the appointing authority in this case) for vacant positions within DOR is alleged to be insufficient.

It is complainant's further understanding based upon an alleged representation by DOR, that no system currently exists by which DOR would be

aware of vacant positions in other agencies. Therefore, part of the relief sought by complainant is a Commission Order requiring the STATE to develop procedures to facilitate inter-agency transfers and demotions as a handicap accommodation under the FEA. Of course, no such order is possible if the STATE is not a party to these proceedings.

DISCUSSION

Under Ch. 230, Stats., DOR is the "appointing authority" in this case with powers to fill vacancies only at DOR. The parties do not dispute that DOR is the "appointing authority" in this case, pursuant to the definition found in s. 230.03(4), Stats. Section 230.06(b), Stats., places the responsibility with each appointing authority to hire and terminate individuals for positions within the appointing authority's agency. Therefore, DOR as an appointing authority does not have the power to appoint individuals to vacancies existing with other appointing authorities. DOR could not, for example, order the Department of Transportation (DOT) to hire complainant for any vacancy at DOT because DOT is an appointing authority separate from DOR.

It could be that the Fair Employment Act (FEA) would consider the STATE as one employer with respect to the duty of accommodation by transfer. The FEA defines employer in s. 111.32(6), Stats., in pertinent part, as follows:

> "Employer" means the state and each agency of the state and . . . any other person engaging in any activity, enterprise or business employing at least one individual. In this subsection, agency means an office, department, independent agency, authority, institution, association, society or other body in state government created or authorized to be created by the constitution or any law, including the legislature and the courts.

Essentially the same definition of the state as an employer is used in the Family Medical Leave Act (FMLA).[1] The Commission has interpreted the term

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[1] The definition of employer in the FMLA is found in s. 103.10(1)(c), Stats., as shown below.

> "[E]mployer" means a person engaging in any activity, enterprise or business in this state employing at least 50 individuals on a permanent basis. "Employer" includes the state and any office, department, independent agency, authority, institution, association, society or other

"employer" in the FMLA as the state in a broader sense than each individual state agency. Butzlaff v. DHSS, 90-0097-PC-ER (9/19/90); reversed on other grounds by Dane County Circuit Court, Butzlaff v. Wis. Pers. Comm., 90-CV-4043 (4/23/91); affirmed by the Court of Appeals, 166 Wis. 2d 1028, 480 N.W.2d 559 (Ct. App. 1992). The Commission stated as follows in its decision:

> "The [FMLA definition of employer] does not exclude the state from the definition of "employer" and include the state agencies. Instead, it lists the state and the various agencies of the state as falling within the scope of the definition. If the legislature had intended to establish each agency of the state as a separate employer for the purpose of the act, the legislature would have deleted the reference to 'the state' from the definition. The specific reference to the state in the definition indicates that the legislature intended for the state to be considered as one employer for the purposes of the act." Id., 90-0097-PC-ER at pp. 2-3. (Emphasis appears in the original.)

The FEA duty to accommodate handicaps might be interpreted to encompass alternative positions in all state agencies if the STATE is considered as one employer under the FEA. The Commission by the foregoing paragraphs merely notes an argument could be made to support Mr. Pellitteri's contention. The Commission, however, does not resolve the question in this interim decision because (as discussed below) it is not necessary to do so.

The Commission lacks jurisdiction under the FEA to add the STATE as a party. The Commission's jurisdiction over the STATE as an employer under the FEA does not parallel the FEA/FMLA definition of employer. Specifically, s. 111.375(2), Stats., grants the Commission jurisdiction only over each agency of the state as an employer. The provision lacks any reference to Commission jurisdiction over the broader concept of the STATE as one employer. [2]

The Commission's jurisdiction under the FMLA found in s. 103.10(12)(a)1., Stats., on the other hand, parallels the FEA/FMLA definition of

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> body in state government created or authorized to be created by the constitution or any law, including the legislature and the courts.

[2] Section 111.375(2), Stats., states in pertinent part, as follows:

> This subchapter applies to each agency of the state except that complaints of discrimination ... against the agency as an employer shall be filed and processed by the personnel commission . . .

the STATE as employer. Specifically, the Commission is granted authority under the FMLA over the state and each agency of the state.

The legislature would have included the broader FMLA jurisdiction language in the FEA if broader Commission authority were intended. The lack of such broad authority in the FEA leads to the inescapable conclusion that the Commission lacks jurisdiction under the FEA to add the STATE as a party.

The DPI case cited by complainant does not support the proposition that the Commission has authority under the FEA over the STATE. The complainant cited State ex rel. Dept. of Pub. Instruction v. ILHR, 68 Wis2d 677, 229 NW2d 591 (1975), as support for the proposition that the Commission has jurisdiction under the FEA over the STATE as a party. The Commission considers this argument and rejects it.

The Wisconsin Supreme Court in State ex rel. Dept. of Pub. Instruction, Id., did not urge the legislature to add the STATE as a party for Commission jurisdiction, as opposed to jurisdiction over state agencies. The Court was concerned because the FEA in 1973, did not cover any state employes. The Court, therefore, urged the legislature to amend the law to cover state employes, but did not tell the legislature how to achieve this goal.

Also, complainant is incorrect in concluding that the legislature waited six years to effect the Court's suggestion. Chapter 31 of the Laws of 1975, changed the FEA definition of employer to "include this state" (without any reference to agencies of the state). The FEA as initially enacted gave the Department of Industry, Labor and Human Relations (DILHR) jurisdiction over all discrimination complaints filed and this remained true in 1975, when "this state" was added to the definition of employer. The Personnel Commission's jurisdiction over discrimination complaints filed by state employes first appeared in the 1979-1980 statutes. The initial language for Commission jurisdiction under the FEA was essentially the same as the current text of s. 111.375(2), Stats.

The Commission's ruling in this Interim Order does not address the question of whether the FEA might require an inter-agency transfer or reinstatement as an accommodation under certain circumstances. The Commission has allowed more than the employing agency per se as a party to a complaint filed under the FEA where the agency acted in the role of an employer. For example, the Commission allowed retention of the Wisconsin

Employe Trust Fund (WETF) as a party in Phillips v. DHSS & DETF, 87-0128-PC-ER (3/15/89), where the complainant was employed by the Department of Health and Social Services (DHSS). The Commission's rationale is quoted below.

> The various agencies of the state are but arms of the state, and when an agency exercises its authority in a way that affects the conditions of employment of a state employe, that agency is acting as the employing agency of that employe, and its action is cognizable under the FEA. Phillips, Id., p. 21, citing Wisconsin Federation of Teachers v. DP, 79-306-PC (4/2/82).

A handicapped employe terminated by one appointing authority due to an inability to perform could ask an appointing authority from a different agency to reinstate him/her in a vacant position. It is arguable whether the different agency might owe an accommodation under the FEA;[3] and whether the latter agency would be acting in the role of an employing agency under the Commission's rationale in Butzlaff, Id. However, this is not what the complainant here is arguing and, therefore, the Commission does not address the question.

Summary. The Commission in this interim order merely holds as follows: a) DOR lacks authority under Ch. 230, Stats., to appoint complainant to vacancies in other state agencies as potential employment to accommodate complainant's handicap; and b) the Commission lacks authority under s. 111.375(2), Stats., to add the STATE as such as a party. The Commission does not resolve the question of whether a non-DOR appointing authority might have a duty to accommodate complainant's handicap if he had applied for a vacancy with a non-DOT appointing authority.

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[3] Similar to the handicapped employe who requested a transfer to a vacancy in a different division in McMullen v. LIRC, 148 Wis.2d 270, 434 NW2d 830 (Ct. App. 1988).

INTERIM ORDER

That complainant's motion to add the State of Wisconsin as a party is denied.[4]

Dated: September 8, 1993 STATE PERSONNEL COMMISSION

JMR

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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4 Complainant suggested the Commission should invite the Wisconsin Attorney General's Office to submit a brief in regard to this motion. (See p.4-5 of Complainant's reply brief.) The Commission, however, declined to do so unless the recommended decision for Commission consideration was to grant the motion and such was not the recommendation here.