STATE OF WISCONSIN PERSONNEL COMMISSION

GRANT KELLER,

Complainant,

v.

Chancellor, UNIVERSITY OF WISCONSIN - MILWAUKEE,

Respondent.

Case No. 90-0140-PC-ER

RULING ON MOTIONS FOR SUMMARY JUDGMENT AND IN LIMINE

This matter is before the Commission on respondent's motions for summary judgment dismissing the complaint, or, in the alternative, in limine, filed January 13, 1993.

By way of background, this case involves a claim of handicap discrimination under the Wisconsin Fair Employment Act (FEA) (Subchapter II, Chapter 111, Stats.). The complaint alleges that complainant was off work following a stroke, that his physician released him to return to his employment as a sheet metal worker, but that respondent refused to allow him to return to work because of the asserted reason that he was unable to perform the duties of his employment, and instead discharged him. A contractual grievance was filed and resulted in an arbitration award dated May 14, 1991, denying the grievance on the basis of the conclusion that the employer had just cause for complainant's termination.

The Commission will first address respondent's motion for summary judgment. In its brief in support of this motion, respondent contends as follows:

> [C]ollateral estoppel should be applied to the factual findings of the arbitral decision. Although the legal conclusions of the arbitration may not conclusively answer the discrimination issue, the facts have been extensively litigated, and UWM has met its burden of proof in showing that its actions were legitimate under §111.34, Stats., the ... FEA. Because such a showing is an affirmative defense under the FEA, summary judgment should be granted to the respondent.

In this case, the arbitrator concluded that respondent had just cause for the discharge and therefore respondent had not violated the contract. The only contract language the arbitrator cited as relevant was Article III,

"Management rights," which include the rights to: "utilize personnel, methods, and means in the most appropriate and efficient manner possible as determined by management ... [t]o manage and direct the employes... [t]o suspend, demote, discharge or take other disciplinary action against employes for just cause." Award, p. 2. The arbitrator recited "the relevant questions presented by this case" as: "[w]hat is the Grievant's physical condition? What is the nature of his job, and given these two considerations, can the Grievant presently or within the foreseeable future be able, with reasonable accommodations, to perform the job safely." Award, p. 15. The arbitrator went on as follows:

> The medical evidence is convincing that the Grievant has a significant deficit which makes it difficult for him to work on ladders. The other basic question has to do with whether this is a material portion of the position. It is the opinion of the Arbitrator that climbing on ladders is a substantial enough portion of the Sheet Metal Worker's position to be considered material and more than negligible. Moreover, the Arbitrator is not convinced, on the basis of this record, that the Employer's duty to make reasonable accommodations extends to accepting unwarranted risks or changing the basic job duties. Also in this regard, the risk involved of a trial period, given the poor prognosis for full and/or improved recovery of the lower extremity deficit, relieved the Employer of this obligation as well.
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> The Arbitrator, in arriving at his conclusions expressed above, did not ignore the Grievant's success at other employers and in performing climbing tasks around the home. However, ultimately these factors cannot carry the day for the Grievant. These other jobs were largely, if not exclusively, shop work. Moreover, the fact other employers may be willing to take a safety risk doesn't necessarily mean that this Employer is unreasonable in not accepting what, objectively speaking, is a meaningful risk. The same thing can be said for the Grievant's willingness to take risks in his personal life. The Employer is privileged and, in fact, obligated to provide a safe work environment for all its employees, including the Grievant and his co-workers. In this case, they have not abused their discretion.

Award, pp. 18-19. The Commission is unable to conclude, as respondent urges, that on the basis of this award and the application of the principle of collateral estoppel: "UWM has met its burden of proof in showing that its actions were legitimate under §111.34, Stats.... Because under the FEA, summary judgment should be granted to the respondent."

In Dohve v. DOT, 84-0200-PC-ER (11/3/88), the Commission addressed the application of collateral estoppel in similar circumstances. In that case, complainant contended that she had been discharged because of her sex and

on the basis of FEA retaliation. The discharge was grieved, and ultimately an arbitrator determined that the discharge had been for just cause because of poor work performance and violation of work rules. Respondent sought to have this determination made conclusive on the parties in the context of the FEA proceeding before the Commission. In denying respondent's motion, the Commission relied heavily on Becton v. Detroit Terminal, 687 F. 2d 140, 29 FEP Cases 1078 (6th Cir. 1982). That case involved a claim of race and retaliation discrimination in connection with a discharge, where an arbitration panel determined that the employer had just cause under the collective bargaining agreement. The Court of Appeals held that the District Court erred when, in reliance on the arbitration decision, "[i]t ... declined to reconsider the evidence on the 'just cause' issue and limited its inquiry to the question 'whether the just cause which did exist was merely a pretext to cover up what was in reality a racially discriminatory termination.'" 29 FEP Cases at 1079. The Court of Appeals reasoned as follows:

> This is an impractical and excessively narrow application of Gardner-Denver. The District Court's distinction between the plaintiff's discharge on the one hand and his discrimination claim on the other attempts to draw a bright line in an area where there is actually considerable overlap. There is no realistic way to sever the discharge from the claim of discrimination because, according to the plaintiff, the discharge is the discrimination. An analysis of one must include consideration of the other because both involve the same operative facts. They cannot be considered in isolation from one another. Inasmuch as "just cause" or similar contract questions are an integral part of many discrimination claims, the better rule avoids judicial efforts to separate and classify evidence offered by the plaintiff under the heading of "discrimination" or "just cause." In our view, Gardner-Denver should not be read as a restriction on the extent to which a Title VII or section 1983 claimant is entitled to develop his evidence of discrimination. (footnote omitted)

29 FEP Cases at 1079-80. Similarly, in the instant case, it can be said that, from complainant's perspective, "the discharge is the discrimination." id. It is undisputed that he was terminated because of his handicap -- i.e., because respondent concluded he could not safely and effectively perform his job because of the effects of the stroke he had suffered. Under these circumstances, respondent can avoid liability under the FEA only if it can establish, pursuant to §111.34(2)(a), Stats., that "the handicap is reasonably related to the individual's ability to adequately undertake the job-related responsibilities of that individual's employment" (this issue may also involve

safety issues pursuant to §111.34(2)(b) and (c)), and, if so, that it did not refuse to "reasonably accommodate" complainant's handicap, or that the accommodation would pose a hardship to respondent's program, §111.34(1)(b). The Supreme court has developed an extensive body of legal analysis that is used in cases arising under these provisions. See, e.g., Boynton Cab Co. v. DILHR, 96 Wis. 2d 396, 291 N.W. 2d 850 (1980); Samens v. LIRC, 117 Wis. 2d 646, 345 N.W. 2d 432 (1984). The doctrine of collateral estoppel only applies:

> " ... where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged...."
>
> The second proceeding "must involve ... the same bundle of legal *principles that contributed to the rendering of the first judgment.*" State ex rel Flowers v. H&SS Department, 81 Wis. 2d 376, 387, 260 N.W. 2d 727 (1978) (citations omitted)

There is no way it can be determined from the award in complainant's arbitration the degree of correlation, if any, between the legal principles controlling the arbitrator's conclusion that there was just cause for the discharge, and hence no violation of the contract, and the legal principles that control with respect to §§111.34(1) and (2). For example, at one point in the award the arbitrator characterizes respondent's action, in the context of the safety issue, as not amounting to an abuse of discretion. Award, p. 19. It is not clear whether this was intended to express the view that under the contract the employer is held to an "abuse of discretion" standard per se, or whether this terminology was used in some looser sense. Under the FEA, the standard for evaluating the employer's decision under §111.34(2), Stats., is as follows:

> *In order to avail itself of this defense, the employer bears the* burden to prove, to a "reasonable probability," that the ostensibly safety-based employment restriction is necessary to prevent harm to the employee or others. The stringent "reasonable probability" standard is eased, however, where the employer's line of business is such that a number of persons could potentially be harmed by the handicapped employee. Where the employment involves a "special duty of care for the safety of the general public," the employer need only show that the otherwise discriminatory practice bears a "rational relationship" to its safety obligations to the public and the employee's co-workers.

Racine Unified School Dist. v. LIRC, 164 Wis. 2d 567, 605, 476 N.W. 2d 707 (Ct. App. 1991) (citations omitted). It is unclear from the language of the award how it relates to these standards.

If the Commission were to apply collateral estoppel only to the more "basic" facts found by the arbitrator -- presumably that "grievant has a significant deficit which makes it difficult for him to work on ladders" and that "climbing on ladders is a substantial enough portion of the Sheet Metal Worker's position to be considered material and more than negligible," Award, p. 18 -- respondent still would not be entitled to prevail on its motion for summary judgment dismissing this complaint. Even assuming, arguendo, that these basic findings would establish that complainant's handicap is "reasonably related to [his] ability to adequately undertake the job-related responsibilities of [his] employment," §111.34(2)(a), Stats., there remains the employer's duty of accommodation under §111.34(1)(b), which can involve transfer, McMullen v. LIRC, 148 Wis. 2d 270, 434 N.W. 2d 830 (Ct. App. 1988). It is clear that the foregoing "basic" findings are insufficient to satisfy respondent's burden of proof on accommodation. Respondent contends that the arbitrator addressed the issue of accommodation in his more conclusory findings, i.e., "the arbitrator is not convinced, on the basis of this record, that the Employer's duty to make reasonable accommodations extends to accepting unwarranted risks or changing the basic job duties." Award, p. 18. However, beyond delimiting the duty of reasonable accommodation in this manner, the award provides no definition of the duty of accommodation that the arbitrator is applying. Respondent asserts that: "it may even be argued that *complainant's FEA claim has also been decided, because Article XI, §11/1/1 of* the Collective Bargaining Agreement incorporates section 111 [sic] of the Wisconsin Statutes, the FEA, into the contract as the standard for discrimination." However, as noted above, the award's recitation of "relevant contract language" includes only Article III, "management rights," and there is no indication that the arbitrator was applying the provisions of the FEA under the aegis of Art. XI, §11/1/1.

In its alternative motion in limine, respondent seeks the exclusion of evidence complainant introduced at the arbitration "that, subsequent to his termination as a sheet metal worker at UWM, he worked as a sheet metal worker for various employers through his union hiring hall."

Respondent contends first that this evidence is not relevant because the issues before the Commission concern complainant's ability to do the job in

which he had been employed at UWM, not at some other job. While this contention is correct as far as it goes, it does not follow that performance in all other jobs is irrelevant. To the extent there are similarities between the jobs in question (which the Commission cannot evaluate definitively at this point in the process), evidence of complainant's performance in the second job would have some probative value with respect to the question of complainant's capacity to perform in the first job. Furthermore, the duty of accommodation can involve transfer to another position, McMullen v. LIRC, 148 Wis. 2d 270, 434 N.W. 2d 830 (Ct. App. 1988), and evidence of subsequent employment also could be relevant to this issue.

Respondent also contends that the reasonableness of respondent's determination must as a matter of law be measured as of the time that complainant was terminated, when he obviously had not received any employment through the hiring hall. However, the employer's decisions that a handicapped employe is unable to effectively perform and that no accommodation is feasible, are measured by an objective standard, and good faith is not a defense. Evidence which postdates the personnel transaction in question, including such things as medical evaluations, and which may have no relevance to the issue of the employer's intent at the time of the transaction, may have some relevance to issues such as the employe's capacity to perform and accommodation. An example of this type of situation is found in Mantolete v. Bolger, 767 F. 2d 1416, 38 FEP Cases 1081 (9th Cir. 1985), a case arising under Section 501 of the Rehabiliation Act of 1973, 29 U.S.C. §791 (1976 and Supp. V 1981), where the Court discussed the standard to be applied as follows:

> Thus an employer has a duty under the Act to gather sufficient information from the applicant and from qualified experts as needed to determine what accommodations are necessary to enable the applicant to perform the job safely. The application of this standard requires a strong factual foundation in order to establish that an applicant's handicap precludes safe employment. After marshalling the facts, the employer must make a decision as to the reasonableness of accommodation, in light of the factors enunciated in 29 C.F.R. §1613.704(c). If the requisite accommodations are not reasonable or if no accommodation can be made to protect against a reasonable probability of substantial injury, then an employer will, of course, not violate §501 in refusing employment to the applicant. However, although it is the employer who must make a substantial gathering of necessary facts, the determination of whether the employer violated §501 is to be made by the trial court de novo. Therefore, a good faith or rational belief on behalf of the employer will not be a sufficient defense to an act of discrimination.

38 FEP Cases at 1087. The Court held that evidence introduced by the employer that postdated the hiring decision was admissible on the issue of whether the applicant was physically qualified to perform the position, but "not as an after-the-fact effort to demonstrate a nondiscriminatory motive." 38 FEP Cases at 1088.

Finally, respondent contends that evidence of complainant's subsequent employment presumably would be hearsay. Besides noting that the Commission's rules do not prohibit hearsay evidence, §PC 5.03(5), Wis. Adm. Code, the Commission observes that it is by no means foreseeable that complainant would offer hearsay evidence on this point at the hearing, and this is not a basis for excluding evidence on this subject in advance of the hearing.

ORDER

Respondent's motion for summary judgment dismissing this complaint, and its alternative motion in limine, filed January 13, 1993, are denied.

Dated: March 19, 1993 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

AJT:rcr

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner