

STATE OF WISCONSIN

PERSONNEL COMMISSION

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AVIS MOSBY II,
Complainant,
v.
Chairperson, WISCONSIN
GAMING COMMISSION,
Respondent.
Case No. 91-0033-PC-ER
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DECISION
AND
ORDERNature of the Case

On March 6, 1991, complainant filed a charge of discrimination alleging that she was discriminated against/harassed on the basis of her race and marital status in regard to certain work-related incidents; and on the basis of race and sex in relation to her failure to receive a \$.15 per hour additional merit increase in her rate of compensation in July of 1990. One of the Commission's Equal Rights Officers issued an Initial Determination on April 19, 1993, finding No Probable Cause to believe that complainant had been discriminated against/harassed as alleged in regard to the work-related incidents cited in complainant's charge of discrimination; and finding Probable Cause to believe that complainant had been discriminated against as alleged in regard to her failure to receive the \$.15 per hour additional merit increase. Complainant failed to appeal the No Probable Cause determinations. A hearing on the remaining compensation-related issue was held on November 11, 1993, before Laurie R. McCallum, Chairperson.

Findings of Fact

1. Complainant is a black female.
2. Complainant was hired by the Wisconsin Lottery (Lottery) in 1988. At all times relevant to this matter, complainant was employed by the Lottery in a position classified as an Administrative Assistant 3 with a working title of Field Sales Representative (FSR) in the Lottery's Milwaukee district office. Complainant's first line supervisor was JoAnne Ramharter, a white female.

3. The principal responsibility of FSR's assigned to the Lottery's district offices was to provide services and training to retailers on the various sales routes within the district. Complainant's position functioned as an informal leadworker and as a "floater" position which did not service an assigned route on a regular basis but was available to assist and fill in on routes. This informal leadworker function was assigned to the Administrative Assistant 3 FSR position held by Dan Brunmeier in the Green Bay district office.

4. As a part of her assigned duties and responsibilities, complainant's position trained LTE's; completed surveys of retailers; participated in setting up game terminals for retailers; worked evening hours on a compensatory time basis in order to complete assignments; assisted Ms. Ramharter in planning and implementing events held in the Milwaukee district relating to the introduction of new statewide Lottery games; assisted Ms. Ramharter in researching inquiries referred by the Lottery Director; and participated in the fine-tuning of sales routes within the Milwaukee district. These duties and responsibilities were also routinely assigned to other FSR positions in the Milwaukee district and other districts.

5. Ms. Ramharter rated complainant's work performance as "outstanding" for the July of 1989 through June of 1990 reporting period. "Outstanding" was the highest possible rating.

6. Based on this performance rating, complainant received a 4.25% merit increase in her hourly rate of compensation. For this reporting period, each Lottery employee whose work performance was rated as satisfactory or above received this 4.25% merit increase.

7. The relevant compensation plan for the 1989-91 biennium also provided for a .25% additional merit increase which was available for employers to award, but which was not funded in the agency's budget, based on considerations of performance, i.e., the performance of a higher level duty or an unusually complex assignment or one which would have an unusual impact; equity, i.e., to correct a significant pay disparity; and retention, i.e., to address the difficulty of retaining certain individuals in certain classifications within certain agencies.

8. Complainant did not receive this .25% additional merit increase for the relevant reporting period.

9. Mr. Brunmeier and Dottie Mosely, a white female, did receive this additional .25% merit increase based on considerations of performance.

During the relevant reporting period, Mr. Brunmeier and Ms. Mosely were assigned by the Lottery Director to develop a plan to redraw district boundaries and redesign sales routes within districts. This was a statewide project of unusual complexity and impact and was not part of the duties and responsibilities routinely assigned to an FSR position in a district office. Mr. Brunmeier had received a performance rating of "outstanding" from his supervisor for the relevant reporting period.

10. During the relevant reporting period, 16 Lottery employees received performance ratings of "outstanding" but did not receive the .25% additional merit increase. This included 9 females and 7 males; and 14 whites and 2 blacks. No members of an ethnic or racial minority were awarded the .25% additional merit increase.

11. Ms. Ramharter rated another female (white) FSR's performance as outstanding. This FSR did not receive the .25% additional merit increase.

12. Ms. Ramharter did not have the authority to award the .25% additional merit increase to any Lottery employees. Apparently, Ms. Ramharter could have made such a recommendation to the Lottery Director relating to employees under her supervision.

Conclusions of Law

1. This matter is appropriately before the Commission pursuant to §230.45(1)(b), Stats.

2. The complainant has the burden to show that she was discriminated against on the basis of her sex or her race when she did not receive an additional merit increase of .25% (\$.15) in July of 1990.

3. The complainant has failed to sustain this burden.

Opinion

Under the Wisconsin Fair Employment Act (FEA), the initial burden is on the complainant to show a prima facie case of discrimination. If complainant meets this burden, the employer then has the burden of articulating a non-discriminatory reason for the actions taken which the complainant may, in turn, attempt to show was a pretext for discrimination. See McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973); and Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 25 FEP Cases 113 (1981).

In the instant case, complainant has shown that she is a member of a protected group under the FEA by virtue of both her race and sex; that she suffered an adverse personnel action when she was not granted a .25% additional merit increase in July of 1990; and that an inference of discrimination was created by the award of this .25% additional merit increase to a person of a different race and sex who was employed in a parallel FSR position to complainant's.

The burden then shifts to respondent to articulate a legitimate, non-discriminatory reason for its action. Respondent has stated that Mr. Brunmeier received the additional merit increase based on his assignment by the Lottery Director to develop a statewide plan for redrawing district boundaries and redesigning sales routes within districts; and that complainant did not receive the additional merit increase because she was not assigned equivalent responsibilities and did not meet the other award criteria under the applicable compensation plan. These reasons are legitimate and non-discriminatory on their face.

The burden then shifts to the complainant to demonstrate pretext. Complainant argues that she and Mr. Brunmeier were in equivalent positions and should have received equivalent compensation. However, this ignores the provisions of the applicable compensation plan which permit the award of different pay increases to different employees in the same classification based on considerations of performance, equity, and retention. Although it is obvious that two positions in the same classification are required to be compensated at a rate which falls within the pay range to which the classification is assigned, it is consistent with the applicable civil service compensation requirements as well as the provisions of the applicable compensation plan that, based on variables such as probationary status, length of service, and award of merit increases, the employees in these two positions may be compensated at different rates of pay within this pay range.

Complainant also argues that she performed duties and responsibilities during the relevant time period which were at a higher level and were unusually complex or had an unusual impact compared with the duties and responsibilities routinely assigned to FSR's in district offices; and, as a result, should have been awarded the .25% additional merit increase in July of 1990. However, the record shows that the duties and responsibilities she cites in support of this argument (See Finding of Fact 4, above), were assigned to other

FSR's in the Milwaukee district office and other district offices, and were not outside the scope of those duties and responsibilities normally or routinely assigned to such positions. In contrast, the record shows that the redistricting and rerouting responsibilities assigned to the Brunmeier and Mosely positions were statewide, as opposed to district-wide; were unusual in their complexity and impact; and were assigned and reviewed directly by the Lottery Director, not the first-line supervisors of these positions. Complainant did not show that she was assigned responsibilities equivalent to these during the relevant reporting period.

It should also be noted that one of the FSR's receiving the .25% additional merit increase based on the statewide redistricting/rerouting assignment is female (Mosely). In addition, of the 16 Lottery employees receiving performance evaluations of "outstanding" for the relevant reporting period but not receiving the .25% additional merit increase, 9 are female and 7 are male; and 14 are white.

The complainant has failed to demonstrate pretext in regard to either her charge of sex discrimination or race discrimination.

At hearing, complainant attempted to introduce evidence of other work-related incidents not related to the compensation matter at issue here. Some of these incidents had been alleged in her original charge of discrimination and investigated by the Commission and some represented new allegations. The Commission upholds the decision of the hearing examiner that these incidents were not related to the issue noticed for hearing and complainant would not be allowed to litigate them within the scope of this case. Complainant was reminded by the hearing examiner that some of the incidents were not mentioned in her charge and others were the subject of a No Probable Cause determination which she did not appeal. It should be noted that the letter to complainant transmitting the Initial Determination stated as follows, in pertinent part:

If you feel that the findings of "no probable cause" are in error and if you wish to have a hearing on the issues with respect to which no probable cause was found, then you must, within 30 days of the date of this letter, file a letter of appeal with the Commission.

In addition, the case file shows that complainant participated in a prehearing conference on August 3, 1993, and agreed to the following issue for hearing:

Did respondent discriminate against complainant on the basis of her race or sex in relation to compensation when in July 1990, complainant received a raise which was \$0.15/hour less than the raise received by Dan Brunmeier?

The Commission upholds the ruling of the hearing examiner and concludes that complainant had a full and fair opportunity to litigate her claim.

Order

This complaint is dismissed.

Dated: January 11, 1994 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

LRM:lrn


DONALD R. MURPHY, Commissioner

Parties:

Avis Mosby II
PO Box 13142
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John Tries
Chairperson, WGC
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NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served

and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the Commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)
2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.)