STATE OF WISCONSIN PERSONNEL COMMISSION

KAREN LARSEN,

Complainant,

v.

Secretary, DEPARTMENT OF CORRECTIONS,

Respondent.

Case No. 91-0063-PC-ER

RULING ON MOTIONS REGARDING PROPOSED AMENDMENT TO COMPLAINT

This matter is before the Commission on respondent's motions filed May 10, 1991. Respondent moved to dismiss part of complainant's amended complaint, filed May 1, 1991, on the grounds that it fails to state a claim for which relief can be granted under the Fair Employment Act (FEA) (Subchapter II, Chapter 111, stats.), and that the Commission lacks subject matter jurisdiction over this amendment. Respondent also moves for fees and costs pursuant to §814.04, stats., on the ground that the proposed amendment is frivolous. The parties have briefed and argued the motions.

The original complaint in this matter, filed June 18, 1990, and assigned # 90-0101-PC-ER, alleged that complainant had been discriminated against on the basis of sex with respect to the denial of promotion. On December 10, 1990, complainant filed an amendment that alleged sex discrimination with respect to a written reprimand and a one day suspension.[1] The most recent amendment, filed May 1, 1991, contains the following statement of discrimination:

> I believe I have been retaliated against because I filed a sex discrimination complaint. I believe that the decision to suspend me for trading shifts was a direct result of my attempting to assert rights guaranteed by the Wisconsin Fair Employment Law. The Employer issued a letter of suspension on September 4, 1990 allegedly for my trading shifts on July 15, 1990. I also believe the

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[1] This amendment subsequently was made a separate case for administrative purposes, because it involved a separate transaction from that alleged in the original complaint, and was assigned # 91-0063-PC-ER.

> Employer retaliated against me by violating my right to privacy. During a deposition on Jan. 29, 1991, I was asked a series of personal questions that were not relevant to my appeal of the Employer's decision to suspend me.

Respondent's motion runs only to the second aspect of the amendment — the claim that respondent retaliated against her by asking her irrelevant personal questions at a deposition.

The central issue raised by this motion is whether a charge of this kind states a claim under the FEA — i.e., assuming arguendo the requisite intent to retaliate, whether asking irrelevant personal questions during a deposition taken in connection with a §230.44(1)(a), stats., appeal, can constitute a discriminatory act of retaliation.

Section 111.321, stats., provides:

> **Prohibited basis of discrimination**
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> Subject to ss. 111.33 to 111.36, no employer, labor organization, employment agency, licensing agency or other person may engage in any act of employment discrimination as specified in s. 111.322 against any individual on the basis of age, race, creed, color, handicap, marital status, sex, national origin, ancestry, arrest record, conviction record or membership in the national guard, state defense force or any reserve component of the military forces of the United States or this state.

Section 111.322, stats., provides, inter alia:

> **Discriminatory actions prohibited**
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> Subject to ss. 111.33 to 111.36, it is an act of employment discrimination to do any of the following:
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> (1) To refuse to hire, employ, admit or license any individual, to bar or terminate from employment or labor organization membership any individual, or to discriminate against any individual in promotion, compensation or in terms, conditions or privileges or employment or labor organization membership because of any basis enumerated in s. 111.321.
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> * * *
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> (3) To discharge or otherwise discriminate against any individual because he or she has opposed any discriminatory practice under this subchapter or because he or she has made a complaint, testified or assisted in any proceeding under this subchapter.

Thus, §111.321 prohibits "any act of employment discrimination as specified in §111.322," and §111.322 states "it is an act of employment discrimination" to take any of the enumerated adverse employment actions on a prohibited basis. The prohibition on retaliation, §111.322(3), uses the language "[t]o discharge or otherwise discriminate against any individual because he or she . . . has made a complaint." (emphasis added) The FEA at §111.322(1) enumerates "act[s] of employment discrimination" as, inter alia:

> To refuse to hire, employ . . . to bar or terminate from employment . . . any individual, or to discriminate against any individual in promotion, compensation or in terms, conditions or privileges of employment.

An employer's act of asking irrelevant personnel questions during a deposition taken in connection with an employe's civil service appeal of a disciplinary action does not fit into any of the specific enumerated acts of employment discrimination. The question then is whether it falls within "terms, conditions or privileges of employment."

Most discussion of this and similar language involves the question of whether a particular aspect of employment constitutes a mandatory or permissive subject of bargaining, or a related issue under the state's statutory scheme of labor and employment regulation. See e.g., Beloit Education Assn. v. WERC, 73 Wis. 2d 43, 242 N.W. 2d 231 (1976); Taddey v. DHSS, 86-0156-PC (6/11/87). Typically in this type of case there is no question that the particular aspect of employment constitutes a "condition of employment" in the general sense; the focus is usually on whether it partakes more of the prohibited, mandatory or permissive subjects of bargaining. Therefore, these cases offer little guidance in interpreting the material provisions of the FEA.

Turning to the dictionary meanings[2] of the words "terms, conditions or privileges of employment," (emphasis added), WEBSTER'S NEW WORLD DICTIONARY (2d college edition 1972) contains the following:

> terms: "conditions of a contract, agreement, sale, etc. that limit or define its scope or the action involved," p.1467.
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> condition: "anything called for as a requirement before the performance or completion of something else; provision; stipulation

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2 See In re Estate of Haese, 80 Wis 2d 285, 291, 259 N.W. 2d 54 (1977).

> [to impose conditions by contract] . . . anything essential to the existence or occurrence of something else; prerequisite [health is a condition of happiness].
> p. 295
>
> privilege: "a right, advantage, favor, or immunity specially granted to one." p. 1131.

In the context of these definitions, it is unlikely that an employe's pursuit pursuant to §230.44(1)(c), stats., of an administrative appeal of disciplinary suspension would be considered a "term" or "condition" of employment because such action probably would not be deemed a requirement, necessary incident or a part of the structure of the employment relationship. This conclusion is consistent with respondent's arguments that "a deposition is not an act within the scope of complainant's work duties," and that "[a]ttendance at a deposition is not in any way a work activity ordered by the employer."[3] However, since the civil service code gives an employe the right to appeal a disciplinary suspension, it can be characterized as a right granted by the state in its role as employer to its employes, and thus a "privilege of employment" under the FEA. Notwithstanding this conclusion, it is not dispositive of these motions. Complainant is not alleging she was denied the right to appeal her suspension. Rather, she alleges that respondent's act of retaliation was, in effect, to treat her unfairly by pursuing an irrelevant and intrusive line of questioning during a deposition. This frames the question of whether the manner in which the litigation is conducted by the employer can involve a "privilege of employment."

In the Commission's opinion, once the employer and employe become opposing litigants in a statutorily-provided proceeding before a third party agency, this context basically is not that of an employment relationship, and the employer's actions as a litigant in that litigation normally would not implicate any "terms, conditions, or privileges of employment." The proceeding may arise out of the employment, but the relationship between the parties in the conduct of the litigation is not that of employer and employe.

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[3] Respondent also contends that the FEA does not protect any "right to privacy." While this assertion is undoubtedly correct, and complainant's reference to respondent's violation of her right to privacy may be inartful, this begs the question of whether the subject matter of the complaint falls within the FEA's prohibition of employment discrimination in "terms, conditions or privileges of employment," §111.322(1), stats.

This is illustrated by the fact that the employer has no authority to control the employe's conduct of the litigation, and that the basic framework for the parties' conduct in such proceedings is the Administrative Procedure Act (Chapter 227, stats.), §§230.44 and 230.45, stats., and Chs PC, Wis. Adm. Code. An employe's rights with regard to deposition questioning will not be found in the substantive civil service code governing the employment relationship. Rather, it will be found (as relevant here) by reference to §§PC 4.03, Wis. Adm. Code, and 804.01(3)(a), stats., pursuant to which the Commission "may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Therefore, it is neither a term or condition of employment in the sense of a requirement, nor is it a privilege of employment in the sense of a right or advantage granted to an employe.

While the Commission is cognizant of the FEA's liberal construction clause, §111.31(3), stats., it would be going beyond a fair liberal construction to hold that "terms, conditions or privileges of employment," §111.322(1), stats., encompasses an employer's line of questioning at a deposition taken in connection with the employe's appeal of a disciplinary action. In addition to the rationale discussed in the preceding paragraph, the Commission notes there is a dearth of reported authority holding that litigation tactics are cognizable under the FEA or similar laws. Furthermore, such a holding would have significant negative policy implications. If any allegedly abusive line of questioning or other litigation tactic could be the basis for a charge of FEA retaliation, this could lead to a plethora of new litigation. On the other hand, failure to so extend the reach of the FEA does not mean there is no remedy against oppressive discovery tactics. As noted above, a party has the prerogative under §§PC 4.03, Wis. Adm. Code, and 804.01(3)(a), stats., to request the Commission to enter an order with respect to discovery "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."

Respondent also requests costs and fees in connection with its opposition to the motion,[4] pursuant to §§814.025 and 814.04, stats., on the ground that the amendment is frivolous. Chapter 814 by its terms is applicable to court

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[4] Respondent withdrew this motion subsequent to the issuance of the proposed decision.

proceedings. In Tatum v. LIRC, 132 Wis. 2d 411, 419-423, 392 N.W. 2d 840 (1986), the Court of Appeals held that §814.025 does not apply to administrative proceedings under the FEA and that the FEA contains no implied authority for an award of attorney's fees to a prevailing employer. Therefore, respondent's request for fees and costs must be denied as outside the Commission's authority.

ORDER

Respondent's motion, filed May 10, 1991, to dismiss that part of the proposed amendment filed May 1, 1991, which states: "I also believe the employer retaliated against me by violating my right to privacy. During a deposition on January 29, 1991, I was asked a series of personal questions that were not relevant to my appeal of the Employer's decision to suspend me," is granted. The remainder of the proposed amendment ("I believe I have been retaliated against because I filed a sex discrimination complaint. I believe that the decision to suspend me for trading shifts was a direct result of my attempting to assert rights guaranteed by the Wisconsin Fair Employment Law. The employer issued a letter of suspension on September 4, 1990, allegedly for my trading shifts on July 15, 1990.") is permitted. Respondent's motion for costs and fees is denied.

Dated: July 11, 1991 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

AJT/gdt/2

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner