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WILLIAM G. WEAVER,
 Complainant,

v.

UNIVERSITY OF WISCONSIN -
 MADISON,
 Respondent.

Case No. 93-0022-PC-ER

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RULING ON RESPONDENT'S
 MOTION IN LIMINE
 RE: Prior Charge of Discrimination
 and James Magee Testimony

Respondent filed a motion in limine requesting that evidence at hearing be limited regarding the charge of discrimination previously filed by complainant and regarding the experiences of Mr. James Magee. Complainant filed a written reply, to which respondent filed a written response. A final piece of pertinent information was received by the Commission on November 19, 1993.

The hearing examiner grants part of respondent's motion and denies part. The facts and supporting rationale follow.

FINDINGS OF FACT

1. On March 6, 1990, complainant filed a charge of discrimination against respondent, which was assigned case number 90-0036-PC-ER. The case was settled short of hearing and was signed by the parties in June & July, 1991. The exculpatory clause of the settlement agreement provides, in relevant part, as follows.

Weaver...in consideration of the promises set forth herein, hereby releases and discharges [respondent] . . . from any and all claims, demands, or causes of action including without limitation all claims for damages of any nature or type which Weaver could assert in the future relating in any way to his employment at the [respondent]. This release and discharge is intended to include, but not be limited to . . . any claim of any type arising under federal or state law prior to the date of this release against . . . the [respondent], including but not limited to the State of Wisconsin Personnel Commission Case No. 90-0036-PC-ER . . .

It is the purpose of this release to completely and fully conclude all claims against any person or entity described in this release arising prior to the date of this release.

2. On February 4, 1993, complainant filed a second charge of discrimination against respondent, with an amendment filed on February 25, 1993. This second charge was assigned case number 93-0022-PC-ER.

3. Complainant's second case was investigated by one of the Commission's Equal Rights Officers. On July 8, 1993, the Equal Rights Officer issued an Initial Determination (ID) which found probable cause to believe that respondent discriminated against complainant on the basis of color/race and retaliated against him for activities protected under the FEA when he was not hired for a limited term employment carpenter position in June 1992.

4. The ID for case number 93-0022-PC-ER, recited information regarding complainant's prior case (par. 2 of the Investigative Summary, for example), as well as information regarding experiences Mr. Magee allegedly had while working for respondent several years ago (par. 16 of the Investigative Summary, for example). Respondent would like these topics excluded or limited at hearing.

6. The ID for the second case (93-0022-PC-ER) also recited information provided by respondent regarding the racial makeup of its workforce (par. 14 of the Investigative Summary, for example). Respondent indicates that the information it shared with the Equal Rights Officer was incorrect and, therefore, requested reconsideration of the ID. This request was considered and denied by the full Commission in a separate decision.

DISCUSSION

Respondent contends that evidence related to Mr. Magee's employment with respondent should be excluded for the following reasons: 1) the events occurred 8-10 years ago and are, therefore, so remote in time as to be irrelevant, 2) the events involving Mr. Magee would be insufficient (without additional evidence) to establish a pattern and practice of discrimination, and 3) the testimony is more prejudicial than helpful. Complainant's response is shown below.

The reason the Magee statement is appropriately before the Commission, and should be allowed into the record at the time of hearing in this case, if Mr. Magee is available and willing to testify, is to establish that other African-American individuals contend that they were discriminated against by the Respondent in a manner similar to that charged by

Weaver. Magee never filed a complaint and his statement that he was discriminated against does not, in and of itself, result in an automatic finding that the Respondent discriminated against him. Should James Magee, and others if they are available, testify to their experience at the University of Wisconsin-Madison Physical Plant, these statements can provide evidence to support the alleged attitude of the Carpentry shop towards persons of African-American heritage.

The hearing examiner denies respondent's request to exclude testimony by Mr. Magee and potential others who may be similarly situated. Mr. Magee's story involves at least one of the same alleged "bad actors" in complainant's second case and, apparently, the same work site. The fact that Mr. Magee's allegations regard events which occurred 8-10 years ago, may affect the weight given by the examiner to such evidence but does not render the evidence irrelevant.

Respondent contends evidence related to complainant's prior case against respondent (case number 90-0036-PC-ER), should be excluded because complainant agreed in settlement of the prior case to forego further actions arising out of the then-existing employment situation. Complainant appears to agree that exclusion would be appropriate if complainant were attempting to seek additional remedies for the employment situation which existed before the settlement agreement was signed (June-July 1991). Complainant asserts such is not the circumstance here.

Complainant must support his retaliation claim by showing that respondent treated him unfavorably and that such action was taken in retaliation for his participation in an activity protected under the Fair Employment Act. The alleged protected activity here is complainant's filing of his prior case (case number 90-0036-PC-ER). The alleged unfavorable act was respondent's failure to hire him as a carpenter in June 1992.

Complainant, therefore, plans to refer to the prior case to establish his participation in an act protected under the Fair Employment Act. The alleged unfavorable act, however, occurred after the settlement agreement was signed and is not covered by the settlement agreement for the prior case. Respondent acknowledged in its reply brief that it would be appropriate to use the prior case as a potential basis of the current retaliation claim.

The examiner agrees with the parties that the prior case serves a limited, but legitimate basis for the current claim of retaliation. The prior case has relevance to the alleged protected activity. Other facts relating to the

prior case also may be relevant to the current retaliation claim, for example, to attempt to show that the current alleged retaliators were either actors in the prior case or knew of the prior case in some other way. However, the examiner agrees with respondent that the facts of the prior case per se are barred unless tied to the current claim of retaliation. This motion of respondent's, therefore, is granted in part and denied in part.

ORDER

Respondent's request to exclude evidence relating to Mr. Magee's employment with respondent is denied; and respondent's request to exclude evidence of complainant's prior case against respondent (Case number 90-0036-PC-ER) is denied in part and granted in part, as described in this ruling.

Dated December 8, 1993.



JUDY M. ROGERS, Commissioner
(608) 266-9764

cc: Atty. Susan Bauman
Atty. Kris Rasmussen