STATE OF WISCONSIN PERSONNEL COMMISSION

NARAYANA S. KAMATH,
Complainant,

v.

Chancellor, UNIVERSITY OF WISCONSIN-MADISON,
Respondent.

Case No. 95-0104-PC-ER

RULING ON RESPONDENT'S MOTION TO DISMISS A PORTION OF THE CASE

This case is before the Commission on respondent's motion to dismiss. Both parties filed written arguments, with the final argument received by the Commission on November 11, 1997.

A prehearing conference was held on August 19, 1997, during which the parties agreed on the following statement of the issues for hearing:

> Did respondent discriminate against complainant on the basis of race and/or national origin in regard to the following actions:
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> a. Dr. Boothman providing what complainant perceived as poor employment references by letters dated October 27, 1994, and May 1, 1995;
> b. Dr. Boothman on April 5, 1995, telling others that complainant was the person who complained to the Nuclear Regulatory Commission; and
> c. Dr. Boothman in January 1995, told complainant he should not testify in a complaint filed against Dr. Boothman with respondent's Office of Affirmative Action and Contract Compliance.

Respondent's present motion requests dismissal of issues "b" and "c" above.

OPINION

Complainant began working for respondent in July 1993, as a Research Associate in respondent's Medical School's Department of Human Oncology where he was supervised by David A. Boothman (Associate Professor). It is undisputed that complainant's employment was terminated effective October 1, 1994. It also is undisputed that complainant had no relationship with respondent after September 30, 1994, except to use respondent's laboratory resources to search for other employment and to receive references from prior employers.

Respondent contends the Commission lacks subject matter jurisdiction in regard to allegations "b" and "c" listed previously. Respondent bases this contention upon the undisputed fact that the employment relationship ended before allegations "b" and "c" occurred.

The FEA's definition of prohibited discriminatory acts is found in §111.322, Stats., as shown below in relevant part.

> **DISCRIMINATORY ACTIONS PROHIBITED.** [I]t is an act of employment discrimination to do any of the following:
>
> (1) To refuse to hire, employ, admit or license any individual, 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 . . . because of any basis enumerated in §111.321. . . .
>
> (4) 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.

Discussion of Veprinsky v. Fluor Daniel, Inc.

Complainant (through counsel) contends the two allegations at issue should not be dismissed and cites as support *Veprinsky v. Fluor Daniel, Inc.*, 67 F.3d 881 (7th Cir. 1996). Veprinsky filed a discrimination complaint with the Equal Employment Opportunity Commission (EEOC) in 1991, alleging the employer discharged him because of his national origin and religion. He later alleged the employer also retaliated against him for filing the EEOC charge. The allegation of religious discrimination was abandoned at the court level, which left remaining the claim of discharge because of national origin and the claim of retaliation in regard to: 1) the employer's provision of false information to a subsequent employer, 2) the employer's refusal to consider rehiring him for another position, and 3) the employer informing complainant's placement firm about the claim filed with the EEOC. Veprinsky also requested leave to add the following additional claim of retaliation: 4) the employer arranged for its prior attorney to defend someone at reduced fees who complainant was suing in an unrelated state court action. The district court granted the employers' motion for summary judgment in regard to all retaliation claims which occurred after the employment relationship ended (retaliation claims 1 and 3 above) and, based on the same principle, denied Veprinsky leave to amend to add the fourth claim of retaliation. (*Veprinsky*, at 882-883.)

The Court of Appeals decided the *Veprinsky* appeal interpreting §704(a) of Title VII of the Civil Rights Act of 1964. The provision is shown below as recited in *Veprinsky* (p. 884):

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this subchapter.

The equivalent provision under state law is §111.322(4), Stats., quoted previously in this ruling.

The Commission first notes that complainant has not alleged retaliation under the FEA. His case is comprised of allegations of discrimination based on race and/or national origin under §111.322(1), Stats. There is language in the *Veprinsky* decision, however, which suggests the case rationale should not be limited solely to claims of retaliation. For example, the following discussion of other cases is found in *Veprinsky* (at p. 885, emphasis added):

> . . . Excluding former employees from the protection of anti-retaliation provisions cannot be justified based on the notion that such employees do not require it, the Third Circuit pointed out:
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> > The need for protection against retaliation does not disappear when the employment relationship ends. Indeed, post-employment blacklisting is sometimes more damaging than on-the-job discrimination because an employee subject to discrimination on the job will often continue to receive a paycheck while a former employee subject to retaliation may be prevented from obtaining any work in the trade or occupation previously pursued.
>
> *Charlton*, 25 F.3d at 200. Thus, concerned that a narrow interpretation of the anti-retaliation provision of Title VII and its counterparts would leave a significant gap in the statutory protection that Congress intended, the majority of courts have eschewed a construction that effectively would, for example, "allow an employer to discriminate against and 'black list' a former employee as long as the employer can successfully keep the former employee from getting a job and thereby becoming technically 'employed by an employer'." *Dunlop*, 548 F.2d at 147. "This would be to reward the very conduct the Act sought to preclude." *Id.*

The *Veprinsky* court concluded that former employees "in so far as they are complaining of retaliation that impinges on their future employment prospects or

otherwise has a nexus to employment" do have a right to sue their former employers. *Veprinsky* at 891. The Court of Appeals in *Veprinsky*, therefore, reversed the District Court's decision granting summary judgment on the following allegations of retaliation: a) the employer disclosed to Veprinsky's placement agency that he had filed a complainant with the EEOC, and b) the employer provided false information about his employment history to a subsequent employer. The Court of Appeals upheld the Circuit Court's decision denying Veprinsky's request to add the additional allegation of retaliation noting not only was the claim unrelated to employment but it further lacked merit. *Veprinsky* at 895.

Conclusions

Complainant has articulated no theory as to how the allegations at issue in this motion created a negative impact on his present or future employment opportunities. This pleading defect first was noted in the Initial Determination issued on June 10, 1997 (pp. 2-3). Complainant provided no illumination on this question as part of his response to the present motion. Accordingly, these post-termination occurrences do not have a sufficient nexus with employment to survive respondent's motion for summary judgment.

ORDER

That respondent's motion for summary judgment is granted which leaves remaining as an issue for hearing whether respondent discriminated against complainant on the basis of race and/or national origin in regard to Dr. Boothman providing what complainant perceived as poor employment references by letters dated October 27, 1994, and May 1, 1995.

Dated: November 20, 1997.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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