

STATE OF WISCONSIN

PERSONNEL COMMISSION

DOROTHY A. HEINZ-BREITENFELD,
Complainant,

v.

**Secretary, DEPARTMENT OF
CORRECTIONS,**
Respondent.

RULING ON MOTION
FOR
SUMMARY JUDGMENT

Case Nos. 95-0153 and 0155-PC-ER

This is a motion for summary judgment arising out of this complaint of discrimination in violation of the Wisconsin Fair Employment Act (WFEA), subchapter II, Ch. 111 Wis. Stats. Both parties filed written arguments. The following findings are based on information provided by the parties, and appear to be undisputed.

FINDINGS OF FACT

1. On February 14, 1995, complainant, a white female, was informed that her position as Recreation Director at the Racine Correctional Institution (RCI) would be eliminated as of June 30, 1995, and that she was one of three people "at risk" of layoff.

2. Complainant received her layoff letter about June 2, 1995, and as an at-risk employe had certain mandatory rights to positions in lieu of layoff, as provided in §§ER-MRS 22.08 (1) through (3), Wis. Adm. Code.

3. Complainant filed three complaints of race discrimination with the Commission against respondent in connection with the elimination of her position at RCI, layoff and subsequent rehire to an alternative position. These were assigned case numbers 95-0153, 0154 and 0155-PC-ER. This motion pertains to Case Nos. 95-0153 and 0155-PC-ER.

4. In Case No. 95-0153-PC-ER, the issues are whether respondent discriminated against complainant on the basis of race in failing to hire her for any of six positions, in failing to interview her for a Personnel Assistant position at OCI, and

in failing to inform her about a Stores Supervisor position at RCI (Conference Report, 10/27/97).

5. In Case No. 95-0155-PC-ER the issue is whether complainant was discriminated against on the basis of race when she received less pay than a coworker, Ms. Boddan, from August 25, 1991 through August 21, 1994. This was a contingent issue. See Conference Report , id., which states:

This issue is contingent on either a determination that this complaint was timely filed or respondent's withdrawal of the objection to timeliness it noted at this prehearing. (Further proceedings on the timeliness issue will await discovery and/or discussion between the parties.)

Summary judgment should only be granted if the moving party establishes there is no genuine issue of material fact and that, as a matter of law, it is entitled to judgment. *Grams v. Boss*, 97 Wis. 2d 332, 294 N.W.2d 473 (1980). In *Baxter v. DNR*, 165 Wis. 2d 298, 477 N.W.2d 648 (1991), the court, citing *Anderson v. Liberty Lobby, Inc.*, 477 US 242, 247-48 (1986), emphasized that the mere existence of some alleged factual dispute will not defeat an otherwise properly supported motion for summary judgment.

Case No. 95-0153-PC-ER

Respondent argues that five of the seven positions at issue, i.e. Badger State Industries specialist at FLCI, Industry Specialist 3 at FLCI, Personnel Assistant at KMCI, Institution Registrar 3 at DCI, and Personnel Assistant at OSCI, were filled by persons of complainant's race; and that in regard to the OSCI position, complainant was not interviewed because, like another interested person (a white female) she submitted her request late, and the three candidates interviewed for the position were all of complainant's race. Complainant has not disputed these representations by respondent. Therefore, the complaint should be dismissed as to these positions.

As to the Registrar position at KMCI, respondent argues that complainant was hired to that position, currently holds it, and it is the subject of Case No. 95-0154-PC-ER. Thus, that portion of this complaint should be dismissed. In support respondent

filed a copy of its response to complainant's interrogatories and cited applicable interrogatories and answers. Complainant agrees that she was hired for the Registrar position at KMCI, but argues, "It is not a question as to whether Ms. Heinz-Breitenfeld lost some position where a white individual was hired. There are questions as to why she had to compete against them at all . . ."

While there may exist some factual disputes as to the hiring process in regards to these six positions, complainant makes no connection between such alleged disputes and the race discrimination issue. We conclude that no genuine issue of material fact exists here.

Concerning the allegation of respondent's racial discrimination against complainant for not informing her about the Stores Supervisor position at RCI, respondent argues that complainant knew about that position being vacant in 1995, but mistakenly assumed it was in a higher classification than her position and chose not to interview for it. In response, complainant argues that any assumption she made about the classification of that position did not relieve respondents of the obligation (even if no rule requires it) to provide her information about that position, that black employees were provided notification about position openings and allowed late interviews. The Commission believes this dispute involves a genuine issue of material fact.

Case No. 95-0155-PC-ER

Respondent argues that this claim should be dismissed for two reasons. First, respondent contends that the complaint was untimely filed because complainant admits the alleged pay disparity ended on August 21, 1994, well over 300 days before she filed her complaint. Respondent argues further that Ms. Bodden's personnel documents indicate she is white and she is believed to be white by RCI; that Ms. Bodden voluntarily demoted in lieu of layoff to RCI on August 25, 1991; that she came from a much higher classification than complainant; and that Chapter ER 29, Wis. Adm. Code (1991), was used to determine Ms. Bodden's salary, and she lost \$.347 when she went to RCI.

Complainant argues the complaint is timely because there is a reoccurring violation every pay period. Respondent argues that ceased on August 21, 1994, well before the time period for the complaint to be filed. Given the particular facts of this case, it is unclear whether a continuing violation occurred. However, we need not become quagmireing by the problematic nature of this question. Regardless of whether this complaint was timely, the motion for summary judgment should be granted. It is undisputed that Ms. Bodden's pay was predicated on her voluntary demotion and the applicable rules as provided in Ch. ER 29. Wis. Adm. Code, and that respondent had no discretion to set her rate of pay. A determination as to Bodden's ethnicity would not affect the outcome of this case. There is not a genuine issue of material fact, and as a matter of law, this summary judgment should be granted.

CONCLUSIONS OF LAW

Case No. 95-0153-PC-ER

1. Respondent has the burden to show there is no genuine issue of material fact and, as a matter of law, is entitled to judgment.
2. Respondent has met that burden regarding the following six positions at issue: Badger State Industries Specialist at FLCI, Industry Specialist 3 at FLCI, Personnel Assistant at KMCI, Institution Registrar 3 at DCI, Registrar at KMCI (also, this position is the subject of Case No. 95-0154-PC-ER), and Personnel Assistant at OSCI.
3. Respondent failed to meet its burden regarding the Stores Supervisor position at RCI.

Case No. 95-0155-PC-ER

1. Respondent has the burden to show there is no genuine issue of material fact and, as a matter of law is entitled to judgment.
2. Respondent has met its burden.

ORDER

Case No. 95-0153-PC-ER

Respondent's motion for summary judgment is granted in part and denied in part as indicated above. Accordingly, the remaining issues in this case are:

- 1) Whether complainant was discriminated against on the basis of race in regard to respondent's failure to hire her for the position of Probation and Parole Agent.
- 2) Whether complainant was discriminated against on the basis of race in regard to respondent's failure to inform complainant about the Stores Supervisor position at RCI, thereby depriving her of an interview opportunity.

Case No. 95-0155-PC-ER

Respondent's motion for summary judgment is granted and this matter is dismissed.

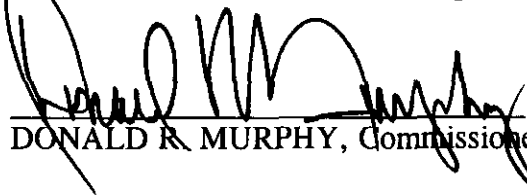
Dated: May 6, 1998.

DRM:rjb
950153Crull

STATE PERSONNEL COMMISSION



LAURIE R. McCALLUM, Chairperson



DONALD R. MURPHY, Commissioner



JUDY M. ROGERS, Commissioner

Parties:

Dorothy Heinz-Breitenfeld
585 Forest Ave
Fond du Lac WI 54935

Michael Sullivan
Secretary, DOC
PO Box 7925
Madison WI 53707-7925

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 (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) 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.

2/3/95