STATE OF WISCONSIN PERSONNEL COMMISSION

ARLYN BRACKEMYER,

Complainant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM (River Falls),

Respondent.

Case No. 95-0172-PC-ER

RULING ON RESPONDENT'S MOTION TO DISMISS

BACKGROUND

1. Mr. Brackemyer filed a complaint on November 29, 1995, alleging discrimination in regard to the method under which the University of Wisconsin System at River Falls (UW) assigns overtime to the least-senior employe.

2. Attached to the complaint was a letter dated April 9, 1995, which Mr. Brackemyer had sent to Martin Beil, Executive Director of AFSCME, Council 24. The text of this letter reflects the nature of Mr. Brackemyer's discrimination complaint and is repeated below:

> Again I would like to point out this Article VI 6/2/5 is wrong -- causing discrimination, harassment, frustration and anger at UW River Falls and especially at the Central Heating Plant. I have 13 years seniority -- my weekend scheduled off -- the family will plan and look forward to activities and along comes Jimmy Jones with 14 years seniority -- who decides he will take vacation on my weekend off. No one wants to work it -- so you will have to work it again, Mr. Brackemyer -- why? Because you are least senior -- so the next time I have a weekend off -- the family is looking forward to the Birthday Party, camping --- along comes Mr. G.E. who decides he would like to take vacation -- on your weekend off -- so Mr. Brackemyer -- you will have to work it again. Why? Because no one else wants to -- and you're least senior man. This will happen again and again and again -- and then you have the individual who intentionally takes vacation to harass least senior who is forced to work -- so as to please his own sick humor -- what a terrible way to treat a person -- least senior could work every Christmas, Thanksgiving, Holidays -- year after year -- we have a verbal agreement -- No one takes vacation on

Christmas -- and that's been broken. Hopefully this Article will be changed so all Union Brothers are treated proper.

3. Mr. Beil's (corrected) response was dated May 4, 1995. The text of Mr. Beil's letter confirmed that the union contract provision on forced overtime was intended to place the work hours on the least senior employee.

4. The Commission interpreted Mr. Brackemyer's complaint as a claim of religious discrimination against the UW and the union. By letter dated December 12, 1995, the Commission informed Mr. Brackemyer that the Commission had jurisdiction over the UW as an employer, but that jurisdiction over the union rested with the Equal Rights Division (ERD) of the Department of Industry, Labor and Human Relations (DILHR). By copy of the same letter, the Commission sent DILHR-ERD a copy of the complaint.

5. The Commission sent Mr. Brackemyer a letter dated December 12, 1995, requesting replies to specific questions including: "What is your creed?" The Commission received his response on December 20, 1995, in which he indicated his creed was: "Equal Rights and Fairness".

6. The UW answered the complaint by letter dated February 23, 1996. The answer included a request that the complaint be dismissed for failure to state a claim upon which relief could be granted. The excerpts shown below were contained in the UW's answer.

> Complainant, at all times pertinent to this complaint, was employed by respondent as a Power Plant Operator 4. In addition to the complainant, the power plant is staffed by a Power Plant Superintendent 3 and five Power Plant Operator 3s. Complainant and the five Power Plant Operator 3s are represented by AFSCME Council 24, Wisconsin State Employees Union. Many of the terms and conditions of their work, including the assignment of overtime hours, are controlled by the collective bargaining agreement between the union and the State of Wisconsin.
>
> The power plant is in operation 24 hours a day, seven days per week, throughout the entire year. At all times, one person must be on duty to operate the power plant, e.g., maintain proper water levels . . .
>
> * * *
>
> There are times where no one is willing to accept the overtime on a voluntary basis. In these instances paragraph

> 6/2/5 [of the union contract] applies which permits the employer to require overtime. . .
>
> * * *
>
> Whenever overtime is required the respondent attempts to schedule overtime pursuant to para. 6/2/4 of the collective bargaining agreement. This is accomplished by offering the overtime to the individuals who normally perform the work. A form is posted indicating the date and shift for which overtime coverage is needed. If overtime is necessary to cover a planned absence, e.g., vacation, respondent attempts to provide at least two weeks notice of the availability of overtime. Where no employee agrees to voluntarily work overtime the provisions of paragraph 6/2/5 come into play. In those situations it is assigned to the least senior person who performs the work involved.

7. Mr. Brackemyer was given an opportunity to respond to the UW's arguments. He responded by letters dated March 8 and 24, 1996, stating in pertinent part as shown below:

> March 8, 1996 letter: U.W. River Falls has made an effort -- dealing with this discrimination. Three years ago I was forced 15 times to work on my scheduled days off --- so senior employees who were scheduled to work could have off --- two years ago I was forced 5 times and last year 3 times -- (but if my supervisor had not worked 20 overtime days) I would have been forced 23 times. I see this as a temporary fix. I go from day to day not knowing when I will be forced to work -- so as senior can have off. . .
>
> . . . [A]s long as there is partiality toward senior employees - - - this brings on a burden and hardship for least senior - - - which is discrimination and harassment. Creed is a set of fundamental and religious beliefs - - - my creed is treating people equally fair and just so as there is no burden or hardship.
>
> With a system that is proper -- least senior should never have to be forced to work on his scheduled days off -- so senior employes who are scheduled to work can have off. Obviously collective bargaining cannot come to an agreement -- hopefully the Personnel Commission can correct this.

DISCUSSION

The UW's motion to dismiss is reviewed here under the standard described in Phillips v. DHSS & DETF, 87-0128-PC-ER (3/15/89), aff'd Phillips v. Wis. Pers. Comsn., 167 Wis.2d 205, 482 N.W.2d 121 (Ct. App. 1992), as follows:

> [T]he pleadings are to be liberally construed, [and] a claim should be dismissed only if "it is quite clear that under no circumstances can the plaintiff recover." The facts pleaded and all reasonable inferences from the pleadings must be taken as true, but legal conclusions and unreasonable inferences need not be accepted.

An individual's creed is a prohibited basis of discrimination under Wisconsin's Fair Employment Act (WFEA), pursuant to s. 111.321, Stats. The term "creed" is defined in s. 111.32 (3m), Stats., as shown below:

> "Creed" means a system of religious beliefs, including moral or ethical beliefs about right and wrong, that are sincerely held with the strength of traditional religious views.

The WFEA requires employers to accommodate religious beliefs if such accommodation would not create an undue hardship for the employer's business. The accommodation requirement is stated in s. 111.337 (2), Stats., as shown below:

> Employment discrimination because of creed includes, but is not limited to, refusing to reasonably accommodate an employe's or prospective employe's religious observance or practice unless the employer can demonstrate that the accommodation would pose an undue hardship on the employer's program, enterprise or business.

The UW raised two basic arguments. First, it was argued that Mr. Brackemyer's claimed basis for creed being "equal rights and fairness" was insufficient to trigger protection under the WFEA. Second, the UW argued it had no choice but to follow the union contract provision on forced overtime going to the least senior employee. The Commission resolves the motion on the second argument and, accordingly, does not address the first argument. The Commission agrees that the UW had no choice but to follow the union contract provision and that to rule otherwise would create an undue hardship on the employer's business.

The state statute governing collective bargaining agreements (union contracts) elevates the terms of the contract on matters related to wages, fringe benefits, hours and conditions of employment over other applicable

statutes or rules. The text of s. 111.93 (3), Stats., is shown below in pertinent part:

> . . . [I]f a collective bargaining agreement exists between the employer and a labor organization representing employes in a collective bargaining unit, the provisions of that agreement shall supersede the provisions of civil service and other applicable statutes . . . related to wages, fringe benefits, hours and conditions of employment . . .

The union contract provision contested by Mr. Brackemyer pertains to hours of employment and, as a general rule, will control over other statutory provisions. The main exception would be if the contested contract provision were tantamount to an intentionally discriminatory seniority system. Mr. Brackemyer, however, does not indicate or even allege that the seniority system for overtime was intended by the union or employer to result in the assignment of overtime to the disadvantage of employees who profess the same creed as Mr. Brackemyer. On the contrary, the use of seniority as a means of settling disputes is neutral in that the less desirable hours will fall to the least senior employee regardless of that employee's creed, sex, race, or personal relationship to the employer.

The Equal Employment Opportunities Commission (EEOC) has responsibility for processing complaints of religious discrimination under federal law (Title 7 of the Civil Rights Act). The provision under federal law is similar to the WFEA in that the employer has a duty to accommodate an employee's religious beliefs unless the employer demonstrates that accommodation would result in undue hardship on the conduct of its business. The EEOC guidelines on religious discrimination are found at 29 CFR 1605, are printed in Vol. 8, FEP, s. 403:261, et. seq.; and contain the following text on pp. 263-264:

> Undue hardship. . . . (2) Seniority Rights. Undue hardship would also be shown where a variance from a bona fide seniority system is necessary in order to accommodate an employee's religious practices when doing so would deny another employee his or her job or shift preference guaranteed by that system. Hardison, supra, 432 U.S. at 80. Arrangements for voluntary substitutes and swaps . . . do not constitute an undue hardship to the extent the arrangements do not violate a bona fide seniority system. Nothing in the Statute or these Guidelines precludes an

> employer and a union from including arrangements for voluntary substitutes and swaps as part of a collective bargaining agreement.

The assignment of work hours pursuant to seniority provisions of a union contract have been consistently upheld in employee challenges that such provisions interfered with religious beliefs. See, for example, Cook v. Chrysler Corp., 60 FEP Cases 647 (CA 8 1992); Blair v. Graham Correctional Center, 58 FEP Cases 112, 113 (C.D. Ill. 1992), citing Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 79, 14 FEP Cases 1697, (1977); and Ackerman v. Amtrak, 53 FEP Cases 1666 (S.D. Fla., 1990). While there has been no precedent-setting case under Wisconsin law, the Commission can think of no legal or policy reason to support a contrary result.

In summary, the facts alleged by Mr. Brackemyer (as well as the reasonable inferences therefrom) make it clear that he could not prevail in his WFEA claim. His avenue for relief is to work with his union to change the contract.

ORDER

That respondent's motion to dismiss be granted, and this case be dismissed.

Dated May 28, 1996.

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

JMR

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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 (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