STATE OF WISCONSIN PERSONNEL COMMISSION

* * * * * * * * * * * * * * * * * * * *

BARTHEL WAYNE HUFF,

Complainant,

v.

President, UNIVERSITY OF WISCONSIN - System,

Respondent.

Case No. 96-0013-PC-ER

* * * * * * * * * * * * * * * * * * * *

RULING ON RESPONDENT'S MOTION TO DISMISS

Mr. Huff filed a discrimination complaint with the Commission on January 25, 1996, alleging that the University of Wisconsin - System (UW) retaliated against him for activities protected under the Fair Employment Act (FEA) in regard to failure to hire. The UW filed an answer to the complaint on March 27, 1996, providing information and requesting that the complaint be dismissed for failure "to state a claim upon which any relief may be granted". Mr. Huff was provided an opportunity to reply, which he did by letter dated April 4, 1996.

BACKGROUND

1. The text of the narrative portion of Mr. Huff's complaint is shown below.

> The University of Wisconsin-System and its legal counsel have placed my name upon a "black list" maintained by the National Association of College and University Attorneys. (I have enclosed a copy of a letter found in EEOC case file 320951492.) That action was not required to respond to charges of age discrimination and was clearly designed to interfere with the handling of unrelated charges. There has clearly been retaliation for my filing a legitimate prima facie charge of age discrimination.
>
> I am still seeking employment. However, I think that the University of Wisconsin-System and its legal counsel should pay a substantial financial penalty for this act of retaliation.

2. The letter from EEOC case file 320951492, was attached to Mr. Huff's complaint and relates to a discrimination complaint which Mr. Huff filed against the Dakota State University. The letter is dated July 20,

1995, and was submitted by the attorney for Dakota State University. Specifically, the letter was signed by Terry N. Prendergast with the law firm of Boyce, Murphy, McDowell & Greenfield. The letter stated in pertinent part as shown below.

> Barthel Huff has alleged that Dakota State University violated his rights under the Age Discrimination in Employment Act of 1987. He alleges that he believes he was discriminated against because of his age in that a younger applicant was selected for the mathematics position.
>
> * * *
>
> A larger question also exists concerning Dr. Barthel Huff's complaint and his groundless allegations of age discrimination. The South Dakota Board of Regents, of which Dakota State University is a part, belongs to the National Association of College and University Attorneys. Through information received from other attorneys belonging to that Association, I have been able to document that Mr. Huff has filed two complaints with the Oregon State System of Higher Education, three charges with the University of South Florida, at least one charge with the Pennsylvania State System of Higher Education, a charge with Berea College, at least two charges with the State Colleges in Colorado, a charge with the University of Connecticut, two separate charges with separate Illinois Universities, two charges with institutions in Kansas, a charge with St. Cloud State University, a number of charges with the University of Wisconsin system, charges with the University of Minnesota, the University of Houston - Clear Lake, and North Carolina A & T.
>
> Upon information and belief, the total number of charges of age discrimination filed by Mr. Huff approaches 200. Some regional offices such as the regional office in Chicago have established a procedure to deal with Mr. Huff's age discrimination charges, no longer asking a University to respond to his charges. It is clear that the EEOC should dismiss this charge filed by Barthel Huff. Not only is the charge meritless on the facts, but Mr. Huff has demonstrated that he is simply a chronic filer and the resources of the State can certainly be better used in areas other than responding further to such groundless claims.

3. The UW's answer to Mr. Huff's complaint included the following pertinent information.

> The respondent is a member of the National Association of College and University Attorneys (NACUA). Approximately 660

postsecondary institutions from the United States and Canada belong to NACUA. The organization exists to improve the quality of legal assistance to colleges and universities and to provide continuing education for university counsel. In addition to producing publications and sponsoring seminars, NACUA provides an opportunity for college and university attorneys to network with various counterparts on current legal problems. One available means for college and university attorneys to network is NACUANET, an electronic mailing (E-Mail) list. NACUANET is available only to college and university attorneys and provides a method by which NACUA members can share information and advice.

On July 12, 1995, an E-Mail message was posted to the network by Mark T. Dunn, an attorney with Dunn, Ulbrick, Hundman, Stanczak & Ogar in Bloomington, Illinois. Attachment 1.] Mr. Dunn noted that he was representing two separate Illinois universities charged with age discrimination by Dr. Barthel Wayne Huff. He inquired whether anyone else on the network had experienced similar complaints involving Dr. Huff.

On that same date, John Tallman, an attorney with the University of Wisconsin System Administration, responded to this message. [Attachment 2.] In pertinent part, Mr. Tallman noted:

> Over the years I've developed a cottage industry representing a number of our universities against the same charges from Dr. Huff: he applies for an opening in math; he isn't hired; he files with the EEOC. I have pounds of paper associated with his claims and our replies. I don't know why for sure, but his latest charge against us, filed maybe six weeks ago, the EEOC didn't even ask for us to reply. They simply threw out the case. (This is the Milwaukee EEOC office.)

* * *

According to Attorney Tallman, he did not directly forward or circulate the NACUANET inquiry or his response to anyone in the UW System. (Footnote: Attorney Dunn's original message, Attorney Tallman's response and additional responses from other attorneys representing various colleges and universities throughout the country were received by other UW System attorneys who are connect to NACUANET. The NACUANET computer servicer is located at Georgetown University.) Furthermore, Attorney Tallman notes that he did not issue anything regarding complainant to any other University of Wisconsin institution, let alone a message advising any campus to refrain from hiring complainant.

Based upon information and belief, complainant was not denied employment by the University of Wisconsin System Administration or any of its campuses during the period covered by this complaint. This is supported by the complainant's complaint, which contains nothing to indicate that he was denied employment as a result of dissemination of this information by respondent. There was no other adverse employment action taken against the complainant. Quite simply nothing proscribed by sec. 111.322(3), Wis. Stats., has occurred.

. . . Nothing prohibits the respondent from disseminating information with respect to WFEA cases and the identity of parties so long as it is not disseminated for purposes of retaliating against the complainant. In effect, complainant has failed to state a claim upon which any relief may be granted.

For the foregoing reasons, respondent hereby requests that the Commission dismiss this matter for failure of the complainant to state a claim upon which relief can be granted, or, in the alternative, issue a finding of no probable cause.

4. Mr. Huff's letter of April 4, 1996, filed in reply to the UW's motion contained the following relevant text.

Respondent seems to admit that it took actions intended to interfere with my protection against age discrimination under the Age Discrimination in Employment Act of 1967 based upon my having filed a charge of discrimination against the UW-System. That would certainly seem to violate the prohibition against acting against any individual because that individual had made a complaint of discrimination.

The implication that the "black list" maintained by the National Association of College and University Attorneys materialized on July 12, 1995 is most questionable. The July 20, 1995 letter of Terry N. Prendergast shows that the "black list" was in full flower by that date.

* * *

Section 709 (3) of Title VII prohibits the EEOC itself from making information public concerning charges of discrimination and imposes penal and financial penalties for such criminal acts. Clearly, the release of information concerning charges of discrimination to the public is restricted in order to protect both Respondent and Charging Party.

5. Mr. Huff filed a prior complaint with the Commission. He initially filed the claim with the EEOC (charge number 260950803) and requested cross-filing. The Personnel Commission received the cross-filing on May 31, 1995, and assigned case number 95-0113-PC-ER to it. This prior complaint was filed against the UW-La Crosse in regard to a position for which he was not hired and about which he claimed age discrimination.

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. Cmsn., 167 Wis2d 205, 482 NW2d 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.

The analytical framework for discrimination/retaliation cases was laid out in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973). This framework provides that the burden is first on the complainant to show a prima facie case; that this burden then shifts to respondent to rebut the prima facie case by articulating a legitimate, non-discriminatory reason for its action; and that the burden then shifts back to complainant to show that respondent's reason is a pretext for discrimination.

The elements of a prima facie case of retaliation under the FEA include: 1) that the complainant engaged in an activity protected under the FEA, 2) that the respondent subsequently took an adverse action against complainant, and 3) that a "causal link" exists between the protected activity and the adverse action. Acharya v. Carroll, 152 Wis2d 330, 340, 448 NW2d 275 (Ct. App. 1989)

Mr. Huff engaged in an activity protected under the FEA by filing his prior complaint, Huff v. UW-La Crosse, 95-0113-PC-ER. Accordingly, he established the first element of a prima facie case.

Mr. Huff alleged that the UW took an adverse action against him by virtue of Attorney Tallman's E-mail response on July 12, 1995, to inquiry from an attorney for two universities in the State of Illinois. Attorney Tallman's action, however, bore no relationship to any ongoing employment between

Mr. Huff and the UW, or to any pending applications for employment at other universities. Instead, Attorney Tallman was responding to a litigation-related request regarding decisions made in the past by two universities in the State of Illinois to hire someone other than Mr. Huff. While Attorney Tallman's action might be viewed in lay terms as an "adverse action", as a matter of law it is too removed from a connection with employment to be protected under the Wisconsin FEA. In Accord, Larsen v. DOC, 91-0063-PC-ER (7/11/91)

Mr. Huff speculated that Attorney Tallman's E-mail message was accessed by the attorney representing Dakota State University in regard to Mr. Huff's EEOC claim that Dakota State University failed to hire him because of his age. Even if Mr. Huff's speculation were shown to be true, there is no allegation that Attorney Tallman's E-mail message influenced the hiring decision. Rather, he alleges it may influence the litigation over the hiring decision which had already been made.

Based upon the foregoing, the Commission concludes as a matter of law that Mr. Huff could not establish a prima facie case of discrimination based upon the allegations raised in his complaint. Accordingly, the UW is entitled to the relief requested in their motion.

ORDER

That the complaint be dismissed.

Dated May 2, 1996.

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

JMR

Parties:
Barthel Wayne Huff
5686 South Park Place East
Salt Lake City, Utah 84121

Katharine Lyall
President, UW - System
1700 Van Hise Hall
1220 Linden Drive
Madison, WI 53706

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