STATE OF WISCONSIN PERSONNEL COMMISSION

NATHANIEL WHALEY,
Complainlant,

v.

Secretary, DEPARTMENT OF CORRECTIONS,
Respondent.

Case No. 96-0157-PC-ER

RULING ON MOTION TO DISMISS

On December 3, 1996, complainant filed a charge of discrimination with the Commission alleging race discrimination. On January 10, 1997, respondent filed a motion to dismiss. The parties were permitted to file arguments relating to the motion and the schedule for doing so was completed on January 27, 1997. The factual findings on which this ruling are based are derived from information provided by the parties, are made solely for the purpose of deciding this motion, and appear to be undisputed.

1. At all times relevant to this matter, complainant has been an inmate at Green Bay Correctional Institution (GBCI).

2. On July 29, 1996, complainant began working in GBCI for Green Bay Textiles as part of the Badger State Industries Private Sector/Prison Industries Enhancement Program. Complainant was qualified for this program as the result of his status as an inmate in the Wisconsin correctional system. This is not a work release program.

3. Complainant's charge of discrimination relates solely to his period of employment in this Badger State Industries program.

Respondent argues that complainant's relationship with the above-described Badger State Industries program does not qualify as an employment relationship within the meaning of the Fair Employment Act and, as a result, this case should be dismissed.

In *Richards v. DHSS*, 86-0086-PC, 9/4/86, the Commission, in reliance on the language of the Fair Employment Act and on a decision of the Equal Employment Opportunities Commission (EEOC)(Case No. 86-7 (4/18/86), 40 FEP Cases 1892) interpreting Title VII, concluded that inmates performing work in a correctional institution are not considered "employees" within the meaning of the Fair Employment Act. In its decision, the Commission quoted the following language of the cited EEOC decision:

> However, these individual factors must be considered in light of the total circumstances of the relationship between the Charging Party and the Respondent.
>
> That relationship arose from the Charging Party's having been convicted and sentenced to imprisonment in the Respondent's correctional institution. The primary purpose of their association was incarceration, not employment. Consequently, the Respondent exercised control and direction not only over the Charging Party's work performance but over the Charging Party himself. The conditions under which he performed his job were, thus, functions of his confinement to the Respondent's institution under its control. While the Charging Party received monetary compensation for his work, that compensation was minimal and, arguably, the greater consideration was the opportunity to earn "good time" credits toward reducing his sentence. Finally, although the Charging Party was not required to work for the Respondent, his very job flowed from his incarceration and was dependent on his status as a prison inmate. Considering these circumstances as a whole, we are persuaded that the reality of the work relationship between the Respondent and the Charging Party was not one of employment. Therefore, we find that, while the Respondent is an employer within the meaning of the Act, the Charging Party was not an employee of the Respondent.
>
> Our finding in this regard is consistent with the Department of Labor's interpretation of the term "employee" under the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §201 et seq. (1982). Section

> 3(e)(1) of that Act defines "employee" in virtually the same words as does Title VII. It is the position of the Department of Labor, which enforces the Fair Labor Standards Act, that in circumstances such as those presented by this charge, a prison inmate is not an employee of the prison:
>
> > Generally, a prison inmate who, while serving a sentence, is required to work by or who does work for the prison, within the confines of the institution, on prison farms, roadgangs, or other areas directly associated with the incarceration program, is not an employee within the meaning of the Act.
>
> Department of Labor, Wage and Hour Division, Field Operations Handbook §10b29(a) (June 24, 1975).

In *Dalton v. DHSS*, 87-0168-PC-ER, 9/26/88, the Commission applied the *Richards* rationale to a situation where an inmate of a state correctional institution worked off-site for a county mental health facility in a pre-release work training program. The Commission concluded, based both on the terms of the agreement between the state and the county relating to this work arrangement, and on the fact that the complainant was not accorded the same benefits and rights that were granted to county employees performing similar work, that complainant's work situation resulted from his status as an inmate and did not qualify as an employment relationship cognizable under the Fair Employment Act.

In *Williams v. Meese*, 55 FEP Cases 390 (10th Cir. 1991), the court considered a claim filed by an inmate of a federal correctional institution relating to prison job assignments, and concluded as follows, in pertinent part:

> We conclude that plaintiff is not an "employee" under either Title VII or the ADEA because his relationship with the Bureau of Prisons, and therefore, with the defendants, arise out of his status as an inmate, not an employee. Although his relationship with defendants may contain some elements commonly present in an employment relationship, it arises "from [plaintiff's] having been convicted and sentenced to imprisonment in the [defendant's] correctional institution. The primary purpose of their association [is] incarceration, not employment." Since plaintiff has no employment relationship with defendants, he cannot

> pursue a claim for discrimination against them under either Title VII or the ADEA. [citations omitted.]

The only exception that the federal courts have carved out relates to inmates employed in off-site work release programs in which their employment has the same attributes as that of non-inmates performing similar work duties. *See, Baker v. McNeil Island Corrections Center*, 859 F.2d 124, 48 FEP Cases 143 (9th Cir. 1988).

More recently, the federal district court for the western district of Wisconsin has decided two cases relating to the application of the Fair Labor Standards Act (FLSA) to the work performed by inmates in a state correctional institution. As noted in *Richards*, cited above, the definition of "employee" in the FLSA parallels the definition of that term in Title VII. It should also be noted that the Commission has frequently looked to Title VII cases for guidance in interpreting and applying the FEA. In *George v. Badger State* Industries, 827 F. Supp. 584 (W.D.Wis. 1993), the court concluded that an inmate working in a state correctional institution in a Badger State Industries program does not qualify as an "employee" within the meaning of the FLSA because, looking to the "economic reality" of the working relationship, no cognizable employer-employee relationship has been established. In *George v. SC Data Center, Inc.*, 884 F. Supp. 329 (W.D.Wis. 1995), the court concluded that an inmate working in a state correctional institution in a program established pursuant to agreement between Badger State Industries and a private entity was not an "employee" of either the private entity or the state for purposes of the FLSA. The fact situation in this latter *George* case is parallel to that under consideration here.

The authority cited here supports the Commission's conclusion that complainant does not qualify as an employee under the Fair Employment Act, and, as a result, this complaint must be dismissed.

ORDER

The motion is granted and this case is dismissed.

Dated: March 12, 1997

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

LRM
960157Crul1.doc

Parties:

Nathaniel Whaley
GBCI
PO Box 19033
Green Bay WI 54307

Michael J. Sullivan
Secretary, DOC
149 East Wilson Street
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.)