STATE OF WISCONSIN PERSONNEL COMMISSION

PRANEE WONGKIT,
Complainant,

v.

Chancellor, UNIVERSITY OF WISCONSIN-MADISON,
Respondent.

Case No. 97-0026-PC-ER

RULING ON MOTION TO DISMISS

On February 26, 1997, complainant filed a charge with the Commission alleging that she had been discriminated against on the basis of national origin/ancestry, race, and sex. An Initial Determination finding probable cause as to some elements of complainant's charge and no probable cause as to others was issued by the Commission on February 25, 1998. At a prehearing conference convened on September 21, 1998, respondent filed a motion to dismiss based on mootness. The schedule for briefing this motion was completed on October 14, 1998. The following findings are based on information provided by the parties, appear to be undisputed, and are made solely for the purpose of deciding the motion under consideration here.

FINDINGS OF FACT

1. At a prehearing conference convened in this matter on May 21, 1998, the parties agreed to the following issue for hearing:

> Whether complainant was discriminated against by respondent due to her national origin/ancestry and/or race in regard to allegations S and T (no waiver of timeliness issue), and V through EE, as identified in the initial determination dated February 25, 1998.

2. The allegations referenced in the issue quoted above are stated as follows in the Initial Determination:

> S. 12/95 Supervisor Beilman slammed a phone and shouted at complainant: "God Dammit! I'm sick of you. I've had it with you up

to here!" Complainant replied she knew Supervisor Beilman was trying to "get rid" of complainant to which Supervisor Beilman screamed "YES!"

T. 4/96 Supervisor Beilman locked complainant in complainant's office for 45 minutes. The door was later unlocked by Jeanne Hendricks, College Personnel Manager.

V. summer/96 Supervisor Beilman called complainant a "snot" and told complainant to "kiss her lemon ass."

W. 8/22/96 Complainant went to the new Chair, Ragland, to discuss the problems with Supervisor Beilman. Chair Ragland's solution was to offer complainant a "Big Party" if she got a new job.

X. 8/22/96 Complainant requested a reclassification. Supervisor Beilman said if complainant tried, complainant would be demoted. Supervisor Beilman told a co-worker that Supervisor Beilman has no intention to support complainant's request for reclassification.

Y. 9/12/96 a police officer was called because Supervisor Beilman stole complainant's $200 prescription glasses as retaliation over complainant telling Supervisor Beilman that complainant could speak to whomever she wanted on work time. Supervisor Beilman returned the glasses while complainant was giving the police a statement. .

Z. 11/96 Two staff retired and complainant absorbed their duties. On this date, complainant was unable to complete all the work. Supervisor Beilman yelled at complainant across the copy room: "Pranee, your time management needs improvement."

AA. 11/8/96 Complainant was asked to format a technical paper for Professor Gadh. Upon telling Supervisor Beilman that complainant was not a technical typist and did not know the technical paper formatting requirements, Supervisor Beilman shouted, "Bullshit!"

BB. 12/96 Supervisor Beilman called complainant's phone and heard that complainant had left a message (deleting Supervisor Beilman's prior message). Supervisor Beilman left complainant an angry voice message: "Pranee, I want you to delete your voice mail message immediately. I don't like it. I don't want your name in it. This is not your personal property. Delete it before I get there." Complainant alleged it has been an on-going issue "for years" that Supervisor Beilman does not want

complainant to record the office message because Supervisor Beilman dislikes complainant's accent.

CC. 12/12/96 Supervisor Beilman told complainant that professors had complained that complainant had not done their work. Complainant confirmed with professors that this was untrue.

DD. 2/7/97 Supervisor Beilman arbitrarily changed complainant's office hours without first consulting with complainant or the union.

EE. 2/20/97 Complainant received a letter of reprimand from Supervisor Beilman based on complainant discussing the change of her office hours with a professor.

2. During the time period relevant to the subject charge of discrimination, complainant was employed by the Mechanical Engineering Department of the University of Wisconsin-Madison.

3. Some time subsequent to filing this charge of discrimination, complainant voluntarily resigned from her position with the University of Wisconsin-Madison to accept a position with the Central Wisconsin Center of the Department of Health and Family Services.

4. The University of Wisconsin and the Department of Health and Family Services are separate state agencies.

OPINION

An issue is moot when a determination is sought which can have no practical effect on a controversy. *State ex rel. Jones v. Gerhardstein*, 135 Wis. 2d 161, 169, 400 N.W.2d 1 (Ct. App., 1986), citing *Warren v. Link Farms, Inc.*, 123 Wis. 2d 485, 487, 368 N.W.2d 688, 689 (Ct. App., 1985). The focus, generally, is upon the available relief in relation to the individual complainant (*see, e.g., Lankford v. City of Hobart*, 36 FEP Cases 1149,1152 (10th Cir., 1996) *and Martin v. Nannie and the Newborns*, 68 FEP Cases 235, 236 (W.D. Okla., 1994)), but may shift to a consideration of others in the workplace when an overt policy of discrimination is

alleged to impact on a category of employes (*see, e.g., Kennedy v. D.C.*, 65 FEP Cases 1615, 1617 (D.C. Cir., 1994), involving review of a grooming code.)

In *Watkins v. DILHR,* 69 Wis. 2d 782, 12 FEP Cases 816 (1975), the Wisconsin Supreme Court ruled, in a case where it was concluded that the complainant had been discriminated against by her state agency employer on the basis of her race when she was denied a requested transfer to a different position in 1969 and in 1970, that the controversy was not moot even though the complainant had been transferred to the position she sought in 1971, after she had filed the underlying complaint of discrimination. The basis for the Court's ruling was that, since the complainant remained an employee of DILHR, an order could be entered which would have the practical, legal effect of requiring that the complainant be considered for all future transfers on the basis of her qualifications and ability, and without regard to her race; that the complainant was entitled, having suffered frustration in her employment over an extended period of time, to know whether or not this was due to race discrimination; and that it would foster, not eliminate, discrimination if employers in such situations could escape liability by simply waiting until enforcement proceedings were begun and then remedying the subject adverse action.. In *LaRose v. UW-Milw*, 94-0125-PC-ER, 4/2/97, the Commission dismissed as moot, as a result of the complainant's retirement, a charge alleging discrimination as to certain terms and conditions of employment.

Complainant argues, in opposition to the motion, that the fact situation here is parallel to that in *Watkins* since complainant, although no longer employed by respondent, remains employed by the State of Wisconsin; as a continuing state employe, has certain transfer and reinstatement rights; and could, as a result of these rights, apply for employment with respondent some time in the future. Complainant also argues that the Commission does have the authority here to provide a form of relief which would have a practical legal effect, i.e., attorney's fees and costs.

The Commission does not agree that the fact situation here parallels that in *Watkins*. The State of Wisconsin is not considered a single employing entity. Complainant is now employed by a state agency over which respondent has no

supervisory authority, and could not act to affect the terms or conditions of her employment in any practical manner. Complainant's theory that she could apply for employment with respondent at some time in the future is too speculative to defeat this motion. The circumstances here more closely resemble those in *LaRose* and justify a conclusion that the controversy is moot.

Practically, what complainant is arguing in regard to a surviving remedy is that, even though the underlying substantive issues are moot, these moot issues should be heard in order to determine whether complainant would have prevailed on these issues and, as a result, been entitled to attorney's fees and costs, most of which would have been generated as a result of having a hearing on the moot issues. Complainant cites no authority for her argument in this regard. This is not comparable to those situations where an employer has, during the course of litigation, provided the requested remedy, and where the courts have concluded, as a result, that the employee is entitled to an award of attorneys' fees. In those cases, the courts have held that it would be inequitable to permit an employer to walk away, without payment of the complainant's expenses, from a case in which an employee has expended considerable resources and has ultimately emerged as the prevailing party, i.e., the employee obtained the remedy he or she was seeking in the action. No such equities are at work here. The case became moot through complainant's voluntary resignation from employment with respondent, and nothing has occurred from which it could be concluded that complainant should be considered a prevailing party. Specifically, this case does not involve a situation where the litigation effort was a causal factor in achieving the complainant's objectives or improving her situation. *See, Klemmer v. DHFS*, 97-0054-PC, 4/8/98.

CONCLUSIONS OF LAW

1. This matter is before the Commission pursuant to §230.45(1)(b), Stats.

2. Respondent has the burden to show that the controversy is moot and this matter should be dismissed.

3. Respondent has sustained this burden.

ORDER

The motion is granted and this complaint is dismissed.

Dated: October 21, 1998

STATE PERSONNEL COMMISSION

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

LRM
970026Cdec1

Parties:

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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