STATE OF WISCONSIN PERSONNEL COMMISSION

MARILYN SLEIK,
Complainant,

v.

DEPARTMENT OF COMMERCE,
Respondent.

Case Nos. 97-0145-PC-ER

RULING ON COMPLAINANT'S MOTION TO DISMISS WITHOUT PREJUDICE

NATURE OF THE CASE

This case involves a charge of sex harassment by the creation of a hostile, intimidating, or offensive work environment. The November 13, 1998, conference report established the following issue for hearing:

> Whether respondent discriminated against complainant by way of harassment because of gender pursuant to §111.36(1)(br), Stats., with regard to the following conduct:
>
> 1) Mr. Ritterbusch's boasts about failing a sex harassment course;
> 2) Negative comments on complainant's June 11, 1997, performance evaluation performed by Mr. Ritterbusch; and
> 3) Mr. Ritterbusch's practice of rummaging through complainant's desk, waste basket, and personal belongings.

After a hearing on February 1, 1999, and the filing of briefs, the hearing examiner issued a proposed decision and order pursuant to §227.46(2), Stats., on June 10, 1999, which concluded that no discrimination had occurred. Complainant filed objections to the proposed decision and order and requested oral argument before the Commission. This request was granted and oral arguments were scheduled for October 6, 1999. However, on August 27, 1999, shortly after oral arguments had been scheduled, complainant requested that this case be dismissed without prejudice, in the context of complainant's desire to litigate the subject matter of this complaint in federal court.

Respondent has objected to this request, and both sides have filed briefs on the question of whether complainant's request for dismissal without prejudice should be granted.

OPINION

Complainant first argues that

> If the Commission is unwilling to dismiss the matter, it may well preclude her from proceeding in federal court, despite her clear right to do so.
>
> The Complainant is entitled to a "trial de novo" of her claims in the federal district court. In *University of Tennessee v. Eliot,* 478 U. S. 788 (1986), the United States Supreme Court held that "Congress did not intend unreviewed state administrative proceedings to have preclusive effect on Title VII claims." In this case, not only is the proposed decision unreviewed, it has not even been held to be the final decision of the Commission. To dismiss this case with prejudice would in effect give finality to the decision without the procedural rights called for in the Wisconsin Statutes and Wisconsin Administrative Code, being afforded to the Complainant.
>
> A dismissal without prejudice would enable the Complainant to pursue her case in a manner which would be consistent with federal law and precedent, as established by the Supreme Court, as well as being consistent with the authority of the Commission.
>
> While holding that the Complainant has a right of de novo review of her claim in federal court, the Supreme Court also held, in *Tennessee,* that the factual findings of state administrative bodies are to be afforded preclusive effect in federal court. The Complainant asserts that such preclusive effect should not be allowed in her case, and that the only way to prevent such preclusion is to dismiss her case without prejudice. Complainant's brief in support of request to withdraw complaint, 2-3. (footnote omitted)

Respondent finds these contentions unpersuasive, for a number of reasons.

First, for complainant to address the question of whether she has a right to proceed in federal court on a Title VII claim begs the question of whether the Commission should dismiss without prejudice her complaint pending here. The Commission must decide that issue on the basis of the circumstances of record before

it. Whether its decision has any preclusive effect on a proceeding in another forum involving the same subject matter is a question to be resolved by such other forum.

Second, and in any event, there is no substantive premise for complainant's argument. The Supreme Court held in *University of Tennessee v. Elliott* that unreviewed administrative decisions do *not* have preclusive effect with regard to a federal court Title VII proceeding. Complainant's characterization of this case as holding "that the factual findings of state administrative bodies are to be afforded preclusive effect in federal court" is erroneous. What the Court held was that while unreviewed administrative decisions do *not* have preclusive effect on *Title VII* claims, administrative factual findings are entitled to the same preclusive effect with respect to actions under *42 USC §1983* in federal court as such findings would be accorded preclusive effect by the precepts of state law on , to the extent that such factual findings would be given preclusive effect in state courts under the substantive state law of issue preclusion. *Id.*, 41 FEP cases at 180-81. Since complainant asserts she wishes to pursue a Title VII claim in federal court, the Commission's resolution of the instant administrative proceeding can not have a preclusive effect with regard to any such claim.

Third, while complainant contends that denying her motion for a dismissal without prejudice would deny her procedural rights, she does not explain the basis for this conclusion, and the Commission can not discern any such basis. If the Commission denies complainant's request for dismissal without prejudice, it will address the merits embodied in the proposed decision and order after both parties have been heard with respect to the proposed decision and order pursuant to the requirements of the Administrative Procedure Act.

In addition to the arguments discussed above, complainant argues that she was denied due process in the way her case was handled by the hearing examiner. These arguments run to the substantive question of whether the Commission should affirm the proposed decision or reverse it on procedural grounds. In any event the Commission concludes that complainant's arguments are without merit.

Complainant first contends that the hearing examiner had a conflict of interest because he had served as the investigator of this complaint and had issued an initial determination finding probable cause as to some allegations and no probable cause as to other allegations. Complainant made no objection to the hearing examiner until after the case had been fully briefed and he had issued a proposed decision favorable to respondent. Under these circumstances, any objection was waived. *See* §*PC 5.01(4),* Wis. Adm. Code; *Mincy v. DER,* 90-0229-PC, 10/3/91. Furthermore, there is no constitutional impediment to an agency employe investigating a complaint, making a decision on probable cause, and then hearing the case on the merits. *See Withrow v. Larkin,* 421 U. S. 35, 43 L. Ed. 2d 712, 95 S. Ct. 1456 (1975), and in the instant case the examiner does not have final decision authority anyway.

Complainant's second objection to the procedural handling of this case is that "Complainant was under the influence of narcotic medication at the time of hearing, a fact which was known to the [examiner] and ignored when confronted with a motion to postpone the hearing." Complainant's brief in support of request to withdraw complaint, p.4. This contention is not supported by the record in this case.

A letter dated January 26, 1999, from the examiner to the parties' attorneys includes the following summary of the situation at that time:

> This will confirm the conference call held this date concerning complainant's motion for postponement of the hearing dated January 19, 1999. Respondent maintained its objection and the undersigned denied the motion, without prejudice, for the following reasons:
>
> 1. Complainant has not shown good cause for delaying discovery to the point that allowing respondent the statutory time for response impinges on complainant's compliance with §4.02, W.A.C.
>
> 2. The letter or fax of January 25, 1999, from Dr. Bolt states there is no date set for surgery, and while it also states that complainant "is on a narcotic medication which <u>can</u> alter her cognitive thinking process" (emphasis added), it does not give his opinion as to whether it would be inadvisable from a medical standpoint for her to proceed with the hearing, from the standpoint of pain, effect on cognitive processes, or on some other basis.

This ruling is subject to the following provisos:

1. Based on Ms. Cochrane's representation that she would be responding to complainant's discovery request on January 28, 1999, complainant's compliance with §PC 4.02 will be considered timely, as to any of complainant's witnesses or exhibits that result from respondent's response to the outstanding discovery request, if filing and service is made by January 29, 1999. Both counsel are directed to make the discovery response and the filing and service of witnesses and exhibits under §PC 4.02 either by fax or by personal delivery. (It also is noted that §PC 4.02 by its terms is inapplicable to rebuttal matter.)

The denial of the motion is without prejudice to renewal on the basis of clarification of the medical advisability of complainant attending the hearing as scheduled on February 1-2, 1999.

Complainant's attorney then sent the following letter dated January 27, 1999:

> This [enclosed memo] is the most recent documentation from [complainant's] doctor. Obviously, the situation is as I have explained on a couple of occasions already to the Commission in my request for a postponement of the hearing, a postponement which has so far been denied. At this point, I have done some last minute preparation for the hearing, have my witnesses lined up, etc., and question any time on my part in making another futile postpone request. I do want this document part of the record so that, if the Commission does not postpone the case sua sponte, I will have possible grounds for a reversal of any decision which would be adverse to my client.

The examiner than responded by a letter dated January 28, 1999, which included the following:

> I am, to say the least, perplexed by your letter of January 27, 1999, which was faxed that date. When we had our January 26, 1999, status conference, I explained specifically that I was denying your motion for postponement without prejudice so that if Dr. Bolt addressed the question of the medical advisability of complainant attending the hearing, the question of postponement could be revisited. I indicated that if Dr. Bolt's January 26, 1999, memo had advised that it would be medically inadvisable for complainant to attend the hearing, the motion would have been granted.

> At this point you have forwarded a copy of Dr. Bolt's new memo which states that he doesn't think complainant can testify at a hearing because of her narcotic medication, and that due to the discomfort from her herniated disc, she wouldn't be able to handle sitting at a hearing for more than 10 or 15 minutes at a time.
>
> In your January 27, 1999, letter/fax you state that you have done "some last minute preparation for the hearing, have my witnesses lined up, etc., and question any time on my part making another futile postponement request." You go on to say that "I do want this document part of the record so that, if the Commission does not postpone the case sua sponte, I will have possible grounds for a reversal" of an adverse decision of this case.
>
> I don't understand, in light of my comments at our January 26th conference, how you can suggest that another postponement request would be futile. I also don't understand how you can then attempt to put the onus on the Commission to respond to Dr. Bolt's most recent memo by "sua sponte" postponing the hearing in the context of your decision not to renew the motion for postponement. In any event, I do not intend to "sua sponte" grant the motion. It is your responsibility to decide whether it is in your client's best interests to renew or not renew the motion, and then to proceed accordingly. If you do renew the motion, I will address it.

The foregoing correspondence speaks for itself. There is no basis for a determination that complainant's due process rights were denied by the examiner's handling of the postponement request.

ORDER

Complainant's request for the dismissal of this complaint without prejudice is denied. A status conference is to be scheduled for this case.

Dated: December 3, 1999

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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