from Chiodo v UW 90-0150 PC ER
12-22-97

Tony Theodore
X

STATE OF WISCONSIN CIRCUIT COURT Branch 9 DANE COUNTY

UNIVERSITY OF WISCONSIN SYSTEM-STOUT,

Plaintiff,

v.

WISCONSIN PERSONNEL COMMISSION,

Defendant.

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PERSONNEL COMMISSION

DECISION

Case No: 97 CV 3386

This matter is before the court on the plaintiff's petition for administrative review of the proceedings of the Personnel Commission which rendered a decision on December 22, 1997. Previously, this court has addressed motions to stay and present additional evidence and a motion to amend pleadings.

Most of the facts in this matter are not contested. Robert L. Chiodo, the complainant (Chiodo), was appointed on a probationary basis to the position of Associate Director of Computer Services at UW Stout on December 19, 1986. His birthdate is March 11, 1934. The job description for the position Chiodo was hired was:

> Manage the Administrative Computing Center. Supervise and schedule the staff of the Administrative Computing Center. Coordinate systems analysis and programming activities. Provides advice and develop recommendations related to information processing and information management.

Chiodo holds an MBA and has more than 20 years of experience in the information processing field. At some unspecified time Chiodo received an indefinite academic staff appointment. Initially, Glen Schuknecht was Chiodo's supervisor. Schuknecht was on

special assignment for four months in 1989 and Chiodo was appointed Acting Director for Administrative Computing during this time. Periodically, Chiodo also received positive performance reviews. The complainant also had good interpersonal and communication skills.

Schuknecht retired in July 1990. Jan Womack, Assistant Chancellor, decided to fill the Director's position on an interim basis while a national search was conducted to permanently hire for the job. Claiming no one expressed interest in the interim appointment and the fact that it was an "acting" position, Womack appointed Rex Patterson as Acting Director. Patterson was 37 years old, a subordinate of Chiodo with less experience and education. Womack postured that she appointed Womack because she felt that he could most easily assume the job on an interim basis and that he had superior communication skills. No one, including the complainant, was consulted by Womack before she made the appointment of Patterson as Acting Director.

At the time of the appointment, Chiodo was supervising 12 to 15 employees and he was the defacto head of the department. When Chiodo inquired of Womack of why Patterson received the appointment, she gave him no answer. He was informed that Patterson would be performing the supervisory duties Chiodo was doing and that Patterson would inform him what his new duties would be. When asked of Patterson about his job responsibilities, Chiodo was provided with no description.

On the evening of July 9, 1990, the very day of the Patterson appointment, Chiodo was hospitalized for chest pain. He was hospitalized for two days and treated by his physician, Dr. Stephen Brown. Chiodo had a history of heart disease and had suffered two heart attacks in 1989. His personal physician was very concerned about the job related stress and its impact on Chiodo's health and recommended that Chiodo take medical leave from his job at Stout. Chiodo's doctor authorized him to return to work in July, 1991, but the university insisted that he be independently examined by their physician which delayed Chiodo's return to work until November, 1991. During Chiodo's absence, Patterson was made the permanent Director. This permanent appointment was introduced as evidence at the hearing over the strong objection of the employer since the initial complaint was registered over the appointment of Patterson as Acting Director. The Examiner allowed the evidence to come in for the limited purpose of showing an adverse employment action since the employer had down played the importance of the appointment to the Acting Director position. The record discloses when Rex Patterson was made the permanent director the job was not posted, there was no national search, no other candidates were considered or interviewed and his appointment was based on his performance in the Acting Director position which he had competently performed.

When the complainant was returned to work, he was given less responsibilities, lower pay and make-work projects.

Based upon these facts, the Examiner concluded:

As of July 9, 1990, complainant was substantially better qualified than Patterson for the position of acting Director of Administrative Computing, based on his far more substantial relevant education, his, at least, comparable communication and interpersonal skills, and his far more substantial experience which included not only several months of successfully serving as acting Director of Administrative Computing, but also several years successfully performing the day to day activities of the position while he was employed as Associate Director of Computer Services.

Respondent's articulated rationale for appointing Patterson rather the complainant to the position in question was a pretext for age discrimination.

The Commission ultimately ordered:

> Complainant has satisfied his burden of proof with respect to establishing that he is entitled to back pay and benefits[1] calculated as if he had received the acting appointment to the position in question in July, 1990, and then the permanent appointment to said position effective July 1, 1991, less in mitigation the actual amount of salary and benefits earned, offset by unemployment benefits paid to complainant; and to an appointment to the position in question when it next becomes vacant, or an appointment to a comparable vacant position, whichever occurs first, assuming he is then eligible and qualified therefore.

RELEVANT STATUTES

111.31(1) Declaration of policy. (1) The legislature finds that the practice of unfair discrimination in employment against properly qualified individuals by reason of their age, race, creed, color, handicap, marital status, sex, national origin, ancestry, sexual orientation, arrest record, conviction record, membership in the national guard, state defense force or any other reserve component of the military forces of the United States or this state or use or nonuse of lawful products off the employer's premises during nonworking hours substantially and adversely affects the general welfare of the state. Employers, labor organizations, employment agencies and licensing agencies that deny employment opportunities and discriminate in employment against properly qualified individuals solely because of their age, race, creed, color, handicap, marital status, sex, national origin, ancestry, sexual orientation, arrest record, conviction record, member in the national guard, state defense force or any other reserve

[1] The term "and benefits" is added to the proposed decision to make it clear that the back pay award includes both salary and benefits.

component of the military forces of the United States or this state or use or nonuse of lawful products off the employer's premises during nonworking hours deprive those individuals of the earnings that are necessary to maintain a just and decent standard of living.

(3) In the interpretation and application of this subchapter, and otherwise, it is declared to be the public policy of the state to encourage and foster to the fullest extent practicable the employment of all properly qualified individuals regardless of age, race, creed, color, handicap, marital status, sex, national origin, ancestry, sexual orientation, arrest record, conviction record, member in the national guard, state defense force or any other reserve component of the military forces of the United States or this state or use or nonuse of lawful products off the employer's premises during nonworking hours. Nothing in this subsection requires an affirmative action program to correct an imbalance in the work force. This subchapter shall be liberally construed for the accomplishment of this purpose.

111.39(4)(c) Powers and duties of department. If, after hearing, the examiner finds that the respondent has engaged in discrimination, unfair honesty testing or unfair genetic testing, the examiner shall make written findings and order such action by the respondent as will effectuate the purpose of this subchapter, with or without back pay. If the examiner awards any payment to an employe because of a violation of s. 111.321 by an individual employed by the employer, under s. 111.32 (6), the employer of that individual is liable for the payment. If the examiner finds a respondent violated s. 111.322 (2m), the examiner shall award compensation in lieu of reinstatement if requested by all parties and may award compensation in lieu of reinstatement if requested by any party. Compensation in lieu of reinstatement for a violation of s. 111.322 (2m) may not be less than 500 times nor more than 1,000 times the hourly wage of the person discriminated against when the violation occurred. Back pay may not accrue from a date more than 2 years prior to the filing of a complaint with the department. Interim earnings or amounts earnable with reasonable diligence by the person discriminated against or subjected to unfair honesty testing or unfair genetic testing shall operate to reduce back pay otherwise allowable. Amounts received by the person discriminated against or subject tot he unfair honesty testing or unfair genetic testing as unemployment benefits or welfare payments shall not reduce the back pay otherwise allowable, but shall be withheld from the person discriminated against or subject to unfair honesty testing or unfair genetic testing and immediately paid to the unemployment reserve fund or, in the case of a welfare payment, to the welfare agency making the payment.

227.57 Scope of review. (5) The court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action, or it shall remand the case to the agency for further action under a correct interpretation of the provision of law.

(6) If the agency's action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence int he record.

(8) The court shall reverse or remand the case to the agency if it finds that the agency's exercise of discretion is outside the range of discretion delegated to the agency by law; is inconsistent with an agency rule, an officially stated agency policy or a prior agency practice, if deviation therefrom is not explained to the satisfaction of the court by the agency; or is otherwise in violation of a constitutional or statutory provision; but the court shall not substitute its judgment for that of the agency on an issue of discretion.

STANDARD OF REVIEW

Sec. 227.57 governs the standard of review to which the court is bound in this matter. Apart from that the court must determine what, if any, deference it must accord to the decision of the Board.

> The first and highest amount of deference given to agency interpretations is the "great weight" standard. Under this standard, it is "only when the interpretation by the administrative agency is an irrational one that a reviewing court does not defer to it." Beloit Education Ass'n v. WERC, 73 Wis. 2d 43, 67, (1976) (footnote omitted). The "great weight" standard is "the general rule in this state," id. We have described the proper use of the " great weight" standard as follows:
>
> (I)f the administrative agency's experience, technical competence, and specialized knowledge aid the agency in its interpretation and application of the statute, the agency's conclusions are entitled to deference by the court. Where a legal question is intertwined with factual determinations or with value or policy determinations or where the agency's interpretation and application of the law is long standing, a court should defer to the agency which has primary responsibility for determination of fact and policy. West Bend Education Ass'n v. WERC, 121 Wis. 2d 1, 12 (1984).

There are two other standards of deference in reviewing administrative agency decisions. The second level is "due weight" or "great bearing" where the issue is one of first impression. Beloit Ed. Ass'n supra pp 67-68. The lowest standard of review, and the

one which the plaintiffs ask that we adopt, is "de novo" which is no deference at all. Local No. 695 v LIRC, 154 Wis. 2d 75, 84 (1990).

The court accords great deference to the decision of the State Personnel Commission. In doing so, the court recognizes that the Commission routinely deals with employment discrimination cases and has done so for an extended period of time. The facts involved and the law being applied raise issues which the Commission and staff deal with routinely.

OPINION

First, it is notable that the petitioner's employer does not contest the finding of the Commission that the complainant was the victim of age discrimination. The thrust of the petitioner's case is that the Commission committed procedural errors in the evidentiary hearing and further misapplied the law.

First, the petitioner cries foul because the hearing examiner, over objection, permitted in testimony in the liability phase of the case concerning Rex Patterson's appointment to the position of permanent Director from that of acting.

Sec. 227.45(1) provides in part:

> "...The agency or hearing examiner shall admit all testimony having reasonable probative value, but shall exclude immaterial, irrelevant or unduly repetitious testimony or evidence that is inadmissible under s. 90.05...."

Sec. 904.01 stat. provides:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that of consequence to the determination of the action more probable or less probable than it would be without the evidence.

The trial examiner stated in the record that he was permitting evidence of Patterson's appointment to the permanent position of Director in for the limited purpose of adverse employment action. How can one argue that such a factor does not come into play in an employment discrimination case? The employer's tack was to minimize any importance in the appointment to the acting Director position. So, in effect, even if the complainant suffered age discrimination in being passed over for the acting position, he suffered no harm. However, the record supports adverse employment action by such a discriminatory act. The acting position carried with it increase in pay, a positive accomplishment for ones personnel record or job resume and also in this case a better opportunity to be promoted in the permanent position. The testimony and evidence elicited has probative value and is relevant. There was no abuse of discretion by the trial examiner permitting such testimony.

Second, the petitioner contends that the permanent position should not have been considered in the remedy phase of the proceeding. True, the complainant never amended his original complaint to include the permanent Director position and he did later file a second complaint when he was denied the appointment to the permanent position in 1993, after Patterson resigned and a third party was appointed, but so what! Sec. 111.31(3) provides in part:

> In the interpretation and application of this subchapter, and otherwise, it is declared to be the public policy of the state to encourage and foster to the fullest extent practicable the employment of all properly qualified individuals regardless of age....This subchapter shall be liberally construed for the accomplishment of this purpose.

Operating with this mandate, the Commission meticulously documented from the record its reasons for considering the permanent position as part of its remedy. It pointed out the job experience, qualifications, education and positive job evaluations of the complainant by his superiors. All of which were equal to, or better, for the most part than Patterson's. Also, Chiodo had been the interim Director for four months at one time and for most of his employment under Schuknecht, the complainant was defacto doing most of the duties of the Director. There was no evidence that Chiodo had any deficiencies in his communication skills. Had he been appointed Acting Director instead of Patterson, there is no reason to believe he would not have performed as well, if not better, and received the permanent appointment based upon the same criteria used when Patterson was appointed permanent Director. Especially in light of the facts that the permanent position was not posted or advertised and Domack only made a few inquiries about Patterson's job performance before making the permanent appointment. This substantial evidence to support the Commission's action.

Counsel for the petitioner claims by introducing such evidence at the remedy phase of the proceeding, they were in effect "blind sided" (court's characterization). With experience counsel, the court finds it difficult to believe that in the remedy phase of an employment discrimination matter, counsel should be taken off guard or surprised especially when the law

addresses making one whole. The act is to be given liberal and broad interpretation. Chicago, M, St.P. & P.RR. Co., VILHR Dept. 62 Wis 2d 392, 397 (1974).

In Whatley v. Skaggs Companies, Inc. 707 F.2d 1129 (CCA. 10th Cir) 1983, the court was dealing a Title VII discrimination claim which parallels Wisconsin's WEEA. Marten Transport, Ltd. v DILHR, 176 Wis 2d 1012, 1020 (1993). In addressing the remedy the Whatley court said (p.1137):

> Defendant strenuously objects to the order for plaintiff's reinstatement to a position equivalent to that from which he was dismissed in 1971. The company says that the plaintiff never requested reinstatement and that the court ignored his physical disability in granting such relief.
>
> [5] We find no merit in these contentions. The court may fashion an order in such cases to eliminate the effects of discrimination and to restore the plaintiff to the position he would have held but for the discrimination, and such equitable relief may be provided, even if it was not sought in the pleadings. See Fitzgerald v. Sirloin Stockade, Inc., 624 F.2d 945, 957 (10th Cir. 1980); Sias v. City Demonstration Agency, 588 F.2d 692, 696 (9th cir.1978). Moreover the trial court did consider the facts pertaining to disability and the duties performed by plaintiff. The responsibilities of his job as lobby manager were developed on cross-examination of plaintiff by defense counsel. III R. 233-35.

The facts in this matter distinguish it from Wisconsin Telephone Co. v. VILHR Dept., 68 Wis.2d 345 (1975). That was a sex discrimination action filed by a telephone company employee who alleged discrimination because she was forced to take a six month maternity leave, involuntarily and she wanted to return to work sooner, but was denied employment. In the hearing other company policy issues were raised which were not set forth in the complaint i.e. disability insurance payments, insurance coverage, seniority credit.

The court found there was inadequate notice to the employer so these issues could not be fully litigated and found error.

In the matter at hand, the issue was age discrimination in passing over and not considering the complainant for the Acting Director position. That was noticed and fully litigated. The issue to follow is how to make the complainant whole.

The Commission made the following observations concerning the remedy: (p. 7)

> Once liability has been established for the first transaction--the acting appointment--the authority discussed above establishes that the complainant is entitled to be made whole for the denial of the acting appointment--i.e. to be put as far as possible in the same place he would have been if the act of discrimination had not occurred. If the complainant can show, by a preponderance of the evidence, that a subsequent personnel transaction--e.g., a change in classification, a step increase on the completion of probation--would have inured to his benefit, he is entitled to have that figured in to his remedy, see e.g., 2 B. Lindemann & P. Grossman, Employment Discrimination Law, 1780 (1996):
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> > This core component (wages and salary) of back pay has been interpreted to include such items of lost compensation as overtime, shift differentials, commissions, tips, cost-of-living increases, merit increases, and raises due to promotions, so long as the plaintiff can prove that he or she would have earned those items absent discrimination. Courts will deny recovery of items, such as anticipated future pay raises, if they are too speculative or if the plaintiff did not adequately prove the actual loss of the items.

Based upon the record it far more likely than not, that had not the complainant suffered age discrimination and been denied the Acting Director's position, he would have been promoted to the permanent position. Substantial evidence supports this finding.

The employer further argues that Chiodo should be denied any wage loss because his medical leave of absence was not caused by his employer's discriminatory action, the denial of appointing him to the Acting Director position. In the same light, the petitioner contends Chiodo could have returned to work sooner. The only medical evidence was the testimony of Dr. Stephen Brown, the complainant's physician. Dr. Brown treated Chiodo for two prior heart attacks and heart disease. Chiodo on the day he was told that Patterson was appointed Acting Director, experienced chest pain and was hospitalized. Dr. Brown was fearful that the extreme stress Chiodo experience at Stout would lead to another heart attack and recommended his patient take a medical leave of absence, which he did. The petitioner presented no evidence to in anyway contradict or impugn the doctor's opinion. This is substantial evidence to support the Commission's finding.

Next, the petitioner argues the complainant could have returned to work sooner. This is based on Dr. Brown testifying and stating that Chiodo could have "possibly" returned to work sooner than July. The Commission chose to rely on the doctor's written authorization of July, 1991, in fixing the date the complainant was available for work rather than speculating on a date and time earlier that the complainant could "possibly" return to work. There was thereafter a four month delay caused by the employer's requirement to have its own physician examine Chiodo. Again there is substantial evidence to support the Commission's determination.

The petitioner also raised the issue that no back pay should be awarded when the complainant had a medical disability. The Commission acknowledged conflicting authority on this issue. In Maturo v. National Graphics, 55 FEP Cases 325, 332, 722 F.Supp. 916 (D. Conn. 1989), an employe who suffered depression and other emotional problems as a result of sexual harassment in the workplace and was unable to work after leaving her employment was compensated for lost wages for the period. The court found a nexus between her temporary disability and the sexual harassment. See also e.g. Nichols v Frank, 61 FEP Cases 1515, 1519 (D. Ore 1991).

The conflicting authority is Bossalina v. Lever Bros., 47 FEP Cases 1265, 1267-68 (D. Md. 1986) aff'd. nen., 47 FEP Cases 1360, 849 F. 2d 604 (4th Cir. 1986). In that case under the ADEA the court refused to award back pay for the period that the claimant suffered emotional distress from their discharge. The court found that the ADEA does not compensate for emotional distress as a matter of law.

Although this court does not owe any deference to the Commission, if the matter is one of first impression (which this appears to be), the statue accords the Commission primary responsibility for interpreting and enforcing our employment discrimination laws. The court respects their experience and responsibility to make policy in this area-that is consistent with legislative intent and plain meaning of the statute. The Commission in making its award decided to follow Maturo, supra and Nichols, supra and quoted 45C Am Jur. 2d JOB DISCRIMINATION sec. 2920:

> Effects of physical incapacity to work. Because a victim is entitled to back pay for losses attributable to only discrimination or other unlawful acts, victims have been denied back pay for the duration of a disability that rendered them unable to work after the violation, if it was not caused by the wrongful conduct...a disability that is the result of the discrimination will not end the back pay period.

The court agrees with the Commissioner's reasoning.

Although not directly on point, the case of Watkins, v. LIRC, 177 Wis.2d 753 (1984) dealt with issue of awarding attorney fees in a discrimination action under the WFEA. The statute made no mention of any such award. Justice Bablitch in his decision stated at page 755:

> Does the Wisconsin Fair Employment Act authorize the Department of Industry, Labor and Human Relations (DILHR) to award reasonable attorney's fees to the prevailing complainant in a discrimination action even though the Act contains no express statutory language authorizing such an award? This is the question raised by Gloria Watkins, the prevailing party in a racial discrimination action that she brought against her employer under this Act. She contends that the authority is implicit in the language of the Act and is necessary to carry out the legislative intent. Because the Act is designed both to discourage discriminatory practices in the work place and to make whole anyone discriminated against, and because the legislature specifically mandated in the Act that the Act shall be liberally construed, we hold that DILHR has the authority to award reasonable attorney's fees to a prevailing complainant.

The Commission rightfully distinguishes between awarding a claimant for emotion distress, visa v back pay. The stress of the workplace caused and aggravated Chiodo's heart condition, disabling him for a period of a year all directly related to the employer's act of discrimination. The award addresses his wage loss and not his emotional condition.

The petitioner argues that the Commission errored in its interpretation of the law as it relates to back pay. It contends the Commission should have viewed this case as a "constructive discharge" case and under the case law and under the facts the Commission errored when it did not find that Chiodo was not laboring under such oppressive conditions so as to give him no other alternative than leave his employment. This argument appears to be just another way to peal the same banana. The petitioners cite a line of cases dealing sexual harassment[2]

It is not contested that in constructive discharge cases the law is settled. In Marten Transport Ltd. v. DILHR, 716 Wis.2d 1012 (1993), was a sex and marital status discrimination case under WFEA. There the court declared there should be no back pay for an employee who was discriminated against and who voluntarily quits. Brooms v. Regal Tube Co., 881 F.2d 412 (7th. Cir. 1989). In Brooms at p.423 the court said:

> We agree with the district court's decision to adopt a test which focuses upon the impact of Gustafson's actions upon a reasonable person. It is true, as the Eighth Circuit stated in Johnson v. Bunny Bread Co., 646 F.2d 1250 (8th Cir.1981), that "[a]n employee may not be unreasonably sensitive to his working environment." 646 F.2d at 1256. Furthermore, as the district court in Bailey v. Binyon, 583 F.Supp. 923 (D.Ill.1984) very aptly noted, "An employee must seek legal redress while remaining in his or her job unless confronted with an 'aggravated situation' beyond 'ordinary' discrimination." 583 F.Supp. at 929 (citations omitted). However, we believe that a reasonable employee would have felt compelled to resign under the circumstances of this case.

[2] A review of the record reveals scant reference to "constructive discharge" by petitioner's counsel until this appeal.

On its facts, this not a constructive discharge case. Chiodo never terminated his employment at UW Stout, he took a medical leave of absence. This was granted by his employer and the medical basis for his leave was never an issue until this discrimination action was filed. The issue is not were the conditions of his continued employment at Stout so wretched that as a reasonable person, had no choice but to leave his employment, rather it is whether a reasonable person should follow the advice of his physician to absent himself from the workplace for a period of time to avoid the stress and not jeopardize his health because of his heart disease. This is not misapplication of the law of constructive discharge by the Commission. As heretofore set forth in this decision the Commission found there was a medical basis for the leave of absence and the loss pay for the period was compensable. As a post script, even if this issue could be framed as a "limited term constructive discharge" case, the court would find ample evidence in the record to support a finding that a reasonable person under this set of facts would have heeded his physician's advice and taken a temporary medical leave of absence.

In closing, the court will address the concern of the petitioner that if back pay is granted in this case, it will encourage all malingers, ne'er-do-wells and other slackers to seek recovery of back pay for time spent away from work because of an employer's discrimination and defeat or circumvent the "constructive discharge" mandate. In this instance you have a good employee, who has a pre-existing medical condition, heart disease which is aggravated by the employer's discriminating acts.

It is established tort damage law that pre existing condition or disease if aggravate is compensable (Civil Jury Instruction 1715 Kablitz v. Hoeft, 25 Wis.2d 518, 523-4 (1964). In simple words "you take them how you find them."

Applying the same logic to the case at hand, the complainant while in the employment of UW Stout suffered from heart disease and experienced two prior heart attacks. Chiodo was hospitalized the same day he was told he was passed over for the Acting Director's position. The record establishes the causal relationship between the discriminatory act, the stressful employment environment and the hospitalization. It seems wise, prudent and logical to take ones physician's recommendation for a medical leave of absence rather than risk further aggravation of one's heart disease with the possibility of death or permanent disability. If supported by the facts, why should the petitioner not be compensated for temporary leave under such circumstances? The complainant award of back pay is not for emotional distress, but was to make Chiodo whole for the period he was required to be away from his job so as not to aggravate his heart condition.

The Commission and its staff are capable of discerning on a case by case basis whether a back pay award is merited. Such a precedent doesn't open the flood gates to spurious claims.

For the reasons stated above, the decision of the Commission is affirmed.

Dated this 24 day of September, 1998

BY THE COURT:

Gerald C. Nichol, Judge
Circuit Court Branch 9

Case Note: Please review the attached Circuit Court Rule #121 for direction on filing reply briefs.