

DANIEL D. HAWK,
Complainant,

v.

**Secretary, DEPARTMENT OF
COMMERCE,**
Respondent.

**RULING ON
MOTIONS
TO DISMISS**

Case No. 99-0047-PC-ER

This matter is before the Commission on respondent's motions to dismiss, filed March 22, 1999, and April 2, 1999.

Respondent's first motion is as follows:

Respondent respectfully moves the Commission for an Order dismissing the Complaint on the basis that the Commission lacks jurisdiction to consider the Complaint where the Complainant was discharged while on probation. See Wilson v. DOC, 94-0065-PC, 7/7/94. (Letter filed March 22, 1999)

This case involves a complaint of WFEA (Wisconsin Fair Employment Act; Subchapter II, Ch. 111, Stats.) discrimination. The Commission has jurisdiction over such complaints pursuant to §§111.375(2) and 230.45(1)(b), Stats. There is no statutory restriction of the Commission's jurisdiction under these statutes to those state employees with permanent status in class. While appeals of disciplinary matters pursuant to §230.44(1)(c), Stats., are limited to employees with permanent status in class, this case does not involve such an appeal. *Wilson v. DOC*, 94-0065-PC, 7/7/94, is inapposite because that case deals with an issue of the Commission's jurisdiction pursuant to §230.44(1)(c), Stats.

Respondent's second basis for dismissal is stated as follows:

Respondent respectfully moves the Commission for an Order dismissing the Complaint on the basis that it fails to state a claim upon which relief can be granted " . . . where the Complaint consists primarily of allegations of an unsatisfactory work environment involving specific

problems Complainant experienced with supervisors . . .” See *Makl v. UW-Stevens Point*, 92-0038-PC-ER, 4/30/93. (Letter filed March 22, 1999)

The complaint includes an allegation that the complainant’s employment was terminated. This was not the case in *Makl v. UW-Stevens Point*, 92-0038-PC-ER, 4/30/93. There is no basis for dismissing this case for failure to state a claim upon which relief can be granted.

Respondent’s next ground for dismissal is:

Pursuant to Sec. PC 2.02(1) Wis. Adm. Code, complaints filed with the Commission should identify “. . . the facts which constitute the alleged unlawful conduct and the statutory basis of the allegation.” Respondent has carefully reviewed the Complainant’s Complaint as well as supplementary material filled with the Commission by the Complainant in support of the Complaint and does not find any facts relating to alleged unlawful discriminatory conduct on behalf of the respondent. Respondent would understand that since the “Complaint” filed in this matter includes no facts which allege unlawful discriminatory conduct on behalf of the Respondent, there is no complaint of discrimination.

If Respondent’s motions to dismiss are not granted, Respondent would respectfully request to be specifically advised of where facts exist in the above referenced documents with regard to alleged unlawful discriminatory conduct of the Respondent in order that Respondent is provided with fundamental due process of being notified of what Respondent is being accused of and to be able to respond to the same. (Letter filed April 2, 1999)

In his complaint filed March 11, 1999, complainant has alleged he was discharged and has checked the boxes on the complaint form for “national origin and ancestry” and “race.” In a subsequent (March 25, 1999) filing with the Commission, complainant asserts that because there was no just cause for his discharge, it can be inferred that his discharge was in violation of the WFEA. Whether he can establish what he alleges is not known at this time. As respondent notes, in his motion, the Commission’s rules at §PC 2.02(1), Wis. Adm. Code, state that the complaint “*should*” (emphasis added) include the facts which constitute the alleged unlawful conduct; this is not required.

The next ground for dismissal is related to the preceding ground:

Pursuant to s. 230.45(1)(b) Wis. Stats. the jurisdiction of the Commission is limited to being able to “Receive and process complaints of discrimination . . .” As described in Section 1 above, there does not appear to be a complaint of discrimination filed by the Complainant in this matter in his Complaint and thus the Commission lacks jurisdiction to receive and process the Complaint of the Complainant. (Letter filed April 2, 1999)

As discussed above, the complaint in effect charges that respondent terminated complainant’s employment because of his national origin, ancestry or race. This complaint is sufficient to invoke the Commission’s jurisdiction.

The final ground for dismissal follows:

Complainant had filed a case similar to the one he has filed with the Commission with the Circuit Court of Dane County and said circuit court case was based on the same termination of employment being addressed in the case before the Commission. The circuit court case was dismissed and a copy of the Order of Dismissal is enclosed with this letter. The Order of Dismissal states that the case was dismissed “For the reasons set forth in defendant’s (Respondent’s) letter of March 3, 1999, and motion and brief dated March 22, 1999.” Those reasons included that (1) the court lacks subject matter jurisdiction over the claim, (2) the Plaintiff’s (Complainant’s) pleadings fail to state a claim for which relief may be granted and (3) the Plaintiff (Complainant) did not state a claim of discrimination. The Wisconsin Department of Justice represented the Defendant (Respondent) in the case the Plaintiff (Complainant) brought against the Defendant (Respondent) in the Circuit Court of Dane County. (Letter filed April 2, 1999)

To the extent that respondent contends that this circuit court decision is dispositive of the complaint before the Commission on grounds of issue preclusion or claim preclusion, he has not supplied any foundation—e.g., copies of the pleadings, documents referred to by the Court in its one sentence order, etc.—that would provide a basis for a conclusion that the elements of issue preclusion or claim preclusion are present. *See, e.g., Schaeffer v. State Personnel Comm.*, 150 Wis. 2d 132, 441 N.W.2d 292 (Ct.App.1989).


ORDER


Respondent's motions to dismiss filed March 22 and April 2, 1999, are denied.

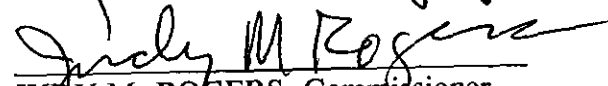
Dated: April 7, 1999.

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STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner