STATE OF WISCONSIN PERSONNEL COMMISSION

DANIEL HAWK,
Appellant,

v.

Secretary, DEPARTMENT OF COMMERCE,
Respondent.

Case No. 99-0047-PC-ER

RULING ON MOTION FOR SUMMARY JUDGMENT

This case is before the Commission on respondent's motion for summary judgment filed April 18, 1999. Respondent previously filed motions to dismiss on various grounds including failure to state a claim upon which relief can be granted. The Commission denied these motions in a ruling entered on April 7, 1999. Although respondent denominates the present motion as a motion for summary judgment, it is not accompanied by affidavits or other evidentiary material, and it appears to be more or less a re-argument of the previous motion to dismiss for failure to state a claim.

Respondent's current motion includes the following:

> 5. The Commission, in its Ruling, provided the following four responses to Respondent's request to be specifically advised of where **facts** exist in the (Complainants Complaint as well as supplemental material) 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" (Ruling, p. 2). The four responses were:
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> a. That the Complainant has alleged that he was discharged. There is no issue of material fact here; Respondent agrees he was discharged.
>
> b. That the Complainant has checked the boxes on the complaint form for national origin and ancestry" and "race". Without appearing disingenuous, Respondent agrees that Complainant checked the boxes on the complaint form and there is, therefore, no issue of

material fact here as well. Accepting what the Complainant did do in the best light possible, is that it could be said that the Complainant has made an unsupported claim but as provided in s. 227.42 (1) (d) Stats. a person does not have the right to a hearing before an agency such as the Commission unless "There is a dispute of a material fact". In this case, there is none.

c. That Complainant has made an assertion "that because there was no just cause for his discharge, it can be inferred that his discharge was in violation of WFEA". "Just cause" has nothing to do with this case. Whether or not there was "just cause" for his termination while in a probationary status is not relevant and is inadmissible as part of the Complainant's case as he was never an employee with permanent status for which such protection would apply. The attempt to build an inference based on a standard which is impermissible to raise in this case and irrelevant as well should argue for its defeat. The Commission has ruled that "the mere assertion of a factual dispute will not defeat an otherwise proper motion for summary judgement" (Randby v. Department of Employment Relations, Case Nos. 94-0465, 0476, 0483, 0506-PC).

d. That the Commission's rules at Sec. PC 2.02(1) Wis. Adm. Code do not require facts to be presented with the Complaint. And in this case, there are no facts which support the Complainant's checking of a box or boxes on a complaint form. There is, then, no genuine issue as to any material fact as the Complainant has produced no facts whatsoever related to the form complaint of WFEA discrimination before the Commission. While not requiring facts to be presented with the Complaint, Complainant acts at his peril in not producing facts if any exist.

6. The Commission has ruled that "Summary judgement should only be granted in clear cases" (Randby, supra at p. 7). What could be more clear than a case where a complainant has made an unsupported claim by checking boxes on a complaint form, where an impermissible and irrelevant inference is attempted to be raised, and where there are no genuine issues as to any material fact.

7. As a matter of law, the Commission must find for the Respondent. The Complainant has made a serious claim against the Respondent:
   a. The Respondent in being asked to defend against such claim is entitled to fundamental due process of being provided Notice of what the Respondent allegedly has done or not done which could relate to allegedly unlawful discriminatory conduct on behalf of the Respondent. Absent such notice, Respondent believes it may be unable to respond to a complaint that consists solely of the checking of a box or boxes on a complaint form and an irrelevant and impermissible inference.
   b. There is no case or controversy before the Commission, as the Complainant has not identified any. Dissatisfaction and unhappiness do not constitute a case or controversy for which the Respondent would be subject to review by an administrative tribunal such as the Commission.
   c. A person's right to a hearing before a state agency such as the Commission exists only when certain criteria are satisfied. One of such criteria is that "There is a dispute of a material fact" (s. 227.42 (1) (d) Stats.). There is no dispute of a material fact in this case, as the Complainant has not provided any facts whatsoever to support his claim of WFEA discrimination. The complainant does not have, therefore, a right to a hearing before the Commission, as he has not satisfied the criteria required to be provided that right pursuant to s.227.42 (1) (d) Stats.

In *Masuca v. UWSP*, 95-0128-PC-ER, 11/14/95, this Commission held as follows:

> The pleading requirements for an FEA complaint of discrimination are extremely minimal. *See, e.g., Goodhue v. UWSP*, 82-PC-ER-24 (11/9/83) (document stating that complainant felt she was treated differently because of her sex with respect to denial of tenure and promotion a sufficient complaint). Neither the WFEA nor this Commission's rules require that a complainant identify in the complaint the elements of a WFEA claim. The complaint in this case alleges that complainant was discriminated against because of his race with respect to criticism of his work and a transfer. This complaint is sufficient to withstand a motion to dismiss for failure to state a claim under the WFEA.

The instant complaint alleges that respondent terminated complainant's employment because of his national origin or ancestry or race. As set forth in *Masuca* and *Goodhue*, a complaint is not required to set forth the elements of a WFEA (Wisconsin Fair Employment Act) claim. *See also Loomis v. Wisconsin Personnel Commission*, 179 Wis. 2d 25, 30, 505 N.W.2d 462 (Ct. App. 1993) ("Pleadings are to be treated as flexible and are to be liberally construed in administrative proceedings." [citation omitted]). The Commission's rules do not require that the complaint state the facts upon which complainant rests his claim of WFEA discrimination: "Complainants should identify . . . the facts which constitute the alleged unlawful conduct." (emphasis added) §PC 2.02(1), Wis. Adm. Code. The bottom line is the complaint in this case is not defective because it does not allege additional facts.

With respect to respondent's point that there is no right to a hearing if there are no material facts in dispute, it does not follow that a complaint must allege the elements of a WFEA claim or recite the evidence upon which complainant will rely.

Respondent also argues that the issue of just cause is not before the Commission because of complainant's probationary status at the time of his dismissal. If complainant had filed an appeal of his termination pursuant to §230.44(1)(c), Stats.[1], it is correct that he could not maintain such a claim because of his lack of permanent status. However, he has not filed such an appeal. Rather he has filed a complaint alleging that his probationary termination constituted discrimination against him on the basis of national origin or ancestry and race. While the question of just cause *per se* is not at issue in such a proceeding, the question of whether respondent's rationale for termination is a pretext for a discriminatory motive may well be at issue. It is not uncommon that a complainant's pretext case involves the contention that the employer's claimed performance deficiencies are false, and merely a pretext for the underlying motivation to get rid of complainant because of his protected status. *See, e.g., Mitchell v. DOC*, 95-0048-PC-ER, 8/6/96:

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[1] This subsection provides that an employe with permanent status in class can appeal a discharge on the issue of just cause.

> In a discrimination case involving a discharge, the employer/respondent is not required to show just cause for the discharge, as would be the case in an appeal of a discharge under §230.44(1)(c), Stats., or in a contractual grievance proceeding. Rather, complainant has the burden of proof and must establish a discriminatory motive for the discharge. In a case such as this, where the complainant denies much of the underlying misconduct, if she could establish that respondent had a weak case for discharge, it would be probative of pretext.

See also Starck v. DILHR, 90-0143-PC-ER (9/9/94) (Where Respondent established there were significant problems with a probationary employe's performance, and complainant failed to show that these reasons were pretextual, it was concluded complainant's probation was not terminated for a discriminatory reason.), *Russell v. DOC*, 95-0175-PC-ER, 4/24/97 ("'Whether Paxton did in fact rape Sivolka or otherwise subject her to unwelcome sexual contact is not an issue that needs to be decided in this case. What matters is the question of what the employer's motivation *was*, not whether it was objectively correct. Notwithstanding this, there is some relevance in considering the question of whether Paxton was culpable, because the more reasonable such a conclusion appears on the basis of what the employer's investigation showed, the more reasonable is the conclusion that the employer's investigators came to genuinely believe, in good faith, that Paxton was culpable.'" [citation omitted]).

Respondent also asserts that the complaint does not provide adequate notice for it to defend itself against complainant's claim. While the Commission does not agree with this contention, it will not address this point now, because this case is not at the stage of providing notice of hearing pursuant to §111.39(4)(b), Stats. Rather, complainant has not waived an investigation, and the investigation will be followed by a written initial determination addressing whether there is probable cause to believe discrimination has occurred. At that point, the Commission will provide statutory notice of hearing.

ORDER

Respondent's motion to dismiss filed April 18, 1999, is denied. Respondent is to submit an answer to the complaint pursuant to §PC 2.04, Wis. Adm. Code, as requested by the Commission investigator's April 13, 1999, letter, within 10 days of the date of service of this ruling.

Dated: June 2, 1999.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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