STATE OF WISCONSIN PERSONNEL COMMISSION

JOSEPH E. SABOL,
Complainant,

v.
President, UNIVERSITY OF WISCONSIN-SYSTEM (Eau Claire),

Respondent.

RULING ON MOTION TO DISMISS

Case No. 99-0144-PC-ER

This matter is before the Commission on respondent's motion to dismiss or, in the alternative, for summary judgment, filed December 29, 1999. Both parties have filed briefs on this motion.

This case involves a discrimination complaint filed September 2, 1999. In that charge, complainant alleges that respondent discriminated against him on the bases of age, marital status, and sex, and in retaliation for occupational safety and health (OSHA) reporting, when he was not hired for a position in the UWEC chemistry department identified as a one year (August 1999-May 2000) fixed term academic staff lecturer.

In deciding a motion to dismiss for failure to state a claim:

> [T]he commission must accept as true the allegations of the appeal [here, complaint], and all reasonable inferences that can be drawn from the allegations. An appeal can not be dismissed "unless it appears to a certainty that no relief can be granted under any set of facts that plaintiff can prove in support of his allegations." *Sundling v. UW-Madison,* 93-0049-PC-ER, 11/23/93 (citations omitted).

The complaint can not be dismissed for failure to state a claim of discrimination on the basis of age or gender. Complainant has alleged he is in the protected age category, a younger (under 40) female applicant was hired for a position for which he was better qualified, and that respondent discriminated against him on the basis of his age and gender. This clearly states a claim of age and sex discrimination. However,

respondent has also moved for summary judgment, and on a motion for summary judgment the Commission is not restricted to consideration of the allegations in the complaint.

The method of analysis for respondent's motion for summary judgment was outlined in *Starck v. UW-Oshkosh,* 97-0057-PC-ER, 11/7/97, citing *Grams v. Boss*, 97 Wis. 2d 332, 338-39, 294 N.W.2d 473 (1980):

> On summary judgment the moving party has the burden to establish the absence of a genuine, that is, disputed, issue as to any material fact. On summary judgment the court does not decide the issue of fact; it decides whether there is a genuine issue of fact. A summary judgment should not be granted unless the moving party demonstrates a right to a judgment with such clarity as to leave no room for controversy; some courts have said that summary judgment must be denied unless the moving party demonstrates his entitlement to it beyond a reasonable doubt. Doubts as to the existence of a genuine issue of material fact should be resolved against the party moving for summary judgment.
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> The papers filed by the moving party are carefully scrutinized. The inferences to be drawn from the underlying facts contained in the moving party's material should be viewed in the light most favorable to the party opposing the motion. If the movant's papers before the court fail to establish clearly that there is no genuine issue as to any material fact, the motion will be denied. If the material presented on the motion is subject to conflicting interpretations or reasonable people might differ as to its significance, it would be improper to grant summary judgment. (citations omitted)

The Commission has also previously noted that in the context of a fair employment claim in which complainant appears *pro se*, "particular care must be taken in evaluating each party's showing on the motion to ensure that complainant's right to be heard is not unfairly eroded by engrafting a summary judgment process designed for judicial proceedings." *Balele v. UW-Madison*, 91-0002-PC-ER, 6/11/92.

Respondent argues that complainant has not presented an inference of sex or age discrimination. However, complainant has demonstrated a prima facie case of age and gender discrimination by the following showing:

1) He is in these protected categories by reason of his age (45) and gender (male).

2) He applied and was qualified for the position in question.

3) Despite being qualified for the position, respondent did not hire him.

4) The person who was hired (female, age 34) is not in the same protected categories as complainant.

At this point, the burden of proceeding is on respondent to articulate a legitimate, non-discriminatory reason for its action. Respondent asserts that the selection committee which screened the candidates[1] sent a list of the three most qualified candidates[2] (which did not include complainant) to the appointing authority, which considered only the three people (allegedly better qualified than complainant) on this list in making the hiring decision. The burden of proceeding then shifts to the complainant to prove that this rationale is really a pretext for a decision motivated by considerations of gender and age. The main thrust of complainant's attempt to show pretext is to try to demonstrate he was significantly better qualified than the final three candidates, including the successful one. He also asserts that the three finalists were significantly younger, and contends the selection committee was motivated to hire someone younger because such candidates would be paid less and thus be less expensive to respondent than he. He further argues that the selection process did not comply with applicable policies and rules.

In response to the complainant's attempt to show pretext, respondent points out that one of the two members on the selection committee was a 45 year old male whom complainant had listed as a reference. (It appears to be undisputed that the other

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[1] There apparently were four candidates, including complainant, of whom two were males and two were female.

[2] I. e., both of the female candidates and one of the male candidates were ranked as better qualified than complainant.

member was a 28 year old male.) Respondent also contends that another reference contacted, who did not give complainant a good reference with regard to his teaching ability, was also a reference complainant had provided. Respondent further points to the fact that the three finalists included one male and two females, and contends "[t]hese facts are inconsistent with an inference that sex or age discrimination motivated the search committee in selecting the finalists for the position." Respondent's motion to dismiss, p.2.

Some of the points respondent raises support respondent's case, but there are material facts in dispute. On the basis of the showings made by the parties, the Commission can not conclude there are undisputed facts which demonstrate that complainant's contentions of being better qualified than the three finalists, and that the selection process did not follow prescribed policies and rules, are unsustainable. If complainant can show that he is better qualified than the three finalists, and that required procedures were not followed in the selection process, this would buttress his efforts to demonstrate pretext, and the Commission can not conclude at this point in this proceeding that complainant's efforts necessarily would be unsuccessful.

The next issue concerns the motion to dismiss the marital status claim. Complainant is unmarried, which is a protected status under the WFEA. If he were simply alleging that respondent rejected him because of that marital status, that would state a claim under the law. However, complainant does not allege he was not hired because of *his* unmarried status. Rather, he claims that respondent was motivated to hire the successful candidate because of the fact that she was married to another faculty member at UWEC, and that hiring the latter's spouse was part of the inducement for him to come to UWEC. Thus complainant's claim is not based on his own marital status, but on someone else's spousal identity. *See Olmanson v. UWGB,* 98-0057-PC-ER, 10/21/98. Furthermore, the Court of Appeals recently has rejected the entire theory of spousal identity as a type of marital status discrimination under the WFEA:

> In essence, the emphasis of the WFEA is to prevent discrimination against classes of people, whether by age, race, creed, color, disability, marital status or any of the other classes protected by

> the statute. Given the language of the statute and the policy behind its prohibitions, we conclude that LIRC reasonably interpreted the WFEA "to protect the status of being married in general rather than the status of being married to a particular person." *Bammert v. LIRC,* 99-1271 (Ct. App., December 21, 1999) (publication recommended).

Therefore, respondent's motion to dismiss the marital status claim must be granted.

Complainant's OSHA claim involves two actions. The first is a November 13, 1998, email he sent to other members of the chemistry department:

> This morning I noticed a bottle of 5% Br2 in hexane on the side bench in P475 with the cap not tight. This bottle is for the Hydrocarbons experiment and is labeled "Use in the hood." None of my lab sections have done this experiment yet. Upon inspection, many other reagent bottles (solvents and acids) also had their caps not tight. I checked all to make sure they were closed before I left.
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> I am concerned that my students could have been exposed to unnecessary chemical vapors and I ask that you check and make sure all reagent bottles are closed when your lab sections are finished.

In his brief in opposition to respondent's motion, complainant also referred to another activity which occurred about a month before the November 13, 1998, email regarding the bromine. This involves a discussion and report about another chemical storage issue. Complainant first brought up this incident in his rebuttal to respondent's answer, filed on November 5, 1999, during the investigative phase of this matter:

> About one month before the bromine report, the Complainant noticed several plastic gallon containers of acetone, an extremely flammable solvent, stored in the hoods overnight, which is a violation of policies in the Chemical Hygiene Plan. The complainant discussed this with Jason Kuehl, Assistant Chemical Stockroom Manager, and Cheryl Muller, Associate Professor and Chemistry 101 Instructor; this discussion is considered an OSHA report and is on file in the Phillips Hall Chemical Stockroom. All three were puzzled by the overnight storage of the acetone and discovered that Halfen was using the acetone in his labs, but failing to return it to proper storage facilities when not in use. The normal lab schedule had students using Bunsen burners in the hoods and this created the potential for a dramatic fireball if a gallon of acetone received a spark. Complainant's rebuttal to respondent's answer, p. 18.

While this alleged protective activity was not discussed in the initial determination, this additional information should be considered an amendment of the complaint at this time. *See, e. g., Hiegel v. LIRC,* 121 Wis. 2d 205, 359 N. W. 2d 405 (Ct. App. 1984)

Section 111.055(8)(ar), Stats., provides in part:

> No public employer may discharge or otherwise discriminate against any public employe it employs because the public employe filed a request with the department [of commerce], *instituted or caused to be instituted any action or proceeding relating to occupational safety and health matters under this section*, testified or will testify in such a proceeding, reasonably refused to perform a task which represents a danger of serious injury or death or *exercised any other right related to occupational safety and health which is afforded by this section.* (emphasis added)

Clearly, if complainant's activity is to be covered by the law, it has to fall within the parameters of the emphasized language in the statute. Any interpretation of this language must consider the "intent" language the legislature inserted at §101.055(1):

> (1) INTENT. It is the intent of this section to give employes of the state . . . rights and protections relating to occupational safety and health equivalent to those granted to employes in the private sector under the occupational safety and health act of 1970 [federal OSHA].

Therefore, the state law, which closely tracks the federal OSHA, must be interpreted in the context of that law. This context includes not only the statute itself, but also federal rules issued by the Department of Labor (DOL) and federal court decisions interpreting the federal OSHA. Also, since OSHA is a remedial statute, it must be liberally interpreted. *See, e. g., Butzlaff v. Wisconsin Personnel Commission,* 166 Wis. 2d 1028, 1033, 480 Wis. 2d 559 (Ct. App. 1992).

The federal law has been interpreted liberally to cover a range of activities as within the ambit of the language: "has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of

himself or others of any right afforded by this chapter." 29 USC §660(c)(1). Chapter 1977, Code of Federal Regulations (CFR), provides, in part:

> §1977.9 **Complaints under or related to the act.** (a) . . . The range of complaints "related to" the Act is commensurate with the broad remedial purposes of this legislation and the sweeping scope of its application, which entails the full extent of the commerce power. . . .
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> (c) Further, the salutary principles of the Act would be seriously undermined if employes were discouraged from lodging complaints about occupational health and safety with their employers . . . Such complaints to employers, if made in good faith, therefore would be related to the Act, and an employee would be protected against discharge or discrimination caused by a complaint to the employer.
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> §1977.10 **Proceedings under or related to the Act.** . . .
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> (b) An employe need not himself directly institute the proceedings. It is sufficient if he sets into motion activities of others which result in proceedings under the Act. . . .
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> §1977.12 **Exercise of any right afforded by the act.** (a) . . . Certain other rights exist by necessary implication. For example, employees may request information from the Occupational Health and Safety Administration; such requests would constitute the exercise of a right afforded by the Act. Likewise, employees interviewed by agents of the Secretary in the course of inspections or investigations could not subsequently be discriminated against because of their cooperation.
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> (b)(1) On the other hand, review of the Act and examination of the legislative history discloses that, as a general matter, there is no right afforded by the Act which would entitle employes to walk off the job because of potential unsafe conditions at the workplace. Hazardous conditions which may be violative of the Act will ordinarily be corrected by the employer, once brought to his attention. If corrections are not accomplished, or if there is dispute about the existence of a hazard, the employee will normally have opportunity to request inspection of the workplace pursuant to section 8(f) of the act, or to seek the assistance of other public agencies which have responsibility in the field of safety and health. . . .

The federal OSHA has been interpreted to cover a wide range of activities. In *Donovan v. Commercial Sewing, Inc.*, 562 F. Supp. 548 (D. Conn. 1982), the employe

asked her supervisor if he knew the contents of a glue which had been introduced into the work site, and received his permission to leave early because the fumes from the glue had given her a headache. Before she left, she complained to the employer's purchasing agent and asked her to find out its contents before leaving for the day. The next day she came back to work and talked to another member of management about the glue, and inquired of its contents. Later in the day she inspected the glue containers in an attempt to determine its contents, and asked the purchasing agent if she had found out what was in the glue. Later that day she was discharged. The Court held that her activities were covered by the act. This case has precedential value because the covered activity did not involve filing a formal complaint with either an agency or the employer, which is the same situation as in the instant case.

In *Donovan v. Diplomat Envelope Corp.*, 587 F. Supp. 1417, 1424 (E. D. N. Y. 1984), the Court held that OSHA covered an employe who had reported an alleged health hazard to his union:

> We must look to the purpose of the statute rather than at its language alone. The purpose of the statute is to encourage employes to come forward with complaints of health hazards so that remedial action may be taken. In the ordinary course of events, an employe who notices a health hazard will begin by bringing the matter to the attention of those with whom he deals directly in his daily worklife, such as the employer, supervisors, co-workers, or union officials. This is simple common sense. These persons are the ones most likely to be in a position to obtain information regarding the alleged hazard and to take appropriate action. It would be foolish to invoke the ponderous mechanisms of government to remedy a problem without first trying to resolve the problem through voluntary means.

The Court noted other decisions holding that communications with a newspaper concerning job safety and health hazards was held to be a protected activity, as were complaints to the employer, and even the act of retaining counsel to represent the employe for an attempt to rectify perceived unsafe conditions.

Complainant's activities appear to be borderline with regard to their coverage by the act. It is by no means clear that complainant made what could be characterized as

"complaints," and what level, if any, of management (particularly members of management who were involved in or had influence over this hiring decision) was aware of the complaints. However, the Commission must be cognizant not only of the foregoing authority, the broad remedial purpose of OSHA and the need to interpret that law liberally, but also of the procedural posture of this case, where there has been no evidentiary hearing, and complainant is unrepresented by counsel. The Commission previously has noted that "particular care must be taken in evaluating each party's showing on the motion to ensure that complainant's right to be heard is not unfairly eroded by engrafting a summary judgment process designed for judicial proceedings." *Balele v. UW-Oshkosh,* 97-0057-PC-ER, 11/7/97. The development of a more complete record in a hearing may provide a context to complainant's activities that will provide a better picture of whether his activities should be viewed as more or less analogous to activities which have been held to be protected or not protected under the federal OSHA, as well as whether the activities were known within management in a way that could have affected the hiring decision in question. *See, e. g., Phillips v. Interior Board of Mine Operations Appeals,* 500 F. 2d 722 (D. C. Cir. 1974) (employe's actions were scrutinized in the context of the mine's procedures regarding safety complaints to determine whether he was protected under the analogous Federal Coal Mine Health and Safety Act of 1969.) Therefore, the Commission will deny respondent's motion with regard to complainant's OSHA claim.

ORDER

Complainant's motion to dismiss is granted in part, and complainant's claim of marital status discrimination is dismissed, and the motion is otherwise denied.

Dated: February 15, 2000.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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