

STATE OF WISCONSIN

PERSONNEL COMMISSION

**ROBERT FERGUSON,**  
*Complainant,*

v.

**Secretary, DEPARTMENT OF  
CORRECTIONS,**  
*Respondent.*

**RULING ON MOTION  
TO DISMISS**

Case No. 99-0165-PC-ER

This is a complaint of discrimination on the basis of race and creed, and of retaliation for engaging in protected fair employment and care facility activities. On October 27, 1999, respondent filed a motion to dismiss. The parties were permitted to brief the motion and the schedule for doing so was completed on December 6, 1999. The following findings are based on information provided by the parties, appear to be undisputed, and are made solely for the purpose of deciding this motion.

FINDINGS OF FACT

1. In his charge, complainant cites as the basis for his complaint his termination by James Nagel, Superintendent of the Winnebago Correctional Center (WCC), from his work release placement with Buechel Stone Company (Buechel). At all relevant times, complainant has been incarcerated at WCC.

2. In order to participate in this work release placement, complainant signed an agreement on September 10, 1997. This agreement placed restrictions on, among other things, complainant's movements while at the work release site, on complainant's use of the monies he earned from his work on the assignment, on complainant's use of controlled substances during work release, on communications or visits he would receive or initiate at the work release site, and on his transportation to and from the work release site. This agreement also provided that complainant's work release placement may be terminated by respondent if respondent determines that complainant

has violated, among other things, a state statute, a rule of the placement site, or the provisions of the work release agreement. One of the provisions of the agreement is that complainant shall abide by the administrative rules of respondent and the specific policies and procedures of the institution to which he was assigned, i.e., Winnebago Correctional Center (WCC).

3. Complainant claims that, on January 29, 1999, he complained to Dan Smith, WCC Work Release Coordinator, that he had been the subject of racial discrimination./harassment at Buechel; and that he made this complaint to Scott Buechel, one of the owners of the company, on February 1, 1999.

4. Complainant was issued a conduct report on February 2, 1999. This report indicated that complainant was terminated by respondent from his work release placement with Buechel as the result of a sexual harassment complaint made against him by a female co-worker, and as a result of the fact that, during the period of time between January 25 and February 1, complainant's work output was less than half of what was expected of him. This report also indicates that complainant had been released from a different work release site due to similar circumstances.

5. Complainant pursued a challenge to this termination through the inmate complaint process, and filed his complaint on July 23, 1999. The Institution Complaint Examiner (ICE) summarized the facts of this complaint as follows:

Complainant was fired from the Buechel Stone company and issued a conduct report for inadequate work performance. This conduct report had to do with the sexual harassment of a female employee. Complainant was found guilty. As far as discrimination at the stone company, complaint states there were complaints of racial discrimination at the stone company. To date none have been received. The center started supplying offenders for work release at the Buechel Stone Company in August of 1998. To date, 64 offenders have worked there. Of the 64, eleven have been terminated for various reasons. Of the eleven, six were black and the other five were white. Complainant offers nothing as far as evidence of racial discrimination. The facts indicate equal treatment.

The ICE recommended that complainant's inmate complaint be dismissed and this recommendation was accepted by Superintendent Nagle on August 11, 1999. Complainant has filed a writ of certiorari in Dane County Circuit Court to have this decision reviewed.

### OPINION

This complaint has been filed pursuant to the Wisconsin Fair Employment Act (FEA). The Commission's jurisdiction under the FEA is limited to complaints against state agencies as employers. §111.375, Stats. The Commission has no statutory jurisdiction over a private—i. e., non-state agency—employer. Thus, the Commission's potential jurisdiction in this case is limited to DOC.<sup>1</sup> However, in its motion to dismiss, DOC contends that there has not been an employer-employee relationship between it and complainant.

The FEA requires that a cognizable employment relationship exist between the complainant and respondent. In *Whaley v. DOC*, 96-0157-PC-ER, 3/12/97, aff'd *Whaley v. Wis. Pers. Comm.*, 97-CV-0462, Brown Co. Cir. Ct, 5/13/97, the Commission held that an inmate working for pay on prison grounds for a private entity as part of the Badger State Industries Private Sector/Prison Industries Enhancement Program did not qualify as an employee under the FEA. In this decision, the Commission stated as follows:

The only exception that the federal courts have carved out relates to inmates employed in off-site work release programs in which their employment has the same attributes as that of non-inmates performing similar work duties. *See, Baker v. McNeil Island Corrections Center*, 859 F.2d 124, 48 FEP Cases 143 (9<sup>th</sup> Cir. 1988).

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<sup>1</sup> Complainant filed a discrimination complaint against WCI with the Department of Workforce Development (DWD) Equal Rights Division (ERD). ERD dismissed this complaint on the grounds that some of the complainant's allegations refer entirely to matters which involve the complainant's conditions of incarceration as an inmate, and that even if there were an employment relationship between WCI and the complainant in connection with some of complainant's allegations, that matter would not be under ERD jurisdiction due to the operation of §111.375(2), Stats., which vests exclusive jurisdiction over state agencies acting as employers with the personnel commission.

This is the language apparently relied upon by complainant in his contention that the Commission should take jurisdiction over the instant complaint.

Complainant's contention lacks merit for several reasons. First of all, the relationship under consideration here arose because of complainant's status as an inmate, not as an employee. See, *Williams v. Meese*, 926 F.2d 994, 55 FEP Cases 390 (10<sup>th</sup> Cir. 1991). In addition, complainant's status as an inmate determined to a large extent the attributes of his work conditions at Buechel, and many of these attributes, e.g., transportation, communication, scope of movements, and rules of conduct, were not the same as those for non-inmate workers at Buechel. Finally, there does not appear to be any persuasive reason to distinguish between the nature of the work relationship of an inmate who performs services for a private entity through the type of program described in the *Whaley* case, *supra*, (See, also, *George v. SC Data Center, Inc.*, 884 F.Supp 329 (W.D.Wis. 1995) and through the type of work release program under consideration here. Both arise as the result of an individual's status as an inmate which governs to a large extent the attributes of the work situation.

It should also be noted that respondent has established an inmate complaint process in Ch. DOC 310, Wis. Adm. Code, which the Legislature has recognized in §801.02(7)(b), Stats., as the appropriate administrative means for an inmate to seek redress of matters arising as the result of his or her status as an inmate of a correctional institution, and that complainant has availed himself of this process in regard to the matters under consideration here, and has a petition for writ of certiorari to review that process pending in court.

Complainant also asserts that WCI was effectively acting as an employment agency in its relationship with inmates and employers in the work release program. The FEA provides that it is unlawful for four kinds of entities to discriminate: "It is unlawful for any employer, labor organization, licensing agency or person to discriminate against any employe or any applicant for employment or licensing." §111.325, Stats. Since the Commission's jurisdiction under the FEA is limited to

complaints “against the agency as *employer*,” (emphasis added) §111.375(2), Stats., even if DOC were acting as an employment agency (i. e., arguably as a “person” under §111.325, Stats.), the Commission would have no jurisdiction over that type of entity because of the restriction of its jurisdiction to state agencies acting as “employer.”<sup>2</sup>

It is concluded that complainant has failed to show that the matters of which he complains arose as a consequence of a cognizable employment relationship with respondent as required by the FEA, and, as a result, this case must be dismissed.

### CONCLUSIONS OF LAW

1. The Commission’s jurisdiction over FEA complaints is limited to claims against state agencies acting as employers, pursuant to §111.375(2), Stats.
2. Respondent’s relationship with complainant was not that of an employer.
3. This Commission lacks subject matter jurisdiction over this complaint.

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<sup>2</sup> For much the same reasons as discussed above in concluding that the relationship between the respondent and the complainant is essentially that of jailer and inmate rather than employer and employe, it is unlikely that DOC would be considered to be an employment agency.

ORDER

This complaint of discrimination is dismissed for lack of subject matter jurisdiction.

Dated: January 25, 2000

LRM-990165Cru1.2

STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

  
DONALD R. MURPHY, Commissioner

  
JUDY M. ROGERS, Commissioner

Parties:

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Oshkosh WI 54903

Jon Litscher  
Secretary, DOC  
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NOTICE  
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL  
REVIEW  
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

**Petition for Rehearing.** Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

**Petition for Judicial Review.** Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the

petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.

2/3/95