STATE OF WISCONSIN PERSONNEL COMMISSION

JOSEPH E. SABOL,
Complainant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM (Eau Claire),
Respondent.

Case No. 01-0150-PC-ER

RULING ON RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

NATURE OF THE CASE

This case was filed on August 23, 2001. Respondent filed a motion for summary judgment by cover letter dated September 7, 2001. Complainant was provided an opportunity to submit a written reply. Oral arguments were held before the full Commission on September 19, 2001.

The facts recited below are made solely to resolve this motion. Disputed facts are stated in a light most favorable to complainant as is appropriate in the context of the motion.

FINDINGS OF FACT

1. On November 13, 1999, complainant filed a prior case against respondent alleging discrimination on the bases of age and sex in violation of the Fair Employment Act (FEA), Subch. II, Ch. 111, Stats., as well as retaliation for engaging in activities protected under the Occupational Safety and Health Act (hereafter, OSHA) reporting under §101.055, Stats. These allegations were raised in connection with respondent's decision in July 1999 to hire someone else for a vacant position. The prior case went to hearing held over five days between February 21, and March 10, 2000. A proposed decision and order (PDO) was mailed to the parties on October 16, 2000. A final decision was issued, *Sabol v. UW (Eau Claire)*, 99-0144-PC-ER, 1/19/01, and complainant's petition for rehearing was denied March 12, 2001. Complainant filed a petition for judicial review on March 30, 2001, and the case is currently pending court review, *Sabol v. Wis. Pers. Comm.*, 01-CV-1366 (Dane County).

2. In the prior complaint, complainant alleged that he engaged in activities protected under the OSHA. Relevant here is an activity (hereafter the "Bromine Incident") described in the prior case at ¶¶3-4of the Findings of Fact,[1] as repeated below:

> (3) On November 13, 1998, complainant sent the following e-mail message to his "General Chemistry Colleagues:"
>
> > 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.
> >
> > 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.
>
> (4) Nine colleagues received the message, including Scott C. Hartsel, Robert Eierman, Jason Halfen, David Lewis and John Pladziewicz. One recipient, Judith Lund, responded as follows to the message, "Good point Joe. Thanks."

3. In the prior case, the Commission concluded that the Bromine Incident was protected under the OSHA as noted in the following excerpt:[2]

> It seems clear that the method or procedure complainant used in this case to communicate his concerns - an email to departmental colleagues - falls within the coverage of OSHA. The question is whether the loosely capped containers complainant reported was a significant enough health or safety issue to make his email a protected activity. There was testimony which supports each party's position. Basically, respondent's position is that the recipients viewed the email as a reminder about a minor matter that was not noteworthy and was barely noticed. For example, there was testimony by a member of the department faculty that complainant's message was akin to a reminder to someone that he or she had forgotten to turn off the lights on a parked car. On the other hand, complainant provided testimony by faculty that the chemical could pose a real

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[1] This is a reference to the Findings of Fact in the Proposed Decision and Order (PDO). The PDO was adopted with minor changes as the Final Decision and Order.

[2] See page 9 of the PDO.

> hazard to people in the lab. Given the liberal intent of the legislature and the range of issues found to have been covered by either the state or the federal laws, the Commission concludes that, while complainant's case is borderline, in the context of this case there is enough evidence of a possible hazard from the situation described in the email to bring this communication under the coverage of OSHA.

4. In the prior case, the Commission issued a decision in respondent's favor finding that respondent's decisions were not motivated by retaliation or discrimination.

5. The present case was filed on August 23, 2001. Complainant alleged therein that respondent did not hire him for a 2001-2002 teaching academic staff position in the Chemistry Unit (position number A-369) because of his age in violation of the FEA. He further alleged that the failure to hire was in retaliation for activities protected under the FEA and under OSHA. The hearing will be held on the merits (rather than at the lower evidentiary standard of probable cause) because complainant waived investigation (see complainant's letter dated August 31, 2001).

6. In the present case, complainant's description of the protected OSHA activity is the Bromine Incident described in ¶2 above.

7 The Chair of the screen committee was Dr. Warren Gallagher, Associate Professor of Chemistry on the Eau Claire campus. Dr. James Phillips and Dr. Marcia Miller were the other members of the screen committee. Both are Assistant Professors of Chemistry on the Eau Claire campus. (Gallagher, Phillips and Miller affidavits.)

8. All members of the screen committee were aware of complainant's November 13, 1998, e-mail message, which forms the basis of the Bromine Incident. No member of the screen committee denies knowledge of complainant's pursuit of the first complaint, the history of which is noted in ¶1 above.

9. Eleven people applied for the position, including complainant. The screen committee began reviewing applications on June 18, 2001. Sometime prior to June 22, 2001, complainant was eliminated from further consideration. On June 22, 2001, reference checks were completed for the two top candidates.

10. The screen committee decided to interview the top two candidates. The Chair of the Chemistry Department, Dr. Jack Pladziewicz also participated in the candidate interviews. The committee recommended that respondent hire Dr. Haag for the position. Dr. Pladziewicz, the Dean and the Provost approved the recommendation. (Gallagher affidavit ¶¶15-16and attached Exhs. B, C and E. Also see Exh. D -- the reference check notes for Dr. Haag.) Respondent hired Dr. Haag for the position. (Supplemental affidavit filed on September 19, 2001.)

11. Complainant was born on March 23, 1954. Dr. Haag was born on September 11, 1938. (Exh. C attached to Gallagher affidavit--Haag resume, last page.)

12. Complainant has two additional cases pending before the Commission. *Sabol v. UW System (Eau Claire)*, 01-0079-PC-ER, was filed on May 25, 2001 and involves an allegation that respondent did not hire him for four positions because of the prior discrimination complaints filed with the Commission. The other complaint, *Sabol v. UW System (Eau Claire)*, 01-0123-PC-ER, was filed on July 16, 2001, and involves an allegation that respondent did not hire complainant for a tenure-track position because of the prior discrimination complaints filed with this Commission.

13. Dr. Gallagher knew that Case No. 01-0079-PC-ER had been filed prior to June 22, 2001, when complainant was eliminated from further consideration for the position that is the subject of the present motion.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in this case pursuant to §230.45(1)(b) and (g), Stats.

2. Respondent has the burden to establish entitlement to summary judgment.

3. Respondent has met its burden with respect to complainant's claim of age discrimination.

4. Respondent has met its burden with respect to so much of complainant's claim of WFEA retaliation claim that arises from complainant's action of filing a charge of discrimination on July 16, 2001 (Case Number 01-0123-PC-ER).

5. Respondent has not met its burden with regard to the remainder of complainant's WFEA retaliation claim arising from having filed Case Numbers 99-0144-PC-ER and 01-0079-PC-ER.

6. Respondent has not met its burden with respect to complainant's claim of OSHA retaliation.

OPINION

I. Summary Judgment Authority and Method of Analysis

The case of *Balele v. WPC*, 223 Wis. 2d 739, 589 N.W.2d 418 (Ct. App. 1998) provides the governing authority for the Commission to decide cases using a process similar to summary judgment procedures under §802.08, Stats. The Commission recently issued a ruling in *Balele v. DOT*, 00-0044-PC-ER, 10/23/01, which contained an in-depth discussion of the use of summary judgment motions in this forum. The five factors identified as minimum considerations, *Id.*, pp. 18-20, are summarized below:

1. *Whether the factual issues raised by the motion are inherently more or less susceptible to evaluation on a dispositive motion.* Subjective intent is typically difficult to resolve without a hearing whereas legal issues based on undisputed or historical facts typically could be resolved without the need for a hearing.

2. *Whether a particular complainant could be expected to have difficulty responding to a dispositive motion.* An unrepresented complainant unfamiliar with the process in this forum should not be expected to know the law and procedures as well as a complainant either represented by counsel or appearing *pro se* but with extensive experience litigating in this forum.

3. *Whether the complainant could be expected to encounter difficulty obtaining the evidence needed to oppose the motion.* An unrepresented

complainant who either has had no opportunity for discovery or who could not be expected to use the discovery process, is unable to respond effectively to any assertion by respondent for which the facts and related documents are solely in respondent's possession.

4. *Whether an investigation has been requested and completed.*

5. *Whether the complainant has engaged in an extensive pattern of repetitive and/or predominately frivolous litigation.* If this situation exists it suggests that use of a summary procedure to evaluate his/her claims is warranted before requiring the expenditure of resources required for hearing.

The Commission now turns to applying the above principles to this case.

The complainant in this case has litigated a prior discrimination case in this forum but has had no prior exposure before the Commission to a motion for summary judgment. He represented himself in the prior case. He represents himself in the present case except he did have an attorney present as an "advisor" at oral arguments relating to the present motion which were held on September 19, 2001. In his earlier case (99-0144-PC-ER) complainant represented himself for five days of hearing, and participated in extensive discovery, including approximately seven hours of motion hearings or conferences to address discovery issues. He has filed extensive briefs in this and his earlier cases. Complainant has a Ph. D. He has waived an investigation in this case. The ultimate issues in this case involve issues of intent -- i.e., whether the hiring decision in question was motivated by a discriminatory or retaliatory motive. Complainant does not have a history of having pursued a large number of frivolous charges before this Commission.

Based on the foregoing, the Commission concludes that, somewhat similar to a judicial summary judgment proceeding, complainant should be held to the requirement, in responding to the motion for summary judgment, that he demonstrate that there are genuine issues of

disputed facts, and that he is entitled to a hearing on his claims. However, in analyzing complainant's showing, appropriate procedural consideration must be given to the fact, except as noted above, he is representing himself. Thus, although complainant filed no affidavits in opposition to the present motion, his assertions in other documents he submitted will be considered.

II. Age Discrimination Claim

The initial burden of proof is on the complainant to show a prima facie case of discrimination or retaliation. If complainant meets this burden, the employer then has the burden of articulating a non-discriminatory reason for the actions taken which the complainant, in turn, may attempt to show was a pretext for discrimination. *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 25 FEP Cases 113 (1981).

A prima facie case of age discrimination in the context of a hiring decision requires complainant to show that 1) he was at least 40 years old at the time respondent made the hiring decision and thus a member of the protected age group under §111.33, Stats., 2) he applied for and was at least minimally qualified for the job, 3) respondent hired someone other than complainant, and 4) the person hired was significantly younger. See, *Harrison v. LIRC*, 211 Wis. 2d 681, 686, 565 N.W.2d 572 (Ct. App. 1997); *Puetz Motor Sales, Inc. v. LIRC*, 126 Wis. 2d 168, 376 N. W 2d 372 (Ct. App. 1985).

Complainant cannot establish a prima facie case of age discrimination because the person hired, Dr. Haag, was about 15 years *older* than complainant. Complainant's claim is insufficient as a matter of law, and respondent's motion for summary judgment is granted on this claim.

III. Retaliation Claims

The same shifting burdens noted above from the *McDonnell Douglas* case apply to the retaliation claim filed under the FEA and OSHA. A prima facie case of retaliation in the

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[3] This subsection provides for a right to a hearing when "there is a dispute of material fact."

context of a hiring decision requires complainant to show that 1) he engaged in a protected activity, 2) he applied for and was at least minimally qualified for the position, 3) respondent hired someone other than complainant and 4) a causal connection exists between his participation in a protected activity and respondent's decision not to hire him. See *Stipetich v. Grosshans*, 235 Wis. 2d 69, 83, 612 N.W.2d 346 (Ct. App. 2000).

Complainant filed the following complaints with the Commission:

- *Sabol v. UW System (Eau Claire)*, 99-0144-PC-ER, filed on November 13, 1999; went to hearing for 5 days between February 21 and March 10, 2000; PDO mailed October 16, 2000; final decision mailed January 19, 2001, petition for rehearing denied March 12, 2001, and petition for judicial review filed March 30, 2001.
- *Sabol v. UW System (Oshkosh)*, 01-0079-PC-ER, filed on May 25, 2001 and is pending at the Commission.
- *Sabol v. UW System (Eau Claire)*, 01-0123-PC-ER, filed on July 16, 2001 and is pending at the Commission.

All the above are protected activities. A protected activity under the FEA includes opposing "any discriminatory practice under this subchapter" as well as making a complaint, testifying or assisting "in any proceeding under this subchapter" (see § 111.322(3), Stats.). A hearing before the Commission is a proceeding under the FEA (see §111.39(4), Stats) as is a judicial review proceeding (see §111.395, Stats.) Similarly, a public employee engages in a protected activity under OSHA by instituting "*any* action or proceeding relating to occupational safety and health matters" (see §101.055(8), Stats., emphasis added). Such language is broad and includes actions filed with the Commission as well as subsequent requests for judicial review of the Commission's decision.

The second and third elements of the prima facie case are undisputed. Complainant applied for the position, was at least minimally qualified and respondent hired someone else.

Complainant has established the final element of the prima facie case for all but the last case listed above. The last case (Case Number 01-0123-PC-ER) was filed on July 16, 2001, which was *after* the screen committee decided to give further consideration only to the top two candidates. Accordingly, complainant failed to establish the requisite causal connection in regard to this protected activity.

All screen committee members knew at the time they considered complainant's application, that he had filed Case Number 99-0144-PC-ER. They do not deny knowing that he has requested judicial review of the Commission's decision. The screen committee decided sometime prior to June 22, 2001, to recommend only the top two candidates, which effectively precluded complainant from further consideration. This decision was made about 3 months after the petition for judicial review was filed. The closeness in time is sufficient to establish the requisite causal connection in the final element of the prima facie case for FEA and OSHA retaliation.

The second case (Case Number 01-0079-PC-ER) was filed on May 25, 2001, less than a month before the screen committee decided to give further consideration only to the top two candidates. Respondent could not have known of this second complaint until after June 13, 2001, when the Commission mailed a copy of the complaint to respondent's counsel in Madison. Miller and Phillips specifically deny knowledge of the second complaint but Gallagher did not. The Commission must assume for purposes of the present motion that Gallagher knew about the second complainant shortly before complainant was eliminated from further consideration. Accordingly, complainant has established a prima facie case of regarding his filing of Case Number 01-0079-PC-ER.

Respondent contends it should prevail on the present motion because although all members of the screen committee were aware of at least some of complainant's protected activities, they have submitted affidavits saying his protected activity played no part in the hiring decision. As discussed previously (see first section of Opinion), this is a question of subjective intent typically resolved at hearing rather than in the context of a summary judgment motion.

Further, complainant raises pretext arguments that cannot be resolved based on the information provided to date by the parties. For example, he contends that the screen committee should have viewed his teaching record as superior to the record of Haag because Haag's teaching record was gained at a less prestigious college. Complainant also notes that two of the reasons given by respondent for saying he was not as qualified as the person hired are suspect. Specifically, respondent noted that there were gaps in complainant's resume and

that his prior employment was of short duration. Complainant alleges these reasons are suspect because both existed when respondent found him suitable to hire for prior positions. The inferences to be drawn from this must be "viewed in the light most favorable to the party opposing the motion." *Grams v. Boss,* 97 Wis. 2d 332, 338-39, 294 N. W 2d 473 (1980); *see also Johnson v. UW-Eau Claire,* 70 F. 3d at 477, 481 (all reasonable inferences are to be drawn in favor of the non-moving party, and all of the proffered evidence must be taken in the light most favorable to the non-moving party). When the record is viewed in this light, a reasonable fact-finder could find in complainant's favor, and summary judgment is not warranted, except to the extent the claim relates to possible retaliation with regard to the complaint filed on July 16, 2001, which was *after* the committee's decision not to select complainant..

IV Remaining Claims

The claims, which survived the motion for summary judgment, are stated below:

> Whether respondent's decision to hire someone other than complainant for the 2001-2002 teaching academic staff position in the Chemistry Unit violated the retaliation prohibitions of OSHA or the FEA based on complainant's filing of Case No. 99-0144-PC-ER and the related petition for judicial review, or on his filing of Case No. 01-0079-PC-ER.

ORDER

Respondent's motion for summary judgment is granted in part and denied in part as noted in this ruling. A conference call will be scheduled to discuss further proceedings.

Dated: November 29, 2001

STATE PERSONNEL COMMISSION

AJT/JMR:010150Crul1.3

JUDY M. ROGERS, Commissioner

ANTHONY J. THEODORE, Commissioner

Chairperson McCallum did not participate in the consideration of this case.