STATE OF WISCONSIN PERSONNEL COMMISSION

HENRY FOX,
Complainant,

v.

Chancellor, UNIVERSITY OF WISCONSIN MADISON,
Respondent.

RULING ON RESPONDENT'S MOTIONS TO DISMISS

Case No. 01-0157-PC-ER

The above-noted case is pending investigation by the Commission. On November 8, 2001, respondent filed motions to dismiss in lieu of an Answer to the complaint. Respondent moved to dismiss certain claims as moot and filed a summary judgment motion as to the remaining claim. Both parties filed written arguments.

The facts recited below are made solely to resolve the present motion. They are undisputed unless specifically noted to the contrary.

FINDINGS OF FACT

1. The issues raised in the complaint (as clarified by Commission letter dated October 3, 2001 and verified by complainant's e-mail dated October 23, 2001), are as noted below:

A. Refusal to reasonably accommodate complainant's religious requirements by:
   1. Not having alternate training sessions available to complainant at times that would enable him to observe his Sabbath.
   2. Not permitting complainant sufficient break time to allow adequate prayer time.
   3. Not providing Kosher food at a training meeting.

B. Failure to promote because of religion, disability and fair employment activities.

C. Disability discrimination in terms or conditions of employment by requiring complainant to perform glucose testing away from the work area and to wash his hands after testing.

2. Complainant began working as a student hourly employee for respondent's Survey Center on October 3, 2000.

3. Complainant voluntarily submitted his resignation on July 24, 2001, effective August 10, 2001. He thereafter filed (on August 29, 2001) the present discrimination complaint.

4. Complainant did not allege that he requested Kosher food at a training meeting and respondent refused his request. Rather, he contended that respondent should have anticipated this based on conversations he had with co-workers and staff leaders about his religious food needs. (See complaint attachment entitled "Religion," p. 1.)

5. Complainant does not allege that he requested extra break time to accommodate his religious practices and that such request was denied. Rather, he alleged that on an infrequent and inconsistent basis it was necessary to pray on his break time and he recalls staff leaders looking at him in amazement and/or laughing. (See complaint attachment entitled "Religion," p. 2.)

6. On August 7, 2000, respondent asked complainant to stop testing his blood sugar levels at the lunch table because of the fear of blood pathogens and concern that such tests caused great concern by co-workers. Respondent asked complainant to do his testing in the bathroom and ordered more alcohol swabs for complainant's use. (See complaint attachment entitled "ADA", p. 1.)

7 Two meetings were held at the Survey Center on the Jewish Sabbath, which complainant did not attend due to his religious beliefs. Complainant perceives that failure to attend those meetings negatively impacted his opportunity for "automatic" promotions. (See pp. 2-3, attachment to complaint entitled "Religion.") However, complainant does not allege that he was denied any automatic promotion.

8. Sometime in June or July 2001, complainant spoke with Kristofer Hansen, supervisor of the phone room at the Survey Center Complainant asked Hansen about a shift

leader position. Hansen told complainant he should apply for the job once it was posted but Hansen said he was unsure when it would be posted. Complainant never submitted an application for the shift leader position or for any other promotional opportunity. (See affidavits of Hansen and Coombs attached to motion and p.3, attachment to complaint entitled "Religion."). It was general knowledge by the time of this meeting that complainant planned to leave the country. Hansen said at the meeting that since complainant was planning to leave the country, then it was not worthwhile to train complainant for the position because he would work only a short period of time before leaving the position. (See p.2, complainant's brief.)

9. Complainant requests monetary damages for "pain, suffering, time, effort et. cetera." (See p. 4, attachment to complaint entitled "Religion.")

10. Complainant wants the Commission to investigate his claims for the benefit of respondent's current and future employees. He noted in the complaint (p. 4, attachment to complaint entitled "Religion") as shown below in pertinent part (emphasis in original):

> Since I no longer work there, instituting a Civil Rights policy does not affect me because I intend to be out of the country. * * * It is also the intent of these papers to ensure the NO PERSON regardless of age, sex, ability, race, religion will experience difficulties there again.

CONCLUSIONS OF LAW

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

2. Respondent has met its burden of establishing that the following allegations are moot and should be dismissed:

> A. Refusal to reasonably accommodate complainant's religious requirements by:
> 1. Not having alternate training sessions available to complainant at times that would enable him to observe his Sabbath.
> 2. Not permitting complainant sufficient break time to allow adequate prayer time.
> 3. Not providing Kosher food at a training meeting.
>
> C. Disability discrimination in terms or conditions of employment by requiring complainant to perform glucose testing away from the work area and to wash his hands after testing.

3. Respondent has met its burden of establishing entitlement to summary judgment on the allegation that complainant was not promoted because of religion, disability and fair employment activities.

OPINION

A. Motion for Summary Judgment

Respondent moves for summary judgment regarding the claim of discrimination with respect to promotions (see ¶8, Findings of Fact). The Commission may summarily decide a case when there is no genuine issue as to any material fact and the moving party is entitled to judgment as matter of law. *Balele v. Wis. Pers. Comm.*, 223 Wis.2d 739, 745-748, 589 N.W.2d 418 (Ct. App. 1998). Generally speaking, the following guidelines apply. The moving party has the burden to establish the absence of any material disputed facts based on the following principles: a) disputed facts, which would not affect the final determination, are immaterial and insufficient to defeat the motion; b) 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; and c) doubts as to the existence of a genuine issue of material fact should be resolved against the party moving for summary judgment. *See Grams v. Boss*, 97 Wis.2d 332, 338-9, 294 N.W.2d 473 (1980) and *Balele v. DOT*, 00-0044-PC-ER, 10/23/01. The non-moving party may not rest upon mere allegations, mere denials or speculation to dispute a fact properly supported by the moving party's submissions. Balele, *id.*, citing *Moulas v. PBC Prod.*, 213 Wis.2d 406, 410-11, 570 N.W.2d 739 (Ct. App. 1997). If the non-moving party has the ultimate burden of proof on the claim in question, that ultimate burden remains with that party in the context of the summary judgment motion. *Balele, id.*, citing *Transportation Ins. Co. v. Huntziger Const. Co.*, 179 Wis.2d 281, 290-92, 507 N.W.2d 136 (Ct. App. 1993)

The Commission has determined that it is appropriate to apply the above guidelines in a flexible manner, after considering at least the following five factors (*Balele, id.*, pp. 18-20):

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.* A complainant's right to an investigation should not be unfairly eroded.
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 factors to this case. The present motion does not focus on subjective intent and instead relies upon undisputed facts. Complainant is in the best position to know whether he applied for a promotion or was denied an automatic promotion. Accordingly, he would not have difficulty responding to the motion or a need to conduct discovery. The investigation of the complaint is pending. Complainant has not engaged in an extensive pattern of repetitive and/or predominately frivolous litigation.

Complainant alleged that respondent failed to promote him because of his religion, disability and fair employment activities. The initial burden of proof under the FEA is on the complainant to show a prima facie case of discrimination. 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).

Respondent contends that complainant has not established a prima facie case because he never applied for the shift leader position or for any other promotional opportunity. It is true that applying for a promotion is an element of the prima facie case in a typical case. *See*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817 (1973), where the following was used as the prima facie case:

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

The elements of a prima facie case, however, are not intended to be rigidly applied and must be flexible for adaptation to the different factual circumstances which give rise to discrimination claims. *See Collier v. Budd Co.*, 66 F.3d 886, 890 (7th Cir. 1995) and *Loyd v. Phillips Brothers, Inc.*, 25 F.3d 518, 522-23 (7th Cir. 1994). For reasons, which will become apparent from the following discussion, the Commission will not require the complainant to establish that he applied for the position as part of his prima facie case. Rather, the Commission will assume for purposes of this ruling that a prima facie case was established.

Respondent articulated a legitimate, non-discriminatory reason for not selecting complainant for the shift leader position or for any other promotional opportunity. Specifically, it is undisputed that complainant never submitted an application for a promotion. The burden shifts to complainant to attempt to show that the respondent's proffered reason is pretext.

The burden shifts to complainant to attempt to show that the respondent's proffered reason is pretext.

The only reply complainant offers to respondent's non-discriminatory reason for not promoting him is as follows (p. 2 of 11/2/01 e-mail):

> The concept of "applying" for promotion is itself a questionable process for several reasons. The UWSC seems to indicate that one of the only methods for promotion is to fill out a hardcopy application. At no time did the staff at the UWSC exclude explicitly other methods of application.

Complainant's argument is insufficient as a matter of law to establish pretext. No one withheld any information from complainant. Respondent specifically informed complainant of the need to file an application and he did not follow the established procedure.

B. Motion to Dismiss Based on Mootness

Respondent moves to dismiss the following claims contending they are moot:

A. Refusal to reasonably accommodate complainant's religious requirements by:
   1. Not having alternate training sessions available to complainant at times that would enable him to observe his Sabbath.
   2. Not permitting complainant sufficient break time to allow adequate prayer time.
   3. Not providing Kosher food at a training meeting.

C. Disability discrimination in terms or conditions of employment by requiring complainant to perform glucose testing away from the work area and to wash his hands after testing.

Respondent has the burden to show that a controversy is moot. *See Wongkit v. UW-Madison*, 97-0026-PC-ER, 10/21/98 and *Nolan v. DILHR*, 95-0163-PC-ER, citing *County of Los Angeles v Davis*, 440 U.S. 625, 99. S. Ct. 1379 (1979). An issue is moot when a determination is sought which can have no practical effect on a controversy. *Id.* When the respondent no longer employs complainant, the question of whether the controversy is moot involves reviewing the available remedies to determine if the separation precludes granting effective relief. *Burns v. UW-Madison*, 96-0038-PC-ER, 4/8/98.

Complainant requests a monetary award for "p ain, suffering, time, effort et. cetera." The Commission, however, lacks authority to provide such relief. *Miller v. DOT*, 91-0117-PC-ER, 1/8/93.

The available remedy if complainant were to prevail on these claims would be a cease and desist order which, in effect, would require respondent to 1) provide alternate training sessions, 2) permit complainant sufficient break time, 3) provide Kosher food for complainant, 4) permit complainant to perform glucose testing in a work area and 5) permit complainant not to wash his hands after glucose testing. The available remedies would provide no effective relief because complainant no longer works for respondent. Accordingly, these allegations are moot.

Complainant appears to recognize that a cease and desist order would have no impact on him, but requests the Commission to investigate his claims for the benefit of respondent's current and future employees (see ¶1 0, Findings of Fact). Assuming, *arguendo*, that the Commission has authority to go forward under these circumstances, it would not do so here. As a matter of law, the remaining issues raised in the complainant do not give rise to a potentially successful claim. With regard to items 1), 2) and 3) in the preceding paragraph, complainant never requested these "accommodat ions." Even under the most liberal reading of the complaint, there is no way that respondent's failure to have anticipated these proposed accommodations could constitute a violation of the FEA. With regard to 4) and 5), these do not amount to adverse actions. Furthermore, the justification and necessity for imposing these requirements on complainant is obvious, and there is no way they could amount to a violation of the FEA.

ORDER

Respondent's motions are granted and this case is dismissed. A copy of this decision will be sent to complainant by e-mail to ensure that he has receipt as soon as practical. Both parties will be sent a copy by postal delivery.

Dated: February 8, 2002. STATE PERSONNEL COMMISSION

JMR:010157Cru11

JUDY M. ROGERS, Commissioner

ANTHONY J. THEODORE, Commissioner

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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.)