STATE OF WISCONSIN PERSONNEL COMMISSION

CASSIE L. YELTON (JANECKE)
Complainant,

v.

Secretary, DEPARTMENT OF CORRECTIONS,

Respondent.

Case No. 98-0227-PC-ER

FINAL DECISION AND ORDER

This is a case involving alleged retaliation in violation of the WFEA (Wisconsin Fair Employment Act; Subchapter II, Chapter 111, Stats.). A hearing was held on April 27, 2000, and then, after a ruling granting complainant's request to reopen the hearing, was continued on December 22, 2000.

The issue for hearing set forth in the prehearing conference report dated May 10, 1999, is as follows:

> Whether probable cause exists to believe that respondent discriminated against complainant because of her participation in an activity protected under the FEA in regard to the:
> 1. June 1998 performance evaluation, and
> 2. August 1998 pre-disciplinary hearing about "unauthorized" leave since December 1997

FINDINGS OF FACT

1. The complainant has been employed by respondent at Ethan Allen School (EAS) in the Teacher classification at all relevant times.

2. Complainant filed a charge alleging age discrimination in violation of the Age Discrimination in Employment Act of 1967 (ADEA) against respondent with the U. S. Equal Employment Opportunities Commission (EEOC) on or about December 8, 1997

3. The EEOC sent a copy of the charge and other documents (Exhibit R-116) to the DOC Office of Legal Counsel (OLC), and they were received on December

15, 1997 The EEOC had addressed the "NOTICE OF CHARGE OF DISCRIMINATION" form to Terri Rees (paralegal) at the OLC.

4. One of the documents the EEOC sent to the OLC was a "NOTICE OF CHARGE OF DISCRIMINATION" form. On this form the EEOC had checked the box associated with the statement "No action is required on your part at this time."

5. Two other boxes associated with the statements "Please submit a statement of your position with respect to the allegation(s) contained in this charge . " and "Please respond fully to the attached request for information " were not checked. There was no request for information form attached.

6. Another attached document was a "DISMISSAL AND NOTICE OF RIGHTS" form dated December 10, 1997 Checked on this form was the box associated with the following statement:

> The Commission [EEOC] issues the following determination: Based upon the Commission's investigation, the Commission is unable to conclude that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this charge.

7. The charge of discrimination itself had "St of WI-D. O. C. (E. A. S.)"named as the employer The text of the charge did not name any specific individuals as having discriminated against complainant.

8. Because the foregoing documents plainly showed that the EEOC had dismissed the ADEA charge, and that the EEOC was not asking for a reply to the charge, Ms. Rees filed these documents and did not forward copies of the charge or associated documents to EAS, and did not otherwise inform EAS of the charge or request it to reply to the charge.

9. By a ruling dated August 8, 2000, the hearing examiner ordered respondent to provide to complainant "copies of all records in its possession related to the charge of age discrimination."

10. In response to this ruling, respondent provided copies of 507 documents. These documents were provided by both OLC and EAS staff.

11. These documents included copies of position descriptions (PD's) (Complainant's Exhibits X 18-X 22) of several Teachers at EAS, including complainant, which conceivably could have some relevance to complainant's ADEA EEOC charge.

12. No one at EAS was aware of the EEOC charge prior to the occurrence of the alleged discriminatory acts.

13. One of the alleged discriminatory/retaliatory actions in this case is a June 1998 performance evaluation. Complainant did not establish that this evaluation had, or probably would have, a negative effect on any tangible aspect of complainant's employment status.

14. The other alleged discriminatory/retaliatory action in this case involves a letter from EAS to complainant notifying her about a pre-disciplinary hearing regarding an unauthorized leave of absence. What occurred here was that the EAS Human Resources Director (HRD) sent complainant a letter dated August 17, 1998 (Respondent's Exhibit R-107), which notified her of a pre-disciplinary meeting for September 1, 1998. The reason for the pre-disciplinary proceeding was that at the time complainant was on sick leave, and the HRD Director was under the misapprehension that she had failed to provide requested medical verification. By a subsequent letter dated August 26, 1998 (Respondent's Exhibit R-108), the HRD Director canceled the pre-disciplinary proceeding, explaining that it had been determined that complainant's leave had in fact been authorized, and apologizing. That was the end of the matter

CONCLUSIONS OF LAW

1. This case is properly before the Commission on the basis of §230.45(1)(b), Stats.

2. The complainant has the burden of proof to establish that there is probable cause, §PC 1.02(16), Wis. Adm. Code, to believe that respondent discriminated against her as she alleged.

3. The complainant has failed to establish her burden of proof.

4. There is no probable cause to believe respondent discriminated against complainant as she alleged.

OPINION

Under the WFEA, the initial burden of proof is on the complainant to show a prima facie case of discrimination. If complainant meets this burden, the respondent then has the burden of articulating a non-discriminatory reason for the actions taken, which the complainant then must show was a pretext for discrimination. *McDonnell-Douglas v. Green,* 411 U. S. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973); *Texas Department of Community Affairs v. Burdine,* 450 U. S., 248, 101 S. Ct. 1089, 25 FEP Cases 113 (1981). In this case, the complainant has failed to establish two essential elements of both a prima facie case and a successful claim of discrimination.

The first element of both a prima facie case and a WFEA retaliation claim is that the complainant must establish she exercised a protected right under the law, §111.322(3), Stats., and that the employer was aware she had done this. *See, e. g., Hecht v. UWHCA,* 97-0009-PC-ER, 3/17/00. There is no dispute that complainant engaged in a protected activity when she filed a complaint of age discrimination with the EEOC on or about December 8, 1997 Respondent has asserted that its management employes at EAS (Ethan Allen School) who were responsible for the alleged acts of discrimination had no knowledge of the EEOC charge. Terri Rees of respondent's OLC testified, and it is supported by respondent's exhibits, that she was served with a copy of the EEOC notice of charge and supporting documents on December 15, 1997 She further testified that she did not send copies of the documents to EAS, or otherwise notify EAS of the charge, because the documents reflected that the charge had already been dismissed by the EEOC, and the EEOC had not checked off the box that would have called for respondent to answer the charge or to provide other information. The relevant staff at EAS testified that they were not aware of the charge at the times of the alleged acts of discrimination/retaliation (June and August 1998). Complainant tried to refute this showing through several contentions.

First, complainant produced some documents from the EEOC that have some relevance to that agency's practices regarding the dissemination of charges. Complainant's Exhibit X 1 is an affidavit from an EEOC official that reflects that her EEOC file with regard to her 1997 ADEA charge was destroyed on February 15, 2000, in accordance with EEOC's standard operating procedures. It also refers to computer records which reflect that "the charge and a request for information were sent to the respondent on the date noted." *Id.*, p. 3. Complainant relies on this document for the hypotheses either that the documents were sent directly to EAS by the EEOC, or that if sent directly to OLC, OLC must have forwarded a copy of the charge to EAS in connection with the gathering of information to answer the charge. However, there is a great deal of evidence that neither of those things occurred.

Ms. Rees testified that she received the documents from the EEOC, and that she never forwarded them, or a request for information, to EAS. The notice of charge of discrimination (Respondent's Exhibit R116) was explicitly addressed to Ms. Rees by the EEOC. The document also has checked off that "no action is required on your part at this time," and the spaces associated with a request for an answer or a request for information are *not* checked. The packet does not contain a request for information form. The fourth document in the packet is a form which shows the EEOC had already dismissed the charge, which also supports Ms. Rees' testimony. Furthermore, all of the EAS witnesses testified that they had not seen the charge prior to the alleged discriminatory actions.

Complainant also refers to certain PD's which were among the documents respondent produced in response to her discovery request. She argues that this shows EAS produced these documents in response to OLC's request for information regarding her ADEA charge. She relies on the fact that, as a matter of routine, individual employees' personnel files are maintained in the employing institutions, not in Madison, so it can be inferred that OLC obtained these documents from EAS. This contention ignores the fact that the record does not establish that all the PD's were in OLC's possession prior to DOC responding to the discovery request. Ms. Rees testified that some

of the responsive documents were provided by her office, and some were provided by EAS. The documents were produced sometime after August 8, 2000. On this record, the existence of these PD's in the documents produced by respondent does not provide an inference that OLC notified EAS of complainant's charge, and then EAS provided the PD's in response to the charge.

Complainant also relies on certain documents associated with a later complaint she filed with the EEOC in 1998 as evidence that in 1997 the EEOC went through the same process of interviewing her, etc., which would have made it clear that her charge was against certain specific individuals at EAS, not just DOC in general, and it is likely that once the EEOC had gathered this information, it would have sent the documents to EAS as the employer. This possibility[1] can not outweigh the fact that the notice of charge was explicitly addressed to Ms. Rees at the OLC, and all of the relevant witnesses testified that these documents were never sent to EAS.

In conclusion on this issue, the evidence against the existence of this element is much stronger than the countervailing evidence, and complainant has not satisfied her burden even under the probable cause standard[2], which is less stringent than the "pre-

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[1] One of the complainant's exhibits (X 1) is a letter from an EEOC official which includes the statement "EEOC would notify the Ethan Allen School if you filed a charge against a supervisor because in all likelihood, the school would be responsible for defending the charge." Respondent's objection to this document on hearsay grounds was sustained. Also, the letter states "if you filed a charge against a supervisor" EAS would be notified, and the charge itself (Respondent's Exhibit R116, p. 2) does not mention any specific supervisors, by name or otherwise. The charge refers to the employer as "St. of WI - D. O. C. (E. A. S.)"

[2] Section 1.02(16), Wis. Adm. Code, defines "probable cause" as "a reasonable ground for belief, supported by facts and circumstances strong enough in themselves to warrant a prudent person to believe that a violation probably has been or is being committed." In *McLester v. Personnel Commission*, Ct. App. 84-1715, March 12, 1985 (unpublished), the court held:

> The commission is entitled to review the credibility of witnesses and the weight of the evidence in determining probable cause. Probable cause exists when there is [sic] reasonable grounds for belief supported by facts and circumstances strong enough in themselves to warrant a prudent person to believe that discrimination occurred. The commission is not limited at the probable cause hearing to merely examining whether the [complainant] has presented evidence which, if believed, would be sufficient to support his claim. Rather, the test is whether the commission believes, upon its examination of

ponderance of the evidence" standard which would apply with regard to a hearing on the merits.

The complainant also has failed to establish another element of both a prima facie case and a successful charge of WFEA retaliation discrimination. An alleged act of discrimination must amount to an adverse employment action. *Klein v. DATCP,* 95-0014-PC-ER, 5/21/97 A performance evaluation, standing alone, does not amount to an adverse employment action. *Lutze v. DOT,* 97-0191-PC-ER, 7/28/99, citing *Smart v. Ball State University,* 89 F. 3d 437, 71 FEP Cases 495 (7th Cir. 1996); *Bragg v. Navistar International,* 78 FEP Cases 1479 (7th Cir. 1998). It has to occur under circumstances which result in it having a concrete, tangible effect on complainant's employment status, such as having an adverse effect on the employe's merit pay. *Id.* Complainant in this case has not shown such an effect.

With regard to the letter scheduling complainant for a pre-disciplinary hearing because of allegedly being on unauthorized sick leave, the record establishes that this was sent out in error, and when this was ascertained, the EAS HRU Director set the matter straight by sending out a letter canceling the hearing and offering an apology. Clearly this was not an adverse employment action. *See generally, Klein, id.*(discussing whether a decision to investigate could be viewed as an adverse employment action).

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the evidence and its view of the credibility of the witnesses, that discrimination probably has occurred. *Id.*, pp. 2-3. (citation omitted)

ORDER

The Commission having concluded there is no probable cause to believe respondent discriminated against complainant as she alleged, this case is dismissed.

Dated: July 26, 2001.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

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JUDY M. ROGERS, 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 af-

fidavit 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.

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