

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 *
 ELIAS SCHWARTZ, *
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 Appellant, *
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 v. *
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 UNIVERSITY OF WISCONSIN, *
 *
 Respondent. *
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 Case No. 78-PC-ER-20A, B. *
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DECISION
 AND
 ORDER

This case is before the Commission on a complaint filed on May 5, 1978, in which complainant charges that respondent discriminated against him on the basis of age in violation of Sections 111.31 through 111.37 Wis. Stats. On March 30, 1979, Equal Rights Officer Robert Gregg made an Initial Determination of no probable cause with respect to the complaint against the University of Wisconsin - Milwaukee, and made an Initial Determination of probable cause with respect to the complaint against the University of Wisconsin - Madison. Before any action had been taken by the Commission, respondent, by letter of April 14, 1979, brought to the Commission's attention an action filed in October , 1978, and still pending before the United States District Court for the District of Rhode Island, involving the same subject matter as this complaint. Respondent requests that the Commission hold all further proceedings in abeyance pursuant to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. Section 633(a), as amended. Complainant replies that the language of Section 633(a) is ambiguous and only provides that the outcome in a federal action will prevail where there is a conflicting

outcome in a state proceeding.

OPINION

The ADEA, 29 U.S.C. §633(a), as amended, provides:

"Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this chapter such action shall supercede any State action."

This subsection has not been a direct subject of litigation. It has been mentioned in decisions concerning the meaning and impact of 29 U.S.C. §633(b), specifically the question of whether prior resort to State proceedings is a jurisdictional requirement of the ADEA. Sections 633(a) and (b), titled "Federal-State Relations," do not state a jurisdictional requirement, but rather express a preferred ordering of federal - state relations in age discrimination cases. Where a proceeding is initiated before a state agency, §633(b) gives the state 60 days to act on the complaint, preferably to settle it, before federal proceedings can be commenced. Once federal proceedings are properly amended, §633(a) provides that the state proceedings be held in abeyance.

The purpose of this scheme is to favor state agency settlement of age discrimination cases by giving the state agency 60 days to act when a complainant chooses to use state processes for redress. Where a state agency has not settled within 60 days, the federal system becomes the preferred forum. See Holliday v. Ketchum, Macleod & Grove, Inc. 584 F. 2d 1221 (C.A. 3 1978), where the court interpreted §633(b) to not require resort to a state agency before filing of a federal action,

and stated that §633(a) was a "highly relevant" factor in its interpretation. The reasoning concluded that §633(b) did not contain a mandatory first resort to a state agency because the operation of §633(a) prevented insistence on exhaustion of state remedies and even the conclusion of state proceedings, since they were necessarily superseded after 60 days.

The most direct statement of the intended impact of §633(a) is in the House reports on the ADEA. The intended effect of §633(a) was unambiguously stated in 1967 and again in 1978. House Report No. 805 at page 2219 of 1967 U.S. Code, Congressional and Administrative News, states that §633(a) means that "commencement of an action under this act [ADEA] shall be a stay on any state action previously commenced." Senate Report No. 95-493, which explained the 1978 Amendments to ADEA, specifically stated, with reference to §633(a):

States are also free to enforce their laws at the same time that the federal government is enforcing the ADEA. However, there are two exceptions to simultaneous enforcement, one in Section 14(a) [§633(a)] the other in §14(b) [§633(b)].

* * *

The manner in which a lawsuit under the ADEA would supercede a lawsuit under a state age discrimination law is explained in the committee reports in 1967. [i]f a lawsuit under a state age discrimination law is pending at the time of a suit under the ADEA is filed, the state lawsuit would have to be immediately held in abeyance, pending a final resolution of the federal litigation or a determination that the federal and state actions are not coterminous in nature." 1978 U.S. Code Congressional and Administrative News, p. 509.

CONCLUSION OF LAW

29 U.S.C. §633(a), as amended, the Age Discrimination in Employment Act, requires a stay of further Commission proceedings in this case, in

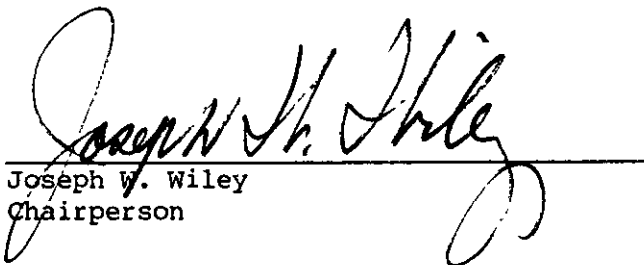
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deferrence to the action involving the same subject matter now pending
in the United States District Court for the District of Rhode Island.

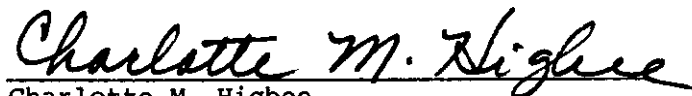
ORDER

Further proceedings in this case are hereby held in abeyance until
resolution of the federal litigation in C.A. 78-0571 before the
United States District Court for the District of Rhode Island.

Dated: Oct. 2, 1979. STATE PERSONNEL COMMISSION



Joseph W. Wiley
Chairperson



Charlotte M. Higbee
Commissioner

AR:jmg

9/8/79