

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 *
 WILLIAM L. RAY, *
 *
 Complainant, *
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 v. *
 *
 Chancellor, UNIVERSITY OF *
 WISCONSIN - LA CROSSE, *
 *
 Respondent. *
 *
 Case No. 82-PC-ER-13 *
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INTERIM
RULING

The complainant has requested the Commission to issue a ruling, prior to hearing, on the question of the extent of the remedies that are available in this matter. Both parties have filed briefs.

It appears to be undisputed that on April 20, 1981, the complainant suffered a back injury while employed as a Power Plant Operator 3 (PP03) at UW-La Crosse. As a consequence of the injury, the complainant was paid worker's compensation benefits from the date of injury until February 15, 1982. At that time, he returned to work at the University as a Building Maintenance Helper 2, (BMH-2) with a lower pay rate than his PPO 3 position. Later in 1982, the complainant was returned to his former PPO 3 position.

Complainant alleges that on June 22, 1981, he should have been returned to his original position as a PPO 3 and that the failure to do so constituted discrimination based on handicap.

During the period between April 20, 1981 and February 15, 1982, the amounts received by the complainant as worker's compensation benefits were supplemented by paid sick leave. From the date of the alleged

discrimination until he returned to work as a BMH 2, the complainant's sick leave accumulation was reduced by approximately 425 hours in order to generate supplemental payments of approximately \$3,500. The complainant apparently also did not earn vacation time during this period.

The complainant has asked the Commission to issue a ruling describing the remedy or remedies that might be awarded to him if he successfully shows that the respondent discriminated against him on the basis of handicap in not returning him to his PPO 3 position on June 22, 1981.

Pursuant to §111.39(4)(c), Wis Stats.:

If, after hearing, the examiner finds that the respondent has engaged in discrimination ... the examiner shall ... order such action by the respondent as will effectuate the purpose of this subchapter, with or without back pay.

In the recent case of Anderson v. Labor & Industry Rev. Comm., 111 Wis 2d 245 (1983), the Wisconsin Supreme Court held that prejudgment interest should be part of a back pay award in an employment discrimination case and stated:

Our holding today, like the federal decisions, is based on the rationale that the person discriminated against should be "made whole". Moreover, a stated policy behind the Act is to discourage discriminatory practices in the employment area. Section 111.31(3), Stats. 1973. We agree with Anderson's argument that an employer who discriminates and delays compliance with orders awarding back pay should not be rewarded for its delay by escaping the application of the basic concept of the "time value of money."

In the present case, the complainant argues that, assuming he establishes that discrimination occurred, he should be entitled to restoration "either to his account or in cash payment the amount of sick leave benefits and vacation credits lost by him as a result of being wrongfully paid worker's compensation payments" instead of being employed as a PPO 3.

Returning used sick leave hours and awarding vacation days that would have been earned absent discrimination would appear to be consistent with the concept of making the employe whole when and if a finding of discrimination is made. However, it would clearly go beyond making the complainant whole if he were awarded a cash payment in lieu of any sick days lost.

If the complainant had been restored to his PPO 3 on June 22, 1981, he would have earned his regular salary. If he had become ill between June 22, 1981 and February 15, 1982, he would have continued to earn his regular salary, but there would have been a reduction in his sick leave account. He would not have earned his regular salary plus a cash payment for the reduction in his sick leave account. Therefore, the only remedies that could be granted to the complainant would be restoration of the approximately 425 hours of sick leave used for supplemental payments and restoration of the vacation hours (as well as any sick leave hours) that he would have earned absent any discrimination.

The respondent raised several arguments against the awarding of a cash payment to the complainant as a consequence of the reduction in his sick leave accumulation. Respondent argued that the complainant suffered no loss of income as a result of its June 22, 1981 decision and that, in fact, he was placed in a better financial position by being paid worker's compensation benefits which are not subject to federal income tax. Respondent also argued that there is an inherent inconsistency between the complainant's receipt of worker's compensation benefits and maintaining the instant discrimination proceeding:

If Complainant was not temporarily totally disabled during the period in question, he should not have received worker's compensation benefits. If he was temporarily totally disabled, he could not have adequately undertaken the job-related responsibilities of his PPO 3 employment, and was therefore not discriminated against on the basis of handicap when he was not returned to that job. See, §111.34(2)(a), Stats. Without regard to which of these contradictory claims is true, there is an apparent injustice in allowing the complainant to proceed and claim damages on both of them.

* * *

Here, the complainant has received, from the respondent, the full relief to which he is entitled under worker's compensation law for a temporary total disability during the period between the date of his back injury and February 15, 1982.

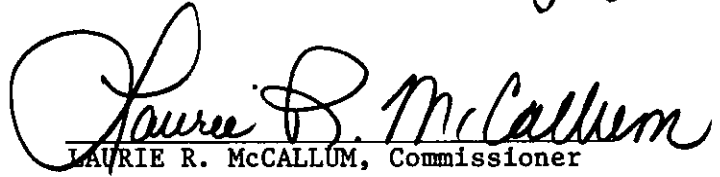
The respondent then goes on to state that "the [sick leave] credit might be restored to the complainant's account, but no cash payment would be proper," except if complainant were ill and therefore qualified to use the restored leave.

Because the Commission has found that a cash award would be inappropriate in this case, it is unnecessary to consider at this time those specific arguments raised by the respondents. If the parties proceed to a hearing in this matter, the Commission will be in a position to review any arguments premised on equitable grounds that respondent may raise — including whether the complainant has already been overpaid for the period in which respondent is alleged to have discriminated against him.

Therefore, the Commission rules that, if discrimination is established, the only remedies that may be available to the complainant in this case are the restoration of the approximately 425 hours of sick leave used for supplemental payments and restoration of the vacation hours (and sick leave) that he would have earned absent any discrimination.

Dated: July 7, 1983 STATE PERSONNEL COMMISSION


DONALD R. MURPHY, Chairperson


LAURIE R. McCALLUM, Commissioner

KMS:jmf


DENNIS P. MCGILLIGAN, Commissioner

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