

STATE OF WISCONSIN

PERSONNEL COMMISSION

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EDWARD A. AMES,
 Complainant,

v.

Chancellor, UNIVERSITY OF
 WISCONSIN - MILWAUKEE,
 Respondent.

Case Nos. 86-0123-PC-ER
 86-0124-PC-ER

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RULING
 ON
 PETITION FOR
 REHEARING

By way of background, this matter involves 2 charges of discrimination under the Wisconsin Fair Employment Act. These charges were consolidated for hearing. In a letter accompanying a post-hearing brief filed with the examiner on April 19, 1988, counsel for complainant advised as follows:

"By this letter, the complainant is hereby notifying the Commission and the respondent that he is withdrawing the entire complaint in Case No. 86-0124-PC-ER, as well as the sexual orientation claim in Case No. 86-0123-PC-ER...."

On May 6, 1988, the Commission entered the following order:

"Pursuant to the request of the complainant, the sexual orientation claim in the above case, Case No. 86-0123-PC-ER, is dismissed, and the discrimination claim based on arrest/conviction remains open. Pursuant to the request of the complainant, the above case, Case No. 86-0124-PC-ER, is dismissed in its entirety."

On May 9, 1988, the Commission received a letter dated May 6, 1988, from respondent's counsel, objecting to the dismissal that had been sought by complainant. The Commission inquired by letter dated May 11, 1988, whether respondent wanted its May 6, 1988, letter treated as a petition for rehearing. On May 16, 1988, the Commission received a letter dated May 11, 1988, from respondent's counsel, requesting that the Commission reconsider

its May 6, 1988, order of dismissal. On May 17, 1988, the Commission received a letter dated May 13, 1988, from respondent's counsel which requested that her aforesaid letter May 6, 1988, letter be treated as a petition for rehearing. Finally, on May 31, 1988, the Commission received a letter dated May 26, 1988, from complainant's counsel, setting forth his point of view on respondent's objections to dismissal.

Section PC 1.11, Wis. Adm. Code, provides: "Subject to the approval of the Commission, a petitioner may withdraw a case at any time prior to a final decision by the commission...." Since at the time the Commission entered its dismissal order on May 6, 1988, no final decision had been rendered, the Commission had the authority to act as it did. However, the rule provides no guidance as to the standards or criteria involved in ruling on a request for voluntary dismissal.

The only Commission case that addresses a similar issue is Pfeifer v. DILHR, Nos. 86-0201-PC, 86-0149-PC-ER (12/17/87), where the Commission denied respondent's request to withdraw its objection to subject matter jurisdiction after an examiner had conducted an evidentiary hearing on the objection and had issued a proposed decision overruling the objection. That case obviously is distinguishable, not only because a proposed decision had been issued, but also because it is axiomatic that questions concerning subject matter jurisdiction are non-waivable and can be raised at any time. Therefore, the issue of subject matter jurisdiction presumably could not have been removed simply by the withdrawal of the objection.

There is not a great deal of other authority to bring to bear on this issue. There are a number of court decisions dealing with voluntary dismissal questions. However, these must be approached with care, because

of the differences between judicial and administrative proceedings, and because either explicit or implicit in most of these cases is the premise that the voluntary dismissal was sought to be entered without prejudice so that the matter involved in the suit could be relitigated. That factor gives rise to different implications than exist here, where the May 6, 1988, order of dismissal was in effect with prejudice pursuant to §PC 1.12, Wis. Adm. Code: "Any dismissal order issued by the commission shall be with prejudice unless otherwise expressly stated...." For example, in Russell v. Johnson, 14 Wis. 2d 406, 413, 111 N.W. 2d 193 (1961), the Court stated:

"A plaintiff does not have an absolute right to discontinue his action. Leave to discontinue may be denied in the discretion of the court if the rights of the defendants, third parties, or the public will be substantially prejudiced by discontinuance. The trial court has the authority to compel a plaintiff to proceed with trial or take a dismissal upon the merits...." (emphasis added) (footnotes omitted)

There are certain situations where even a dismissal with prejudice can result in an unfair impact on the rights of a defendant. For example, a defendant may have filed a counterclaim that possibly could not be litigated if the underlying cause of action were to be dismissed. However, in most cases, a voluntary dismissal with prejudice will leave the defendant in the same position as a final decision on the merits in defendant's favor.

In the instant case, respondent contends as follows:

Respondent's letter dated May 6, 1988:

"We object to the Complainant's request to withdraw, at this late date, Case No. 86-0124-PC-ER and the sexual orientation claim contained in Case No. 86-0123-PC-ER. We ask that the Personnel Commission make findings of no probable cause and frivolous claims with regard to these matters. If it is within the power of the Commission to order the payment of costs and attorney's fees to the Respondent, we do so request. A finding of frivolous complaints will perhaps deter others in the future from filing frivolous complaints and from using these hearings as and instead of the discovery process.

It appears that the totally baseless claims are being withdrawn at this late stage as a tactic so as not to detract from the remaining claims, and as an attempt to make them appear stronger than they are. The persons unjustly accused of discrimination, however, are entitled to a finding that they did not discriminate after all they have been subjected to, such as having to defend their legitimate actions at a hearing. This untimely request for withdrawal shows a lack of good faith and abuse of the system. The lack of merit of these claims should be considered in evaluating the merits of the others. Therefore, we object to the withdrawal of the complaints and ask the Commission to deny the Complainant's request."

Complainant makes the following argument:

First, the respondent neither cites nor has any legal authority for its request. No statute or administrative rule would authorize the Commission to deny a voluntary withdrawal of a claim by a complainant, much less allow it to consider a claim that the action was brought frivolously.

Second, even if there were legal authority for the respondent's petition, the grounds for the petition lack merit. The Commission's Equal Rights Investigator, Barbara Bastien, found in her Initial Determination of October 30, 1987 in these cases that, "Complainant has established a prima facie case for all three positions." Given that fact, the complainant was entitled to test the respondent's witnesses for pretext in an evidentiary hearing. Contrary to the respondent's suggestion, the complainant was under no obligation to elicit testimony from the respondent's agents through discovery, particularly where, as in the instant case, the complainant is indigent and therefore financially incapable of affording a deposition.

The complainant was entitled to assume that the respondent was engaging in a pattern of discriminatory conduct from the fact that he was repeatedly turned down by the respondent for positions for which he was qualified. This pattern was established as to the sexual orientation and arrest record claims in Case No. 85-113-PC-ER, and as to the arrest record claim in Case No. 86-0123-PC-ER. He was entitled to challenge the basis for the no-hire decision in Case No. 86-0124-PC-ER to determine if the pattern of discrimination established in the other two cases could be established in the third case through an evidentiary hearing.

Furthermore, the respondent has demonstrated no substantial harm that has been suffered by anyone by the withdrawal of the claims. The testimony of the witnesses for Case No. 86-0123-PC-ER would have been needed for the arrest record claim anyway. The testimony of the one witness for Case No. 86-0124-PC-ER lasted approximately 15 minutes. Letter dated May 26, 1988.

Dealing first with the parties' initial contentions, the Commission, as noted above, has the authority pursuant to §PC 1.11, Wis. Adm. Code, to

exercise its discretion to grant or deny a request for voluntary dismissal. As to respondent's request for a finding of a frivolous claim, there is no statutory or administrative code provision which deals with frivolous claims or charges under the FEA. While there would be nothing to prevent the Commission from expressing the opinion that a claim were frivolous, this would not have any legal significance since there is no way under the statutes or administrative code that the complainant in a case of this nature could be taxed costs or otherwise penalized for having pursued a claim deemed frivolous. Tatum v. LIRC, 132 Wis. 2d 411 (Ct. of Appeals, 1986)

Turning to policy considerations, each party's position has positive policy implications. If the evidence does not support a charge of discrimination, respondent has a legitimate interest in having its management vindicated, particularly after putting in the time and effort to prepare for and go through the hearing. On the other hand, it is beneficial, from the standpoint of administrative efficiency and for the purpose of saving time and resources, to have a charge withdrawn as soon as it is apparent that there is insufficient evidence to support it. Even if this occurs only after the evidence is presented at the hearing, dismissal then saves the parties the time and effort needed to brief the issue or issues withdrawn, and the Commission the time and effort needed to analyze those issues.

While the respondent has a legitimate interest in vindication, it is difficult to see how this interest is served better by a favorable decision by the Commission rather than by a voluntary withdrawal with prejudice by complainant after the hearing revealed a failure of evidence. Not only does the dismissal extinguish any possible FEA liability by respondent, it

amounts in effect to an admission by complainant that the dismissed claims were not sustained by the evidence.

Therefore, the Commission must conclude that its May 6, 1988, order of dismissal was not affected by an error of fact or law, and respondent's petition for rehearing should be denied.

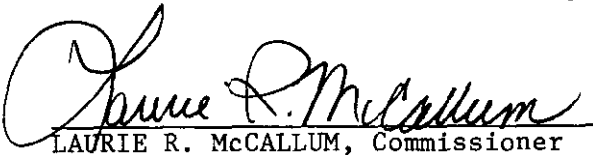
ORDER

Respondent's petition for rehearing with regard to the Commission's May 6, 1988, order of dismissal, is denied.

Dated: June 7, 1988 STATE PERSONNEL COMMISSION

AJT:rcr
DPM/1


DONALD R. MURPHY, Commissioner


LAURIE R. McCALLUM, Commissioner

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