

WILLIAM C. RUFF,

Complainant,

v.

Commissioner, OFFICE OF
COMMISSIONER OF SECURITIES

Respondent.

Case No. 87-0005-PC-ER

RULING ON
PETITIONS
FOR
REHEARING

The Commission issued a final decision and order on the merits of the above matter on May 16, 1990, concluded that the respondent did not retaliate against the complainant in violation of the Fair Employment Act and dismissed the complaint. On May 24, 1990, the respondent requested the Commission "reconsider its decision insofar as the Commission finds that Mr. Payne's decision to transfer Mr. Ruff was in part the result of a retaliatory motive." On June 5, 1990, the complainant filed a petition for rehearing, alleging that the Commission "misconstrued and misapplied the causation test set forth in the Supreme Court's decision in Price Waterhouse v. Hopkins."

Respondent's Petition

Respondent contends that the Commission's decision is internally inconsistent in that Finding of Fact 16 reflects a conclusion that Mr. Payne told the complainant words to the effect that, "Your life will be miserable here," while footnote 3 states that "Mr. Payne did not make the statement." The word "not" in the latter sentence was a typographical error. However, as noted below, the Commission now reaches a different conclusion as to whether or not the "smoking gun" statement attributed by the complainant to Mr. Payne was actually made and modifies Finding 16, accordingly.

The respondent further contends that in his proposed decision, the hearing examiner "in effect decided that Mr. Payne did not make the statement attributed to him by Mr. Ruff." A review of the proposed decision supports the Commission's view that the hearing examiner never made a finding as to

whether Mr. Payne actually made such a statement to the complainant¹.
Finding 17 in the proposed decision reads:

17. Complainant and Mr. Payne met again on January 5, 198[7], to discuss the transfer. Complainant again indicated that he didn't want to transfer and asked that the decision be reconsidered. Complainant said the action was retaliatory and he would appeal it if he could. Mr. Payne indicated complainant should go ahead. Complainant testified and produced his personal notes of the meeting (Complainant's Exhibit #44) that Mr. Payne said words to the effect "Your life will be miserable here." Mr. Payne did not recall saying it.

The proposed decision also included the following paragraph in the Discussion section:

Complainant testified that during the meeting on January 5, 1987, to discuss the transfer, Mr. Payne said something like "Life will be miserable for you here." Mr. Payne does not recall saying it. Based on the record, the decision to transfer complainant was made on December 16, 1986. Consequently, the decision on the transfer action was at least initially made by Mr. Payne before the statement and not after. Additionally, there is nothing in the record (other than the involuntary transfer) which would give any indication that complainant's "life has been made miserable" in the agency. While Mr. Payne is no longer there, the conduct of complainant and respondent certainly showed there was a difference of opinion, but there is nothing to suggest any open hostility or enmity.

The Commission's final decision specifically concluded that on January 5, 1987, Mr. Payne told the complainant, "Your life will be miserable here," or words to that effect. After further scrutiny of the record, the Commission finds that this conclusion was in error. The tape recording of the hearing reflects the following testimony by Mr. Payne regarding the January 5th meeting:

Q (Mr. Rice) OK. And then as he [complainant] reports it, after having suggested that it was retaliation and your having said "no", and after he said he wouldn't do it voluntarily, or that he wouldn't sign the transfer,

¹Because the Commission's decision was not at variance with the proposed decision on this point, but simply reached a conclusion where none was reached by the examiner, it was not necessary for the Commission to explain the basis for its conclusion.

and he'd appeal if he could and you said "go ahead", that you then told him that you would make his life miserable in the agency. Is that -- is that -- jibe with your memory?

A No, I wouldn't do that -- that would be retaliation. I mean no -- no, I don't ever remember telling him that.

Q Would it have been your practice as a manager of the Office of Commissioner of Securities to have told somebody that your action was non-retaliatory and that he had rights to appeal and he could exercise them, and then, the next breath say that you were going to make his life miserable in the agency?

A No, I wouldn't. First of all, I guess I am smart enough not to say that, and second, it would be just inconsistent with the earlier statements to say it's not retaliatory, but I will make your life miserable. That doesn't make sense to me.²

Mr. Payne's testimony amounts to a denial of the "smoking gun" statement attributed to him by the complainant. Elsewhere in the decision, the Commission found Mr. Payne credible and concluded that Mr. Payne had actually relied on those reasons listed at hearing as a basis for the transfer. In light of Mr. Payne's denial of the statement in question, the credibility of Mr. Payne's other testimony and the fact that the complainant had not offered any evidence of the alleged statement during the probable cause hearing, the Commission find's Mr. Payne's testimony on this point to be more credible. Therefore, Finding of Fact 16 is modified to read:

16. Complainant and Mr. Payne met again on January 5, 1987, to discuss the transfer. Complainant again indicated that he didn't want to transfer and asked that the decision be reconsidered. Complainant said the action was retaliatory and he would appeal it if he could. Mr. Payne indicated complainant should go ahead.

The Discussion section of the Commission's May 16th decision must also be modified to reflect the revised finding of fact. Therefore, that portion of the Discussion section, commencing on page 22, under the heading "Mr. Payne's Comment" is replaced with the following language:

²This transcription is from approximately the mid-point of tape 5.

Complainant testified that during the meeting on January 5, 1987, to discuss the transfer, Mr. Payne said something like, "Life will be miserable for you here."³ Mr. Payne denied having made such a statement. Elsewhere in the decision, the Commission found Mr. Payne credible and concluded that Mr. Payne had actually relied on those reasons listed at hearing as a basis for the transfer. In light of Mr. Payne's denial of the statement in question, the credibility of Mr. Payne's other testimony and the fact that the complainant had not offered any evidence of the alleged statement during the probable cause hearing, the Commission finds Mr. Payne's testimony on this point to be more credible.

Respondent's decision to transfer the complainant was based on legitimate objectives associated with the functioning of the Office of the Commissioner of Securities, rather than in retaliation for the complainant's prior complaint of discrimination. Respondent was motivated by its evaluation of how best to meet the agency's staffing needs. The respondent was confronted with two unexpected vacancies in DSFIR. Mr. Payne needed to transfer an experienced employe to limit the number of new hires for that division. The decision was influenced by the fact that Ms. Wilson was viewed by Mr. Payne as the best performer in DLR and she was about to return from a maternity leave on only a part-time basis. In addition, Mr. Hojnacki had just recently been appointed administrator of DLR. Of the pool of four examiners available for transfer, complainant was the most appropriate choice. Complainant had more experience in performing examiner functions than Mr. Reed or Ms. Kleaver. Complainant was available on a full-time basis while Ms. Wilson was returning only on a part-time basis. Finally, because Mr. Dorman was a recognized enforcement expert, Mr. Payne needed to retain him in the Enforcement Division.

Complainant raised a number of issues in his objections and oral arguments in which he refers to the findings contained in the probable cause decision. In his objections to the proposed decision in this matter, the complainant writes:

In this decision on [probable] cause, the hearing officer found in my favor because, as stated: "a number of the reasons assigned by management fit its decision to choose the complainant for transfer turned out to be contradicted by the facts brought out at a hearing ..." Thus there was probable cause that retaliation occurred because respondent, and

³ The proposed decision describes each party's testimony concerning this statement, but does not make any actual finding as to whether Mr. Payne indeed made the statement. In consultation with the examiner, the Commission now finds Mr. Payne did not make the statement.

the reasons for the transfer, were found to be not credible.

At the probable cause stage of a Fair Employment Act proceeding, the complainant has a lesser burden than at the subsequent stage where the claim of retaliation is reviewed, as here, on the issue of whether illegal retaliation occurred. Winters v. DOT, 84-0003-, 0199-PC-ER, 9/4/86. Because a finding of probable cause is premised on a less demanding degree of proof, it does not translate into a finding of illegal retaliation at a hearing on the merits. In order to find that a respondent has illegally retaliated or discriminated against a complainant, the complainant must present a preponderance of evidence to support the allegation. This, rather than probable cause, is the standard which complainant must meet.

During oral argument in this matter, complainant identified a number of discrepancies and inconsistencies which repeated certain contentions made by the complainant at the hearing. In all of these arguments, there is the allegation that Mr. Payne lied by either misrepresenting the facts or making up reasons after the fact. These allegations are the basis for the complainant's contention that Mr. Payne was not credible. In making its credibility determinations, the Commission considered Mr. Payne's demeanor during the hearing and his knowledge of or reasonable belief as to the relevant facts. The Commission also considered the extent to which the reasons offered by Mr. Payne were reasonable and consistent with the rest of the record. Even though Mr. Payne may have been mistaken about certain of the facts which supported his reasons for transferring the complainant, the Commission finds that Mr. Payne's testimony was credible.

Complainant's Petition

The complainant's petition for rehearing raises arguments that are substantially similar to those already considered by the Commission in reaching its May 16th final decision. However, the complainant does point out a typographical error in finding of fact 15. The second sentence of that finding is corrected to read:

In addition, complainant felt that the position in DSFIR involved less complex and varied duties, no travel and more contact with lower level professionals.


Given that the Commission now finds there was no retaliatory motivation in the respondent's decision, complainant's statement that Commission

misconstrued and misapplied the Supreme Court's decision in Price Waterhouse v. Hopkins, 104 L Ed 2d 268, 5/1/89, is inapposite.

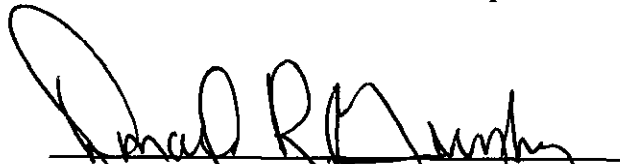
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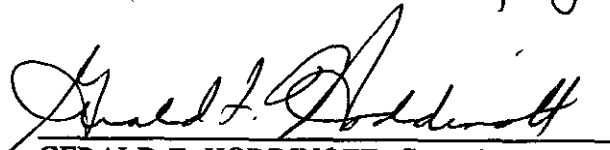
The petitions for rehearing filed on May 24 and June 5, 1990, by the respondent and the complainant are granted to the extent that they show that the Commission's May 16th final decision included errors of fact in Findings of Fact 15 and 16 and are otherwise denied. The May 16th final decision is modified as set forth in the body of this ruling and the complaint is dismissed.

Dated: June 25, 1990 STATE PERSONNEL COMMISSION


LAURIE R. MCCALLUM, Chairperson

KMS:kms


DONALD R. MURPHY, Commissioner


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