

STATE OF WISCONSIN

PERSONNEL COMMISSION

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ROD DUVNJAK and JAMES STUDENEC,
 Complainants,

v.

Secretary, DEPARTMENT OF HEALTH
 AND SOCIAL SERVICES,
 Respondent.

Case Nos. 88-0164-PC-ER
 88-0168-PC-ER

* * * * *

INTERIM
DECISION
AND
ORDER

These are complaints of discrimination on the basis of sex filed by complainant Duvnjak on October 17, 1988, and by complainant Studenec on October 24, 1988. Complainants allege that the difference in the officer/inmate ratio between the Marshall Sherrer Correctional Center which is a male institution and the Women's Correctional Center which is a female institution creates different working conditions for the correctional officers employed at these institutions and results in discrimination on the basis of sex

On June 8, 1989, respondent filed a motion to dismiss these complaints based on an alleged lack of standing and on an alleged failure to state a claim for relief.

The following findings of fact are based on documents and other information supplied by the parties, appear to be undisputed, and are made only for the purpose of deciding the instant motion:

1. Complainants are employed by respondent as correctional officers at the Marshall Sherrer Correctional Center (MSCC), a male correctional

institution in Milwaukee, Wisconsin. As of October, 1988, there were 7 correctional officers employed at MSCC and the institution had 44 inmates.

2. The Women's Correctional Center (WCC) is a female correctional institution in Milwaukee, Wisconsin. As of October, 1988, there were 10 correctional officers employed at WCC and the institution had 44 inmates.

3. As of October, 1988, the WCC had 7 female and 3 male officers.

4. As of October, 1988, the MSCC had 6 male and 1 female officer.

5. Complainants have not applied for appointment to a correctional officer position at the WCC.

Complainants allege the following:

1. Certain positions at the WCC may be occupied only by female correctional officers because sex is considered to be a bona fide occupational qualification (BFOQ) for these positions.

2. Aside from the positions reserved for females as a result of BFOQ's, respondent prefers to hire females for correctional officer positions at the WCC.

3. The lower the officer/inmate ratio, the greater the safety and custody risk for the inmates, the officers, and the community.

Respondents allege the following:

1. The officer/inmate ratio at the MSCC is better than that at 8 other correctional centers.

2. The officer/inmate ratio at the WCC is not as good as that at some male correctional centers.

Standing

Although the primary emphasis of the subject complaints relates to the disparity in working conditions between the MSCC and the WCC, it also appears that complainants are alleging that respondent's hiring practices at the WCC (aside from those positions involving BFOQ's), involve discrimination on the basis of sex. Complainants do not have standing to advance this allegation since they have never applied for appointment to a position at the WCC and, as a result, have never been "injured in fact" by such allegedly discriminatory hiring practices. [See Wis. Environmental Decade v. PSC, 69 Wis.2d 1, 230 N.W.2d 243 (1975)].

Complainants would, however, be "injured in fact" by a disparity in working conditions between the institution in which they work and another institution and, as a result, do have standing to advance that aspect of their complaints.

Failure to State a Claim for Relief

In considering whether to grant or deny a motion to dismiss for failure to state a claim on which relief may be granted, the underlying complaint must be read liberally in favor of the complainant and the motion will be granted only if it appears to certainty that no relief can be granted. [State v. American TV and Appliance of Madison, Inc., 140 Wis.2d 353 (1987)]. In the instant case, complainants assert that, as a result of the use of gender as a BFOQ for certain correctional officer positions, females have a better opportunity to be hired for correctional officer positions at the WCC than males. Complainants also assert that working conditions are better at the WCC than at the MSCC, where they are employed, as a result of a higher officer/inmate

ratio at the WCC. If the Commission were to accept complainants' conclusion that this situation discriminates against complainants because of their sex, a potential remedy could be an order to modify officer/inmate ratios at certain institutions. Complainants, who are unrepresented by counsel, appear to be arguing that respondent's decisions regarding staffing ratios at the WCC and the MSCC are in some way gender-based. The Commission cannot conclude, at this stage of the proceedings, that it would not be possible for complainants to offer and prove some set of facts which would state a claim upon which relief could be granted.

Respondent argues in this regard that not all the correctional officers at the MSCC are male and there is no practice of hiring only males at the MSCC; that not all the correctional officers at the WCC are female and there is no practice of hiring only females at the WCC; that complainants do not allege that male officers at one institution are treated differently than female officers at that same institution; and that complainants have an opportunity to transfer to the WCC if they want. These arguments are not germane to the issue raised by respondent, i.e., that complainants have failed to state a claim for relief. Nowhere in respondent's arguments relating to this motion is there even any reference to potential relief. Furthermore, even if respondent's arguments were germane to the issue under consideration here, they assume that the parties agree that males and females have an equal opportunity to be hired at the WCC. However, complainants are alleging that, due to the use of BFOQ's, females have a better opportunity to be hired for officer positions at the WCC than do males; that working conditions are better at the WCC than at the MSCC in view of the higher officer/inmate ratio at the WCC than at the MSCC; and that, as a result, complainants are being discriminated against on

the basis of sex in regard to working conditions. Respondent's argument, therefore, is not convincing in this regard.


Order


Complainants lack standing to advance their allegations relating to hiring preferences (not BFOQ's) at the WCC. Complainants have standing to advance their allegations relating to the disparity in working conditions between the WCC and the MSCC. Respondent's motion to dismiss for failure to state a claim for relief is denied.

Dated: September 8, 1989

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

LRM:irm

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