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DALE NASH,

Complainant,

v.

Secretary, DEPARTMENT OF
REGULATION AND LICENSING, and
Secretary, DEPARTMENT OF
EMPLOYMENT RELATION,

Respondents.

Case No. 90-0107-PC-ER

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RULING
ON
MOTIONS TO DISMISS
AND
TO DISAPPROVE
AND
STRIKE OUT
SUPPLEMENTAL CHARGES

This matter involves a charge of discrimination on the basis of handi-
cap and sexual orientation with respect to salary and position classi-fication
which was filed on June 28, 1990. The statement of discrimination
is as follows:

On January 1, 1990, the Department of Regulation and Licensing
hired a Consumer Protection Specialist (CPS) and then a second
one a few weeks later to work along side of me in the Complaint
Resolution Unit, performing the exact same job. The CPS's have
been, and continue to be, paid significantly more than I am. Both
of the CPS's are heterosexual and married. One of them is handi-
capped. I believe that I may be a victim of discriminatory em-
ployment practices because of my physical handicap and sexual
orientation. In addition, another Investigator, Don Williams,
submitted a reclass request which was approved by the
Department for an RCI-5 position when my reclass requests for
reclass to an RCI-5 was rejected. Mr. Williams and I are perform-
ing the same job. Williams is a heterosexual male.

On November 23, 1990, respondent Department of Regulation and Licensing
(DRL) filed a motion to dismiss for failure to state a claim or in the alternative
for a more definite statement.¹ Subsequently, on January 4, 1991, complainant
filed a letter with respect to this and some related cases² which was stated to be
a "clarification regarding the position of the complainants. This letter is also

¹ No action was taken on this motion because of the possibility,
discussed at a conference, that the dispute underlying the motion could be
resolved by stipulation. However, this has not occurred, and respondent has
requested a ruling on this motion.

² Harden v. DRL, 90-0106-PC-ER, Garrette v. DRL, 90-0092-PC-ER.

in response to the defendants' motion to clarify or dismiss the action." On May 21, 1991, all three complainants filed amended complaints. The cover letter from counsel stated that "I am formally amending these complaints after discussing this matter with my clients to correct some minor errors in my letter of January 2, 1991." This document contains the following summary of the complaints:

³This complaint is an amendment to complaints dated June 28, 1990, Nos. 90-0092-PC-ER, 90-0106-PC-ER and 90-0107-PC-ER. This complaint stands as a formal incorporation of the amendments set forth in complainants' letter to the Wisconsin Personnel Commission dated January 2, 1991. Complainants Garrette and Harden allege that they were discriminated against on the basis of their race with regard to promotional opportunities at the Department of Regulation and Licensing and that, absent discrimination, they would have obtained a job classification of RCI-5. Complainants Garrette and Harden had petitioned for reclassification and their petition was pending when they were reclassified to consumer specialists as they were informed on August 8, 1990 as more fully set forth below. They believe the reclassification to consumer specialist was precipitated by their earlier complaints of discrimination (Case Nos. 90-0092-PC-ER and 90-0106-PC-ER) but, while appearing to address one of the issues raised in those complaints actually served to retaliate against complainants Garrette and Harden by either preventing or denying the reclassification of said complainants to the RCI-5 pay range. The consumer specialist job tracked Garrette and Harden into a lower pay range than they would have received had they been classified at the RCI-5 level and was purposely done to retaliate against them for having filed the original complaint.

Complainant Nash makes these same allegations with the exception that the original basis for discrimination was his physical handicap and sexual orientation. All three individuals seek relief in the form of back pay and classification to the RCI-5 level retroactive to their date of application. (For further facts see addendum).³

Subsequently, on September 20, 1991, respondent DRL filed a "motion to disapprove and strikeout charges." The Commission first will address respondent's November 23, 1990, motion to dismiss. Respondent argues that the original complaint fails to adequately identify "the 'employment action' taken by respondent which constitutes unlawful discrimination." This motion is grounded primarily on lack of specificity, and to this extent essentially has

³The Commission assumes this document was intended to supersede the January 4, 1991, filing.

been rendered moot by the subsequent amendment. However, the Commission observes that a fair reading of the initial complaint is that Mr. Nash is complaining both about being paid less than certain coworkers, and about being denied reclassification, and it should survive the original motion to dismiss under the liberal approach to pleading observed by this Commission, see Oakley v. Commr. Securities, No. 78-66-PC (10/10/78).

Respondent also argues that Mr. Nash has an appeal pending (No. 90-0358-PC) of the reclassification of his position, and that: "[i]f any issue has been raised by complainant's pleading in this matter it is the issue of classification which is properly before the Commission in Case No. 90-0358-PC as a review of a classification decision rather than upon a charge of discrimination." Mr. Nash has the right to raise a charge of sexual orientation discrimination on the basis of his allegation that a similarly situated heterosexual employee was granted a reclassification while he was denied one. Since such a claim is invoked under a different statutory basis (§§111.321, 111.322, 111.36, Stats.) than a claim that a reclassification denial was improper under the civil service code (§§230.09, 230.44(1)(b), Stats.), complainant has the right to pursue each claim in a separate proceeding.⁴

In support of its September 20, 1991, "motion to disapprove and strike out charges," respondent contends, with respect to the documents filed May 21, 1991, that "it is not clear whether these documents amend the previous complaints, present new charges or just explain previous charges." Respondent also argues that because the amendment presents some matters which are common to all three complainants — i.e., Nash, Harden and Garrette — it is an indirect and premature effort at consolidation.

The Commission rules provide at §PC 2.02(3), Wis. Adm. Code, as follows:

A complaint may be amended by the complainant, subject to approval by the commission, to cure technical defects or omissions, or to clarify or amplify allegations made in the complaint or to set forth additional facts or allegations related to the subject matter of the original charge, and those amendments shall relate back to the original filing date.

⁴ It may be efficacious to consolidate the claims for hearing purposes, but that issue has not yet been reached.

With respect to respondent's first argument ("it is not clear whether these documents amend the previous complaints, present new charges or just explain previous charges."), in the Commission's opinion the documents primarily are an attempt to amend the initial complaint "to clarify or amplify allegations made in the complaint or to set forth additional facts or allegations related to the subject matter of the original charge," §PC 2.02(3), Wis. Adm. Code. , Complainant primarily is adding additional specificity to his original charge, and this is an appropriate subject for amendment pursuant to the rule.

There appear to be two new matters alleged. First, complainant alleges he was informed on August 8, 1990, he had been reallocated to CS 1 retroactive to January 1990, and that this reallocation was in retaliation for having filed his initial complaint. Since this is a separate transaction which occurred after the filing of the original complaint, it should be processed as a separate complaint rather than as an amendment to the original complaint that would date back to the filing date of that claim. Second, the amended complaint alleges that:

[T]he Department has revised the job position descriptions for Consumer Specialist and RCI so that they [complainants] will be unable to obtain reclassification to the RCI-5 level, which they could have attained had the old criteria been applied. Williams also would not have attained the RCI-5 level had the new criteria been applied to him. Thus, the revision of criteria after elevating Williams to the RCI-5 level is both discriminatory and retaliatory.

Again, this alleged revision appears to be a separate transaction which should be handled separately rather than by way of amendment to the original complaint.

With respect to respondent's argument that the amendment should be rejected because it is an improper attempt to consolidate the three cases, the only question before the Commission at this point is whether the amendment should be allowed under §PC 2.02(3), Wis. Adm. Code. There is no reason why a complaint is defective merely because it asserts matters that are common to a number of complainants. At this point, no decision has been made as to whether these cases will be heard on a consolidated basis, although the cases have been processed together so far. This decision will be made sometime after it is determined whether the cases will be investigated or waived to a hearing on the merits pursuant to §230.45(1)(1m), Stats. If a decision is made to try the

cases separately, those portions of this complaint that refer to Mr. Harden and Mr. Garrette can be ignored.


ORDER

1. Respondent DRL's motion to dismiss filed November 23, 1990, is denied.
2. Respondent DRL's "motion to disapprove and strike out charges" filed September 20, 1991, is denied.
3. Complainant's amendment filed May 21, 1991, is granted except to the extent that so much of the amendment that relates to the claims that complainant's position was reallocated to CS 1 in retaliation for his having filed his original complaint of discrimination, and that "the revision of criteria after elevating Williams to the RCI-5 level is both discriminatory and retaliatory," will not be permitted as amendments to the original complaint pursuant to §PC 2.02(3), Wis. Adm. Code, but will be handled as separate claims.
4. The Department of Employment Relations is added as a party respondent as presumably it was at least nominally involved in the classification matters alleged in the complaint.

Dated: December 23, 1991 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

AJT:rcr


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner