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RALPH SUNDLING, *

Complainant, *

v. *

President, UNIVERSITY OF *

WISCONSIN - MADISON, *

Respondent. *

Case No. 93-0049-PC *

* * * * *

RULING ON MOTION TO DISMISS

This matter is before the commission on respondent's motion to dismiss for failure to state a claim, filed on August 25, 1993. Appellant, who is non-represented by counsel, did not file a brief.

This appeal, filed on April 27, 1993, relates to the loss of appellant's restoration rights as a laid-off employe upon refusal to accept an offer of restoration, pursuant to §ER-Pers 22.10(3) Wis. Adm. Code. This offer of restoration from respondent's personnel office, dated March 30, 1993, included the following:

This letter is a formal offer of restoration to the position of Food Service Administrator 1 at Memorial Union.

In accordance with s. ER-Pers 22.10(3), Wis. Adm. Code, failure to accept this offer of reappointment within 5 work days of the offer shall result in forfeiture of any further restoration rights. In addition upon acceptance you will be required to report to work within 10 days after acceptance of this offer.

Appellant responded to this offer by a letter dated April 6, 1993, which included the following:

In reply to your March 30, 1993 letter and pursuant to s. ER-Pers 22.10(3), Wis. Adm. Code, I must, under protest, decline the formal offer of restoration to a Food Service Administrator 1 position at the Memorial Union. Due to my past differences with the Wisconsin Union, including the non-renewal of my academic staff position, I believe it would be an uncomfortable--if not hostile--environment to work in.

I realize that my non-acceptance of this position forfeits any future restoration rights that I may have had. I will, however, be formally appealing the loss of these rights with the State Personnel Commission. I believe that some of my rights, according to Wis. Stats. Chapter 230, have been violated.

Appellant had been demoted in lieu of lay off and had three years of restoration eligibility pursuant to §ER-Pers 22.10, Wis. Adm. Code. Section ER-Pers 22.10(3) provides that "[a]n employe ... having restoration rights under this section who fails to accept a reasonable offer of reappointment within the agency ... forfeits any further restoration rights." This appeal apparently was precipitated by appellant's perception that, as set forth in respondent's March 30, 1993, letter offering him restoration to the Memorial Union position, if he did not accept the offer his restoration rights would be forfeited.¹ It appears that the forfeiture of restoration rights under the civil service code involves the removal of the employe from a register. Section ER-Pers 12.01, Wis. Adm. Code, provides: "To fill a vacancy, the appointing authority shall submit a request on the prescribed form to the administrator." Section ER-Pers 12.02 provides, in part, as follows:

The administrator shall certify eligibles as provided in the law and rules or authorize appointment by other means as provided in §230.15(1) and (2), Stats.

(1) Except for persons who are on mandatory restoration registers from layoff or from demotions as a result of layoff, under §ER-Pers 22.08(2) or who have specified right of restoration, certifications shall be made from existing employment registers in the following order of preference.... (emphasis added)

The underscored language leads to the conclusion that appellant, who had been demoted in lieu of layoff, would have exercised his restoration rights through certification from a mandatory restoration register. The establishment and maintenance of registers is the responsibility of the administrator, §ER-Pers 11.01. Therefore, a negative action with respect to

¹ It is not clear from the documents of record if any concrete action has been taken to effect such a forfeiture, or if respondent merely decided that if the offer were not to be accepted, it would not honor any future efforts appellant might make to exercise restoration. However, for purposes of deciding this motion, the commission must assume that respondent has taken some adverse action with respect to appellant's restoration eligibility.

appellant's restoration eligibility is legally attributable to the administrator, and appealable as a decision made or delegated by the administrator pursuant to §230.44(1)(a), Stats.²

It cannot be concluded on this record that this appeal fails to state a claim upon which relief can be granted. In deciding this kind of motion, the commission must accept as true the allegations of the appeal, and all reasonable inferences that can be drawn from the allegations. An appeal cannot be dismissed "unless it appears to a certainty that no relief can be granted under any set of facts that plaintiff can prove in support of his allegations." Phillips v. DHSS & DETF 87-0128-PC-ER (3/15/89) (quoting Morgan v. Pennsylvania General Ins. Co., 87 Wis. 2d 723, 731-32, 275 N.W. 2d 660 (1979)); affirmed, Phillips v. Wis. Personnel Comm., 167 Wis. 2d 205, 482 N.W. 2d 121 (Ct. App. 1992).

Respondent contends that there is no meritorious basis for an appeal. However, if the offer of restoration was not reasonable, then appellant should not be subject to loss of his restoration eligibility for having declined the offer. §ER-Pers 22.10(3). Respondent argues that appellant's expressed concerns about returning to work for the same management he had sued with regard to his academic staff nonrenewal represent: "an unfounded speculative fear that the circumstances surrounding his previous employment as an academic staff employe at Union South would somehow affect his employment as a civil service employe at Memorial Union... Had appellant accepted the restoration offer he would have had ample protection from any arbitrary, capricious or illegal actions, which he feared could befall him, by filing an appeal with the commission if his fears in fact became a reality."

Basically, what is present on this record is a difference of opinion as to whether the restoration offer was reasonable. In addition, the commission notes that not all personnel-related actions by management which an employe could perceive as retaliatory fall within the commission's statutory appellate jurisdiction.³ Also, the Commission does not agree with respondent's

² Again, it is not apparent from this record whether any concrete action has been taken or whether respondent has indicated what it would do if appellant attempted to exercise his restoration rights.


³ For example, discretionary performance awards are not appealable. §230.44(1)(e), Stats.

contention that appellant's statement in his April 6, 1993, letter, that: "I realize that my non-acceptance of this position forfeits any future restoration rights I may have had " is an admission that the offer of restoration was reasonable. It just as well could be construed as an acknowledgement of respondent's earlier statement that it would take the position that a refusal of restoration would have this effect. The former interpretation also is inconsistent with appellant's stated intent in that letter to appeal the loss of his restoration rights to this commission. It cannot be concluded on this record that there is no way that appellant could establish facts that would support a viable claim.

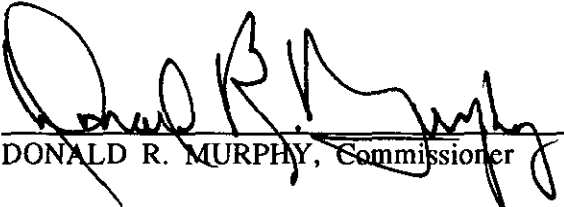
ORDER

Respondent's motion to dismiss is denied. Since it appears that this is a §230.44(1)(a), Stats., appeal, the administrator of DMRS will be added as a party.

Dated: November 23, 1993 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

AJT/rlr


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner