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JUDITH VOLOVSEK,

Appellant,

v.

Secretary, DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION, and Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS,

Respondents.

Case No. 93-0098-PC-ER

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RULING ON MOTION RELATING TO THE SCOPE OF HEARING

This matter is before the Commission on respondents' "motion for an order for a no probable cause hearing." The parties have filed written arguments regarding the motion.

This complaint of discrimination based on sex and age was filed with the Commission on June 16, 1993. The Commission issued protective orders on October 20 and December 28, 1993, and a hearing was held in February of 1994 as a consequence of the respondent's contention that complainant had violated the protective orders. A ruling was issued on March 1, 1994, and a mixed finding of probable cause/no probable cause was issued in an initial determination dated December 22, 1995. The sole probable cause finding related to complainant's allegation arising from the failure to reclassify the complainant's position to the Agrichemical Specialist-Developmental level in February or May of 1993. Complainant appealed the no probable cause findings.

During a prehearing conference held on March 14, 1996, the complainant agreed to the following statement of issues for hearing:

Whether respondent DATCP or respondent DER discriminated against complainant because of her sex or age when respondent(s) took the following actions:

- a) Respondents did not reclassify the appellant's position to the Agrichemical Specialist - Developmental level in either February 1993 or May 1993;

- b) Respondent DATCP required complainant to serve one year of probation (August 1991 - August 1992);
- c) Respondents made advancement to the Environmental Enforcement Specialist position a promotional opportunity rather than a reallocation in March 1993;
- d) Respondent DATCP did not select complainant for an Environmental Enforcement Specialist - Senior position in June 1993;
- e) Respondent DATCP assigned an Environmental Enforcement Specialist to conduct an investigation in complainant's area/territory in June 1993.

Respondents reserved the right to file an alternative statement of issue. A hearing was scheduled for May 13 through 17, 1996. During the prehearing conference, the parties also discussed whether it made sense to consolidate this case with another complaint filed by complainant (Case No. 95-0072-PC-ER). After the parties indicated a consolidated hearing might run two weeks in length, the examiner presiding at the conference recommended that consolidation not take place and the parties agreed.

Respondents' motion seeks limitation of the hearing to a probable cause determination. Respondents propose the following issues for the May hearing:

Whether there is probable cause to believe respondent DATCP or respondent DER discriminated against complainant because of her sex or age when respondent(s) took the following actions:

- a) Respondent DATCP required complainant to serve one year of probation (August 1991 - August 1992);
- b) Respondents made advancement to the Environmental Enforcement Specialist position a promotional opportunity rather than a reallocation in March 1993;
- c) Respondent DATCP did not select complainant for an Environmental Enforcement Specialist - Senior position in June 1993;
- d) Respondent DATCP assigned an Environmental Enforcement Specialist to conduct an investigation in complainant's area/territory in June 1993.

In support of their motion, respondents rely primarily on the Commission's rules. Respondents also contend there is very little overlap of facts between

the four allegations for which the investigator found no probable cause and the lone probable cause allegation.

Complainant contends bifurcation would waste time and suggests respondents' motion is motivated by an intent to "bleed[] the complainant financially."

In §PC 2.07, Wis. Admin. Code, the Commission's rules provide that unless the parties agree otherwise, separate procedures are used for processing probable cause determinations and no probable cause determinations:

(2) PROBABLE CAUSE DETERMINATIONS. Upon either an initial determination of probable cause following investigation or a finding of probable cause following hearing, the commission shall seek to resolve the dispute between the parties by conciliation unless either party waives conciliation in writing. If conciliation is waived or is unsuccessful, the complaint may proceed to hearing on the issue of whether discrimination, unfair honesty testing or retaliation occurred.

(3) NO PROBABLE CAUSE DETERMINATIONS. Within 30 days after the service of an initial determination of no probable cause as to any claim raised in a complaint, a complainant may file, with the commission, a written request for hearing on the issue of probable cause as to that claim. If, after a hearing, the commission finds probable cause as to the claim and reverses the initial determination, the complaint shall be processed under sub. (2).

(4) MIXED DETERMINATIONS. When a complaint includes two or more claims and findings of both probable cause and no probable cause have resulted, those claims for which probable cause has been found shall be processed under sub. (2), and those claims for which no probable cause has been found shall be processed under sub. (3), except that the parties may agree to process the entire complaint under sub. (2) as if probable cause had been found as to all claims.

The respondents' motion raises two questions. The first is whether a complainant may, after a mixed determination of probable cause and no probable cause, unilaterally decide to proceed directly to a hearing on the merits as if probable cause had been found as to all claims. The clear answer to this question is "no," based upon the explicit language of §PC 2.07(4). Only if the parties agree can complainant bypass a no probable cause hearing as to those claims for which the initial determination found no probable cause.

The second question raised by respondents' motion is whether it is necessary or appropriate to convene one hearing on the claims that are still at the probable cause stage before considering the claim for which probable cause has already been found. This result is not required by the rules nor would it be consistent with principles of judicial economy. It will be much more efficient to hold one hearing on all claims. Depending on the results of that hearing, it may or may not be necessary to reach the merits of those claims for which the initial determination found no probable cause.

ORDER

The hearing, now scheduled to commence on May 13, 1996, will proceed in terms of the following issues:

1. Whether respondent DATCP or respondent DER discriminated against complainant because of her sex or age when respondents did not reclassify the appellant's position to the Agrichemical Specialist - Developmental level in either February 1993 or May 1993.
2. Whether there is probable cause to believe respondent DATCP or respondent DER discriminated against complainant because of her sex or age when respondent(s) took the following actions:
  - a) Respondent DATCP required complainant to serve one year of probation (August 1991 - August 1992);
  - b) Respondents made advancement to the Environmental Enforcement Specialist position a promotional opportunity rather than a reallocation in March 1993;
  - c) Respondent DATCP did not select complainant for an Environmental Enforcement Specialist - Senior position in June 1993;
  - d) Respondent DATCP assigned an Environmental Enforcement Specialist to conduct an investigation in complainant's area/territory in June 1993.

Dated: April 16, 1996

STATE PERSONNEL COMMISSION

  
LAURIE R. MCCALLUM, Chairperson

  
DONALD R. MURPHY, Commissioner

  
JUDY M. ROGERS, Commissioner

KMS:kms  
K:D:temp-4/96 Volovsek