

U.S. Department of Labor

Office of Administrative Law Judges
Washington, DC



DON L. SWANN
Complainant

vs.

Case No. 80-ES-1

MISSOURI STATE JOB SERVICE
Respondent

Appearances:

DON L. SWANN, pro se
Route 1, Box 189
Gerald, Missouri 63037
For the Complainant

RICK V. MORRIS, ESQUIRE
Post Office Box 59
Jefferson City, Missouri 65104
For the Respondent

Before: RHEA M. BURROW
Administrative Law Judge

DECISION

Statement of the Case

This case relates to a complaint alleging religious discrimination and was referred by the Regional Administrator, Employment and Training Administration, United States Department of Labor, Kansas City, Missouri, on a memorandum dated January 11, 1980 to the Office of the Chief Administrative Law Judge. The case was assigned to the undersigned for consideration and disposition pursuant to 20 CFR §658,421(j).

The initial complaint received from Complainant on August 26, 1977 and filed with the Equal Employment Opportunity Commission alleged in substance that a branch of the Missouri Job Service, Division of Employment Security through its manager, Anton C. Esser, used his position to hire, promote and give preferential treatment to Catholics; as a non-catholic Lutheran he stated that he was by-passed in promotion, training and job assignment. As a consequence he stated that working conditions became undesirable and he quit on July 30, 1977 giving reasons in

a letter for his action. The letter is dated July 30, 1977 and stated:

"I, Don L. Swann, do hereby resign my position with MODES. I feel the manager of the Office uses his position to enhance the Catholics. I believe he religiously discriminates and his supervisors are aware of this and condone it. I feel he has blackballed me for sometime. This makes me nervous and I have difficulty restraining myself from knocking his - - - off which isn't right either. I have been under the care of 2 doctors who advised me to chuck the job. Rather than risk my health with ulcers, etc., I tried to get a transfer which did not go through. The rest of the day will be on annual leave."

A hearing was held in the captioned matter on April 14, 1980 in St. Louis, Missouri. The Complainant appeared pro-se and the Respondent by counsel.¹ The parties were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues. The Respondent at the beginning of the hearing moved to dismiss the action because the Department of Labor did not have jurisdiction over Mr. Swann's complaint.

Findings

1. The Complainant, Don L. Swann, was employed by the Missouri Division of Employment Security at a local office in Washington, Missouri from November 10, 1969 to July 30, 1977. His complaint was filed with the Equal Employment Commission on August 26, 1977 and after termination of his employment.

2. The Complainant was hired as an Employment Security Deputy II at the time he commenced his employment in 1969 and was promoted to a Claims Technician in August 1970 upon the recommendation of the local office manager, Anton C. Esser.

3. Anton Esser has about 35 years tenure with the Missouri Division of Employment Security and 30 to 31 years of this service has been with the local office in Washington, Missouri. He was the manager of the Washington, Missouri Division of Employment Security Office during the entire period from November 1969 to July 30 1977 that the Complainant Don L. Swann was employed by that office.

4. Following investigation of the case by an Equal Employment Opportunity Commission Specialist, the District Director on behalf of the Commission entered a decision on June 26, 1978 that the evidence of record indicates that "... there is not reasonable cause to believe that these allegations are true."² He was also advised of his right to file a private action in Federal District

¹No one appeared at the hearing to represent the interests or position of the Employment and Training Administration, United States Department of Labor.

² The District Director's determination was as follows:

Court.

At the time the June 26, 1978 decision was entered, the record contained two letters dated April 21, 1978 and April 27, 1979 relating to responses to the April 13, 1978 letter of the Equal Employment Opportunity Specialist and the accompanying Charge of Discrimination filed by Mr. Don Swan. The letters were submitted by Rick V. Morris, Counsel, Department of Labor and Industrial Relations Division of Employment Security, Jefferson City, Missouri.

5. The United States Department of Justice issued a letter dated March 21, 1979 entitled Notice of Right to Sue Within 90 days advising the Complainant of his rights.³

"Under the authority invested in me by the Commission's Procedural Regulations, I issue on behalf of the Commission, the following determination as to the merits of the subject charge.

"All jurisdictional requirements have been met. Charging Party alleged he was discriminated against by being by-passed for promotion, training and job assignments because as a result, he quit his job.

"Examination of the evidence of record indicates that there is not reasonable cause to believe that these allegations are true. No determination is made as to any other issues which might be construed as having been raised by this charge.

"This dismissal concludes the Commission's processing of this charge. Should the Charging Party wish to pursue this matter further, Charging Party may do so by filing a private action in Federal District Court against the Respondent named above, within 90 days of receipt of Notice of Right to Sue which will be issued by the Department of Justice and by taking the other steps set out in that Notice of Right to Sue."

³ The Notice of Right to Sue Letter states:

Re: "EEOC Charge Against State of Missouri Division of Employment Security No. 072771595

"Dear Mr. Swann:

"Because you filed the charge against the respondent named above with the Equal Employment Opportunity Commission, and the Commission has dismissed that charge, you are hereby notified that you have the right to institute a civil action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 52000e; et seq., against the above-named respondent.

"If you choose to commence a civil action, such suit must be filed in the appropriate United States District Court within 90 days of your receipt of this Notice. If you are unable to retain an attorney, the Court is authorized in its discretion to appoint an attorney to represent you and to authorize commencement of the suit without payment of fees, costs, or security. In order to apply for an appointed attorney, you may take this Notice, along with any correspondence you have received from the Justice Department or Equal Employment Opportunity Commission, to the Clerk of the United States District

6. In a letter to the Complainant dated August 24, 1979 from the Director, EEOC Staff, U.S. Department of Labor, Employment and Training Administration, he was advised:

"Your complaint filed with this office August 30, 1977, is now ready for investigation. The State Employment Service Agency named in your complaint is a grantee of the Employment and Training Administration, and therefore, within legal jurisdiction of this office.

"Your complaint is scheduled to be investigated during the week of September 24, 1979. If you do not reply to this letter we will presume that your complaint has been settled at the State level. If you do reply, that reply must reach us by September 17, 1979.

7. The Complainant in a letter dated August 29, 1979 addressed to Everett Lee McCormick, Regional Advocate Monitor, U.S. Department of Labor stated in reference to "your letter of 8-24-79" that:

"My complaint was not settled by the State Agency. It was not settled by the EEOC..."

8. In August 1979 Complainant had expressed interest regarding reemployment by the Missouri Division of Employment Security and was informed by the Personnel Officer in a letter dated August 29, 1979 as follows:

"You make reference in your letter to being on a Reinstatement Register, but you are not in fact on such a register. The only people who are placed on a Reinstatement Register are those who are laid off due to lack of work or who accept a demotion in lieu of layoff. Such individuals would have 'reinstatement rights' before anyone else could be appointed to such a position.

"In your situation, you resigned your position with the Division and you could be considered for reemployment whenever an appropriate vacancy occurs, at the discretion of the appointing authority. There is no obligation on the part of any Merit System Agency to reemploy a person who resigns of their own accord. I can

Court in St. Louis.

"Your attorney may inspect the investigative file pertaining to your case at a time and place convenient to the parties. The file is located in the EEOC District Office, 1601 Olive Street, St. Louis, Missouri 63103.

"We request that you send this Department a copy of any complaint initiating suit.

"This Notice should not be taken to mean that the Department of Justice has made a judgment as to whether or not your charge is meritorious."

assure you that your filing of a complaint with the Equal Employment Commission has not in any way been a factor in your not being offered reemployment."

On April 7, 1980 the Complainant was advised by the Chief Counsel for the Missouri Division of Employment Security in reference to his letter regarding reemployment that:

"There has been no change in the Merit System Rules and Regulations regarding reemployment procedure and your status would be the same at this time as was outlined to you in Mr. McCann's letter of August 29, 1979 (copy attached)."

9. The final determination on the religious discrimination complaint against the Missouri Division of Employment Security was contained in a letter dated September 29, 1979, addressed to the Complainant from the Grant Officer, U.S. Department of Labor, Employment and Training Administration, Kansas City, Missouri. It was held that: "... a review of your statement and the MODES⁴ official files in the central office files indicates that there is not reasonable cause to believe that your allegation is true. It has been determined that MODES performed its functions in accordance with merit system procedure."⁵

The complainant later requested and was granted a hearing in the matter which was held on April 14, 1980. At the hearing counsel for the Respondent was permitted to review the Appeals File which is a part of the record in the proceeding.

⁴ Missouri Department of Employment Security.

⁵ The full paragraphs or contents of the cited letter are as follows:

"Your complaint against the Missouri Division of Employment Security (MODES), Washington local office manager has been investigated under the provisions of 20 Code of Federal Regulation (CFR), Chapter V, Section 658.421. A review of your statement and the MODES official files in the Central office indicates that there is not reasonable cause to believe that your allegation is true. It has been determined that MODES performed its functions in accordance with prescribed merit system procedure.

"This is our final determination from our investigation of your religious discrimination complaint against MODES. The 20 CFR's, Chapter V, Section 658.421, paragraph (a), states you may request a hearing before a Department of Labor Regional Office Hearing Officer provided you request the hearing in writing within 30 calendar days of the date of this letter.

"Since your case was investigated by MODES local and state levels, by EEOC from St. Louis area offices and this office, I trust that this resolves the matter.

Discussion and Conclusions

On April 4, 1980 the Respondent filed a motion to dismiss the proceeding on the basis that the Administrative Law Judge is without jurisdiction over this matter because the Complainant Don L. Swann failed to exhaust his administrative remedies pursuant to 20 CFR §658.421 at the State level.⁶

Confusion in Processing Complaints

This case illustrates the handling of this complaint by EEO officials under Title VII of the Civil Rights Act (42 U.S.C. Section 2000e, et seq.), including notice to the complainant that he had the right to initiate suit in Federal Court upon denial of his claim. The Complainant Donald L. Swann did not elect to file suit, in Federal Court as provided by the Civil Rights Act so the Title VII action passed by way of default without an appeal. In any event, the Administrative Law Judge does not have jurisdiction to hear Title VII actions as this is vested in the Federal Courts. The Title VII action is not and was not an issue for consideration in this proceeding; it is not an escape hatch to avoid proper consideration of the claim under 20 CFR, Chapter V, Section 658.421.

The issue of religious discrimination against the Division. of Employment Security (MODES), Washington, Missouri, local office manager is reflected in the final determination from the Grant Officer, U.S. Department of Labor, Employment and Training Administration, Kansas City, Missouri in his letter to the Complainant dated September 29, 1979.⁷ This letter reflects investigation and consideration of the complaint under 20 CFR, Chapter V, Section 658.421.

Essentially the same allegations of religious discrimination are reflected in a memorandum concerning disciplinary action taken against the Complainant in August 1976. The memorandum from the District II Manager dated August 30, 1976 to the Complainant states: This is to verify your disciplinary suspension without pay for the 2 day period of August 30-31,

⁶ Section 658.421 entitled "Handling of Complaints by the RA provides:

"(a) No ES related complaint, shall be handled by the ETA regional office level until the complainant has exhausted the State agency administrative remedies set forth at §§658.410-416 of this subpart. Therefore, if the RA determines that any complainant , who has filed an ES-related complaint with the regional office, has not yet exhausted the administrative remedies at the State agency level, the RA shall inform the complainant in writing that the complainant must first exhaust those remedies before the complaint may be filed in the regional office. A copy of this letter shall be sent to the State Director."

⁷ See footnote 5, supra.

1976. This action was taken for the following reasons:

" 1 . Your violation of agency policy against conducting personal business affairs in the office. This relates to numerous telephone conversations during working hours with prospective real estate clients.

" 2 . Your defiant attitude when these infractions were brought to your attention.

"3 . Your malicious charges of discrimination against you due to religion, when no such discrimination occurred."⁸

He, Donald L. Swann, had previously been advised by Betty Adams, Departmental Director for the Missouri Department of Labor and Industrial Relations, on behalf of Governor Bond on August 27, 1976 that she had been advised that there has been no act of discrimination taken against you in the Washington local office due to religion or any other factor.

The disciplinary charge was not appealed and became final. There were no discrimination charges pending or outstanding at the time the Complainant voluntarily resigned his position as Claims Technician with the Missouri Division of Employment Security on July 30, 1977. When the official files were reviewed in September 1979 the Grant Officer held that "there is not reasonable cause to believe your allegation is true" and that "MODES performed its functions in accordance with merit system procedure."

Inasmuch as the issue of religious discrimination was raised, investigated and decided during Mr. Swann's tenure of employment in 1976-1977 by both the EEOC and the Missouri Division of Employment Security, his attempt to revive the discrimination charge after he voluntarily resigned from employment and without any new factual basis is found to be without merit. I conclude from the facts in this case, that since Complainant did not appeal the suspension charge that was based in part on religious discrimination he had made in 1976 when

⁸ Counsel for Respondent's letter to the EEO Specialist dated April 27, 1978 states in part the following:

"In August 1976, Mr. Swann wrote a letter to then Governor Christopher S. Sand complaining that the Manager of the Washington local office was discriminating against him because he (Mr. Swann) was non-catholic. Pursuant to this letter, the Missouri Department of Labor and the Division of Employment Security conducted a thorough investigation which included sending an area supervisor to Washington, Missouri, to speak with Mr. Swann in regard to his complaint. This investigation concluded in a finding that Mr. Swann's complaint was groundless and totally without merit. Mr. Swann was unable to provide the Department or the Division with any instances in which he was discriminated against due to his religion or for any other reasons. . . ."

such discrimination was found not to have occurred, such constituted final action and adjudication by the State of the issue. Such determination was Res Judicata when he attempted to revive the same religious discrimination charges after voluntarily termination of his employment.

The Administrative Law Judge concludes that he has jurisdiction of the case on the foregoing basis. Neither a review of the evidence in the appeals folder nor that presented at the hearing before me in April 1980 supports the Complainant's allegations of religious discrimination against him by the Employer, the Missouri Division of Employment Security and its Washington Office Manager. I conclude that the record does not establish that the Complainant was by-passed in promotion, training or job assignment or otherwise discriminated against by reason of his religion, as alleged. It follows that the complaint must be and is hereby dismissed.

Also, the Respondent's motion to dismiss the case for lack of jurisdiction is denied. In this connection his 2-day suspension in August 1976 was based in part on findings of malicious charges of discrimination due to religion, when no such discrimination occurred; this was in fact the final action by the State when the Complainant failed to appeal and accepted the Missouri Division of Employment Security's determination.

It should be noted that this situation differs from those where an employee is terminated from a job involuntarily by a State Agency because of religious discrimination by such employer and is entitled to exhaust all avenues of State Agency remedies including a hearing at the State level before the ETA obtains authority and jurisdiction to handle the complaint pursuant to 20 CFR 658.421. An ETA official cannot review the record and substitute his/her judgment for the final determination of the State agency. Since the 1976 charges of discrimination were substantially the same as those made after termination of employment and were investigated at all State agency levels and the decision was unappealed, it became the State agency determination.

The appeal is dismissed.

RHEA M. BURROW
Administrative Law Judge

Dated: June 11, 1980
Washington, D.C.

RBB/mml