STATE OF WISCONSIN	COUNTY COURT Branch 2	FOR DANE COUNTY

CITY OF MADISON, Plaintiff, vs. RENNEBOHM DRUG STORES, INC., Defendant.	DECISION City Docket, V.179, P.319

Honorable WILLIAM L. BUENZLI, County Judge

Motions to dismiss, dated January 27, 1976, have been made and filed with the Court. The bases defendant relies upon in its motions to dismiss are contained thereon.

Notwithstanding said motions, however, it is within the discretion of this Court to dismiss this action on its own initiative in the interest of orderly administration of justice. Latham v. Casey & King Corp., 23 Wis. 2d 311; Alexander v. Farmer's Mut. Automobile Ins. Co., 25 Wis. 2d 623; 131 N.W. 2d 373.

It is the Court's belief that the absence of facts in the record makes it impossible for the Court to determine:

(1) Whether either the rule of exhaustion of administrative remedies or the doctrine of primary jurisdiction is appropriately applicable to the present case; or (2) Whether defendant's conduct falls within the exclusionary language of s.3.23

(2) (k) and is, therefore, nondiscriminatory.

1. Applicability of rule of exhaustion of administrative remedies or doctrine of primary jurisdiction.

It is the belief of this Court that information relating to whether a formal complaint was made to the Madison Economic Opportunities Commission and, if so, the status or resolution of that complaint, is essential to the present record because of the potential operative effect of the rule of exhaustion of administrative remedies.

There is some authority for the idea that exhaustion should be applied even where no administrative activity has been commenced, but it is clearly applicable where some administrative action is under way but as yet uncompleted. State v. Dairyland Power Cooperative, 52 Wis. 2d 45; 187 N.W. 2d 878. When a party has failed to exhaust his administrative remedies, the Court may refuse to hear the suit in appropriate circumstances. Supra @ 54. Since the determination of whether such circumstances are present in a given case is a matter of discretion of the Court, the absence of a factual record renders the Court helpless as to whether or not the present suit should be continued.

The absence of facts in the record also makes it difficult to evaluate the applicability of the primary jurisdiction doctrine. The Court, in light of the present record, or lack of it, is left unable to determine whether it would be more appropriate for the Madison Economic Opportunities Commission to make the initial decision as to whether a violation has, in fact, occurred.

"...The Equal Opportunities Commission shall have the following powers and duties: ...4. To receive and initiate complaints alleging violation of this ordinance and to attempt to eliminate or remedy any violation by means of conciliation, persuasion, education, litigation, or any other means, to make the complainant whole again ...." S.3.23(10) (b), Madison General Ordinances.

The Wisconsin Supreme Court has stated some preference for deferring to an agency determination where "the issue presented to the Court involves exclusively factual issues within the peculiar expertise of the commission ...." State v. Dairyland Power Cooperative, 52 Wis. 2d 45; 187 N.W. 2d 878.

This Court, therefore, on its own initiative, dismisses this action for failure to make of record facts which would enable the Court to determine whether an administrative determination might be more appropriate in this instance prior to the instigation of judicial relief.

2. Whether defendant's conduct falls within the exclusionary language of s 3.23(2)(k).

"'Physical appearance' means the outward appearance of any person, irrespective of sex, with regard to hair style, beards, manner of dress, weight, height, facial features, or other aspects of appearance. It shall not relate, however, to the requirement of cleanliness, uniforms, or prescribed attire, if and when such requirement is uniformly applied . . . to employees in a business establishment for a reasonable business purpose." S.3.23 (2)(k), Madison General Ordinances.

The present record is devoid of any allegation that Mr. Marks' hair length was not being regulated by the defendant for "cleanliness," as "uniforms or prescribed attire."

The applicable rule of statutory construction is that where an exception integral to the enforcement of a statute is contained within that statute, the exception is deemed an essential part of the prohibition of the statute, and the burden is placed on the prosecution to plead and prove that the defendant is not within the exception. U.S. v. Milan Vuitch, 402 U.S. 62; U.S. v. Shreveport Grain and Elevator Co., 287 U.S. 77. The failure by the City of Madison to allege that the defendant is not within the exception of s.3.23 (2) (k) supplements the Court's finding of dismissal, particularly in relation to count two and specifically for failure to state facts sufficient to sustain a cause of action.

Therefore, the Court hereby orders that this action by the City of Madison against Rennebohm Drug Stores, Inc., be dismissed for failure to make sufficient facts of record and for failure to state facts sufficient to sustain a cause of action. The Court further orders that this dismissal be without prejudice, and, therefore, the action may be reinstituted.

Dated this 19th day of July, 1977,

BY THE COURT:

William L. Buenzli
County Judge

EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
210 MONONA AVENUE
MADISON, WISCONSIN

Robert C. Marks 5631 Mendota Drive Madison, Wisconsin 53705 Complainant vs. Rennebohm Drug Stores, Inc. John H. Sonderegger, President 2300 Badger Lane Madison, Wisconsin 53713 Respondent	FINDINGS, CONCLUSION, ORDER & RELIEF

In a complaint filed on May 27, 1975 with the Madison Equal Opportunities Commission, Complainant alleged he was discriminated against by Respondent because of his physical characteristics in regard to Respondent's

employment practices in violation of Section 3.23(7)(a) Madison General Ordinances, Equal Opportunities Ordinance.

An Initial Determination, issued on June 24, 1975, resulted in a finding that there was probable cause to believe that Respondent discriminated against the Complainant. The Respondent waived conciliation and requested a hearing before the Hearing Committee. The finding of the investigator in the Initial Determination was upheld by a duly authorized Hearing Committee comprised of three (3) members of the Equal Opportunities Commission on August 4, 1975.

The Respondent filed a timely appeal of the Hearing Committee's findings. A hearing before the Commissioners who were not members of the Hearing Committee was held on October 23, 1975. At that time the position of both parties was heard.

As a result of that hearing, the Commission issues the following findings, conclusion, order and relief.

FINDINGS

1. Respondent is an employer within the meaning of the Ordinance.
2. Respondent has a policy requiring male employees to have their hair cut one (1) inch above the collar.
3. Complainant's hair complied with this rule at the time he was hired, but subsequently his hair grew to a length which Respondent considered contrary to the rule.
4. Complainant was employed as a dishwasher by Respondent. In this capacity, he was visible to customers approximately 20 percent of the time.
5. Complainant had asked and received permission from his immediate supervisor, Doris Thompson, to wear a hair net rather than cut his hair. Complainant's hair was longer than the required one (1) inch above the collar, but above his shoulders.
6. Another supervisor, Steve Skolaski, on or about May 19, overruled that decision (to permit Complainant to wear a hair net).
7. On or about May 20, Complainant consulted EOC Investigator, Sheila Swanson, with regard to the Respondent's policy on hair length for male employees.
8. EOC Investigator Swanson then contacted Steve Skolaski by telephone to inquire about the policy.
9. Subsequent to Skolaski's conversation with the EOC Investigator, on or about May 24, he told Complainant to cut his hair or be dismissed.
10. Complainant did not cut his hair and was dismissed on Friday, May 30, 1975.
11. Complainant's job performance was not an issue in the dismissal.
12. Compliance with City and State health codes was not an issue in the dismissal.
13. Complainant's dismissal was based on Respondent's opinion that hair below the specified length does not constitute desirable physical characteristics for male employees.
14. Respondent has not demonstrated that the hair length rule and hair net policy as applied to the male Complainant, are job related.
15. Respondent has not demonstrated "a reasonable business purpose" for the hair length rule or for their denial of Complainant's request to wear a hair net.
16. Other male employees of Respondent, specifically Complainant's brother, David Marks, and another cook who worked with him, were allowed by Steve Skolaski to have their hair longer than one (1) inch above the collar, and to wear hair nets while they worked for Respondent as cooks.

CONCLUSION

We conclude that the Respondent discriminated against the Complainant because of physical characteristics in violation of the Equal Opportunities Ordinance, Section 3.23(7)(a) Madison General Ordinances.

We further conclude that Respondent discriminated against Complainant because he opposed Respondent's discriminatory practice and made a complaint of discrimination, in violation of Section 3.23(7)(e) of Madison General Ordinances.

Based upon this conclusion, the Commission orders the following order and relief:

ORDER & RELIEF

1. That Respondent pay the sum of $108 (One hundred eight dollars) in gross wages as back pay. This sum represents the amount of wages he would have received less all wages or benefits received in the interim.

2. That Respondent's policy be altered to allow male employees to wear their hair at lengths appropriate to their personal preference contingent upon employees conforming to public health regulations and reasonable standards of cleanliness and neatness.

3. That Respondent will inform all present and future employees in writing of the new policy.

4. That Respondent communicate its compliance with this order within thirty (30) days from this date.

5. The Equal Opportunities Commission will monitor the employment practices of the Respondent for a period of not less than one (1) year in order to ensure compliance with this order.

Dated at Madison, Wisconsin this 29th day of October, 1975.

EQUAL OPPORTUNITIES COMMISSION by unanimous vote of quorum.

/s/
John "Chico" Hilton
President

/s/
J. C. Wright
Executive Director