

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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PHENG XIONG,

Petitioner,

v.

STATE OF WISCONSIN  
DEPARTMENT OF EMPLOYEE  
TRUST FUND,

Respondent.  
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ORDER

07-C-467-C

In this proposed civil action for injunctive relief, petitioner Pheng Xiong, who is Hmong, alleges that respondent State of Wisconsin Department of Employee Trust Fund subjected him to a hostile work environment because of his race and color, denied him paternity leave because of his sex and terminated his employment in retaliation for his having filed a discrimination complaint with the State of Wisconsin Department of Workforce Development's Equal Rights Division, in violation of Title VII of the Civil Rights Act of 1964. Petitioner has requested leave to proceed in forma pauperis.

To determine whether a petitioner qualifies for indigent status, the court uses the following calculation: From petitioner's annual gross income, the court subtracts \$3400 for

each dependent, excluding the petitioner. If the balance is less than \$15,000, the petitioner may proceed without any prepayment of fees and costs; if the balance is greater than \$15,000 but less than \$28,000, the petitioner must prepay half the fees and costs; and if the balance is greater than \$28,000, the petitioner must prepay all fees and costs. Substantial assets or debts require individual consideration.

From petitioner's affidavit of indigency, I find that he has an annual gross income of \$21,600 and that he has two dependents. Subtracting \$6800 from \$21,600, the balance is \$14,200. Therefore, petitioner qualifies financially to proceed without prepaying the fees and costs of filing his action.

The next step is determining whether petitioner's proposed action is frivolous or malicious, fails to state a claim on which relief may be granted or seeks money damages from a respondent who is immune from such relief. 28 U.S.C. § 1915(e)(2). In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. Haines v. Kerner, 404 U.S. 519, 521 (1972).

From the allegations of petitioner's complaint and attachments to the complaint, I draw the following facts.

#### FACTUAL ALLEGATIONS

Petitioner Pheng Xiong is "Asian/Hmong." He was employed at the respondent

Department of Employee Trust Fund until April 20, 2007, when he was terminated. Before he was terminated, a Russ St. Claire harassed petitioner daily. He called petitioner names, used racial slurs, swore at him, publicly insulted him, accused him of being incompetent, and monitored him strictly. When petitioner reported these incidents to Marlene Lamb in Human Resources, she covered up the incident by claiming that St. Clair was an affirmative action committee chair who would not have race issues or blow up. At that moment, petitioner feared for his life. Another Asian individual worked for St. Clair at an earlier time, but didn't work for him for very long, for what reason petitioner does not know.

A few months after the incident with St. Clair, Jerry Dietzel, petitioner's supervisor, put petitioner on performance evaluation. He asked petitioner to email him daily when petitioner arrived at work and left as well as when he went to and returned from lunch. He had another worker look over his shoulder every day to see whether petitioner was on the Internet. When petitioner went "to get corrections from benefit appraisal," he would get taunted and blamed for errors.

When petitioner asked for paternity leave, he was denied the leave. Petitioner asked the Asian women who worked in his office whether they ever experienced anything like petitioner did, and they said no. Petitioner believes he was discriminated against because he is an Asian "guy."

On March 19, 2007, petitioner filed a discrimination complaint with the State of

Wisconsin Department of Workforce Development's Equal Rights Division. On April 20, 2007, he was terminated from his job and subsequently, was denied unemployment compensation.. Petitioner believes respondent terminated him in retaliation for his having filed his complaint with the ERD.

## DISCUSSION

Title VII prohibits employers from discriminating against employees or creating a hostile or abusive work environment because of their race, sex, religion or national origin. In addition, it prohibits retaliation for participating in activity protected by Title VII. This law applies to discrimination by state employers. Alexander v. Wisconsin Dept. of Health and Family Services, 263 F.3d 673, 681-82 (7th Cir. 2001). See also Oncale v. Sundowner Offshore Services, Inc., 118 S. Ct. 998, 1001 (1998); Harris v. Forklift Systems, Inc., 510 U.S. 17, 22 (1993); Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986).

Although it is much too soon to tell whether petitioner will be able to prove his claim of discriminatory and retaliatory treatment, he has done enough to put respondent on notice of the charges against it. He is required to do no more at this early stage. Therefore, petitioner's request for leave to proceed in forma pauperis will be granted with respect to his claims that respondent subjected him to a hostile work environment because of his race and color, denied him paternity leave because of his sex and terminated his employment in

retaliation for his having filed a discrimination complaint with the State of Wisconsin Department of Workforce Development's Equal Rights Division.

I note for the record that it is a precondition to a Title VII suit that the petitioner exhaust his administrative remedies with the EEOC and obtain a right-to-sue letter. Petitioner's complaint is accompanied by such a letter dated May 29, 2007.

One other matter requires attention. At the present time, petitioner's complaint does not meet the requirements of Fed. R. Civ. P. 8. In particular, Fed. R. Civ. P. 8(a)(3) requires that a complaint contain "a demand for judgment for the relief the pleader seeks." In the section of his complaint titled "Request for Relief," petitioner states only, "Proceed with filing this legal suit. Please help bring justice and help me restore my hardship cause[d] by the defendant." This is not sufficient to meet the requirements of Rule 8. Petitioner must specify what relief he wishes to obtain from this lawsuit, such as a particular amount of money damages or an injunction of one sort or another. (Even in cases against a state agency, petitioner may seek money damages under Title VII, because Congress has validly abrogated state sovereign immunity with respect to Title VII. Nanda v. Board of Trustees of the University of Illinois, 303 F.3d 817, 830-31 (7th Cir. 2002)).

Because petitioner's complaint does not conform to the requirements of Rule 8, he may have until September 14, 2007, in which to supplement his complaint with a proper request for relief. If he fails to do so, I will be required to dismiss his complaint and close

this case.

## ORDER

IT IS ORDERED that petitioner Pheng Xiong's request for leave to proceed in forma pauperis is GRANTED on his claims under Title VII of the Civil Rights Act that respondent discriminated against him because of his color, race and sex and retaliated against him because he filed a complaint of discrimination.

Further, IT IS ORDERED that no later than September 14, 2007, petitioner supplement his complaint with a proper request for relief. If, by September 14, 2007, petitioner fails to submit such a supplement, I will dismiss his complaint and close this case.

Finally, IT IS ORDERED that

- Upon petitioner's submission of a proper request for relief, his complaint will be forwarded to the marshal's office for service on the respondent.
- With the exception of his request for relief due to be filed by September 14, 2007, from this point forward petitioner must send respondent a copy of every paper or document that he files with the court. Once petitioner has learned what lawyer will be representing respondent, he should serve the lawyer directly rather than respondent. The court will disregard any documents submitted by petitioner unless petitioner shows on the court's copy that he

has sent a copy to respondent or to respondent's attorney.

- Petitioner should retain a copy of all documents for her own files. If petitioner does not have access to a photocopy machine, she may send out identical handwritten or typed copies of his documents.

Entered this 30th day of August, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge