STATE OF WISCONSIN PERSONNEL COMMISSION

MARCELLA FITZGIBBON,
Complainant,

v.

Chancellor, UNIVERSITY OF WISCONSIN-MADISON,
Respondent.

Case No. 00-0017-PC-ER

RULING ON MOTION TO DISMISS

This matter is before the Commission on the respondent's motion to dismiss the complaint as untimely filed. The following findings appear to be undisputed and are made solely for the purpose of ruling on this motion.

FINDINGS OF FACT

1. Early in 1998, complainant worked for the respondent in a position assigned to pay range 8.

2. Complainant's pay range 8 position was "phased out" and, until September 4, 1998, the complainant worked for the University of Wisconsin-Madison Medical School, Department of Medicine as a Coding Technician, assigned to pay range 11.

3. Complainant commenced a medical leave from her Coding Technician position on September 4, 1998.

4. Complainant has not returned to work for respondent since the commencement of her leave, although she has had contacts with respondent's representatives and her leave has been extended several times.

5. Mary Ellen Taylor, the Human Resources Manager for respondent's medical school wrote complainant a letter dated January 25, 2000, stating, in part:

> On December 1, 1999 I wrote you a letter responding to questions you had regarding your reinstatement eligibility, pay upon return from your leave of absence without pay, etc. Another letter was sent to you on December 23, 1999 along with three position descriptions, which were also

> faxed to Dr. Kushner [complainant's physician] for his review, and a leave of absence without pay form which I asked you to complete and return to Sharon Morrison, Payroll and Benefits Specialist for the Department of Medicine. Also in my letter of December 23, 1999, I asked you some questions and one of them was who is Dr. Harker and is he one of your treating specialists? Lastly, I mentioned that before you could return to work, we would need written verification from your treating specialist(s) releasing you to return to work along with any recommendations/accommodations that we would need to consider. However, today January 27 [sic], 2000, I received your medical leave without pay request, which was signed by you but not dated. The leave form did not have a beginning date or a scheduled return to work date.
>
> As you know, the Department of Medicine approved and extended medical leaves for you from September 27, 1998 through December 31, 1999. Since you did not respond to my letters of December 1 and December 23, 1999, before another leave will be approved, we would have to evaluate any recommendation/accommodations that we request received by your treating specialist(s). If we do not hear from you by Friday, February 5, 2000, your position with the University of Wisconsin Medical School Department of Medicine will end as of December 31, 1999. . . .
>
> If I do not hear from you by Friday, February 5, 2000, I will assume you are no longer interested in employment with the University of Wisconsin Medical School.

6. Complainant sent a letter dated January 31, 2000, to Ms. Taylor. That letter stated:

> Regarding your letter I received on Saturday 1/29/00, I am happy to see that you are still looking after my interest. I did not include a date for return to work because 1) You usually supply this date and 2) I was hoping to have employment with the University by this time this has been going on for over a year.
>
> Dr. Kushner will write a letter.

7. Dr. Kushner's letter to Ms. Taylor was also dated January 31st. His letter stated:

> We have had discussions about Marcella FitzGibbon's return to work since December of 1998. In December 1999, she shared a letter written by you stating she needed a letter from her treating physician to return to

> work. This was the first mention made of this sort to me and I am happy to supply this letter
>
> As I communicated to you at the time during one of our phone calls, Marcella was able to return to work as of December 1998. . . . In November you faxed me three positions and she expressed interest in one of the positions at the genetics building. I assumed that at that time she would have been placed in that position.

8. On February 2, 2000, the complainant filed a charge of discrimination/retaliation with the Personnel Commission, alleging that respondent violated the Family/Medical Leave Act.

9. Nothing in the file suggests that respondent has actually terminated the complainant's employment. She remains on medical leave.

CONCLUSIONS OF LAW

1. Complainant has the burden of establishing that her complaint was timely filed.

2. Complainant has failed to meet her burden with respect to the decision to "phase out" her pay range 8 position.

3. Complainant's contention that respondent violated the FMLA when it failed to return her to her former position is timely on a continuing violation theory.

OPINION

The time limit for filing a claim under the Family/Medical Leave Act is set forth in §103.10(12)(b), Stats:

> An employe who believes his or her employer has violated sub. (11)(a) or (b) may, within 30 days after the violation occurs or the employe should reasonably have known that the violation occurred, whichever is later, file a complaint with the [commission] alleging the violation.

Complainant filed her complaint with the Personnel Commission on February 2, 2000. The 30 day filing period means that, as a general matter, events occurring before January 3, 2000, would not be timely.

Complainant's contentions are reflected, at least in part, in the following narrative:

> I have been a State employee for 15 years. They phased out my old job in 1998. I took additional training for a new Coding Tech job, an actual 3-step increase in 5 months. Then was on Medical Leave from 9/98 to 12/98. After my medical leave they told me the Coding Tech position was no longer available to return to. I am willing to take a demotion from the range 11 @ $14.00 an hour to a range 8 @ around $11.00, to make it easier to get back to a job again within the State. I recently found out that another person still is there and doing some of my old jobs when I was range 8 (job was being phased out.) (Complaint of discrimination, narrative, page 1.)

To the extent the complainant alleges that the respondent's action, in 1998, of "phasing out" her pay range 8 position in 1998, violated the Family/Medical Leave Act, her complaint filed on February 2, 2000, was filed well outside of the 30 day filing period. The complainant alleges that she "recently" found out that someone else is performing at least some of her old range 8 duties. Under certain circumstances, new information acquired by a complainant may serve as the basis for denying a timeliness objection. In *Sprenger v. UW (Green Bay)*, 85-0089-PC-ER, 12/30/86, the respondent's motion to dismiss was denied with respect to the complainant's age discrimination claim arising from a layoff decision and the failure to recall him at a later date. There was no evidence for concluding that complainant had or should have formed the belief that he was discriminated against until he read an entry in the faculty/staff directory listing a person with a position title identical to the classification title of complainant's former position. However, in *Sprenger,* the complainant had established that he first saw the entry in the faculty/staff directory within 300[1] days of when he filed his age claim with the Commission, i.e. within 300 days of the date when complainant knew or should have known of the existence of the replacement position. In the present case, the complainant has failed to establish a comparable scenario. The burden of proof is on the complainant to show that her complaint was timely filed. She has failed to sustain that burden because

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[1] The filing period under the Fair Employment Act is 300 days, rather than 30 days as under the FMLA.

she has failed to show when she had notice of facts that gave rise to her belief that "phasing out" her pay range 8 position violated the FMLA. Therefore, the respondent's motion bars complainant from pursuing her claim relating to any action that respondent might have taken in 1998 to "phase out" her pay range 8 position.[2]

Complainant also appears to contend that respondent violated the FMLA by refusing to allow her to return to work.[3] The rights under the FMLA for returning from leave are set forth in §103.10(8), Stats:

> (a) Subject to par. (c), when an employe returns from family leave or medical leave, his or her employer shall immediately place the employe in an employment position as follows:
> 1. If the employment position which the employe held immediately before the family leave or medical leave began is vacant when the employe returns, in that position.
> 2. If the employment position which the employe held immediately before the family leave or medical leave began is not vacant when the employe returns, in an equivalent employment position having equivalent compensation, benefits, working shift, hours of employment and other terms and conditions of employment.

This allegation is consistent with a continuing violation theory. A party is not required to file a claim within 30 days of the initial accrual of a claim if the claim involves a continuing violation. *Gurrie v. DOJ*, 98-0130-PC-ER, 11/4/98. In *Gurrie*, the complainant sought a different position as an accommodation for a disability but later re-

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[2] Even if the complainant had shown that she filed her complaint within 30 days of when she learned that someone else was performing her old duties, that FMLA claim would be susceptible to dismissal because the respondent's action would have occurred *before* complainant had commenced her FMLA leave.

[3] Complainant says motivation for her FMLA complaint was the January 25th letter:

> Based on the attached letter dated January 25, 2000, I realized was not working with me. [sic] As a result I took this action.

Respondent responds by stating that Ms. Taylor's January 25th letter "simply provides clarification and seeks additional information from the Complainant" but "cannot be construed as an adverse employment action or a violation of s. 103.10(11), Wis. Stats." The Commission understands complainant was *motivated* by the January 25th letter to file her complaint and that she is not contending that the January 25th letter violated the FMLA.

signed her position. The Commission declined to grant a motion to dismiss the complaint as untimely filed and noted:

> In a case of this nature, the alleged failure to accommodate was at least arguably a continuing violation while complainant remained employed and on a leave of absence. This time period includes two days within the actionable period. . . . At this stage of this case, granting a motion to dismiss on timeliness grounds would be inappropriate because there are facts in dispute as to whether respondent discharged its duty of accommodation during the two day period prior to the effective date of complainant's resignation, and whether the circumstances of this case give rise to a continuing violation.

In *Vander Zanden v. DILHR*, 87-0063-PC-ER, 2/28/89, the Commission provided the following discussion of the continuing violation theory:

> The fact that an employe may be subjected to a number of adverse employment actions does not in and of itself give rise to a continuing violation. Usually, if there are discrete personnel transactions involving the same employe, he or she must challenge these through separate complaints. . . .
>
> An allegation that an employe has requested and for retaliatory reasons has been denied reinstatement on certain occasions usually will not give rise to a continuing violation theory -- the alleged wrong against the employe occurs on specific occasions and is not of an ongoing nature. On the other hand, an allegation that a laid-off employe was subject to recall for a period of time and that the employer wrongfully refused to do so during that period probably would amount to a continuing violation because of the ongoing nature of the alleged wrong. (Citation omitted.)

Finally, in *McDonald v. UW-Madison,* 94-0159-PC-ER, 8/5/96, the Commission applied the continuing violation concept to complainant's contention that during approximately the last six months of her employment, including a week that was within the 300 day FEA time limit, her superior discriminated against her when he failed to return a manuscript in a timely fashion, effectively refusing to work with the complainant on the manuscript. The Commission held that this alleged conduct "was in the nature of a decision-making process which took place over a period of time, making it difficult to say that the alleged discrimination occurred on any one particular day to the exclusion of other days." This conclusion was consistent with the first of three forms

of the continuing violation theory described in *Selan v. Kiley,* 59 FEP Cases 775, 778 (7th Cir., 1992), cited with approval in *Tafelski v. UW(Superior)*, 95-0127-PC-ER, 3/22/96:

> The continuing violation doctrine allows a plaintiff to get relief for a time-barred act by linking it with an act that is within the limitations period. For purposes of the limitations period, courts treat such a combination as one continuous act that ends within the limitations period. . . . The first [continuing violation] theory stems from "cases, usually involving hiring or promotion practices, where the employer's decision-making process takes place over a period of time, making it difficult to pinpoint the exact day the 'violation' occurred." (Citation omitted.)

Here, complainant contends that she could have returned to work since November of 1998, but there was no position for her. This condition continued through the 30 days immediately preceding her complaint to the Commission. Therefore, she has articulated a claim arising from a process that took place over a period of time, without discrete events, and her claim falls within the scope of the continuing violation doctrine.

The Commission notes that in order to prevail on this claim, the complainant will need to show that she, or someone on her behalf, followed any steps imposed by respondent, that were not inconsistent with the FMLA, in order for her to return to work.

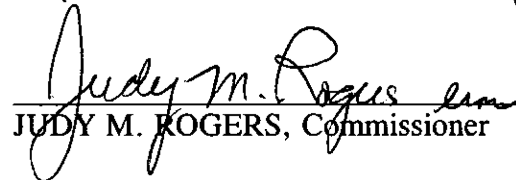
ORDER

Complainant's claim relating to the "phasing out" of her pay range 8 position is dismissed as untimely. However, respondent's motion to dismiss is denied as to complainant's claim relating to the failure to return her to work.

Dated: March 29, 2000 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner



JUDY M. ROGERS, Commissioner

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