STATE OF WISCONSIN PERSONNEL COMMISSION

LEANORE HOEPNER, Appellant, v. Secretary, DEPARTMENT OF HEALTH & SOCIAL SERVICES, Respondent. Case No. 79-191-PC	DECISION AND ORDER

NATURE OF THE CASE

This appeal relates to the appellant's salary level and alleges discrimination on the basis of sex with respect thereto. Following preliminary proceedings including settlement negotiations, the respondent moved to dismiss on the ground of untimely filing. A briefing schedule was established, and a brief was filed by the respondent on April 20, 1981. The findings which follow are based on matter in the file which appears to be undisputed, including a partial stipulation of facts.

FINDINGS OF FACT

1. Appellant began employment in the classified service at Northern Wisconsin Center as a Beauty Operator 2 (PR 6-06), in February, 1958.

2. Until 1974, she worked with female residents.

3. In 1965 the institution hired a male barber who worked with male residents until 1974.

4. In 1974, the appellant and the barber began working together and doing substantially the same work.

5. The barber was at one step above the appellant until 1976, when the appellant's position was reallocated to Beautician (PR 6-07), effective August 15, 1976.

6. Since the appellant was above the permanent status in class minimum (PSICM),

she received no salary increase.

7. The barber, having progressed at a higher pay range since 1965, was receiving more pay than appellant at the time of the reallocation. Since appellant's pay was not increased, she continued to be paid less than the barber.

8. The appellant, in 1976, filed a timely contractual grievance which stated in part:

> "I am filing this grievance because of a discriminatory practice that has been perpetuated by the state, i.e., I have been getting less pay for doing the same work as the male barber at the Center. This I feel is a violation of State Statutes 111.31-111.37 as cited in Ariticle XI Section 1 of agreement."

9. The grievance contained the following statement of "relief sought":

> "1) That I am put in the same pay range as the barber.
>
> 2) That I receive the difference in pay that I have been denied since the inception of my employment by the state."

10. The answer to this grievance at the first and second steps was that it could not be resolved at the institutional level.

11. Following certain proceedings at the third step, the matter was never definitely resolved - i.e., either granted or denied. The third step grievance form under "employer's decision" has the word "dropped." The appellant alleges that following a meeting in early 1979 "it was relayed to Len O'Connell in July of 1979 that the Department refused to pay at all."

12. The appellant filed this appeal with the Commission.

CONCLUSION OF LAW

1. So much of this appeal as alleges to discrimination under subch. II of Chapter 111 was not untimely filed under s.230.44(3), Stats.

OPINION

Sec. 230.44(3), Stats., provides in part as follows:

> "...if the appeal alleges discrimination under subch. II of ch. 111, the time limit for that part of the appeal alleging such discrimination shall be 300 days after the alleged discrimination occurred."

The respondent argues that the alleged discrimination in this case occurred not later than August 15, 1976, the effective date of the reallocation of appellant's position to Beautician, that there was no "continuing violation," and that this appeal, filed in 1979, is untimely. Before considering the question of whether on these facts there is a continuing violation, the Commission will consider the question of whether the contractual grievance pursued by the appellant tolled the running of the 300 day period set forth in s.230.44(3), Stats.

There does not appear to be any authority in Wisconsin on this issue, but the federal courts have addressed it in the Title VII context.

Electrical Workers v. Robbins & Myers, Inc., 429 US 229, 13 FEP Cases 1813 (1976) involved a discharged employe who filed a contractual grievance 2 days after her discharge. Following the denial of her grievance at the third step, she filed a charge of racial discrimination with the EEOC. This was 84 days after the denial of her grievance at the third step, and 108 days after her discharge. Her subsequently filed suit was dismissed on the ground that she had not filed a charge with the EEOC within 90 days of her discharge, pursuant to s.706(d), 42 U.S.C. s.2000e-5(d).

The Supreme Court held that the employe's pursuit of the grievance did not toll the statutory period for filing a claim with the EEOC. The Court pointed out that in Alexander v. Gardner-Denver, Co. 45 US 36, 7 FEP Cases 81 (1974), and in Johnson v. Railway Express Agency, 421 US 454, 10 FEP Cases 817 (1975), it had held

that an arbitrator's decision pursuant to a collective bargaining agreement was not binding on an employe seeking to pursue Title VII remedies, and in the latter case, that filing a charge with the EEOC did not toll the running of the statute of limitations applicable to an action under 42 USC 1981 based on the same facts. The court distinguished Burnett v. New York Central R. Co., 380 U.S. 424 (1965), because there the employe actually had filed an FELA action in state court, which had concurrent jurisdiction with the federal courts. However, he had filed his complaint in a state court where venue did not lie under Ohio law. Despite the fact that the complaint was dismissed and refiled in federal court, the plaintiff had commenced an FELA action in a court of competent jurisdiction within the prescribed time frame.

While in the instant case the argument may be made that the appellant asserted in her contractual grievance that her rights under Subchapter II of Chapter 111 had been violated, this type of argument was disposed of the Court in Alexander v. Gardner-Denver Co., supra, 4150.5, at 57-58:

> "...the tension between contractual and statutory objectives may be mitigated where a collective-bargaining agreement contains provisions facially similar to those of title VII. But other facts may still render arbitral processes comparatively inferior to judicial processes in the protection of title VII rights. Among these is the fact that the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land....
>
> Moreover, the factfinding process in arbitration usually is not equivalent to judicial factfinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath are often severly limited or unavailable...And as this court has recognized, '[a]rbitrators have no obligation to the court to give their reasons for an award.' ...Indeed, it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditions means for dispute resolution This same characteristic, however, makes arbitration a less appropriate forum for final resolution of title VII issues than the federal courts."

The court further noted as footnote 19, 94 S. Ct. at 1024, 415 U.S. at 58:

> "A further concern is the union's exclusive control over the manner and extent to which an individual grievance is presented... In arbitration, as in the collective-bargaining process, the interests of the individual employe may be subordinated to the collective interests of all employes in the bargaining unit... Moreover, harmony of interest between the union and the individual employe cannot always be presumed especially where a claim of racial discrimination is made... And a breach of the union's duty of fair representation may prove difficult to establish...In this respect, it is noteworthy that Congress thought it necessary to afford the protections of title VII against unions as well as employees. See 42 USC s. 2000e-2(c)."

While the law developed in Title VII litigation is not automatically transferrable to proceedings under Subchapter II of Chapter 111, the Commission is of the opinion that these are substantial similarities between the two laws, that the reasoning of the Supreme Court set forth above is persuasive with respect to the issue raised by this appeal, and that therefore the time for appeal should not be considered tolled by the filing and precessing of the contractual grievance.

The second question presented by this matter is whether there is a continuing violation which may be said to have occurred within the 300 day period of limitations.

Prior to the 1976 reallocation of her position, the appellant was in a position classified at a lower level and hence a lower pay range than a barber who was doing essentially the same work. The state personnel rules applicable to the reallocation precluded a pay increase for the appellant because she was above the permanent status in class minimum. See s. Pers 5.03(2)(b)3:

> "If an employe's position is reallocated to a classification in a pay range with a higher maximum and the incumbent's present pay rate is above PSICM of the new class, the employe shall receive no pay increase as a result of the reallocation."

The male barber had been in the higher classification since 1965 and consequently was receiving more pay than the appellant at the time of the reallocation.

Since the appellant's pay was not increased, she continued to be paid less than the barber. For the purpose of deciding this motion, the Commission will presume that the appellant continued to be paid less than the barber on an onging basis thereafter.

There does not appear to be any direct Wisconsin authority on the question of what is necessary to have a continuing violation under either s.111.36(1) or s.230.44(3), Stats. The U.S. Supreme Court has addressed a similar question in a Title VII context in United Air Lines v. Evans, 431 US 533, 14 EPD para. 7577 (1977). In that case, Ms. Evans was forced to resign from employment as a flight attendance with United Air Lines in 1968 when she married, due to then existing company policy. She did not pursue this by filing a charge with the EEOC. In 1972 she was hired as a new employe with United. For seniority purposes, she was given no credit for her prior service, and she commenced a Title VII proceeding. The court discussed the question of whether her action was untimely as follows, 14 EPD at p. 4841 (footnotes omitted):

> Respondent recognizes that it is now too late to obtain relief based on an unlawful employment practice which occurred in 1968. She contends, however, that United is guilty of a present, continuing violation of Title VII and therefore that her claim is timely. She advances two reasons for holding that United's seniority system illegally discriminates against her: first, she is treated less favorably than males who were hired after her termination in 1968 and prior to her re-employment in 1972; second, the seniority system gives present effect to the past illegal act and therefore perpetuates the consequences of firbidden discrimination. Neither argument persuades us that United is presently violating the statute.
>
> It is true that some male employees with less total service than respondent have more seniority than she. But this disparity is not a consequence of their sex, or of her sex. For females hired between 1968 and 1972 also acquired the same preference over respondent as males hired during that period. Moreover, both male and female employees

> who had service prior to February 1968, who resigned or were terminated for a nondiscriminatory reason (or for an unchallenged discriminatory reason), and who were later re-employed, also were treated as new employees receiving no seniority credit for their prior service. Nothing alleged in the complaint indicates that United's seniority system treats existing female employees differently from existing male employees, or that the failure to credit prior service differentiates in any way between prior service by males and prior service by females. Respondent has failed to allege that United's seniority system differentiates between similarly situated males and females on the basis of sex.
>
> Respondent is correct in pointing out that the seniority system gives present effect to a past act of discrimination. But United was entitled to treat that past act as lawful after respondent failed to file a charge of discrimination within the 90 days then allowed by §706(d). A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences.
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> Respondent emphasizes the fact that she has alleged a *continuing* violation. United's seniority system does indeed have a continuing impact on her pay and fringe benefits. But the emphasis should not be placed on mere continuity; the critical question is whether any present *violation* exists. She has not alleged that the system discriminates against former female employees or that it treats former female employees who were discharged for a discriminatory reason any differently than former employees who resigned or were discharged for a non-discriminatory reason. In short, the system is neutral in its operation."

The state of the law subsequent to Evans is discussed in a law review note, The Continuing Violation Thoery of Title VII After United Air Lines Inc. v. Evans, 31 Hastings Law Journal 929, 954-956 (1980):

> "The lower courts have interpreted Evans' primary holding as being that present, continuing adverse effects upon an individual as a result of a past discriminatory act are insufficient to create a present violation of Title VII. The second major holding in Evans, as seen by the lower courts, is that discharges are not continuing violations, or, in other words, the limitation period always starts to run on the date of discharge. A related holding of Evans, effected in later cases, is that a discriminatory act or practice must take place during the limitation period for a court to hold that a present violation of Title VII exists.

Nearly all of the continuing violation cases decided after Evans and Teamsters, [Intl. Bro. of Teamsters v. US, 431 US 324 (1977)] may be categorized under one of the three sub-theories - continuing course of conduct, continuing pattern or practice of discrimination, and present effects of past discrimination. In general, the subsequent federal court decisions have held that both the continuing course of conduct and the continuing pattern or practice of discrimination sub-theories reman viable after Evans and Teamsters but that Evans rejects the present effects of past discrimination."

In his brief, the respondent argues in part as follows:

"In the instant case, Hoepner is apparently alleging that the failure of the respondent to adjust her salary at the time she was reallocated from beauty operator 2 to beautician in 1976 constitutes a discriminatory act. However, she did not file an appeal with the Personnel Commission within 300 days of the date of that reallocation. Under the holding in Evans, it is clear that the unappealed reallocation '...is the legal equivalent of a discriminatory act which occurred before the statute [the Civil Rights Act of 1964] was passed.' Such an act is not unlawful."

The aforesaid law review article contained the following discussion with respect to this aspect of the opinion:

"This passage need not indicate the end of the continuing violation theory. According to the Court, the only discrimination present in Evans' case was her dismissal in 1968. This was a single, distinct discriminatory act which started the running of the limitation period. Even though the adverse effects resulting from the dismissal continued to injure Evans, they were held insufficient to toll the running of the limitation period for her claim. Accordingly, the discriminatory act of dismissal had 'no present legal consequences.' The Court was addressing the present effects of past discrimination sub-theory only when it held that a discrimatory act which is not made the basis for a timely charge is equivalent to a discriminatory act which occurred before the statute was passed. They are equivalent only in that neither would be actionable under Title VII. These statements by the Court only apply to a past discrimatory act and not to continuing violations, e.g., discriminatory promotion practices." 31 Hastings Law Journal at 951-952.

The federal courts after Evans have applied the continuing violation theory in Title VII cases to claims of women being paid less than similarily situated

male employes. See Jenkins v. Home Insurance Co., 24 EPD para. 31.405(US Ct. of Appeals, 4th Cir., 12/15/80). In that case, the employe was hired in 1969, promoted in 1973, and retired in 1977. She alleged that "she was consistently paid less than her male counterparts who performed the same work." She testified that she became aware of the discrepancy in January, 1975, and was told by her manager in the summer 1976 that the discrepancy was due to the low salary the company paid her when she was initially hired. The employe filed a claim with the EEOC on May 3, 1978.

The district court dismissed her complaint on the grounds of untimely filing. The court of appeals summarized the district court's decision as follows:

> "...the discriminatory violation which gave rise to her claim occurred when she was hired at a lower salary, and that her cause of action accrued on that date or, at the latest, upon her discovery of the violation in 1975-76. Applying the rule in Evans, the court determined that although Jenkins' initial low salary affected her level of pay throughout the duration of her employment, this differential did not constitute a continuing violation. "24 EPD at p. 18,411."

The Court of Appeals reversed:

> "Unlike Evans, the Company's alleged discriminatory violation occurred in a series of separate but related acts throughout the course of Jenkins' employment. Every two weeks, Jenkins was paid for the prior working period; an amount less than was paid her male counterparts for the same work covering the same period. Thus, the Company's alleged discrimination was manifested in a continuing violation which ceased only at the end of Jenkins' employment."

This is very much the situation in the instant case. Ms. Hoepner has been and continues to be paid week after week at a lower rate than the male barber. That the respondent made a determination as to appellant's salary in 1977 when her position was reallocated does not take this case out of the continuing violation category. A case such as this which involves a basic issue of salary level can be distinguished from a case which involves a discrete personnel transaction which over the years has a continuing effect on an employe's salary as a result of the operation of a neutral personnel policy. Compare, for example, De Grafenreid v. General

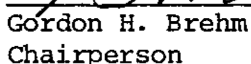
Motors Assembly Div., St. Louis, 14 EPD para. 7692 (US Ct. of Appeals, 8th Cir., 7/15/77), which involved claims for retroactive seniority to correct past discriminatory refusals to hire; Freude v. Bell Tele. Co. of Pa., 15 EPD para. 7983 (US D. Ct. E.D. Pa., 7/26/77), which involved a claim alleging that pension checks were discriminatorily small because they were based on salaries that were sex discriminatory.

ORDER

The respondent's motion to dismiss is denied.

Dated June 30, 1981

STATE PERSONNEL COMMISSION



Gordon H. Brehm
Chairperson

Donald R. Murphy
Commissioner

AJT:mgd

Parties

Ms. Leanore Hoepner
1424 Eagle Street
Chippewa Falls, WI 54729

Mr. Donald Percy
DHSS, 1 W. Wilson St.
Madison, WI 53702