

\* \* \* \* \*  
 STANLEY LABER,  
                                   Appellant,  
 v.  
 President, UNIVERSITY OF  
    WISCONSIN,  
                                   Respondent.  
 Case No. 79-293-PC  
 \* \* \* \* \*

INTERIM  
 DECISION  
 AND  
 ORDER

NATURE OF THE CASE

This case initially was handled by the Commission as an appeal of the termination of probationary employment pursuant to §230.45(1)(f), Wis. Stats. The appellant subsequently has requested that the matter be handled as a complaint of religious discrimination pursuant to §230.45(1)(b), Wis. Stats., and the respondent has objected. Both parties have filed briefs. The following findings set forth the procedural background of this case, and appear to be undisputed.

FINDINGS OF FACT

1. In his initial appeal filed with the Commission on October 2, 1979, Mr. Laber alleged in part as follows:

"I wish to appeal my termination from the Facilities Department at UW-M on August 24, 1979. I specifically request a hearing because my appeal is based on religious discrimination.

Although my supervisor (Clifford Johnson) claims the decision was based on performance and absenteeism, I don't feel this is truthful and is only a pretext. I feel this way because a) co-worker made comments about my religion and my religious dress, b) the single performance evaluation I received was after 4 months of work and that was an 'average' rating; c) the number of days I missed was not unusually high compared to other probationary employees who did pass probation."

2. A prehearing conference report dated January 11, 1980, contained the following statement:

"The hearing examiner suggested to Mr. Laber that in view of his belief that his termination was discriminatory because based on his religion, he may also wish to file a complaint under the Fair Employment Act, §111.37-111.37, Wis. Stats. With appellant's copy of this conference report is enclosed a discrimination complaint form and a copy of the current administrative rules governing the processing of employment discrimination cases."

3. No complaint of discrimination was filed by the appellant at that time, although later a complaint with respect to the subject matter of this appeal was filed on March 12, 1981.

4. By letter dated April 1, 1980, from the hearing examiner to the parties, this appeal was noticed for hearing with jurisdiction pursuant to §§230.45(1)(f) and 111.91(3), Wis. Stats., on the following issues, which had been proposed by appellant:

"1. Whether appellant was terminated because of his religion or religious habits.

2. Whether respondent's stated reasons for termination are pretextual.

3. Whether complainant received equal treatment as other probationary employees (who are not of his creed or did not display his habits).

4. Whether complainant's termination was motivated by complainant's previous charges of religious discrimination."

5. The matter proceeded to hearing on May 5th and 27th, 1980, and post-hearing briefs were filed.

6. By letter to the parties from the examiner dated September 11, 1980, they were informed as follows:

"...I respectfully submit that my case should not be deferred. Although I am appealing a termination from probationary employment, my case is actually a claim of religious discrimination which only incidently is an appeal of termination from probation."

8. Mr. Laber was sent a discrimination complaint form on March 2, 1981, and filed a completed notarized form on March 12, 1981, which stated in part as follows:

"I feel the basis of my discharge August, 1979, was pre-textual. The true reason was my religion and associated dress and behaviors. Also the employer acted in a retaliatory manner and failed to consider my handicap (back injury)."

9. Mr. Laber has been unrepresented by counsel throughout this proceeding.

#### OPINION

The respondent argues that this matter cannot now be pursued as a complaint of discrimination because the complaint, which was filed on March 12, 1981, was filed more than 300 days after the date of the alleged discrimination, see §230.44(3), Wis. Stats.

However, at least so much of the matter subsequently filed on a complaint form on March 12, 1981, was initially timely filed on a literal reading of §230.44(3), Wis. Stats., which states in pertinent 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."

In this case, the original appeal letter stated in part "...my appeal is based on religious discrimination. Although my supervisor...claims the decision was based on performance and absenteeism, I don't feel this is

truthful and is only a pretext." This allegation of religious discrimination was timely filed under §230.44(3). Essentially all that the filing of the complaint form on March 12, 1981, provided, as to the allegation of religious discrimination, was the technical perfection of the original appeal by supplying sworn verification. Compare, Blue Bell Boots, Inc. v. Equal Employment Opportunity Commission, (U.S. Court of Appeals, 6th Circuit 1969), 2 EPD Para. 10.115, a case involving a claim under Title VII: "Accordingly, courts have consistently held that a charge filed within 90 days of an alleged unfair practice need not be accompanied by the oath of the complainant. Sworn verification may occur later."

To the extent that the complaint form filed March 12, 1981, is construed as a substantive amendment to the original appeal, any amendment of it which is permitted would relate back to the date that the original appeal was filed. See, Oakley v. Bartell, Wis. Pers. Commn. 78-66-PC (10/10/78), where the Commission observed that in judicial proceedings, an amendment of a complaint relates back to the date of the filing of the original pleading "'if the claim asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading,' §802.09(3), Stats." The Commission indicated that in its opinion no stricter rule was called for in administrative proceedings, and held that the amendment would relate back. See also, Fisk v. DOT, Wis. Pers. Commn. No. 79-83-PC (1/23/80).

Although it certainly would have been preferable for Mr. Laber to have filed the complaint of discrimination at an earlier date, in the opinion of the Commission it is not difficult for a person unrepresented by counsel to be unclear as to the difference between denominating a matter a complaint of discrimination as to a probationary termination and an appeal of a probationary termination which contains an allegation of discrimination. Furthermore, given the nature of the issues noticed for hearing, see Finding #4 above, it is difficult to see how the respondent could have been materially prejudiced in its preparation for hearing, at least as to the allegation of religious discrimination. These are exactly the sort of issues normally raised by a complaint of discrimination.

With respect to the allegation of discrimination on the basis of handicap, this is a new substantive charge which was not raised in the initial appeal letter. There has been no indication in the arguments filed since the hearing that the basis for this allegation was not known or knowable prior to the hearing, and the respondent of course had no notice of this charge prior to the hearing. The Commission declines to permit the amendment of the original appeal to permit the addition of a charge of handicap discrimination.

#### ORDER

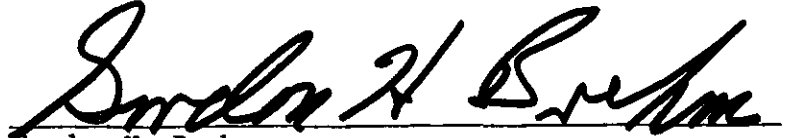
So much of the charge of discrimination filed March 12, 1981, which relates to a charge of religious discrimination, is deemed to be a perfection of the charge of religious discrimination contained in the appeal filed on October 2, 1979, and is determined to relate back to October 2, 1979,

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The remainder of the charge of discrimination filed March 12, 1981, is dismissed as untimely filed. This matter is referred to the Commission's investigative staff for investigation.

Dated Aug 6, 1981

STATE PERSONNEL COMMISSION



Gordon H. Brehm  
Chairperson



Charlotte M. Higbee  
Commissioner

AJT:mew

Parties

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Commissioner Murphy did not participate in the consideration or decision of this matter due to his employment with the respondent during the period in question.