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 *
 MARGARET GOODHUE, *
 *
 Complainant, *
 *
 v. *
 *
 Chancellor, UNIVERSITY OF *
 WISCONSIN-STEVENSON POINT *
 *
 Respondent. *
 *
 Case No. 82-PC-ER-24 *
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 * * * * *

INTERIM
 DECISION
 AND
 ORDER

The respondent has moved for dismissal of the above matter, arguing that no complaint was filed within the 300 day time limit established by §111.39(1), Stats. The parties have filed briefs. The facts set out below are based upon documents in the Commission's file and appear to be undisputed.

FINDINGS OF FACT

1. On April 30, 1981, the complainant received a memo from the Chancellor and Vice-Chancellor of the University of Wisconsin-Stevens Point (UW-SP) indicating that she would not be recommended for tenure or for promotion to the rank of associate professor and that her term of appointment would end with the 1981-82 academic year. She had previously been employed in the UW-SP Biology Department.

2. On January 11, 1982, the Personnel Commission received a letter from the complainant that had been addressed to Legal Counsel, Equal Employment Opportunity Council. A copy of the letter is attached hereto and included as if fully set forth as part of this finding. The letter is dated December 27, 1981.

3. On January 11, 1982, an employe of the Commission sent a memorandum to the complainant. The memo stated:

Your letter to the Equal Opportunity Council, dated December 27, 1981, has been forwarded to our office.

The Personnel Commission is responsible for investigating charges of discrimination which are filed against a state agency. This includes the entire University of Wisconsin system. Therefore, I am enclosing a discrimination complaint form and instructions. Should you wish to file a formal charge against the UW-Stevens Point, please fill out the form and return it to our office. Also, please be sure you sign the form and that it is notarized.

After we receive the completed form, an equal rights officer will be assigned, the case will be assigned a number and the usual processing procedure will be followed.

4. The Commission mailed a letter to the complainant on January 29, 1982, which stated:

On January 11, 1982, our office received a letter from you and, in response to that letter, I mailed you a discrimination complaint form.

I have heard nothing from you since that date. We cannot proceed with a complaint until we have the notarized, signed form.

Unless I hear from you to the contrary within thirty days, I will assume you are no longer interested.

5. On March 8, 1982, the complainant filed a completed Form PC-3 (Charge of Discrimination) with the Commission.

CONCLUSIONS OF LAW

1. The complainant's December 27, 1981 letter constituted a complaint of discrimination that was timely filed with the Commission.

2. The complainant's filing of Form PC-3 on March 8, 1982, corrected any technical deficiencies in, and related back to, the complainant's prior letter.

OPINION

The time limit for filing a complaint of discrimination with the Commission is established by §111.39(1), Stats., which provides:

The department may receive and investigate a complaint charging discrimination or discriminatory practices or unfair honest testing in a particular case if the complaint is filed with the department no more than 300 days after the alleged discrimination or unfair honesty testing occurred.

The Commission has interpreted this provision, in conjunction with §230.44(3), Stats., as meaning that the discrimination occurs when the adverse decision was made and the complainant was so notified. Grimmenga v. DOR, Case No. 83-0007-PC-ER (August 17, 1983).

In the present case, the complainant was notified of the Chancellor and Vice-Chancellor's tenure decision on April 30, 1981. The 300th day after April 30th was Wednesday, February 24, 1982.

On December 27, 1981, the complainant wrote a letter that ultimately reached the Commission on January 11, 1982. The letter provided the Commission with the following information:

- 1) The complainant's name.
- 2) The complainant felt that she was treated differently because of her sex and possibly her marital status.
- 3) The conduct complained of was attributed to the Chancellor of UW-Stevens Point and the Chairman of the Biology Department.
- 4) The conduct included denial of tenure and promotion as well as comments made by faculty members and the Department Chairman.
- 5) The complainant sought "any help" she could get.

The respondent argues that the December 27th letter failed to comply with the requirements of §PC 4.02(1), Wis. Adm. Code, and that it was not until the complainant filed Form PC-3 on May 8, 1982, that she had actually filed a complaint. §PC 4.02(1), Wis. Adm. Code, provides:

(1) CONTENT. Complaints shall be in writing, shall be signed and notarized and shall contain the following information:

- (a) Name and address of complainant.

- (b) Type of discrimination alleged (age, race, color, handicap, sex, creed, national origin, ancestry, retaliation, arrest record or conviction record).
- (c) The name, title, agency or department charged with the unlawful discriminatory practice or act.
- (d) The facts which constitute the alleged unlawful discriminatory practice or act.
- (e) The relief or remedy requested, if determined.
- (f) Notarized signature.

The complainant's letter of December 27th did not indicate the complainant's address or specify the relief or remedy requested, nor was the letter notarized. However, the Commission is convinced that the complainant's letter was a complaint that included certain technical deficiencies and that these technical deficiencies were corrected by a subsequent filing of a completed Form PC-3 that related back to the prior letter.

The information listed in §PC 4.02(1)(a) through (f), Wis. Adm. Code need not all be present in order to constitute a complaint of discrimination with the Commission. For example, sub (e) specifically qualifies the information regarding "relief or remedy requested", by noting that that information is to be provided "if determined." The administrative rule generally states that complaints "shall contain the following information." However, the provisions of the Commission's procedural rule should be construed with the same liberality as is required in construing Subch II, Ch. 111, Stats. (the State Fair Employment Act):

111.31 Declaration of Policy.

(3) In the interpretation and application of this subchapter, and otherwise, it is declared to be the public policy of the state to encourage and foster to the fullest extent

practicable the employment of all properly qualified individuals regardless of age, race, creed, color, handicap, marital status, sex, national origin, ancestry, sexual orientation, arrest record or conviction record. Nothing in this subsection requires an affirmative action program to correct an imbalance in the work force. This subchapter shall be liberally construed for the accomplishment of this purpose.

In addition, the mere presence of the word "shall" in the Commission's rules, does not make the rule mandatory. The factors to be considered when construing a statute or rule in terms of whether it is mandatory or directory were set forth in Cross v. Soderbeck, 94 Wis. 2d 331, 340-41 (1980):

In determining whether a statutory provision is mandatory or directory in character, we have previously said that a number of factors must be examined. These include the objectives sought to be accomplished by the statute, its history, the consequences which would follow from the alternative interpretations, and whether a penalty is imposed for its violation. We have also stated that directory statutes are those having requirements "which are not of the substance of things provided for." (citations omitted)

In the present case, the legislative intent behind the State Fair Employment Act has already been referenced. The Commission appears to have adopted the liberal construction provision now found in §111.31(3), Stats., when it "accepted the fair employment mandate":

PC 4.01 Scope of investigatory power. Pursuant to §§230.45(1)(b) and 111.33(2), Stats., [1979-80] the commission may, in response to timely filed complaints of discrimination, conduct investigations, undertake conciliations and settlements, and hold hearings to enforce with respect to state agencies the fair employment mandate set forth in subch II of ch. 111, Stats.

Any construction of §PC 4.02(1), Wis. Adm. Code that would find all those provisions regarding complaint contents to be mandatory would result in unfair consequences to potential complainants without identifying a significant benefit to state employment. The rule's failure to impose any penalty on a complainant's non-compliance also supports construing the rule as discretionary rather than mandatory.

In prior decisions, the Commission has permitted complainants to correct technical errors in their complaints. Those corrections then "related back" to the original complaint filed with the Commission. For example, in both WFT v. DP, Case No. 79-306-PC (April 2, 1982) and Saviano et al v. DP, Case No. 79-PC-CS-335 (June 28, 1982), the appellants had filed letters of appeal under §230.44, Stats., which included allegations of discrimination based upon sex. The respondent raised jurisdictional objections. The Commission found that it lacked jurisdiction over the matters as appeals, but because the appellants had alleged sex discrimination, they were allowed to perfect complaints of sex discrimination by filing notarized complaints which related back to the date that the original appeals were filed.

The facts in the present case are substantially similar. The complainant sent a letter which, when it reached the Commission, clearly indicated that the complainant felt she was discriminated against based upon her sex. The Commission sent her a form so that her complaint would comply with the technical provisions of §PC 4.02, Wis. Adm. Code, and processing the complaint could begin. The filing of Form PC-3 on March 8th corrected the technical deficiencies in the complainant's prior letter. The correction related back to the January 11, 1982, date on which the letter had been filed with the Commission.

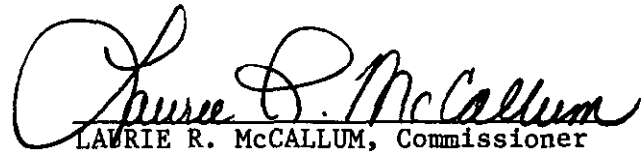
ORDER

Respondent's motion to dismiss is denied.

Dated: November 9, 1983 STATE PERSONNEL COMMISSION


DONALD R. MURPHY, Chairperson

KMS:jmf


LAURIE R. McCALLUM, Commissioner


DENNIS P. MCGILLIGAN, Commissioner

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