STATE OF WISCONSIN PERSONNEL COMMISSION

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HELEN GOERS GRIMMENGA,

Appellant,

v.

Secretary, DEPARTMENT OF REVENUE,

Respondent.

Case No. 83-0007-PC-ER

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INTERIM DECISION AND ORDER

This matter is before the Commission on consideration of a proposed decision and order, a copy of which is attached, the Commission having considered the respondent's objections and arguments with respect thereto and consulted with the examiner. The Commission adopts the proposed decision and order as its own, and adds the following comments.

With respect to the question of when constructive service might be concluded to constitute effective notice prior to the time the document actually comes into the hands of a complainant, the Commission makes the following observations. The cases cited in the proposed decision are marked by what may be characterized as reasonable diligence in looking after their affairs on the part of the people to whom the notice was sent For example, in Killingham v. Board of Governors, 30 FEP cases 184,185 (U.S. D. Ct. N.D.Ill. 1982), the certified letter was signed for by the complainant's mother on September 18th and delivered to him on September 19th. In Fletcher v. Royston, 30 FEP Cases 286, 288 (U.S. D. Ct. of Columbia 1982), the certified letter was received by the complainant's father-in-law on July 18th and by the complainant on July 19th.

In the Commission's view a constructive receipt may be imputed where a complainant is not reasonably diligent in tending to his or her affairs and effectively ignores a piece of registered mail. However, such is not the case on these facts where the complainant was temporarily residing at some distance from her home, her daughter received the letter on the 23rd, and delivered it to her mother on the 25th. The Commission cannot agree, as argued by the respondent, that the appellant was under an obligation either to have had her daughter read her the letter over the phone, or to have driven to Watertown on the 23rd. With respect to the former contention, it raises questions of invasion of privacy, and at least on this record, failure to have done so can not be concluded to be inconsistent with reasonable diligence. With respect to the latter contention, in the opinion of the Commission, reasonable diligence does not require that the addressee have "dropped everything" and have rushed to Watertown as soon as she heard that the letter had been delivered there.

The respondent's objection to the Commission's consideration of the foregoing, and other similar federal cases on the ground that:

> "Those four cases all deal with the right to sue under 42 U.S.C. §2000e5(f)(1) which provides that one must exercise one's right to sue 'within 90 days after the giving of such notice.' Thus, the statute specifically grants the appeal time of 90 days after the notice is given. In the present case the statute provides for an appeal within 300 days after the alleged discrimination occurred,"

is misplaced. These cases were cited in connection with the question of the constructive receipt of certified mail, not the question of the interpretation of the 300 day time limit set forth in §230.44(3), Stats.

With respect to the issue of how this 300 day time limit should be computed, the respondent makes the following argument:

> "Again, Section 230.44(3) of the Wisconsin Statutes provides for an appeal period for 30 days after the effective date of the action, or within 30 days after the appellant is notified of the

action, except if the appeal alleges discrimination, the time limit for that part of the appeal alleging such discrimination shall be 300 days after the alleged discrimination occurred. If the legislature wanted to have 300 days from the date of actual notification, it could easily have so stated as it had for the appeals not alleging discrimination."

Section 230.44(3), Stats., provides as follows:

"Any appeal filed under this section may not be heard unless the appeal is filed within 30 days after the effective date of the action, or within 30 days after the appellant is notified of the action, whichever is later, except that 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." (emphasis added)

The legislative expression of the time limit for matters under the Fair Employment Law - "300 days after the alleged discrimination occurred" - is not the same as "30 days after the effective date of the action." (emphasis added) It would seem that if the legislature had wanted to provide that Fair Employment Act complaints had to be filed within 300 days after the effective date of the action, it simply would have repeated that language from the initial part of §230.44(3), rather than to have used a different wording.

In the opinion of the Commission, it is more likely that the legislature used the language "300 days after the alleged discrimination occurred" because it desired to parallel the provision on timeliness found in the Fair Employment Act, which contains the same language. Accordingly, it seems appropriate in interpreting this language to advert to the body of case law which has interpreted similar language in the Title VII, 42 USC 32000e-5(e).

ORDER

The Commission adopts as its interim decision and order in this matter the proposed interim decision and order, attached hereto.

Dated: August 10, 1983 STATE PERSONNEL COMMISSION

Donald R. Murphy /ers
DONALD R. MURPHY, Chairperson

Dennis P. McGilligan
DENNIS P. McGILLIGAN, Commissioner

AJT:ers

Parties

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STATE OF WISCONSIN PERSONNEL COMMISSION

HELEN GOERS GRIMMENGA,

Complainant,

v.

Secretary, DEPARTMENT OF REVENUE,

Respondent.

Case No. 83-0007-PC-ER

PROPOSED INTERIM DECISION AND ORDER

NATURE OF THE CASE

This is a charge of discrimination before the Commission pursuant to §230.45(1)(b), Stats. The respondent has moved to dismiss on the ground that the charge was not timely filed. An evidentiary hearing was conducted to determine the facts relative to timeliness, and the parties subsequently filed briefs.

FINDINGS OF FACT

1. At all times material, the complainant's permanent residence has been 1034 Richards Avenue in Watertown. This also has been the only address she had had on file with the employer/respondent, Department of Revenue (DOR).

2. By letter dated March 17, 1982, DOR terminated complainant's employment effective February 19, 1982.

3. The aforesaid letter was postmarked March 18, 1982, and sent to the complainant by certified mail. The letter bore the street address of 1023 Richards Avenue.

4. Since about February 19, 1982, and through the month of March, 1982, the complainant had been staying with her sister in Madison, due to an asthmatic condition and an allergic reaction to certain pets maintained by her daughter at home.

5. On March 23, 1982, the complainant's daughter, then age 18, received and signed a receipt for the aforesaid certified letter from the United States Postal Service.

6. The evening of March 23, 1982, the complainant and her daughter spoke over the telephone, and the complainant was informed by her daughter that she had received a letter addressed to the complainant from the DOR.

7. On March 25, 1982, the complainant's daughter drove to Madison and gave the letter to the complainant, who at that point opened it and read it.

8. The complainant filed the instant charge of discrimination with this Commission on January 18, 1983.

CONCLUSIONS OF LAW

1. This charge of discrimination, was timely filed with this Commission.

2. This Commission has subject matter jurisdiction over this charge of discrimination pursuant to §230.45(1)(b), Stats.

OPINION

Section 230.44(3), Stats., provides:

> Time Limits. Any appeal filed under this section may not be heard unless the appeal is filed within 30 days after the effective date of the action, or within 30 days after the appellant is notified of the action, whichever is later, except that if the appeal alleges discrimination under Subch. II of Chapter 111, the time limit for that part of the appeal alleging such discrimination shall be 300 days after the alleged discrimination occurred. (emphasis supplied)

The respondent argues that the alleged discrimination "occurred" in this case on March 17, 1982, because the "complainant was terminated by a letter dated March 17, 1982 ... and the discrimination complaint filed January 19, 1983, was filed 307 days after the alleged discrimination occurred." Respondent's brief, p. 4.

This raises the question of whether, under these facts, the 300 days for filing a charge of discrimination begins to run the date the employer signed the letter informing the employe of her discharge, effective at an earlier date, or the date the employe received the letter.

There does not appear to be any direct authority in Wisconsin on this point. However, statutory language similar to that set forth above is found in Title VII of the federal Civil Rights Act of 1964, which requires that discrimination complaints be filed "within one hundred and eighty days after the alleged unlawful employment practice occurred." 42 U.S.C. §2000e - 5(e).

In Delaware State College v. Ricks, 24 FEP Cases 827 (1980), the U. S. Supreme Court considered a case involving a decision to deny tenure which then was communicated to the complainant at a later date. The Court held:

> ... the limitations period commenced to run when the tenure decision was made and Ricks was notified....
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> * * *
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> The District Court rejected both the June 30, 1975, date and the September 12, 1974 date, and concluded that the limitations period had commenced to run by June 26, 1974, when the President of the Board notified Ricks that he would be offered a 'terminal' contract for the 1974-1975 school year. We cannot say that this decision was erroneous. By June 26, the tenure committee had twice recommended that Ricks not receive tenure, the Faculty Senate had voted to support the tenure committee's recommendation; and the Board of Trustees formally had voted to deny Ricks tenure. In light of this unbroken array of negative decisions, the District Court was justified in concluding that the college had established its official position -- and made that position apparent to Ricks -- no later than June 26, 1974. (emphasis supplied) 24 FEP Cases at 830, 832.

In Caldwell v. Seaboard Coastline R. R., 15 FEP Cases 426, 427 (W.D. N. C. 1977), the District Court held:

> February 5, 1973, the day plaintiff first learned of his seniority date, should be the date to be considered in determining if Caldwell has complied with the statute of limitations of Title VII.... (emphasis supplied)

In each case, the Court utilized the date the employe learned of a prior employment decision as the point at which "the alleged unlawful employment practice occurred" for the purpose of computing the period of limitations. The policy attributes of such an approach are obvious. An employe has no way of knowing of certain kinds of personnel transactions until they are communicated by management. It would be inequitable to permit a period of limitations to commence to run from the date of a transaction about which an employe was unaware and could not have been aware. Second, the approach suggested by the respondent could permit an employer to drastically reduce the amount of time available to an employe to file a charge of discrimination simply by withholding the notice of an adverse personnel transaction.

In keeping with the foregoing cases, discrimination should not be considered to have occurred under §230.44(3), Stats., in this case, until after the adverse decision was made and the complainant was so notified.

The respondent next contends that the complainant received notice of the adverse action when her daughter picked up the certified letter on March 23, 1982, on the theory that she was acting as an agent for her mother at that point.

A statement of the general rule as to imputation to a principal of notice to an agent is set forth in 3 Am Jur 2d Agency §273:

> The general rule, which is subject to qualifications, is that the principal is chargeable with, and bound by, the of knowledge of or notice to his agent received while the agent is acting as such within the scope of his authority and in reference to a matter over which his authority extends.

In §276 it further is stated that "the knowledge or notice must come to an agent, who has authority to deal in reference to those matters which the knowledge or notice effects."

In this case, there is nothing to suggest that the complainant's daughter had the authority to have received notice of her mother's discharge from employment, such as possibly might have been possessed by an attorney or union representative. The Commission is not prepared to equate such authority with the authority to receive certified mail. In the absence of specific evidence to the contrary, all that can be inferred from the latter type of authority is that the agent/daughter had the authority to receive the piece of mail in her mother's absence and to hold it for, or deliver it to her.

Without the kind of more extensive authority that would give rise to an imputation to the complainant of such notice, actual notice to the complainant is required. See 66 CJS Notice, ss 3, 18C.(1):

> Generally a notice is regarded in law as actual when the person sought to be affected by it knows of the existence of the particular fact in question, or is conscious of having the means of knowing it. Notice is actual when it is directly and personally given to the person to be notified.
>
> * * *
>
> In the absence of custom, statute, estoppel, or express contract stipulation, when a notice, affecting a right, is sought to be served by mail, the service is not effected until the notice comes into the hands of the one to be served, and he acquires knowledge of its contents, except perhaps in those cases where the party to be notified resorts to some trick or artifice to avoid personal communication with him. (emphasis supplied).

This approach also is consistent with a number of federal court decisions under Title VII.

In Killingham v. Board of Governors, 30 FEP Cases 184, 185 (U.S.D. Ct. N.D. Ill., 1982), the EEOC sent the complainant a right-to-sue letter by certified mail. It was signed for by the complainant's mother on September 18, 1981, and delivered to him the following day, September 19th. The court held that the time for filing suit began to run on September 19th:

> That issue has been resolved by our Court of Appeals in favor of the date of actual (not constructive) receipt by the Title VII claimant. Archie v. Chicago Truck Drivers, Helpers and Warehouse Workers Union, 585 F. 2d 210, 214-16, 20 FEP Cases 473 (7th Cir. 1978).

In the Archie case, the Court cited Franks v. Bowman Transportation Co., 495 F. 2d 398, 404, 8 FEP Cases 66 (5th Cir.), rev'd other grounds, 424 U.S. 747, 8 FEP Cases 1280 (1976), as follows:

> We do not deal here with service of process or receipt of an offer of acceptance to make a contract, but with the interpretation of Title VII. The courts have consistently construed the Act liberally to effectuate its remedial purpose, and we think this purpose would be poorly served by the application of a 'constructive receipt' doctrine to the notification procedure. More narrowly, the purpose of the statutory notification, which is to provide a formal notification to the claimant that his administrative remedies with the Commission have been exhausted: Beverly v. Lone Star Lead Construction Corp., 5th Cir. 1971, 437 F. 2d 1136, 3 FEP Cases 74, and to inform him that the ... period has begun to run, has not been accomplished until the claimant is actually aware of the suit letter. In terms of the policy behind limitations periods generally, the claimant can hardly be said to have slept on his rights if he allowed the ... period to expire in ignorance of his right to sue.

See also, Fletcher v. Royston, 30 FEP Cases 286, 288 (U.S. D. Ct. Dist. of Columbia 1982), where the Court held that where a right-to-sue notice was sent by certified mail, received by the complainant's father-in-law on July 18, 1980, and by the complainant on July 19, 1980, the limitations period began to run on July 19th: "Finally, this resolution of the time problem accords with the courts' general view that, because Title VII is a broad remedial statute, pursuant to which laymen,

operating without legal assistance often initiate lawsuits, narrow procedural technicalities should not be allowed to cut off a plaintiff's rights."

The Wisconsin Fair Employment Law also contains a broad declaration of policy and an admonition that "This subchapter shall be liberally construed for the accomplishment of this purpose." §111.31(3), Stats. The Commission is convinced that the approach to constructive receipt set forth in the above federal cases is more in keeping with the Fair Employment Law than that urged by the respondent, and concludes that the 300 day time period set forth in §230.44(3), Stats., did not begin to run until actual receipt by the complainant of the notice of discharge on March 25, 1982.

ORDER

The respondent's motion to dismiss for untimely filing is denied.

Dated:_____,1983 STATE PERSONNEL COMMISSION

_____
DONALD R. MURPHY, Chairperson

AJT:jmf

_____
DENNIS P. McGILLIGAN, Commissioner

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