

STATE OF WISCONSIN

PERSONNEL COMMISSION

* * * * *
 *
 CARL BURNARD, *
 *
 Complainant, *
 *
 v. *
 *
 Secretary, DEPARTMENT OF *
 ADMINISTRATION, *
 *
 Respondent. *
 *
 Case No. 83-0040-PC-ER *
 *
 * * * * *

INTERIM
 DECISION
 AND
 ORDER

This matter was filed as a charge of discrimination on April 8, 1983.
 The charge of discrimination includes the following statement.

In 1979, I requested a leave of absence without pay for medical reasons. I was never allowed to return to work and I was forced to resign in June 14, 1982 because I was not allowed to return to work. This refusal of reinstatement constitutes constructive discharge and was based upon discrimination against me for perceived handicaps.

A copy of the complaint was served on respondent DOA which then filed a motion to dismiss the complaint for failure to comply with the 300 day filing requirement. The motion included the following statements:

The Appellant worked as a Building Construction Superintendent 2 and, on January 29, 1979, was granted a leave of absence without pay pursuant to section ER-Pers 18.05, Wis. Adm. Code.

Pursuant to section ER-Pers 18.05(1), Wis. Adm. Code, a leave of absence without pay may be requested for a period not to exceed one year. A leave of absence may be extended on a year-to-year basis for an additional two years, but no formal leave shall exceed three years in total.

Appellant's leave of absence was extended yearly, until it expired on January 29, 1982.

The date the leave of absence expired was considered the last day the Appellant worked, pursuant to section ER-Pers 18.05(4), Wis. Adm. Code. The Appellant was not discharged.

Pursuant to §§111.39(2) and 230.44(3), Wis. Stats., complaints of discrimination must be filed within 300 days after the alleged discrimination occurred. According to the respondent, complainant's leave of absence finally expired on January 29, 1982. Pursuant to §Pers. 18.05(1)(a), Wis. Adm. Code^{FN}, "[n]o formal leave of absence shall exceed 3 years", except for certain project employes. Respondent also states that January 29th was considered the last day "worked" by the complainant and that he was not discharged.

The administrative code specifically establishes a procedure to be utilized when an individual does not actually return to work upon the expiration of a leave of absence:

§Pers 18.05(4) Failure to return from leave. See §Pers 21.03 Wis. Adm. Code. The date the leave of absence expires shall be considered the last day worked.

* * *

§Pers 21.03 Abandonment. (1) If an employe fails to report for work as scheduled, or to contact the employe's supervisor regarding absence from work, the appointing authority may discipline the employe.

(2) If an employe fails to report to work as scheduled or to contact his or her supervisor for a minimum of 5 consecutive working days, the appointing authority shall consider the employe's position abandoned and may take one of the following actions:

(a) Initiate discipline of the employe, which may include terminating the employe for cause, effective the last day worked; or

(b) Treat the employe as having resigned, effective as of the end of the last day worked.

FN Effective March 1, 1983, many of the civil service rules in the administrative code were revised. None of the revisions affected the rules cited in this decision.

(3) The appointing authority shall notify the employe in writing at the employe's last known mailing address of all actions taken under (1) and (2).

In the present case, respondent has failed to allege that it complied with §Pers 21.03(3), Wis. Adm. Code, by notifying the complainant that he had been discharged for cause or that he was considered to have resigned. In the absence of any evidence that the respondent gave complainant the requisite notice of resignation effective January 29, 1982, the Commission must conclude that the complainant's employment with DOA was not terminated for purposes of this proceeding until his resignation dated June 14, 1982 was accepted. Counting from June 14th, the complainant filed his charge of discrimination on the 298th day, thereby complying with the 300 day limitation.

ORDER

Respondent's motion to dismiss is denied.

Dated: May 25, 1983 STATE PERSONNEL COMMISSION

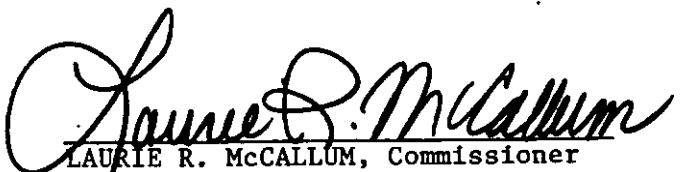
KMS:lmr

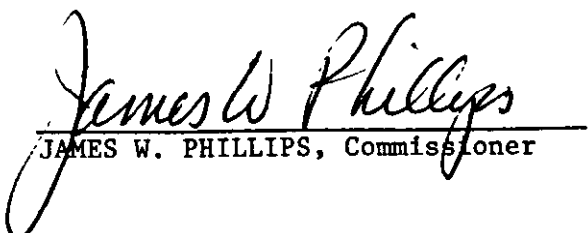
Parties:

Carl Burnard
P.O. Box 1
Elroy, WI 53929

Doris Hanson
Secretary, DOA
P.O. Box 7864
Madison, WI 53707


DONALD R. MURPHY, Chairperson


LAURIE R. McCALLUM, Commissioner


JAMES W. PHILLIPS, Commissioner