STATE OF WISCONSIN PERSONNEL COMMISSION

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CHARLES LATIMER,

Appellant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM (Oshkosh),

Respondent.

Case No. 84-0034-PC-ER

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INTERIM DECISION AND ORDER

This complaint of discrimination on the basis of race, pursuant to §§111.321, 111.322, 111.325, 230.45(1)(b), Stats., is before the Commission on the respondent's motion to dismiss as untimely, filed June 13, 1984. Both parties have submitted arguments with respect to this motion. This motion includes, in part, the following factual allegations which appear to be undisputed:

> Mr. Latimer was a probationary faculty member at UW-Oshkosh from 1977 to June 6, 1983, employed under successive academic year contracts. Mr. Latimer received his non-renewal notice on May 18, 1982.

The complaint of discrimination covers both the termination of the complainant's employment and what may be characterized as racial harassment in conditions of employment.

The respondent argues that the complaint, filed April 2, 1984, was untimely, since the alleged discrimination occurred when the decision set forth in the May 18, 1982, nonrenewal notice was made and communicated to the complainant, which was more than 300 days before the complaint was filed. See §111.39(1), Stats:

> The department[1] may receive and investigate a complaint charging discrimination in a particular case if the complaint is filed with the department no more than 300 days after the alleged discrimination...occurred.

The statutes do not offer any further guidance that would illuminate the question of at what point in the scenario surrounding a personnel matter or transaction an act of alleged discrimination "occurred."

This case presents the question of whether the alleged discrimination with respect to termination should be deemed to have occurred on May 18, 1982 (or shortly thereafter), when the complainant was notified that he would not be offered employment beyond the 1982-83 academic year, and that his employment would terminate June 6, 1983, or on June 6, 1983, when his employment terminated.

If that alleged discrimination is determined to have occurred on June 6, 1983, then the complaint was timely filed, since the 300th day thereafter was April 1, 1984, a Sunday, and by operation of law the complainant had until the next business day to effect filing, see §990.001(4)(b), Stats.

If the alleged discrimination is determined to have occurred on (or shortly after) May 18, 1982, then the complaint was not timely filed since it was filed more than 300 days thereafter.

With respect to that part of the complaint alleging racial harassment, it would appear to be timely to the extent that it involves a continuing violation, since the complaint was filed within the requisite time after the last day of employment.

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[1] In this case, this Commission, pursuant to §111.375(2), Stats.

With respect to the complainant's employment termination, the United States Supreme Court dealt with a somewhat similar statute of limitations issue under Title VII in Delaware State College v. Ricks, 449 U.S. 250, 66 L.Ed. 2d 431, 101 S. Ct. 498 (1980). In that case, a professor was formally denied tenure in March, 1974, and then he was offered and accepted a one-year "terminal" contract to expire in June, 1975. In September 1974, he was notified that a grievance he had filed concerning the denial of tenure had been denied. He filed a complaint with the EEOC in April 1975. The federal law on timeliness under Title VII required that a complaint be filed with the EEOC within 180 days after the "alleged unlawful employment practice occurred." The Supreme Court held that the "alleged unlawful employment practice" occurred, and the period of limitations began to run, at the time the decision was made to deny tenure and this was communicated to the complainant. The Court rejected arguments that the period should be deemed to have commenced on the complainant's final date of employment.

In a subsequent case Chardon v. Fernandez, 454 U.S. 6, 70 L.Ed. 2d 6, 102 S. Ct. 28 (1981) (per curiam), several non-tenured administrators in the Puerto Rico Department of Education received letters prior to June 18, 1977, notifying them that their appointments would be terminated on specified subsequent dates. The Court held that the limitations period applicable to an employment discrimination action under 42 USC §1983, ran from the time of notice that the appointments would terminate rather than the actual termination dates. Justices Brennan, Marshall, and Stevens dissented.

The majority refused to distinguish Ricks on the theory that that case involved a denial of tenure as the alleged unlawful employment practice, while the case before them involved termination of employment as the alleged unlawful employment practice:

> We think Ricks is indistinguishable. When Ricks was denied tenure, he was given a 1-year "terminal" contract. Thus, in each case, the operative decision was made - and notice given - in advance of a designated date on which employment terminated.
>
> In Ricks, we held that the proper focus is on the time of the Discriminatory act, not the point at which the consequences of the act became painful... The fact of termination is not itself an illegal act. In Ricks, the alleged illegal act was racial discrimination in the tenure decision... Here, respondents allege that the decision to terminate was made solely for political reasons, violative of First Amendment rights. There were no other allegations, either in Ricks or in these cases, of illegal acts subsequent to the date on which the decisions to terminate were made... 454 U.S. at 8, 70 L.Ed. 2d at 8-9 (footnote omitted).

The dissent written by Justice Brennan contained, in part, the following:

> It is one thing to hold, as was held in ...Ricks... that for the purpose of computing the limitations period, a cause of action for denial of a benefit such as tenure, and consequent damage, accrues when the plaintiff learns that he has been denied that benefit; it is quite another to hold, as the Court does here, that a cause of action for damages resulting from an unconstitutional termination of employment accrues when the plaintiff learns that he will be terminated. To my knowledge, such a rule has no analogue in customary principles of limitations law. See 4A Corbin, Contracts §989 (1951) ("The plaintiff should not be penalized for leaving to the defendant an opportunity to retract his wrongful repudiation; and he would be so penalized if the statutory period of limitation is held to begin to run against him immediately.") 454 U.S. at 9, 70 L.Ed. 2d at 9.

In Les Moise, Inc. v. Rossignol Ski Co., Inc., 116 Wis. 2d 268, 342 N.W. 2d 444 (1983), the Wisconsin Court of Appeals considered the question of whether the statute of limitations applicable to an action alleging violation of the Wisconsin Fair Dealership Law, ch. 135, should be deemed to begin to run at the actual time of termination of a ski supply agreement, or at the time of notification that the agreement would be terminated upon its expiration. The Court held that the operative point with respect to the statute of limitations was the time of termination, and discussed Chardon at length.

The court's rationale for its holding included the following:

First, the express public policy behind ch. 135, Stats., makes it clear that the chapter is remedial and is to be liberally construed in favor of dealers. Section 135.025, Stats., reads in pertinent part:

> Purposes; rules of construction; variation by contract.
> (1) This chapter shall be liberally construed and applied to promote its underlying remedial purposes and policies.
> (2) The underlying purposes and policies of this chapter are:
> (a) To promote the compelling interest of the public in fair business relations between dealers and grantors, and in the continuation of dealerships on a fair basis;
> (b) To protect dealers against unfair treatment by grantors, who inherently have superior economic power and superior bargaining power in the negotiation of dealerships;
> (c) To provide dealers with rights and remedies in addition to those existing by contract or common law;

We do not believe that a statutory scheme such as ch. 135, Stats., which has the explicit purpose of protecting dealers against unfair treatment by grantors and of providing them with rights and remedies beyond common law and contract, should be construed to put dealers in a tight corner when they believe they have been terminated without good cause.

Second, where, as here, notice of termination is not immediately accompanied by any actual injury or detriment under the contract, starting the clock to run at date of notice would produce at least two untoward results. If the time between date of notice and date of termination were greater than one year, a dealer would be absolutely obliged to bring suit before any injury occurred or also be time-barred. Also, dealers who brought actions before they were actually injured would be effectively foreclosing their chances of persuading grantors to change their minds about termination. This would frustrate the express statutory purpose of "continuation of dealerships on a fair basis..."

Third, because of the relatively short statutory period involved, the "stale claim" rationale behind statutes of limitation generally is, on balance, less weighty a consideration here as compared to the injustice of barring meritorious claims. See Hansen, supra, at 558, 335 N.W. 2d at 582.

Finally, although neither the pleadings nor the briefs on appeal characterize the action as either tort or contract, we believe that an examination of tort and contract principles is helpful to our analysis and leads to our conclusion that the date of actual injury is the better and more appropriate date from which the statute ought to be deemed to run. 116 Wis. 2d at 275-276

In the ensuing discussion, the Court pointed out that "Wisconsin does not recognize an action in tort <u>before</u> injury has occurred," 116 Wis. 2d at

277, and that in contract law, the better view is as set forth in 4A Corbin, Corbin on Contracts §989 (1951):

> There is no necessity for making the statutory period of limitation begin to run against the plaintiff until the day fixed by the contract for the rendition of performance, at least unless the plaintiff definitely elects to regard the anticipatory repudiation as final breach... For the purpose of determining when the period of limitation begins to run, the defendent's non-performance at the day specified may be regarded as a breach of duty as well as the anticipatory repudiation. The plaintiff should not be penalized for leaving to the defendant an opportunity to retract his wrongful repudiation; and he should not be so penalized if the statutory period of limitation is held to begin to run against him immediately. [Emphasis added.] 116 Wis. 2d at 278-279

This citation of Corbin is the same as is set forth in Justice Brennan's dissent in Chardon, and the Court of Appeals at note 8, 116 Wis. 2d at 279-280, explained why it agreed with that dissent rather than the majority, and why it felt that Ricks was distinguishable:

> We also note that the pertinent principle from §989 was cited with approval in the dissent of Justices Brennan and Marshall to the 6-to-3 per curiam opinion, Chardon v. Fernandez, 454 U.S. 6, 9 (1981); reh'g denied, 454 U.S. 1166 (1982). While Chardon, which involved the application of Puerto Rico's statute of limitations to a 42 USC §1983 action in federal court, id at 7, does not govern the case before us, we point out that the supreme court's focus upon the "operative decision" and notice of that decision as being the key to the statute of limitations, id at 8, has "no analogue in customary principles of limitations law." Id. at 9 [j. Brennan, dissenting.] We further agree with Justice Brennan that "lawsuits ... should not be filed until some concrete harm has been suffered, and until the parties, and the forces of time, have had maximum opportunity to resolve the controversy." Id. We believe that the logic of the majority opinion in Chardon runs counter to that in this opinion and that of Hansen.
>
> We distinguish a case related to Chardon and used by the Chardon majority to bolster its position: Delaware State College v. Ricks, 449 U.S. 250 (1980). There Ricks was a college professor who had formally been denied tenure but who was subsequently offered a "terminal" one year contract. Id. at 252-253. The Supreme Court rejected Ricks' argument that the statute of limitations began to run only when his "terminal" contract expired, id. at 257-58, and held that the time commenced "at the time the tenure decision was made and communicated to Ricks." Id. at 258 [Footnote omitted.] The rationale for this position was that the denial of

> tenure and notice thereof constituted a present violation. See id. As such, Ricks is distinguishable from the case before us.

While the foregoing decision of the Court of Appeals was not an interpretation of the statute of limitations for proceedings under the Fair Employment Act, §§111.39(1), 230.44(3), Stats., the Court's analysis is in many respects applicable to the problem before the Commission. At the center is the Court's focus on the necessity for concrete harm in a factual setting very similar to the instant case, since in each case notice was given of the impending termination or nonrenewal of a contractual relationship.

In its analysis, set forth above, the Court first noted the express public policy behind chapter 134, and the liberal construction clause therein. This factor is to a substantial extent paralleled in the Fair Employment Act, at §111.31, Stats:

> 111.31 Declaration of policy. (1) The legislature finds that the practice of unfair discrimination in employment against properly qualified individuals by reason of their age, race, creed, color, handicap, marital status, sex, national origin, ancestry, sexual orientation, arrest record or conviction record substantially and adversely affects the general welfare of the state. Employers, labor organizations, employment agencies and licensing agencies which deny employment opportunities and discriminate in employment against properly qualified individuals sole because of their age, race, creed, color, handicap, marital status, sex, national origin, ancestry, sexual orientation, arrest record or conviction record deprive those individuals of the earnings which are necessary to maintain a just and decent standard of living.
>
> (2) <u>It is the intent of the legislature to protect by law the rights of all individuals to obtain gainful employment and to enjoy privileges free from employment discrimination because of age, race, creed, color, handicap, marital status, sex, national origin, ancestry, sexual orientation, arrest record or conviction record,</u> and to encourage the full, nondiscriminatory utilization of the productive resources of the state of the benefit of the state, the family and all the people of the state. It is the intent of the legislature in promulgating this subchapter to encourage employers to evaluate an employee or applicant for employment based upon the employe's or applicant's individual qualifications rather than upon a particular class to which the individual may belong.

> (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.
>
> (4) The practice of requiring employes or prospective employes to submit to honesty tests without providing safeguards for the test subjects in unfair, and the use of improper tests and testing procedures causes injury to the employes and prospective employes.
>
> (5) The legislature finds that the prohibition of discrimination on the basis of creed under §111.337 is a matter of statewide concern, requiring uniform enforcement at state, county and municipal levels. (emphasis added)

The overriding purpose of the Fair Employment Act is to protect individuals from employment discrimination and the law is to be liberally construed to that end. Just as in the Les Moise, Inc. case, this goal is not furthered by a construction which would put complainants "in a tight corner when they believe they have been terminated without just cause." 116 Wis. 2d at 275-276

The second factor the Court discussed was that if the statute of limitations began to run upon notice of impending termination, plaintiffs in many cases would be absolutely required to file suit prior to the termination of the agreement. This would effectively foreclose the possibility of persuading grantors to change their minds and frustrate the statutory purpose of "continuation of dealerships on a fair basis..." Similarly, the purpose of the Fair Employment Act of encouraging non-discriminatory employment is not encouraged by a statutory construction which inevitably will result in the filing of complaints prior to the effectuation of the alleged discriminatory act, and the hardening of positions when there is still a possibility for the employer to change its mind about the termination.

The third factor relied on by the Court was the relatively short length of the statute of limitations (one year):

> ...Because of the relatively short statutory period involved, the 'stale claim' rationale behind statutes of limitation generally, is, on balance, less weighty a consideration here as compared to the injustice of barring meritorious claims... 116 Wis. 2d at 276.

Under the Fair Employment Act, the period of limitations is only 300 days, so this consideration is even more marked here.

Finally, the Court analyzed statute of limitations doctrine with respect to both tort and contract and concluded that "the date of actual injury is the better and more appropriate date from which the statute ought to be deemed to run." 116 Wis. 2d at 276.

With respect to tort, the Court noted that "Wisconsin does not recognize an action in tort before injury has occurred." 116 W. 2d at 277.

With respect to contract law, much of the Court's analysis was quoted above, including the footnote (#8, 116 W. 2d at 279-280) which set forth the Court's disagreement with Chardon and its distinguishing of Ricks. The Court concluded as follows:

> To allow an election between two dates for bringing suit but to start the statute running upon the earlier of the two would, especially where the statute of limitations is relatively short, serve neither sense nor justice, nor comport with the ameliorative and remedial purposes of the doctrine of anticipatory repudiation and the Wisconsin Fair Dealership Law." 116 W. 2d at 279-280

Again, this rationale seems basically applicable to the period of limitations under the Wisconsin Fair Employment Act.

Based on the analysis in Les Mois, and its explicit rejection of the Chardon holding, the Commission concludes that the period of limitations in the instant case began to run upon the cessation of the complainant's employment on June 6, 1983.

In its motion to dismiss, the respondent cited the Commission decision in Goodhue v. UW, No. 82-PC-ER-24, where the Commission stated:

> The Commission has interpreted this provision [§111.39(1), Stats.] 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).

However, neither Goodhue nor Grimmenga involved decisions which were to be operative at a later date, such as in the instant case. In Goodhue the adverse decision was a denial of tenure, as in the Ricks case. In Grimmenga the decision was to terminate appellant's employment because of job abendonment. This decision was made on or about March 17, 1982, the termination was effective February 19, 1982, and the complainant did not receive notice until March 25, 1982. Therefore, these cases provide little precedent for a situation such as is here presented, where the effective date of the respondent's decision followed the decision by many months.

ORDER

The respondent's motion to dismiss filed June 13, 1984, is denied.

Dated: November 21, 1984 STATE PERSONNEL COMMISSION

Laurie R. McCallum
LAURIE R. McCALLUM, Commissioner

Dennis P. McGilligan
DENNIS P. McGILLIGAN, Commissioner

AJT:ers

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