STATE OF WISCONSIN PERSONNEL COMMISSION

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MARTIN SCHROEDER,

Appellant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES, and Administrator, DEPARTMENT OF MERIT RECRUITMENT AND SELECTION,

Respondents.

Case No. 85-0036-PC-ER

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DECISION
AND
ORDER

This matter is before the commission on a motion to intervene filed by William Mauthe, and opposed by respondent Department of Health and Social Services (DHSS).

This case involves an Officer 5 vacancy at Kettle Moraine Correctional Institution (KMCI). It appears to be undisputed that this position was filled through a departmental promotional competitive examination process, which was announced on March 12, 1984, and which resulted in an appointment effective on or about February 17, 1985. In the initial determination issued in this matter on February 14, 1986, it was found that expanded certification pursuant to §ER-Pers. 12.05, Wis. Adm. code, was used as part of the selection process for this position, and the appointee was certified through minority expanded certification. The initial determination concluded there was probable cause to believe the respondents discriminated against complainant in violation of the Fair Employment Act (FEA), Subchapter II, Chapter 111, stats., by its use of expanded certification.

In his motion to intervene filed March 5, 1986, Mr. Mauthe stated in part as follows:

> On 02-18-86 it came to my attention, via the Initial Determination; Schroeder vs. DHSS & DER 85-0036-PC-ER that the practices used in hiring Sgt. Tommy Hobson for the position of Lieutenant (CO V) at KMCI were probably discriminatory and in violation of law. On 03-02-86, I received, DER Bulletin/01-27-86 #MRS and AA-1 regarding "Balanced Work Force Definition". This bulletin and the above mentioned Initial Determination lead me to now believe that, as an interviewee with a score of 86.12 and Rank of 5 on the CO V examination at KMCI when Tommy Hobson was promoted, I was also a victim of discrimination along with Mr. Schroeder. Enclosed are abundant memos etc. explaining why up until now, I had no reason to believe that there was a basis for complaint. I therefore claim that the time limit for complaint be dated from the time that the State of Wisconsin finally admitted that a wrong had been done. I would further note that my job evaluations required knowledge and implementation of the policy of the DOC on affirmative action, which also had a chilling effect on my filing charges....

The respondent's objection to Mr. Mauthe's motion to intervene rests primarily on the point that it was not presented until after the expiration of the 300 day time period for filing complaints of discrimination, §230.44(3), stats.

There is nothing in either the statutes or the Wisconsin Administrative Code which specifically addresses intervention in an administrative proceeding under the FEA. However, the general rule has been stated as follows:

> "A person who claims an independent cause of action cannot intervene in the original action after the statute of limitations has run.
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> As a general rule the right to intervene exists in favor of a person who claims to be the owner of, or to have some interest in, the property or right which is the subject of litigation, even though an action by him would be barred by the statute of limitations. In other words, where there is a community of interest, a suit properly and timely instituted issues to the benefit of one who intervenes after the time limited has passed." 51 Am Jur 2d Limitation of Actions §§263,264.

This general rule is similar to the Wisconsin law governing intervention in civil judicial proceedings, §803.09, stats. In the opinion of the

Commission, a similar approach to intervention must be followed in administrative proceedings under the FEA such as this.

Sections 111.39(1) and 230.44(3), stats., require that complaints of discrimination be filed within 300 days of the date of the discrimination. In other words, in order to assert a claim under the FEA, a person must come forward and file a complaint within 300 days after the alleged discrimination. If persons could intervene in proceedings with respect to which they did not have a community of interest, without regard to the 300 day statute of limitations, this statute of limitations would be rendered meaningless.

In this case, both Mr. Schroeder's and Mr. Mauthe's complaints concern the same hiring transaction. However, there is no more community of interest than, for example, there would be if they both happened to have been injured as passengers in the same airplane.

In his motion, Mr. Mauthe contends that the statute of limitations should not be considered to run from the date of the discrimination because at that time he was unaware of any illegality associated with the use of expanded certification. However, the general rule is that the statute of limitations begins to run from the date of the discriminatory transaction, not from the date the complainant decides the transaction was illegal or discriminatory. See, e.g., Wickman v. D.P., Wis. Pers. Comm. No. 79-302-PC (3/24/80), where the Commission rejected appellants' contention that since they were not aware that withholding of overtime in 1977 was improper until the Commission entered an order to that effect in a similar case in 1979, the statute of limitations should not begin to run until the date of the order in 1979.

ORDER

The motion to intervene filed by Mr. Mauthe on March 5, 1986, is denied, and to the extent it may be considered a complaint of discrimination, it is dismissed, as untimely.

Dated: November 12, 1986 STATE PERSONNEL COMMISSION

DENNIS P. McGILLIGAN, Chairperson

DONALD R. MURPHY, Commissioner

LAURIE R. McCALLUM, Commissioner

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