

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 JOHN R. SPRENGER,
 Complainant,
 v.
 President, UNIVERSITY OF
 WISCONSIN SYSTEM (Green Bay)
 Respondent.
 Case No. 85-0089-PC-ER
 * * * * *

INTERIM
 DECISION
 AND
 ORDER

This case involves the complainant's charges of occupational safety and health retaliation and age discrimination in the respondents' decision to lay him off, and in its failure to recall him at a later date.

The respondents filed motions to dismiss each of the charges, based, inter alia, upon the claim that the charges had not been timely filed. In an Interim Decision and Order dated January 24, 1986, the Commission denied these motions to dismiss.¹ However, with respect to the question of timely filing of the charges, the Commission's Order scheduled a status conference for the parties to discuss the advisability of holding a preliminary hearing to determine the facts relating to the issue of timeliness prior to reaching the substantive aspects of the case.

¹ An earlier Interim Decision (dated September 13, 1985) had granted the motion to dismiss the charge of occupational safety and health retaliation on the ground that it was not timely filed. The Decision of January, 1986, vacated and rescinded the original decision, and denied the motion to dismiss.

A prehearing conference was held by telephone on March 17, 1986. The parties waived an investigation of the complaint and agreed instead to submit briefs and affidavits on the issue of timeliness. Submissions by both parties were timely filed.

The matter before the Commission now is whether, in light of the briefs and affidavits submitted by the parties, the complainant's charge of occupational safety and health retaliation and the charge of age discrimination were timely filed.

The Applicable Standard

The law applicable to this question was determined in the Commission's Interim Decision of January 1986 (hereinafter, "Decision"), which was written after submission of briefs on the issue from both parties. The Decision reviewed the statutory schemes applicable to both charges and held that the 30-day time period for filing a charge of occupational and safety and health retaliation and the 300-day time period for filing charges of age discrimination do not begin to run

"until the facts that would support a charge of discrimination or retaliation were apparent to the complainant or should have been apparent to a person with a reasonably prudent regard for his rights similarly situated to the complainant."

Decision, citing, inter alia, Reeb v. Economic Opportunity Atlanta, 11 FEP Cases 235, 241, 516 F.2d 924 (5th Cir. 1975).

And, on the basis of the facts before the Commission at that time, the Commission ruled that it could not be said that "the facts to support a charge of discrimination" should have been apparent at the time of the complainant's layoff, or before he learned of the position which he maintains was a reinstatement of his own former job.

With respect to the charge of age discrimination in his layoff, the Decision pointed out:

In the instant case, the complainant has alleged that at the time of his layoff he was told that his position was being eliminated, and that only subsequently he learned that his position had been "reinstated"² and that a younger person had been appointed. Decision, p.9.

And with respect to the charge of occupational safety and health retaliation in his layoff, it stated:

This is a closer case than was presented in the context of the age discrimination aspect of this matter, since the complainant alleges that, as of the time of the layoff, he already had been named in a lawsuit concerning a co-employee's injuries, and had indicated to the respondent that he felt that the respondent had been negligent and partially responsible for the injuries, and that he intended to tell the truth. Shortly thereafter, he was laid off. While this scenario obviously could give rise to some suspicion concerning a retaliatory motive it again must be emphasized that the notice of layoff advised the complainant that the layoff was necessitated by the elimination of his position. This normally could be considered as a rather straightforward statement of cause for the layoff that usually would be difficult if not impossible to controvert. Decision, p. 13.

On the retaliation claim, the Decision concluded that even considering the facts surrounding the lawsuit, it could not be said that at the time of the layoff, and before learning that the position had been "reinstated" and the complainant not recalled, that "facts which would support a charge of discrimination" were or should have been apparent to a person with a reasonably prudent regard for his or her rights similarly situated to the complainant.

And with respect to the claims of retaliation and discrimination in the failure to recall, the Decision stated:

...there clearly is jurisdiction over so much of this complaint as related to failure to recall (as opposed to the layoff transaction per se), since complainant alleges that he did not have any knowledge of the failure to recall until June 10, 1985, and the complaint was filed on June 14, 1985." Decision, pp. 10, 14.

² As noted in the Decision, respondent disputes this factual allegation, but the Commission accepts it solely for the purpose of deciding the motion to dismiss.

The Question of Timeliness

The earlier Decision concluded that the date on which the complainant knew -- or a reasonably prudent person would have known -- facts to support a charge of discrimination or retaliation was June 10, 1985, when he learned of the "Theatre Tech" position which had been advertised and filled by the university for the 1984-85 academic year. The specific question before the Commission now is whether anything in the parties' recent submissions alters its previous decision that the complainant knew or should have known facts to support a charge of discrimination or retaliation prior to that date.

The respondents did submit additional evidence on this point, but the Commission finds that the relevant issues raised are met by the complainant, and that the decision on the motions to dismiss for failure to file timely are unchanged.

The University's submission includes a brief, six affidavits, and a dozen documents. With one exception, these are relevant to various issues on the merits of this case³, and consequently will not be discussed here. The evidence which is relevant here is an undated letter of resignation from the complainant to the university's Director of Personnel Services, which was received on October 27, 1983. This letter states:

Dear M. Barry:

As of this date I hereby resign my position as Theatre Maintenance Co-ordinator, Department of Lectures and Performances University of Wisconsin, Green Bay Campus. I understand that this removes me from Lay-off status of July 1, 1983.

³ For example, there are several affidavits in support of the respondents' contention that the Theatre Tech position was not a reinstatement of the complainant's former position.

My reason for this resignation is based solely [sic] on the following:

1. To facilitate the release of Employee Trust Fund Retirement monies.
2. The hiring of Mr. Terry Burton has for all intent and purposes replaced my position and duties and violated my Civil Service status of Lay-off, resulting in job discrimination by the University of Wisconsin Green Bay.

Sincerely,

John R. Sprenger /sig/

The respondents argue that this letter indicates:

Mr. Sprenger was alleging in October 1983 that he had been discriminated against and was also obviously aware that Mr. Burton, an academic staff employee, had been hired and that part of Mr. Burton's job involved performing the duties previously performed by Mr. Sprenger. Mr. Sprenger was also apparently corresponding with legal counsel at this time. Respondent's Brief, p. 1.

And on this basis, they argue that the complainant was aware of his claim in October 1983, well before the June 10, 1985, date claimed by the complainant.

The complainant's brief and affidavit, however, explain the letter differently. They state that in June 1983, the complainant was laid off; that during the same summer, he suffered a heart attack; that because of his health problems and unemployment in the summer of 1983, his financial situation became so desperate that he had no alternative than to resign from the University in order to obtain the release of his funds deposited with the State of Wisconsin Employee Trust Fund; and that motivated by this, he wrote the letter to Mr. Barry indicating his resignation. (Affidavit of John Sprenger, p. 2.)

With respect to the fact that discrimination is mentioned in the letter, the complainant's affidavit states:

Your affiant believed at that time that he had been discriminated against as a result of the occupational safety complaint of Jerry Frisque, but your affiant did not have factual information which would support this belief. (Affidavit of John Sprenger, p. 2)

On the basis of all the information submitted by the parties to date, the Commission finds that at the end of October 1983, the following facts were known or should have been known to the complainant:

- 1) For ten years prior to his layoff, complainant was employed in the classification of Theater Technician, with a working title of Theater Maintenance Coordinator.
- 2) On January 11, 1983, the complainant's deposition was taken in the Frisque case (Affidavit of Al Rheinschmidt)⁴;
- 3) According to the complainant:

"That prior to giving said deposition, your affiant was urged to testify in such a manner as to protect the University from any claim. That your affiant believed that he should testify truthfully, and upon information and belief, believes that the testimony obtained from your affiant was detrimental to the University's position." (Affidavit of John Sprenger, p. 1)

- 4) On January 31, 1983, the complainant was served with a third party summons and complaint in the Frisque case (Affidavit of Al Rheinschmidt);

⁴ In his original charge, the complainant stated that he was served with the "lawsuit" "approximately one month prior to the time of his notification of layoff; and that he was laid off in June, 1983. It is now shown by the respondents that complainant was, in fact, served with the summons at the end of January, 1983. Complainant responds that he does not contest this date. The Commission notes that the original layoff notification by the Director of Personnel Relations on February 14, 1983, was within a month of the complainant's deposition and the service of the summons and complaint, and accepts this as the probable explanation of the complainant's original error.

5) On February 14, 1983, the respondent's Director of Personnel Services met with union representatives concerning the elimination of complainant's job and his impending layoff (Affidavit of Tom Barry, para. 6), and the creation of a new academic staff position that would include complainant's duties as well as other responsibilities. (Affidavit of Tom Barry, para. 4).

6) On February 28, 1983, the union filed a grievance on behalf of the complainant. The university's layoff decision was sustained through level three of the university's grievance procedure (Affidavit of Tom Barry, para. 6);

7) The complainant's layoff was effective June 30, 1983 (Barry Affidavit, para. 7).

8) In the late summer of 1983, respondent appointed Mr. Terry Burton to the new academic staff position. (Bauer affidavit, para. 5).

9) On June 10, 1985, complainant reviewed a UW-Green Bay Faculty-Staff Directory and discovered the following listing under the Arts & Performances Department:

Theater Tech.: Michael Mills

The complainant contends that he lacked factual information to support the belief he had in October of 1983 that he was retaliated against as a result of his involvement with the Frisque occupational safety complaint. The Commission cannot agree with the complainant's argument that it wasn't until June 10, 1985, that he had facts that would support a charge of retaliation.

As of October of 1983, the complainant knew that within a month of his activity relating to the Frisque case, he had been slated for lay-off. He knew that a new academic staff position was going to be created that would be assigned complainant's responsibilities as well as some other duties. He disagreed with the layoff decision to the extent that he grieved the decision to the third step. He believed that the layoff was retaliatory yet he did not file a complaint.

In his affidavit of April 16, 1986, the complainant states:

5. That in June of 1983, your affiant was laid off from his employment with the University and informed that his job was eliminated and that his duties would be assigned to more than one existing position. [Emphasis added]

The reference in this affidavit to "more than one existing position" is not supported by the other materials before the Commission. The affidavit of Tom Barry indicates that the complainant (as well as the union) was aware "of the newly created academic staff level III position and the fact that this position would include Mr. Sprenger's duties as well as other responsibilities." (Paragraph 4). Documents submitted by the respondent clearly indicate that a new position was going to be created rather than merely assigning complainant's duties to an existing position.

While it is true that respondent created a part-time LTE position in the Fall of 1983 to assist Mr. Burton's position and that Ms. Lucinda Burton was hired for the LTE position and began working in September of 1983 (Thron affidavit, paragraph 2) the record suggests that the complainant did not know this fact because the LTE position was added after the complainant's layoff. Also, complainant's own letter of October 27, 1983 refers to the "hiring of Mr. Terry Burton" rather than to the hiring of more than one person to perform complainant's prior responsibilities. The

fact that this letter alleged job discrimination, and that complainant sent a copy to an attorney does nothing to undermine the Commission's conclusion that the complainant was aware or should have been aware of facts sufficient to support a claim of retaliation under the Occupational Safety and Health provisions.

Therefore, the Commission will grant the respondent's motion to dismiss as to complainant's claim of retaliation.⁵

The University offered no additional information on the specific matter of the timeliness of the complainant's claim of age discrimination. The Commission therefore reaffirms its earlier decision on this claim, i.e., that the complainant could not have known facts to support such a claim until he knew (in June 1985) that his position had been "reinstated"⁶ and that a younger person had been appointed to it.

ORDER

The respondent's motion to dismiss the complaint as to the occupational safety and health claim is granted. The respondent's motion to dismiss the complaint as to the age discrimination claims is denied.

⁵ In contrast to his claim of age discrimination which is based both on the layoff decision and the decision not to reinstate or recall, complainant's charge of occupational safety and health retaliation refers only to the initial layoff decision.

⁶ See footnote 2, above.

Dated: June 18, 1986 STATE PERSONNEL COMMISSION


DENNIS P. MCGILLIGAN, Chairperson

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DONALD R. MURPHY, Commissioner

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