STATE OF WISCONSIN PERSONNEL COMMISSION

JOHN R. SPRENGER,

Complainant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM (GREEN BAY),

Respondent.

Case No. 85-0089-PC-ER

INTERIM DECISION AND ORDER

This matter is before the Commission on respondent's motion to dismiss the complainant's charge of age discrimination on the ground the complaint was untimely filed. In an interim decision dated September 13, 1985, the Commission granted respondent's motion to dismiss complainant's charge of occupational safety and health retaliation.

The complaint, filed on June 14, 1985, sets forth the complainant's charge of age discrimination as follows:

> 2. Age discrimination. The undersigned also believes, in the alternative, that his layoff was a result of age discrimination. The undersigned, at the time of his layoff, was 51 years of age, and his job duties were reassigned to individuals under 30 years of age. The undersigned has had a clear and good work record prior to the reassignment of these duties. The undersigned has recently discovered that his former position is now held by an individual under 30 years of age. Under the complainant's labor agreement with the University, the undersigned has had recall rights for the subject job. No notification of recall was received by the undersigned, even though such notification was required. The undersigned believes that the failure to recall, as well as the initial layoff, was the result of age discrimination.

In his brief relating to respondent's motion to dismiss, the complainant alleged the following facts with respect to the timeliness of the age discrimination claim:

> John R. Sprenger was employed by the University of Wisconsin - Green Bay in the position of Theater Technician for the school year

> 1982-83. On May 6, 1983, the University informed Mr. Sprenger that his position was being eliminated and he was subsequently laid off on June 30, 1983.
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> During the school year of 1983-84, Mr. Sprenger's previous duties were split between two other employees.
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> Under the then existing Union contract, Mr. Sprenger was entitled to certain layoff rights. Among these layoff rights was the ability to be recalled in the event that the identical position or a similar position became available. During the school year 1984-85, the faculty directory lists the position of Theater Technician. At no time during the school year was Mr. Sprenger advised that the position was available. Mr. Sprenger was not extended the recall rights guaranteed in the Union contract he was subject to. Mr. Sprenger did not become aware that the University had reinstated the full-time position of Theater Technician until looking through the student directory on June 10, 1985. Upon information and belief, the student directory was not published until sometime during the first semester of 1984. In any event, the discrimination [allegedly] occurred because of the University's failure to extend recall rights to Mr. Sprenger for the school year 1984-85. Classes began on September 4, 1984, and Mr. Sprenger filed his complaint within 300 days of the commencement of classes. Presumably, even accepting the respondent's position that the complaint must be filed within 300 days of the alleged discrimination, Mr. Sprenger's complaint is timely.

In response, the respondent placed into contention several of complainant's allegations:

> The complainant asserts that in 1984-85 the University "reinstated" the full-time position of Theatre Technician. This is simply not the case. At no time since June 30, 1983 was Mr. Sprenger's former position ever reinstated.
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> [The complainant] asserts the University failed to comply with his (Mr. Sprenger's) contractual rights. If this allegation had substance, then Mr. Sprenger and the union could have pursued this allegation under the collective bargaining agreement or by filing a non-contractual claim with the Personnel Commission. Neither was done. A grievance was filed in conjunction with the original decision to eliminate the Theatre Maintenance Coordinator position and layoff of Mr. Sprenger. The matter was pursued to Step 3 of the collective bargaining agreement and the University position was sustained.

The Commission's jurisdiction over complaints of discrimination filed under Wisconsin's Fair Employment Act is based on §230.45(1)(b), Stats., which provides:

> (1) The commission shall:
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> * * *
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> (b) Receive and process complaints of discrimination under §111.375(2).

In turn, §111.375(2), Stats., provides:

> This subchapter [entitled Fair Employment] applies to each agency of the state except that complaints of discrimination or unfair honesty testing against the agency as an employer shall be filed with and processed by the personnel commission under §230.45(1)(b).

Two separate provisions, one each in Chapters 111 and 230, Stats., relate to the time limit for filing a complaint of discrimination with the Commission. In §230.44(3), Stats., time limits are set for filing appeals under that section:

> 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 ch. 111, the time limit for that part of the appeal alleging such discrimination shall be 300 days after the alleged discrimination occurred.

Elsewhere in §230.44, Stats., certain actions ("decision made or delegated by administrator", "decision made or delegated by secretary", "demotion, layoff, suspension or discharge", and "action after certification which is related to the hiring process") are specifically made appealable to the Commission. Because of the language stating that an appeal "may not be heard" unless filed within 30 days, the Commission has construed this provision to be jurisdictional in nature rather than as a statute of

limitations when applied to appeals filed under §230.44, Stats. Richter v. DP, 78-261-PC (1/30/79).

The second provision relating to the time limit for filing complaints is §111.39(1), Stats.:

> Except as provided under §111.375(2), the department [of Industry, Labor and Human Relations] shall have the following powers and duties in carrying out this subchapter:
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> (1) The department may receive and investigate a complaint charging discrimination or discriminatory practices or unfair honesty testing in a particular case if the complaint is filed with the department no more than 300 days after the alleged discrimination or unfair honesty testing occurred. The department may give publicity to its findings in the case.

The remaining provisions of §111.39, Stats., set forth at some length the procedures to be used by DILHR's Equal Rights Division in processing complaints of discrimination and include authority to "hold hearings, subpoena witnesses, take testimony and make investigations", to dismiss complaints for lack of prosecution, to utilize probable cause determinations, conciliations and hearings, to grant relief and to obtain review of an examiner's decision. In 1979, the Attorney General issued an opinion concluding that the Personnel Commission has the same powers and duties in processing discrimination complaints involving the state as an employer as are exercised by DILHR with respect to complaints involving an employer other than a state agency:

> Furthermore, to construe the Commission's power under §230.45(1)(b), Stats., to "receive and process" discrimination complaints so narrowly as not to include all of the powers and responsibilities of DILHR in administering the law for nonstate employes would defeat the overall legislative intent, as evidenced by the history noted above, that the procedures and remedies for state employes be the same as for other employes. For example, under such a narrow construction, the Commission shall have no authority to reinstate and order backpay in the case of an employe

> unlawfully discharged. Such a result would be contrary to the legislative purpose, and therefore such narrow construction must be rejected. 68 OAG 403, 405.

Given the Attorney General's opinion and the specific language of §111.375(2), Stats., which states that the entire Fair Employment "subchapter" applies to state agencies except that the complaints of discrimination are to be "filed with and processed by" the Commission, it seems most appropriate to construe the phrase "any appeal filed under this section may not be heard" in §230.44(3), Stats., as applying only to appeals involving the subject matter set forth in §230.44, Stats., and not to appeals or charges of discrimination filed not under §230.44 but under §§230.45(1)(b) and 111.375(2), Stats.

In Milwaukee County v. Labor and Industry Review Commission, 113 Wis 2d 199 (Court of Appeals, 1983), the Court of Appeals construed §111.36(1), Stats. (1977) setting a 300 day filing limit as a statute of limitations which is subject to waiver rather than as a statute concerning subject matter jurisdiction and, therefore, unwaivable. The statute at issue in that case was the predecessor to §111.39(1), Stats., and the language of the two statutes is identical in all material respects.

As a statute of limitations rather than a jurisdictional requirement, the 300 day time limit in §111.39(1), Stats., is subject to equitable tolling. Jones v. Racine County Fire and Police Commission, Labor and Industry Review Commission (ERD Case No. 8254838), (7/8/83). Although the Jones decision does not cite any authority for its conclusion that equitable tolling is available, such authority does exist:

> Thus, statutes of limitation rest upon reasons of sound public policy in that they tend to promote the peace and welfare of society, safeguard against fraud and oppression, and compel the settlement of claims within a reasonable period after their origin

> and while the evidence remains fresh in the memory of the witnesses.
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> On the other hand, they merely represent a public policy as to the privilege to litigate, and their shelter has never been regarded as what now is called a "fundamental" right, or what used to be called a "natural" right of the individual. Thus, the policy of repose expressed in statutes of limitation is frequently outweighed where the interests of justice require vindication of the plaintiff's rights, as where a plaintiff has not slept on his rights, but rather has been prevented from asserting them. 51 Am. Jur. 2d 19 (citations omitted).
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> Thus, it is the established rule that exceptions to a statute of limitations will not be implied, and where the legislature has not seen fit to except a class of persons from the operation of the statute, the courts will not assume the right to do so. Nevertheless, most courts recognize a limited class of exceptions arising from necessity, as in the case of inability to bring suit or to exercise one's remedy, or the defendant's fraudulent concealment of a cause of action against him. In such instances of necessity, the running of the statute of limitations may be suspended even though no exceptions or causes of suspension are mentioned in the statute itself. 51 Am. Jur. 2d 139 (citations omitted).

Title VII, 42 USC §2000e-5, requires that a charge of discrimination "...be filed within 180 days after the alleged unlawful employment practice occurred...." §706(e). This language is very similar to that found in §§230.44(3) and 111.39(1), Stats.: "... 300 days after the alleged discrimination [or unfair honesty testing] occurred."

In Reeb v. Economic Opportunity Atlanta, 11 FEP Cases 235, 241, 516 F. 2d 924 (5th Cir. 1975); the Court held that:

> ... the ... period did not begin to run ... until the facts that would support a charge of discrimination under Title VII were apparent or should have been apparent to a person with a reasonably prudent regard for his rights similarly situated to the plaintiff."

Another holding to this effect is found in Chappell v. EMCO Machine Works Co., 20 FEP Cases 1059, 1065, 601 F.2d 1295 (5th Cir. 1979):

> ... this court has upheld deferring the commencement of the running of the 180 day period until the claimant knew

> or should have known the facts which would give rise to his Title VII claim....

The Commission in the past has held that the time period for filing a charge of discrimination does not begin to run until the transaction in question occurs and the complainant receives notice of it. Grimmenga v. DOR, No. 83-0007-PC-ER. See also, Delaware State College v. Ricks, 24 FEP Cases 827, 830, 449 U.S. 250, 101 S. Ct. 498, 66 L. Ed. 2d 431 (U.S. Supreme Court 1980). The Commission has not considered an equal rights case where the complainant argued that the date of first notice of the transaction itself should not be applied because as of that date the facts which would support a charge of discrimination were not apparent and would not have been apparent to a similarly situated person with a reasonably prudent regard for his or her rights.[1]

It is not uncommon for Wisconsin adjudicative bodies to look to federal decisions under Title VII in interpreting the Wisconsin Fair Employment Act. Hiegel v. LIRC, 121 Wis. 2d 205, 217, 359 N.W. 2d 405 (1984); Bucyrus-Erie Co. v. ILHR Dept., 90 Wis. 2d 408, 421, n.6, 280 N.W. 2d 142 (1979), Ray-O-Vac v. ILHR Dept., 70 Wis. 2d 919, 236 N.W. 2d 209 (1975). If the Commission were not to use the same kind of approach used by the Fifth Circuit in the Reeb and Chappell cases, the potential for inequity could be substantial. Compare, e.g., Feser v. Weyerhauser Co., 39 FEP Cases (D.C. N. Ga. 1985).

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[1] In several cases, the Commission has ruled that the time limit for filing an appeal under §230.44(3), Stats., does not commence on the date the appellant learns of facts which leads to the belief that the transaction was improper. Donahue v. DATCP & DP, 78-189-PC (3/21/80); Bong & Seeman v. DILHR, 79-167-PC (11/8/79). However, these were appeals under §230.44, Stats., as to which the "may not be heard" language applied, not discrimination complaints pursuant to §§230.45(1)(b) and 111.375(2), Stats. Furthermore, they did not involve situations where a reasonably prudent person similarly situated would not have been aware, at the time of receipt of notice of the transaction, of the facts giving rise to the alleged violation of the civil service law.

Furthermore, while caution must be exercised in drawing analogy to the law developed in the area of limitations in judicial proceedings, it should be noted that the Wisconsin Supreme Court, in Hansen v. A. H. Robins, Inc., 113 Wis. 2d 550, 335 N.W. 2d 578 (1983), held that in tort actions (other than those where the question is specifically regulated by statute), the cause of action accrues, and the statute of limitations begins to run, "on the date the injury is discovered or with reasonable diligence should be discovered, whichever occurs first." 113 Wis. 2d at 560. The court's opinion included the following discussion, inter alia:

> ... It is manifestly unjust for the statute of limitations to begin to run before a claimant could reasonably become aware of the injury... In some cases the claim will be time barred before the harm is or could be discovered, making it impossible for the injury party to seek redress. Under these circumstances the statute of limitations works to punish victims who are blameless for the delay and to benefit wrong-doers by barring meritorious claims.... 113 Wis. 2d at 539.

While the court recognized the danger of stale claims, it pointed out that:

> Under the rule a claim accrues when the injury is discovered or reasonably should have been discovered. Therefore, it does not benefit claimants who negligently or purposely fail to file a timely claim. Further, defendants are protected by the requirement of proof at trial. The plaintiff bears the burden of proving negligence. 113 Wis. 2d at 539.

Many similar factors are present in administrative proceedings under the Fair Employment Act. Furthermore, in Yanta v. Montgomery Ward & Co., Inc., 66 Wis. 2d 53, 61-62, 224 N.W. 2d 389 (1974), the court analogized between an action based on a violation of the Fair Employment Act, and a tort action as follows:

> This situation is comparable to the tort law doctrine that the violation of certain statutes constitutes negligence per se. This

> court has held numerous times that where a defendant violates a statute designed to prevent a certain kind of harm to a certain kind of persons, and the plaintiff was so harmed and was in that class of persons, then violation of the statute constitutes negligence per se even though the statute contains no such express provision. Although the present action is not founded on negligence, the situations are similar, since in violating the statute, defendant breached a duty owed to the plaintiff....

Cf. Wilson v. Garcia, 471 U.S. _____, 85 L.Ed. 2d 254, 267, 107 S. Ct. ____ (1985), where the Court analogized actions under 42 USC 1983 and tort actions:

> The Constitution's command is that all 'persons' shall be accorded the full privileges of citizenship; no person shall be deprived of life, liberty, or property without due process of law or be denied the equal protection of the laws. A violation of that command is an injury to the individual rights of the person.

Similarly, a violation of the Wisconsin Fair Employment Law could be considered a violation of the employe's right to be free of employment discrimination.

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.

In the context of this motion to dismiss, it does not appear to the Commission that this is a case where it could be said that "the facts that would support a charge of discrimination under Title VII were apparent or should have been apparent to a person with a reasonably prudent regard for his rights similarly situated to the [complainant]." Particularly in a

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[2] Respondent disputes this factual allegation. At this stage of the proceeding, the Commission must accept the complainant's factual allegations for the purpose of deciding the motion to dismiss.

personnel transaction such as this, which on its face was not predicated on employe misconduct or inefficiency, a prudent employe normally should be able to rely on the bona fides of the employer's explanation of the seemingly neutral reasons for the transaction. In fact, any other result could open the door to potential abuse, as an employer wanting to get rid of an older employe could do so with impunity if it could manage to delay 300 days in filling the position with a younger employe.

Finally, there clearly is jurisdiction over so much of this complaint as relates 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.

The foregoing result constrains the Commission to re-review, sua sponte, its earlier interim decision in this matter entered September 13, 1985, which held that the portion of the complaint relating to occupational safety and health retaliation had not been timely filed in accordance with §101.055(8)(b), Stats.

That decision rested essentially on the theory that since the act uses the language "within 30 days after the employe received knowledge of the discrimination or discharge...", (emphasis added), this is inconsistent with the theory that the limitations period would not start to run until the employe received notice of facts which gave rise to a belief that discrimination actually occurred.

The entire sub-section in question reads as follows:

> (b) A state employe who believes that he or she has been discharged or otherwise discriminated against by a public employer in violation of par. (a) may file a complaint with the personnel commission alleging discrimination or discharge, within 30 days after the

> employe received knowledge of the discrimination or discharge. (emphasis added)

Section 101.055(8)(a), Stats., provides, inter alia:

> (8) PROTECTION OF PUBLIC EMPLOYES EXERCISING THEIR RIGHTS. (a) No public employer may discharge or otherwise discriminate against any public employe because the public employe filed a request.... (emphasis added)

It seems clear that §101.055(8)(a) prohibits a public employer from either discharging or taking any other adverse employment action against an employe because the employe exercises his or her rights related to occupational safety and health which are afforded by that section. The use of the term "or otherwise discriminate" indicates that from a conceptual standpoint, the only difference between "discharge" and "otherwise discriminate" is the nature of the transaction involved -- i.e., the latter term would include such things as layoffs and demotions. However, both terms include the concept of an illegally discriminatory transaction.

Subsection (b) provides that an employe "who believes he or she has been discharged or otherwise discriminated against by a public employer in violation of par. (a) may file a complaint with the Personnel Commission alleging discrimination or discharge, within 30 days after the employe received knowledge of the discrimination or discharge." (emphasis added) It seems clear that the term "discharge" means by necessary implication a discharge "in violation of par. (a)", i.e., a discharge which is discriminatory because it was based on the employe's exercise of rights secured by the Act. It is difficult to perceive how an employe could be said to have knowledge of a discriminatory discharge if he or she had no knowledge of the facts underlying the allegation of discrimination.

Furthermore, subsection (b) states that an employe who "believes that he or she has been discriminated against by a public employer in violation

of par. (a), may file a complaint with the Personnel Commission alleging discrimination or discharge...."(emphasis added) An employe can neither form a belief as to the occurrence of discrimination nor file a complaint alleging the occurrence of discrimination until he or she has knowledge of the facts underlying that discrimination.

The Commission's September 13, 1985, interim decision included the following analysis:

> The statute in question ... does refer to knowledge of the discrimination rather than knowledge of the injury. Discrimination is defined in Webster's New Collegiate Dictionary as "the act of discriminating" and "discriminate" is defined as "to make a difference in treatment or favor on a basis other than individual merit." Application of this definition suggests that accrual occurs only when the knowledge of different treatment is obtained by the complainant. However, such an interpretation would be inconsistent with the time limit applicable to discharges. (i.e., "within 30 days after the employe received knowledge of the ... discharges." Under the law, it is clear that an employe has 30 days to file once he or she has received knowledge of the discharge. There is no question that the date a complainant may have become aware that his discharge constituted "different treatment" is irrelevant for purposes of determining the date of accrual. Given the very clear time computation applicable to discharges and the understanding that the legislature would not have intended to create different time standards for discharges as compared to all other adverse employment actions, the Commission must construe the phrase "knowledge of the discrimination or discharge" to refer to knowledge of the adverse action or injury rather than knowledge of a difference in treatment.

This analysis fails to recognize that, in the context of the entire statutory scheme, the reference to "discharge" in §101.055(8)(b), Stats., "within 30 days after the employe received knowledge of the discrimination or discharge...," carries with it the necessary implication of a discharge illegally discriminatory under §101.055(8)(a), Stats. Furthermore, the interpretation set forth above has the effect of nullifying the term "discrimination" in the phrase "knowledge of the discrimination or discharge." It is given solely the meaning of "adverse employment action other than

discharge" and stripped of the full meaning of the term "discrimination," as provided by both the dictionary and the statute as a whole. "One part of a statute may not be construed so as to render another part nugatory, or of no effect." 73 Am Jur 2d Statutes §249.

Based on the complainant's allegations, the Commission concludes that this complaint is also timely under §101.055(8)(b), Stats. Again, the complainant has alleged that he did not become aware that his position had been reinstated, and that he had not been recalled, until June 4, 1985, many months after his layoff in June 1983.

Even if the Commission were to interpret §101.055(8)(b), Stats., as commencing the period of limitations when the underlying facts of the alleged discrimination were apparent or should have been apparent to a person with a reasonably prudent regard for his or her rights, similarly situated, it would conclude, based on complainant's allegations, that he did not have such knowledge until the date he asserts -- i.e., June 4, 1985. 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-employe'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.

The Commission concludes that it cannot be said, even considering the facts surrounding the lawsuit, that at the time of the layoff, and before learning that the position had been "reinstated" and the complainant had not been recalled, that the facts that would support a charge of discrimination under §101.055(8), Stats., should have been apparent to a person with a reasonably prudent regard for his or her rights similarly situated to the complainant.

So much of the complaint under §101.055(8), Stats., which relates to the recall transaction (as opposed to the layoff transaction) clearly is timely, because complainant alleges he had no knowledge of the recall until June 10, 1985, and the complaint was filed on June 14, 1985.

There were two other issues mentioned by the Commission in its September 13, 1985, interim decision, but not addressed because of the result reached on timeliness grounds.

The respondent argued that the complainant was a third party defendant in a civil suit, and that this type of proceeding is not included within the coverage of §101.055(8)(a), Stats. However, that subsection refers, inter alia, to: "any action or proceeding relating to occupational safety and health matters under this subsection, testified or will testify in such a proceeding...." (emphasis added). The complainant contends in his brief that he "was a named defendant in a lawsuit alleging a violation of the occupational health and safety requirements of the State of Wisconsin." At this stage of this proceeding, that is adequate to withstand a motion to dismiss.

Respondent also raised in its brief an issue as to the adequacy of the complaint:

> (3) Mr. Sprenger's complaint is defective because it does not allege what occupational health, or safety violations the University is alleged to have committed. The complaint merely states that the "layoff was a result of retaliation regarding statements of violations of occupational, safety and health requirements". Furthermore, the complaint does not indicate who allegedly "urged" the complainant not to testify contrary to the University's interest in the civil suit. I therefore submit that the complaint is defective since the University does not have sufficient information to defend itself against this charge of discrimination.

Particularly given the relatively informal nature of pleadings in administrative proceedings, this complaint cannot be considered defective. Furthermore, the respondent has available relatively extensive discovery procedures, §PC 2.02 Wis. Adm. Code, to obtain additional specific information from the complainant prior to the hearing.

Notwithstanding that at this stage of the proceeding the Commission must assume the complainant's factual assertions relating to jurisdiction, it is concerned about the number of such matters that appear to be contested, and the related possibility that an investigation into the substantive aspects of this case might be rendered nugatory in whole or in part by subsequent findings on the facts underlying the issue of timeliness. Therefore, a conference will be held to discuss the advisability of holding a preliminary hearing to determine the facts relating to timeliness.

ORDER

The Commission's interim decision and order entered September 13, 1985, is vacated and rescinded, and respondent's motion to dismiss the complaint as to the occupational safety and health claim is denied. The respondent's motion to dismiss the complaint as to the age discrimination claim also is denied. These motions are denied without prejudice to renewal if appropriate facts are developed at hearing. A status conference is to be held as soon as possible.

Dated: July 24, 1986

STATE PERSONNEL COMMISSION

DENNIS P. McGILLIGAN, Chairperson

DONALD R. MURPHY, Commissioner

LAURIE R. McCALLUM, Commissioner

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