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

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INTERIM DECISION AND ORDER

This matter is before the Commission on respondent's motion to dismiss the complainant's charge of occupational safety and health retaliation.

On June 14, 1985, the complainant filed a complaint form with the Commission alleging both age discrimination (s. 111.321, Wis. Stats.) and occupational safety and health retaliation (s. 101.055(8), Wis. Stats.). The complaint provided, in part as follows:

> 1. Occupational safety and health retaliation. The undersigned was laid off from his employment in June, 1983. Approximately one month prior to the time of the undersigned's notification of layoff, the undersigned was served with a lawsuit as a co-defendant regarding injuries which were sustained by a student-employe, Jay Frisque, in the undersigned's department. Prior to notice of the undersigned's layoff, the undersigned indicated that the injuries of Jay Frisque were a result of bad facilities. The undersigned believes that his layoff was a result of retaliation regarding statements of violation of occupational safety and health requirements. The undersigned indicated that he would be truthful in his views regarding the safety of the premises even if this resulted in an unfavorable finding against the University. The undersigned was urged not to testify contrary to the University's interests, which the undersigned refused to do. The undersigned believes that his layoff was occasioned by his intimation that he would testify truthfully in regard to the lack of safety on the premises.
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> 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 has been reinstated in its entirety, and the 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.

THe respondent moved to dismiss the entire complaint. The parties subsequently agreed to consider first the respondent's motion as to the occupational safety and health retaliation claim. The parties also agreed to extend the time limits found in §101.055(8)(c), Wis. Stats., so that a hearing would not be required within 60 days after the receipt of the complaint.

Respondent raises three separate arguments with respect to the occupational safety and health retaliation claim. Respondent argues that the claim was not timely filed, that the complainant's testimony that allegedly resulted in retaliation was in a proceeding other than the class of proceedings covered by the law, and that the claim is defective because it does not provide "sufficient information [for the University] to defend itself."

The relevant provisions of the public employe safety and health law state:

> (8) PROTECTION OF PUBLIC EMPLOYES EXERCISING THEIR RIGHTS. (a) No public employer may discharge or otherwise discriminate against any public employe it employs because the public employe filed a request with the department instituted or caused to be instituted any action or proceeding relating to occupational safety and health matters under this section, testified or will testify in such a proceeding, reasonably refused to perform a task which represents a danger of serious injury or death or exercised any other right related to occupational safety and health which is afforded by this section.

> (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.

The initial issue raised by respondent's motion is whether the complainant's June 14, 1985 claim was filed "within 30 days after the employe received knowledge of the discrimination or discharge."

In his brief, complainant argues that he did not have "knowledge of the discrimination" until June 4, 1985. Complainant's brief reads in part, as follows:

> During the school year of 1982-83, John Sprenger was employed as the Theater Maintenance Coordinator in the office of Lectures and Performances at the University of Wisconsin-Green Bay. In early May of 1983, Mr. Sprenger was served with a lawsuit in regard to an injury sustained in the UW-GB theater by a student employee, Jay Frisque. Prior to the time that the lawsuit was served, Mr. Frisque had made claim for his injuries. In the course of the University's investigation of the situation surrounding the injuries, University officials spoke with John Sprenger. Mr. Sprenger had indicated that he felt the University was negligent and therefore partially responsible for Mr. Frisque's injuries. Shortly thereafter, Mr. Sprenger was issued a notice of layoff in regard to his position at the University. THe notice of layoff indicated that his position was to be eliminated.
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> Mr. Sprenger was a member of a labor association and was afforded recall rights under the labor contract for a period of five years after such a layoff.
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> Sprenger discovered on June 4, 1985 that the University had re-established his old position for the school year 1985-86. Further investigation by Mr. Sprenger uncovered that the position had already been filled. Mr. Sprenger was not afforded the opportunity of his recall rights, and consequently, feels that cause exists to believe that the temporary elimination of his position and his subsequent layoff was for other than economic reasons. Consequently, he did not "discover" discrimination until such time as he was not afforded the recall opportunities as afforded in the contract. Therefore, the thirty-day time limit on filing did not begin to run until June 4, 1985. Mr. Sprenger shortly thereafter, specifically on June 10, 1985, quite diligently filed the complaint in question.

The complainant cites the recent decision of Hansen v. A. H. Robins, Inc. 113 Wis. 2d 550 (1983) to support his contention. In Hansen, the plaintiff had been fitted with an IUD in 1974 and in 1978 experienced "bleeding between menstrual periods, inability to digest food comfortably, nausea, diarrhea, nervousness, cramping, abdominal pain and occasional fever." On June 13, 1978, one physician diagnosed plaintiff's ailments as possibly related to gastroenteritis. On June 26, 1978, a second physician removed plaintiff's IUD and concluded that she probably had pelvic inflammatory disease (PID). Plaintiff subsequently recovered from PID but it rendered her sterile. On June 24, 1981, plaintiff filed an action in federal court seeking damages for injuries arising out of use of the IUD. The Court held that the action had been filed within the 3 year statute of limitations because the tort claim accrued on the date the injury was discovered or with reasonable diligence should have been discovered. The Hansen decision specifically overruled prior cases holding that tort claims accrue at the time of the negligent act or injury.

The Hansen decision construed the statute of limitations for tort actions. In the present case, the occupational safety and health retaliation provision already specifies that knowledge of the injury commences the 30 day period for filing a complaint. Here, the knowledge of the injury occurred when the complainant was laid off in 1983, not when the complaint received information sufficient to cause him to believe that the layoff constituted illegal retaliation.

The statute in question (s. 101.055(8)(c), Stats.) 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.

Given this construction, the complaint in this matter should have been filed within 30 days of the date of layoff in order to obtain review of that action. This complaint was filed nearly two years later, so the respondent's motion to dismiss the occupational safety and health retaliation claim must be granted.

ORDER

That portion of the complaint alleging occupational safety and health retaliation is dismissed.

Dated: September 13, 1985 STATE PERSONNEL COMMISSION

DENNIS P. McGILLIGAN, Chairperson

LAURIE R. McCALLUM, Commissioner

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