STATE OF WISCONSIN PERSONNEL COMMISSION

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*
THOMAS J. GOZINSKE, *
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Complainant, *
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v. *
*
Secretary, DEPARTMENT OF *
HEALTH AND SOCIAL SERVICES, *
Respondent. *
*
Case No. 86-0038-PC-ER *
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DECISION
AND
ORDER

This case involves three complaints of discrimination on the basis of national origin or ancestry, race, color and sex with respect to promotion. These complaints were filed on March 4, 1986. The complaints involve three promotions that were made in 1983 and 1984 through the use of expanded certification of women and minorities pursuant to §ER-Pers 12.05, Wis. Adm. Code.

Pursuant to §§230.44(3) and 111.39(1), Stats., discrimination complaints must be filed within 300 days of the date of the discrimination. The complainant has argued in letters to the Commission that at the time of these transactions he had no reason to doubt the validity of the state's use of expanded certification pursuant to §ER Pers 12.05, Wis. Adm. Code. He says it was not until February 7, 1986, that he received a copy of DER Bulletin MRS-32 and AA-1, through which he learned that this Commission (actually a hearing examiner) had issued a proposed decision finding that the use of general population figures to determine whether a classification was balanced with respect to representation of affirmative action target groups was improper. He goes on to state:

> I only became aware of action discriminatory against me as of 7 February 1986 with the issuance of the bulletin suspending use of expanded certification in the promotional and hiring processes. Because I had been constantly trained in affirmative action and its principles, and it was only with issuance of said referenced bulletin that the facts of discrimination became apparent to me, I have filed my charges of discrimination in a proper and timely manner -- well within the 300 day statute of limitations.... (letter of June 11, 1986)

In Sprenger v. UW-Green Bay, Wis. Pers. Commn. No. 85-0089-PC-ER (1/24/86), the Commission held that the 300 day time limit begins to run when the facts that would support a charge of discrimination are apparent or should be apparent to a person with a reasonably prudent regard for his or her rights similarly situated to the complainant.

In this case, there is no reason to assume that the complainant was not aware of or could not have become aware of all the facts that would have supported charges of discrimination back in 1983 and 1984 when these transactions occurred. However, at that time, he had not formed the conclusion that these facts arguably give rise to a violation of the Fair Employment Act. While he only reached this conclusion (in effect a legal conclusion) in 1986 when he learned of the Commission's proposed decision and the state's reaction to it, this does not alter the point that the facts essential to a charge of discrimination were certainly known or readily knowable in 1983 or 1984. If he had not been aware at that time that the state was basing expanded certification decisions on a comparison between the representation of women and minorities in the agency and in the state population at large, there is no reason to think he could not easily have found out by inquiring.

This case is quite similar to Wickman v. DP, Wis. Pers. Commn. No. 79-302-PC (3/24/80), where certain employes were denied premium pay for certain overtime worked in 1977 and did not file an appeal until 1979 when they found out that another group of employes, who had appealed in 1977,

had received a proposed decision and order concluding that they were entitled to premium pay for that period. The Commission rejected the appellants' argument that they "did not realize we had been aggrieved" until the proposed decision was issued.

Complainant also argues in his June 11, 1986, letter that "...because of the issuance of further bulletins reinstituting use of expanded certification, I find the situation to have changed into a case of continuing discrimination...."

A continuing discrimination theory is unavailable to the complainant. Assuming that expanded certification is being used, its use does not affect him "continually," but only with respect to certain specific, discrete employment transactions. In order for expanded certification to affect him the complainant would have to take and pass a promotional exam, and circumstances would have to be such as to lead to a decision by respondent to use expanded certification.

Finally, it cannot be argued that there is a continuing violation from complainant's failure to have been promoted in 1983 and 1984. This involves the injury or effects of previous alleged discrimination. See, United Air Lines, Inc. v. Evans, 431 U.S. 553, 975 Ct. 1885, 52 L. Ed. 2d 571, 14 FEP Cases 1510 (1977).

ORDER

These complaints are dismissed as untimely filed.

Dated: June 25, 1986 STATE PERSONNEL COMMISSION

DENNIS P. McGILLIGAN, Chairperson

DONALD R. MURPHY, Commissioner

LAURIE R. McCALLUM, Commissioner

AJT:jmf
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