STATE OF WISCONSIN PERSONNEL COMMISSION

PEDRO MEDINA,

Complainant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 86-0076-PC-ER

INTERIM DECISION AND ORDER

This matter is before the Commission for the purpose of establishing an appropriate issue for hearing. The parties have been provided an opportunity to file briefs.

The complaint in this matter was filed on June 10, 1986. The complainant described the harm he suffered as "termination of employment" and made the following statement of discrimination:

> I was discriminated against because my conviction had no relationship to my employment and it is in fact violative of the law as relates to termination for conviction unrelated to employment.

The complaint was notarized by complainant's attorney and was accompanied by a cover letter from complainant's attorney.

An initial determination of no probable cause to believe that complainant was discriminated against on the basis of conviction record was issued on July 8, 1987. By letter dated July 27, 1987, complainant appealed the initial determination. The conference report for a prehearing conference held on September 2, 1987 reflects that the parties agreed to a main issue for hearing but disagreed on certain proposed subissues. The parties agreed to the following main issue:

Whether there is probable cause to believe that respondent discriminated against the complainant based on conviction record as set forth in his complaint of discrimination and, accordingly, whether the initial determination of "no probable cause" should be affirmed or reversed.

The complainant proposed the following subissues:

a) Whether the respondent's action setting a termination date of May 30, 1985 constituted discrimination based on conviction record.

b) Whether the respondent's action suspending the complainant without pay commencing May 30, 1985 constituted discrimination based on arrest record.

The briefing schedule allowed the parties to submit arguments as to the proposed subissues as well as on the question of whether the complaint could be amended to permit investigation of the proposed subissues in the event they were found to be outside the scope of the existing complaint.

The following facts appear to be undisputed.

FINDINGS OF FACT

1. In May, 1985, criminal charges of second degree sexual assault were filed against the complainant in Waukesha County Circuit. At this time, complainant was on medical leave without pay from his position as a Youth Counselor II at Ethan Allen School, Wales, Wisconsin.

2. On May 30, 1985, complainant returned to work with a letter from his doctor releasing complainant from his care and stating that complainant could return to work. A pre-disciplinary hearing was held the same day, and a decision was made to suspend complainant without pay pending the outcome of the criminal charges, and to terminate complainant effective May 30, 1985, if convicted of the alleged criminal act. This decision was announced in a letter addressed to the complainant and dated May 30, 1985, which stated in pertinent part:

"This letter serves as formal notification that you are hereby

suspended without pay from your position as a Youth Counselor at Ethan Allen School effective May 30, 1985.

* * *

This suspension will remain in effect pending the outcome of criminal charges which have been brought against you in Waukesha County Court regarding an alleged second degree sexual assault. If you are convicted, you will be terminated from employment effective the date of this suspension. If you are totally cleared and exonerated regarding the alleged criminal acts, you will be restored with full back pay and benefits for the period of the suspension . . . ."

3. On June 5, 1985, complainant filed a grievance pursuant to the applicable collective bargaining agreement regarding his May 30, 1985, suspension. This grievance was subsequently withdrawn by complainant.

4. On October 4, 1985, complainant pleaded no contest to a charge of third degree sexual assault pursuant to a plea agreement with the Waukesha County District Attorney. He was sentenced to a term of two years imprisonment, stayed, and four years probation, imposed, on the condition that he serve 60 days in jail with release privileges to seek employment, keep up his residence and continue his medical treatment.

5. On October 21, 1985, Ethan Allen School sent complainant a letter confirming his termination. This letter stated, in its entirety:

"This letter serves as formal notification of your discharge from employment at Ethan Allen School as a Youth Counselor 2, effective May 30, 1985. This action is being taken as you have been found guilty of third degree sexual assault, on October 4, 1985.

You were informed in your letter of suspension dated May 30, 1985, that should you be found guilty of this offense your employment would be terminated. Conduct of this nature is in violation of Department of Health and Social Services Work Rule No. 5 which prohibits in part 'illegal conduct.'

If you feel that this action was not for good cause, you may appeal through the contractual grievance procedure."

6. On June 10, 1986, complainant filed the instant discrimination complaint. In his complaint, complainant stated " I was discharged on

October 21, 1985, with effective date of May 30, 1985, for having been found guilty of third degree sexual assault on October 4, 1985."

OPINION

The time limit for filing complaints of alleged discrimination under the Fair Employment Act is "no more than 300 days after the alleged discrimination . . . occurred." §111.39(1), Stats. In the present case, the complaint was filed on June 10, 1986, approximately 375 days after the May 30, 1985 letter, but only approximately 231 days after the October 21, 1985 letter.

Respondent argues that both the suspension and termination should be tied to the May 30, 1985 letter. However, respondent concedes that

> by submitting to the Commission's jurisdiction and participating in these proceedings, it has waived this objection insofar as the complaint relates to the time period commencing with the confirmatory letter of October 21, 1985. Thus, respondent must concede that it is estopped from arguing that complainant's claims are barred for the period commencing October 21, 1985. The 300-day period for filing discrimination complaints is a statute of limitations, not a statute concerning subject matter jurisdiction, and thus it may be waived, either by estoppel or otherwise. Milwaukee County v. LIRC, 113 Wis.2d 199, 335 N.W.2d 412 (1983). However, respondent is in no way estopped from raising the 300-day limitations period as a bar to complainant's claims covering the period from May 30, 1985, to October 21, 1985. Respondent's brief, page 10.

The complainant's second proposed subissue refers to the suspension without pay. The complainant was informed of this action by letter dated May 30, 1985 and the suspension was effective immediately. Depending on the result of the criminal charge pending against the complainant, it was possible that the suspension period would be retracted at some point in the future. Nevertheless, the suspension without pay was in fact being imposed on the complainant starting May 30, 1985 and the 300-day period for filing a complaint regarding the suspension began to run on the same date.

Complainant's June 10, 1986 complaint is not timely with respect to the May 30, 1985 suspension. The original complaint referred only to the October 21, 1985 discharge rather than to the preceding suspension. Any amendment to the complaint would relate back to the original date of filing, but the amended complaint would still be untimely as to the May 30th suspension.

The complainant's first proposed subissue refers to the decision to set May 30, 1985 as the termination date for complainant's employment. This decision was clearly tied to the termination decision: it was made either at the same time or after the termination decision but could not have been made before the termination decision.

While the complainant was notified on May 30th that he might be discharged, he was also notified that he might not be discharged. The May 30th letter merely threatened the complainant with the possibility of a future disciplinary action. Imposition of the discipline was contingent upon complainant's conviction on some future date. However, if complainant were cleared of the criminal allegations, he would not be discharged. Because of the contingent nature of the May 30th letter, it cannot be said that the decision was made to discharge the complainant until on or after October 4, 1985 when he plead guilty to a charge of third degree sexual assault. Then the contingency was removed and the discharge decision, as reflected in the October 21, 1985 letter, was made.

This set of facts may be distinguished from the line of cases cited by respondent where an employe was to be terminated at a specific future date from their position but the employer indicated it would make at least some effort to obtain alternative permanent employment for the employe. In Mull v. Arco Durethane Plastics, 784 F. 2d 284, 40 FEP Cases 311 (7th Cir, 1986) and Janikowski v. Bendix, 603 F. Supp. 1284, 39 FEP Cases 1482 (E.D. Mich.,

1985), the limitations period was held to commence on the date the employe was notified of the impending discharge, rather than on the date the discharge was effectuated. However, in Verschuuren v. Equitable Life Assur. Soc., 554 F. Supp. 1188, 30 FEP Cases 1309, (S.D. N.Y., 1983), a termination notice was held not to be a "final" decision where the notice stated that the plaintiff's employment would be terminated as of a specific date if he had not been placed in another position by that date and the employer would make "every reasonable effort" to locate such an alternative position. The court held:

> The letter of June 8th, on which Equitable relies, is not a letter of dismissal. It advises Verschuuren that he may be dismissed, but only if another position cannot be found for him, and it assures him that efforts will be made to find another position for him. 30 FEP Cases 1309, 1311.

Also, in Cocke v. Merrill Lynch Co., 43 FEP Cases 1724 (11th Cir, 1987), the court held that when the employer is actively trying to find a position within the company for an employe, the filing period was equitably tolled. The employe had been notified in August of 1984 he would be terminated on a specific date six months later.

In the present case, the complainant was not notified he was being terminated until he received the October 21, 1986 letter. Prior to that date he simply knew that there was a possibility he would be terminated on an unknown future date. For the same reasons, the instant complaint is distinguishable from another case cited by respondent. In Rodriguez v. Chandler, 641 F. Supp. 1292, 41 FEP Cases 1038 (S.D. N.Y,, 1986) the plaintiff was informed that he had been denied tenure by a June 1st letter stating in part:

> If we receive by February 1, 1984 in the Office of the Vice President for academic affairs formal notification from the degree-granting institution that your doctoral degree has been awarded, this decision

> not to renew your appointment will be reviewed.... You should be aware, however, that such a degree or its equivalent is not in itself a sufficient condition for a continuing appointment. 41 FEP Cases 1038, 1040 (emphasis added).

The court held that the "unlawful employment practice was the June 1, 1983 decision not to offer the plaintiff a further appointment."

Because notice of the termination was not provided the complainant until October 21, 1986, his June 10th complaint was timely filed as to the discharge decision. However, the original complaint made no allegations as to the effective date of the discharge. Therefore, the initial determination did not consider that contention. As noted in Adams v. DNR & DER, 80-PC-ER-22, 1/8/82, there are strong policy considerations preventing a complainant from unilaterally expanding the scope of his discrimination charge during the hearing stage. Therefore, the complainant is provided a period of 20 days to file an amended complaint identifying his contention regarding the effective date of the discharge. Such an amendment will relate back to the original filing date. Once the amendment is filed, an amended initial determination can be issued.

ORDER

The complainant has 20 days to file an amendment to his complaint. The complainant's request to add the above-noted subissues to the statement of issue in this matter is denied.

Dated: February 11, 1988 STATE PERSONNEL COMMISSION

DENNIS P. McGILLIGAN, Chairperson

DONALD R. MURPHY, Commissioner

LAURIE R. McCALLUM, Commissioner

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