

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 *
 PETER GRANT CLEVELAND, M.D., *
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 Complainant, *
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 v. *
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 Secretary, DEPARTMENT OF *
 HEALTH AND SOCIAL SERVICES, *
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 Respondent. *
 *
 Case No. 86-0104-PC-ER *
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DECISION
 AND
 ORDER

This matter is based on an allegation of retaliation under the whistleblower law, Subch. III, Ch. 230, Stats., and is before the Commission on a question of timeliness.

On August 8, 1986, the complainant filed a fourth step "Non-represented Employee Grievance Report" with the Commission. The report read, in relevant part:

On March 11, 1986, a patient of mine at W.C.I. had been pressuring me for drugs. Later that night he wrote a harassing letter and addressed it to me. Standard procedure is that this letter would arrive in the H.S.U., be brought to my attention and I would schedule a medical appointment with the patient.

The enclosed letter shows that the patients letter addressed to me was intercepted and processed through all of the following: K. Morrison, Administrator DOH; J. Chapin, Asst Administrator DOH; W. Young, Supt W.C.I.; R. Belshaw, Director, BPER; B. Whitmore, Director, BCHS; DOH & DOC legal personnel; S. Kronzer; and others. (How many???)

My professional relationship with my patient was violated and abridged.

There are gross violations of management work rules here.

Violation of "The Whistle Blower's Act" has occurred in retaliation for my exercise of professional peer responsibility regarding the ethical standards of some DOH personnel.

That I could not have a copy of the letter (it was addressed to me) is a violation of my constitutional rights. B. Whitmore provided me with a copy early in the meeting of investigation held at W.C.I. the afternoon of April 28, 1986.

That this is the latest in a series fo [sic] incidents of intimidation and harassment by state employees have been documented.

I have worked hard many years for my patients, my profession and my government. The treatment I have received from management personnel has been -- dehumanizing -- and a growing discouragement to me and others in state service.

The Commission assigned case number 86-0104-PC-ER to the document.

In a letter dated June 5, 1987, from the Commission, the complainant was invited to submit arguments as to whether his complaint was timely filed in light of the period of more than 60 days from the date of the investigation, April 28, 1986 and the August 8, 1986 date of filing.

In his response dated June 19, 1987, the complainant wrote:

Your letter of June 5, 1987 regarding the question of timeliness of filing the above named case is herein considered. Dr. Cleveland had been subjected to acts of retaliation as far back as 1983 continuing to his discharge without just cause on 3/31/87. A partial list of events include the following.

1. 1/2/86. Transfer of Dr. Cleveland half-time from DCI to WCI.
2. 4/28/86. Retaliation and harassment etc. of Dr. Cleveland. See cases 86-0104-PC-ER and 86-0154-PC.
3. 5/5/86. Expansion of DCI to full time position and hiring of new employee. See case 86-0152-PC.
4. 5/5/86. Retaliation and discrimination etc. against Dr. Cleveland by assignment of younger physician with less experience to CCI. See case 86-0133-PC.
5. 7/1/86. Dr. Cleveland transferred full time to WCI from FLCI and Dr. Lloren transferred from WCI to FLCI.
6. 1/2/87. Dr. Russler quits at CCI. Dr. Lloren assignet to CCI.
7. Early 1987. Medical Directorship BCHS contracted. Relates to case 86-0151-PC.
8. 3/31/87. Discharge of Dr. Cleveland. This is retaliation in violation of "the whistle blower's act." See case 87-060-PC.

Case No. 86-0104-PC-ER requests assistance from the Personnel Commission and was filed in the middle of a series of events which were illegal acts of retaliation against Dr. Cleveland.

The time limit for filing complaints of retaliation under the whistleblower law is based on §230.85, Stats.:

(1) An employe who believes that a supervisor or appointing authority has initiated or administered, or threatened to initiate or administer, a retaliatory action against that employe in violation of §230.83 may file a written complaint with the commission, specifying the nature of the retaliatory action or threat thereof and requesting relief, within 60 days after the retaliatory action allegedly occurred or was threatened or after the employe learned of the retaliatory action or threat thereof, whichever occurs last.

(2) The commission shall receive and investigate any complaint under sub. (1).

In his letter of June 19th, the complainant has clearly assigned a date of April 28, 1986 to the events which form the basis of his claim filed on August 8, 1986. This represents a period of more than sixty days between the date of the alleged retaliatory action and the date of filing.

The Commission has previously held that grievance procedures do not toll the time within which a claim under the Fair Employment Act must be filed. King v. DHSS, 86-0085-PC-ER, 8/6/86, citing Electrical Workers v. Robbins & Myers, Inc., 429 US 229, 50 L. Ed. 2d 427, 97 S. Ct. 441 (1976).

The King decision construed s. 111.30(1), Stats., which provides:

The [Commission] 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 [Commission] no more than 300 days after the alleged discrimination or unfair honesty testing.

This language is comparable to that of s. 230.85, Stats., relating to the filing of a whistleblower claim. Both statutes refer to the date of the occurrence of the alleged improper action rather than to the date of a grievance decision arising from that action. Based on its decision in King, the Commission holds that the 60 day time period for filing a whistleblower complaint is not tolled by the filing of a grievance of the same transaction.

In his June 19th letter, the complainant appears to allege that his March 31, 1987 discharge constituted whistleblower retaliation. The complainant has already filed an appeal of his discharge pursuant to s.230.44(1)(c), Stats. That appeal, filed on April 28, 1987, has been assigned case number 87-0060-PC and a prehearing conference was held on June 3, 1987. The parties in that case have agreed to a hearing date and to an issue for hearing. In the instant complaint, the Commission does not address the question of whether the complainant may now file a new complaint of retaliation arising from the same transaction that will relate back to the date of filing of the appeal. See, generally, WFT v. DP, 79-306-PC, 4/2/82; Saviano, et al. v. DP, 79-PC-CS-335, 6/28/82. However, to the extent the complainant's June 19th letter is an attempt to amend the instant complaint to include retaliation in regard to complainant's discharge on March 31, 1987, such an amendment is not possible because the underlying claim arising from the April 1986 action has already been found to have been untimely filed. In addition, June 19th is more than 60 days from the date of the discharge. The untimeliness of the filing of an amended charge cannot be cured by relating back to a previous untimely filed original charge. Cobb v. Stringer, 43 FEP Cases 695 (W. D. Ark., 3/23/87). In Cobb, the complainant had filed a charge of sex discrimination with the EEOC on September 7, 1984 alleging denial of the opportunity to apply to a position filled in 1982. The charge was subject to a 180 day time limit. On October 29, 1984, complainant filed an "amended" charge alleging sex discrimination with respect to her demotion 214 days earlier, on March 28, 1984. Complainant's original charge had made no reference to the demotion decision. The court held that the original charge was untimely so the complainant's effort to have her


amended charge relate back to the date of filing of the original charge also failed.

In addition, the complainant's discharge is an occurrence separate from the facts forming the basis for the August 8, 1986 complaint, i.e. respondent's actions relating to the interpretation of the inmate's letter and subsequent investigation. Therefore, these facts are distinguishable from those cases in which the Commission has applied the relation back theory. In those cases, the complainant has simply sought to add an additional theory of discrimination arising from the same events.¹ Adams v. DNR & DER, 80-PC-ER-22, 1/8/82; Jones v. DNR, 78-PC-ER-12, 11/8/79.

ORDER

This matter is dismissed as untimely filed.

Dated: July 8, 1987 STATE PERSONNEL COMMISSION


DENNIS P. MCGILLIGAN, Chairperson


LAURIE R. MCCALLUM, Commissioner

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Parties:

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¹ In addition, the Commission has applied the relation back theory to permit correction of technical deficiencies in a charge. Goodhue v. UW, 82-PC-ER-24, 11/9/83.