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 *
 JOSEPH V. PELIKAN, *
 *
 Complainant, *
 *
 v. *
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 Secretary, DEPARTMENT OF *
 NATURAL RESOURCES, and *
 Secretary, DEPARTMENT OF *
 EMPLOYE TRUST FUNDS, *
 *
 Respondents. *
 *
 Case No. 87-0043-PC-ER *
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 * * * * *

DECISION
 AND
 ORDER

NATURE OF THE CASE

This charge of age discrimination under the Fair Employment Act (FEA)(Subch. II, ch. 111, stats.), is before the Commission for a determination as to whether it has been timely filed. The parties have filed briefs, and there appears to be no dispute regarding the underlying facts material to the issue of timeliness. The following findings are taken essentially from complainant's brief.

FINDINGS OF FACT

1. Complainant was a Conservation Warden-Supervisor I with the DNR in charge of six counties: Dunn, Pierce, Pepin, St. Croix, Chippewa and Eau Claire.
2. Complainant was employed with the DNR for over twenty years.
3. Complainant's last day of work with the DNR was December 6, 1985, the date of his retirement.
4. Complainant had been informed by the state of Wisconsin through its personnel department once a year, every year at least since 1982, that there

was what complainant characterizes as a "retirement penalty" for working after the age of 55 years.

5. Section 40.23(2m)(e)3 of the Wisconsin Statutes was the applicable law at the time of complainant's retirement, and continues to be the law today, which provides for the aforesaid "retirement penalty" for those persons, who work after the age of 55.

6. At the time complainant retired, he was making \$33,000.00 per year, plus fringe benefits. He receives monthly retirement checks which are substantially less than the pay he was receiving prior to his retirement.

7. On April 30, 1987, complainant filed an age discrimination complaint dated April 28, 1987, with this Commission.

8. Said complaint alleged, inter alia, that his date of birth was June 1, 1931, and:

"I retired on December 6, 1985. I was forced to retire because of the law which stated that the pension plan would be reduced each quarter of every year I worked after 55 until age 62 when my pension would equal the same as it was when I was 55, and when I retired. I was forced to retire early because of my age, which constitutes age discrimination. Other classifications who are covered by the pension plan are treated differently, those in non-hazardous, over 55 can continue working without any penalties and increase their pension fund. The discrimination affects all people similarly situated in my classification. We are requesting monetary damages in an unspecified amount at this time."

DECISION

The statutory time limit for filing discrimination complaints is 300 days. §§230.44(3), 111.39(1), Stats.

In this case, complainant retired December 6, 1985, and filed his complaint on April 30, 1987, more than 300 days later. He argues that the complaint should not be considered untimely because he contends there is a continuing violation:

"In this case, the law and policy of the State of Wisconsin

had been in effect since, at least, 1981. Mr. Pelikan had received directives from the personnel department stating there would be a penalty for retiring after the age of 55. Mr. Pelikan had received notices that retirement after 55 would involve a penalty. Mr. Pelikan made his decision to retire at the age of 55 because of the penalty. The penalty continued after Mr. Pelikan retired, and is the law today.

Mr. Pelikan believes that each check constitutes a separate and continuing violation." Complainant's brief on timeliness.

The purported "penalty for retiring after the age of 55" to which complainant refers is set forth at §40.23(2m)(e)3, Stats., which provides, inter alia, for the reduction of the monthly retirement annuity of protective occupation employes such as complainant as follows:

". . .for all years of creditable service by 0.0125 for each calendar quarter-year that elapses after the calendar year in which the participant attains age 55. . ."

In other words, complainant contends that if he had not retired when he did and if he had remained on the job, his retirement annuity would have been reduced by a certain factor for each quarter that elapsed after the calendar year in which he turned 55. He asserts it was at least in part in order to avoid this penalty that he retired when he did.

The Commission is unable to conclude that these circumstances give rise to a "continuing violation" that extends beyond complainant's retirement date for timeliness purposes under the FEA. The instant complaint focuses on the contention that the statutory retirement formula forced complainant to retire at an earlier age than he otherwise would have:

". . .I was forced to retire because of the law which stated that the pension plan would be reduced each quarter. . .I was forced to retire early because of my age, which constitutes age discrimination. Other classifications who are covered by the pension plan are treated differently, those in non-hazardous, over 55 can continue working without any penalties and increase their pension fund. . ."

Complainant argues in his brief on timeliness as follows:

". . .Mr. Pelikan made his decision to retire at the age of 55 because of the penalty. The penalty continued after Mr. Pelikan retired, and is the law today.

Mr. Pelikan believes that each check constitutes a separate and continuing violation."

However, this is the type of situation where each check is conceptually either an injury flowing from the alleged act of discrimination or, put another way, the present effects of past discrimination.

A great many personnel transactions have adverse economic impacts on employes that continue over time. For example, an employe who is involuntarily demoted for disciplinary reasons will continually be paid less than if he or she had not been demoted. These are the employe's monetary damages or loss, and the fact that they continue to accrue indefinitely obviously does not mean that the employe has an indefinite period in which to appeal. The difference between this hypothetical and a true continuing violation is that the reduction in salary in each paycheck following the demotion is essentially a neutral act. If the demotion has not been shown to have been improper, either because the employer demonstrated just cause following a hearing, or because the employe failed to contest it in a timely manner, there is no basis on which to contend that each paycheck constitutes a separate act of discrimination.

A true continuing violation typically involves an employer's ongoing policy that affects that employe continually. For example, an employer may have a salary schedule which calls for a higher salary range for stock clerks, a male-dominated job classification, than for cashiers, a female-dominated classification. A woman hired into the latter classification presumably would not be limited to the 300 days after her hiring in which to file a sex discrimination charge, because there is an ongoing policy that continues to affect her over the course of her

employment, so long as the employer continues to maintain the structural salary differential between the two classifications.

In the instant case, Mr. Pelikan is not complaining about how his salary is being computed now that he is retired; his complaint runs to the contention that he was forced into an early retirement, and as a consequence is realizing less compensation from the State.

In United Air Lines, Inc. v. Evans, 431 U.S. 553, 558, 52 L. Ed. 2d 571, 578, 97 S. Ct. 1885 (1977), the plaintiff-respondent was a female flight attendant who had been terminated from employment in 1968 because of a subsequently invalidated policy against marriage. She was rehired in 1972, and complained in 1973 about the employer's refusal, pursuant to its uniform policy, to credit her with pre-1972 seniority. The court refused to apply a continuing violation theory:

"Respondent emphasizes the fact that she has alleged a continuing violation. United's seniority system does indeed have a continuing impact on her pay and fringe benefits. But the emphasis should not be placed on mere continuity; the critical question is whether any present violation exists. . ."

Similarly, in the instant case, Mr. Pelikan is not pointing at any alleged present violation, only at a present effect of an earlier alleged violation.

The Commission has not been cited to, nor has it been able to find, any case involving forced retirement where there was a finding of a continuing violation of the nature espoused here by complainant. However, it is instructive that in EEOC v. Home Insurance Co., 553 F. Supp. 704, 30 FEP Cases 841 (S.D.N.Y. 1982), an ADEA case involving the employer's adoption of a policy reducing its mandatory retirement age from 65 to 62, the Court considered which of two points commenced the running of the statute of limitations--the date the employe was terminated or the date the employe was made aware he or she would be terminated. Thus, the furthest possible extent of a continuing violation

from a retirement policy requiring retirement at a certain age under this holding would be the actual retirement date.

Such a result was also reached in a Title VII case, Hannahs v. Teachers Retirement System, 26 FEP Cases 527, 531 (SDNY 1981):

" . . . Rather than constitute a separate or continuing violation, each monthly check merely reflects the effects of the discriminatory act which occurred in 1976. The fact that plaintiff currently feels that effects of past discrimination is not the decisive issue: 'the critical question is whether any present violation exists.' (emphasis in original). Evans, supra, 431 U.S. at 558; accord, Ricks, supra, 101 S. Ct. at 503-04. . . ."

Because of the conclusion reached with respect to the absence of a continuing violation after complainant's retirement date, and the application of the 300 day time limit, the Commission does not reach the contention of respondent DETF in its brief that there has been "no reduction in his pension check nor would there have been a reduction if he had opted to retire and had continued beyond age 55."

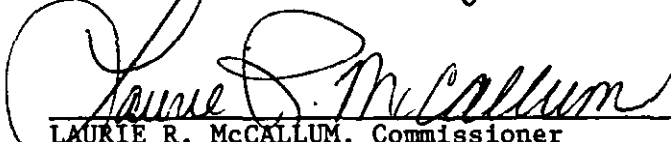
ORDER

This charge of discrimination is dismissed as untimely filed.

Dated: June 24, 1987

STATE PERSONNEL COMMISSION


DENNIS P. MCGILLIGAN, Chairperson


LAURIE R. MCCALLUM, Commissioner

AJT:vic
VIC02/

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