STATE OF WISCONSIN PERSONNEL COMMISSION

KENNETH VANDER ZANDEN,

Complainant,

v.

Secretary, DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS,

Respondent.

Case No. 87-0063-PC-ER

RULING ON PETITION FOR REHEARING

This matter is before the Commission on appellant's petition for rehearing filed January 29, 1991. Both parties have submitted arguments with respect thereto.

In a ruling on a motion to dismiss entered on January 11, 1991, the Commission concluded as follows:

1) That the complaint filed on June 5, 1987, was untimely with respect to the alleged retaliatory acts of the layoff of complainant in March 1985 and the failure to have offered him an ILTR position in Wausau in June 1986.

2) That an amended complaint filed December 12, 1988, which alleges that throughout 1988 complainant applied for and was denied transfers into positions on a retaliatory basis, including the specific position he previously had held for 14 years, would be considered untimely except as it relates to that specific position.

In his petition for rehearing, complainant contends in part as follows:

> [T]he retaliation was not apparent to the complainant at the time of his layoff and subsequent failure to be recalled because he was lied to when he inquired as to the reasons for not getting the appointments for which he applied. It was only later that he learned of the real reason behind these actions, and at that point he filed his claim. When the employer has lied to an employe concerning the reason for an adverse employment action, the claim can be saved when the employe, only much later learns of the facts that would lead him to believe he has a claim.

The petition does not set forth the specific facts of the transactions and communications to which it refers. However, there are some specific facts in the documents which were before the Commission with respect to the aforesaid motion to dismiss.

With respect to the timeliness of the complaint filed June 5, 1987, the specific facts complainant relies on are set forth in his brief in opposition to the motion to dismiss as follows:

> As the charge of Discrimination filed on June 5, 1987, makes clear, Vander Zanden did not learn about the retaliation until April 28, 1987, when he spoke with officials at the DILHR Apprenticeship office in Madison. Of course he was aware that his position in Appleton was eliminated and that he did not receive a position in Wausau, before that date. However, he had no basis to believe that the motive for these actions was retaliatory, in response to his protected whistleblowing activities.
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> Respondent argues that Vander Zanden knew in March, 1985, that the reason his position was eliminated was because he was being retaliated against. However, the complaint makes clear that Vander Zanden did inquire at that time about the reason for the action, and was told that there was no need for two professionals in Appleton. Respondent also argues that Vander Zanden knew in June or July, 1986, that he did not receive an offer for the Wausau position because of retaliation. Again, the complaint makes clear that Vander Zanden did inquire about the action and was told that the position had been filled by transfer.
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> Respondent's argument suggests that Vander Zanden should be penalized because he believed the responses that he was given in 1985 and 1986. As he was not employed by DILHR since March, 1985, he could not learn directly about what was being discussed in the office. In fact, it was not until April, 1987, when he personally confronted DILHR officials in the Madison headquarters that he had any basis — other than pure speculation — that his failure to be recalled was connected to his engaging in protected activities.

The body of the June 5, 1987, complaint, which is referred to in the aforesaid brief, contains the following:

> It is difficult to identify what happened, when, or by whom because I am no longer employed by DILHR, and these things happened since I've left.
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> I had heard rumors for quite some time about various actions taken that I was curious about. On 4-28-87 I stopped in the

> DILHR-Apprenticeship office in GEF 1, Madison, WI to see what I could find out.
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> In June '86 I was told by Pat Hook (DILHR Personnel) that the Industry, Labor, Training Rep (ILTR) position in Wausau was going to be filled. I was informed that the position would be posted and if no other ILTR posted for it, the position would be offered to me because I am laid off from that classification. Later in the month of June '86 Ms Hook informed me that no one posted for the position in Wausau, and that the notice of recall would be coming soon.
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> When I did not receive any offer to return, I contacted Ms. Hook again and was told that the position was filled by transfer. I was then offered a position of ILTR in Milwaukee, which I refused as an unreasonable offer.
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> Eventually I started to hear that the ILTR who was in Eau Claire was transferred to Wausau, that the para-professional in Eau Claire was in Eau Claire running the office, and that a person was to be hired for the ILTR position in Milwaukee.
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> On 4-28-87 I thought I'd find our just what was going on from my former employers. Mr. Nye, Mr. Reinholtz and all other Madison staff was out except for Antionette Schwoegert. I found that the ILTR who is now in Wausau was forced to go there, or Milwaukee.
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> Common sense staffing would have moved the para-professional in Eau Claire to Milwaukee to function as a para-professional so that the person would have professional leadworkers, and or Supervision near by. With the Para-professional in Eau Claire, the nearest professionals are in Wausau, or La Crosse.
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> The fact that my position was moved from Appleton in March of '85 because there was supposedly no need for two professionals in Appleton is somewhat questionable in view of the fact that the Appleton office now has two professionals there with their headquarters in other cities.
>
> I contend that these abnormal staffing patterns are being done to keep me from returning to the ILTR position that is acceptable to me in retaliation for my exposing the Supervisor of Job Service, Oshkosh to an investigation. (emphasis supplied)

All that can be gleaned from both of complainant's briefs and his June 5, 1987, complaint about what complainant learned in Madison on April 28, 1987, is the underscored sentence above: "I found that the ILTR who is now in Wausau was forced to go there, or Milwaukee." It is not alleged, nor

is there any reason to assume, that this information would not have been available to complainant at an earlier date, if he had made inquiry.

The Commission held in Sprenger v. UW-Green Bay, 85-0089-PC-ER (7/24/86), that the period of limitations for filing a complaint of discrimination begins to run on the date "the facts which would support a charge of discrimination were not apparent and would not have been apparent to a similarly situated person with a reasonably prudent regard for his or her rights." This concept can involve obligation on the part of the complainant to make inquiry:

> At that time [when the alleged act of discrimination occurred] complainant either knew, or should have known as a person with a reasonably prudent regard for his rights, that under the FEA, an employer is prohibited from discriminating against an employe because of handicap . . . complainant as a person with a reasonably prudent regard for his rights would be charged at that time either with knowledge of the facts necessary for a discrimination claim . . . or at least with a duty to make such further inquiry to determine if he had an arguable claim under the FEA. Welter v. DHSS, 88-0004-PC-ER (2/22/89).

In Welter, complainant was denied a requested accommodation and over a year later found out about another employer who was granted an accommodation. While this may have precipitated his awareness of the grounds for a complaint, a "person with a reasonably prudent regard for his or her rights similarly situated" would have been aware of the facts that would have supported a charge of discrimination at the time of the accommodation denial.

In the case before the Commission, complainant has alleged he had been involved in "exposing the Supervisor of Job Service, Oshkosh to an investigation," and that subsequently he was laid off and then denied reinstatement to a particular position. In the Commission's opinion, a reasonably prudent person at least would have made inquiry at the time to determine if there was a possible retaliation claim. Complainant apparently believed he had enough information to have filed a discrimination complaint on June 5, 1987, when the only "new" information he alleges he ascertained on April 28, 1987, was that the person who posted for transfer to the Wausau position had been forced to go either to Wausau or Milwaukee, but presumably he could have found this out in 1986 at the time of transaction, if he had made inquiry.

Complainant contends he reasonably relied on the representations made by persons in the DILHR personnel office in Madison, who he asserts presumably would have had no desire to retaliate against him, but that they lied to him:

> At the time Vander Zanden made his enquiries he was laid off, and he did all that a person with a reasonably prudent regard for his rights in a similar position would do: he contacted persons in the Personnel Department at the Department of Industry, Labor and Human Relation's (DILHR) Madison office about why he was not offered the Wausau position.
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> In the present case the retaliation was not apparent to the complainant at the time of his layoff and subsequent failure to be recalled because he was lied to when he enquired as to the reasons for not getting the appointments for which he applied. It was only later that he learned of the real reason behind these actions, and at that point he filed his claim.

However, looking at the specific facts set forth above, complainant alleges that in June 1986, Ms. Hook told him that the position had been filled by transfer. He then says that on April 28, 1987, he learned from an Antionette Schwoegert that the person who filled the Wausau job was "forced to go there, or Milwaukee." He has not alleged, however, that the job was not filled by transfer or as discussed above, that he could not have made the same inquiry into the circumstances surrounding the staffing of the Wausau position at the time it occurred. Therefore, assuming arguendo it was reasonable to have relied on the representations of DILHR personnel under the circumstances, this was not a source of misinformation to him, unless complainant is really contending that he was lied to because he was not told by DILHR personnel that he did not get the Wausau job because of retaliatory motivations by someone in DILHR management. If so, this contention would lead to the absurd result that in all cases where the employer does not admit to a complainant that a personnel action was retaliatorily motivated, the statute of limitations is suspended until the complainant finds out about the discrimination by some other means.

It also should be noted that complainant has not alleged that he learned anything on April 28, 1987, that related specifically to his layoff per se. To the extent it may be implicit in his position that the information he obtained about his nonreinstatement to the Wausau position also aroused his suspicions about the layoff, this linkage is far too remote and must also fail.

With respect to the December 12, 1988, amended complaint, this is concededly timely as to the failure to hire complainant for the Bureau of Apprenticeship Standards position. Complainant argues that respondent refused to recall him from layoff and that this constitutes a continuing violation.

In the Commission's February 28, 1989, ruling on complainant's motion to amend, it was ordered that his complaint could be amended by his December 12, 1988, amendment, which alleged as follows:

> (1) Throughout 1988, Complainant has applied for a job transfer into numerous positions for which he is qualified with the state.
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> (2) He has been repeatedly denied transfers into those positions.
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> (3) Specifically, in September, 1988, Complainant wrote Secretary Coughlin of DILHR requesting consideration for any available positions.
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> (4) Complainant thereafter specifically applied for the very position he held for 14 years.
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> (5) He was informed that the position was not being offered to him, but opened up to competition.
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> (6) Complainant believes that this failure to offer him any job in DILHR for which he is qualified is based on retaliation for his initial whistleblowing and ongoing legal challenge through the state Personnel Commission.

In its ruling, the Commission discussed the continuing violation theory as follows:

> An allegation that an employe has requested and for retaliatory reasons has been denied reinstatement on certain occasions usually will not give rise to a continuing violation theory — the alleged wrong against the employe occurs on specific occasions and is not of an ongoing nature. On the other hand, an allegation that a laid-off employe was subject to recall for a period of time and that the employer wrongfully refused to do so during that period probably would amount to a continuing violation because of the ongoing nature of the alleged wrong.
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> It is somewhat difficult to determine in which of the aforesaid categories the instant case falls. On one hand, complainant refers to having been denied appointment to specific positions. On the other hand, he refers to having been laid off and to recall rights. Given the minimal pleading requirements in proceedings

> of this nature, and giving a liberal reading to complainant's pleadings, it would be inappropriate to deny the request for amendment of the complaint.
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> In taking this approach, the Commission is not ruling that there is a continuing violation, but rather is ruling that it cannot rule out a continuing violation based solely on the pleadings. Any determination of whether there is or was a continuing violation will have to await the development of the underlying facts. (footnotes omitted)

In his subsequent brief filed in opposition to the motion to dismiss, complainant argued as follows with respect to this subject:

> Presumably Respondent argues that Vander Zanden knew about the retaliatory action that occurred throughout 1988, when it happened. In fact, Vander Zanden was not aware that he was repeatedly denied transfers throughout 1988, because he was being retaliated against until he was informed that he was not being offered the very position he held for fourteen (14) years, at which time it became clear to him the real reason behind the denials.

This portion of complainant's brief makes it reasonable clear that he is not alleging an ongoing failure to recall, where he could have been subject to recall at any time if respondent had chosen to have done so. Rather, he refers to the repeated denial of transfers, which he did not realize were retaliatory until he was denied his old job.

As the Commission pointed out in its February 28, 1989, ruling on complainant's motion to amend, "[a]n allegation that an employe has requested and for retaliatory reasons has been denied reinstatement on certain occasions usually will not give rise to a continuing violation theory — the alleged wrong against the employe occurs on specific occasions and is not of an ongoing nature." While in the petition for rehearing complainant now states "the employer continually refused to recall him from his layoff," it seems apparent that he is simply trying to hang another label on what he previously had referred to as having been "repeatedly denied transfers" (brief in opposition to motion to dismiss). If in fact there had been an ongoing failure to recall as opposed to a series of discrete denials of transfer or reinstatement, complainant, who is represented by counsel and who has had an extended period available for discovery, presumably would be able to allege this with some degree of specificity. However, since the Commission is retaining jurisdiction over this matter with respect to the concededly timely transaction, it is

conceivable, depending on the circumstances that complainant could bring on another motion to amend if he should unearth evidence that there in fact was an ongoing failure to recall.

The other part of complainant's argument with respect to the December 12, 1988, amendment is that it should be considered timely as to all the 1988 transfer denials based on a Sprenger-type theory because he was not aware he was being retaliated against until he was denied transfer to his old position. This argument is even weaker than the argument that his complaint as to his 1985 layoff and 1986 denial of reinstatement to the Wausau position should be considered timely. When complainant was denied reinstatement in 1988, this was against the backdrop of his 1987 complaint alleging not only that the 1985 layoff, but also the 1986 denial of reinstatement had been retaliatory. Certainly when the denials of reinstatement or transfer occurred in 1988, the facts that would support a charge of discrimination were apparent or should have been apparent "to a similarly situated person with a reasonably prudent regard for his or her rights."

Inasmuch as complainant has failed to identify any denials of reinstatement that occurred within 60 days of his December 12, 1988, amended complaint (except for the position in the apprenticeship bureau), has failed to establish a continuing violation, and has failed to establish that a similarly situated person with a reasonably prudent regard for his or her rights would not have been aware of the facts that would have supported a charge of discrimination at the other times he allegedly was denied reinstatement in 1988, the Commission's January 11, 1991, ruling on the untimeliness of the complaint as to these transactions must stand.

ORDER

Complainant's petition for rehearing, filed January 29, 1991, is denied.

Dated: February 26, 1991 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

AJT/gdt/2

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

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