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PHYLLIS O. KIRK,
 Complainant,

v.

Secretary, DEPARTMENT OF
 INDUSTRY, LABOR AND HUMAN
 RELATIONS,
 Respondent.

Case No. 87-0177-PC-ER

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RULING
 ON
 MOTION
 TO
 DISMISS

This matter is before the Commission on respondent's motion to dismiss the complaint as untimely filed. Both sides have filed written arguments.

This complaint of unlawful discrimination under the Fair Employment Act (FEA) (Subchapter II, Ch. 111, Stats.) was filed on December 30, 1987. It alleges a number of acts of discrimination including a discharge from her Equal Rights Investigator 2 position on November 11, 1986. On its face, the complaint appears to have been filed more than 300 days after the date of the last act of discrimination, and therefore it would appear to be untimely under §§230.44(3), 111.39(1), Stats.; and §PC 2.01, Wis. Adm. Code. However, the complaint also alleges that respondent prepared a negative performance evaluation of which she was not aware until she examined her personnel file on August 1, 1987.

In Sprenger v. UW-GB, 85-0089-PC-ER (1/24/86), the Commission held that the time for filing a charge of discrimination under the FEA does not begin to run until the date the facts which would support a charge of discrimination are apparent or would be apparent to a similarly situated person with a reasonably prudent regard for his or her rights. This standard or test can include a requirement that the complainant make inquiry. See Rudie v. DHSS & DER, 87-0131-PC-ER (9/19/90). In the case before the Commission, Ms. Kirk is alleging a number of discriminatory acts over about a three-year period culminating in an allegedly discriminatory discharge on November 11, 1986. There is nothing in her brief on the motion or in her complaint that even

suggests she did not have enough information on November 11, 1986, to have filed a complaint at that time with respect to all matters, except possibly the negative performance evaluation. In fact, she specifically states in her complaint that she requested a complaint form from the Commission in September 1986 but never received one. Therefore, the complaint is clearly untimely as to all matters except possibly the negative performance evaluation.

In her complaint, Ms. Kirk alleges, in part, as follows:

I was discriminated against from Nov. 30, 1983 until Aug. 1, 1986 ... in the areas of promotion, training, discharge, and other disciplinary actions including evaluations. I was discharged on Nov. 11, 1986. (emphasis added)

Included in her "other examples of discriminatory practices" is an unsatisfactory evaluation in June or July 1985. In summary, Ms. Kirk believed she was a victim of pervasive discriminatory activity, which included performance evaluations and which culminated in her discharge, and she even alleges she contacted the Commission for a complaint form in September, 1986. Under these circumstances, the Commission cannot conclude that the facts that would have supported a charge of discrimination were not apparent or would not have been apparent to a similarly situated person with a reasonably prudent regard for his or her rights until August 1, 1987. This situation is not comparable to that found in Sprenger, where the complainant had no indication of any age discrimination either prior to or at the time of layoff, and only discovered several months later that his position had been reinstated and filled by a younger employe.

Complainant argues that this case presents a "continuing violation." The Commission does not need to reach this issue, because even if there were a continuing violation it presumably ceased when complainant was discharged, which was more than 300 days before she filed her complaint. Although she alleges that she was discriminated against after her discharge, the only possible source of such discrimination is the performance evaluation, and since she alleges this document was prepared in November, 1986, the complaint would still be untimely with respect to the performance evaluation considered as the last act of discrimination.

Finally, complainant argues that she "suffered an emotional breakdown prior to her lay-off in 1981, and in 1986," that she was incompetent and therefore the statute should be tolled. Complainant does not provide any details concerning the specific nature and duration of this condition. However, she has admitted that she contacted the Commission in September, 1986, and requested a complaint form, and that she inspected her personnel file on August 1, 1987. If she had filed her complaint at either of these times, it would have been timely. Under the circumstances of the general and completely conclusory allegation of incompetency, and complainant's admitted ability to contact the Commission in September, 1986, and to examine her personnel file on August 1, 1987, the Commission is not prepared to conclude the time period for filing should be tolled.


ORDER

This complaint is dismissed as untimely filed.

Dated: July 11, 1991 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

AJT:rcr


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

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