STATE OF WISCONSIN PERSONNEL COMMISSION

CHARLES WELTER,

Complainant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 88-0004-PC-ER

DECISION AND ORDER

This complaint arises from respondent's action not to permit the complainant to work on a "light duty" basis following an injury. An Initial Determination was issued on July 19, 1988 in which the investigator concluded that the complaint was not timely filed and, consequently, was unable to conclude that there was probable cause to believe respondent discriminated against complainant on the basis of handicap. Complainant filed a timely request for a hearing on the issue of probable cause pursuant to §PC 2.07(3), Wis. Adm. Code. Respondent subsequently filed a motion to dismiss contending that the original complaint was untimely filed. Neither party requested an evidentiary hearing on the respondent's motion. The parties have been provided an opportunity to file written arguments and the following findings appear to be undisputed.

FINDINGS OF FACT

1. At all times relevant to this proceeding, the complainant was employed at the Green Bay Correctional Institution (GBCI) as a journeyman carpenter.

2. On February 17, 1986, complainant was injured and after being treated by a physician, was directed by the physician to return to work on light duty.

3. Respondent refused to permit the complainant to return to work with light duty restrictions.

4. The complainant remained off work until March 30, 1986, when he was able to return to work without restrictions.

5. While he was off work, complainant's salary was covered in part (2/3) by workers compensation but the complainant was forced to cover the rest of the time (77.33 hours) by depleting his sick leave account.

6. On December 3, 1987, a correctional officer at GBCI was permitted to return to work with light duty restrictions following an injury.

7. On January 13, 1988, the complainant filed a charge with the Commission alleging he had been discriminated against by the respondent on the basis of temporary handicap "by being forced to use sick pay to supplement 1/3 of my wages for this 29 day period or 77.33 hrs."

OPINION

In a dispute as to jurisdiction, the burden of proof is on the party asserting jurisdiction. Allen v. DHSS & DMRS, 87-0148-PC, 8/10/88. Here, that party is the complainant. For the purposes of this decision, the Commission has accepted as accurate all those allegations set forth in the complainant's charge of discrimination.

The initial determination in this matter properly set forth the legal basis and proper analysis in determining the timeliness of the complainant's charge. The initial determination reads, in part:

> In Sprenger v. UW-Green Bay, Wis. Pers. Commn. No. 85-0089-PC-ER (7/24/86), the Commission held, relying largely on federal court decisions under Title VII, that [the] 300 day period of limitations did not begin to run until the facts that would support a charge of discrimination under the Fair Employment Act (FEA) were apparent or should have been apparent to a person with a reasonably prudent regard for his or her rights similarly situated to the complainant.
>
> * * *
>
> In this case, in early 1986 Mr. Welter was denied the opportunity to return to work on light duty status and was forced to use sick leave credits to cover his time off, notwithstanding his contention in his complaint that there was no legitimate basis for respondent's decision, given the nature of his work and the nature of his restrictions. At that time, 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, unless the employer can demonstrate that the handicap is reasonably related to the employe's ability to adequately undertake the responsibilities of his or her job, §111.34(1)(b), Stats. Also, complainant obviously was aware of his limitations and the demands of his occupation at the time he was not allowed to work. Therefore, the 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 (at least based on his theory of liability set forth in his complaint), or at least with a duty to make such further inquiry to determine if he had an arguable claim under the FEA.
>
> The Commission cannot accept the notion that a person with a reasonably prudent regard for his or her rights similarly situated to complainant would not have been aware of the facts that would support a charge of discrimination until a year and one-half after the act of discrimination occurred, when respondent allowed another employe in a different classification (officer) and vocational group (protective services), and with a different condition to return to work on light duty. It might well not have occurred to Mr. Welter at the time he was denied return to work on a light duty status that there was a basis for a possible discrimination charge, and that the return to work of [Officer] Basche [in December of 1987] might well have caused him to think that he had been discriminated against when he was denied this back in 1986. However, when the situation is looked at in the context of the "objective" test of "a person with a reasonably prudent regard for his or her rights similarly situated" to complainant, it cannot be said that such a person would not have been aware of the facts that would give rise to a charge of discrimination until Officer Basche was permitted to return to work in December 1987. This is not the kind of case that involves, for example, a claim of age discrimination like Sprenger where the complainant does not find out until years after the fact of layoff that a much younger employe has been hired to replace him.

The complainant also points out that it wasn't until February of 1988 that he became aware of a document dated June, 1984 and entitled "DOA/DVR Project for Reemployment of Injured State Workers". Complainant argues that had the respondent not "suppressed or withheld" this information from him, he would have "considered [his] layoff illegal from the start." While it may be true that had the complainant been aware of the document he would have filed his complaint earlier, this does nothing to alter the conclusion that the complainant should have been aware of the facts giving rise to his discrimination claim

when he was denied employment on a light duty basis. Even if the respondent were found to have "suppressed" the DOA/DVR document, that would not stop the 300 day period from running given the other facts reasonably known to the complainant.

ORDER

The respondent's motion to dismiss is granted and this matter is dismissed as untimely filed.

Dated: February 22, 1989 STATE PERSONNEL COMMISSION

LAURIE R. MCCALLUM, Chairperson

KMS:kms

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

Parties:

Charles Welter
995 Biemeret
Green Bay, WI 54304

Patricia Goodrich
Secretary, DHSS
P. O. Box 7850
Madison, WI 53707