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MICHAEL H. DAWSEY,
 Appellant,

v.

Secretary, DEPARTMENT OF
 HEALTH AND SOCIAL SERVICES,
 Respondent.

Case No. 89-0061-PC-ER

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INTERIM
 DECISION
 AND
 ORDER

This matter is before the Commission on the questions of whether the complainant has already amended or may now amend his complaint of discrimination, which reached the Commission on May 25, 1989, to include allegations relating to the filling of positions during August and September of 1989. The parties have filed briefs. The following facts appear to be undisputed.

FINDINGS OF FACT

1. On May 16, 1989, the appellant filed a discrimination complaint form with the Milwaukee office of the Equal Rights Division of the Department of Industry, Labor and Human Relations. The complainant alleged race discrimination as follows:

I have been applying for a Management Information Systems position with [the Department of Health and Social Services] since September 1988, and have been denied. I have talked to the Affirmative Action Officer on several occasions, who said that she is aware of the Department's Management Information Systems Division not hiring Blacks. Ms. Mabel Smith said that the personnel managers have not made any commitment to recruit, hire, and train Blacks and other minorities. I've wrote Ms. Smith 2 letters and have called her, but she hasn't returned my call in two weeks. Their overall management Information Systems Division is about 99% white.

On the form, the complainant specified that he did not wish to have a copy of his claim sent on to the Equal Employment Opportunity Commission (EEOC).

The complaint form was forwarded to the Personnel Commission pursuant to §111.375(2) where it was received on May 25, 1989, and assigned Case No. 89-0061-PC-ER.

2. On May 31, 1989, a copy of the complaint was mailed to the respondent DHSS.

3. On September 26, 1989, the complainant sent a letter to the Equal Employment Opportunity Commission requesting the complaint be investigated by the EEOC rather than by the Personnel Commission.

4. The Personnel Commission then mailed the EEOC a copy of the complaint and, by letter dated October 10, 1989, informed the complainant as follows:

This letter is in response to your letter of September 26, 1989 to the Equal Employment Opportunity Commission which was referred to the Personnel Commission and received on October 2, 1989. In your letter, you requested that the Personnel Commission turn the jurisdiction in the above referenced cases over to the Equal Employment Opportunity Commission. On October 10, 1989, I forwarded the appropriate 212 forms to the EEOC requesting that they take jurisdiction of the cases.

The Commission's usual practice in such situations is to defer to the EEOC investigation and adopt the EEOC determination on probable cause, with the complainant having the right to appeal and request a hearing on a no probable cause determination in accordance with Section PC 2.07(3) Wis. Adm. Code.

5. The complaint was assigned charge number 260-90-0083 by the EEOC and assigned to investigator Rodolfo Martinez.

6. In November of 1989, the complainant was hired by the respondent to fill a limited term employment position as a Management Information Specialist.

7. In a letter dated December 1, 1989 to investigator Martinez, the complainant wrote:

I would like to amend my complaint, because I have reason to believe that retaliation and racial harassment have already began, during my first week on the job from one of the supervisors in the Office of Information Services, Ms. Gayle Hanson.

I believed my complaint filed with the EEOC has not been kept confidential and has been secretly shared and discussed amongst all the supervisors, who are all white. I have talked to two Black

supervisors, that have confirmed to me that every Black person who used to work in the Office of Information Systems has been subject to the same type of treatment, such as being denied proper training, proper information and career advancement.

8. The EEOC case log includes the following entry for January 12, 1990:¹

[Complainant] contacted investigator discuss - other issue at HSS - were he is employed as LTE - employee. Will be submitting additional evidence, may want to file another charge.

9. On January 18, 1990, the complainant filed another letter with the investigator at EEOC. This letter references "continuous racial harassment and mistreatment by the white co-workers [since Nov. 1989]." The EEOC case log includes an entry for January 18th which refers to the receipt of the letter along with "two cassette tapes."

10. In a June 21, 1990 letter directed to Mr. Martinez, the complainant wrote:

I am providing the new investigator written evidence for my charge of employment discrimination against Black males as programmers in the Office of Information Systems. I first applied at this agency in August 1988 for a MIS II position, and kept applying throughout that whole year including 1989 for the same position.

Since that time this agency has hired many MIS IIs'. Here is a list showing many MIS II vacancies and showing the names of the applicants that were hired as MIS IIs' during the same time frame that I had applied for the same positions.

Attached to the letter were approximately 40 organizational charts, some of which had dates ranging from March of 1988 to October of 1989. Justification memos and employment transaction forms dated from August to October of 1989 and relating to five vacant MIS 2 LTE positions during that period were also attached. The forms show that 2 LTE positions were approved ("cleared") on August 31, 1989, and that 3 other LTE positions were approved on September 13, 1989. The forms also show that one or two of the latter group of positions was filled on October 2, 1989. The June 21st letter bears a date stamp of June 27,

¹The log lists the date as "1/12/89" but the entry was obviously made on 1/12/90 based upon the dates of the previous and subsequent entries.

1990 for the Equal Rights Division of the Department of Industry, Labor and Human Relations (DILHR). There is no entry on the EEOC case log showing receipt of the letter.

11. In May of 1991, and based upon the request of the complainant, the EEOC referred the case back to the Personnel Commission for investigation. The EEOC sent a copy of its investigation file (including the letter and materials described in finding 10 but not including the cassette tapes mentioned in finding 9) to the Personnel Commission on July 8, 1991.

12. An Equal Rights Officer on the staff of the Personnel Commission issued an initial determination of "no probable cause" on May 14, 1992. The initial determination concluded that there was "No Probable Cause to believe that complainant was discriminated against on the basis of race when he was not hired for Management Information Specialist positions with the respondent in November, 1988." The investigator also concluded the Personnel Commission could not address the hiring decisions in August and September of 1989:

Complainant also alleged that he was rejected for MIS positions in 1989. Any discriminatory acts which post date the date of filing the original charge of discrimination require that a complainant file an amendment to his or her charge of discrimination (under some circumstances) or file a new charge of discrimination (under other circumstances). Complainant alleged that respondent rejected him for three MIS-2 positions in August and September, 1989 after he filed his original charge of discrimination (in May, 1989). However, he did not file any document within 300 days of filing this charge of discrimination that could be construed either as an amendment or as a new charge of discrimination. Therefore, these allegations will not be given further consideration in this Initial Determination.

13. At all times prior to the issuance of the initial determination, the complainant appeared *pro se*.

DISCUSSION

In §PC 2.02, Wis. Adm. Code, the Personnel Commission's rules include the following provisions regarding the filing of complaints and amendments:

(1) CONTENT. Complaints should identify the name, address and telephone number of the complainant, the name of the respon-

dent agency, the facts which constitute the alleged unlawful discrimination, unfair honesty testing or retaliation and the basis or type of discrimination, unfair honesty testing or retaliation being alleged.

(2) FORM. Complaints shall be written on a form available from the commission or on any other form that is acceptable to the commission. The complaint shall be signed, verified and notarized.

(3) AMENDMENT. A complaint may be amended by the complainant, subject to approval by the commission, to cure technical defects or omissions, or to clarify or amplify allegations made in the complaint or to set forth additional facts or allegations related to the subject matter of the original charge, and those amendments shall relate back to the original filing date.

(4) ASSISTANCE. Appropriate assistance in completing complaint forms, including notarization, shall be provided by the commission in the commission's offices.

The complainant contends that his submissions to the EEOC while the EEOC was investigating his claim constituted a timely amendment of that claim to include the failure to hire him in August and September of 1989. In the alternative, the complainant contends that he may now amend his original complaint before the Personnel Commission to include the respondents' failure to hire him in August and September of 1989, and that the amendment relates back to the date of the original filing.

There are two questions raised by the complainant's first contention. The first is whether materials submitted to amend a Title VII charge of discrimination which has been filed with the EEOC and is being investigated by that agency, act simultaneously as an amendment to a Wisconsin Fair Employment Act claim which has been cross-filed with the Personnel Commission. If so, the second question is whether the materials submitted by the complainant to the EEOC here acted to amend his charge of discrimination.

While the Personnel Commission is not aware of any precedent on the first question, the net effect of the Personnel Commission's October 10, 1989 letter to the complainant was to inform him that the EEOC would be taking jurisdiction of the case, and that the Personnel Commission typically defers to the EEOC investigation. Under these circumstances, the complainant, who was not represented by counsel, had no reason to believe he would need to have further contact with the Personnel Commission during the course of the EEOC

investigation. Complainant's action of notifying the EEOC investigator of the failure to hire him in August and September of 1989 should be considered to relate to his existing case before the Personnel Commission. The complainant's June 27, 1990 letter² and attachments, which referenced vacancies in DHSS for which the complainant was not hired from August of 1988 through October of 1989, are sufficient to constitute an amendment to the complainant's previous complaint. Omissions in those documents may be cured now by the complainant.

The Personnel Commission has previously held that a letter may constitute a complaint. In Goodhue v. UW-Stevens Point, 82-PC-ER-24, 11/9/83, the letter in question identified the complainant, alleged different treatment based on sex, identified the conduct complained of and its source and requested assistance from the Commission. Since the issuance of that decision, the Commission promulgated revised rules relating to the information and form of a complaint of discrimination. Those rules, set forth above, indicate that a complaint shall be written, signed, verified and notarized and *should* identify the complainant, the respondent agency and the facts which constitute the alleged unlawful discrimination. However, the rules also specify that technical defects or omissions may be cured by amendment. Here, the complainant's letter to the EEOC investigator, when read with the attachments, identifies the complainant, the respondent agency, and the alleged discriminatory conduct. Technical omissions may now be cured through the submission of a completed complaint form

In reaching this result, the Commission takes note of the liberal construction language found in §111.31(3). In addition, the courts have previously expressed a desire to provide substantial leeway to unrepresented complainants in terms of amending their complaints. Hiegel v. LIRC, 121 Wis. 2d 205, 359 N.W. 2d 405 (Cl. App., 1984). The facts in the present case also bear comparison to Title VII case law where, as a defense to an action filed in district court, an employer contends that the plaintiff has failed to exhaust ad-

²Even though the June 21st letter from the complainant to Mr. Martinez was not listed on the EEOC case log and bore a date stamp of the DILHR's Equal Rights Division rather than of the EEOC (finding 10), the fact that these materials were included in the copy of the EEOC case file submitted to the Personnel Commission (finding 11), shows that they were in fact filed with the EEOC.

ministrative remedies with respect to claims which arose subsequent to the charge initially filed with EEOC and where the plaintiff never filed an amended or separate charge with respect to that subsequent conduct.

When an employee seeks judicial relief for incidents not listed in his original charge to the EEOC, the judicial complaint nevertheless may encompass any discrimination like or reasonably related to the allegations of the EEOC charge, including new acts occurring during the pendency of the charge before the EEOC.

Oubichon v. North American Rockwell Corp., 482 F. 2d 569, 571 (9th Cir., 1973).

Finally, the Commission notes that the amendment identified by the complainant was clearly known to the Commission's investigator prior to the issuance of the initial determination and there is no indication that, had the additional allegations been investigated at the same time as the original allegation, the processing of the case would have been significantly delayed. In previous decisions on whether or not to permit an amendment under §PC 2.02(3), the Commission has focused on whether the amendment was filed before or after an initial determination had been issued, whether there is some indication that the complainant could have filed the amendment significantly earlier and whether the amendment would cause a significant delay in the proceeding. See, Kloehn v. DHSS, 86-0009-PC-ER, 1/10/90; Ferrill v. DHSS, 87-0096-PC-ER, 8/24/89; Holubowicz v. DHSS, 87-0097-PC-ER, 4/7/89.

The remaining point is that the conduct being complained of was ongoing conduct rather than a series of discrete decisions. The process used in order to be considered for vacant MIS 2 limited term positions was simply to submit a resume to the respondent. There is no indication that the complainant was required to take any special action for each individual position as it became vacant. There is also no indication that the respondent's practice was to notify individuals when they had *not* been selected as an LTE. The nature of the recruitment/hiring process and the absence of any notification to those candidates who were not selected distinguishes the facts of this case and supports the conclusion that the additional allegation relates back to the May, 1989 original filing date.


The Commission is aware that, under certain circumstances, permitting an amendment to relate back to a prior filing date may work a hardship on the

respondent agency. Here there was no allegation that the respondent would be prejudiced by permitting the amendment.

ORDER

Complainant is provided 20 days from the date this interim order is issued in which to file a complaint form which will cure any technical omissions relating to his amendment arising from the failure to select the complainant for MIS 2 limited term employment for the period commencing in August of 1989. Within the same time period, the complainant shall either 1) request investigation of the additional claim or 2) waive investigation of the additional claim so the matter can proceed directly to hearing..

Dated: October 29, 1992 STATE PERSONNEL COMMISSION


LAURIE R. MCCALLUM, Chairperson

KMS:kms
k:d:temp-11/92 Dawsey


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner