

STATE OF WISCONSIN

PERSONNEL COMMISSION

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VERNON E. SEAY,

Appellant/
Complainant,

v.

President, UNIVERSITY OF
WISCONSIN SYSTEM (Madison),
and Secretary, DEPARTMENT OF
EMPLOYMENT RELATIONS,

Respondents.

Case Nos. 89-0082-PC-ER
92-0855-PC

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RULING
ON
MOTION
TO DISMISS

Timeliness--Case No. 92-0855-PC

During the course of a prehearing conference convened by the Commission on December 18, 1992, respondents filed a Motion to Dismiss for untimely filing. The parties were permitted to file briefs and the briefing schedule was completed on February 10, 1993. The following facts appear to be undisputed:

1. By letter dated March 29, 1989, and received by the Commission on March 30, 1989, the appellant wrote:

This letter will serve as notice of appeal in a matter involving a request for an audit of my position and classification.

* * *

I will also use this letter to allege and file a complaint that my employer has retaliated against me and continues to retaliate against me because of my lawful disclosures regarding my employment and because of my known involvement in the classification audit proceedings. I ask that this matter be taken up also during the course of your investigation into the above. If a more formal charge of discrimination is necessary, please so advise.

2. This letter was construed by the Commission as an appeal of a constructive denial of a reclassification request and assigned Case No. 89-0032-PC. On November 15, 1989, appellant agreed to the dismissal of this appeal.

3. On July 12, 1989, appellant filed a complaint form alleging whistleblower retaliation. On this form, complainant stated as follows, in pertinent part:

This charge will amend and supplement my initial charge which was sent to the Personnel Commission in a letter dated March 29, 1989.

* * *

On or about June 13, 1989, the Employer, through its representatives David Prucha, Greg Jagodinski, Marsh Findley and Dale Schlough, made definite and certain its purpose to retaliate against me for exercising rights as a State employee by disclosing improper employment practices and a possible and probable violation of Chapter 230, Wis. Stats. On this date the Employer threatened to abolish my position and cause my layoff. This threat was in addition to previous threats of layoff connected with lawful protected activities.

My employer has also retaliated against me over of a period of time through the means of having my supervisor, Robert Vetter, alter my job duties, demote me, make my work assignments onerous, attempt to have me constructively terminated from my job classification, threaten me with complete termination if my audit request is successful, refuse to become involved when I received physical threats from a fellow employee, discuss my activities with other employees, and by other means. My potential for layoff was also brought to my attention by employer representative Ed Corcoran.

3. In an Interim Decision and Order issued November 25, 1992, the Commission concluded that the letter of March 29 should not be regarded as a complaint of whistleblower retaliation but instead as a protected disclosure; and that the letter of July 12 should be regarded as the original complaint of whistleblower retaliation (See Interim Decision and Order, pages 9-10).

4. In August of 1990, appellant was interviewed for a position in the University of Wisconsin Housing unit.

5. On August 24, 1992, appellant filed a Motion to Amend Charge of Retaliation which stated as follows, in pertinent part:

Specifically, Mr. Seay moves to amend his charge to reflect that it arises under Secs. 230.44(1)(b), 230.44(1)(c), and 230.44(1)(d), Stats., in addition to Sec. 230.80, Stats. et. seq.

The factual allegations remain the same as contained in the original charge.

Accompanying this Motion was an affidavit of appellant listing and describing a chronology of actions which occurred between October of 1988 and October of 1990 and alleged by appellant to be retaliatory. In his brief accompanying this Motion, appellant argued that these actions should be cognizable by the Commission pursuant to the statutory sections cited in his statement of the basis for the Motion, i.e., §230.44(1), Stats. as well as §230.80, Stats.

6. In its November 25, 1992, Interim Decision and Order, the Commission concluded that only the following action listed and described by appellant in this affidavit was cognizable by the Commission pursuant to §230.44(1), Stats.:

In August, 1990, I was interviewed for another position at UW Housing by Steve Patterson. Patterson told me he contacted Vetter for a reference, and that Vetter told him that I had legal problems and a conflict with some of my co-workers. Patterson told me he didn't hire me based on what Vetter said.

In view of this conclusion, the Commission ordered that a new case file be opened "for the complainant's allegation under §230.44(1)(d), Stats., relating to a reference provided by Mr. Vetter in August of 1990." Such a case file was subsequently opened and assigned Case No. 92-0855-PC.

Respondent argues that, since appellant did not file with the Commission any writing challenging the subject reference given by Mr. Vetter until August 24, 1992, appellant's appeal of this matter did not file the 30-day filing requirement of §230.44(3), Stats.

Appellant argues that the filing date of the appeal of the subject reference should relate back to the filing date of the original whistleblower complaint, i.e., July 12, 1989.

In the fact situation underlying Van Rooy v. DILHR, 84-0253-PC, the appellant had filed a discrimination complaint on December 7, 1984, alleging that she had been discriminated against in regard to a hiring decision; had offered an amendment to this complaint on December 20, 1984, seeking to have the December 7 complaint also treated as an appeal of the subject hiring decision pursuant to §230.44(1)(d), Stats.; and had argued in offering this amendment that the date of filing of the appeal should relate back to the date of filing the complaint. In its decision of this matter, the Commission stated as follows:

The Commission has held on a number of occasions that an amendment relates back to the date of filing of the original pleading if the claim asserted in the amendment arises out of the occurrence or transaction set forth in the original pleading. See Fish v. DOT, No. 79-83-PC (1/23/80); Oakley v. Bartell, No. 78-66-PC (10/10/78); compare, §802.09(3), Stats. Since the amendment filed December 20, 1984, should be deemed to relate back to December 7, 1984, when the original appeal or complaint was filed, it is timely, since December 7th is within 30 days of November 12th.

In his brief, respondent raises the following concern:

"If the filing of a timely discrimination charge could be used to permit the later filing of a civil service appeal 'by amendment,' the 30 day time limit would effectively be interpreted out of the statute."

However, in order for the amendment to be timely, the discrimination complaint must have been filed within 30 days of the transaction in question, such as occurred here. The 30 day time limit is still very much a part of the law.

The facts under consideration here are distinguishable. Section PC 2.02(3), Wis. Adm. Code, permits complaints to be amended to "set forth additional facts or allegations related to the subject matter of the original charge." The Commission has interpreted this language to require that the claim made in the amendment must arise out of the same occurrence or transaction set forth in the original complaint. See Van Rooy, *infra*; Schilling v. UW, 90-0064-PC (9/19/90); Lipford v. UW & DER, 91-0118-PC 12/23/91); Pugh v. DNR, 86-0059-PC-ER; Iwanski v. DHSS, 88-0124-PC (6/12/89). Obviously, in the instant matter, this requirement could not be met since the claim in the amendment relates to a reference given in August of 1990, more than a year after the original complaint was filed in July of 1989. Appellant argues that the general language in the original complaint relating to retaliation "by other means" was intended to describe an ongoing practice of retaliation by respondent which should be interpreted to include any future actions of alleged retaliation, including the subject reference. However, such an approach would be inconsistent with the purpose of a pleading, i.e., to provide a respondent with sufficiently specific information to enable them to prepare a defense. The subject reference was a discrete action which, in order to be cognizable by the Commission pursuant to §230.44(1)(d), Stats., was required to have been the subject of a specific filing with the Commission, either as an

original complaint, an amendment to an original complaint, or as a separate appeal, within 30 days of its occurrence. See Vander Zanden v. DILHR, 87-0063-PC-ER (2/28/89).

The Commission concludes that the subject reference did not relate to an occurrence or transaction in the original complaint and was not the subject of a filing with the Commission within 30 days of its occurrence. As a result, the 30-day filing requirement of §230.44(3) has not been met.

Case No. 89-0082-PC-ER


Respondent DER filed a Motion to Dismiss DER as a party to this action on February 10, 1993. The final brief was filed in regard to this motion on February 24, 1993. In order to give the Commission an opportunity to decide this motion prior to the commencement of a hearing, the hearing scheduled for March 22 and 24, 1993, is indefinitely postponed.

ORDER

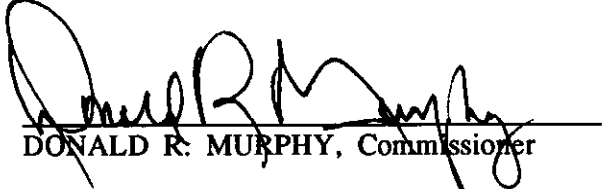
Respondent's Motion to Dismiss for Untimely Filing in Case No. 92-0855-PC is granted and this appeal is dismissed.

The hearing scheduled for March 22 and 24, 1993, is indefinitely postponed to afford the Commission the opportunity to decide the Motion to Dismiss respondent DER as a party.

Dated: March 10, 1993 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

LRM:rcr


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

Parties:

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**NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION**

Petition for Rehearing. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.