

EDWARD J. GERMAIN,
Complainant,

v.

**Secretary, DEPARTMENT OF HEALTH
AND SOCIAL SERVICES [DHFS]¹**
Respondent.

**RULING ON
MOTION
TO DISMISS
AND MOTION
FOR SEPARATION
OF CASES**

Case Nos. 90-0005-PC-ER & 91-0083-PC-ER

This matter is before the Commission on a renewed request for dismissal of case number 91-0083-PC-ER. The following information appears to be undisputed:

1. On January 4, 1990, complainant, Edward J. Germain, filed a charge of discrimination with this agency alleging respondent, Department of Health and Social Services, failed to hire him for a position because of his race and sexual orientation in violation of WFEA, Subch. II, Ch. 111, Stats. (Case No. 90-0005-PC-ER)

2. On June 28, 1991 complainant filed a second charge of discrimination against respondent, alleging respondent treated him differently in terms and/or conditions of his employment in retaliation against him for fair employment activities, and because of his sexual orientation, which resulted in his constructive discharge. (Case No. 91-0083-PC-ER)

3. On August 25, 1992 complainant was issued an initial determination of probable cause for Case No. 90-0005-PC-ER and a no probable cause determination for Case No. 91-0083-PC-ER.

4. Previously, in May 1992, after complainant had failed to respond to respondent's initial interrogatories for Case No. 91-0083-PC-ER, the Commission granted a motion to compel discovery. Complainant failed to comply with this order.

5. After the initial determination was issued, respondent filed a motion for sanctions and dismissal of Case No. 91-0083-PC-ER. By an order dated July 30, 1993 the Commission denied respondent's motion for dismissal, but granted its motion barring

¹ Pursuant to 1995 Wisconsin Act 27 §9126, as of July 1, 1996, the name of Department of Health and Social Services changed to Department of Health and Family Services.

complainant from “offer[ing] any evidence in support of his position that [was] related to the subject matter inquired into by the respondent’s December 16, 1991 interrogatories and request to produce documents.”

6. In January, 1994, Case No. 90-0005-PC-ER was scheduled to be heard, beginning on May 19, 1994. Case No. 91-0083-PC-ER was temporarily set aside pending a decision in Case No. 90-0005-PC-ER.

7. On May 16, 1994 respondent filed copies of exhibits and a list of witnesses for Case No. 90-0005-PC-ER. Also, respondent filed a motion for separation of the two cases with a motion to dismiss Case No. 91-0083-PC-ER.

8. Contemporaneous with respondent’s motions, complainant filed a motion to stay proceedings in both cases pending a request by complainant to the federal EEOC for a right to sue letter.

9. Complainant’s motion to stay proceedings was granted on May 23, 1994 and based on an agreement by the parties, respondent’s motions were held in abeyance pending a decision on complainant’s claim in state or federal court.

10. Complainant did not receive a right to sue letter from EEOC until late November, 1995.

11. During a status conference on November 20, 1996, the Commission was informed that complainant did not file his claim in federal court, but he and respondent were engaged in negotiating a settlement agreement.

12. The parties failed to reach a settlement. On January 7, 1997 respondent renewed its motion to dismiss Case No. 91-0083-PC-ER. The briefing schedule was completed on February 18, 1997.

DISCUSSION

In a Ruling on Motion for Sanctions, dated July 30, 1993, which resulted from complainant’s failure to comply with a discovery order, the Commission precluded complainant from offering any evidence in support of his claims in Case No. 91-0083-PC-ER that pertained to matters inquired into by respondent’s December 16, 1991, interrogatories and request for documents. In making this ruling the Commission said:

. . . the delay [in complying with the order compelling discovery] reflects gross negligence and a callous disregard for the discovery process and the Commission relies on these conclusions and orders preclusion of the evidence sought in the discovery request.

About respondent's motion to dismiss the Commission said it "declined to dismiss the complaint at this time."

Respondent asserts there is no point in proceeding to hearing on this case, as complainant is prohibited from presenting evidence relating to the discovery request, which inquired into all claims made in complainant's complaint. Also, respondent points to page 8 of the initial determination, where it states:

Complainant identified a number of incidents that were filed untimely including a) close supervision and unfair evaluation (July 24, 1990), b) unfair discipline in the form of a one day suspension (July 24, 1990), c) a denied salary increase (June 11, 1990), and d) constructive discharge (August 20, 1990) . . . Complainant had one remaining allegation that conceivably is timely. He alleged that after submitting his resignation, respondent refused to allow him to change the effective date of that resignation when he requested to do so.

Without question , allegations a) through d) above were untimely filed. The complaint was filed June 28, 1991, more than 300 days after these alleged discriminatory incidents occurred.

Complainant argues that respondent's motion to dismiss was denied by the Commission on July 30, 1993 and it should not be revisited. We disagree. In its 1993 decision the Commission said it would decline to dismiss this complaint "at this time," implying possible reconsideration of this question at a later stage in the proceedings. Three years ago in May, this case and its companion (Case No. 90-0005-PC-ER) were set aside pending pursuit by complainant of the inclusive claims in federal court. Complainant received a right to sue letter on November 27, 1995, but never filed the claims in court. One year later, complainant advised the Commission that he did not file his claim in court, had decided not to pursue such claims there, and was ready to proceed here. Given this record, reconsideration of respondent's motion to dismiss is appropriate.

This record supports granting respondent's motion. With one exception, complainant's allegations of discrimination were not timely filed. The remaining allegation that respondent refused to allow complainant to amend the effective date of his resignation, was precluded by

the 1993 decision by the Commission, barring complainant from presenting evidence that was the subject of respondent's 1992 interrogatories to him. Interrogatory 6 requested complainant to describe every act and date of retaliatory occurrence alleged in the complaint. This ruling critically hampers complainant's case. Finally, over the past several years complainant has bounced from this forum to federal court and back without prosecuting this case. Complainant's approach to Case No. 91-0083-PC-ER is similar to that exhibited during the discovery process and now warrants dismissal.

ORDER

Respondent's motion is granted and Case No. 91-0083-PC-ER is dismissed.

Dated: April 11, 1997

STATE PERSONNEL COMMISSION

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LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

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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 (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) 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.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)
2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.)

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