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EUGENE WRIGHT,
 Complainant,

v.

Secretary, DEPARTMENT OF
TRANSPORTATION,
 Respondent.

Case No. 90-0012-PC-ER

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INTERIM
RULING

This matter is before the Commission on the respondent's motion to dismiss those claims raised by the complainant relating to respondent's failure to select him for a permanent Shipping and Mailing Clerk position in January of 1989.

The complainant was interviewed by respondent for a Shipping and Mailing Clerk 1 position on January 10, 1989 and he received a rejection letter dated January 13, 1989.

On January 24, 1990, complainant filed a charge of discrimination regarding both the non-selection decision and the respondent's action in January of 1990 to terminate complainant's employment in a limited term position.

Complainant also avers as follows:

5. In February 1989, this affiant phoned Demetri Fisher, the Affirmative Action Officer for the Department of Transportation complaining about this affiant's failure to be selected for the position in question.

6. On October 18, 1989 this affiant was contacted by Spring Ferguson of the DOT saying that there had been "irregularities" in the hiring procedures and that the DOT would find this affiant a temporary position until something opened up in the area that this affiant had originally applied for.

7. On December 1, 1989 Demetri Fisher reiterated to affiant that he would be given a temporary position until a permanent position opened up. This affiant inquired of Mr. Fisher about any additional requirements for filing a discrimination complaint but received no information in that regard. This affiant believed that the complaint which he had already filed with the DOT was sufficient to give him a remedy for the race discrim-

ination about which he had complained. Demetri Fisher indicated that it would be (sic) not be necessary for him to file a formal complaint in order to obtain relief from what this affiant believed to be discrimination.

8. As a result of the conversation that this affiant had with Spring Ferguson on October 18, 1989 and the above-described conversations with Mr. Fisher, this affiant was of the belief that he would be given a position to remedy the complaint of discrimination that he had filed with the DOT's office of Affirmative action and thus delayed consulting with legal counsel to obtain independent advice regarding other remedies that might be available.

Pursuant to §111.39(1), Stats., claims under the Fair Employment Act must be filed "no more than 300 days after the alleged discrimination... occurred." In Milwaukee Co. v. LIRC, 113 Wis. 2d 199, 205, 335 N.W. 2d 412 (Ct. App., 1983), this time limit was held to be "a statute of limitations and not a statute concerning subject matter jurisdiction." This conclusion is analogous to that reached in Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 28 FEP Cases 1 (1982), where the Court addressed a similar question with respect to the time limit for filing an EEOC charge as it related to bringing a Title VII suit. The Court held that "filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." 28 FEP Cases 1, 4

The legal theories applicable here were explained by Judge Posner in Cada v. Baxter Healthcare Corp., 920 F. 2d 446, 54 FEP Cases 961 (7th Cir., 1990), cert. den. 116 L. Ed. 2d 6, 111 S.C. 2916, a discharge case filed under the ADEA:

Tolling doctrines stop the statute of limitations from running even if the accrual date has passed.... One, a general equity principle not limited to the statute of limitations context, is equitable estoppel, which comes into play if the defendant takes active steps to prevent the plaintiff from suing in time, as by promising not to plead the statute of limitations. Equitable estoppel in the limitations setting is sometimes called fraudulent concealment.... Fraudulent concealment in the law of limitations presupposes that the plaintiff has discovered... that the defendant injured him, and denotes efforts by the defendant--above and beyond the wrongdoing upon which the plaintiff's claim is founded--to prevent the plaintiff from suing in time. 54 FEP Cases 961, 963 (citations omitted)

One form of such conduct which falls within the scope of this principle is a misrepresentation by an employer of its intent to remedy an unlawful practice. Such an employer "should expect that the aggrieved employee will delay filing suit in reliance on the employer's promise that the practice will be corrected" and the filing period will "be tolled until the time the employee discovered or should have discovered the misrepresentations of the employer that induced him to delay filing suit." Coke v. General Adjustment Bureau, 22 FEP Cases 1352, 1356 (5th Cir., 1980) Therefore, in Janowiak v. City of South Bend, 33 FEP Cases 958 (N.D. Ind., 1983), the court refused to grant summary judgment where the complainant alleged that shortly before he filed his EEOC charge, the employer had been promising him he would be hired, even though the original decision not to hire the complainant occurred outside the statute of limitations period. In Miranda v. B & B Cash Grocery Store, 60 FEP Cases 295 (11th Cir., 1992), the court affirmed the trial court's decision that the statutory time limit for filing a charge with the EEOC was equitably tolled for a period of two years until the time the complainant was told that her position was to be eliminated, where the complainant's claim of sex discrimination arose from her rate of pay and the court found that she had been assured on several occasions that the pay inequity would be cured.

Here, the complainant was notified of the non-selection decision by the January 13th letter. The alleged statements made by Demetri Fisher on December 1st were beyond the 300 day filing period. Therefore, unless the alleged statement by Ms. Ferguson is sufficient to have tolled the 300 day period, the complainant's allegation relating to the January hiring decision must be found to be untimely.

According to complainant's affidavit, Ms. Ferguson told him on October 18, 1989, that "there had been 'irregularities' in the hiring procedures and that the DOT would find this affiant a temporary position until something opened up in the area that this affiant had originally applied for." Complainant also avers that, based upon this conversation as well as the later conversations with Mr. Fisher, complainant 1) believed he would be given a position and 2) "delayed consulting with legal counsel to obtain independent advice regarding other remedies that might be available."

The burden of establishing facts sufficient to justify tolling of the filing period is on the complainant. Price v. Northwestern Bell Tel. Co., 33 FEP Cases


1807 (D.C. Minn., 1983) Based upon his affidavit, the complainant has established facts sufficient to meet the respondent's timeliness objection, at least at this point of the proceeding. The Commission recognizes that the respondent may dispute the complainant's version of the conversations described in his affidavit. For that reason, the Commission directs counsel to confer in terms of whether the parties prefer to schedule a separate hearing to establish a factual record on this point or whether any such remaining dispute could more efficiently be heard as part of a single hearing that would also address the merits of the complainant's allegations. The parties are directed to advise the Commission in writing and within 21 days of the date of this ruling as to their individual positions on this question.

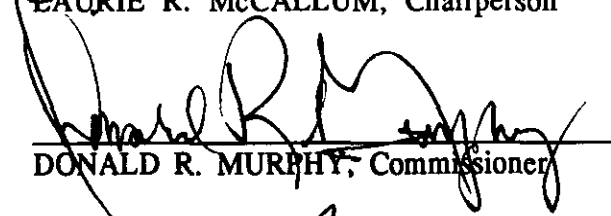
ORDER


Respondent's motion to dismiss is denied without prejudice, and counsel are directed to consult and notify the Commission in accordance with the foregoing discussion.

Dated: February 25, 1993 STATE PERSONNEL COMMISSION

KMS:kms


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner