

JOAN LAZARUS,

Complainant,

v.

Secretary, DEPARTMENT OF  
EMPLOYEE TRUST FUNDS,

Respondent.

Case No. 90-0014-PC-ER

RULING  
ON  
TIMELINESS  
OBJECTION

This matter is before the Commission on the respondent's timeliness objection raised during a prehearing conference held on November 7, 1990. The parties have filed briefs. The following findings of fact are set forth solely for the purpose of ruling on the respondent's timeliness objection and appear to be undisputed.

#### FINDINGS OF FACT

1. The complainant is a member of the University of Wisconsin-Madison faculty and practices Christian Science as her religion.

2. After she was hired at the University, complainant inquired if the health insurance benefits approved and offered at that time included Christian Science care. Complainant was informed that they did not. Since she could not afford to pay for her own health insurance policy, she carried no insurance at all.

3. In the fall of 1988, complainant became aware that the Group Insurance Board was reevaluating its policies regarding Christian Science care. Expecting a favorable outcome, complainant enrolled for coverage.

4. On December 15, 1988, the Group Insurance Board considered and rejected a request by George Jeffrey of the Christian Science Committee on Publication for Wisconsin to extend standard plan health insurance coverage to include treatment by Christian Science practitioners or nurses.

5. When complainant learned of the Board's decision and learned that she would not be allowed to file claims for Christian Science care, she terminated her group health insurance coverage effective February 1, 1989.

6. Complainant made approximately ten to twelve telephone calls to the University insurance office and the Group Insurance Board during the period from autumn of 1988 until autumn of 1989 and was invariably informed by agents or representatives of respondent that coverage would not be extended to the complainant for Christian Science care. Based on that information, the complainant concluded it was foolish to enroll in one of the state's health insurance plans.

7. On January 22, 1990, the complainant filed a complaint of discrimination with the Commission alleging she had been discriminated against on the basis of her creed in terms of the denial of group health insurance coverage for Christian Science practitioner expenses.

8. In a letter to the parties dated May 1, 1990, the Commission's legal counsel wrote, in part:

Respondent has not submitted a motion to dismiss following complainant's letter of March 1, 1990, and the Commission will proceed with the investigation of this matter.

9. Respondent formally raised the issue of timeliness in a letter to dismiss dated May 4, 1990. The member of the Commission's staff assigned to investigate the matter then addressed the timeliness issue in an initial determination issued on August 31, 1990, applied a continuing violation theory and found probable cause to believe that discrimination had occurred. Respondent renewed its timeliness objection during a prehearing conference held on November 7, 1990.

#### DISCUSSION

The time limit for filing complaints of discrimination is derived from §111.39(1), Stats:

The [Commission] may receive and investigate a complaint charging discrimination . . . if the complaint is filed with the [Commission] no more than 300 days after the alleged discrimination . . . occurred.

The 300 day time limit is a statute of limitations rather than a statute concerning subject matter jurisdiction. As a result, it is subject to waiver. Milwaukee County v. Labor & Industry Review Comm., 113 Wis. 2d 199, 335 N.W. 2d 412 (Ct. App., 1983). The complainant contends that the respondent waived its right to raise a timeliness objection by failing to address those issues prior to May 4, 1990. Given the analysis below of the timeliness issue, the Commission need not reach the question of whether the respondent waived its right to object on timeliness grounds.

Clearly, the instant complaint was filed more than 300 days after the complainant terminated her group health insurance coverage in February of 1989. Complainant made the decision to terminate her insurance coverage when she learned of the decision in December of 1988, rejecting a request to extend group coverage to include reimbursement of Christian Science practitioner expenses. The December 1988 decision represented no change from the existing policy regarding reimbursement for such expenses and that policy continued to be in effect within the period of 300 days from January 22, 1990, when the complainant filed her complaint with the Commission.

While in the present case, the complainant did not actually submit a bill from a Christian Science practitioner to the respondent for reimbursement during the 300 days preceding the filing of her complaint, the respondent's policy was clearly established and it was reiterated to the complainant on numerous occasions, including a number of times within the 300 day period prior to the date she filed her complaint with the Commission. Throughout this period, the respondent's policy had the effect of denying coverage to the complainant for care by Christian Science practitioners.

The Commission has previously applied a continuing violation theory to a policy establishing procedures to be used by a complainant for purchasing materials for tailoring classes she taught at a correctional facility. Olson v. DHSS, 83-0010-PC-ER, 4/27/83. In the present case, the respondent's sole argument regarding the continuing violation doctrine is as follows:

The continuing violation concept presupposes a relationship between a complainant and the entity that is alleged to have discriminated against the complainant. Ms. Lazarus has no standing to raise a continuing violation complaint against DETF because she voluntarily terminated her health insurance coverage

through DETF nearly a year before the filing of her discrimination complaint. Consequently, DETF could engage in no continuing discriminatory actions in respect to Ms. Lazarus's health coverage, because she elected to have none.

The sole reason the complainant did not have insurance coverage was the existence of the policy in question. Clearly, the complainant continued to have a "relationship" with the respondent after the complainant terminated her coverage in that the complainant continued to be employed by the University of Wisconsin and the respondent continued to maintain the same reimbursement policy, thereby causing certain benefits to be unavailable to the complainant. The absence of those benefits meant that insurance coverage of a nature desired by the complainant was effectively unavailable to her during the entire period.

Previous decisions by the Commission which have addressed the question of standing support the conclusion that the complainant has standing to pursue this matter. In Oestreich v. DHSS, 87-0038-PC-ER, 6/29/88, the Commission ruled that a complainant who was not considered further for certain positions because his exam scores were not high enough had standing to pursue a claim of handicap discrimination where certain individuals who scored lower than complainant were allowed to proceed further in the selection process because of their handicapped status. In Wood v. DNR, 85-0002-PC-ER, 4/15/87; affirmed by Waushara County Circuit Court, Wood v. State Pers. Comm., 87-CV-80, 5/3/88, the Commission found that a complainant who had not scored high enough on a written exam to have been certified as eligible for a position lacked standing to contest allegedly illegal vision acuity standards that were required for appointment.

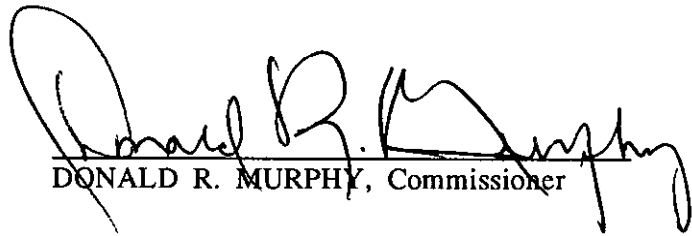
Here, respondent's policy caused the complainant an "injury in fact" during the 300 day period by effectively denying group insurance coverage to her which would have provided for Christian Science practitioner reimbursement. In contrast to the facts in Wood, supra, there is no indication that the complainant was not otherwise eligible for the insurance. The complainant's past conduct indicates that but for the policy in question, the complainant would have held group health insurance from the respondent during the 300 day period preceding the filing of her complaint.

The Commission concludes that the respondent's continuing policy represents an appropriate application of the continuing violation theory and the complaint of discrimination filed on January 22, 1990, was timely.

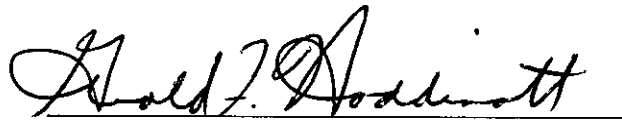
ORDER

Respondent's timeliness objection to this proceeding is denied.

Dated:     July 15    , 1991      STATE PERSONNEL COMMISSION

  
DONALD R. MURPHY, Commissioner

KMS:kms  
k:d:temp-3/91 Lazarus

  
GERALD F. HODDINOTT, Commissioner

Chairperson Laurie R. McCallum did not participate in the consideration of this matter.