STATE OF WISCONSIN PERSONNEL COMMISSION

STEVEN BUTZLAFF,

Complainant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 90-0162-PC-ER

INTERIM RULING

This matter is before the Commission with respect to a number of procedural issues. By way of background, complainant filed an appeal on May 31, 1990 which was assigned Case No. 90-0214-PC. This appeal alleged that Mr. Butzlaff had been unjustly terminated from a Security Officer III position at Mendota Mental Health Institute (MMHI), and also had been subjected to certain acts of harassment and mistreatment with respect to various conditions of employment This appeal was dismissed for lack of subject matter jurisdiction on August 8, 1990, because it involved an appeal of the termination of probationary employment, which is not cognizable pursuant to §230.44(1)(c), Stats.

On June 15, 1990, Mr. Butzlaff filed a complaint of Family and Medical Leave Act (FMLA) discrimination which was assigned Case No. 90-0097-PC-ER. This complaint included as an attachment a copy of the letter of appeal referred to above and in effect incorporated it by reference. This complaint was dismissed for lack of subject matter jurisdiction on September 19, 1990, on the ground that Mr. Butzlaff failed to meet the requirement in the FMLA at §103.10(2)(c), Stats., of more than 52 weeks of consecutive employment. However, this ruling subsequently was reversed through judicial review, which resulted in the reinstatement of this complaint.

On October 16, 1990, Mr. Butzlaff filed another complaint of discrimination which was assigned Case No. 90-0162-PC-ER. In this complaint, Mr. Butzlaff asserts that he "recently became aware of new information which helps confirm additional forms of discrimination were committed against me in addition to my original complaint of Family/Medical Leave

Discrimination." The complaint went on to allege discrimination on the basis of whistleblower retaliation and marital status with respect to the previously-alleged adverse employment actions at MMHI. On February 13, 1991, Mr. Butzlaff filed what he denominated as an amendment to his original complaint, noting that he had intended "to have each instance mentioned be regarded as a charge and for all to be investigated and heard together. To make charges more clear I'm submitting this amendment to that original complaint." In this document, Mr. Butzlaff reiterated some of his early allegations of discrimination and added contentions of handicap, sex, FEA retaliation, and occupational safety (OSHA) discrimination, as well as a number of other non-cognizable contentions (e.g., contract violations, libel and slander, etc.). The Commission handled this document as an amendment to 90-0162-PC-ER.

On April 5, 1991, the Commission entered an order in No. 90-0162-PC-ER dismissing complainant's FMLA, OSHA, and whistleblower retaliation claims as untimely filed. The Commission expressed the view that the only way these claims could be timely would be if they related back to his original filing of May 31, 1990, but that complainant had never sought to amend that pleading while it was pending, and it now had been dismissed for lack of subject matter jurisdiction.[1] Therefore, the Commission reasoned in effect that there was nothing to amend, and that complainant's ability to raise these additional clauses ended when the original complaint was dismissed on September 19, 1990.

At this point the judicial reversal of the Commission's September 21, 1990, decision raises the question of whether the Commission should reinstate the claims that were dismissed on April 5, 1990. By letter dated August 26, 1992, respondent has set forth its positions on this and certain other issues.

Respondent opposes the amendment of the original complaint to include the OSHA and whistleblower claims. Although respondent admits that "it appears that these 'amendments' technically set forth additional allegations

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[1] I.e., as noted above, the Commission had dismissed this claim on September 21, 1990, because of its conclusion that complainant had not been employed by the same employer for more than 52 consecutive weeks as required by §103.10(2)(c), Stats.

related to the subject matter of the original charge (Mr. Butzlaff's discharge)," respondent contends that:

> [C]omplainant's amendments to the original complaint constitute an attempt to bypass the statutory time limit for filing claims. Given the length and detail of the complainant's initial letter of appeal dated May 29, 1990, and the content of his amended complaints, it appears that the complainant did not need or use the substantial additional time until he filed his amended complaints to discover new facts relating to the circumstances of his discharge. He as easily could have made the charges of whistleblower and occupational and safety retaliation in his initial letter.

In this case, the original letter of appeal was filed on May 31, 1990, followed by a formal FMLA complaint of discrimination on June 15, 1990 On October 16, 1990 complainant filed another complaint which alleged whistleblower retaliation and marital status discrimination, and on February 13, 1991, he filed another amendment which added the OSHA claim. In the Commission's opinion, this situation does not compare with other cases where the Commission has exercised its discretion to deny an amendment of a complaint where the amendment met the technical requirements of §PC 2.02(3), Wis. Adm. Code.[2] For example, in Ferrill v. DHSS, 87-0096-PC-ER (8/24/89), the Commission denied a request for amendment where the complaint had been filed on July 31, 1987, and amended on December 11, 1987, an initial determination had been issued on July 6, 1989, and complainant filed a request to amend the complaint to add new bases of discrimination. The Commission noted that to permit an amendment at that point would have required a new investigation of the new allegations, and concluded that the "potential for delay, the existence of a prior amendment and the extensive opportunity to amend before the issuance of the initial determination all militate against permitting a widening of the scope of the proceeding at this time." In the instant case, the investigation had not been commenced as of February, 1991. Permitting the amendment now would not threaten delay, and there has been

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[2] "AMENDMENT. A complaint may be amended by the complainant, subject to approval by the Commission ... 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." (emphasis added)

no allegation of potential prejudice. Therefore, the amendment will be permitted.

Respondent also requested that Case No. 90-0162-PC-ER be consolidated for processing with Case No. 90-0097-PC-ER since they both relate to the same subject but allege different claims. Apparently, complainant is only represented by counsel as to No. 90-0097-PC-ER, and counsel objects to consolidation on the grounds that No. 90-0162-PC-ER relates to a different transaction (complainant's allegedly discriminatory rehiring at Central Wisconsin Center (CWC)), and that consolidation "would unduly interfere with this firm's effective representation of him in Case No. 90-0097-PC-ER, and would have a prejudicial effect on that case." However, the case which involves complainant's rehiring at CWC is No. 91-0044-PC-ER which already has been heard and is not involved in the requested consolidation. Therefore, consolidation will be ordered.[3]

Finally, respondent moves to dismiss the OSHA claim for failure to state a claim upon which relief can be granted. Respondent contends with respect to complainant's allegations concerning this refusal to comply with an order to conduct fire drills that:

> Assuming this allegation is true, it does not constitute a factual basis for claiming occupational safety and health retaliation because there is no indication that such fire alarm testing represented a danger of serious injury or death and because there is no allegation that the complainant's refusal to test fire alarms was a factor in his discharge.

Respondent makes similar contentions with respect to complainant's allegations about being required to jump start a vehicle.

Given the liberal pleading requirements in matters of this nature, the Commission is not in a position at this stage of this proceeding to conclude that: "it appears to a certainty that no relief can be granted under any set of facts that [complainant] can prove in support of his allegations." Morgan v. Pennsylvania General Ins. Co., 87 Wis. 2d 723, 731-32, 275 N.W. 2d 660 (1979); Phillips v. DHSS & DETF, 87-0128-PC-ER (3/15/89), affirmed, Phillips v.

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[3] Respondent also sought the dismissal of the FMLA claim from No. 90-0162-PC-ER "in order to eliminate any duplication of efforts or possible confusion." In light of the consolidation of these cases, there is no need to proceed in this manner.

Wisconsin Personnel Commission, 167 Wis. 2d 205, 482 N.W. 2d 121 (Ct. App. 1992). Therefore this motion will be denied.[4]

ORDER

Complainant's amendments to include claims of OSHA, FMLA, and whistleblower discrimination, which were dismissed by the Commission's April 5, 1991, order are permitted. Case Nos. 90-0162-PC-ER and 90-0097-PC-ER will be consolidated for processing purposes. Respondent's motion to dismiss the OSHA claim for failure to state a claim upon which relief can be granted is denied.

Dated: November 13, 1992 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

AJT/gdt/2

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

[4] The issues raised by respondent's motion to dismiss will be addressed in the initial determination following the investigation of this matter.