STATE OF WISCONSIN PERSONNEL COMMISSION

STEVEN BUTZLAFF,

Complainant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 90-0162-PC-ER

INTERIM DECISION AND ORDER

This matter is before the Commission on the issue of timeliness. The file reflects that by letter dated May 29, 1990, Mr. Butzlaff filed an appeal of his May 2nd probationary termination from employment with Mendota Mental Health Institute. The letter of appeal, which reached the Commission on May 31st, contained the elements of a claim of family/medical leave discrimination although it did not formally identify such a claim. The letter of appeal was assigned Case No. 90-0214-PC and was dismissed for lack of jurisdiction on August 8, 1990. On June 15, 1990, the complainant filed a formal complaint of family/medical leave discrimination relating to the same personnel transaction. That complaint was assigned Case No. 90-0097-PC-ER and was dismissed on September 21, 1990 for lack of subject matter jurisdiction.[1] The complainant was represented by legal counsel in that proceeding. The complainant appealed the dismissal by filing a petition for judicial review in circuit court. The circuit court proceedings are [pending?]

On October 16, 1990, the complainant filed a second complaint related to his employment at Mendota Mental Health Institute. In that complaint, which was assigned Case No. 90-0162-PC-ER, the complainant again referred to discrimination based on family/medical leave and also referred to discrimination based on marital status and whistleblower retaliation. By letter dated October 22nd, complainant's counsel informed the Commission as follows:

[1]The Commission based its dismissal order on the conclusion that the complainant had not been employed by the same employer for more than 52 consecutive weeks of employment immediately preceding the disputed action as required by §103.10(2)(c), Stats.

> Mr. Butzlaff informed me that his latest complaint [90-0162-PC-ER] was not a separate medical leave claim, rather, he was proceeding on a whistleblower, marital status discrimination claim. Accordingly, you may proceed with Mr. Butzlaff's latest complaint as if no reference were made to the family or medical leave act.
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> Additionally, inasmuch as I have not been retained by Mr. Butzlaff to represent him in his latest claim, further proceedings and pleadings in that regard should be directed to him individually.

On February 13, 1991, the Commission received what was designated by the complainant as an "amendment" to his "original complaint." The February 13th "amendment" again refers to a family/medical leave claim as well as discrimination claims based on handicap, marital status and sex and retaliation claims based on fair employment activities, occupational safety and health reporting and whistleblowing. The complainant subsequently confirmed that he intended to amend the original letter of appeal which was dated May 29, 1990. By letter dated March 11, 1991, the Commission informed the complainant that his claims of family/medical leave discrimination, occupational safety and health retaliation and whistleblower retaliation raised the issue of timeliness and provided him an opportunity to file written arguments.

According to §103.10(12)(b), Stats., a complaint under the family/medical leave law must be filed "within 30 days after the violation occurs or the employe should reasonably have known that the violation occurred, whichever is later." According to §101.055(8)(b), Stats., a complaint alleging public employe safety and health retaliation must be filed "within 30 days after the employe received knowledge of the discrimination or discharge." According to §230.85(1), Stats., a complaint of whistleblower retaliation must be filed "within 60 days after the retaliatory action allegedly occurred or was threatened or after the employe learned of the retaliatory action or threat thereof, whichever occurs last."

The only way in which the three claims could be considered timely is if they related back to the original letter filed with the Commission on May 31, 1990. The problem with this argument is that both the initial appeal and the initial complaint which arose from the complainant's May 29th letter were dismissed for lack of subject matter jurisdiction. As to the initial complaint of

family/medical leave discrimination, which was assigned Case No. 90-0097-PC-ER, the complainant was represented by legal counsel. Complainant had a full opportunity in that proceeding to seek to amend his complaint to add allegations arising under other statutes, and thereby avoid a dismissal order. He failed to do so. When the matter was dismissed on September 21st for lack of subject matter jurisdiction, his ability to raise claims of public employe safety and health retaliation as well as whistleblower retaliation ended. The instant complaint was filed on October 16, 1990. That date is within 300 days of the May 2nd termination action, so claims under the Fair Employment Act, which has a 300 day filing period, would appear to be timely. However, the allegations of family/medical leave discrimination[2], occupational safety and health

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[2]In addition, the doctrine of res judicata acts to bar the new claim of family/medical leave discrimination. According to 46 Am Jur. 2d *Judgments* §394:

> [T]he doctrine of res judicata is that an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of causes of action and of facts or issues thereby litigated, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction. [footnotes omitted]

While the Commission's September 21, 1990 dismissal order for Case No. 90-0097-PC-ER was not "on the merits" of the claim, the doctrine still applies:

> In stating the doctrine of res judicata, the courts usually refer to the fact that the judgment sought to be used as a basis of the doctrine was rendered upon the merits, and give support to a general rule that a judgment rendered on any grounds which do not involve the merits may not be used as a basis for the operation of the doctrine of res judicata. Cases disposed of on technical grounds are said not to fall within the doctrine. This is true of that phase of the doctrine of res judicata precluding the maintenance of a subsequent action on the same cause of action; a judgment which is not on the merits does not preclude a subsequent action brought in a way to avoid the objection which proved fatal in the prior action. However, even though the judgment disposes of the action without a determination of the merits of the cause of action, it is nevertheless conclusive as to the issues or technical points actually decided therein. To this extent, it is not essential to the operation of the doctrine of res judicata that the court shall have passed on the ultimate substantive issues. 46 Am. Jur. 2d *Judgments* §477 [footnotes omitted]

retaliation and whistleblower retaliation were filed outside their respective filing periods and cannot relate back to any earlier filings.

ORDER

The complainant's claims of family/medical leave discrimination, occupational safety and health retaliation and whistleblower retaliation are dismissed as untimely filed. The Commission will continue to process the complainant's remaining claims.

Dated: April 5, 1991 STATE PERSONNEL COMMISSION

LAURIE R. MCCALLUM, Chairperson

KMS:kms

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

Here, the complainant's new action does nothing to "avoid the objection which proved fatal in the prior action" so the September 21st dismissal is conclusive as to the family/medical leave discrimination claim.