

STATE OF WISCONSIN

PERSONNEL COMMISSION

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MARTHA FLOREY,
 Complainant,

v.

Secretary, DEPARTMENT OF
 TRANSPORTATION,
 Respondent.

Case No. 91-0086-PC-ER

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RULING ON MOTION
 TO AMEND
 ISSUE

This matter is before the Commission on complainant's motion to amend the issue for hearing, filed August 30, 1993, which respondent opposes.

This charge of sex discrimination was filed on July 10, 1991. After an investigation, an initial determination finding "probable cause" to believe respondent discriminated against complainant on the basis of sex in regard to the terms and conditions of her employment was issued on December 2, 1992. A prehearing conference was held on April 2, 1993, at which complainant appeared with counsel. The parties agreed to hearing dates of September 27-28, 1993, and to an issue for hearing of: "Whether respondent discriminated against complainant on the basis of sex in the terms and conditions of her employment." The conference report reflects a closing date for completion of discovery of August 27, 1993.

On August 30, 1993, complainant filed a "motion to amend issue." The motion requests an "amendment of the issue to include an alleged violation of Section 230.80 et seq., Wis. Stats. (1991-92)." The motion further states that while the current issue for hearing only includes sex discrimination, the "alleged Section 230.80, et. seq. issue was originally raised and pleaded in the complaint filed herein. It was filed within thirty (30) days."

In Noyak v. DER, 83-0104-PC (2/29/84), the Commission cited Nunnelee v. Knoll, Wis. Pers. Bd. No. 75-77 (3/22/76), as follows:

In agreeing to reopen the stipulation as to issues, the Board stated:

We conclude that a party may be relieved of the obligations of a stipulation in certain circumstances. See 73 AM JUR 2d Stipulations S. 14:

It is generally held that relief may be afforded from a stipulation which has been entered into as the result of inadvertence, improvidence, or excusable neglect, provided that the situation has not materially changed to the prejudice of the antagonist and that the one seeking relief has been reasonably diligent in doing so.

In the instant case, the stipulation as to the issue was reached at a prehearing conference held on April 2, 1993. The motion to amend was not filed until August 30, 1993, which was after the closing date for discovery. Complainant does not advance any reasons why the issue of whistleblower retaliation was not raised at the prehearing conference, or why it was not raised earlier than August 30. Nor does complainant explain how the stipulation that sex discrimination was the only issue for hearing was the result of mistake, inadvertance, etc.

Furthermore, although complainant asserts that the whistleblower issue "was originally raised and pleaded in the complaint filed herein," the only box checked on the complaint form as the cause of the discrimination was "sex." Also, the body of the complaint does not appear to allege that complainant was retaliated against because she made a disclosure pursuant to §230.81, stats. Rather, the essence of the statement of discrimination is as follows:

I believe that Mila Plosky, Director of the Office of Transportation Safety, has discriminated and is continuing to discriminate against me and harass me in an attempt to make me leave my job.

I believe that Ms. Plosky is doing so because I am a woman. I believe that the discrimination began as soon as I disagreed with her - and the disagreement was based upon my knowledge, traing [sic] and experience and was offered pursuant to the performance of my job. Mila does not work well with women, particularly with confident and knowledgeable women, who have earned their jobs in fair competition and who perform their jobs ably.


Given the absence of any identifiable claim of whistleblower retaliation in the complaint, the motion to amend the issue for hearing in effect attempts to inject a new claim into this litigation rather than to amend the issue to reflect a claim that is already reflected in the complaint.

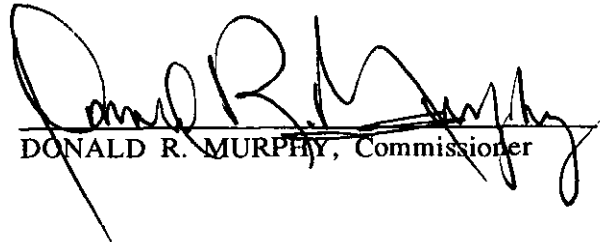
Respondent points out that the purported whistleblower claim was not raised at the prehearing conference and was not subject to discovery. This factor is of particular concern in that this motion is being raised now, after the deadline for discovery has passed.

ORDER

Complainant's "motion to amend issue," filed August 30, 1993, is denied for the reasons set forth above.

Dated: September 16, 1993 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

AJT/rlr