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STATE OF WISCONSIN

PERSONNEL COMMISSION

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THOMAS J. BOINSKI,

Complainant,

v.

Chancellor, UNIVERSITY OF  
WISCONSIN-MILWAUKEE,

Respondent.

Case No. 92-0233-PC-ER

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INTERIM  
DECISION  
AND  
ORDER

This matter is before the Commission on the respondent's motion to dismiss complainant's claim under the Family/Medical Leave Act as untimely. A review of the Commission's file reflects the following:

1. Complainant was employed as a lieutenant in respondent's Department of Protective Services.
2. Respondent issued complainant a letter of reprimand dated January 22, 1992. Complainant grieved the reprimand.
3. Complainant commenced a period of family leave on February 28, 1992, due to the imminent birth of his third child.
4. Complainant's child was born on March 2, 1992.
5. The hearing on complainant's grievance relating to the letter of reprimand was held on March 11, 1992, while complainant was on family leave.
6. Complainant had scheduled himself for family leave until March 25, 1992.
7. Prior to his return to work from his family leave and as a consequence of his conduct during the grievance hearing, complainant was placed on administrative leave and was notified by letter dated March 26, 1992, that he needed to undergo a psychiatric evaluation.
8. Complainant met with a psychiatrist on April 11, 1992.
9. By letter dated May 19, 1992, respondent informed the complainant as follows:

As a follow-up to the telephone conversation [Police Chief] Phil Clark and I had with you on May 19, 1992, I am writing to confirm the items we discussed. Following our earlier telephone conversation on May 14, 1992 you requested time off. You confirmed that you wanted to use vacation or personal holiday time for the period May 15, 1992 (Friday) through May 22, 1992 (Friday). May 25 is a legal holiday and you will be paid for that day.

I indicated that you would be temporarily assigned [at the same salary and benefits] to Physical Plant. On Tuesday May 26 please report to me in Chapman Hall room 207 at 7:45. At that time I would like to discuss with you the length of your temporary assignment and how we will proceed to permanently assign you to a different position.

10. On June 24, 1992, complainant filed a letter with the Personnel Commission which stated in part:

This letter constitutes Lt. Thomas Boinski's formal appeal and challenge to the actions taken by Police Chief Phillip Clark, Director of Protective Services at the University of Wisconsin Milwaukee, demoting and reassigning Lt. Boinski effective May 26, 1992.... Appellant alleges that this demotion and reassignment was unreasonable and an improper exercise of discretion.

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In addition, Lt. Boinski further appeals the actions of Chief Clark and the UWM Department of Protective Services/University of Wisconsin System as they are in violation of Lt. Boinski's rights under the Fair Employment Act as set forth in Wis. Stats. §§111.31, et seq. The demotion and reassignment levied against Lt. Boinski was improper because Chief Clark and the UWM Department of Protective Services/University of Wisconsin System perceived Lt. Boinski of having a mental impairment in direct violation of §111.32(8)(c).

The complainant's June 24, 1992 appeal letter to the Commission mentioned the FMLA only in that it stated the complainant was on FMLA leave commencing on February 28, 1992. The appeal was assigned Case No. 92-0702-PC. The Personnel Commission acknowledged receipt of the appeal by letter dated September 25, 1992, which stated, in part: "In light of the reference in this letter of appeal to the Fair Employment Act, a complaint form and related instructions are enclosed."

11. By letter dated September 10, 1992, complainant was informed that his employment as a Police Lieutenant would be terminated effective

September 27, 1992, unless he elected to voluntarily demote from that position. The demotion involved a pay cut.

12. On October 15, 1992, complainant filed an amended appeal so as to specifically reference the action reflected in the September 10th letter.

13. On December 7, 1992, complainant filed a charge of discrimination form, alleging discrimination based on handicap and violation of the Family/Medical Leave Act. The FMLA claim was premised on the assertion that respondent "failed to reinstate me to my Lieutenant's position after my acknowledged Family Leave."

Complaints under the FMLA must be filed "within 30 days after the violation occurs or the employe should reasonably have known that the violation occurred, whichever is later." §103.10(12)(a)1., Stats. Of the various provisions of the FMLA, the subsection which the complainant seeks to invoke<sup>1</sup> is §103.13(8), which provides, in part:

(8) POSITION UPON RETURN FROM LEAVE. (a) [W]hen an employe returns from family leave... his or her employer shall immediately place the employe in an employment position as follows:

1. If the employment position which the employe held immediately before the family leave... began is vacant when the employe returns, in that position.

Respondent contends that any violation of this provision would have occurred upon completion of complainant's family leave, i.e. on March 25, 1992, so that a complaint would have to be filed no later than April 24, 1992. The problem with the respondent's contention is that the statute refers to an employe who *returns* from leave, rather than an employe who has *completed* their family leave. The right of an employe to his or her former position occurs when the employe returns to work. The limited record available here indicates that the complainant did not return to work until May 26, 1992. From March 26th, which would have been his first day of work after the end of his scheduled family leave, and May 14th, the materials in the file indicate that the com-

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<sup>1</sup>Section 103.13(8) is the provision which specifically relates to the assertion in complainant's charge of discrimination that respondent "failed to reinstate me to my Lieutenant's position after my acknowledged Family Leave."

plainant was on administrative leave. Then, from May 15th through the 25th, the complainant used personal holiday or vacation time. He didn't return to work until he was placed in the temporary assignment at the Physical Plant commencing May 26th. Therefore, complainant had 30 days from May 26th to file his claim under the FMLA.

The complainant filed a letter of appeal with the Commission on June 24, 1992, which was within the 30 day period. Neither the June 24th appeal nor the October 15th amended appeal specifically alleged a violation of the FMLA, but the June 24th letter clearly did seek to invoke the FEA. Both the original and amended appeals referenced the complainant as having taken Family Leave and complainant's FMLA claim is based upon the same personnel transaction which serves as the basis for his appeal, i.e. his assignment to a position at the Physical Plant.

In previous cases, the Commission has permitted a complaint of discrimination to relate back to a previously filed appeal where the appeal related to the same personnel transaction and where the appeal specifically alleged illegal discrimination. In Saviano v. DP, 79-PC-CS-335, 6/28/82, the appellants, who had filed an appeal of reallocation decisions and had alleged in their appeal that the actions constituted discrimination based on sex, were permitted to perfect a complaint of sex discrimination by filing a notarized complaint as to the matters set forth in the appeal. In Laber v. UW, 79-293-PC, 8/6/81, the appellant, who in 1979 had filed an appeal of his termination and had alleged in his appeal that the termination was "based on religious discrimination," was permitted in 1981 to perfect a complaint of discrimination based on creed and relating to his termination. In its decision, the Commission construed the filing of the formal complaint form as "the technical perfection of the original appeal by supplying sworn verification." The Laber and Saviano cases provide clear precedent for the conclusion that Mr. Boinski's claim of handicap discrimination, which was perfected by the filing of his complaint on December 7, 1992, should relate back to the June 24th filing of the appeal. The relation back question with respect to the FMLA claim, which was first identified in the December 7th complaint, is a separate issue. In its decision in Laber, the Commission went on to decline to permit amendment of the original appeal to permit a claim of handicap discrimination, where there had been no mention

of this claim in the initial appeal letter and where there had been a hearing on the appeal.

The Commission's rules, in §PC 3.02(2), permit the amendment of appeals as follows:

An appeal may be amended, subject to approval by the commission, to clarify or amplify allegations 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 of the appeal.

This rule became effective in September of 1987, and no comparable rule existed before that date.


Based upon the language of §PC 3.02(2), and the fact that the FMLA claim is related to the subject matter of the original appeal, the Commission holds that the December 7th complaint was, in effect, an amendment of the June 24th filing, and relates back for purposes of the question of timeliness. The facts of this case may be distinguished from a situation where a hearing had already been held and prejudice had been clearly established.


ORDER

Respondent's motion to dismiss complainant's claim under the Family/Medical Leave Act as untimely is denied.

Dated: April 23, 1993 STATE PERSONNEL COMMISSION

KMS:kms  
K:D:temp-5/93 Boinski

  
LAURIE R. MCCALLUM, Chairperson

  
DONALD R. MURPHY, Commissioner

  
GERALD F. HODDINOTT, Commissioner