STATE OF WISCONSIN PERSONNEL COMMISSION

LORENE KORTMAN,

Complainant,

v.

Chancellor, UNIVERSITY OF WISCONSIN-MADISON,

Respondent.

Case Nos. 94-0038-PC-ER

RULING ON MOTIONS TO DISMISS

On March 15, 1994, complainant filed a charge with the Commission alleging that respondent had discriminated against her on the basis of handicap and had retaliated against her for engaging in protected whistleblower and Fair Employment Act (FEA) activities. On June 27, 1995, one of the Commission's Equal Rights Officers issued an Initial Determination finding no probable cause to believe that complainant had been discriminated against on the basis of handicap, or retaliated against for engaging in protected whistleblower activities or certain FEA activities, and probable cause to believe that complainant had been retaliated against for engaging in certain other FEA activities. Complainant appealed the no probable cause findings.

On September 22, 1995, respondent renewed two motions to dismiss it had originally filed during the investigation. In these motions, respondent contends that, in regard to the whistleblower retaliation charge, complainant failed to make a proper disclosure and failed to file a timely charge; and, in regard to the handicap discrimination charge, complainant's claim is precluded by the exclusivity provisions of the worker's compensation law.

The following findings are derived from materials provided by the parties and appear to be undisputed:

1. At all times relevant to this matter, complainant has been employed as a Food Service Supervisor at the UW-Madison.

2. In her charge of discrimination/retaliation, the alleged actions taken against her by respondent include:

a. "reprimanded" in front of customers by Bill Williams, Memorial Union Food Service Director--September 3, 1991;

b. angry and rude reaction by Mr. Williams when complainant presented to him physician's statement recommending two-week medical leave--September 6, 1991;

c. instructions given to co-workers by Mr. Williams not to listen to complainant--September 24, 1991;

d. the removal from her position of authority over two units--November 18, 1991;

e. Mr. Williams requested information relating to complainant's medical condition and medications; complainant referred to Employee Assistance program--October 31, 1991;

f. complainant brought to attention of Mary Fischer, Memorial Union Assistant Personnel Director, her ongoing problems with Mr. Williams, i.e., his anger, removal of authority, interference with her relationship with her staff--November 1991;

g. Mr. Williams filled Catering Supervisor position without posting it--November 14, 1991;

h. Joe Zitkus, complainant's new supervisor, embarrassed complainant in staff meeting--late November of 1991;

i. complainant's compensatory time not approved by Tom Cleary, Memorial Union Personnel Director--December 10, 1991;

j. the reclassification of complainant's position put on indefinite hold--December 11, 1991;

k. advised by Nancy Malz, UW Disability Specialist, to withdraw the self-identifying disability accommodation request complainant had filed with Mr. Zitkus as recommended by UW Affirmative Action office (Luis Pinero and Donna Jones)--June 17, 1992;

l. Mr. Zitkus appeared angry after complainant presented him physician's note indicating surgery and recovery schedule--July 13, 1992;

m. notified by physician that complainant's health insurance had been cancelled--not straightened out until 3 days later--August 24-27, 1992;

n. directed by Mr. Zitkus to no longer record overtime or compensatory time hours on time card--September 21, 1992;

o. advised by Mr. Cleary that complainant would be reassigned out of unit she was supervising at Union South since they needed someone there 100% of the time (complainant working part time and collecting workers' compensation benefits at time)--November 16, 1992;

p. received from Mr. Cleary a position description and list of physical requirements for her former position at Union South (to which complainant wished to return) which complainant would be unable to perform--January 21, 1994;

3. Complainant was allegedly physically assaulted by her then-supervisor Ralph Sundling on May 19, 1991, and alleges that the actions listed above were taken against her at least in part in retaliation for reporting this assault.

4. Complainant reported the assault verbally to Ms. Fischer, Mr. Williams, and Mr. Pinero on June 3, 1991. Complainant subsequently reported the assault to Mr. Pinero in writing. Complainant alleges that it was her understanding from her conversation with Mr. Pinero that he would provide a copy of this written report to Mr. Cleary and Mr. Williams.

5. During the relevant time period, complainant filed four claims for workers compensation benefits:

a. for depression and other ramifications of assault by supervisor Sundling on May 19, 1991;

b. for August 27, 1991, slip on wet floor;

c. for January 13, 1992 slip on piece of ice on floor;

d. for September 14, 1992, slip on wet floor.

6. Records from the Worker's Compensation Division at the Department of Industry, Labor and Human Relations indicate that, as of February 17, 1993, complainant had received worker's compensation benefits for medical and hospital expenses and for leave taken between July 12 and 19, 1992; July 20 and August 30, 1992; August 30 and December 27, 1992; and January 3 and February 1, 1993, related to one or more of the four injuries listed above.

Whistleblower retaliation charge

In order to be protected under the whistleblower law, an employee must engage in one or more of the protected activities identified in §230.81, Stats. An employee can engage in a protected activity by making a written disclosure after having contacted the Commission; making a disclosure to a law enforcement agency or in a court proceeding; or making a disclosure to an attorney, union representative or legislator (§§230.81(1)(b)(2) and (3), Stats.), but complainant does not claim that she made any of these types of written disclosures here. The protected activity can also be a written disclosure to complainant's supervisor as provided in §230.81(1)(a), Stats. Although complainant does not contend that she made a written disclosure to Mr. Sundling, her first-line supervisor, she does contend that she made a written disclosure to Mr. Pinero, an employee of the UW-Madison's Affirmative Action Office, and that it was her understanding from her conversation with Mr. Pinero that he would provide a copy of this writing to Mr. Williams who, as the Memorial Union Food Service Director, was in complainant's supervisory chain of command.[1] Complainant argues by implication that she was induced by the representations of Mr. Pinero, an agent of respondent, not to file her written disclosure with Mr. Williams directly due to the fact that Mr. Pinero led her to believe that he would be doing so. At this point in these proceedings, without an evidentiary record to consider or even an assertion by respondent that Mr. Pinero did nothing to induce this inaction on complainant's part, the Commission concludes that it would be appropriate to apply the doctrine of equitable estoppel. Application of this doctrine here leads to the conclusion that complainant filed a written disclosure of the assault by Mr. Sundling with Mr. Williams, an employee in her supervisory chain of command and, as a result, has satisfied the requirements of §230.81(1)(a), Stats.

Respondent also argues that complainant's charge of whistleblower retaliation was not timely filed. Pursuant to §230.85(1), Stats., an employee alleging a violation under the whistleblower law may file their complaint with

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[1] In Morkin v. UW-Madison, 85-0137-PC-ER, 11/23/88; rehearing denied, 12/29/88; affirmed by Dane County Circuit Court, Morkin v. Wis. Pers. Comm., 89-CV-0423, 9/27/89, the Commission concluded that a disclosure made to three individuals, all of whom were in the supervisory chain above the complainant, constituted a protected disclosure even though it was not made to the complainant's first-line supervisor.

the Commission "within 60 days after the retaliatory action allegedly occurred or was threatened or after the employee learned of the retaliatory action or threat thereof, whichever occurs last." Respondent contends that the last action of retaliation alleged by complainant occurred in August of 1993, more than 60 days prior to the date that the charge was filed, i.e., March 15, 1994. However, both complainant's charge and the list of allegedly discriminatory/ retaliatory actions she subsequently provided to the Commission specify as one of such actions the receipt from Mr. Cleary of a position description and list of physical requirements on January 21, 1994 (See finding 2. p., above). This action occurred during the relevant 60-day period.

The remaining question in regard to the timeliness issue is whether the list of allegedly discriminatory/retaliatory actions (See finding 2., above) lends itself to the application of a continuing violation theory here. In cases such as this, where the complainant alleges a pattern of harassment or a pattern of actions designed to achieve a particular result (here, complainant's separation from her Food Service Supervisor position at Union South), the Commission has applied a continuing violation theory if at least one of the actions falls within the statutory time period and as long as there is not a sufficient length of time between actions to "break the chain" which links the pattern of actions together. Chelcun v. UW-Stevens Point, 91-0159-PC-ER (3/9/94); CaPaul v. UW-Extension, 92-0225-PC-ER (1/27/93). Here, as already concluded above, the receipt by complainant on January 21, 1994, of the position description and list of physical requirements occurred during the 60-day period; and none of the alleged actions is sufficiently remote in time from its predecessor or successor to break the chain. As a result, the Commission concludes that complainant's charge of whistleblower retaliation was timely filed.

It should be noted here that these conclusions relating to the complainant's charge of whistleblower retaliation are based, at this stage of the proceedings, on information presented informally by the parties, not on an evidentiary hearing, and any factual inconsistencies presented in this information are resolved in favor of the complainant. As a result, respondent's motion is denied without prejudice and may be revived once an evidentiary record is created.

Handicap discrimination charge

Complainant's charge of handicap discrimination relates to four injuries she sustained during the course of her employment and for which she filed worker's compensation claims. (See finding 5., above). Section 102.03(2), Stats., states in pertinent part:

> Where such conditions exist [establishing the employer's liability for worker's compensation] the right to the recovery of compensation under this chapter shall be the exclusive remedy against the employer . . .

Section 102.35(3), Stats., states as follows:

> Any employer who without reasonable cause refuses to rehire an employe who is injured in the course of employment, where suitable employment is available within the employe's physical and mental limitations, upon order of the department and in addition to other benefits, has exclusive liability to pay to the employe the wages lost during the period of such refusal, not exceeding one year's wages. In determining the availability of suitable employment the continuance in business of the employer shall be considered and any written rules promulgated by the employer with respect to seniority or the provisions of any collective bargaining agreement with respect to seniority shall govern.

Respondent cites Schachtner v. DILHR, 144 Wis. 2d 1, 422 N.W. 2d 906 (Ct. App. 1988), in support of its argument that §§102.03(2) and 102.35(3), Stats., provide complainant's exclusive statutory remedy here. However, in County of LaCrosse v. WERC, 182 Wis. 2d 15, 513 N.W. 2d 579 (1994), the Wisconsin Supreme Court stated as follows:

> Nor do we find *Schachtner v. DILHR, supra,* 144 Wis. 2d 1, or *Norris v. DILHR, supra,* 155 Wis. 2d 336, determinative. In *Schachtner* and *Norris* the question was whether sec. 102.03(2), in conjunction with sec. 102.35(3), precluded an employe with a work-related injury from filing a complaint with the Equal Rights Division alleging that her employer had refused to rehire her because the employer perceived her as handicapped in violation of the Wisconsin Fair Employment Act. In both cases the court of appeals concluded that to the extent that coverage under the Worker's Compensation Act and the Fair Employment Act overlaps, the Worker's Compensation Act provides the exclusive remedy. All that the court of appeals held in *Schachtner* and *Norris* was that the Worker's Compensation Act was the exclusive *statutory* remedy for refusal to rehire an employe because of a

work-related injury. These cases do not involve the issue raised in the case at bar and are not dispositive.

Respondent has failed to show that any of the acts of handicap discrimination alleged here (see finding #2, above) constitutes a "refusal to rehire" within the meaning of §102.35(3), Stats., or of the Court of Appeals' analysis in Schachtner or Norris. In addition, the information available to the Commission tends to show that the "injuries" alleged by complainant here, i.e., the acts of discrimimation detailed in finding #2, above, are distinct in time and place from the injuries which formed the basis for complainant's worker's compensation claims. See County of LaCrosse v. WERC, 182 Wis. 2d 15, 34, 513 N.W. 2d 579 (1994).

The Commission concludes at this point in these proceedings and based on the information provided by the parties that the exclusivity provisions of the worker's compensation law do not bar complainant's charge of handicap discrimination.

Order

Respondent's motion to dismiss the charge of whistleblower retaliation is denied without prejudice. Respondent's motion to dismiss the charge of handicap discrimination is denied without prejudice.

Dated: November 17, 1995 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

LRM:lrm

JUDY M. ROGERS, Commissioner

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