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STATE OF WISCONSIN

PERSONNEL COMMISSION

JOHN FRANCIS LORSCHETER
Complainant,

v.

**Secretary, DEPARTMENT OF
INDUSTRY, LABOR AND HUMAN
RELATIONS [DEPARTMENT OF
WORKFORCE DEVELOPMENT],¹**
Respondent.

**RULING ON
MOTION TO
DISMISS**

Case No. 94-0110-PC-ER

This matter is before the Commission on respondent's motion to dismiss the complaint as untimely filed and for failure to state a claim upon which relief can be granted.

Complainant filed his complaint of age and handicap discrimination with the Commission on July 29, 1994. Complainant alleged:

I had planned to retire on September 7, 1994 and on June 16, 1994 I decided to extend my employment to 12/30/94. Because with a little over 3 months of extra work I could set my second highest year for retirement and earn 60 [dollars] more per month for the rest of my life.

This request was not granted by DILHR in Madison. I asked for a written statement that I was not allowed to retire on 12/30/94. I was informed again verbally that a written statement would not be provided and that I would have to retire on 9/7/94. . . .

Also I was hired off total disability on 12/13/88 to work here as a Jobs Counselor 3 full time. On Jan 1, 1991, due to budget problems, I was singled out of our office staff to be cut to 80 per cent time. I had over 20 years state service with job service then. I was a veteran, older worker and handicapped but I was cut.

¹ Pursuant to the provisions of 1995 Wisconsin Act 27, effective July 1, 1996, the name of the Department of Industry, Labor and Human Relations was changed to the Department of Workforce Development.

Complainant appealed from an initial determination of "No Probable Cause" and the Commission convened a prehearing conference on September 26, 1996. During the conference, respondent requested 10 days to raise jurisdictional objections and the parties agreed to the following statement of issue for hearing:

Whether respondent discriminated against the complainant on the basis of age with respect to its decision to reduce complainant's full time position to part time (80%) from January 1991 through March 1994 or in respondent's refusal to extend complainant's retirement date from September 1994 to December 1994.

Timeliness

Respondent contends the complainants' claim arising from the decision to reduce his position from full to part time is untimely. The time limit for filing complaints of discrimination under the Fair Employment Act is derived from §111.39(1), Stats:

The [Commission] may receive and investigate a complaint charging discrimination, . . . if the complaint is filed with the [Commission] no more than 300 days after the alleged discrimination, . . . occurred.

Complainant clearly filed his complaint more than 300 days after respondent decided, in 1990 or 1991, to reduce his position to 80%.² Therefore, the complainant's allegation relating to the original decision to reduce his hours is untimely.³

Complainant's brief also contains the following statements:

In Jan 1991 I and a few others were reduced to less than full time. . . . Later the others were reinstated to full time. I wasn't. . . . I feel the program was never overspent these years and I should have been reinstated as the others and newly hired were.

² Complainant has not alleged he was unaware respondent's original decision to reduce his hours was discriminatory at the time the decision was made. *Cf. Sprenger v. UW*, 85-0089-PC-ER, 12/30/86. Even if he made such an allegation, nothing indicates complainant reasonably learned of the discriminatory nature of the decision at a time within 300 days of when he filed his complaint with the Commission.

³ Complainant's claim regarding the reduction in his hours is not in the nature of a continuing violation. *McDonald v. UW-Madison*, 94-0159-PC-ER8/5/96; *Tafelski v. UW*, 95-0127-PC-ER, 3/22/96.

The Commission interprets these statements as a contention that complainant should have been reinstated to full time at the same time others returned to or were hired in full time positions. This interpretation is consistent with the broad language of the statement of issue for hearing as set forth above. However, the complainant still has not identified any decision respondent made, within 300 days of when he filed his complaint with the Commission, not to return him to full time employment. The submissions of the parties indicate that the only time within this period that respondent specifically considered whether to employ complainant on a full time basis was in approximately March of 1994, when the supervisor agreed to increase complainant's time from 80% to 100%.

Failure to state a claim

Respondent contends complainant's claim arising from the decision to deny his request to postpone his retirement date from September 7, 1994, until December 30, 1994, should be dismissed for failure to state a claim. Respondent states the decision was based on respondent's previous agreement to permit complainant to work full time from early in 1994 until his anticipated retirement in September of that year, so that complainant had "[u]sed up the 80% funding for his position" by his scheduled retirement on September 7th.⁴ According to respondent's motion:

Neither the complaint nor any of the other documents provided by the complainant during the probable cause investigation provides any coherent theory as to the basis of the alleged discrimination other than the argument that the respondent could have taken funding from other positions and used it to support his position.

In *Masuca v. UW*, 95-0128-PC-ER, 11/14/95, the Commission considered the role of a motion to dismiss for failure to state a claim in the context of a FEA claim:

The WFEA contemplates that a person who believes that he or she has been the victim of employment discrimination can file a complaint al-

⁴ In his complaint, complainant acknowledges that he was returned to full time in 1994 because he was going to retire: "In February [of 1994] I talked to [my supervisor] about going full time again. It was decided if I retired this year I could go to full time until then."

leging this, and is entitled to an investigation and/or hearing on the allegations. *See, e.g.*, §§111.39(1), 230.45(1m), Stats. In cases where it is clear that the complaint fails to state a claim – e.g., the complainant is not a member of a protected category, the complainant’s retaliation complaint rests on an activity not covered by the FEA – it may be appropriate to dismiss the complaint on the basis of a motion supported by a factual showing establishing the defect in the claim. However, in a case like this, where the parties differ about such things as whether a supervisor’s complaints about complainant’s work were racially motivated and whether complainant’s choice of options presented by management rendered the personnel transaction in question voluntary or involuntary, the claim cannot be resolved dispositively on this motion. Complainant is entitled to have his complaint investigated and then to proceed to a hearing.

The present case is comparable to *Masuca*. Complainant will be provided an opportunity at hearing to offer evidence tending to support his contention that respondent’s decision not to allow him to delay his retirement from September 7, 1994, until December 31, 1994, constituted discrimination based on age.

ORDER

Respondent's motion to dismiss is granted as to complainant's allegation relating to the reduction of his position from full to 80% time, and is otherwise denied. The issue for hearing is modified to read:

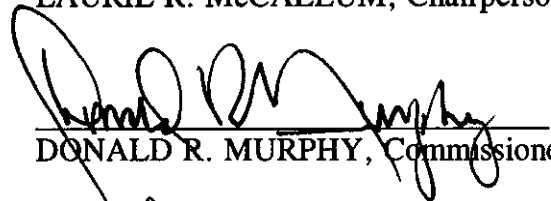
Whether respondent discriminated against the complainant on the basis of age with respect to its refusal to extend complainant's retirement date from September 1994 to December 1994.

The parties will be contacted for the purpose of scheduling a new hearing date.

Dated: December 4, 1996 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

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DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner