

STATE OF WISCONSIN

PERSONNEL COMMISSION

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JAMES A. LAROSE,

Complainant,

v.

Chancellor, UNIVERSITY OF  
WISCONSIN-MILWAUKEE,

Respondent.

Case No. 94-0125-PC-ER

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RULING  
ON MOTION  
FOR  
PROTECTIVE ORDER  
AND ON  
TIMELINESS OBJECTION

This matter is before the Commission on the respondent's motion for protective order as well as respondent's objection to the timeliness of various allegations raised by the complainant.

The complainant filed a charge of discrimination form with the EEOC on March 3, 1993 alleging age discrimination. The sole employment action referenced on the charge was a "demotion" on February 1, 1993, in which complainant was moved from his "position as night week [sic] and operations manager of the student union to the position of coordinator of staff services." Elsewhere on the charge, complainant indicated that he was not alleging a continuing violation, and the "earliest" date that discrimination took place was February 1, 1993, which was also the "latest" date that discrimination took place. At the same time he filed his charge of discrimination, the complainant also completed an affidavit which referenced 1) the respondent's decision, on February 1, 1993, to "transfer" complainant to the third shift, and 2) the complainant's 1992 performance evaluation. A few days later, complainant issued a correction letter stating that the "demotion" from the position of Night and Weekend Operations Manager occurred on August 1, 1988 rather than in 1993. A copy of the charge of discrimination was first received by the Personnel Commission on March 16, 1993. The complaint was initially processed by the EEOC, but after conciliation efforts were unsuccessful in that forum, the complainant, by letter dated August 29, 1994, requested the Personnel Commission continue to process his charge.

After the respondent filed its answer to the complaint, complainant expanded upon and clarified his age discrimination claim. In his November 15, 1994 response to the respondent's answer, complainant wrote, in part:

In August 1988 I was demoted in position from Night and Week[*end*] Operations Manager to Manager of Staff Services then to Coordinator of Staff Services. This was a demotion in position only not in salary or classification. In ... effect this was constructive termination.

I appealed this demotion up to the Assistant Chancellor, S. Sikes, to no avail. The immediate effect of this demotion was not to allow me to manage the department of Staff Services, but to make me a security guard. This entailed on a daily basis, escorting money funds and locking the building at night. It was their hope that I would not accept this demotion and leave. Then they could eliminate my civil service position and hire a part time student employee at a fourth of my salary. This was their best option since there was no cause for termination and lay-off would not suit their purpose, because of my seniority.

My introduction into the department meant that all the other employees had their hours cut, since they were not civil service. This immediately created a hostile work environment, since the student employees viewed me as responsible for their loss of hours.

Management has continued to foster this hostile work environment during my tenure in the department. The director of union operations has made disparaging remarks to me in front other employees. Commented on my appearance on more than one occasion. My supervisor has allowed a co-worker to harass me for the past two years. This harassment stopped when he was caught vandalizing my van, and he was forced to resign.

My supervisor has created friction between me and my co-workers by not replacing me when I am on union business, or working on projects.

She has made reference to my age by referring to me in a derogatory manner as a senior staff member. Management has denied the use of the department computer when the student employees have access. This has effectively denied me the opportunity to improve my skills, restricted my access to information, and to communicate. My name has been removed from the department routing lists further, restricting my access to information. My name has been removed from the office directory and the department mail box.

I have been arbitrarily transferred to third shift where my duties have been further reduced to a night watchmen [sic]. I am

being replaced on second shift by a student employee. Clearly this is another attempt to harass me and get me to leave. My classification in civil service is a program assistant- 4, pay range 11. My present duties would be more properly classified as security officer 2, pay range 6.

The complainant goes on to contend that the letter advising him of the August, 1988 transaction "documents the beginning of the discrimination and harassment that has continued to the present time." He further contends that: 1) the respondent refilled complainant's former position of Night and Weekend Manager in 1993, by hiring "a younger person," Dennis Starr; and 2) complainant attempted to transfer to another position in the same employing unit, but the recruitment for the vacancy was suspended due to budgetary reasons.

Respondent has filed detailed responses to all of the materials submitted by the complainant. However, in response to complainant's November, 1994 discovery request, which included requests for information regarding the 1988 personnel action, respondent moved for a protective order and raised a timeliness objection. Respondent contends that the only allegation that is timely is the February 1, 1993, change in work schedule. Initially, the Commission granted the parties an opportunity to file arguments relating to the motion for protective order. This schedule was later expanded to include the timeliness objection because the motion for protective order was viewed as being intertwined with the timeliness/continuing violation issue.

#### Timeliness Issue

As noted above, complainant did not allege a continuing violation on his initial complaint form. He failed to mark the box marked "continuing action" on that form and February 1, 1993, was the only date of discrimination he referenced on the form. Even though he has not formally amended his complaint to include additional allegations, it is now clear that complainant is alleging a continuing violation. In his January 20, 1995, submission to the Commission, complainant alleges there has been a "a pattern of age discrimination and harassment that has taken place since August 1, 1988, when [complainant] was demoted for reasons of age."

The Commission notes that the complainant appears *pro se* in this matter.

There is a 300 day time limit for filing complaints of discrimination under the Fair Employment Act. This time limit runs from the date the alleged discrimination occurred. §111.39(1), Stats. Actions which occurred outside the 300 day limit may, under certain circumstances, be linked to alleged discriminatory conduct occurring within the 300 day period. Where such linkage is appropriate, a continuing violation may be recognized, so as to permit review of that conduct occurring beyond 300 days.

In Berry v. Bd of Supervisors of La. State Univ., 715 F. 2d 971, 32 FEP Cases 1567, 1575 (5th Cir., 1983), the court held:

Courts have not formulated a clear standard for determining when alleged discriminatory acts are related closely enough to constitute a continuing violation and when they are merely discrete, isolated, and completed acts which must be regarded as individual violations. See Tarvesian v. Carr Division of TRW, Inc., 407 F. Supp. 336, 339-40, 16 FEP Cases 345 (D. Mass. 1976); Nelson v. Williams, 25 FEP Cases 1214, 1215 (D. D.C. 1981) ("In order to support a finding of a continuous violation, [plaintiff] must do more than show a series of unrelated and isolated instances of discrimination. She must prove a series of continuous violations constituting an organized scheme leading to a present violation."). This inquiry, of necessity, turns on the facts and context of each particular case. Relevant to the determination are the following three factors, which we discuss, but by no means consider to be exhaustive. The first is subject matter. Do the alleged acts involve the same type of discrimination, tending to connect them in a continuing violation? The second is frequency. Are the alleged acts recurring (e.g., a biweekly paycheck) or more in the nature of an isolated work assignment or employment decision? The third factor, perhaps of most importance, is degree of permanence. Does the act have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate? (Footnote omitted)

Of the various personnel actions and incidents referred to by the complainant in his submissions in this matter, the first is the August, 1988 transaction, described by complainant as a "demotion" and by respondent as a "reassignment." This incident is clearly not appropriate for inclusion under a continuing violation theory. The 1988 personnel action was a discrete transaction. Complainant acknowledges having appealed it up to the level of the Assistant Chancellor. In his submission dated February 27, 1995, complainant

also makes the following statement regarding the action: "If you ... were reassigned from your present positions to locking your building at night, there would be no doubt in your mind or in anyone else's mind that you had been discriminated against and humiliated."<sup>1</sup> The 1988 personnel action had the requisite degree of permanence to trigger complainant's duty to assert his right to file a claim of age discrimination. It would be unfair to permit complainant to initiate a complaint regarding that transaction nearly 5 years later, and to require respondent to defend such an allegation.

Complainant has clearly identified a separate personnel transaction as having occurred within 300 days of the day he filed his age discrimination claim: his reassignment from the 2nd to the 3rd shift, effective February 1, 1993. The parties have submitted information relating to this transaction as well as to the other conduct alleged by complainant to have been discriminatory. In light of the current posture of this case, it is unnecessary for the Commission to rule on whether the other conduct referenced by complainant as occurring after the August, 1988 transaction, constitutes a continuing violation. The reason the Commission has found it necessary to consider the respondent's timeliness objection at this time is because of the interaction of the timeliness objection with respondent's motion for a protective order. That motion is addressed below, with the result determined by the conclusion that complainant's claim relating to the August, 1988 transaction is untimely.

The Commission also notes that at least some of the complainant's allegations appear to relate to events subsequent to the date the complainant filed his complaint with the Commission. If the complainant intends to pursue a claim relating to these later events, he should file an amended complaint with the Commission. The amended complaint should specifically reference that conduct occurring after March of 1993 which complainant has already referenced in his materials filed with the Commission.

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<sup>1</sup>This statement by complainant is effectively an admission that complainant either was aware or should have been aware of his rights to pursue an age discrimination claim in 1988. In Roberts v. Gadsden Memorial Hosp., 850 F. 2d 1549, 47 FEP Cases 811, 812, (11th Cir., 1988), the court concluded that otherwise time-barred incidents were not part of a continuing violation where plaintiff admitted that he was aware of his right to file suit at the time of an earlier incident.

Motion for Protective Order

In a letter dated November 6, 1994, the complainant submitted a discovery request to respondent. The request listed eight different subject areas. Respondent agreed to supply complainant with responses to items 4, 5 and 7, but requested a protective order as to the remainder of the items which it deemed to be "harassing, burdensome, and irrelevant." These remaining requests read as follows:

1. Documentation supporting Mr. Wilmot's [affidavit] statement that he eliminated a number of student and LTE positions for a salary saving of \$25,000 to include but not limited to: numbers of positions, dates, names, departments, position descriptions, and salaries.
2. All student and LTE personnel transactions in the student union for 1988.
3. Names, position descriptions, and salaries of all personnel in the department of Staff Services for 1988.

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6. All dates and times that any Night and Weekend Manager or similar titled position was posted, listed, or recruited, after the Night and Weekend Operations Manager position was eliminated on July 31, 1988.

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8. Supervisor's Hours Reports For the Week Of: For all weeks of 1988 for the department of Staff Services.

The complainant has exercised his right to obtain discovery from the respondent, as provided in §PC 4.03, Wis. Adm. Code. Pursuant to that provision, "the commission ... may issue orders to protect persons or parties from annoyance, embarrassment, oppression or undue burden or expense, or to compel discovery." The basis for the respondent's motion is clearly that the requested information relates to the 1988 action of moving the complainant from his position as Night and Weekend Operations Manager to the position of Staff Services Coordinator. As noted above, the complainant did not file a timely complaint regarding the 1988 personnel action. He is not permitted to have that transaction reviewed as part of this complaint.

The limits to the scope of discovery are set forth in §804.01(2), Stats. Paragraph (a) reads, in part:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action .... It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

All five of the complainant's remaining discovery requests seek information relating to the August, 1988 personnel action, rather than any other personnel action that might fall within the scope of the complainant's claim of age discrimination. It is true that some of the information appears to relate to the complainant's contention that sometime after 1988, respondent recreated his former position and hired Mr. Starr to fill the vacancy. However, in its answer dated January 9, 1995, respondent contends that complainant did not compete for the vacancy when it was available:

In regard to the position of Student Services Program Manager, an unclassified academic staff position, recruitment was initiated on May 28, 1992, and candidates were interviewed but no formal offer was made by the University. On January 14, 1993, the recruitment was reopened and a formal offer was made to Mr. Dennis Starr .... He accepted said offer. Recruitment for this position was advertised on various campus bulletin boards, on flyers distributed to all union employees, and in various newspapers including the Milwaukee Journal. LaRose was informed of the availability of this position but did not apply. Although he submitted a memorandum dated March 26, 1994, to Wilmot asking for the reasons why he was not reassigned to this "former position", he was apprised of the appropriate procedures to follow to apply for the academic staff position but failed to do so.

Complainant has not contested respondent's statement that he did not compete for the position filled by Mr. Starr. This indicates that the complainant's original age claim relates to the August, 1988 personnel action, rather than the hiring of Mr. Starr in 1993. Because the complaint is untimely in terms of the 1988 personnel action, respondent is also entitled to a protective order with respect to complainant's discovery efforts relating to whether the position was subsequently refilled.


ORDER

Respondent's timeliness objection is granted with respect to the complainant's claim that he was discriminated against with respect to the decision in August of 1988 to move his position from Night and Weekend Operations Manager to Staff Services Coordinator. Otherwise, the motion is denied without prejudice so that respondent may renew the objection at some later point in the proceedings.

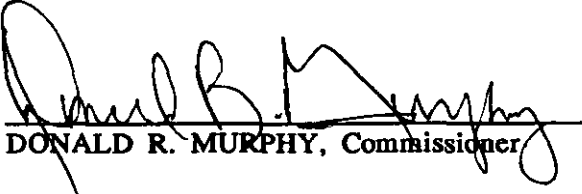
Respondent is granted a protective order with respect to questions 1, 2, 3, 6 and 8 in complainant's discovery request dated November 6, 1994. Complainant may not inquire into the August, 1988 decision to move his position from Night and Weekend Operations Manager to Staff Services Coordinator, nor the process resulting in the hiring of Mr. Starr in 1993.

Any amendment to the complaint relating to conduct occurring after March of 1993 which complainant has already referenced in materials filed with the Commission must be filed within 20 days of the date of this order. If such an amendment is filed, the respondent will then have 20 days to indicate if any further supplementation of its answer is required.

Dated: March 31, 1994<sup>[5]</sup> STATE PERSONNEL COMMISSION

  
LAURIE R. MCCALLUM, Chairperson

K:D:temp 3/95 LaRose

  
DONALD R. MURPHY, Commissioner