STATE OF WISCONSIN PERSONNEL COMMISSION

MARGARET MASKO,

Complainant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 95-0096-PC-ER

RULING ON PETITION FOR REHEARING

On February 16, 1996, the Commission mailed to the parties a copy of its Ruling on Motion to Dismiss, dated February 15, 1996. The ruling granted respondent's motion and dismissed the complaint as untimely filed. On March 6, 1996, complainant filed a petition for rehearing and both parties have submitted arguments regarding the petition.

The key portions of the Commission February 15th ruling are as follows:

> Complainant filed her complaint of discrimination on July 14, 1995. The complaint includes allegations of discrimination based on handicap, marital status and sex. Pursuant to §111.39(1), Stats., a complaint under the Fair Employment Act must be filed within 300 days of the occurrence of the alleged discrimination. The only action occurring within this 300 day period was on September 23, 1994, when complainant received a copy of a document from her personnel file. Complainant contends that this document, which contains contemporaneous notes taken by her supervisor, Richard Kiley, of his conversations with two of complainant's co-workers on March 29, 1990, "made me more aware of other discriminatory treatment I had received while under Mr. Kiley's supervision."
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> Complainant has not argued that the information found in Mr. Kiley's notes relates in any way to her allegations of discrimination based upon marital status and sex. Therefore, the Commission concludes that those claims should be dismissed as untimely filed.
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> The complainant's handicap claims are premised upon alleged different treatment of complainant in comparison to her co-workers. Everything indicates that the complainant was aware of this difference in treatment as it was occurring but that

> she did not attribute it to handicap discrimination until she read Mr. Kiley's meeting notes. The nature of the alleged discrimination and the knowledge of the complainant at the time of the conduct in question is such that the additional information found in the 1990 notes of Mr. Kiley is insufficient to make the complainant's handicap claim timely. For example, complainant was well aware in 1992 that she was not promoted to the Program Assistant 2 position and that Ms. Donovan was placed into that position. Complainant has identified numerous other incidents of alleged discrimination which occurred during the time period before 300 days prior to the date she filed her complaint in July of 1995. Those additional events included discipline and other instances where complainant was able to directly compare respondent's treatment of her to respondent's treatment of her coworkers. A "similarly situated person with a reasonably prudent regard for his or her rights" would have investigated these actions or filed a complaint. The additional information provided to complainant by Mr. Kiley's 1990 notes are insufficient to make her 1995 complaint timely.

The complainant listed six arguments in her petition. Those arguments are set forth below, as well as arguments raised in her subsequent submissions:

Arguments 1 and 3:

> First, the test of a similarly situated person with reasonably prudent regard for their rights is inappropriate. My known handicaps, cited in the ruling and order, prevented me from being that type of person. It was not until I really felt there was an intent to actually harass me that my self-defense mechanisms really began to work. This is not unusual for a person with my handicaps.
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> * * *
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> Third, I did investigate these incidents somewhat when they occurred, but only to the level of my ability at the time. While I may have been aware of the way I was being treated differently, I could not figure out why and was not aware of all my rights. I felt powerless and was very confused about this until Mr. Kiley's notes were found and Mr. Kiley stated how he used the information. This was the kind of evidence I was lacking for a legitimate claim.

The ruling cited statements by complainant that "her handicaps 'include Post Traumatic Stress Disorder and Anxiety Attacks, both of which affect [her] memory and ability to concentrate,' and 'agoraphobia, depression,... fybromyalgia, self-defeating personality.'" The ruling also noted that complainant was on medical leave from September of 1989 through April of 1990.

Complainant's allegations have some similarity to those addressed by the Commission in Kirk v. DILHR, 87-0177-PC-ER, 7/11/91. In that case, Ms. Kirk filed her complaint on December 30, 1987, more than 300 days after she had been discharged in November of 1986. She also alleged that her employer had prepared a negative performance evaluation of which she was not aware until she examined her personnel file in August of 1987. Ms. Kirk argued that she had suffered an emotional breakdown in 1986 causing her to be incompetent so the 300 day filing period should be tolled. However, she admitted she had contacted the Commission in September of 1986 and requested a complaint form. The Commission declined to toll the filing period given "the general and completely conclusory allegation of incompetency, and complainant's admitted ability to contact the Commission in September, 1986, and to examine her personnel file on August 1, 1987."

In the present case, respondent noted that whatever handicaps complainant may have had during the period in question, "she demonstrated sufficient prudence, rational self interest, 'memory and ability to concentrate' to request leave on numerous occasions, to attend MATC, to request DHSS payment for college courses she wanted to take during regular business hours, to request adjustments of her work schedule to accommodate her needs, and to secure union representation for her March 1994 meeting with Mr. Kiley regarding her use of sick leave." (Respondent's Brief dated March 15, 1996)

It does not appear that complainant contends she was incompetent to pursue a claim during the period in question. To the extent the complainant contends the statute of limitations should be tolled due to the nature of her handicaps, those handicaps are clearly insufficient to meed any standard necessary for the tolling of the filing period. Nunnally v. MacCausland, 996 F.2d 1, 2 AD Cases 970 (1st Cir. 1993); Bassett v. Sterling Drug, Inc., 578 F. Supp. 1244, 35 FEP Cases 382 (S.C. Ohio 1974), appeal dismissed, 770 F.2d 165, 40 FEP Cases 1617 (6th Cir. 1985); Moody v. Bayliner Marine Corp., 44 FEP Cases (E.D. N.C., 1987) Complainant was on medical leave for approximately eight months, ending in April of 1990. She then returned to work. Complainant acknowledges she was able to carry out an investigation when the various incidents occurred and that she contacted a lawyer. She also does not indicate any change in her circumstances that suddenly permitted her to obtain the document in question in September of 1994. This course of conduct clearly indicates the complainant

did not suffer from a mental incapacity that would toll the statute of limitations.

Therefore, in analyzing the timeliness issue, the Commission must apply the standard of a similarly situated person with a reasonably prudent regard for his or her rights. The Commission lacks the discretion of applying some other standard.

Complainant acknowledges she was "aware of the way [she] was being treated differently" when that treatment was occurring. She was required to file her complaint within 300 days thereafter.

Arguments 2 and 4

Complainant contends that the information found in Mr. Kiley's notes of the March 1990 meeting with complainant's co-workers was very significant and that her complaint was filed within 300 days of the discovery of those notes. Even if the notes fell into the category of the proverbial "smoking gun" category of proof, the discovery of the notes does not start the filing period where facts which would support a charge of discrimination would have been apparent earlier to a similarly situated person with a reasonably prudent regard for her rights.

Arguments 5 and 6

Complainant contends the Commission failed to investigate her complaint by talking to her witnesses and also argues that dismissal is an injustice because respondent admitted discrimination had occurred.

Because the respondent raised a timeliness issue and because the Commission determined that the complaint was untimely filed, dismissal of this matter occurred before the Commission's investigation had been completed. If no objection had been raised and the investigation had been completed, it would have been the typical procedure for the investigator to issue an Initial Determination based entirely upon written submissions rather than to conduct witness interviews.

The Commission also notes that respondent expressly denied complainant's contention that it had admitted Mr. Kiley's alleged conduct was discriminatory.

The complainant asks that distribution of any written communications in this case be limited to certain specified individuals. The Commission will distribute copies of this ruling to the same individuals noted on the affidavit of

mailing which accompanied the Commission's February 15th ruling, and must also make the ruling available to the extent required under the Open Records Law, subch. II, ch. 19, Stats. The information set forth both in this ruling as well as the February 15th ruling relating to the nature of the complainant's medical conditions is all information provided to the Commission by the complainant.

The complainant also appears to be contending the filing period should not commence until she became aware of her right to file a complaint of discrimination. Lack of knowledge of the law does not toll the running of a statute of limitations. Gillett v. DHSS, 89-0070-PC-ER, 8/24/89

Petitions for hearing may be granted only on the basis of a material error of law or fact or the discovery of new evidence. §227.49(3), Stats. The complainant has failed to establish any of these conditions.

ORDER

Complainant's petition for rehearing is denied.

Dated: April 4, 1996

STATE PERSONNEL COMMISSION

LAURIE R. MCCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats. 2/3/95