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MARGARET MASKO,

Complainant,

v.

Secretary, DEPARTMENT OF  
HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 95-0096-PC-ER

\* \* \* \* \*

RULING ON  
MOTION  
TO  
DISMISS

In its answer to this complaint, respondent moved to dismiss the case, contending it was untimely filed. Complainant filed a response.

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."

As of September of 1989 complainant was employed by respondent as a word processing operator. Respondent granted her a medical leave without pay for the period from September 11, 1989, through April 12, 1990. While she was on leave, complainant's position was transferred as a consequence of a reorganization and certain responsibility for reviewing complainant's daily work was assigned to Richard Kiley. On March 29, 1990, Mr. Kiley met with two of complainant's former co-workers, Kathy Faas and Norma Donovan, to discuss complainant's previous work. Mr. Kiley's notes of that meeting include the following comments by Ms. Faas:

Typing needs not met by Margaret

Not very organized; spacy...  
Needs very lengthy instructions, must follow-up several times  
Not good support staff  
Not dependable; off work often - sometimes didn't show-up

When she was there did OK

Mr. Kiley's notes also include the following comments by Ms. Donovan:

Was given a lot of personal development

Didn't not (sic) show initiative  
Call Zerox (sic) for repair  
Didn't add paper...  
[Didn't] fix ribbon

According to complainant, the document includes references to symptoms of her handicaps. In her complaint, complainant also contends:

On 9-23-94 I received a copy of a document from my personnel file through the grievance process which was used by my supervisor (Richard Kiley) to determine my work assignments. That document contained information that was a negative reflection on my previous work performance provided by two other employees who were not familiar with my job description, did not supervise my work, and were unfamiliar with my handicaps or the symptoms related to those handicaps.

In the materials filed with the Commission, complainant states that her handicaps "include Post Traumatic Stress Disorder and Anxiety Attacks, both of which affect [her] memory and ability to concentrate," and "agoraphobia, depression,... fibromyalgia, self-defeating personality" (Sept. 8, 1995, submission). Complainant contends the following alleged conduct by respondent was discriminatory.

1. Complainant contends respondent discriminated against her with respect to her work assignments which were based, at least in part, on the information in the March, 1990 document. Assignments in using certain computer software (Lotus) went to Ms. Donovan rather than complainant. Complainant was also required to provide staff support for more than 40 employees, while the Donovan position was only required to support 2 positions.

In addition, complainant was excluded from section meetings, while Ms. Donovan attended them.

2. Complainant contends respondent discriminated against her with respect to a) respondent's conclusion that complainant was a sick leave abuser; b) the decision to consider several years of records when reviewing complainant's leave history; and c) the statement, on March 4, 1994, that complainant was required to obtain medical certification for any sick leave.

3. Complainant contends respondent discriminated against her with respect to the alleged failure to promote her to a Program Assistant 2 position. Ms. Donovan was placed into the position in March of 1992.

4. Complainant contends respondent discriminated against her with respect to the alleged absence of letters, cards and notes of thanks from Mr. Kiley which he provided to other employes under his supervision and were filed by complainant.

5. Complainant contends respondent discriminated against her with respect to a) the requirement that complainant pay for training in the use of certain computer software (Lotus) she took at Madison Area Technical College while Ms. Donovan was provided similar training internally at no cost; b) Ms. Donovan received training in LAN (Local Area Network) while complainant was not offered it; c) in July of 1992, respondent decided not to approve complainant's request to attend an Administrative Office Procedures class; d) complainant was required to make up the time she spent at conferences; e) complainant was required to stagger her work hours in order to attend training approved by respondent.

6. Complainant contends respondent discriminated against her with respect to alleged harassment by Mr. Kiley on March 22 and 25, 1994, regarding the timesheet of an employe on disciplinary leave. The employe was erroneously paid for time spent on leave without pay and respondent attributed the error, at least in part, to the complainant. The alleged harassment includes Mr. Kiley asking the complainant to look for the employe's timesheet even though the timesheet was on Mr. Kiley's desk.

7. Complainant contends respondent discriminated against her when a) other employes were held to different standards in terms of accounting for their time at work; b) complainant was required to report to work when she had car problems rather than being allowed to be absent; c) com-

plainant was not offered the alternative of working at home, in contrast to other employees.

8. Complainant contends respondent discriminated against her when the contents of her personnel files in the Bureau were moved, including documents relating to her case.

The following facts are also undisputed:

1. Complainant's 1990 medical leave was extended to October 12, 1990, when complainant returned to work.

2. Complainant's position was reclassified from Word Processing Operator 1 to Program Assistant 1, effective May 31, 1992.

3. Respondent held formal supervisory conferences with complainant regarding her use of sick leave on January 12 and October 18, 1993.

4. Complainant was on medical leave from May 2, 1994 until October 31, 1995, when the Department of Employee Trust Funds approved her request for disability retirement benefits.

The consequence of the 300 day filing period under the Fair Employment Act was discussed in Christensen v. UW-Stevens Point, 91-0151-PC-ER, 1/24/92:

[T]he fact that a complaint is not filed within 300 days of the date of the discrimination does not compel the conclusion that it is untimely. The time for filing a complaint is not a matter of subject matter jurisdiction. Milwaukee Co. v. LIRC, 113 Wis. 2d 199, 335 N.W. 2d 412 (Ct. App. 1983). The time for filing does not start to run on the date of the alleged discrimination if "as of that date the facts which would support a charge of discrimination were not apparent and would not have been apparent to a similarly situated person with a reasonably prudent regard for his or her rights." Sprenger v. UW-Green Bay, 95-0089-PC-ER (7/24/86) (footnote omitted).

In her submission dated January 16, 1996, complainant offers the following argument regarding Mr. Kiley's 1990 meeting and notations:

[Complainant] claims, and Respondent admits, that Mr. Kiley in fact used this information from these two inappropriate sources to determine her work assignments. This predisposition resulted in very low level expectations of [complainant] when she returned to work and continued even after evidence to the contrary. This treatment constituted discrimination during this time,

even though the document was not discovered until after [complainant] went on her most recent medical leave.

In the same submission, complainant contends that until the time she obtained a copy of Mr. Kiley's notes, complainant "thought there was something wrong with her and did not understand why she was being treated so differently."

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.

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 co-workers. 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 respondent also moved to dismiss this matter because of the inability of the Commission to grant some of the complainant's relief. The Commission does not need to address this additional contention.

ORDER


Respondent's motion to dismiss is granted and this matter is dismissed as untimely filed.

Dated: February 15, 1996 STATE PERSONNEL COMMISSION

  
LAURIE R. MCCALLUM, Chairperson

KMS:kms  
K:D:temp-2/96 Masko

  
DONALD R. MURPHY, Commissioner

  
JUDY M. ROGERS, Commissioner

**Parties:**  
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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