STATE OF WISCONSIN PERSONNEL COMMISSION

**KELLY SCHULTZ,**
***Complainant,***

**v.**

**Secretary, DEPARTMENT OF CORRECTIONS,**
***Respondent.***

Case No. 96-0122-PC-ER

RULING ON RESPONDENT'S MOTION TO DISMISS

This case is before the Commission to consider respondent's motion to dismiss based on the contention that the complaint was untimely filed. Both parties have been represented by counsel throughout these proceedings. Both parties filed written arguments, with the final argument received by the Commission on February 17, 1997.

Complainant initially filed her discrimination complaint in the wrong forum, with the Equal Rights Division (ERD) in the Department of Industry, Labor and Human Relations (DILHR) on September 9, 1996, and such complaint was sworn to by her attorney rather than by the complainant. The Commission first received a copy of the complaint on September 20, 1996, but again the complaint was sworn to by her attorney instead of herself. The defect was brought to the parties' attention by Commission letter dated September 23, 1996. The Commission received a copy of the perfected complaint (copy sworn to by complainant) on October 9, 1996.

Respondent filed an Answer to the complaint on December 18, 1996. Complainant filed a Rebuttal to the Answer on February 7, 1997, to which respondent filed a response on February 20, 1997.

The facts recited below are made solely for the purpose of resolving the present motion. It should be noted that many of the recited facts are disputed by respondent.

## FINDINGS OF FACT

1. In October 1993, complainant worked for the Department of Corrections (DOC) as a licensed practical nurse at the Dodge Correctional Institution (DCI). Her duties included working in the lab with James Treleven, a phlebotomist.

2. Mr. Treleven began to sexually harass complainant beginning in November of 1993. She first complained to management in January 1995, when she

spoke to Grace Nesman[1], a supervisor.[2] Ms. Nesman responded to complainant by saying that Mr. Treleven was "just having a bad day." Ms. Nesman refused to listen to complainant's concerns about Mr. Treleven. The Monday following her discussion with Ms. Nesman, complainant transferred to DOC's correctional institution in Waupun, Wisconsin.

3. No contact occurred between complainant and Mr. Treleven for the first eleven months of 1995, despite the fact that complainant returned to DCI in June 1995.

4. Just before November 23, 1995 (just before Thanksgiving Day), Mr. Treleven began to re-initiate unwanted sexual contact and to make unwelcome sexual comments. In November 1995 prior to Thanksgiving (exact date not provided by complainant), complainant spoke with the infirmary supervisor, Lynn Hintz and informed her that Mr. Treleven had been sexually harassing her.

5. As a result of complainant's report to Ms. Hintz, Mr. Treleven was temporarily suspended with pay from DCI while respondent conducted an investigation of complainant's charges. By letter dated December 20, 1995, respondent gave Mr. Treleven a written reprimand and a directive to attend training on the subject of harassment. He was allowed to return to work on December 21, 1995. No further complaints have been filed regarding Mr. Treleven from any female coworker.

6. On November 15, 1995, complainant requested a transfer to DOC's Taycheedah Correctional Institution (TCI). The transfer action report was signed by the hiring authority on November 22, 1995, with an effective date of November 23, 1995. Complainant requested the transfer in an attempt to distance herself from Mr. Treleven's harassing actions,[3] although she did not tell respondent this was why she requested the transfer.

7. As part of respondent's investigation (referred to in ¶5 above), Ms. Hintz was interviewed in or about the first week in December 1995. Ms. Hintz recounted at the interview in December 1995, that in or around May or June 1995, complainant spoke with Ms. Hintz saying that an incident happened at DCI involving "this guy" who was permanent and important in the community and who had made

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[1] The correct spelling of this individual's name is unclear. The complaint refers to Ms. Nesman, while the briefs refer to Ms. Mesman.

[2] Respondent disputes that complainant provided notice of the alleged harassment in January 1995.

[3] Respondent contends complainant wanted the transfer to TCI to obtain a shorter drive to work and to be closer to her children. Respondent disputes complainant's allegation that she requested the transfer to distance herself from Mr. Treleven.

sexual advances to complainant which she reported to "a supervisor" but the supervisor said he had a bad day. Ms. Hintz did not work at the same institution as complainant when the conversation took place in May or June 1995 (hereafter, the Prior Conversation). In this Prior Conversation, Ms. Hintz told complainant she would need more details to "go forward", but complainant refused to provide them. In this Prior Conversation, Ms. Hintz advised complainant that she could go to respondent's Affirmative Action Office to seek relief. Complainant did not follow through with this suggestion. Complainant did not include an allegation of discrimination in her complaint regarding her Prior Conversation with Ms. Hintz.

## OPINION

Claims of discrimination must be filed within 300 days after the alleged discrimination occurred. §111.39(1), Stats. The first issue for resolution is to determine when the complaint was filed.

Neither party argued that the filing date is September 9, 1996, when the complaint was filed with ERD in DILHR. Nor would such suggestion be consistent with Commission rules defining the filing date as the date of Commission receipt of the document (§PC 1.02(10), Wis. Adm. Code), or with prior decisions. *Ziegler v. LIRC*, 93-0031-PC-ER, 5/2/96.

The remaining filing-date options are September 20, 1996, when the Commission received the complaint form sworn to by complainant's attorney; or October 9, 1996, when the Commission received the complaint form sworn to by complaint. A review of the Commission's prior cases supports the conclusion that the complaint was filed on the earlier date of September 20, 1996, as the perfected complaint relates back to the initial filing date. *See, e.g., Goodhue v. UW*, 82-PC-ER-24, 11/9/83.

The 300-day period prior to a filing date of September 20, 1996, (hereafter, the Actionable Period) commenced on November 25, 1995. The discriminatory acts alleged in the complaint include: a) subjecting complainant to a hostile work environment, b) failing to impose corrective discipline on the person who harassed complainant, and c) transferring complainant after she complained of the sex harassment. The chart below shows the potential dates associated with each alleged act of discrimination based on the information contained in the complaint.

| Description of Allegation | Related Dates |
|---|---|
| a) subjecting complainant to a hostile work environment. | • November 1993 until January 1995<br>• In November 1993, and ending prior to November 23, 1996 |
| b) failing to impose corrective discipline on the person who harassed complainant. | • January 1995<br>• December 20, 1995 |
| c) transferring complainant after she complained of the sex harassment | • November 22, 1995 |

As noted previously, the Actionable Period commenced on November 25, 1995. The only act alleged in the complaint occurring within the Actionable Period was the alleged failure to impose corrective discipline in December 1995.

Complainant attempts to include actions prior to the Actionable Period as part of her claim arguing that the failure to sufficiently discipline Mr. Treleven in December 1995, was part of a continuing violation of sexual harassment. There must be a discriminatory act during the Actionable Period to sustain a continuing violation theory. *See, e.g., Talfelski v. UW System*, 95-0127-PC-ER, 3/22/96, and *Womack v. UW-Madison*, 94-0009-PC-ER, 7/25/94. Accordingly, the first question to resolve is whether respondent's alleged failure to impose corrective discipline on December 20, 1995, is a cognizable claim under the FEA. Pertinent portions of the governing statutes are shown below. (Emphasis added.)

> **§111.36, Stats. Sex, sexual orientation; exceptions and special cases.**
>
> (1) Employment discrimination because of sex includes, but is not limited to, any of the following actions by any employer . . .
>
> (a) Discriminating against any individual . . . in terms, conditions or privileges of employment . . .
>
> (b) Engaging in sexual harassment; or implicitly or explicitly making or permitting acquiescence in or submission to sexual harassment a term or condition of employment . . .

The Commission concludes that complainant has made a cognizable claim in her allegation that respondent failed to impose adequate discipline for Mr. Treleven in December 1995. The gravamen of this allegation is that without sufficient disciplinary

action the employer sends an implicit message to its workers that actions similar to Mr. Treleven's are an expected or tolerated aspect of the workplace. Although complainant transferred to an institution where Mr. Treleven does not work, she continues to be respondent's employe and subject to respondent's work environment.

The next question to resolve is whether the alleged acts occurring prior to the Actionable Period should be deemed timely filed under a continuing violation doctrine. The continuing violation doctrine allows an employe to obtain relief for an otherwise time-barred act by linking it with an action that occurred within the limitations period. The seventh circuit has provided guidance on application of this doctrine, as noted below. (Citations omitted.)

> The continuing violation doctrine allows a plaintiff to get relief for a time-barred act by linking it with an act that is within the limitations period. For purposes of the limitations period, courts treat such a combination as one continuous act that ends within the limitations period. This court . . . discussed three viable continuing violation theories . . . The first theory stems from "cases, usually involving hiring or promotion practices, where the employer's decision-making process takes place over a period of time, making it difficult to pinpoint the exact day the 'violation' occurred." Courts have tolled the statute in such cases for equitable reasons similar to those underlying the federal equitable tolling doctrine. . . . The second theory stems from cases in which the employer has an express, openly espoused policy that is alleged to be discriminatory . . . The third continuing violation theory stems from cases in which "the plaintiff charges that the employer has, for a period of time, followed a practice of discrimination, but has done so covertly, rather than by way of an open notorious policy . . . In such cases the challenged practice is evidenced only by a series of discrete, allegedly discriminatory, acts." This brand of continuing violation has also been referred to as a "serial violation," and as a "pattern of ongoing discrimination." . . .
>
> Under the third theory, the question is whether, in response to the defendants' motion for summary judgment, [the employe] produced sufficient evidence to establish that there existed a genuine issue of fact whether the defendants' acts were "related closely enough to constitute a continuing violation" or were "merely discrete, isolated, and completed acts which must be regarded as individual violations." The Fifth Circuit has suggested three factors to consider in making this determination:
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> > 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?

This court and others have stressed the significance of the third factor:

> What justifies treating a series of separate violations as a continuing violation? Only that it would have been unreasonable to require the plaintiff to sue separately on each one. In a setting of alleged discrimination, ordinarily this will be because the [employe] had no reason to believe he was a victim of discrimination until a series of discriminatory treatment.

*Selan v. Kiley*, 59 FEP Cases at 778-779.

It is the third theory discussed in *Selan* which potentially has application to Ms. Schultz's case. Complainant's allegation of a hostile work environment from November 1993 until January 1995, is time barred. Complainant in January 1995, had reason to believe she was a victim of discrimination due to the harassment up to that point in time as evidenced clearly by her alleged complaint of the same to Ms. Nesman. Accordingly, complainant had a duty to file a discrimination complaint within 300 days of this period of alleged harassment and her failure to do so is fatal to this claim. Similarly, complainant knew in January 1995, that Ms. Nesman failed to respond to her complaint and such knowledge triggered complainant's duty to file a discrimination complaint within 300 days.

The transfer decision of November 22, 1995, was a discrete event. Complainant alleges she requested the transfer to distance herself from Mr. Treleven's harassing conduct. In short, when her transfer request was granted complainant knew all of the facts which she now advances in support her claim that the transfer was discriminatory. Her failure to file a complaint within 300 days of the transaction is fatal to this claim.

The alleged harassment in November 1995, ended prior to November 23, 1995, the date complainant transferred to a different institution. Again, all of the facts which complainant now advances in support of this discrimination claim were known to her prior to November 23, 1996. Her failure to file a complaint within 300 days of the end of the harassment is fatal to this claim.

The complainant's arguments in opposition to the present motion contained a new allegation that respondent failed to take corrective action in May or June of 1995,

when she discussed the alleged harassment in general terms with Ms. Hintz (as noted in ¶7 of the Findings of Fact.) The Commission treats this new allegation as a request to amend the complaint under §PC 2.02(3), Wis. Adm. Code. As explained in the following paragraph, it is unnecessary for the Commission to determine whether the requested amendment should be granted.

The new allegation regarding complainant's discussion with Ms. Hintz, even if accepted as an amendment, would be subject to dismissal because it was untimely filed. The conversation occurred in May or June 1995. All facts offered in support of this claim were known to complainant at the time the conversation occurred. Complainant had a duty to file a complainant within 300 days of the conversation and her failure to do so is fatal to her right to go forward with the claim.

The only allegation which survives this ruling is the sufficiency of respondent's discipline of Mr. Treleven on December 20, 1995. This remaining allegation will continue through the Commission's investigative process under §PC 2.05 - 2.08, Wis. Adm. Code.

ORDER

That respondent's motion to dismiss be granted in part and denied in part as detailed in this ruling.

Dated: April 2, 1997.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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