

STATE OF WISCONSIN

PERSONNEL COMMISSION

JAMES GANTHER,
Complainant,

v.

**Secretary, DEPARTMENT OF
REVENUE,**
Respondent.

**RULING ON
MOTION TO
DISMISS**

Case No. 97-0152-PC-ER

NATURE OF CASE

This case involves a complaint of disability discrimination in violation of the Wisconsin Fair Employment Act, Subchapter II, Ch. 111, Stats. Respondent has filed a motion to dismiss on the bases of timeliness and failure to state a claim upon which relief may be granted, following complainant's appeal of an initial determination of "no probable cause." Both parties have filed briefs. The following findings of fact are based on information provided by the parties, appear to be undisputed and are made solely for the purpose of deciding this motion.

FINDINGS OF FACT

1. At all times relevant to this matter, complainant has been employed by respondent as a Revenue Agent.
2. During the fall of 1996, respondent reorganized its operation. The reorganization included moving the Sales Tax Office Audit Unit—where complainant worked—from the Compliance Bureau to the Audit Bureau, and renaming it "Office Audit Unit K." At that time, there were 9 Revenue Agents in the Sales Tax Office Audit Unit. It was decided to assign seven agents with the most seniority in their pay range to the renamed "Office Audit Unit K." The least senior position incumbent in each pay range (ranges 11, 12, 13) remained in the Compliance Bureau. Complainant

was the least senior Revenue Agent in pay range 13 and was one of two agents who remained in the Compliance Bureau after the reorganization.

3. The seven positions reassigned to the Audit Bureau were reallocated to Revenue Auditor 2 or 3 classifications. There were no pay changes.

4. On September 27, 1996, complainant was notified that he would remain in the Compliance Bureau and be reassigned to the Vehicle Review Unit. The reassignment was effective on October 13, 1996.

5. Between October 1996 and July 1997, complainant expressed interest in any openings in the Office Audit Unit K to certain supervisors. These supervisors informed complainant there were no openings in Revenue Auditor positions in Office Audit Unit K at that time.

6. Complainant first identified himself as "handicapped" in August 1997 when he completed the "Disability Self-Identification Survey." Complainant did not identify the disabling condition and stated he needed "no special help" for his disability.

7. On October 22, 1997, complainant filed a charge of discrimination with the Personnel Commission, alleging respondent discriminated against him on the basis of disability in regard to the following:

- a) a paid administrative leave from June 13 through September 1996;
- b) a requirement, stated in a letter to complainant dated July 26, 1996, that he submit to a psychological examination;
- c) a disciplinary suspension without pay for three days in August 1996;
- d) failure to be reassigned/reallocated to a Revenue Auditor position in the Audit Bureau as a result of the department reorganization; and
- e) failure to be "rehired" into a Revenue Auditor position in the Audit Bureau between October 1996 and July 1997.

8. On August 25, 1998, the Commission's investigator issued an Initial Determination of "non-substantive" no probable cause to allegations a), b), c), and d), because the complaint was untimely. Regarding allegation e), the investigator concluded, "some of complainant's inquiries . . . made outside the actionable period . . .

. would be considered timely based on the application of the continuing violation theory.” However, the investigator found “no probable cause” because the available information did not demonstrate that there was a vacant position in Office Audit Unit K to which complainant could have been appointed.

9. On September 22, 1998, complainant appealed the Initial Determination of “no probable cause” to the Commission.

OPINION

Timeliness

This action was filed under the Wisconsin Fair Employment Act (WFEA), Subchapter II, Ch. 111, Stats. Section 111.39(1), Stats. provides, “The [Commission] may receive and investigate a complaint . . . if the complaint is filed . . . no more than 300 days after the alleged discrimination . . . occurred.” Here the 300-day actionable period is from December 26, 1996, through October 22, 1997.

Complainant does not dispute that allegations a) through c) occurred prior to December 26, 1996, but argues that his complaint was timely filed based on a continuing violation theory. The Commission rejects this argument. Under the continuing violation theory, a complainant is allowed relief for a time-barred act by linking it with an act within the actionable period. *Selan v. Kiley*, 59 FEP Cases 775, 778 (7th Cir. 1992). Under the continuing violation theory as applicable to this matter¹, the question is whether allegations a) through c) related closely enough to some action within the actionable period to constitute a continuing violation or were “merely discrete, isolated, and completed acts which must be regarded as individual violations.” *Berry v. Board of Supervisors of L.S.U.*, 715 F.2d 971, 981, 32 FEP Cases 1567 (5th Cir. 1983).

In *Berry*, three factors were considered relevant to the determination of this question:

¹ For a full discussion of the continuing violation doctrine, See *Stewart v. CPC Internation, Inc.*, 679 F.2d 117, 33 FEP Cases 1680 (7th Cir. 1982).

Do the alleged acts involve the same type of discrimination, tending to connect them to a continuing violation? . . . Are the alleged acts recurring (e.g. a bi-weekly paycheck) or more in the nature of an isolated work assignment or employment decision? . . . [P]erhaps of the most importance, is . . . Does the act have the degree of permanence which would trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employer that the continued existence of the adverse consequences of the act is to be expected without being dependent on the continuing intent to discriminate?

Applying these three factors to complainant's allegations a), b) and c), it is concluded they were not recurring but instead were isolated employment decisions, and that the nature of each of these acts demonstrates "a degree of permanence" which should have caused complainant to recognize the need to assert his rights or lose them. Therefore allegations a), b) and c) do not qualify for application of a continuing violation theory.

Also, complainant argues that all allegations linked to the reorganization of the department, which is the focus of allegation d), should be considered timely filed, since the reorganization was not finally approved until some time in January of 1997. As this argument relates to complainant's continuing violation theory in regard to allegations a), b), and c), it is not persuasive since a), b), and c) are not sufficiently linked to the reorganization. As this argument relates to the timeliness of allegation d), the Initial Determination concluded as follows:

In regard to allegation d), above, complainant argues that, since the reorganization which resulted in the reassignments to the Audit Bureau was not finally approved until some time in January of 1997, the complaint was timely filed as to this allegation. However, under the facts present here, the date of notice, not the effective date of the underlying reorganization, would govern. *Hilmes v. DILHR*, 147 Wis. 2d 48, 433 N.W.2d 251 (Ct.App.1988). Complainant was notified on or around September 27, 1996, that his position would remain in the Compliance Bureau. Since this was not during the actionable period, it is concluded that the complaint was not timely filed as to this allegation.

This rationale and conclusion are adopted here.

Finally, in regard to allegation e), although some of complainant's inquiries were made outside the actionable period, it is concluded that they would be considered

timely filed based on the application of a continuing violation theory. However, allegations a), b), c), and d) are not sufficiently linked to allegation e) to render them timely based on the timeliness of e).

Failure to State a Claim

Respondent asserts that “complainant is not a ‘handicapped’ person under the Wisconsin Fair Employment Act nor a ‘disabled’ person under the Americans with Disabilities Act [ADA]² and thus not a member of a protected class, has no standing to bring this action against the respondent and has failed to state a claim upon which relief can be granted.” In making this claim, respondent presents two arguments.

First, respondent argues that complainant is not a disabled person under the WFEA or ADA, has no record of being disabled, never identified himself as “disabled” until August 1997 when he completed the “Disability Self-Identification Survey,” has never identified his disability to respondent or provided a certification from his health care provider identifying his disability, has never requested any accommodation for his alleged disability, and is not perceived by respondent as having a disability. In support, respondent cites *McDonnell-Douglas v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 5 FEP Cases 965 (1973) (“the initial burden of proof is on the complainant to show a prima facie case of discrimination”), *Figueroa v. DHSS [DHFS]*, 95-0116-PC-ER, 3/11/98 (“describe[s] the handicap discrimination analysis”), WFEA, §111.32(8), Stats., and ADA, 42 USC §12111(8). Complainant’s claim of disability, respondent argues, is based on respondent’s independent psychological evaluation dated September 16, 1996. Respondent alleges the report supports the position that complainant was not disabled or handicapped. Also, affidavits were submitted by respondent from Messrs. Davis and Frazier, and Ms. Papenfuss, management personnel who complainant alleges perceived him to have a mental impairment. The question of whether complainant should be

² The Personnel Commission does not have jurisdiction under the ADA.

considered disabled within the meaning of the Fair Employment Act, however, involves a factual dispute not susceptible to resolution at this point in these proceedings.

Respondent's second argument specifically addresses complainant's claim in allegation e) that respondent failed to "rehire" him into a Revenue Auditor position in the Audit Bureau between October 1996 and July 1997. Respondent argues this allegation should be dismissed because no adverse actions were taken; there is no basis for alleging discrimination on the basis of handicap or disability; and, even if the Commission were to determine that a vacant position existed, albeit disputed by respondent, complainant failed to comply with prerequisite requirements to have his name included as an eligible candidate until June 1997, when he completed a union contractual form that entitled him to consideration for other Revenue Agent 3 positions, but no Revenue Auditor positions in the Audit Bureau. In support, respondent directs attention to the affidavits of Gregg Frazier, who made the reassignment decision at issue; Supervisor of Audit Unit K, Jean Papenfuss, who attested to no opening in the unit and advised complainant to seek assistance from personnel on transfer eligibility; and Human Resource Specialist Terri Wilke, who attested to the transfer process and complainant's failure to comply with application requirements for transfer to Revenue Auditor positions.

However, since complainant continues to assert that there was a vacant position in the Audit Bureau to which he could have been appointed between October of 1996 and July of 1997, there remains a dispute of fact which can only be resolved by a hearing on these matters.

Although respondent has characterized the instant motion as one for failure to state a claim for relief, it was actually argued in a manner more akin to a motion for summary judgment. A conclusion that complainant failed to state a claim would be appropriate if, accepting as true the facts alleged by complainant, it could not be concluded that complainant would be able to prevail on the merits. *See, e.g., Elmer v. DATCP*, 94-0062-PC-ER, 11/14/96. Here, if it is assumed that, as complainant has alleged, he was disabled and there were vacancies in Revenue Auditor positions in the

Audit Bureau during the relevant time period for which complainant applied but to which he was not appointed, it could not be concluded that complainant would not be able to show he was the victim of disability discrimination. As a result, respondent's motion to dismiss for failure to state a claim should be denied.

CONCLUSIONS OF LAW

1. This matter is before the Commission pursuant to §230.45(1)(b), Stats.
2. Complainant has the burden to show that this complaint was timely filed.
3. Complainant has satisfied this burden as to allegation e) but not as to allegations a), b), c), or d).
4. Respondent has the burden to show that this complaint should be dismissed for failing to state a claim.
5. Respondent has not satisfied this burden.

ORDER

Respondent's motion to dismiss complainant's allegations of discrimination a) through d) as untimely filed is granted. Respondent's motions to dismiss complainant's allegation of discrimination e) for failure to state a claim and for untimely filing are denied.


Dated: April 21, 1999.

DRM:rjb:970152Cru1.2

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner