STATE OF WISCONSIN PERSONNEL COMMISSION

DENNIS J. SHESKEY,
Complainant,

v.

Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS,
Respondent.

Case No. 98-0054-PC-ER

RULING ON PETITION FOR REHEARING

NATURE OF THE CASE

On June 3, 1998, the Commission granted respondent's motion to dismiss this Family and Medical Leave Act (FMLA) case on the grounds of untimely filing and failure to state a claim, and issued a final decision and order which was served on June 5, 1998. This case is now before the Commission on a petition for rehearing filed on June 25, 1998.

OPINION

Complainant's petition advances a number of arguments in support of a rehearing. He seeks to distinguish his case from several Commission cases involving the statute of limitations issue: *Oestreich v. DHSS & DMRS,* 89-0011-PC-ER, 9/8/89; *Welter v. DHSS,* 88-0004-PC-ER, 2/22/89; *Schroeder v. DHSS & DER,* 85-0036-PC-ER, 11/26/86; and *Kimble v. DILHR,* 87-0061-PC-ER, 2/19/88. Complainant argues as follows:

> 1. At the time of my [performance] review on 2/1/95, there is no evidence of being subject to an adverse employment action or actions.
> -My overall Performance Evaluation Form (PEF) indicated my work was satisfactory.
> -I successfully completed my permissive probation.
> -I was granted Family Leave according to both Federal and State regulations.
> -No negative actions or comments were directed at me concerning my taking Family Leave.

> 2. My case involves additional future employment actions that I could not have possibly foreseen at the time. Just as in *Sprenger v. UWGB,* I could not have known that changes would be made to my performance review and that I would be denied my restoration rights . . . .
>
> 3. If it is determined that the PEF notation is a violation of the FMLA, its continued presence must therefore be a continual [sic] violation. Even with it crossed out, it is still readable to anyone who is predisposed to discriminate against someone who has and may again exercise their rights under the FMLA. . . .
>
> 4. If it is determined that the PEF notation is a violation of the FMLA, the altering of the evidence must also be ruled a continuing violation. . . .

Petition for rehearing, pages 1-2.

Complainant's contention that at the time of his layoff he had no basis to have believed that he had been discriminated against prior to and at the time of the layoff is inconsistent with material in both his complaint and his brief in opposition to respondent's motion to dismiss.

In his complaint, complainant states that at the time of his July 7, 1995, performance review, he "strongly argued about my evaluation and the work environment in general. I stated I would bring a separate sheet of my comments to our results session."[1] The complaint further states: "I also told Jean that I would be taking family leave sometime in February and would need more time than the last time. For the next two and a half weeks I was given the silent treatment." Complainant then alleges that on July 26, "I stated I could not endure the environment anymore and could we discuss during my performance result session about the possibility of me being laid off or working half-time." Furthermore, in his brief in opposition to the motion to dismiss, complainant asserts that in addition to the entry on his PEF, he was also retaliated against for taking FMLA leave with respect to being restricted "to using 5 days of sick time for taking FMLA," and being given impossible tasks to perform.

[1] Complainant was laid off prior to the results session.

These allegations directly conflict with complainant's assertion in the petition for rehearing that "[n]o negative actions or comments were directed at me concerning my taking Family Leave."

Complainant also contends that, unlike the cases cited above, his situation did not involve learning additional information about the personnel transaction or transactions in question after the fact, but rather involved learning of "future employment actions that I could not have possibly foreseen at the time." The only future employment actions which occurred after complainant's layoff were the alleged failures of restoration. He attempts to compare his case to *Sprenger v. UWGB,* 85-0089-PC, 7/24/86. He argues that, like Mr. Sprenger, he had no way of knowing his layoff was improper until he later learned of subsequent personnel transactions—in *Sprenger,* the filling of complainant's position by the appointment of a younger person; in this case, the failure to effectuate complainant's restoration rights. The Commission effectively addressed this argument in its decision on the motion to dismiss, as follows:

> According to complainant, he had formed the opinion he was being subjected to a hostile environment prior to his layoff on August 18, 1995. A person with a reasonably prudent regard for his or her rights under similar circumstances would not have waited until February 19, 1998, to make an inquiry relative to his employment rights. Just as with respect to his claim regarding the performance evaluation, this situation is materially different than the situation in *Sprenger v. UWGB,* 85-0089-PC-ER, 7/24/86. In that case the complainant had no reason to have suspected age discrimination at the time of his layoff. A person with a reasonably prudent regard for his or her rights would not have been concerned about age discrimination until he or she had learned that his position, which ostensibly lacked funding, had been filled by a younger person. Pages 7-8.

As noted above, complainant refers at several points in his complaint and earlier brief to alleged acts of retaliation in connection with his FMLA leave use that occurred prior to his layoff. Complainant argues that the complainant in *Sprenger* was similar, in that Mr. Sprenger must have had some doubts about the legitimacy of his layoff because he had filed a contractual grievance concerning his layoff. However, there is nothing in

the *Sprenger* decision to suggest that the contractual grievance had anything to do with age discrimination.[2]

> The Commission's original decision also contains the following:
>
> > Complainant also alleges as retaliatory that: "I was restricted to using 5 days of sick time for my Family Leave and had to use other leave time for the remainder." Any requirement that he could only use 5 days of sick leave was known to complainant at the time (1994). He says in his complaint that he was preoccupied "and didn't notice the connection until recently." This provides no possible basis for tolling the statute of limitations on this allegation. Page 7.

Complainant asserts with regard to this point that his complaint was grossly misinterpreted due to "poor sentence structure," and offers the following:

> > I was referring to the connection between the reference in my log to substandard performance and the fact it occurred within the first five days of my taking family leave. I could not have known it was the first reference without reviewing my log. I made the connection after reviewing my log in writing my original complaint. Petition for rehearing, p. 4.

Complainant's modification of his complaint does not lead to any different result. Complainant obviously knew at the time he made the entry in his log that the reference to substandard performance had occurred after his use of FMLA leave. That complainant did not make the connection between the reference to substandard performance and his use of FMLA leave until he reviewed his log three years later does not change this. That complainant may have been preoccupied at the time still does not provide a basis either for tolling the statute of limitations or otherwise concluding his complaint should be considered timely filed

Finally, the Commission will address complainant's continuing violation theory. With respect to the notation on his evaluation, complainant argues in his petition that this is a continuing violation because "[e]ven with it crossed out, it is still readable to anyone who is predisposed to discriminate against someone who has and may again

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[2] The reference in *Sprenger* to the complainant's pursuit of a contractual grievance was contained in a quotation from the respondent's brief.

exercise their rights under the FMLA." The Commission does not agree that the notation gives rise to a continuing violation. To the extent it arguably could contribute in some way to future discrimination against complainant, this would be a subsequent damage from the notation, not a continuing violation, *see, e.g., Junceau v. DOR & DP,* 82-0112-PC, 10/14/82. The Commission reaches the same conclusion as to complainant's argument that the altering of the evaluation is itself a continuing violation. Complainant further argues that the change in his work assignment constitutes a continuing violation. The Commission will not address the issue of whether this is a continuing violation, because even if it were, it could not continue in time past the date of Complainant's layoff on August 18, 1995.

In conclusion, since complainant has not established a material error of fact or law or the "discovery of any new evidence sufficiently strong to reverse or modify the order, and which could not have been previously discovered by due diligence," §227.49(3), Wis. Stats., his petition for rehearing must be denied.

ORDER

Respondent's petition for rehearing filed June 25, 1998, is denied.

Dated: July 22, 1998.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

JUDY M. ROGERS, Commissioner

AJT:980054Crul2

Parties:
Dennis J. Sheskey
217 Gilman St
Verona WI 53593

Jon E Litscher
Secretary, DER
PO Box 7855
Madison WI 53707-7855

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