STATE OF WISCONSIN PERSONNEL COMMISSION

DENNIS J. SHESKEY,
Complainant,

v.

Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS,
Respondent.

Case No. 98-0054-PC-ER

RULING ON MOTION

NATURE OF THE CASE

In his charge of discrimination, filed on March 9, 1998, complainant alleged both violations of the FMLA (Family and Medical Leave Act; §103.10, Stats.) and Whistleblower Law (Subchapter III, Chapter 230, Stats.). For reasons of administrative convenience, complainant's whistleblower claims were assigned Case No. 98-0063-PC-ER, while his FMLA claims were assigned Case No. 98-0054-PC-ER. On April 3, 1998, respondent filed a motion to dismiss the FMLA allegations (Case No. 98-0054-PC-ER) on the basis of timeliness and failure to state a claim. Both parties have filed briefs on this motion. This ruling does not address complainant's whistleblower case.

DISCUSSION

This complaint of discrimination includes the following allegations:

> I was laid off by DER on the 18th of August 1995. At the time, I believed my layoff was just because I had requested it, I believe now that my layoff was directly related to avoiding attention to DER's practices which they felt I would find out and expose. If I had called attention to the problems with the AAIS reports, its other illegal practices would have been exposed. This is further suggested by filling positions where I should have at least been given a chance at reinstatement. After notifying DER of my desire to have access to certain documents, the actions seem designed to obstruct my efforts. With the limited resources

I have, it seems apparent that DER engaged in a pattern of illegal activity. If you examine the AA reports and the Veteran reports closely, you will find errors big and small. This is the tip of the iceberg that DER thought I would expose because of my frustration with the lack of management's concern of a serious problem. The entry of October 10, 1994 indicates a potential for an even more serious problem. Also since I mentioned needing more time for Family Medical Leave and I most likely would have found that I was previously discriminated against. . . .

The other incident which I believe now was discriminatory concerning my taking Family Leave for the daughter of my child.

11/11 Dennis said my performance was marginal, used the cheshire labels as an example, felt I should be as productive as Leeann even though I have no Unisys training and no in-house experience, said he will develop a performance review for me and will work closely with me to insure I am judged fairly on my performance, said I will be judged on my performance only.

According to my log, this is the first direct reference to my performance being sub-standard. This happened after I took 5 days off following the birth of my child on a Saturday. I also was told I could only use 5 of my sick days for family leave and would have to use vacation time after that. As this was one of my days off and being shortly after my daughters birth, I was preoccupied and didn't notice the connection until recently.

On February 1, 1995, I was given a four month review. When I questioned whether it was appropriate to subtract my family leave time, Dennis told me its legal along [sic] as I worked less than half time during the period. I didn't question it further as I assumed DER knew its own rules and would follow them. At the time I was more concerned by the fact, I wasn't supported or provided training from either Bill or Leeann. This is reinforced by the fact all negative comments are connected to receiving assistance. Please note the review has no area for employee comments. After signing my performance review which clearly indicated a 4 month review, someone crossed out the notation concerning my family medical leave. The initials J.P. are present (Joseph Pellitteri?) at three locations while my [initials] are only present at two.

While I could find no written standards or rules, If feel now that I was mislead about having to use my sick time and that it was appropriate to not include my leave time in my evaluation period. I am fairly confident there is neither an authorizing policy or a standard practice for this type

of behavior. Furthermore the fact I took Family leave should not be information contained in a performance evaluation nor should it have been considered relevant to my review.

I believe Mr. Pellitteri changed the documents after my initials and signature to lessen the risk of a family leave discrimination charge. . . .

My next performance review was on July 7, 1995. At the time I signed it, I was told we would discuss my actual performance at another time. At the time, I 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. I could find no logical answer for the discrepancies and told Jean that the AAIS system needs to be redone. I stated printing information you know is inaccurate had to be illegal. I also told Jean that I would be taking family leave sometime in February and would need more time off than last time. For the next two and a half weeks I was given the silent treatment. On July 26, the day after an interview, 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. On that Friday the 28th, I asked Jean when we were going to have the results session and was told Monday morning. First thing Monday morning I was told of my lay-off and told according to policy I had to be escorted off the property immediately but that I would remain in pay status until August 18th.

Needless to say I was shocked at the abruptness, however, I felt there was nothing sinister concerning the process. While I knew Dennis Carol was told at least 6 months in advance that he would be laid-off and I also was told by Kathryn Moore that her position was at risk, I had no reason to believe my lay-off wasn't appropriate. After finding out that a lay-off plan is part of the lay-off process, I found some interesting information. . . .

Elaine Zimmerman transferred into my position implying my position was reallocated downwards and I should have been recalled from lay-off. On 6/23/97 she transferred again into my position. Also the PD is marked initially "requested allocation," however, that is crossed over and replaced by transfer.

Also a MIT 2 and IS Profession Entry position were filled in June and July 97 without my being notified.

The FMLA provides at §103.10(12)(b), Stats.:

> An employe who believes his or her employer has violated sub. (11)(a) or (b) may, within 30 days after the violation occurs or the employe should reasonably have known that the violation occurred, whichever is later, file a complaint with the [Commission] alleging the violation.

In his complaint and his brief in opposition to this motion to dismiss, complainant has identified a number of matters included in his charge of FMLA discrimination.

The first claim involves his performance evaluation signed in January and February 1995, which at the time it was signed by complainant and his supervisor had as part of the "Period Covered by Appraisal" the following: "Family Medial [sic] Leave 11/7/94 to 12/5/94." When complainant reviewed this form (on February 19, 1998) pursuant to his open records request, he found the reference to the "Family Medial Leave 11/7/94 to 12/5/94" crossed out, with the accompanying initials JP (Joseph Pelliteri, a member of DER management).

This evaluation was completed in early 1995, and this claim is clearly untimely as measured from the date of the alleged FMLA violation. The question then, is whether the complaint was timely filed in the context of the following language in §103.10(12)(b), Stats.: "within 30 days after . . . the employe should reasonably have known that the violation occurred."

Complainant contends that it was not reasonable for an employe to have known prior to February 19, 1998, when he first saw Pelliterri's notation striking out the reference in the performance evaluation to complainant's FMLA leave, that there had been a violation of the FMLA.

Complainant clearly knew as of February 1, 1995, when he signed the performance evaluation, that it contained the notation regarding his FMLA leave. In his complaint he states as follows:

> On February 1, 1995, I was given a four month review. When I questioned whether it was appropriate to subtract my family leave time, Dennis told me its legal along [sic] as I worked less than half time during

> the period. I didn't question it further as I assumed DER knew its own rules and would follow them.

In his complaint, complainant further alleges that "I believe Mr. Pelliteri changed the documents after my initials and signature to lessen the risk of a family leave discrimination charge." He also states in his brief that "[t]he fact that apparently Mr. Pelleteri crossed out the notation and 'postdated' the changes by signing it twice, signaled to me the importance of its documented evidence of discrimination."

The question is whether a person similarly situated to complainant with a reasonably prudent regard for his or her rights would have made the inquiry necessary to determine whether his or her rights provided by the FMLA were violated because of the performance evaluation when he first saw the evaluation. At that time, complainant knew he had taken FMLA leave and he knew the contents of the evaluation. Normally, when a person is faced with a discrete personnel transaction, he or she has a responsibility to make any necessary inquiry to determine whether the transaction was illegal. *See, e.g. Oestreich v. DHSS & DMRS*, 89-0011-PC, 9/8/89:

> The general rule is that when a "reasonably prudent" person is affected by an adverse employment action such as a disciplinary action, denial of reclassification, failure to promote, etc., he or she could be expected to make whatever inquiry is necessary to determine whether there is a basis for believing discrimination occurred. In *Sprenger*, there obviously was no way complainant could have known at the time of his layoff that his position would be filled later by a younger person. However, in most cases an employe must look into the transaction at the time it occurs. *See, e.g., Welter v. DHSS,* 88-0004-PC-ER (2/22/89).

When complainant saw his evaluation again in 1998 and saw the reference to his FMLA leave crossed out, he states that this was when he realized that his evaluation had been illegal under the FMLA. However, this was an inference he drew from what he perceived as an attempt by Mr. Pelleteri to "lessen the risk of a family leave discrimination charge." At the time he saw the evaluation on February 1, 1995, the facts that would give rise to his allegation of an FMLA violation were apparent on the face of the evaluation. Seeing Mr. Pelliteri's change in the document amounted to a

catalyst for a determination by complainant that he had been discriminated against. The general rule is that "the statute of limitations begins to run from the date of the discriminatory transaction, not from the date the complainant decides the transaction was illegal or discriminatory." *Schroeder v. DHSS & DER,* Case No. 85-0036-PC-ER, 11/12/86. This is not a case like *Sprenger v. UWGB*, Case No. 85-0089-PC-ER, 7/24/86, where at the time of his layoff the complainant had no way of knowing that his position would later be filled by a younger person, and at the time of his layoff he had no reason to have questioned the respondent's explanation that his position was being eliminated. In the instant case, complainant asserts in his complaint as follows:

> On February 1, 1995, I was given a four month review. When I questioned whether it was appropriate to subtract my family leave time, Dennis told me its legal along as I worked less than half time during the period. I didn't question it further as I assumed DER knew its own rules and would follow them. . . . While I could find no written standards or rules, I feel now that I was mislead about having to use my sick time and that it was appropriate to not include my leave time in my evaluation period. I am fairly confident there is neither an authorizing policy or a standard practice for this type of behavior. Furthermore the fact I took Family leave should not be information contained in a performance evaluation nor should it have been considered relevant to my review.

Again, the entries that give rise to complainant's charge were all apparent on the face of the performance evaluation when complainant signed it on February 1, 1995.

In his brief in opposition to this motion, complainant argues that the original performance evaluation is not the full extent of his claim:

> [Respondent's] contention that the violation consisted solely of the notation on my PEF [performance evaluation form] is in error. The fact that Mr. Pelliteri crossed out the notation and "postdated" the changes by signing it twice signaled to me the importance of its documented evidence of discrimination.

However, that the change in the evaluation may have "signaled" something to the complainant does not make it part of a cognizable claim. That is, while respondent arguably violated the FMLA by including the notation concerning complainant's FMLA

leave in his performance evaluation, the deletion of the allegedly improper comment cannot also amount to a violation of the FMLA.

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.

In his brief, complainant also alleges retaliation in being given a "nearly impossible task" as part of his work assignments, but again has not provided any basis for tolling the statute of limitations as to this aspect of his complaint. Obviously, complainant knew prior to his layoff/constructive discharge about the change in his work assignments.

Complainant's claim with respect to his layoff per se is also plainly untimely. Complainant has not alleged there is anything that he needed to know to have made this claim in 1995 that he either didn't know in 1995 or couldn't have found out about if he had made inquiry at that time. Furthermore, complainant alleges in his complaint that he felt he was in a hostile environment at the time he requested layoff: "On July 26 [1995], 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." Complainant's perception of a hostile environment reinforces the conclusion that a person with a reasonably prudent regard for his or her rights, similarly situated to complainant, either would have known the facts necessary to have filed a claim, or would have made additional inquiry to attempt to ascertain those facts.

Complainant also alleges respondent denied him his recall rights. The potential operative dates of personnel transactions which arguably involved a violation of his recall rights occurred more than 30 days prior to the filing of this complaint. 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 recall rights. Just as with respect to his claim concerning 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. The present case is more similar to *Kimble v. DILHR*, 87-0061-PC-ER, 2/19/88, where the complainant had formed the belief as of July 25, 1985, that his supervisor was discriminating against him, and the Commission held he should not have waited until January 1988 to inquire about coworkers' salaries.

ORDER

Respondent's motion to dismiss is granted and Case No. 98-0054-PC-ER is dismissed.

Dated: June 3, 1998.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

AJT:rjb:980054Crul1.2

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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.)