

STATE OF WISCONSIN

PERSONNEL COMMISSION

BARBARA MEYER,
Complainant,

v.

**Chancellor, UNIVERSITY OF
WISCONSIN-MADISON,**
Respondent.

**RULING ON
MOTION TO
DISMISS**

Case No. 98-0103-PC-ER

NATURE OF CASE

This case involves a complaint of disability discrimination and retaliation in violation of the Wisconsin Fair Employment Act (WFEA), Subchapter II, Chapter 111, Stats., and the whistleblower law, §230.80, et seq., Stats. Respondent filed a motion to dismiss the allegations of whistleblower retaliation on the basis of being untimely filed. Both parties have filed written arguments. The following findings of fact do not appear to be disputed, and are made solely for the purpose of deciding this motion.

FINDINGS OF FACT

1. On May 21, 1998, complainant, Barbara Meyer, filed a complaint of discrimination and retaliation based on the WFEA and whistleblower law against the University of Wisconsin-Madison, the respondent. An amended complaint was filed June 19, 1998.
2. Complainant has been employed by respondent as a reference librarian in its law school since 1975.
3. In 1987 complainant requested that respondent ban smoking in the law school library because the smoke affected her allergies and respiratory problems.
4. Complainant never gained relief from the smoke until 1989, when she was transferred to the evening and weekend shift.

5. Complainant alleges she was transferred to the evening and weekend shift in retaliation for her participation in efforts to achieve gender equity.

6. Construction of a new law library started in the summer of 1994. In early 1995 complainant made a request to law library supervisors Sue Center and Bill Ebbott to accommodate her dust-related health problems by transferring her to a temporary law student lounge in Bascom Hall and establishing a satellite library during the construction. The request was denied by the Executive Committee of the Law Library, consisting of library administrators Center, Ebbott, Kenneth Davis (complainant's immediate supervisor) and Nancy Paul.

7. On January 26, 1995, complainant requested a medical leave of absence for the period of February 1, 1995, through June 30, 1995, because she suffered from asthmatic bronchitis and allergies, and these conditions were being aggravated by construction dust in the law school library. This request was approved.

8. In June 1995, respondent granted complainant permission to extend her leave of absence through August 31, 1996.

9. Again in August 1996, complainant requested and was granted an extended leave of absence through January 1, 1997.

10. In early fall of 1996, complainant informally requested the accommodation of a post-construction cleaning of levels one through five of the library, including the use of high efficiency vacuum cleaners with microfilters on the library materials; and regular and thorough cleanings to control workplace dust. Later that fall, complainant proposed to return to work and work on each floor of the library as it was cleaned.

11. By letter dated December 30, 1996, from the Assistant Dean of the law school, complainant was advised that post-construction had started and it was anticipated to be completed by February 1, 1997.

12. Complainant returned to work on January 2, 1997. At the request of the law school, complainant formalized her request by submitting a disability accommoda-

tion request form to Nancy Maltz, Disability Consultant for respondent's Equity and Diversity Resource Center.

13. By letter dated January 15, 1997, respondent was advised by complainant's internist that complainant continued to suffer from severe environmental allergic reactions and could not return to work until the work place was clean and dust free.

14. Complainant ceased working after January 20, 1997, and respondent granted her a medical leave through July 15, 1997.

15. In February 1997, Dr. Bertrand, an industrial hygienist, recommended complainant be transferred to a library where dust levels were lower or that she wear a respirator.

16. By letter dated May 5, 1997, respondent advised complainant it was premature to look for a position elsewhere, as a decision on her accommodation request had not been made.

17. By letter dated June 3, 1997, UW Law School Assistant Dean Correales summarized respondent's approval of complainant's accommodation request. Correales recommended that complainant consider the possibility of a respirator with her allergists. The letter included information regarding improvements in respirator technology. Complainant was informed that minor construction continued in the library.

18. In mid-September 1997, complainant received correspondence from Nancy Maltz, respondent's Disability Consultant, informing complainant that all additional clean-up had been completed and further efforts to clean the library were unlikely.

19. Subsequently, further contacts regarding accommodation for complainant took place between counsels for complainant and respondent, until negotiations ended on March 16, 1998. On March 16, 1998, counsel for respondent advised complainant's attorney that no settlement offer would be made.

20. On March 25, 1998, complainant wrote Chancellor Ward describing the nature of her case and stating that respondent's attorney said no settlement offer would

be made. Complainant stated in the letter that she believed the matter should be settled and without "accommodation or negotiation," she would file suit.

21. Chancellor Ward responded (to the letter described in the prior paragraph) by letter dated April 24, 1998, which contained the following text:

This letter is in response to your correspondence of March 25, 1998. I understand from your letter that you are represented by an attorney in regard to your alleged claims. As such, the Office of Administrative Legal Services is the appropriate contact for discussions of possible resolutions. I have no reason to believe anyone in that office has handled this situation inappropriately and request that all future correspondence in this matter be sent directly to Lisa Massman, Associate University Legal Counsel. I also encourage you to share with her any specific information regarding the difficulties you may have experienced which have led to your claims.

OPINION

The charges of whistleblower retaliation referenced by complainant that respondent asserts should be dismissed for untimeliness, pursuant to §230.85(1), Stats., include:

1. In 1989 complainant's supervisor transferred her to the evening and weekend shift.
2. In or around May of 1997, Mr. Steven Lund, Academic Personnel Officer, allegedly informed complainant that her request for a transfer to another library was impossible because she "came with too much baggage" from her participation in gender equity efforts.
3. In 1995 complainant's supervisors denied her request for transfer to her proposed satellite library in Bascom Hall.

Complainant contends respondent relies exclusively on §230.85(1), Stats., for its argument for dismissal of her charges of retaliation, but that she timely filed such charges under the WFEA (§111.375(2), Stats.), and, consequently, the 300-day time limit under §111.39(1), Stats. for filing alleged discriminatory acts and not the 60-day requirement, as argued by respondent, under §230.85(1), Stats., is applicable.

Also, complainant contends her charges of retaliation fall within the 60-day-time limit of the whistleblower statute §230.83(1), Stats.) because she did not believe she was a victim of retaliation until reading UW-Madison Chancellor Ward's letter of April 26, 1998; and under the continuing violation theory with respect to respondent's failure to transfer her to a position in another library.

Complainant also contends, even if she failed to comply with the 60-day time limit of the whistleblower law, respondent is barred from asserting the 60-day limitation on the basis of the doctrine of equitable estoppel. Complainant alleges "respondent never unequivocally foreclosed" the possibility of meeting her requests for accommodation until March 16, 1998.

In rebuttal, respondent states that its motion to dismiss pertains only to those portions of the complaint regarding whistleblower retaliation, which were linked to complainant's gender equity efforts "as early as 1987 and allegedly into 1989." Respondent argues that if complainant believed the actions of Sue Center and Bill Ebbot in 1995, denying her request for accommodation, were caused by her gender equity claims and were retaliatory, then she should have filed a complaint within 60 days from that initial action. However, complainant filed her complaint three years later....Further, respondent argues complainant has provided no law to support her contention that claims of whistleblower retaliation are subject to the theory of continuing violations.

A whistleblower complaint must be filed within 60 days "after the retaliatory action allegedly occurred or was threatened or after the employe learned of the retaliation action or threat thereof, whichever occurs last," as noted in §230.85(1), Stats. Complainant filed her discrimination/retaliation complaint against respondent with the Commission on May 21, 1998. Even considering complainant's continuing violation theory and equitable estoppel arguments, a reasonable person would have known as of March 16, 1998, that respondent was not willing to further consider accommodations or settlement of the case. Accordingly, her whistleblower complaint was untimely filed, having been received by the Commission more than 60 days after March 16, 1998.

The Commission is not persuaded by complainant's argument involving the Ward letter and continuing violations. The three actions that are the subject of this motion were discrete events not susceptible to application of a continuing violation theory (*see, Tafelski v. UW (Superior)*, 95-0127-PC-ER, 8/22/96). It is undisputed that these actions occurred in 1989, 1995, and 1997, and that complainant became aware of them at the time they occurred. The fact that complainant may not have formed a belief until 1998 that they were retaliatory does not operate to toll the 60-day filing period under the whistleblower statute. *VanderZanden v. DILHR*, 87-0063-PC-ER, 1/11/91.

Complainant's argument relating to equitable estoppel appears to be linked to the issue of failure of accommodation under the WFEA. The WFEA allegations are not the subject of this motion.

CONCLUSIONS OF LAW

1. Complainant has the burden to show that the subject allegations were timely filed within the 60-day period set forth in §230.83(1), Stats.
2. Complainant failed to sustain this burden.

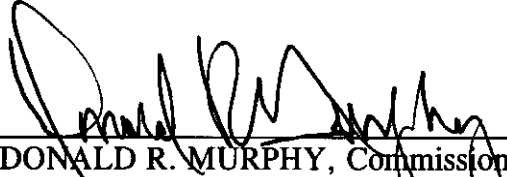
ORDER

Respondent's motion to dismiss the three subject whistleblower allegations is granted.

Dated: October 21, 1998.

DRM:rjb:980103Crull

STATE PERSONNEL COMMISSION


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner