

**DENNIS J. SHESKEY,**  
*Complainant,*

v.

**Secretary, DEPARTMENT OF EMPLOYE  
TRUST FUNDS, and  
Secretary, DEPARTMENT OF  
EMPLOYMENT RELATIONS,**  
*Respondent.*

**DECISION  
AND  
ORDER**

Case No. 98-0106-PC-ER

This matter is before the Commission on respondents' motions for protective orders with respect to pending discovery. In addition, the Commission will address pending motions to dismiss.

I. BACKGROUND

This complaint of discrimination filed May 28, 1998, alleges as follows:

As documented in 98-0063-PC-ER (amended) and by the attached document, DER had decided I was totally disabled and therefore denied me restoration rights to numerous positions. However, DER sought to denied [sic] me the benefits of being classified disabled.

I sought information on disability benefits around June 1997. Jocelyn Brown told me that since I was on lay-off, I qualified for benefits because DER would sign a waiver stating they would hire me back if it wasn't for my disability. Sometime in late 1997 or early 1998, I was assigned a new case worker, Debbie Hornbeck. On the 15<sup>th</sup> of May, I received a notice (attached) indicating that DER was not issuing me a waiver even though they admitted not considering me for restoration because of my disability. Also they failed to submit Disability Premium Waiver form (ET - 5306) to ETF concerning my life insurance premiums.

It is clear DER denied me employment opportunities because of my disability. It is also clear that they deliberately harassed me by denying

me disability benefits even though DER clearly stated that they viewed me as unemployable. Given DER's record, I would like investigated why my ETF worker was switched.

On the complaint form, complainant has checked the box for "disability" as the basis for discrimination. Attached to the complaint is a copy of a DETF (Department of Employee Trust Funds) form "DISABILITY BENEFIT DENIAL/CANCELLATION" DATED May 15, 1998, which reflects that complainant's disability application that had been filed on June 19, 1997, was being denied because it did not meet the statutory requirements set forth in §40.63(1), Stats. The following reasons were checked on the form:

The medical evidence submitted did not establish that you are disabled within the meaning of the law.

Your employer [DER] did not certify your termination was due to disability.

Attached to this form is the following statement:

The grievance is denied for the reasons set forth in the Department's Step 1 answer. Those reasons are incorporated herein by reference as if fully set forth.

Additionally, you were totally disabled at relevant times (November 1996 - present) (i.e.), you were unable, by reason of a medically determinable physical or mental impairment, to perform each and all of the material duties pertaining to your occupation or like occupation for which you are reasonably qualified.

On July 20, 1998, respondent DER filed a letter brief denominated as its motion to dismiss or, in the alternative, its answer to the complaint. The ground for the motion to dismiss was lack of subject matter jurisdiction. DER asserted that jurisdiction over the matter rested with DETF. Respondent also argued in the alternative that the matter before the Commission "be held in abeyance pending the conclusion of any appeal that may be or has been filed with DETF since that decision may have a bearing on the Commission's decision in this matter." By a letter to the

parties dated July 24, 1998, the Commission advised that complainant should respond to DER's answer and motion.

On August 26, 1998, complainant filed an amended complaint which identified DETF as a party-respondent, and added a new basis of discrimination—WFEA retaliation. Complainant also submitted a reply to DER's answer and motion to dismiss, as well as his responses to certain questions the Commission had propounded as part of the process of investigating complainant's complaint.

A letter submission by complainant on October 9, 1998, includes the following:

I was unclear in my 8/26/98 brief concerning retaliation. DER and ETF's falsehoods concerning my eligibility for the Life Insurance Disability Waiver (ET-5306) are the actions which are retaliatory. DER's initial actions, concerning not initially filing a Life Insurance Waiver (ET-5306), falsely stating I was terminated, and their failure to indicate I was denied restoration rights to numerous positions, are the discriminatory acts.

In a November 20, 1998, letter, respondent DETF filed an answer to the amended complaint and a request for dismissal, which included the following:

The DETF requests that Mr. Sheskey's complaint be dismissed with respect to the DETF. He has failed to state a case upon which relief might be granted. Indeed, he has failed to state a complaint which invokes any Personnel Commission jurisdiction with respect to the DETF. Mr. Sheskey has made no allegations of discrimination or retaliation by the DETF as an employer. Mr. Sheskey makes no allegations that a fringe benefit program for state employees, administered by the DETF, is discriminatory in nature . . .

Mr. Sheskey's complaint, insofar as it might relate to any activity involving the DETF, seems to be associated with:

1. A denial of an application for disability annuity benefits under Wis. Stat. §40.63.
2. A waiver of premiums for life insurance premiums following his layoff by DER.
3. The reported termination date of Mr. Sheskey.

It is DETF's position that the Personnel Commission has no authority to determine (1) whether Mr. Sheskey is or was entitled to a disability

annuity under Wis. Stat. §40.63; (2) whether Mr. Sheskey is or was entitled to a waiver of life insurance premiums during any period of alleged disability; or (3) whether Mr. Sheskey qualified as a participating employee under the Wisconsin Retirement System after the August 19, 1998 termination date reported by DER, or at any other time. The actions taken by DETF in regard to all three matters have been those required by statute or necessary to the proper administration of the benefit plan in question. The DETF has not in any instance acted in a discriminatory or retaliatory manner towards Mr. Sheskey . . .

On November 20, 1998, DER filed an answer to the amended complaint, which incorporated by reference DER's earlier motion to dismiss.

By a letter dated January 5, 1999, the Commission extended complainant's time to file a response to respondent's answer to March 16, 1999. Complainant filed a response on March 16, 1999. Respondent DER filed a reply on March 30, 1999.

On April 5, 1999, complainant submitted discovery requests to both respondents. On April 9, 1999, respondent DETF filed a request that it not be required to respond to the discovery requests until after the Commission decides whether DETF should be a party, and the subject matter properly before the Commission is determined. DETF also contends it should not have to respond to complainant's discovery requests which are duplicative of complainant's public records requests to which it already has responded.

On April 12, 1999, DER filed a request for a protective order relieving it from having to respond to complainant's discovery requests, until the Commission decides its pending motion to dismiss.

On April 14, 1999, and April 20, 1999, complainant filed responses to the preceding motion by respondents. A hearing examiner then advised the parties that respondents would be relieved from responding to the foregoing discovery requests pending further order of the Commission.

## II. SUBJECT MATTER JURISDICTION

Respondents contend that complainant's exclusive remedy with regard to DETF's decisions is to file an administrative appeal with DETF. DETF also contends that it is not and was not complainant's employer, and therefore is not a proper party to this matter. While complainant apparently has the right to pursue an appeal with DETF concerning its decision to deny him a disability retirement annuity, this does not preclude him from pursuing a WFEA discrimination complaint to the extent he contends that any actions taken by DER and DETF with respect to his potential benefits were discriminatory. The Commission addressed similar issues in *Phillips v. DHSS & DETF*, 87-0128-PC-ER, 3/15/89; appealed on other grounds and affirmed, *Phillips v. Wisconsin Personnel Commission*, 167 Wis. 2d 205, 482 N.W.2d 121 (Ct. App. 1992), in which the Commission held as follows:

### PROPER PARTIES RESPONDENT

Both respondents contend they are not proper parties in this case. The FEA provides at §111.375, Stats., that:

This subchapter applies to each agency of the state except that complaints of discrimination or unfair honesty testing against the agency as employer shall be filed with and processed by the personnel commission under s. 230.45(1)(b) . . .

Pursuant to §111.32(6)(a), Stats., the definition of the term "employer" includes "the state and each agency of the state." The FEA does not contain any functional definition of the term "employer" which sets forth the functional attributes of the employer-employee relationship.

Respondent DETF contends as follows:

While the sec. 111.33(6)(a), Stats., definition of employer includes 'the state and each agency of the state,' sec. 111.375(2), Stats., limits the Commission's authority to complaints 'against the [employing] agency as an employer.' The DETF is not such an employer of complainant and thus not within the Commission jurisdiction as established by the legislature.

In somewhat the same vein, respondent DHSS argues it had no role in the alleged discriminatory conduct, since it has no authority to make determinations as to eligibility for employee benefits.

The legislature has seen fit to divide authority for the administration of the state civil service employment program among a number of different state agencies. By way of example, the “appointing authority” (here, DHSS) has the authority to hire and fire employees and assign their duties, §230.06(1)(a), Stats. The Department of Employment Relations (DER) has the authority to determine the classification level (and the concomitant salary level) of positions, §230.09, Stats. The administrator of the Division of Merit Recruitment and Selection (DMRS) has the authority to administer the examination function which determines who is eligible to be hired in the classified service, §230.16, Stats. The various agencies of the state are but arms of the state, and when an agency exercises its authority in a way that affects the conditions of employment of a state employee, that agency is acting as the employing agency of that employee, and its action is cognizable under the FEA. *Phillips*, pp. 20-21.

In *Phillips* the Commission held that the immediate employing agency, (DHSS) had no cognizable role with respect to the subject matter of the complaint (denial of family health insurance coverage). In the instant case, complainant has alleged (among other things) that “DER was not issuing me a waiver even though they admitted not considering me for restoration because of my disability. Also they failed to submit Disability Premium Waiver form (ET-5306 to ETF concerning my life insurance premiums.” Original complaint filed May 28, 1998. Since it is alleged DER had a role in the matters complained of, it should be continued as a party.

In *Phillips* the Commission addressed respondents’ exclusivity contention as follows:

PRECLUSIVITY OF §40.03(1)(j) APPEAL

Section 40.03(1)(j), Stats., provides for appeals to the Employee Trust Funds Board from DETF eligibility determinations. Respondent DETF asserts that this “specific statutory method of appeal of DETF determinations precludes the Personnel Board [sic] from any concurrent jurisdiction.”

The fact that administrative agencies which derive their authority from the same source (here, the state) have jurisdiction over the same transaction does not automatically give rise to the conclusion that the agency with the more specific grant of authority has exclusive jurisdiction. This is particularly true where the agencies are enforcing different statutes. See Warner-Lambert v. FTC, 361 F. Supp. 948, 952-953 (D. D.C. 1973)

In this case, the Commission's inquiry is limited to the question of whether there has been a violation of the FEA. The Employee Trust Funds Board has no statutory responsibilities under the FEA and cannot make that kind of determination. There is nothing inherent in the statutory framework underlying the two proceedings (appeal to the Employee Trust Funds Board and charge of the discrimination before the Personnel Commission) that would make the two proceedings inconsistent, and there is no explicit statutory provision making one remedy exclusive.

Carried to its logical extreme, respondent's position would strip FEA protection from an employee with respect to any transaction where the legislature provides an additional, specific remedy. For example, a county employe who has the right pursuant to §63.10(2), Stats., to a hearing before the civil service commission in connection with a disciplinary action presumably would not have the right to pursue a claim with the Department of Industry, Labor and Human Relations that the disciplinary action was unlawfully discriminatory. Such a result would substantially and arbitrarily undermine the FEA and many other protective labor laws. *Phillips*, pp. 23-24 (footnote omitted).

For the same reasons, the Commission concludes that its subject matter jurisdiction is unaffected by the existence of any remedies complainant has available with DETF.

### III. MOTION TO HOLD IN ABEYANCE PENDING DETF APPEAL

As noted above, it is unlikely that a DETF decision of complainant's appeal (if any) with that agency would address the issues complainant raises in this proceeding. Therefore, respondent DER's motion to hold this matter in abeyance is denied.

#### IV. MOTION TO DISMISS CLAIM AS TO DENIAL OF PREMIUM WAIVER

In its answer to the complaint and motion to dismiss filed November 20, 1998, respondent DETF contends that the part of this complaint that relates to DER's failure or refusal to have signed a "Disability Premium Waiver" form is untimely:

The only period during which a premium waiver can have been in question is between Mr. Sheskey's last day paid at DER (August 19, 1995) and the beginning of his employment at the University of Wisconsin on April 13, 1998. Clearly, when Mr. Sheskey is able to work at DER or the UW he does not meet the disability standard for a premium waiver. This period can be narrowed even further. There is no question that Mr. Sheskey was not disabled on August 19, 1995. On August 21, 1995, he signed and filed an unemployment compensation claim for (form RCB015) on which he answered "yes" to the question

Are you able to work and available for work during the first shift on a full-time basis (40 hours per week, between 6:00 A.M. and 6:00 P.M., Monday through Friday)?

Mr. Sheskey admits that "I didn't consider myself disabled on August 1995 [sic]." See his letter dated August 26, 1998. Mr. Sheskey could not be eligible for a premium waiver until he became disabled, which must have been at a later date, if at all. In response to the Commission's specific request (in Ms. Ruona's letter dated July 24, 1998) for Mr. Sheskey to state his disability and identify the date on which he became disabled, Mr. Sheskey replied:

I have chronic back pain, I ruptured a disk in my back around October 1996.

Mr. Sheskey's last day paid was August 19, 1995. The 90-day deadline expired on November 17, 1995. If Mr. Sheskey's complaint is that solely for discriminatory motives, DER did not file a Disability Premium Waiver form prior to that deadline, then his complaint is time barred unless it was filed by September 12, 1996. Furthermore, Mr. Sheskey admits that he was not disabled during this 90-day period. Thus, regardless of any action by DER, he could never qualify for a premium waiver without proving his disability to the satisfaction of Minnesota Life Insurance Company, assuming he otherwise qualifies for a waiver.

At all times from his employment with DER, through his layoff and up to his employment by the University of Wisconsin in 1998, Mr. Sheskey



has known that no premium waiver had been granted because he was paying the life insurance premiums himself. If Mr. Sheskey's complaint is that solely for retaliatory motive, DER did not file a Disability Premium Waiver form prior to the November 17, 1995 deadline, then his complaint is time barred unless it was filed by January 16, 1996. Clearly Mr. Sheskey filed no complaint against the DETF during those time periods, so his complaint should be dismissed. Furthermore, because he admits that he was not disabled at the time, DER's unwillingness to sign a premium waiver form during the 90 days after his last day paid was justified. Pp. 8-9 (footnotes omitted).

Complainant responded to this contention in a letter dated March 16, 1999, which includes the following:

1. Mr. Weber seems to think Complainant's allegations are concerned with DER not submitting a waiver before 11/17/95, however, Complainant has never alleged a waiver should have been processed before 11/17/95. Mr. Wild [sic] claims Complainant is only alleging discrimination for not submitting a waiver during a 90-day window where medical evidence is not required to qualify for a waiver, however, Complainant alleges that not submitting a waiver from around 11/96 until Minnesota Mutual intervened is the period of discrimination. Except for Mr. Wild's [sic] "90-day period" theory, the date of 11/17/95 is completely irrelevant, indeed, Complainant was able to work on 11/17/95.
2. Mr. Weber's arguments, concerning a "90 day period" to submit a waiver without medical evidence and his associated limitation start date of 11/17/95, are disputed by the instructions on the waiver itself (ET-5306)(Exhibit H): "You may file this form without medical evidence within 90 days after the last day for which earnings were paid, or 90 days after the occurrence of the disability, whichever is later." Clearly Complainant's occurrence of disability was later than his last day paid. Equally clear is that Mr. Weber is lying about the terms of the insurance contract.
3. At no time does Mr. Weber argue that Complainant was aware he was entitled to have a waiver submitted and that DER would not submit one. Clearly Complainant has to be aware of an alleged discriminatory act before any period of limitations can start.
4. Mr. Weber does not mention DER inaction after receiving ETF request for a waiver around 6/26/97. Also, Mr. Weber does not

mention the falsehoods told to Complainant around 6/2/98 concerning DER's letter (Exhibit G). P. 6.

As noted above, the initial charge of discrimination was filed on May 28, 1998. The time limit for filing a claim of WFEA discrimination is 300 days from the date of the alleged discrimination. §111.39(1), Stats. Therefore, the actionable period in this case presumably commences August 1, 1997. To the extent that complainant's claim runs to cognizable conduct of either respondent occurring on or after August 1, 1997, his complaint would be timely.

With respect to DER's failure or refusal to submit the disability premium waiver form (ETF-5306) to DETF, complainant states (above) that he is alleging "that not submitting a waiver from around 11/96 until Minnesota Mutual intervened is the period of discrimination." To the extent that complainant contends that DER failed or refused to submit such a waiver prior to August 1, 1997, his complaint is untimely. Complainant apparently contends that respondent has to establish that he knew about his waiver eligibility before the time for filing begins to run:

At no time does Mr. Weber argue that Complainant was aware he was entitled to have a waiver submitted and that DER would not submit one. Clearly Complainant has to be aware of an alleged discriminatory act before any period of limitations can start. March 16, 1999, letter, p. 6.

This is not respondent's burden. Rather, complainant has a duty to be aware of his rights in connection with his employment status. *See Sheskey v. WPC*, Dane Co. Circuit Court No. 98-CV-2196, April 27, 1999: "the complainant must file a claim when he or she knows or should have reasonably known of the violation." Pp. 6-7. *See also Jabs v. State Board of Personnel*, 34 Wis. 2d 245, 251, 148 N.W.2d 853 (1967): "A state employe cannot relieve himself of the responsibility of informing himself regarding the rules regarding sick leave merely by not making inquiry;" *Welter v. DHSS*, 88-0004-PC-ER, 2/22/89 (An employe who was denied the opportunity to return to work on light duty status should have known his rights under the WFEA and should have made inquiry at the time to determine if his rights were violated.) Thus, to the extent that complainant argues that he didn't know about the life insurance waiver

process in 1996-1997 and accordingly didn't realize that DER had not provided him a waiver, complainant's ignorance of this aspect of his employment status does not avoid the effect of his untimely filing. Furthermore, complainant must have known at all times prior to August 1, 1997, that he was paying the life insurance premiums in question, and this reinforces the point that it was not reasonable for him not to have known what his rights were with regard to his life insurance premiums.

Therefore, this complaint is time-barred to the extent it runs to conduct occurring prior to August 1, 1997. However, complainant has alleged conduct which arguably may be attributed to occurrences on or after August 1, 1997. He cites a DETF form dated June 26, 1997, which includes a request to DER to "complete and return the enclosed Group Life Insurance Disability Premium Waiver, form ETF-5306, so that we can determine whether the employe meets the requirements to continue life insurance." At this stage of this case, it can not be determined to what time period to attribute DER's alleged failure or refusal to complete and return the form. Therefore, the motion to dismiss can not be granted as to the entirety of the life insurance waiver issue.

#### V. DISCOVERY REGARDING RECENT TRANSACTIONS

In an April 5, 1999, letter to the Commission, complainant states, in part: "Because of recent discriminatory actions by ETF and DER, I would like to update my complaint with these recent actions . . ." Respondent DETF objects to discovery regarding these matters because the commission has not determined whether those transactions will be considered part of complainant's claim. However, by an April 12, 1999, letter, Commission staff advised complainant as follows:

Your [April 5, 1999] letter refers to the above case number; however, it appears to refer to events which occurred after Case No. 98-0106-PC-ER was filed on May 28, 1998. If you wish to file a complaint regarding these more recent events, you must complete another complaint form (a form is enclosed) and timely file it with the Commission.

Complainant subsequently did file such a complaint. Inasmuch as the Commission is not at this time treating the matters referred to in complainant's April 5, 1999, letter as part of Case No. 98-0106-PC-ER, respondents are under no obligation to respond to discovery requests regarding the new material as part of the discovery in Case No. 98-0106-PC-ER, unless it pertains to matter which is relevant to this case (98-0106-PC-ER).

#### VI. DUPLICATION OF PUBLIC RECORDS REQUESTS

DETF asserts that some of complainant's discovery requests are duplicative of his requests made under the public records law, to which DETF has already responded. DETF seeks an order that it "need not respond to any [discovery] request . . . if it has already provided Mr. Sheskey with copies of, or review of, the public record or document(s) in his WRS participant file which responds to the inquiry." Letter dated April 8, 1999, and filed April 9, 1999, p.3.

Without going into detail, there are a number of differences between the public records law and the law governing discovery, with respect to the permissible parameters of inquiry and the duties and responsibilities of the responding entities. It may be that the circumstances would be such that it would be appropriate for respondent to respond to a particular discovery request by incorporating by reference a prior response under the open records law. However, this must be evaluated on a case-by-case basis, and DETF's request for a blanket order will be denied.

#### VII. PROCEDURAL MATTERS

On April 30, 1999<sup>1</sup>, Commission General Counsel Theodore sent a letter to the parties advising that the Commission would be taking up this matter at its May 5, 1999, meeting, and that "[I]n the meantime, respondents' obligation to respond to complainant's outstanding discovery requests is suspended pending further order." In a

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<sup>1</sup> This letter was erroneously dated April 12, 1999.

letter dated May 5, 1999, and filed May 6, 1999, complainant has objected to said order on a number of grounds.

Complainant's stated concerns about not having been heard on respondents' discovery motions are related to the misdating of the letter. As mentioned above in the procedural history of this case, complainant filed responses to respondents' contentions.

Complainant also contends there was no good cause for the order. Obviously the order was similar to a preliminary injunction that preserved the status quo while a decision was rendered on the pending motions.

Complainant also contends that Mr. Theodore is neither "a hearing examiner or a Commissioner," and thus had no authority to issue the order. Mr. Theodore's duties include functioning as a hearing examiner and exercising that authority with respect to cases pending before the Commission.

ORDER

1. Respondent DER's motions to dismiss and to hold in abeyance dated and filed July 20, 1998, are denied.
2. Respondent DER's motion for protective order filed April 12, 1999, is denied.
3. Respondent DETF's motion to dismiss filed November 20, 1998, is denied in part and granted in part. So much of complainant's claim that relates to the subject matter of the life insurance waiver, and which involves conduct by respondents which occurred prior to August 1, 1997, is dismissed as untimely filed.
4. Respondent DETF's request for a protective order dated April 8, 1999, and filed April 9, 1999, is denied.
5. Respondents are to respond to outstanding discovery requests within 30 days of the date of this order.

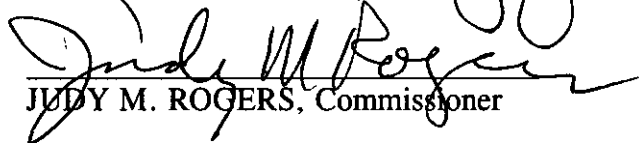
Dated: May 25, 1999.

AJT:rjb.980106Cru12

STATE PERSONNEL COMMISSION

  
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LAURIE R. McCALLUM, Chairperson

  
\_\_\_\_\_  
DONALD R. MURPHY, Commissioner

  
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JUDY M. ROGERS, Commissioner

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