STATE OF WISCONSIN PERSONNEL COMMISSION

MEGAN K. GURRIE,
Complainant,

v.

Attorney General, DEPARTMENT OF JUSTICE,
Respondent.

Case No. 98-0130-PC-ER

RULING ON MOTION TO DISMISS

NATURE OF THE CASE

This is a complaint of discrimination on the bases of disability and whistle-blower retaliation filed on July 10, 1998. On September 22, 1998, respondent filed a motion to dismiss on the grounds of untimely filing and failure to state a claim. Both parties have filed briefs. The following findings of fact are made solely for the purpose of deciding this motion.

FINDINGS OF FACT

1. This complaint of discrimination on the bases of disability and whistle-blower retaliation filed on July 10, 1998, alleges as follows: "Attached is my letter of resignation dated 9-15-97. I believe I was forced to resign due to my being forced to leave my workplace because [respondent] would not accommodate my disability." Complainant checked the boxes for disability and whistleblowing under "CAUSE OF DISCRIMINATION/RETALIATION." The attached letter of resignation included, among other things:

> Due to stress from a hostile work environment, I have been on medical leave and receiving Income Continuation Insurance payments since February 18. . . . .
>
> [T]he DOJ responded to my complaint [Case No. 97-0083-PC-ER] with over fifty pages of lies, half-truths and personal attacks. This document

> succeeded in poisoning any chance I might have had at a positive, stable, or healthy return to work.

2. Complainant was employed by respondent from July 11, 1994, until her resignation effective September 15, 1997.

3. Complainant did not go to work after February 18, 1997, when she began a medical leave of absence (LOA).

4. Complainant began receiving income continuation insurance on April 28, 1997.

5. Complainant filed a complaint of discrimination on the basis of disability with respect to harassment, failure to accommodate, and other conditions of employment, with this Commission on June 11, 1997 (Case No. 97-0083-PC-ER).

6. On May 8, 1998, the Commission issued an initial determination in Case No. 97-0083-PC-ER concluding that there was no probable cause to believe that complainant was discriminated against on the basis of disability in regard to alleged harassment, and probable cause to believe that respondent failed to accommodate complainant's disability when complainant's work location was changed on January 2, 1997, and when she was not informed of a transfer opportunity when she was on leave. Complainant did not appeal the no probable cause part of the initial determination, so that aspect of that claim has in effect been abandoned.

CONCLUSIONS OF LAW

1. Complainant's claim of discrimination under the whistleblower law (Subch. III, Chapter 230, Stats., was untimely filed and must be dismissed.

2. Complainant's disability claim is not untimely in the context of this record.

3. Complainant's allegation of constructive discharge does state a claim in the context of this record.

4. Any allegation by complainant that respondent's brief filed in Case No. 97-0083-PC-ER constituted an act of discrimination fails to state a claim and must be dismissed.

5. The Commission has jurisdiction over the remaining parts of this complaint.

OPINION

I. Timeliness—Whistleblower Claim

Section 230.85(1), Stats., provides that a complaint of whistleblower retaliation must be filed "within 60 days after the retaliatory action allegedly occurred or was threatened or after the employe learned of the retaliatory action or threat thereof, whichever occurs last." In this case, complainant resigned from her employment with respondent effective September 15, 1997. Under the circumstances of this case, this would have been the last possible date of any discriminatory action against complainant. Since her complaint was not filed until July 10, 1998, it clearly is untimely under §230.85(1), Stats.

II. Timeliness—Disability Claim

While the complaint in this case was filed more than 60 days after the date of complainant's resignation, the WFEA (Wisconsin Fair Employment Act; Subchapter II, Chapter 230, Stats.) has a 300 day time limit: "The [Commission] may receive and investigate a complaint . . . if the complaint is filed . . . no more than 300 days after the alleged discrimination . . . occurred." §111.39(1), Stats. This complaint was filed 298 days after September 15, 1997, so it appears to be timely with respect to the resignation/constructive discharge per se. Respondent's motion to dismiss on timeliness grounds is based on several occurrences that preceded September 15, 1997, which respondent alleges did or should have made complainant aware of the elements of her constructive discharge claim:

> Ms. Gurrie was aware as early as February 28, 1997, of all actions creating a claim of discrimination and constructive discharge. In a document dated February 28, 1997, she contended Supervisor Westra "ma-

> nipulated my environment (from where she makes me sit to how my co-workers treat me) with the intent of forcing me out of the unit . . . . "
>
> By May 30, 1997, complainant stated she would not return to work at the Handgun Hotline, apparently because of the alleged discriminatory act which occurred there. . . . In a memo dated June 2 and received by the DOJ on June 11, 1997, Gurrie's physician, Dr. d'Oleire repeated that Gurrie believed these conditions did not exist at the Handgun Hotline. Also on June 11, 1997, Gurrie filed her first complaint of discrimination which could have included a claim of constructive discharge, but did not. Having thus discovered her complaint of constructive discharge at the latest June 2, 1997, the statute of limitations began to run. Ms. Gurrie should have filed this allegation no later than March 28, 1997 [sic]. Having failed to do so until July 10, 1998, it is now time barred.
>
> A complaint of constructive discharge based on the new job offers is similarly time barred. Even if DOJ's new job offers could create a claim of constructive discharge or discrimination, those offers were made in August of 1997 at the meeting with Gurrie's union representative. Even August 31, 1997, the latest possible day for an August meeting, is more than 300 days prior to the July 10, 1998, date that Gurrie filed her complaint. Respondent's brief, p. 6-7.

The gravamen of this complaint is complainant's contention that respondent constructively discharged her by refusing to provide her a reasonable accommodation. Respondent made certain efforts at accommodation prior to September 15, 1997. Respondent provided notice of certain vacancies, which complainant declined to pursue because in her opinion they did not constitute adequate accommodations. Respondent contends that at certain points prior to the actionable period—i. e., the 300 days prior to the filing of this complaint on July 10, 1998—a cause of action had accrued because respondent had proffered accommodations which were not satisfactory, based on complainant's theory of the case.

The general rule is that a WFEA complaint must be filed within 300 days of the accrual of the claim. *See. Jicha v. DILHR,* 169 Wis. 2d 284, 294, 485 N. W. 2d 256 (1992):

> The statute at issue in this case [Wisconsin Family and Medical Leave Act (FMLA), §103.10(12)(b), Stats.] provides that an employee must bring a claim "within 30 days after the violation occurs[1] . . . ." This language is another way of saying that a claim must be brought within 30 days after a violation accrues [sic—occurs ?] or a cause of action has accrued."

However, a party is not required to file a WFEA claim within 300 days of the initial accrual of a claim if the claim involves a continuing violation. An employer has a continuous duty of accommodation. In a case of this nature, where complainant was seeking a different position as an accommodation, the alleged failure to accommodate was at least arguably a continuing violation while complainant remained employed and on a leave of absence. This time period includes two days within the actionable period—September 13-14, 1997. *See Genas v. N. Y. S. Dept. of Corrections,* 67 FEP Cases 27, 33-34 (S. D. N. Y., 1995) (continuing violation effectively alleged where the employe is contending that disciplinary actions were manifestations of an on-going policy of non-accommodation and disparate treatment); *Florence v. Frank,* 2 AD Cases 815, 818-19, 770 F. Supp. 1054 (S. D. Ohio, 1991). At this stage of this case, granting a motion to dismiss on timeliness grounds would be inappropriate because there are facts in dispute as to whether respondent discharged its duty of accommodation during the two day period prior to the effective date of complainant's resignation, and whether the circumstances of this case give rise to a continuing violation.

III. Failure to state a claim of constructive discharge

Respondent argues that complainant has failed to state a claim of constructive discharge for two reasons. First, respondent contends that "[t]he Commission has already found no probable cause on Gurrie's claim that the actions of her supervisors and colleagues amounted to harassment, if there was no support for a harassment finding, there certainly could be none for a constructive discharge claim." Respondent's brief, p. 11. This is not dispositive because this complaint alleges that: "I was forced to re-

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[1] The WFEA uses very similar language—"[t]he [Commission] may receive and investigate a complaint . . . if the complaint is filed . . . no more than 300 days *after the alleged discrimination occurred."* §111.39(1)(a), Stats. (emphasis added).

sign due to being forced to leave my workplace because [respondent] would not accommodate my disability;" it does not allege that the harassment that was involved in the first case had this result. Second, respondent asserts that because it offered complainant a choice of three vacant positions before her resignation, complainant had options available to her other than resignation, and therefore there could be no constructive discharge. There are disputed issues of fact regarding the suitability of the positions that were offered, and these cannot be resolved on a motion to dismiss for failure to state a claim.

IV. Failure to state a claim with regard to complainant's contention that respondent's brief in first case constituted an act of discrimination

Complainant included as an attachment to this complaint a copy of a letter dated September 15, 1997, from complainant to the Department of Employe Trust Funds which includes the following: "DOJ responded to my complaint [Case No. 97-0083-PC-ER] with over fifty pages of lies, half-truths, and personal attacks. This document succeeded in poisoning any chance I might have had at a positive, stable, or healthy return to work." Respondent argues that this allegation fails to state a claim as a matter of law. While it is questionable whether this is actually part of complainant's claim, the Commission agrees that such an allegation does not constitute an adverse employment action and cannot serve as the basis for a discrimination claim. *See Larsen v. DOC,* 91-0063-PC-ER, 7/1/91 (conduct of employer's attorney during deposition taken in connection with an employe's appeal of a disciplinary action does not fall within the concept of terms, conditions or privileges of employment).

ORDER

Respondent's motion to dismiss is granted in part and denied in part, and so much of this complaint as may constitute a complaint of whistleblower retaliation is dismissed as untimely filed, and so much of this complaint as may constitute a claim of discrimination with respect to respondent's filings in Case No. 97-0083-PC-ER, is dismissed for failure to state a claim. The issue for hearing is whether respondent discriminated against complainant on the basis of disability in connection with her alleged constructive discharge.

Dated: 11/4, 1998.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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