

NATHANIEL HARWELL,
Complainant,

v.

**Superintendent, DEPARTMENT OF
PUBLIC INSTRUCTION,**
Respondent.

Case No. 98-0210-PC-ER

**RULING ON
MOTIONS**

This matter is before the Commission on respondent's motion to dismiss and alternative motion to make more definite and certain, filed February 26, 1999. Both parties have filed briefs. The Commission also addresses complainant's motion to preserve records filed, April 21, 1999.

This complaint, filed on November 23, 1998, alleges discrimination on the bases (as indicated by the checked boxes on the back of the complaint form) of race and whistleblower retaliation with respect to failure to hire or promote, discipline and harassment. The complaint states that the discrimination has been ongoing since 1991, which was when complainant became employed at DPI. Complainant stated in connection with his complaint that he would be filing additional "documentation."

Respondent's motion to dismiss filed February 26, 1999, seeks the dismissal as untimely of all whistleblower complaints, the dismissal as untimely of the claim that complainant was denied hiring or promotion due to race discrimination, an order requiring complainant to make his claim more definite and certain, and an order precluding discovery "until the complaint is made more definite and certain and the Commission identifies the issues for litigation."

In a document filed March 3, 1999, complainant stated, among other things, that DPI was proceeding with a disciplinary track and complainant expected to be fired within two weeks and complainant wanted until April 30, 1999, to file an amendment to his claims.

On March 18, 1999, complainant filed a response to DPI's motions. In this document, complainant stated that he would file the amendment to his claim on April 7, 1999. Complainant indicated that this amendment would be responsive to respondent's motion to make more definite and certain. Complainant also provided additional information about his complaint in the March 18, 1999, document.

On April 7, 1999, complainant filed an amendment to this complaint, accompanied by a number of exhibits.

In the meantime, on March 15, 1999, complainant had filed another complaint alleging whistleblower retaliation with respect to failure to hire or promote, discipline, and harassment (No. 99-0051-PC-ER). Complainant alleges he made written whistleblower disclosures regarding racism at DPI on February 3, 1999, and before that on October 23, 1996. He summarizes the alleged retaliation for these disclosures as follows, "I have been subject to written reprimands, a 10-day suspension without pay, and threatened with termination on or near April 7, 1999."

On March 29, 1999, complainant filed a complaint alleging discrimination on the basis of race with regard to failure to hire or promote, discipline and harassment (No. 99-0063-PC-ER). This complaint states that it covers the period of November 24, 1998, through March 17, 1999, although it mentions incidents that were part of complainant's "history" with DPI, starting in 1991.

Complainant has waived investigation as to all three of these complaints. A prehearing conference is scheduled for May 25, 1999¹.

TIMELINESS OF WHISTLEBLWER CLAIM

Complainant states he was on medical leave from May 5, 1998, through December 4, 1998. The time limit for whistleblower complaints is "60 days after the retaliatory action allegedly occurred or was threatened or after the employe learned of

¹ Complainant states that he does not want to have these complaints consolidated without his approval. The Commission has the authority to decide whether cases are consolidated, §227.44(2s), Stats. This issue will be discussed at the May 25, 1999, prehearing conference, which will involve all three of these cases.

the retaliatory action or threat thereof, whichever occurs last.” §230.85(1), Stats. Since the original complaint was filed November 23, 1998, the actionable period for a whistleblower claim commences September 24, 1998. Based on the record before the Commission, it does not appear that complainant alleges any DPI management conduct that violates the whistleblower law during this period. Therefore, the whistleblower claim will be dismissed from this case on the ground of untimely filing.

TIMELINESS OF CLAIM OF FAILURE TO HIRE OR PROMOTE

Respondent contends that complainant does not allege either that he requested or was denied a reclass, promotion, etc., within the actionable period—i.e., 300 days, *see* §111.39(1), Stats., before November 23, 1998, with respect to his race discrimination complaint.

In his document filed March 18, 1999, complainant asserts that he was harassed from January 1998 through May 1998, and he considers the harassment “a constructive failure to promote because I was currently doing the Production Application System (PAS) project, which would qualify me for a reclass from MIS 4 to MIS.5.” This contention does not appear to be untimely because complainant alleges respondent conduct within the actionable period.

MOTION TO MAKE MORE DEFINITE AND CERTAIN

Respondent contends that the complaint does not give adequate notice of the alleged discrimination, and that the Commission should order complainant to make his complaint more definite and certain. After respondent filed this motion, complainant did file an amended complaint, on April 7, 1999. Under these circumstances, no decision of the motion to make more definite and certain will be made at this time. Respondent will have 20 days from the date of this decision to respond to the amended complaint, and to file any motions with respect to the amended complaint.

DISCOVERY DELAY

Respondent seeks an order “precluding discovery until the complaint is made more definite and certain and the Commission identifies the issues for litigation.”

The Commission will deny this motion. To some extent, the motion leads to a “chicken and egg” problem. Discovery may impact the nature of the issues to be heard. The complainant has waived the investigation of this complaint and has indicated he plans to do discovery. If respondent decides it is inappropriate to respond to a particular discovery request because of ambiguity over whether it is relevant to the complaint, it can so respond. However, a blanket ban on discovery would be unnecessarily broad.

COMPLAINANT’S MOTION REGARDING RECORDS

Complainant filed a motion on April 21, 1999, to direct respondent to preserve true and accurate records, as defined by §19.32(2), Stats., with respect to this case.

Respondent already has a legal obligation under the public records law to preserve such records. There is no basis on this record for a finding that DER has or is likely to violate its statutory duty in this regard. Therefore, this motion will be denied.

ORDER

1. Respondent’s motion filed February 26, 1999, to dismiss complainant’s whistleblower claim as untimely filed is granted, and said claim is dismissed.
2. Respondent’s motion filed February 26, 1999, to dismiss complainant’s failure to promote claim as untimely is denied.
3. Respondent’s motion filed February 26, 1999, to make more definite and certain is denied without prejudice to its renewal. Respondent will have 20 days from the date of this order to serve and file a response to complainant’s complaint amendment filed on April 7, 1999, and to file any motions with regard to the amended complaint.

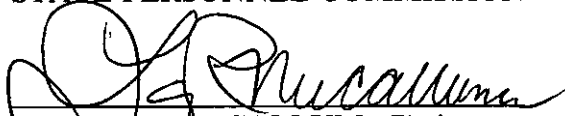
4. Respondent's motion filed February 26, 1999, for a delay in discovery is denied.

5. Complainant's motion filed April 21, 1999, to direct respondent to preserve records is denied.

Dated: May 12, 1999.

AJT:rjb:980210Crull

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

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