

STATE OF WISCONSIN

PERSONNEL COMMISSION

ALLEN S. JOHNSON

Complainant,

v.

**Secretary, DEPARTMENT OF
CORRECTIONS,**

Respondent.

**RULING ON MOTION
TO DISMISS**

Case No. 99-0098-PC-ER

This is a complaint of discrimination on the basis of color and disability and of retaliation for engaging in protected whistleblower activities. On July 19, 1999, respondent filed a motion for dismiss for untimely filing and for lack of jurisdiction. The following findings of fact are based on information provided by the parties, appear to be undisputed, and are made solely for the purpose of deciding this motion.

FINDINGS OF FACT

1. This complaint was filed on June 3, 1999, and alleges discrimination on the basis of color and disability, and retaliation for engaging in protected whistleblower activities.

2. In his complaint, complainant charges that the following constitute the allegedly discriminatory/retaliatory actions taken against him by respondent:

a. The alleged physical assault by Captain Brunious on July 1, 1995; and respondent's failure to adequately investigate or take appropriate action as a consequence of this alleged assault;

b. Respondent's requirement that complainant undergo an independent medical examination (IME) in October of 1995; and the results of this IME.

c. Respondent's failure to pay complainant from October of 1995 through June of 1996;

d. Delays by the Department of Employee Trust Funds (DETF) in processing necessary paperwork relating to certain of complainant's claims, and the resulting failure to receive pay/benefits for a period of one year ending in September of 1998;

e. DETF's failure to restore sick leave and vacation benefits used by complainant during 1997; complainant did not become aware that these benefits would not be restored until November of 1998.

f. Complainant's allegedly involuntary medical retirement effective October 11, 1998.

g. Respondent's location of alternative employment for complainant in November of 1998 in a Program Assistant 2 position which pays less than and is located further from his home than his previous Officer position.

Section 230.85(1), Stats., requires that complaints of whistleblower retaliation be filed within 60 days "after the retaliatory action allegedly occurred or was threatened or after the employee learned of the retaliatory action or threat thereof, whichever occurs last." Here, none of the acts of alleged retaliation occurred within the 60-day period prior to June 3, 1999, the date this complaint was filed. Moreover, complainant does not contend that he received notice of any of these acts within this 60-day period. As a result, complainant's claim of whistleblower retaliation must be dismissed.

Complainant has brought this complaint against only the Department of Corrections, and has indicated that he does not wish to file against DETF. Since complainant alleges that the actions which form the basis for allegations d. and e. were taken by DETF, not DOC, they are not properly a part of this complaint and must be dismissed as a result.

Section 111.39(1), Stats., requires that complaints of discrimination under the Fair Employment Act (FEA), such as this one, be filed "no more than 300 days after the alleged discrimination . . . occurred." In reviewing allegations a. through g., above, the only actions attributable to respondent DOC which occurred during the 300-day time period prior to June 3, 1999, are allegations f. and g. A continuing violation

theory would not apply here to link allegations a. b., and c. with allegations f. and g. since, not only are allegations a., b., and c. discrete, isolated and completed actions which must be regarded as individual violations (*see, McDonald v. UW-Madison*, 94-0159-PC-ER, 8/5/96), but the period of time of more than two years between allegation c. and allegation f. “breaks the chain” of continuity between successive actions and, as a result, prevents a finding of a continuing violation (*see, Chelcun v. UW*, 91-0159-PC-ER, 3/9/94). As a result, it is concluded that the complaint is not timely filed under the FEA as it relates to allegations a., b., and c.

CONCLUSIONS OF LAW

1. Complainant has the burden to show that this complaint was timely filed.
2. Complainant has failed to sustain this burden in regard to his charge of whistleblower retaliation.
3. Complainant has sustained this burden in regard to his charge of color/disability discrimination for allegations f. and g. but not for allegations a., b., and c.
4. Complainant has the burden to show that the Commission has jurisdiction over this complaint.
5. Complainant has failed to sustain this burden as to allegations d. and e.

ORDER

Complainant's charge of whistleblower retaliation is dismissed. So much of this complaint as relates to the actions which form the basis for allegations a., b., c., d., and e. is dismissed.

Dated: August 25, 1999

LRM: 990098Cdec1

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner