STATE OF WISCONSIN PERSONNEL COMMISSION

PASTORI M. BALELE,
Complainant,

v.

Secretary, DEPARTMENT OF TRANSPORTATION,
Respondent.

Case No. 99-0103-PC-ER

RULING ON MOTION TO DISMISS

NATURE OF CASE

This case involves a complaint of discrimination on the basis of color, national origin, race and WFEA retaliation with respect to failure to hire. The complaint was filed on May 25, 1999. This matter is now before the Commission on respondent's motion to dismiss "as untimely filed any portion of the . . . complaint which may relate to hiring transactions occurring more than 300 days prior to the filing of the complaint on May 25, 1999." (Respondent's motion filed August 11, 1999) Both parties have submitted briefs. The following findings appear to be undisputed and are made for the sole purpose of addressing said motion.

FINDINGS OF FACT

1. This complaint was filed May 25, 1999.

2. This complaint's allegations include the following:

> Recently complainant found that DOT had used the Career Executive Option 1 to promote, reassign or appoint white individuals in various career executive positions without advertising the positions. Specifically Option 1 career executive recruitment and selection was used to promote people into administrator-Senior executive positions of pay ranges 18 through 22 without tests or interviews. Complainant has found that all people reassigned or promoted using the career executive Option 1 practice were all white people. Complainant alleges that Option 1 career executive recruitment, selection and appointing practice had disparate impact on racial minorities and therefore complainant because of his black race.

3. The complainant found out about DOT's use of the career executive option one as alleged above (Finding of Fact #2) on May 7, 1999, from testimony in a hearing in another case (98-0104-PC-ER) to which he is a party.

4. Complainant has filed numerous WFEA complaints over the years in this and other forums against a number of state agencies, including DOT, alleging that those agencies have discriminated against racial minorities in their selection practices, and that their discriminatory practices include the filling of career executive positions without open competition.

5. DOT has filled at least one vacancy in the manner alleged (i.e., use of career executive option one without advertisement of the vacant position) since on or after July 29, 1998 (i.e., within 300 days of the date of filing this complaint—May 25, 1999).

OPINION

The time limit for filing WFEA complaints of discrimination is 300 days after the alleged discrimination occurred. §111.39(1), Stats. Since this complaint was filed on May 25, 1999, the ostensible actionable period is the 300 days ending May 25, 1999, or from on or after July 29, 1998. It is undisputed that at least one personnel transaction of the kind alleged by complainant (i.e., use of the career executive program option one without advertising) has occurred since July 29, 1998. The question presented by this motion is whether the complaint is untimely as to personnel transactions which occurred prior to July 29, 1998, as being outside the apparent actionable period, or whether a doctrine such as a continuing violation or equitable tolling operates to make this complaint timely as to those earlier transactions. On a motion of this nature, "[I]t is complainant's burden of proof to demonstrate that the allegations raised in [the] complaint were timely filed. In analyzing this question it is appropriate to construe the allegations raised in the complaint in a light most favorable to complainant." *Reinhold v. OCCDA*, 95-0086-PC-ER, 9/16/97 (citations omitted).

Complainant argues that the continuing violation theory applies to this case. However, decisions on filling particular positions by transfer, demotion or promotion are usually viewed as discrete, specific acts which are not amenable to the continuing violation theory. *See, e.g., McDonald v. UW*, 94-0159-PC-ER, 8/5/96. Complainant's contention of a continuing violation is summarized in his brief as follows:

> DOT has admitted that it used option 1 several times prior to the 300 days continuously with full knowledge that career executive positions were underutilized for racial minorities in DOT and statewide. These were continuous intentional acts. (Complainant's brief in opposition to motion to dismiss, pp. 4-5)

Assuming that respondent utilized option one while aware of under-utilization, it simply does not follow that such knowledge makes the specific hiring decisions part of a continuing violation. *See Tafelski v. UW*, 95-0127-PC-ER, 3/22/96.

In *Tafelski*, the Commission looked for guidance to the Seventh Circuit decision of *Selan v. Kiley*, 969 F. 2d 560, 59 FEP Cases 775 (7th Cir. 1992). In *Selan*, the Court identified three viable continuing violation theories, none of which encompass the circumstances of this case before this Commission:

> The first theory stems from "cases, usually involving hiring or promotion practices, where the employer's decision-making process takes place over a period of time, making it difficult to pinpoint the exact day the 'violation' occurred." Courts have tolled the statute in such cases for equitable reasons similar to those underlying the federal equitable tolling doctrine. . . . The second theory stems from cases in which the employer has an express, openly espoused policy that is alleged to be discriminatory. . . . The third continuing violation theory stems from cases in which "the plaintiff charges that the employer has, for a period of time, followed a practice of discrimination, but has done so covertly, rather than by way of an open notorious policy . . . In such cases the challenged practice is evidenced only by a series of discrete, allegedly discriminatory, acts." This brand of continuing violation has also been referred to as a "serial violation," and as a "pattern of ongoing discrimination." (citations omitted)

The first theory is exemplified by tenure decisions, *see Selan*, 59 FEP Cases at 778, n. 4, which may require action by a number of entities over the course of an

extended decision process. This does not apply here because we are dealing with promotions, transfers and demotions, actions which are made on the basis of decisions of the appointing authority, and with regard to which there has been no allegation of lack of certainty as to when the alleged violations occurred.

The second theory involves an express, openly espoused policy that is alleged to be discriminatory. An example of this would be a retirement policy. *See Selan*, 59 FEP Cases at 778, n. 5. If an employer has an overt explicit requirement that all employes in a specific classification have to retire by a certain age, that policy operates continuously to separate from employment employes over that age. In the instant case, complainant is arguing that continuity is provided by the respondent's continuing knowledge it was underutilized for racial minorities. However, having knowledge of this fact cannot be equated to an openly espoused policy such as a mandatory retirement age or a height limit for hiring.

The third theory involves a covert practice of discrimination that "is evidenced only by a series of discrete, allegedly discriminatory, acts." *Selan*, 59 FEP Cases at 778.

Complainant in the instant case does not allege a "covert practice of discrimination." This is illustrated by comparing the circumstances of this case with the circumstances of *Selan*. Here, there are a number of appointment decisions which, as discussed above, constituted specific, discrete personnel transactions and completed acts of alleged discrimination. In *Selan*, there were several acts which in the aggregate amounted to an alleged attempt to reduce the plaintiff's responsibilities to the ultimate detriment of her employment status.

The inapplicability of the third theory of continuing violation to complainant's claim is further illustrated by the application of the *Selan* criteria for evaluation of a specific claim that ostensibly fits under the third theory as a potential continuing violation.

Under the third theory, the question is whether the employer's acts "are related closely enough to constitute a continuing violation, or were 'merely discrete, isolated,

and completed acts which must be regarded as individual violations.'" (citations omitted) *Id.* *Selan* goes on to delineate three factors to consider in making this determination:

> The first is subject matter. Do the alleged acts involve the same type of discrimination, tending to connect them in a continuing violation? The second is frequency. Are the alleged acts recurring (e.g., a biweekly paycheck) or more in the nature of an isolated work assignment or employment decision? The third factor, perhaps of most importance, is degree of permanence. Does the act have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate?

This court and others have stressed the significance of the third factor:

> What justifies treating a series of separate violations as a continuing violation: Only that it would have been unreasonable to require the plaintiff to sue separately on each one. In a setting of alleged discrimination, ordinarily this will be because the [employe] had no reason to believe he was a victim of discrimination until a series of adverse actions established a visible pattern of discriminatory treatment. (citations omitted)

Tafelski, 59 FEP Cases at 778-79.

In *Tafelski*, the Court considered the plaintiff's allegations relating to a transfer/demotion, removal of psychotherapy duties, removal of clinical supervisory duties, and the removal of clinical supervisory privileges, all of which occurred at separate times. The Court observed that all the transactions involved the same type of action-taking responsibility away from the plaintiff.

In the instant case, the first factor is difficult to apply because it is essentially non-applicable to the kind of case complainant advances, one involving overt rather than covert discrimination. Complainant is not arguing there were various transactions that were related by a common thread; rather, he complains of exactly the same, but repeated, personnel transactions—the use of the career executive option one to fill vacancies within DOT.

Looking at the second factor—frequency—in this case, there are no recurring acts of discrimination. The selection decisions do not occur on a regular basis like a paycheck. This factor would weigh against a conclusion of a continuing violation.

The third (and according to the court the most significant) factor is degree of permanence:

> Does the act have the degree of permanence which should trigger an employe's awareness of and duty to assert his or her rights, or which should indicate to the employe that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate? *Selan*, 59 FEP Cases at 778.

An employer's hiring decision is permanent. When the employer hires someone other than the complainant for a particular vacancy, that is an explicit act that denies complainant the possibility of competing for that vacancy.

In addition to arguing the continuing violation theory, complainant contends that the filing time should be tolled on the basis of both equitable tolling and equitable estoppel. Complainant contends that respondent had a duty to have publicly advertised the positions in question, and because it did not, his failure to have found out about these transactions until the May 9, 1999, testimony in another case, should be excused.[1]

Complainant cites a number of statutory provisions providing that agencies give due regard to affirmative action when deciding how to fill positions. Some of these provisions do not apply to positions in the career executive program, which are by definition outside the classified service. However, §230.24, Stats., "Career executive selection," specifically provides at §230.24(2) as follows:

> A vacancy in a career executive position may be filled through an open competitive examination, a competitive promotional examination or by restricting competition to employes in career executive positions in order to achieve and maintain a highly competent work force in career executive position, *with due consideration given to affirmative action.* The appointing authority *shall consider the guidelines under s. 230.19*

[1] Respondent submitted an affidavit of a DOT personnel specialist that asserts that information about how positions had been filled was a matter of public record that complainant could have accessed by making inquiry. Complainant apparently does not disagree with this proposition.

> when deciding how to fill a vacancy under this paragraph. (emphasis added)

Section 230.19 provides as follows:

> Promotion. (1) The administrator shall provide employes with reasonable opportunities for career advancement, within a classified service structure designed to achieve and maintain a highly competent work force, *with due consideration give to affirmative action.* (emphasis added)

Complainant goes on to argue as follows:

> There is nothing in DOT brief that suggests that DOT took heed of provisions in section 230.19. All appointed individuals were white people. . . . Given that racial minorities were underutilized in DOT and statewide, DOT knew or should have known that it had duty to advertise the positions to inform the public and Balele of the existence of the positions before the positions were filled using Option 1 – not after they had been filled using Option 1. Therefore DOT arguments that Balele should have contacted DOT, three years ago to find if it had used Option 1 fails. It was mandatory that DOT should have advertised the positions before it used Option 1. (Complainant's brief, pp. 8-9)

In addressing this motion to dismiss the Commission will assume the facts complainant alleges—i.e., that respondent knew it was underutilized for racial minorities in the relevant job categories—are true. Complainant has cited to no provision in the civil service code that would have required respondent to have publicly advertised[2] the vacancies in question. Both §230.19 and §230.24 require that there be "due consideration given to affirmative action," but neither address the question of the need for public advertising. Whether these statutes would require some kind of public announcement for a particular selection process because of affirmative action factors is a question that could be answered only by applying the general principles embodied in these statutes to a specific factual context. Complainant's position on equitable tolling and equitable estoppel would have the effect of essentially eliminating any time

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[2] Presumably, public advertising would mean advertising outside of DOT in some fashion that would provide notice to complainant without complainant having to make inquiry with DOT—e.g., an announcement in the COB (Current Opportunities Bulletin).

limitation on claims directed toward an agency's use of career executive option one to fill career executive positions in the agency. The limitations period would never start to run until complainant happened to become aware of the agency's use of the process, either by happenstance or by requesting information from the agency, possibly years after the event.[3]

This case is somewhat analogous to *Sheskey v. DER,* 98-0054-PC-ER, 6/3/98; affirmed, *Sheskey v. WPC,* 98CV2196, Dane Co. Cir. Ct., 4/27/99. In that case, the complainant was laid off on August 18, 1995. Complainant did not file a complaint concerning his layoff and a failure to recall until after he had inspected DER's records on February 19, 1998. The Commission held that it was not reasonable for complainant to have waited that long to make inquiry, noting that he had been concerned about a hostile atmosphere at the time of his layoff.

In the instant case, the complainant has long been concerned about the use of option one to fill career executive vacancies. The information concerning respondent DOT's use of option one has been available to him if he had made inquiry. It is not reasonable under these circumstances for complainant not to make any such inquiry, and then expect to be able to file claims years after the personnel transactions in question when he happens to find out about the transactions while litigating a different claim.

In conclusion, the Commission determines that this claim is restricted to appointment transactions that have occurred within the 300 day time period prior to the date of filing this complaint on August 11, 1999.

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[3] Complainant contends his claim should be allowed to reach back for a period of three years prior to the date it was filed (May 25, 1999). The rationale for this particular time period is unclear.

ORDER

Respondent's motion to dismiss filed August 11, 1999 is granted as to all appointment transactions that have occurred more than 300 days prior to August 11, 1999, and this complaint is dismissed as to all such transactions.

Dated: November 19, 1999.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

JUDY M. ROGERS, Commissioner

Commissioner Donald R. Murphy did not participate in the consideration of this matter

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