STATE OF WISCONSIN PERSONNEL COMMISSION

HALLEY YOUNG, JR.,
Complainant,

v.

Secretary, DEPARTMENT OF TRANSPORTATION,
Respondent.

Case Nos. 00-0123-PC-ER, 01-0007-PC-ER

RULING ON MOTION

These matters are before the Commission on respondent's motion to dismiss certain allegations as untimely and for failure to state a claim upon which relief may be granted. The parties filed written arguments and the following facts appear to be undisputed.

FINDINGS OF FACT

1. At various times in 1998 and 1999, complainant was employed by respondent as a limited term employee (LTE) in District 5. However, complainant was not so employed in 2000 or 2001.

2. Complainant unsuccessfully applied for various full-time positions with respondent in 1998, 1999 and 2000.

3. On September 11, 2000, complainant filed a complaint alleging discrimination based on age and disability as well as whistleblower retaliation and retaliation for having engaged in Fair Employment activities.[1] The complaint, which was assigned Case No. 00-0123-PC-ER, referenced the following conduct:

> Violated the State of Wisconsin Statutes by not giving me copies of my personnel file when I requested it twice, in writing. Required me to perform unnecessary work that worsened my disabled condition. Ridiculed

[1] Complainant also alleged retaliation for occupational safety and health reporting activities. That claim was separated from the remaining claims and assigned Case No. 00-0129-PC-ER, which is being processed separately by the Commission due to the time requirements set forth in §101.055(8)(c), Stats.

> and ostracized me for discussing unsafe acts and improper inspection and construction practices in violation of DOT protocol. I am more qualified for the position of Engineering Specialist than people they hired as a result of the 6-22-00 interview. The DOT did not comply with their own affirmative action guidelines by not hiring me. Not sure what remedy I seek.
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> I submitted an application in Jan. 2000 for limited term employment (LTE) positions for this year, and despite being hired for 4 positions in previous years, and being more qualified than others, to this date, I have not been contacted for employment for the year 2000.

4. The Commission asked complainant to 1) identify the protected activities that served as the basis for his claims of whistleblower retaliation and Fair Employment Act retaliation, 2) provide copies of any written disclosures, and 3) list the adverse employment actions allegedly taken by respondent. Complainant, by letter dated December 21, 2000, responded:

> Mr Young complained to one or more of his three supervisors about the following:
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> 1. In midsummer, 1998, he complained that the supervisor was allowing the crew to create an incorrect map of underground power cables on which utility companies and anyone else wishing to dig, would rely.
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> 2. In September, 1998, Mr. Young told both Mr. Ostreng and Mr Frank that he was not going to take the Nuclear Density Gauge the crew used to do underground mapping home with him. The proper procedure was to take such equipment back to the shop for proper storage, however the supervisor wanted Mr. Young to take it home so the crew would not have to go back to the shop before they started the next day. At different times in 1998 and 1999, when Mr. Young refused to take the nuclear testing equipment home, another worker, Nathan Byom, took it home. My Young complained to Ostreng and Frank about this. Mr Young also complained about his not being provided with his Lifetime Cumulative Radiation Exposure as required by the NRC.
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> 3. In May, 1999, Mr Young complained that there was not a flag crew to protect him while he operated the Nuclear Density Gauge on the side of the road during paving operations on state highway 95. This complaint was repeated numerous times after May, 1999.

> 4. In late 1998 or early 1999, Mr Young complained that the crew was not testing the road concrete properly, which could have made the road dangerous on which to drive and/or forced DOT to waste taxpayers' money replacing the same road.
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> 5. In August 1999, Mr Young observed the Crew Chief of the truck-mounted drilling rig start to raise the mast of the rig while directly under a power line. Mr. Young brought it to the attention of the Crew Chief, but the operation continued. Mr. Young also brought this to the attention of Don Ostreng and Russ Frank.

None of these complaints were in writing.

5. Complainant contends that these same 5 activities serve as a basis for his claim of Fair Employment Act retaliation in Case No. 00-0123-PC-ER.

6. In his December 21st response to the request that he identify the adverse employment actions, complainant listed 10 separate occasions between July 9, 1998, and October 23, 2000, when he had been rejected as a candidate for vacant positions with respondent. Complainant sent a copy of his December 21st response directly to respondent's counsel.

7 By letter dated December 21, 2000, a Commission investigator responded to complainant's submission, noted that he had referred to two events that had occurred after he had filed his initial complaint on September 11th, and provided him an opportunity to complete a new complaint form if he wanted to pursue a claim relating to those events:

> Your letter of December 21, 2000, contains two alleged actions which occurred after the September 11, 2000, filing of this complaint. I am referring to the October, 2000 refusal to hire instances you cite on page four of your letter I am unsure whether you have listed those for informational purposes or if you are alleging those as allegations of refusal to hire for discriminatory/retaliatory reasons.
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> If you are alleging the October, 2000, refusal to hire actions were for discriminatory/retaliatory reasons it will be necessary to complete a new complaint form (enclosed). All sections of the complaint must be completed. With respect to section 6, you may refer to your letter of December 21, 2000, when referring to the refusal to hire events of October, 2000.

> If you allege the October, 2000, refusal to hire events were for discriminatory/retaliatory reasons please file the completed complaint on or before **January 2, 2001**. (emphasis in original)

Complainant did not file the complaint form by January 2nd

8. On January 17, 2001, complainant did file another complaint of discrimination/retaliation with the Commission. This complaint, assigned Case No. 01-0007-PC-ER, alleged age and disability discrimination and retaliation for engaging in Fair Employment activities as well as whistleblower retaliation. The complaint arose from respondent's failure to hire complainant for Engineering Specialist positions on October 11, October 23 and November 9, 2000.

9. Complainant has been represented by counsel in these matters since no later than December 4, 2000.

OPINION

I. Case No. 00-0123-PC-ER

The whistleblower law prohibits retaliation against certain state employees who engage in protected activities recognized by the law. While there are a variety of protected activities that may satisfy the requirements of the law, the most common category, and the one at issue with respect to complainant's first complaint, Case No. 00-0123-PC-ER, is a disclosure of "information in writing to the employee's supervisor." Sec. 230.82(1)(a), Stats.

The Commission asked the complainant to identify the protected activity that serves as the basis for his first complaint. Complainant's response is set forth as Finding 4. None of the disclosures listed by complainant (before he filed his complaint of retaliation on September 11, 2000) were in writing. All were safety concerns that complainant raised orally. These activities do not satisfy the requirements of §230.81(1)(a), Stats., and do not satisfy any of the alternative categories of protected activities described in §§230.81(1), (2) or (3).

In his brief, complainant made the following argument in support of his whistleblower claim:

> While under §230.81(1), disclosures must be made in writing to an employee's supervisor, the disclosures made in this particular instance were made regarding occupational safety and health, covered by Chapter 101 of the Wisconsin Statutes. Under Wis. Stat. §101.055(8), the section regarding the protection of public employees exercising their safety and health rights under the section, absolutely no mention is made requiring an employee to formally submit a written document detailing safety and health concerns to his supervisor The statute prohibits discrimination on the basis of exercising an employee's safety and health rights, and only requires a state employee to file a complaint with the personnel commission within thirty days after the employee received knowledge of the discrimination. Wis. Stat. §101.055(8)(b).

Complainant's claim of retaliation for occupational safety and health reporting activities under §101.055, Stats., is being processed separately from this matter, as Case No. 00-0129-PC-ER. Complainant's argument may be relevant with respect to that matter, but it does not relate to the present case. In order to state a claim under the whistleblower law, the complainant must have engaged in a protected activity *under the whistleblower law.* Because complainant did not make a lawful disclosure, the whistleblower claim that is part of Case No. 00-0123-PC-ER must be dismissed.

Respondent seeks to dismiss certain of complainant's allegations of FEA discrimination in Case No. 00-0123-PC-ER based on age and disability as untimely filed. There is a 300 day filing period for claims under the Fair Employment Act. §111.39(1), Stats. Complainant filed Case No. 00-0123-PC-ER on September 11, 2000. The actionable period for a complaint filed on Monday, September 11, 2000, commenced on November 14, 1999. In his letter dated December 21, 2000, complainant listed the "adverse employment actions" that served as the basis for his complaint.[2] He listed non-hires on July 9, 1998, July 28, 1998, September 4, 1998, October 15,

[2] In his original complaint, complainant also referred to other actions by respondent, such as "not giving me copies of my personnel file when I requested it" and "[r]equired me to perform unnecessary work." Complainant did not include these actions when he was asked by the Commission to list all of the adverse personnel actions, so the Commission considers them to have been withdrawn.

1999, November 9, 1999, December 10, 1999, March 2, 2000, July 17, 2000, October 11, 2000, and October 23, 2000. The last two actions occurred after complainant filed Case No. 00-0123-PC-ER, so they will not be considered further in the section of this ruling dealing with Case No. 00-0123-PC-ER. The first five actions all occurred outside of the actionable period. The only timely allegations, in terms of complainant's claims of age and disability are the non-hires on December 10, 1999, March 2, 2000, and July 17, 2000.

Respondent seeks to dismiss complainant's claim of FEA retaliation. Respondent contends that complainant failed to identify any protected activity that could serve as the basis for a FEA retaliation claim. The only FEA protected activities alleged by complainant are the same ones that he identified for his whistleblower claim. The scope of activities that may serve as the basis for a claim of FEA retaliation are set forth in §111.322(2m), Stats. Complainant has not explained how any of the five activities listed in Finding 4 would fit within any of the categories of protected activities listed in §111.322(2m), and the Commission concludes that none fit within those categories. Therefore, complainant has failed to state a FEA retaliation claim.

II. Case No. 01-0007-PC-ER

In this case, filed on January 17, 2001, complainant alleges additional retaliatory conduct during October and November of 2000. Respondent raises several objections to the complainant's whistleblower claims.

Respondent argues that the whistleblower claim in Case No. 01-0007-PC-ER is untimely because the complaint was filed on January 17, 2001, more than 60 days after the last (November 9th) decision not to hire complainant.

Pursuant to §230.85(1), Stats., whistleblower complaints must 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." Complainant first mentioned the October 11th and October 23rd selection decisions in his December 21st submission to the Commission in Case No. 00-0123-PC-ER. In a letter

dated December 21st, a Commission employee explained to complainant that it wasn't clear whether he had mentioned these actions "for informational purposes or if you are alleging those as allegations of refusal to hire for discriminatory/retaliatory reasons." The Commission's employee provided complainant an additional complaint form and asked him to "please file the completed complaint" by January 2nd Complainant, who was represented by counsel throughout this period, filed a complaint form on January 17, 2001, more than two weeks after January 2nd.

Under certain circumstances, a perfected complaint may relate back to a previous filing. For example, in *Schultz v. DOC*, 96-0122-PC-ER, 4/2/97, the Commission received a complaint form sworn to by complainant on October 9, 1996. That filing related back to September 20, 1996, when the Commission received a complaint form sworn to by complainant's attorney.[3]

The present case is complicated by the fact that complainant's December 21st submission was not clear whether complainant sought to raise additional allegations of discrimination or whether he merely referenced the conduct in October of 2000 for informational purposes. Complainant was asked to clarify his intent and he was provided a short period to file a perfected complaint if he wanted to pursue discrimination/retaliation claims relating to the October hiring decisions. These facts are related to, but distinguishable from, those in *Reinhold v. Office of the Columbia County District Attorney*, 95-0086-PC-ER, 11/7/97; petition for rehearing denied, 12/17/97 In *Reinhold*, the complainant's claims were dismissed as untimely filed where she failed to cure a technical defect as directed by the Commission in a previous ruling. In the earlier ruling, issued on September 16, 1997, complainant was permitted to amend her complaint by filing, within 21 calendar days, a properly signed, verified and notarized statement as required under §PC 2.02(2), Wis. Adm. Code. The Commission included a warning that if complainant did not submit the required statement by the due date, the allegations would be dismissed. Instead of curing the technical defect by complainant

[3] Pursuant to §PC 2.02(2), Wis. Adm. Code, complainant's signature on the complaint form must be verified and notarized.

verifying the information herself, her attorney provided the information under his own signature, which was the same defect addressed in the September 16th ruling. Because complainant had not taken advantage of the opportunity granted her to cure the technical defect, the unverified allegations were dismissed as defective. The remaining allegations were dismissed as untimely filed. The Commission further explained its analysis when it denied complainant's petition for rehearing:

> [T]he new allegations raised by complainant were interpreted *by the Commission* as a request to amend the complaint and such request was granted under the conditions that the amendment be filed within a certain time frame and in a statement signed, verified and notarized by complainant as required under §PC 2.02(2), Wis. Admin. Code. Complainant simply has not preserved her right to go forward because she failed to comply with the opportunity already given to cure the technical defect. The Commission is unaware of any requirement for administrative or court forums to extend more than one fair and full opportunity to cure a technical defect. (Emphasis in original.) *Reinhold v. Office of the Columbia County District Attorney*, 95-0086-PC-ER, 12/17/97

In the present case, there was no formal order from the Commission directing complainant to perfect his complaint or have his claims dismissed. There was merely a written request from a member of the Commission's staff asking complainant to please file the completed form by January 2nd without an indication of any consequences if complainant did not comply. In addition, that letter went out on December 21st, a Thursday. Because December 25th and January 1st were holidays, there were only 5 workdays after the date of the letter and before the due date of Tuesday, January 2nd. The new complaint form had to travel, via regular mail, to complainant's attorney in Madison who then had to fill it in and get it to complainant who then had to verify the information on the form and return it to the Commission. Complainant's home address is in La Crosse. The verified form didn't make it back to the Commission by January 2nd.

The circumstances in the present case bear comparison to those in *Goodhue v. UW (Stevens Point)*, 82-PC-ER-24, 11/9/83. There, in response to a December 27, 1981, letter from complainant, an employee of the Commission mailed her a complaint

form with a cover letter inviting her to return the form. Eighteen days later, after not having received a response from complainant, the Commission employee sent her a second letter, dated January 29, 1982, stating that the Commission could not proceed without a completed form. This second letter included the following statement: "Unless I hear from you to the contrary within thirty days, I will assume you are no longer interested." Complainant finally filed the completed complaint form on March 8, which was beyond the 30 day period referenced in the January 29th letter. The Commission held, nevertheless, that the complainant's December 27th letter constituted a timely filed complaint and also held that the complaint form, filed on March 8th, corrected any technical deficiencies in the December 27th letter and related back to that letter

Based on *Goodhue*, and given the particular facts of the present case, the Commission concludes that, as to the allegations of discrimination/retaliation found in the December 21, 2000, letter from complainant arising from his rejection for vacant positions on October 11 and October 23, 2000, the letter constituted a complaint of discrimination that complainant subsequently perfected when he filed a verified complaint form on January 17, 2001.

The Commission notes that the December 21st letter referred to rejections of complainant for vacant positions through October 23, 2000. That letter did not refer to a rejection on November 9, 2000. It wasn't until the complainant filed the perfected complaint form on January 17, 2001, that he identified the November 9th rejection as another incident of discrimination/retaliation. Therefore, January 17, 2001, is the filing date for the purpose of complainant's allegation of discrimination/retaliation arising from the November 9th rejection.

As noted above, respondent contends that complainant's claims of whistleblower retaliation should be dismissed as untimely filed. Based upon a December 21st filing date (which applies with respect to the October 11 and 23 rejection decisions) the first day in the 60-day actionable period under the whistleblower law was October 22, 2000. Complainant's allegation regarding the October 11th decision not to select him is un-

timely as to his whistleblower claim. The remaining allegation arising from the October 23rd rejection decision is timely under the whistleblower law. However, as to the November 9th rejection decision, the Commission must use the filing date of January 17, 2001, which is when complainant first mentioned that decision. The 60-day actionable period for the January 17th filing commenced on November 18, 2000. Therefore, the complainant's whistleblower allegation arising from the November 9th rejection decision is also untimely.

Complainant's sole timely allegation under the whistleblower law in Case No. 01-0007-PC-ER, relates to the October 23, 2000, rejection decision.

Respondent also contends that the complainant is not eligible to pursue a claim under the whistleblower law because he "was not employed by Wis DOT at the time" of the allegedly retaliatory conduct. Respondent points to the definition of "disciplinary action" in §230.80(2), Stats. That definition reads:

> (2) "Disciplinary action" means any action taken *with respect to an employee* which has the effect, in whole or in part, of a penalty, including but not limited to any of the following:
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> (a) Dismissal, demotion, transfer, removal of any duty assigned to the employee's position, refusal to restore, suspension, reprimand, verbal or physical harassment or reduction in base pay.
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> (b) Denial of education or training, if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation or other personnel action.
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> (c) Reassignment.
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> (d) Failure to increase base pay, except with respect to the determination of a discretionary performance award. (Emphasis added)

It is undisputed that Mr Young was not employed by respondent at the time he filed his first complaint in September of 2000 and at the time of the selection decisions that serve as the basis for Case No. 01-0007-PC-ER.

In *Hollinger v. UW-Milwaukee*, 84-0061-PC-ER, 11/21/85, the Commission addressed complainant's motion to reconsider a ruling on October 14, 1985, denying

complainant's request to amend her complaint. The later ruling included the following language:

> In a decision dated October 14, 1985, the Commission denied complainant's motion to amend her complaint. The complainant had sought to amend her complaint "by adding an allegation that the respondent's offer of settlement dated September 13, 1985, constituted a 'further attempt . . to penalize' her for her prior whistleblower activities." The Commission held that complainant was not an employee as defined in s. 230.80(3), Stats., and, therefore, did not fall within the protection from retaliation granted employees in s. 230.83(1), Stats.
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> On October 29, 1985, complainant filed a motion for the Commission to reconsider its October 14th decision. The motion stated in part:
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>> It is true, of course, that at the time of the complained acts Ms. Hollinger was not on the payroll nor was she performing services for Respondent. She was not because Respondent had purportedly nonrenewed her lawfully. If, however, as her original complaint alleges this nonrenewal was unlawful and, therefore, void, Ms. Hollinger has continued to be an employee of Respondent. Thus, the question whether Ms. Hollinger is or is not an employee of Respondent has not yet been determined. Upholding her contention that she is an employee would require this Commission to determine the validity of the amendments set forth in her motion.
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> The term employee is defined in s. 230.80(3), Stats., as "any person employed by any governmental unit . . . ." The operative language in subch. III, ch. 230, Stats, is similar to the language used in §704 of Title VII, Civil Rights Act of 1964. There, the protection from retaliation reads:
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>> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter. 42 U.S.C. §2000e-3(a)
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> Title VII defines an "employee" as "an individual employed by an employer." 42 U.S.C. §2000e(f). In *Bilka v. Pepe's Inc.*, 38 FEP Cases 1655 (1985), the U.S. District Court for the Northern District of Illinois held that a former employee who alleged his employer was giving nega-

> tive employment references had stated a claim under Title VII even though the employment relationship had ended:
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> > Section 704 was plainly written to protect employees who assert Title VII rights. If an employee asserts her rights after the relationship is over, her assertion nevertheless grows out of that relationship. "[T]he statute prohibits discrimination related to or arising out of an employment relationship, whether or not the person discriminated against is an employee at the time of the discriminatory conduct." *Patchenko v. C.B. Dolge Co., Inc.*, 581 F.2d 1052, 1055, 18 FEP Cases 691 (2d Cir. 1978). If Pepe's narrow reading of the statute were correct, employers could easily retaliate against former employees against whom they have discriminated. Section 704(a) was obviously written to prevent employers from chilling employee's assertions of Title VII rights, and the section should be read broadly to protect former employees as well as current employees. 38 FEP Cases 1655, 1658.
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> Based upon the same reasoning in *Bilka*, the definition of employee in s. 230.80(3), Stats., should also be liberally construed so as to permit claims that arise from an earlier employment relationship even if the alleged retaliation occurred after the complainant has stopped working from the employer. See s. 230.02, Stats.

In its November 21, 1985, ruling in *Hollinger*, the Commission then proceeded to deny complainant's motion to reconsider on other grounds, after concluding that an offer of settlement did not effectuate retaliation because it required acceptance by complainant before the terms of the settlement could go into effect.

The reasoning in *Hollinger* applies to the present case. Although complainant is no longer an employee of respondent, he contends that he is being denied re-employment because of activities protected under the whistleblower law. The denial of re-employment certainly has the effect of a penalty on complainant. Complainant contends that this penalty arises out of his previous employment relationship with respondent. This is the type of a penalty that the whistleblower law was designed to prevent.[4]

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[4] Respondent relies on the Commission's decision in *Kuri v. UW (Stevens Point)*, 91-0141-PC-ER, 4/30/93. There the Commission noted that

Respondent also argues that because complainant's disclosures to his superiors were not in writing, his whistleblower allegations that are part of Case No. 01-0007-PC-ER must fail.

To the extent complainant's allegation of whistleblower retaliation in this case still relies on the same 5 safety concerns he outlined for Case No. 00-0123-PC-ER, the result would be the same as in that case: complainant failed to make a written disclosure that satisfied the requirements of the whistleblower law The two cases are not identical, however, because a whistleblower retaliation complaint, filed with the Commission, may also serve as a protected activity under the law

A disciplinary action imposed after respondent learned of a charge of whistleblower retaliation could constitute illegal retaliation under the whistleblower law *Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98. The whistleblower law prohibits an "appointing authority, agent of an appointing authority or supervisor" from taking "any retaliatory action against an employee." Sec. 230.83(1), Stats. "Retaliatory action" is defined in §230.80(8), as a "disciplinary action taken because . (a) The employee lawfully disclosed information under s. 230.81 or filed a complaint under s. 230.85(1)." Complainant's first complaint, filed on September 11, 2000, may act as the "protected" activity in terms of his subsequent whistleblower complaint.

The parties filed written briefs regarding respondent's motion to dismiss Case No. 00-0123-PC-ER, and relied on those arguments without filing additional arguments regarding respondent's motion to dismiss Case No. 01-0007-PC-ER. Because of this scenario, it is unclear whether complainant is alleging that the failure to hire him on

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> these [retaliatory actions] all occurred after the termination of complainant's employment relationship with respondent, and could not as a matter of law constitute "disciplinary action" pursuant to the statutory definition found in §230.80(2)(a), Stats., which refers to actions taken with respect to an employee."

While this language appears to be inconsistent with the conclusion in *Hollinger*, it is important to note that the alleged whistleblower retaliation in *Kuri* involved conduct by respondent towards complainant's attorney, so the conduct clearly did not relate to the employment relationship and fell outside of the definition of a "disciplinary action."

October 23, 2000, was in retaliation for the conduct described in Finding 4 or whether it was in retaliation for having filed the initial complaint on September 11, 2000. The Commission will provide complainant an opportunity to clarify his allegations in that regard.

Respondent also asks the Commission to dismiss complainant's FEA retaliation claim that is part of Case No. 01-0007-PC-ER because complainant did not engage in any protected activity. Again, it is unclear whether complainant is alleging that the complaint he filed on September 11, 2000, is the basis for his claim of FEA retaliation. He will be provided an opportunity to clarify his allegation.

ORDER

Case No. 00-0123-PC-ER

Complainant's claims of whistleblower retaliation and FEA retaliation are dismissed. Complainant's allegations of age and disability discrimination are dismissed in part. Complainant may proceed with respect to his allegations of age and disability discrimination with respect to the non-hires on December 10, 1999, March 2, 2000, and July 17, 2000.

Case No. 01-0007-PC-ER

Respondent's motion to dismiss complainant's whistleblower claim is granted as to complainant's allegations arising from the non-selection decisions on October 11 and November 9, 2000. Complainant has 15 days from the date this order is signed in which to identify the protected activity/activities that serve as the basis for his whistleblower and FEA retaliation claims. If the Commission does not receive that information within the 15-day period, the Commission will dismiss his remaining whistleblower and FEA retaliation allegations.

Dated: May 17, 2001 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

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JUDY M. ROGERS, Commissioner