STATE OF WISCONSIN PERSONNEL COMMISSION

GARY PATERA,
Complainant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM (Stout),
Respondent.

RULING ON CROSS MOTIONS

Case No. 00-0146-PC-ER

The complainant filed a motion for summary judgment by letter dated May 15, 2001, asserting that his discrimination complaint was timely filed and that he was entitled to judgment on the merits. On June 11, 2001, respondent filed a motion to dismiss for untimely filing. The parties filed briefs and the final brief was received on August 21, 2001.

The facts recited below are made solely to resolve this motion. They are undisputed unless specifically noted to the contrary

FINDINGS OF FACT

1. The Commission received the above-captioned complaint on November 6, 2000. Complainant alleged therein that respondent discriminated against him based on his disability, in violation of the Fair Employment Act (FEA), Subch. II, Ch. 111, Stats. He also alleged retaliation based on his reporting of occupational safety and health (OSH) concerns in violation of §101.055(8), Stats. and retaliation based on his whistleblowing activities in violation of §230.80, et. seq., Stats. By letter dated November 9, 2000, complainant withdrew the OSH and whistleblower claims.

2. In order to satisfy the 300-day filing requirement, a complaint would have to be filed on or before November 1, 2000, if the discrimination occurred January 6, 2000; or on or before November 7, 2000, if the discrimination occurred January 12, 2000.

3. Complainant began working for the State of Wisconsin in 1983 as a Facility Repair Worker 3 (FRW3) at the Northern Wisconsin Center for the Developmentally Disabled.

He began working for respondent in 1990, in a FRW3 position. He went on disability leave some time during the spring of 1999.

4. A meeting was held on January 6, 2000, to discuss complainant's medical limitations and his job duties. The following management employees were present: 1) Wayne Argo, Director of Human Resources; 2) Don Moats, Superintendent of Buildings and Grounds; 3) Mike Abrahamson, Maintenance Supervisor; and 4) Donna Weber, Assistant to the Chancellor for Affirmative Action. Mark Amthor, Maintenance Mechanic 2, attended as complainant's union representative. Complainant also attended.

5. Each person who attended the above-noted meeting filed an affidavit for purposes of resolving the present timeliness motion.

6. The parties dispute whether complainant was told that his employment would be terminated during the January 6th meeting. The following affiants indicated that complainant was told during the meeting that his employment would be terminated: Mr. Argo[1], Mr Moats[2], Mr Abrahamson[3], Ms. Weber[4] and Mr. Amthor[5] The complainant disputed their affidavit statements and averred as shown below (complainant's affidavit, par 23):

> At no time prior to the receipt of the letter from Human Resources on January 12, did I hear or receive a conclusive statement from U.W.-Stout or its

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[1] Mr. Argo stated in his affidavit (par. 8) that he "informed Mr. Patera that UW-Stout would be terminating his employment, and that he would shortly receive a letter formalizing his termination." Mr. Argo's notes of the meeting are attached to his affidavit and include the following statement: "We will send letter to him terminating his appointment with the university."

[2] Mr. Moats stated in his affidavit (par. 5) that during the meeting, Mr. Argo "specifically informed Mr. Patera that UW-Stout would be terminating his employment, and that Patera would receive a letter formalizing his termination."

[3] Mr. Abrahamson stated in his affidavit (par. 5) that during the meeting, Mr. Argo "specifically informed Mr. Patera that UW-Stout would be terminating his employment and that a letter would be sent formalizing his termination."

[4] Ms. Weber stated in her affidavit (par. 6) that at the meeting Mr. Argo "clearly stated to Mr. Patera that UW-Stout was going to terminate his employment. Mr. Argo further stated that Mr. Amthor would shortly receive a letter from the university formalizing his termination." She attached a copy of her meeting notes which contain the following pertinent notation: "He will receive a letter from HR."

[5] Mr. Amthor stated in his affidavit (par.4) that at the meeting Mr. Argo "stated to Mr. Patera that his employment would be terminated. Mr. Argo further informed Mr. Patera that a letter would be sent formalizing his termination."

representatives that a final decision had been made to terminate my employment.

7 On January 12, 2000, the complainant received a termination letter (dated January 10, 2000) which stated as shown below (in pertinent part):

> This letter is to notify you that your employment with the University of Wisconsin-Stout was terminated effective January 7, 2000, because of your inability to perform your assigned job duties. This decision was made as a result of the discussion held with you and your union representative on Thursday, January 6th and supporting medical evidence which was shared with you at that meeting.

OPINION

Complainant has the burden to establish that his claim was filed timely. See, e.g., *Nelson v. DILHR*, 95-0165-PC-ER, 2/11/98 and *Reinhold v. OCCDA*, 95-0086-PC-ER, 9/16/97 When the timeliness issue is being resolved in the context of a motion to dismiss it is appropriate to construe the allegations raised in the complaint in a light most favorable to complainant. *Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98.

Cases under the Fair Employment Act (FEA) must be filed "no more than 300 days after the alleged discrimination . . occurred" (§111.39(1), Stats.). Here, in order to satisfy this 300-day filing requirement, a complaint would have to be filed on or before November 1, 2000, if the discrimination occurred January 6, 2000; or on or before November 7, 2000, if the discrimination occurred January 12, 2000.

In *Hilmes v. DILHR*, 147 Wis. 2d 48, 53, 433 N.W.2d 251 (Ct. App. 1988), the court held that the word "occurred" means "the date of notice of termination." Oral notice of termination could be sufficient. In *Harris v. UW-LaCrosse*, 87-0178-PC-ER, 11/23/88, the Commission adopted the following standard to determine when the notice provided to an employee is sufficient to commence the 300-day limitations period (pp. 4-5), quoting from *Carpenter v. Bd. Of Regents*, 529 F. Supp. 525, 27 FEP Cases 1569 (W.D. Wis. 1982):

> When the legal process must be initiated by laypersons without professional legal advice, the limitations requirement should be construed in a manner comprehensible to such persons. As the Supreme Court noted in [*Delaware State College v. Ricks*, 449 U.S. 250, 260, 66 L.Ed 2d 431, 441, 101 S.Ct. 498 (1980)], the limitations periods should not commence to run so soon that it becomes difficult for a layman to invoke the protection of the civil rights statutes." Thus, it is appropriate to apply a "reasonable person" standard when determining the point at which the Title VII limitations period should begin to run.
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> The essential question to be resolved, then, is the date on which a reasonable person in plaintiff's position would have been put on notice of defendant's official and final decision on the merits . .
>
> The Commission agrees with the Court's use of this reasonable person standard to determine the date of notice under the Wisconsin Fair Employment Act. Not to use this approach would leave the door open to the possibility of substantial unfairness to laypersons trying to deal with what can be confusing bureaucratic processes.

The question, accordingly, is whether a reasonable person in complainant's position would have understood by the end of the meeting on January 6, 2000, that an official and final decision had been made to terminate his employment. The Commission concludes that the material facts underpinning this question are disputed and are best resolved after a hearing on the motion with an opportunity to assess witness credibility, rather than in the context of the present motion.

Respondent argues its motion should be granted because everyone at the meeting, except complainant, recalls that he was told that his employment would be terminated. Citing from *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)[6], respondent contends (brief dated 6/11/01, pp. 5-6) that the evidence is "so one-sided that respondent must prevail as a matter of law."

Respondent essentially is saying that by measurement of the *quantity* and without consideration of the *quality* of evidence contained in affidavits filed on the timeliness motion, that complainant must lose as a matter of law. Such argument ignores the *Anderson* Court's

subsequent statements that its decision should not be interpreted as favoring a "trial on affidavits" and that the "evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor" (*Id.* @ 255). Respondent's argument also fails to acknowledge that complainant's affidavit was based on personal knowledge as he was present at the meeting. His affidavit is not based solely on some metaphysical doubt, general denials or a failure to recall as was the situation in the other cases cited by respondent (*Wamser v. J.E. Liss, Inc.*, 838 F.Supp 393 (E.D. Wis. 1993) and *Scherer v. Rockwell Int'l Corp.*, 975 F.2d 356 (7th Cir 1992)).

The respondent correctly notes that all people at the meeting except the complainant heard Mr Argo tell complainant that he was going to be terminated. Complainant stated in his affidavit that he did not hear or receive "a conclusive statement" that a "final decision had been made to terminate" his employment. His statement is subject to interpretation. He does not specifically deny that Mr. Argo told him his employment would be terminated and he would be receiving a letter "formalizing" the termination. But in the context of the present motion, the Commission must draw all justifiable inferences in his favor and, in this context, his affidavit is sufficient to defeat the present motion.

The Commission will convene an evidentiary hearing for the limited purpose of resolving the timeliness issue. The Commission considered letting the matter proceed through the investigative process, but rejected that approach given the potential here for a more timely resolution and for conserving resources.

The Commission will defer ruling on complainant's motion for summary judgment until the timeliness issue is resolved.

ORDER

A determinative ruling on respondent's motion to dismiss is deferred pending completion of an evidentiary hearing on the motion. The parties will be contacted for the

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[6] On remand, *Liberty Lobby, Inc. v. Anderson*, 81-2249, 1990 U.S.Dist. LEXIS 19587 (D.C. Dist. 1990)

purpose of scheduling a prehearing conference. A ruling on complainant's motion for summary judgment is deferred pending resolution of respondent's motion to dismiss.

Dated: September 24, 2001

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

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JUDY M. ROGERS, Commissioner

ANTHONY J. THEODORE, Commissioner