STATE OF WISCONSIN PERSONNEL COMMISSION

EMANUEL C. BROOKS, JR.,
Complainant,

v.

Chancellor, UNIVERSITY OF WISCONSIN-MADISON,
Respondent.

RULING
ON
MOTIONS

Case No. 00-0111-PC-ER

This matter is before the Commission on the complainant's motions to amend his complaint and for partial summary judgment on the amended complaint, filed May 2, 2002.[1] Both parties have filed briefs. On October 17, 2002, complainant filed a lawsuit in Dane County Circuit Court, Branch 2, alleging that respondent discriminated against him on the bases of race and sex and violated his rights under 42 USC 1983, 42 USC 1981, and Title IX. On December 6, 2002, respondent requested dismissal of the instant case, contending that the lawsuit was comprised of the same issues being pursued in this case. On December 10, 2002, complainant denied that the issues were the same and opposed dismissal of this case.

The following facts appear to be undisputed. These findings are made solely for the purpose of resolving this motion.

FINDINGS OF FACT

1. Prior to June 9, 2000, respondent employed complainant as a project employee, in the classification of Clerical Assistant 1, to perform duties as a parking cashier.

2. Respondent suspended complainant without pay on May 12, 2000. Respondent did not provide complainant with written notification of this action.

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[1] The commission regrets the delay in issuing this decision. Due to the state's ongoing budget difficulties, the commission has been understaffed in professional positions by 20% since May 2000, 40% since February 2002, and 60% since January 2003. In addition, during this time the commission has had to relocate its offices, and to deal with a number of matters related to the impending demise of the commission on July 1, 2003, pursuant to the budget bill, SB 44, sec. 9139. These factors have contributed to this delay.

3. By letter dated June 7, 2000, respondent terminated complainant's employment, effective June 9, 2000.

4. Complainant filed a charge of WFEA (Wisconsin Fair Employment Act; Subch. II, Ch. 111, Stats.) discrimination with the Commission on August 22, 2000, alleging that respondent's actions of suspending and then terminating his employment constituted discrimination based on arrest/conviction record, race and sex.

5. Commission staff investigated the complaint and, on November 6, 2001, issued a mixed Initial Determination that found both "probable cause" and "no probable cause" as to different aspects of the alleged discrimination. Complainant appealed the "no probable cause" portion.

6. The Commission convened a prehearing conference on January 28, 2002, and the parties agreed to a statement of the issues for hearing and agreed to dates for hearing in June of 2002. The statement of issues for hearing is as follows:

> 1. Whether respondent discriminated against complainant because of his arrest/conviction record, race, and/or sex when he was suspended by respondent in May 2000.
> 2. Whether probable cause exists to believe that complainant was discriminated against because of his arrest/conviction record, race and/or sex when he was discharged by respondent in June 2000.

7. On May 2, 2002, complainant filed a motion to amend his complaint to add two claims:

> (1) that he was denied his statutory rights to pre-disciplinary process, to be evaluated under the progressive disciplinary criteria codified for and applied to classified civil service, and to be terminated only after a determination of just cause; and (2) that he was denied his constitutional right to due process.

Complainant also moved for partial summary judgment and declaratory relief on his new claims.

CONCLUSIONS OF LAW

1. The commission does not have jurisdiction over the subject matter of the claims that complainant seeks to add through his motion to amend.

2. If the complainant were allowed to amend his complaint as he requests, the new claims he seeks to add would be untimely pursuant to s. 230.44(3), Stats.

OPINION

Complainant seeks:

> to amend his complaint of discrimination filed under the Wisconsin Fair Employment Act (FEA) on August 22, 2000, to add the following claims:
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> (1) that he was denied his statutory rights to pre-disciplinary process, to be evaluated under the progressive disciplinary criteria codified for and applied to classified civil service, and to be terminated only after a determination of just cause; and (2) that he was denied his constitutional right to due process. (Complainant's motion to amend complaint, filed May 2, 2002, p. 1)

In its brief in opposition to the motions, respondent contends, among other things, that the commission does not have subject matter jurisdiction with regard to the allegations complainant raises in conjunction with his motions.

In order to add separately cognizable claims of this nature, there must be a basis for subject matter jurisdiction. None of the commission's statutory bases of jurisdiction (ss. 230.44, 230.45, Stats.) give the commission the authority to entertain claims of denial of statutorily or constitutionally based due process, although such matters often are implicated in appeals of disciplinary transactions under s. 230.44(1)(c), Stats.

The only specific argument complainant presents concerning the statutory basis for subject matter jurisdiction is as follows: "[T]he Personnel Commission has the authority to review a decision made by an appointing authority. Wis. Stat. s. 230.44(1)(a). Here, the appointing authority, Lori Kay, made the decision to summarily terminate Mr. Brooks without first providing him with the process he was due as a project employee." (Complainant's motion to amend complaint, filed May 2, 2002, p. 5)

The statutory provision complainant cites, s. 230.44(1)(a), Stats., provides as follows:

> (1) APPEALABLE ACTIONS AND STEPS. Except as provided in par. (e), the following are actions appealable to the commission under s. 230.45(1)(a):
> (a) *Decision made or delegated by administrator.* Appeal of a personnel decision under this subchapter made by the administrator or by an appointing authority under authority delegated by the administrator under s. 230.05(2).

The "administrator" referred to in this subsection is "the administrator of the division [of merit recruitment and selection]." SS. 230.03(1), 230.03(10), Stats. The powers and duties of this administrator involve the administration of the state's classified civil service merit recruitment and selection program, and are found throughout the civil service code (Subch. II, Ch. 230, Stats., and related rules identified in the administrative code as ER and ER-MRS), *see, e. g.,* s. 230.16(4), Stats. ("All examinations . . . for positions in the classified service shall be job-related in compliance with appropriate validation standards and shall be subject to the approval of the administrator.") There is no conceivable function of the administrator that could be delegated to an appointing authority pursuant to s. 230.05(2), Stats., that could have anything to do with the personnel transaction involved in this case (termination of project employment), that would provide a jurisdictional basis pursuant to s. 230.44(1)(a), Stats., for complainant's proposed amendments.

In its brief in opposition to complainant's motions, respondent points out that the commission has repeatedly held that it does not have subject matter jurisdiction under s. 230.44(1)(c), Stats., over an appeal of the termination of project employment. *See LaPorte v. DILHR,* 81-0153-PC, 10/30/81; *Busch v. HEAB,* 82-0058-PC, 6/25/82; *Hart v. UW,* 83-0190-PC, 11/9/83. These holdings are based primarily on s. ER 34.07(1), Wis. Adm. Code, which provides:

> Employees serving a project appointment shall [] Have the same appeal and grievance rights as permanent non-represented employees except that *termination of the project appointment may not be appealed* (emphasis added),

and s. 230.27(2m), Stats., which provides:

> An employee on a project appointment, while in the position, shall earn and receive all rights and privileges specifically authorized by statute for nonrepresented classified employees, except tenure, transfer, restoration, reinstatement, promotion eligibility and layoff benefits. (emphasis added)

Complainant argues in support of his motions that project employees have the same rights as non-project employees as to terminations for disciplinary reasons:

> It does not follow from the fact that a project appointment may be terminated at any time, either because of a lack of funding for that project or for some other reason the project may end, and such a termination may not be appealed, that a project employee does not have any rights to appeal or grieve discipline or a termination. "There is an important distinction here between an appointment and an employee." (Complainant's motion p. 9)

This inner quote is a statement from an affidavit of Dennis Dresang, who states that he drafted s. 230.27, Stats., while on a task force studying the civil service system. He goes on to say in his affidavit:

> A project employee may be terminated at any time, so long as that termination is related to the termination of the project appointment. Wis. Admin. Code s ER-MRS 34.08.[2] This does not mean, contrary to Ms. Stella's[3] interpretation, that a project employee may be terminated without just cause. There is an important distinction here between an appointment and an employee. If the termination of a project employee is related to the performance of the employee, as opposed to the termination of the project appointment, that employee is entitled to the same rights and privileges of permanent, nonrepresented classified employees. These rights include . . . the right to be disciplined only if there is just cause . . . the right to grieve or appeal any disciplinary action taken, and the right to be disciplined, up to and including termination, only where there is a showing of just cause. (Affidavit dated May 1, 2002, pp. 3-4)

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[2] Section ER-MRS 34.08(1) provides that "Employees on a project appointment may be terminated at any time."

[3] Ms. Stella is an employment relations specialist who advised the appointing authority with regard to complainant's termination. The question of whether her advice was right or wrong is not before the commission. The question is whether the commission has jurisdiction over the subject matter of this complaint. The commission has to base this decision on what respondent did, not on what advice the appointing authority was given from support staff.

Laying to one side the question of whether it is appropriate to consider the statement of a drafter of a statute as evidence of legislative intent,[4] the interpretation complainant advances is not supported by the civil service code. Section ER 34.07(1) provides that employees "serving a *project appointment* shall [] Have the same appeal and grievance rights as permanent non-represented employees except that termination of the *project appointment* may not be appealed." (emphasis added) An "appointment" is defined by both ss. ER 1.02(33) and ER-MRS 1.02(25) as "the action of an appointing authority to place a person in a position within the agency in accordance with the [civil service] law." A "project appointment" is defined by both ss. ER 1.02(33) and ER-MRS 1.02(25) as "the appointment of a person to a project position under conditions of employment which do not provide for attainment of permanent status." A "project position" is defined by s. 230.27(1), Stats.[5], as:

> [A] position which is normally funded for 6 or more consecutive months and which requires employment for 600 hours or more per 26 consecutive biweekly pay periods, either for a temporary workload increase or for a planned undertaking which is not a regular function of the employing agency and which has an established probable date of termination. No project position may exist for more than 4 years.

These definitions do not support complainant's argument that "There is an important distinction here between an appointment and an employee. If the termination of a project employee is related to the performance of the employee, as opposed to the termination of the project appointment, that employee is entitled to the same rights and privileges of permanent, nonrepresented employees," including the right to be terminated only for just cause, and the right to appeal such a termination. Dresang Affidavit, pp. 3-4. Complainant's argument is inconsistent with the definition of a project appointment as the "appointment of a *person* to a project position." S. ER-1.02(33) (emphasis added) The termination of a project appointment can only be a reference to

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[4] Respondent cites two supreme court decisions disapproving of such reliance, *State v. Consolidated Freightways Corp.*, 72 Wis. 2d 727, 738, 242 N. W. 2d 192 (1976); *Moorman Mfg. Co. v. Industrial Commission,* 241 Wis. 200, 208, 5 N. W. 2d 743 (1942).

[5] Section ER-MRS 1.02(26m) provides that "'Project position' has the meaning defined in s. 230.27(1), Stats."

the termination of the project employee/incumbent's employment in that project position, regardless of whether it is effected for disciplinary reasons or because of, for example, a lapse in funding. The terminated employee has no right to appeal that termination because he or she has no permanent status in class as required by s. 230.44(1)(c), Stats., and because s. ER 34.07(1) explicitly provides that "termination of the project appointment may not be appealed."

The commission rejected a similar argument in *Hart v. UW,* 83-0190-PC, 11/9/83, which also involved the termination of a project employee:

> Laying to one side the question of whether the term "except tenure" in s. 230.27(2) in itself excludes the right to appeal a discharge,[6] the major difficulty with appellant's argument is that it does not follow [as appellant argues] that the "rights and privileges specifically authorized by statute for non-represented classified employees" includes the right to be discharged only for just cause and the right to appeal such discharges to the commission. Both such rights are limited to non-represented classified employees with permanent status in class. See ss 230.34(1)(a), 230.44(1)(c), Stats. *Hart v. UW* at p. 3.

Another problem with the proposed amendment is that it is untimely under s. 230.44(3), Stats., which requires that appeals under this section be filed within 30 days of the effective date of the action or within 30 days after the date the employee is notified of the action, whichever is later. In his motion, complainant addresses the effect of this provision as follows:

> [P]er Wis. Stat. s. 230.44(3), Mr. Brooks had 30 days after receiving *notice of his right to appeal a disciplinary action* in which to file that appeal. Here, Mr. Brooks received no such notice. Rather . . . the officials involved in his disciplinary action maintained that Mr. Brooks not only had no right to progressive discipline, he had no right to appeal . . . any disciplinary action taken against him. Motion to amend complaint filed May 2, 2002, p. 4. (emphasis added)

In this case, complainant was terminated effective June 9, 2000, and received notice of this action on or about June 7, 2003. The respondent never advised complainant that he had appeal rights, but there is no requirement under s. 230.44(3) that

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[6] However, this is the clear intendment of that language.

the employing agency advise an employee of his rights to appeal.[7] Contrary to complainant's assertion quoted above, s. 230.44(3) does not provide that an employee like Mr. Brooks "has 30 days after receiving notice of his right to appeal a disciplinary action in which to file an appeal." Rather, it uses the expression "after the appellant is notified of the *action*." (emphasis added) Furthermore, the general rule under the civil service code is that an employing agency has no obligation to inform an employee of his or her rights. *See, e. g., Jabs v. State Board of Personnel,* 34 Wis. 2d 245, 250-51, 148 N. W. 2d 853 (1967).

Complainant also contends his amendment is timely because he filed promptly after he discovered through discovery the real rationale for the respondent's termination decision:

> Until Ms. Bladl and Ms. Kay revealed that they did not exercise any flexibility regarding the discipline of Mr. Brooks that the UW indicated they had in its Answer [to the complaint], Mr. Brooks had no idea that he had been subjected to an improper mandate. As required under Wis. Stat. s. 230.44(3), Mr. Brooks sought to amend his complaint "within 30 days after the appellant is notified of the action." His amendment is thus timely.
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> Mr. Brooks' amendment is also timely because he sought to bring a new claim as soon as possible after he learned of the statutory violation here. This is known as equitable tolling. *See Tafelski v. UW-Superior,* Case No. 95-0127-PC-ER (3/22/96) at p. 11. Equitable tolling "permits a plaintiff to avoid the bar of the statute of limitations if despite all due diligence he is unable to obtain vital information bearing on the existence of his claim." *Id.* (Complainant's reply brief filed June 10, 2002, pp. 6-7)

However, this is not a case which falls into the category where equitable tolling applies due to the complainant's inability to discern a claim at the time of the adverse employment action, such as *Rudie v. DHSS,* 87-0131-PC-ER, 9/19/90; or *Sprenger v. UW-GB,* 85-0089-PC-ER, 85-0089-PC-ER, 1/24/86. Here, complainant knew on or about June 7, 2000, that he had been terminated for what amounts to cause. He obviously at least suspected in that time frame that the employer had acted improperly, be-

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[7] In the commission's opinion, complainant did not have any appeal rights anyway.

cause he filed this complaint on August 22, 2000. What he learned through discovery (as relevant here) is that respondent had proceeded as it did regarding his termination based at least in part on an understanding of civil service code requirements that complainant alleges was legally incorrect. However, at the time of his termination complainant knew that he was being discharged without having been afforded progressive discipline or a formal pre-termination hearing.[8] The time for filing an appeal does not start to run:

> from the date the employee learns of facts that lead him or her to the belief that a prior transaction or state of affairs was improper, illegal or unfair. *See, e. g., Bong & Seeman v. DILHR,* Wis. Pers. Commn. No. 79-167-PC, 11/8/79; 51 Am. Jur. 2d *Limitation of Actions* s. 146: ". . . the mere fact that a person entitled to an action has no knowledge of his right to sue, or of the facts out of which his right arises, does not prevent the running of the statute or postpone the commencement of the period of limitations until he discovers the facts or learns of his rights thereunder . . . ." *Cronin v. DHSS,* 82-0180-PC, 9/23/82

Therefore, it is concluded that this amendment would result in an untimely claim and also should not be allowed on that ground, in addition to the jurisdictional issue discussed above.

With regard to further proceedings, and specifically respondent's request to dismiss this case due to the pendency of complainant's court case, it has been the commission's usual practice to hold its proceeding in abeyance pending an employee's pursuit of a judicial Title VII claim, because the results of a Title VII claim usually will render the commission proceeding moot or have a preclusive effect thereon, whereas if the commission case were resolved first, it would not have a preclusive effect on a Title VII claim. *See, e. g., Goetz v. DOA,* 95-0083-PC-ER, 1/16/98. However, the commission has never considered that issue with regard to a Title IX claim. In light of the amount of time that has elapsed since the complainant's court case was filed, the com-

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[8] According to respondent, a member of management interviewed complainant to get his side of the story regarding the precipitating incident as part of the investigation that preceded the decision to terminate complainant's project employment the termination.

mission will ask the parties to provide a status report on that litigation before determining the course of any further proceedings here.

ORDER

1. The complainant's motions for leave to amend his complaint, for partial summary judgment, and for a declaratory ruling, filed May 2, 2002, are denied.

2. The parties are directed to advise the commission (or its successor agency, ERD (Equal Rights Division) of DWD (Department of Workforce Development),[9] of the status of Mr. Brooks' claims that were filed in Dane County Circuit Court on October 17, 2002, within 20 days of the date of this order.

Dated: June 27, 2003 STATE PERSONNEL COMMISSION

ANTHONY J. THEODORE, Commissioner

Commissioner Theodore is the sole sitting commissioner; the other two commissioner positions are vacant. Therefore, Commissioner Theodore is exercising the authority of the Commission. *See* 68 Op. Atty. Gen. 323 (1979).

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[9] At this time, the budget bill calling for elimination of the commission and transfer of WFEA claims to ERD, SB 44, s. 9139, with an effective date of July 1, 2003, has not been effectuated. However, the Joint Finance Committee has approved this provision.