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 CARLTON PUGH,
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 Complainant,
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 v.
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 Secretary, DEPARTMENT OF
 NATURAL RESOURCES,
 *
 Respondent.
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 Case No. 86-0059-PC-ER
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INTERIM
 DECISION
 AND
 ORDER

This matter is before the designated hearing examiner on respondent's motion to dismiss certain allegations of discrimination as untimely filed. The findings of fact set out below appear to be undisputed and are made solely for the purpose of this interim decision and order.

FINDINGS OF FACT

1. On April 21, 1986, complainant filed a charge of discrimination based on race and arrest/conviction record in reference to discharge and conditions of employment. The body of the complaint reads as follows:

I have been employed by the Department of Natural Resources, Bureau of Program Services since April 30, 1984 until March 17, 1986 as a limited-term employee. My classification with the dept. was that of Program Assistant 3 with the function of Systems Analyst for the dept.'s records management program. On March 17, 1986 I was terminated by Bureau Director, Richard Fox, resulting from allegations by Dorothy Rymer and Evelyn Kois that I had falsified my time sheet for the periods of February 2 - 15, the 16th - March 1st, and March 3rd through the 15th. The particular dates in question are: February 15 & 16 & 17, February 21st, and March 3rd & 10th. I was told in a meeting on March 17th, in which myself, Mr. Fox, Ms. Rymer, and Ms. Kois were present, that I had not worked any of the above mentioned days. It was alleged that on ~~March~~ February 15th & 16th, which was a weekend, that I did not have possession of the building access card to work on those days. The truth of the matter is that I was personally handed the access card by Ms. Rymer in front of another employee on Friday March 14th. In regards to the other dates in question I was simply told that I had not reported to work on those days. Other

employees in the work area as well as throughout the department can account for my presence on those days. I feel that these days were fictitiously concocted by Ms. Rymer and Ms. Kois and presented to Mr. Fox -- ultimately causing my dismissal. Even though I repeatedly pointed out to Mr. Fox the discrepancies in their allegations, he proceeded to discharge me without taking into consideration the proof I had presented. I feel I was discriminated on the basis of my race due to the fact that I was discharged without due process, and on the basis of what was presented by Ms. Rymer and Ms. Kois. I feel that other white limited-term as well as permanent employees within the dept. are not subject to such discriminatory actions, and would not have been discharged without some type of investigatory action. I also feel that Mr. Fox, as a supervisor, acted discriminatory in that he did not treat me fairly in his decision to terminate me, and acted solely on the fabricated allegations of Ms. Rymer and Ms. Kois, who are white. Furthermore, Mr. Fox referred to me as the wrong "boy" for the job prior to discharging me, giving further proof of racial/discriminatory overtone. [T]he remedy in which I am seeking in this matter includes, but is not limited to, reinstatement to the position and/or capacity I once held, back wages, as well as compensation for unemployment benefits I have been denied as a result of this matter.

2. On July 29, 1987, an equal rights officer issued an initial determination of no probable cause to believe discrimination occurred in regard to complainant's allegations that he was discriminated against on the basis of race in regard to the termination of his employment in March of 1986 and on the basis of arrest record in regard to harassment prior to his discharge.

3. During a prehearing conference on October 5, 1987, the parties agreed to an issue for hearing that read:

Whether there is probable cause to believe that respondent discriminated against complainant on the basis of race in regard to his discharge in March of 1986 and/or on the basis of his arrest record as to the terms and conditions of his employment.

The parties also agreed to schedule the matter for hearing on November 23, 1987.

4. A November 12, 1987 letter from the Commission to the parties reads as follows:

This will confirm that on 11/9/87 at the request of the complainant, and with the objection of the respondent, Donald R. Murphy, Commissioner, has granted postponement of the hearing scheduled for

11/23/87. Mr. Pugh is still seeking counsel and he will be contacted around December 10, 1987 for a status check on the above matter.

5. Then, on January 6, 1988, the complainant filed a signed, but unnotarized, amendment to his complaint. The amendment alleged discrimination based on race and arrest/conviction record and retaliation based on fair employment activities in reference to recruitment, hire, discharge and conditions of employment. The body of the amendment reads as follows:

Amend to original to include ;discrimination purs. to Fair Employment 111.32(5)(e) Equal Pay Act of 1963/Title VII of Civil Rights Act of 1967,Purs. to ss.230.26(1), (2) and (3),ss.230.41 and Manual Code 9170.6 and Manual Code 9108.1.Complainant contends that the alleged violations occurred during the periods of 4-25-84 to 3-17-86,by the DNR as an whole;Bureau of Progam Services and the Affirmative Action Office,complaint states that this type of hiring and extentions of time periods with regard to his employment (LTE)violated State and Federal Laws.

The complainant asked that investigation of the amendment be waived.

6. By letter dated February 3, Commissioner Donald R. Murphy informed respondent that complainant wished to waive the investigation of the amended complaint and to "proceed to prehearing to determine issues."

Respondent was asked to indicate a response to the waiver request.

7. By letter dated February 9, 1988, respondent wrote:

In reference to your letter dated February 3, 1988, I find it difficult to take a position on whether or not to waive the investigation since I am unsure of exactly the nature of Mr Pugh's amended complaint. The amended complaint needs more specificity in order to discern the thrust of the allegations.

Consequently, unless more information is provided which delineates the exact acts of discrimination, I object to the amended complaint on the basis it was not timely filed.

8. After complainant filed a response to the respondent's letter, a status conference was held on March 11, 1988. The conference report indicates that "[n]o jurisdictional issues were raised" and the parties agreed to the following issue:

Whether there is probable cause to believe respondent discriminated against complainant on the basis of race and arrest record in regard to terms and conditions of employment, including wages and harassment, and termination of his employment in March, 1986.

The parties also agreed to a hearing on May 5, 1988 and to conclude discovery by April 8, 1988.

9. After complainant failed to appear at his deposition on April 5, 1988, respondent moved to compel discovery. During a conference held on April 11, 1988 regarding respondent's motion, the parties agreed to postpone the hearing until June 21, 1988.

10. By letter dated April 12, 1988, the designated hearing examiner informed the parties of his concerns regarding the issue for hearing, specifically, the failure of the March 11th statement of issue to specify what additional allegations of discrimination/retaliation raised by the amended complaint were to be the subjects of the hearing. The parties were directed to discuss the scope of the hearing and to indicate if they could agree on the scope of the hearing.

11. Due to the failure of the parties to reach an agreement, a telephone conference was convened on May 9, 1988. During that conference, and a subsequent telephone call, the complainant alleged that the following actions constituted illegal discrimination:

1. The April 25, 1984 decision to hire him as an LTE rather than as a project employe. Basis: race.
2. The March 17, 1986 termination decision. Basis: race, arrest/conviction record.
3. The actions to extend his status as an LTE. These extensions occurred on January 2, 1985, and September 17, 1985. Basis: race.
4. The August 20, 1985, decision to send the complainant home for failing to cooperate. Basis: race.

5. The failure, throughout the period of his employment, to provide complainant with health insurance, life insurance, sick leave and holiday pay. Basis: race.
6. Statements made by Mr. Fox to the effect that he would need to hire several people to get the same results as the complainant was producing. These statements occurred on or about January 2, 1985, September 17, 1985 and during May or June of 1985. Basis: race.
7. The failure on or about March 17, 1986, of the respondent's Affirmative Action office to enforce their own policies of maintaining a discrimination free environment. Basis: race.
8. The decision early in April of 1986 by respondent to formulate "misconduct" reasons which were used as a basis for denying unemployment benefits to the complainant. Basis: retaliation.
9. Statements made by Mr. Fox in approximately April of 1985 to discourage complainant from applying for/taking the examination for the project/permanent portion of Records Management Coordinator. Basis: race.

The respondent subsequently filed an objection based on timeliness as to all allegations except paragraph 2.

OPINION

The respondent's jurisdictional objection raises two issues for consideration:

- 1) By its conduct at the conference on March 11, 1988, did the respondent waive its objections to the amended complaint?
- 2) Should the Commission permit the complainant to amend his original complaint?

Waiver

In its February 9th letter (finding #7), the respondent objected to the amended complaint, on the basis it was untimely filed, "unless more information is provided which delineates the exact acts of discrimination." One month later, at a status conference, the respondent did not raise any jurisdictional issues and agreed to an issue for hearing which referred to "terms and conditions of employment, including wages and harassment" as well as the termination decision. Notable by its absence is any reference

to retaliation, despite the claim of illegal retaliation in the January 6th amended complaint. However, the reference to "wages and harassment" in the March 11th issue did go beyond the mere reference in the October 5th issue to discrimination based on arrest record "as to the terms and conditions of his employment." (See finding #3).

The 300 day time limit for filing complaints under the Fair Employment Act is a statute of limitations rather than a statute concerning subject matter jurisdiction. Milwaukee Co. v. LIRC, 113 Wis. 2nd 199, 205 (Ct. of Appeals, 1983). As such, the 300 day limit is waivable. The Commission's rules do not require a respondent to file an answer to a complaint. §PC 2.04, Wis. Adm. Code. Therefore, the failure to assert the affirmative defense in an answer cannot constitute a waiver as to raising the defense later in the proceeding. In the present case, the respondent indicated that the amended complaint was too vague to permit any agreement to waive the investigation and raised a timeliness objection:

[U]nless more information is provided which delineates the exact acts of discrimination, I object to the amended complaint on the basis it was not timely filed.

The respondent's failure to raise a "jurisdictional objection" at the March 11th conference is irrelevant because, as noted above, a timeliness objection is an affirmative defense rather than a jurisdictional objection. The statement of issue does not appear to satisfy the condition set forth in respondent's February 9th letter of providing "more information ... which delineates the exact acts of discrimination." Therefore, the Commission concludes that respondent did not waive its timeliness defense but effectively reserved the right to pursue such a defense until such time that complainant provided specificity to his amended complaint. That specificity was provided during the May 9, 1988 conference.

Amendment

The Commission rules provide at §PC 2.02(3), Wis. Adm. Code, as follows:

(3) AMENDMENT. A complaint may be amended by the complainant, subject to approval by the commission, to cure technical defects or omissions, or to clarify or amplify allegations made in the complaint or to set forth additional facts or allegations related to the subject matter of the original charge, and those amendments shall relate back to the original filing date.

Therefore, in order for the instant new charge to be considered an amendment that would relate back to the time the original charge was filed, the attempted amendment would have to "clarify or amplify allegations made in the complaint or to set forth additional facts or allegations related to the subject matter of the original charge...."

The original charge alleged that complainant was discriminated against with respect to the March 17, 1986 termination decision and a statement by Mr. Fox referring to complainant as the wrong "boy" for the job prior to the discharge. Of the nine allegations listed by the complainant on May 9th (finding #11), only two can be said to be either the same allegation as in the original complaint or to "clarify or amplify allegations ... of the original charge:"

2. The March 17, 1986¹ termination decision. Basis: race, arrest/conviction record.

* * *

7. The failure on or about March 17, 1986, of the respondent's Affirmative Action office to enforce their own policies of maintaining a discrimination free environment. Basis: race.

To the extent that allegation 7 is referring to a failure as embodied in

¹ The respondent does not object to paragraph 2 as an appropriate subject for hearing.

the termination decision, that allegation is an amplification of the original charge.

None of the other allegations are additional facts or allegations related to the original charge. These allegations relate to other discrete personnel transactions occurring both before and after the termination decision. Therefore, amendment would be inappropriate as to allegations 1, 3, 4, 5, 6, 8 or 9.

The Commission finds that the complainant may amend his complaint to add the allegation that the actions taken by the respondent's Affirmative Action Office on or about March 17, 1986 with respect to the termination of complainant's employment constituted discrimination based on race. That amendment relates back to the date the original complaint was filed pursuant to §PC 2.02(3), Wis. Adm. Code. All other proposed amendments are denied. If construed as a new complaint, these allegations would clearly be untimely pursuant to s. 111.39(1), Stats.

Although not expressed in his brief on respondent's motion, the appellant has previously argued that there was a failure on the part of the investigator to consider certain information allegedly raised by the complainant during a June 8, 1987 interview. Complainant appears to allege that he should have been advised by the investigator to file an amended complaint:

In response to Mr. Henneger's letter dated February 9, 1988, it is my position that the responsibility for an explanation of the amended complaint does not fall in my court, to the contrary that is the responsibility of the Personnel Commission, due to the fact that it was the Commission's investigator "Mr. Sturm's negligents and failure to consider the information during our June 8, 1987, meeting at which time a thorough explanation was given and the necessary document's to support the allegations.

Also, at that time I expressed my concerns regarding the amending of the original complaint for the purpose of clarifying the manner in which the act's of discrimination occurred, and to avoid any

unnecessary confusion at a later date, to no avail. [Complainant's letter dated February 12, 1988]

If the Commission were to accept these arguments, an amendment effectuated on the date of the interview still would have been more than 300 days after the occurrence of the allegedly discriminatory conduct described in paragraphs 1, 3, 4, 5, 6, 8 and 9 of finding #11.

The complainant has already agreed to waive the investigation of his amendment. The hearing examiner designated in the matter will contact the respondent within 3 days after this interim decision is issued to determine whether the respondent will also waive the investigation. If so, the matter will proceed to hearing on June 21, 1988² as previously scheduled based on the following statement of issue:

Whether there is probable cause to believe respondent discriminated against the complainant based on race and/or arrest record with respect to the decision to terminate the complainant's employment on March 17, 1986.

Subissue: Whether probable cause based on race exists as to the conduct of respondent's Affirmative Action Office with respect to the termination of complainant's employment.

ORDER

Respondent's motion to dismiss those claims identified as paragraphs 1 and 3 through 9 in finding #11 is granted except as to paragraph 7.

Dated: June 10, 1988 STATE PERSONNEL COMMISSION

KMS:rcr
DPM/3


DONALD R. MURPHY, Commissioner


LAURIE R. McCALLUM, Commissioner

² The hearing is scheduled to commence at 10:00 a.m. in the Personnel Commission offices at 121 E. Wilson Street in Madison. The hearing will be a class 3 proceeding with jurisdiction pursuant to §230.45(1)(b), Stats.