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 JOHNNY KIMBLE, \*  
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                   Complainant, \*  
 \*  
 v. \*  
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 Secretary, DEPARTMENT OF \*  
 INDUSTRY, LABOR AND HUMAN \*  
 RELATIONS, \*  
 \*  
                   Respondent. \*  
 \*  
 Case No. 87-0061-PC-ER \*  
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 \* \* \* \* \*

DECISION  
 AND  
 ORDER

This matter is before the Commission on respondent's motion to dismiss on timeliness grounds. Both parties have submitted briefs.<sup>1</sup>

This matter involves a charge of sex and retaliation discrimination. This charge was filed June 2, 1987, and was denominated as an amendment to complainant's earlier charge of discrimination (No. 85-0116-PC-ER).

The original charge (No. 85-0116-PC-ER) was filed on July 25, 1985. It alleged, inter alia, that complainant "received an unsatisfactory evaluation [on June 4, 1985] which was inaccurately [sic] and retaliatory because I previously opposed what I believed was discriminatory conduct."

The second, or amended, charge that is the subject of this decision alleges, inter alia:

I wish to amend my Charge of Discrimination as follows:

1. Although my evaluation dated June 5, 1984 was rated satisfactory, it was used against me as if it were unsatisfactory. It was [sic] as a basis for denying me a pay increase for the 12 month period commencing July, 1984 and extending through June, 1985.

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<sup>1</sup> Neither party has requested an evidentiary hearing, and this has effectively been waived. See prehearing conference report dated July 27, 1987.

2. Robert Huppertz, my immediate supervisor, by way of a continuous retaliation concealed that he was denying me an increase on the basis of the evaluation by falsely telling me that no one got an increase in pay for the 12 month period ranging from July, 1984 through June, 1985, because no money was available for raises.

3. Consequently, the retaliation alleged in my original complaint began at least as early as June 5, 1984, the date of my first evaluation following the filing of charges against Robert Huppertz by me and my staff and has continued down to and including the present time. Only recently in April, 1985 [sic] while preparing my case, I learned that contrary to the representation to me by Robert Huppertz, there were, in fact, funds available for raises. As a direct result of the continuing retaliation stated above, and the allegations of my original complaint, I have been denied a pay raise affecting my base pay for each of the 12 month periods as follows:

- a. July 1, 1984 through June 30, 1985
- b. July 1, 1985 through June 30, 1986
- c. July 1, 1986 through June 30, 1987

Respondent asserts, and this has not been contested, that with respect to the three twelve-month periods set forth above (July 1, 1984 - June 30, 1985; July 1, 1985 - June 30, 1986; July 1, 1986 - June 30, 1987), the salary transactions in question were first reflected in complainant's paychecks on August 2, 1984; August 1, 1985; and July 31, 1986, respectively.

The Commission rules provide at §PC 3.02(2), Wis. Adm. Code, as follows:

"AMENDMENT. An appeal may be amended, subject to approval by the commission, to clarify or amplify allegations 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 of the appeal."

Therefore, in order for the 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 or to set forth additional facts or allegations related to the subject matter of the original charge...."

The original charge alleged that an unsatisfactory performance evaluation was retaliatory. There was no mention of having been denied pay increases. The matter set forth in the new or amended charge, which concerns the denial of pay increases, cannot be characterized as clarifying or amplifying allegations set forth in the original charge. Rather, the new charge sets forth additional transactions alleged to have been discriminatorily motivated. Similarly, the matters set forth in the new or amended charge are not "additional facts or allegations related to the subject matter of the original charge...." An example of such things would be the addition of an allegation of retaliation to what originally had been a charge of race discrimination, or the addition of factual information that supports the original charge. Again, what is alleged here are new and separate salary transactions. Therefore, the new charge does not constitute an amendment under §PC 3.02(2), Wis. Adm. Code, which would relate back to the date of the original charge.

Complainant also contends that this case involves a continuing violation. However, the employer's decisions on salary increases are discrete transactions which cannot be characterized as continuing violations.

Complainant also contends as follows in his brief dated February 9, 1988:

Complainant learned for the first time that the spurious and false performance evaluations had been used to affect the percentage increase in his annual salary only after he began to prepare his case subsequent to receiving the Initial Determination. At the time these were only suspicions. These suspicions were confirmed as a result of materials obtained by discovery on January 25, 1988. The materials confirm that subsequent to February 1984, Complainant's annual percentage increase compared to that of a comparable supervisor was diminished. Please see Exhibits A (Kimble, Complainant) and B (Anderson, Comparable supervisor) attached hereto reflecting annual wage percentage increase data. Kimble had been told previously by Huppertz that he "got what everybody else was getting".

Assuming, for the purposes of deciding this motion, these factual allegations, the Commission must conclude that they do not give rise to an equitable estoppel, equitable tolling, or similar theory that would avoid the effect of §111.39(1), Stats.<sup>2</sup>

In Sprenger v. UW Green Bay, Wis. Pers. Commn. No. 85-0089-PC-ER (1/24/86), the Commission held that the time limit for filing a charge of discrimination under the FEA begins to run when the facts that would support a charge of discrimination are apparent or should be apparent to a person with a reasonably prudent regard for his or her rights similarly situated to the complainant. In the instant case, complainant alleged in his first charge of discrimination filed July 25, 1985, that his immediate supervisor retaliated against him by giving him an unsatisfactory performance evaluation on June 4, 1985, because complainant had opposed certain alleged sexual harassment performed by said supervisor, and had filed a complaint against the supervisor which had resulted in the supervisor's suspension. Complainant went on to say that after that:

"...there was worsening of the working relationship between he and I. It was his opinion that I caused the difficulties resulting in his suspension."

The charge goes on to set forth in detail the complainant's analysis of the performance evaluation.

It is undisputed that the salary adjustments in question were reflected in complainant's paychecks dated August 2, 1984, August 1, 1985,

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<sup>2</sup> The 300-day time limit set forth at §§230.44(3) and 111.39(1), Stats., is in the nature of a statute of limitations and is not jurisdictional. Milwaukee Co. v. LIRC, 113 Wis. 2d 199, 335 NW 2d 412 (Ct. App. 1983).

and July 31, 1986, so as of those dates complainant knew the amounts, if any, of his salary increases. Complainant had formed the belief no later than July 25, 1985, that his immediate supervisor was upset with him and was disposed to discriminate against him because of the complaint he had filed. The information he obtained regarding his co-employee's salary in January 1988 is a matter of public record and could have been obtained either through discovery in No. 85-0116-PC-ER or under the open records law.

Applying the Sprenger test, we have a person with a reasonably prudent regard for his or her rights who files a charge of discrimination (85-0116-PC-ER) against his or her supervisor. The charge alleges that the complainant opposed the supervisor's alleged sex discrimination and informed management of the supervisor's conduct which resulted in the supervisor's suspension. The charge also goes on to allege that the supervisor retaliated by giving the person an unsatisfactory performance evaluation. Furthermore, as of the date the charge was filed, July 25, 1985, the same prudent person was aware or would become aware of the results of the supervisor's annual decisions regarding salary increases. Certainly a prudent person under these circumstances would conduct some kind of inquiry, if that were needed, to confirm or deny whether the salary transactions were proper. In other words, although it is arguable that while normally a prudent person would accept at face value the statements attributed to Mr. Huppertz that there was no money available for raises and that complainant "got what everybody else was getting," once complainant had formed the belief and filed the charge alleging that Mr. Huppertz had retaliated against him with respect to his performance evaluation, no further tolling of the statute should occur. Also, it is noteworthy that

although complainant asserts he did not have the necessary information to confirm his suspicions until he obtained the salary data for a comparable supervisor in January 1988, he obviously felt he had enough information in June, 1987, to file his second charge of discrimination with regard to these pay transactions.

While the foregoing discussion primarily concerns equitable tolling, much of it also applies to equitable estoppel. A necessary element in establishing equitable estoppel is reasonable reliance by the person alleging the estoppel. Assuming Mr. Huppertz made the alleged statements, under the circumstances here present the Commission cannot conclude that there was reasonable reliance. Complainant as a reasonably prudent person would not reasonably rely on his supervisor's representations concerning his salary adjustments after July 25, 1985, since it can be inferred that by then complainant had formed the belief that Mr. Huppertz had unlawfully retaliated against him. If complainant then had looked into his August 2, 1984, salary transaction and filed a charge, he might have been able to argue that equitable estoppel should be applied because of his reasonable reliance on Mr. Huppertz's (presumably earlier) statement that no money had been available for raises. However, such reliance could no longer be considered reasonable after July 25, 1985.

While respondent's objections to the June 2, 1987, charge must be sustained, it should be noted, in the interest of avoiding possible future confusion, that this decision does not address the question of whether complainant could establish entitlement to some or all of the salary amounts in question as elements of damages with respect to his charge of discrimination (85-0116-PC-ER) concerning the unsatisfactory evaluation. That is, while complainant is barred on timeliness grounds from litigating

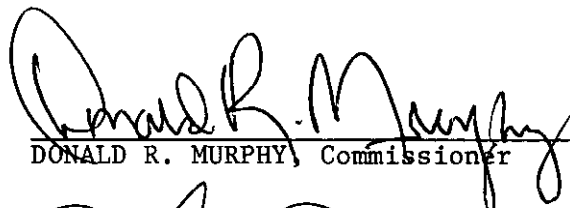
the salary transactions as separately cognizable claims, if complainant could establish the requisite link between the performance evaluation and one or more of the salary transactions, as well as liability for the performance evaluation, this decision does not rule out the inclusion of said transaction or transactions as part of complainant's remedy.

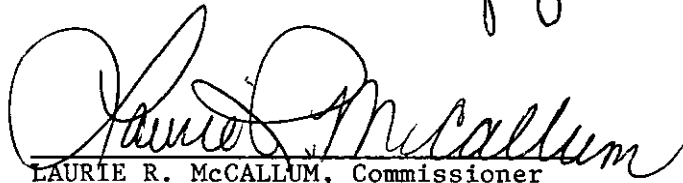
ORDER

Respondent's objection on timeliness grounds to this charge of discrimination filed June 2, 1987, is sustained, and this charge of discrimination is dismissed.

Dated: February 19, 1988 STATE PERSONNEL COMMISSION

  
DENNIS P. MCGILLIGAN, Chairperson

  
DONALD R. MURPHY, Commissioner

  
LAURIE R. McCALLUM, Commissioner

AJT:rcr  
RCR01/3

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