

STATE OF WISCONSIN

PERSONNEL COMMISSION

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KENNETH VANDER ZANDEN,
 Complainant,

v.

Secretary, DEPARTMENT OF
 INDUSTRY, LABOR AND HUMAN
 RELATIONS,
 Respondent.

Case No. 87-0063-PC-ER

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RULING
 ON
 MOTION
 TO DISMISS

This matter is before the Commission for a ruling on respondent's motion to dismiss complainant's complaint and amended complaint. For reasons stated in this ruling, the motion is granted in part.

Viewing the submitted statements of fact by the parties in a light most favorable to complainant, the Commission observes the following facts are undisputed.

In February 1985, complainant was told his position in the Appleton office in the Bureau of Apprenticeship Standards was being eliminated and he would be placed on layoff status. Prior to layoff, complainant was given the option to accept reassignment in Milwaukee, but in exercise of his layoff rights, he requested voluntary layoff. In March 1985, complainant's position was eliminated and he was laid off.

In June 1986, an Industry and Labor Training Representative (ILTR) position in Wausau was posted. Complainant applied for the position, but it was filled by transfer. Later in July, complainant was offered an ILTR position in Milwaukee, but on August 7th he refused it as being an unreasonable offer.

Afterwards, complainant continued to apply for job transfers or recalls to numerous positions but was never selected.

In early 1987, complainant learned of a hire into an ILTR position in Milwaukee and of staffing changes, involving ILTR positions in Eau Claire and Wausau. On June 5, 1987, complainant filed a complaint of discrimination with the Commission alleging respondent had retaliated against him for having exposed the supervisor of the Oshkosh Job Service office to investigation by manipulating staffing patterns and by failing to return him to an acceptable ILTR position.

Throughout 1987 and 1988, complainant applied for transfers and recalls to numerous positions and was not selected. On December 12, 1988, he filed an amended complaint, which was accepted by the Commission in a Ruling on Motion to Amend issued February 28, 1989. The amended complaint makes allegations as follows:

- (1) Throughout 1988, Complainant has applied for a job transfer into numerous positions for which he is qualified with the state.
- (2) He has been repeatedly denied transfers into those positions.
- (3) Specifically, in September, 1988, Complainant wrote Secretary Coughlin of DILHR requesting consideration for any available positions.
- (4) Complainant thereafter specifically applied for the very position he held for 14 years.
- (5) He was informed that the position was not being offered to him, but opened up to competition.
- (6) Complainant believes that this failure to offer him any job in DILHR for which he is qualified is based on retaliation for his initial whistleblowing and ongoing legal challenge through the state Personnel Commission.

Referring to complainant's complaint of June 5, 1987, respondent contends that it was untimely filed for claiming respondent retaliated against complainant when it laid off complainant in March 1985 and later, in June 1986, when it failed to offer complainant the ILTR position in Wausau.

With reference to complainant's layoff, respondent submitted a copy of a memorandum to Charles T. Nye from complainant, dated February 28, 1985. This memorandum discloses that complainant requested voluntary layoff rather than accept reassignment to Milwaukee. His specific words were:

"The conditions which have been set for my reassignment to the Southern Region (Milwaukee) are such that I must decline.

You should start the process necessary to place me on lay-off status."

Regarding the Wausau position, respondent argues that complainant knew he was not going to be offered the Wausau position in June 1986, when he was told it was filled by transfer and later in July, when he was offered a position in Milwaukee, which he declined on August 7.

Finally, respondent argues that complainant's amended complaint, dated December 12, 1988, makes vague claims, but specifically references only respondent's decision to fill a Bureau of Apprenticeship Standards position by competition and is timely only as to the specific claim.

In reply, complainant argues that both complaints were timely filed. He asserts the original complaint was timely because he first learned he was being retaliated against when he talked with certain DILHR staff personnel in the Madison headquarters on April 28, 1987. Regarding his amended complaint, he states he first realized he was being retaliated throughout 1988 when he was informed in November or December 1988 that respondent intended to fill the Bureau of Apprenticeship Standards position by open competition.

The controlling statutory law in this matter is s. 230.85(1), Stats. It provides:

An employe who believes that a supervisor or appointing authority has initiated or administered, or threatened to initiate or administer, a retaliatory action against that employe in violation of s. 230.83 may file a written complaint with the commission, specifying the nature of the

retaliatory action or threat thereof and requesting relief, within 60 days after the retaliatory action allegedly occurred or was threatened or after the employe learned of the retaliatory action or threat thereof, whichever occurs last.

Under s. 230.85(1), Stats., the focus of the time limitation is on the date of "retaliatory action." The sixty-day limitation period begins to run at the point the retaliatory action allegedly occurred or was threatened or after the employe learned of the retaliatory action or threat, whichever was last, not at the point the employe believes or concludes the action is retaliatory. See Wickman v. DP, Wis. Pers. Commn., 79-302-PC (3/24/80). Also, this case can be distinguished from the situation in Sprenger v. UWGB, Wis. Pers. Commn., 85-0089-PC-ER (1/24/86), where at the time complainant was laid off he was not aware that subsequently his position would be "reinstated" and the position filled by a younger employe. In the instant case, complainant has not alleged comparable circumstances.

In the instant case, complainant learned of the alleged retaliatory actions in excess of sixty days before he filed his original complaint on June 5, 1987: Complainant was laid off in March 1985 and he knew he would not be offered the Wausau position in August 1986.

Respondent acknowledges that complainant's amended complaint was timely filed as to the specific allegation regarding the decision to require competition for filling complainant's former Bureau of Apprenticeship Standards position. As to complainant's contention that he was "repeatedly denied transfers throughout 1988" (Complainant's brief, page 6), the complainant has failed to sustain his burden of establishing that his complaint was timely with respect to the allegation. Allen v. DHSS & DMRS, 87-0148-PC, 8/10/88. The complainant offered no evidence tending to show that any transfer denials occurred within 60 days of the date he filed his amended


complaint. The Commission notes that the complainant is represented by counsel and there has been an extended opportunity to obtain discovery.

ORDER

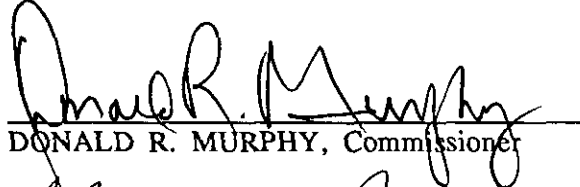
Respondent's motion to dismiss complainant's original complaint of June 5, 1987, as untimely filed is granted.

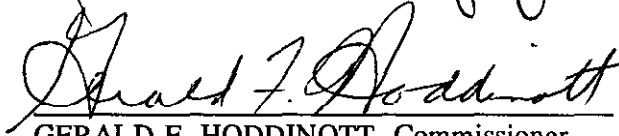
Respondent's motion to dismiss as untimely all allegations in complainant's amended complaint of December 12, 1988, except the allegation regarding the Bureau of Apprenticeship Standards position to be filled by open competition, is granted.

Dated: January 11, 1991 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

DRM:rcr


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

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