

STATE OF WISCONSIN

PERSONNEL COMMISSION

* * * * *
 KENNETH VANDER ZANDEN,
 Complainant,
 v.
 Secretary, DEPARTMENT OF
 INDUSTRY, LABOR AND HUMAN
 RELATIONS,
 Respondent.
 Case No. 87-0063-PC-ER
 * * * * *

RULING
 ON
 MOTION TO AMEND
 COMPLAINT

On December 12, 1988, complainant filed an amended complaint. On January 27, 1989, respondent filed an objection to allowing complainant to amend and took the position that the amended complaint should be treated as a new complaint. After further correspondence, this matter is now before the Commission to determine whether an amendment should be permitted or whether the document submitted by complainant on December 12th should be handled as a new complaint.

The original complaint in this matter was apparently drafted pro se and filed on June 5, 1987. A copy of the original complaint is attached, as well as a copy of the proposed amended complaint.

The original complaint identified certain personnel transactions and alleged:

" ... that these abnormal staffing patterns are being done to keep me from returning to the ILTR position that is acceptable to me in retaliation for my exposing the Supervisor of Job Service, Oshkosh to an investigation."

The proposed amended complaint asserts that in 1988 complainant has repeatedly been denied transfers into unspecified positions, that sometime

in or after September of 1988 he specifically applied for his former position and was informed that the position was not being offered to him but opened up to competition, and that the failure to offer him a job is based on retaliation.

Pursuant to §PC 2.02(3), Wis. Adm. Code, a complaint may be amended on the following bases:

" ... 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...."
(emphasis added)

In this case, only the underscored language is potentially applicable. The proposed amended complaint concerns certain personnel transactions which occurred in 1988. The only way this subject matter could be considered to constitute "additional facts or allegations related to the subject matter of the original charge" would be to the extent there is a "continuing violation" alleged. In a letter dated February 14, 1989, complainant's counsel asserts:

"Mr. Vander Zanden's original 1986, pro se, complaint, clearly contemplated a continuing violation based on referrals he did know about and ones that he suspected. The facts in the Amended Complaint is simply another example of the course of conduct complained of and continuing."

The fact that an employe may be subjected to a number of adverse employment actions does not in and of itself give rise to a continuing violation. Usually, if there are discrete personnel transactions involving the same employe, he or she must challenge these through separate complaints. However, some kinds of alleged discriminatory actions are effective on a continuing basis. For example, in Olson v. DHSS, (Wis. Pers. Commn. No. 83-0010-PC-ER (4/27/83), a continuing violation theory was applied to an institutional policy regarding purchasing materials and to the employer's approach to a requested accommodation:

In the present case it is clear that, although the purchasing policy was adopted over two years before the complaint was filed, the policy continued in effect during 1981, 1982 and 1983 and continued to dictate the methods used by the complainant for purchasing material during that period. Assuming, arguendo, the policy to be discriminatory, then the continuing refusal to permit the complainant to shop for materials in Madison would have to be considered as a continuing violation, rather than merely the continuing effects of a past violation. Delaware State College v. Ricks, 449 U.S. 250, 24 FEP Cases 827 (1980).

The same conclusion is reached as to what the complainant alleges to be a failure by respondent to reasonably accommodate complainant's handicap, i.e., the assignment of the complainant to a second floor classroom and the lack of a telephone on the second floor. Based upon the theory of continuing violation, the complainant must be considered to have been filed within the 300 day limit set out in §230.44(3), Wis. Stats.

An allegation that an employe has requested and for retaliatory reasons has been denied reinstatement on certain occasions usually will not give rise to a continuing violation theory -- the alleged wrong against the employe occurs on specific occasions and is not of an ongoing nature. On the other hand, an allegation that a laid-off employe was subject to recall for a period of time and that the employer wrongfully refused to do so during that period probably would amount to a continuing violation because of the ongoing nature of the alleged wrong.¹

It is somewhat difficult to determine in which of the aforesaid categories the instant case falls. On one hand, complainant refers to having been denied appointment to specific positions. On the other hand, he refers to having been laid off and to recall rights. Given the minimal pleading requirements in proceedings of this nature, and giving a liberal reading to complainant's pleadings, it would be inappropriate to deny the request for amendment of the complaint.


¹ At least under certain circumstances a failure to recall a laid-off employe can constitute a continuing violation. See Cox v. U.S. Gypsum Corp., 409 F. 2d 289, 290-291 1 FEP Cases 714 (7th Cir. 1969), Loo v. Gerarge, 374 F. Supp. 1338, 1340, 8 FEP Cases 30 (D. Hawaii 1974).

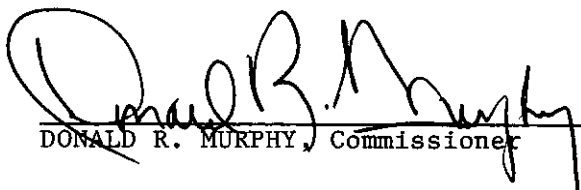
In taking this approach, the Commission is not ruling that there is a continuing violation, but rather is ruling that it cannot rule out a continuing violation based solely on the pleadings. Any determination of whether there is or was a continuing violation will have to await the development of the underlying facts.²

ORDER

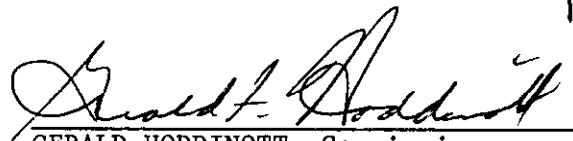
The complaint of discrimination in this matter is ordered amended by the proposed amended complaint filed on December 12, 1988.

Dated: February 28, 1989 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner

AJT:rcr
DPM/2


GERALD HODDINOTT, Commissioner

² Since the proposed amended complaint is clearly timely from the standpoint of the only specifically identified transaction, this question may be academic.

STATE OF WISCONSIN
PERSONNEL COMMISSION

RECEIVED

~~DEC 12 1988~~

KENNETH VANDERZANDEN,
Complainant,

Personnel
Commission

vs.

87-0063-PC-ER
AMENDED COMPLAINT

DEPARTMENT OF INDUSTRY, LABOR
AND HUMAN RELATIONS,
Respondent.

AMENDED COMPLAINT

COMES NOW Kenneth VanderZanden, through his attorneys, GARDE LAW OFFICE, and amends his original complaint in the following manner:

(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.

Complainant requests expedited consideration of this matter, since it has been pending initial investigation since February, 1988.

Sincerely,



Billie Pirner Garde
GARDE LAW OFFICE
104 East Wisconsin Avenue
Appleton, WI 54911-4897
(414)730-8533
Attorney for Complainant

cc: Howard Bernstein
DILHR
State of Wisconsin
P. O. Box 8928
Madison, WI 53707

CHARGE OF DISCRIMINATION

PC 3 (Rev 6/85)

87-0063-PCR

WISCONSIN STATE PERSONNEL COMMISSION

121 E Wilson Street 2nd Floor
Madison WI 53702 (608) 266-1995

The Personnel Commission has authority to investigate matters involving the State as an employer pursuant to sections 111.31 to 111.395 Wis Stats. (Fair Employment), sections 230.80 to 230.89, Wis Stats. (Whistleblower), section 101.055, Wis Stats. (Occupational Safety & Health Reporting) and section 46.90, Wis Stats. (Elder Abuse Reporting)

In addition to dealing with complaints of discrimination, the Personnel Commission also has the authority pursuant to sections 230.44 and 230.45 Wis Stats., to review certain personnel actions taken by the State as an employer for compliance with the civil service code. Please consult the statutes or call the Commission for further information.

| | | | |
|---|--|--|--|
| Your Name (Mr Ms Mrs) Kenneth P. Vander Zanden | | Date of Birth Aug. 30, <i>1944</i> 1987 | CAUSE OF DISCRIMINATION Check Appropriate Boxes |
| Street Address 142 W. Greenfield Drive | City, State, Zip Code Little Chute, WI 54140 | | |
| Telephone (Include area code) Home (414) 788-2370 Work (414) 929-3800 | | | |
| PERSON WHO ALWAYS KNOWS WHERE YOU CAN BE REACHED | | | |
| Name | | Telephone | BASIS: <input type="checkbox"/> National Origin or Ancestry <input type="checkbox"/> Race <input type="checkbox"/> Creed <input type="checkbox"/> Color <input type="checkbox"/> Age <input type="checkbox"/> Handicap <input type="checkbox"/> Marital Status <input type="checkbox"/> Sex (includes sexual harassment) <input type="checkbox"/> Sexual Orientation <input type="checkbox"/> Arrest/Conviction Record <input type="checkbox"/> Honesty Testing Device <input type="checkbox"/> Retaliation, based on <input type="checkbox"/> Fair Employment Activities <input type="checkbox"/> Elderly Abuse Reporting <input checked="" type="checkbox"/> Whistleblowing <input type="checkbox"/> Occupational Safety & Health Reporting |
| Street Address | City, State, Zip Code | | |
| NOTE You are responsible for keeping the Personnel Commission notified of your current address and phone number. Failure to do so may result in dismissal of your complaint for lack of prosecution. | | | |
| RESPONDENT (The State Department/Agency against whom you are filing complaint) | | | |
| Name of Department Industry, Labor and Human Relations | | Telephone (608) 266-1093 | IN REFERENCE TO: <input type="checkbox"/> Recruitment <input type="checkbox"/> Hire <input type="checkbox"/> Promotion <input checked="" type="checkbox"/> Discharge <input checked="" type="checkbox"/> Other Discipline <input type="checkbox"/> Wages <input type="checkbox"/> Conditions of Employment <input type="checkbox"/> Other |
| Street Address E. Washington Street | City, State, Zip Code Madison, WI 53707 | | |
| Name of person who discriminated (if known) | Position or Title | Telephone | |

NOTE: If this complaint of discrimination is made on the basis of age, race, creed, color, sex or national origin, and you wish the Commission to forward a copy of this complaint to the United States Equal Employment Opportunity Commission (EEOC), you should check this box Other federal agencies may also have jurisdiction over these, as well as possibly other bases of discrimination. If you desire to explore this further, you may wish to consult an attorney or contact the EEOC.

Please explain the details of the discrimination. When and how did the discrimination take place? Why do you believe it was because of your race, creed, color, age, handicap, sex or other basis of discrimination listed above? How were others treated differently? Did discrimination affect someone other than yourself? Also specify the relief or remedy you are requesting. Use backside and/or additional pages, if needed.

It is difficult to identify what happened, when, or by whom because I am no longer employed by DILHR, and these things happened since I've left.

I had heard rumors for quite some time about various actions taken that I was curious about. On 4-28-87 I stopped in the DILHR-Apprenticeship office in GEF 1, Madison WI to see what I could find out.

In June '86 I was told by Pat Hook (DILHR Personnel) that the Industry, Labor, Training Rep (ILTR) position in Wausau was going to be filled. I was informed that the position would be

STATE OF WISCONSIN)
COUNTY OF Fond du Lac **

Kenneth P. Vander Zanden, being duly sworn on oath, deposes and says that (s)he is the complainant herein that (s)he has read the foregoing complaint and knows the contents thereof that the same is true to his (her) own knowledge except as to matters therein stated on information and belief, and that as such matters (s)he believes the same to be true.

Kenneth P. Vander Zanden
Complainant

Subscribed and sworn to before me this 3rd day of June, 1987

Betty Jane Habel
Signature of Notary Public

Notary Public, State of Wisconsin
My Commission (is permanent) (expires) _____

NOTARY PUBLIC, STATE OF WIS.
MY COMMISSION EXPIRES MAY 19, 1991

IF MORE SPECIFIC INFORMATION OR ASSISTANCE IS NEEDED,

RECEIVED PERSONNEL COMMISSION AT THE ADDRESS AND TELEPHONE NUMBER NOTED ABOVE

Personnel Commission

JUN 05 1987

posted and if no other ILTR posted for it, the position would be offered to me because I am laid off from that classification. Later in the month of June '86 Ms Hook informed me that no one posted for the position in Wausau, and that the notice of recall would be coming soon.

When I did not receive any offer to return, I contacted Ms Hook again and was told that the position was filled by transfer. I was then offered a position of ILTR in Milwaukee, which I refused as an unreasonable offer.

Eventually I started to hear that the ILTR who was in Eau Claire was transferred to Wausau, that the para-professional in Eau Claire was in Eau Claire running the office, and that a person was to be hired for the ILTR position in Milwaukee.

On 4-28-87 I thought I'd find out just what was going on from my former employers. Mr. Nye, Mr. Reinholtz and all other Madison staff was out except for Antionette Schwoegert. I found that the ILTR who is now in Wausau was forced to go there, or Milwaukee.

Common sense staffing would have moved the para-professional in Eau Claire to Milwaukee to function as a para-professional so that the person would have professional leadworkers, and or Supervision near by. With the Para-professional in Eau Claire, the nearest professionals are in Wausau, or La Crosse.

The fact that my position was moved from Appleton in March of '85 because there was supposedly no need for two professionals in Appleton is somewhat questionable in view of the fact that the Appleton office now has two professionals there with their headquarters in other cities.

I contend that these abnormal staffing patterns are being done to keep me from returning to the ILTR position that is acceptable to me in retaliation for my exposing the Supervisor of Job Service, Oshkosh to an investigation.