

STATE OF WISCONSIN

PERSONNEL COMMISSION

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JUNE C. ZIEGLER, *

Complainant, *

v. *

Chairperson, LABOR & INDUSTRY *

REVIEW COMMISSION, *

Respondent. *

Case No. 93-0031-PC-ER *

* * * * *

DECISION AND ORDER

On March 4, 1996, respondent filed a motion to dismiss this complaint of age discrimination as untimely filed and to deny complainant's request to amend the complaint. The parties were permitted to file briefs in relation to the motion and the briefing schedule was completed on April 11, 1996. The following numbered findings are based on information provided by the parties, appear to be undisputed, and are made solely for the purpose of deciding this motion.

1. On January 7, 1992, complainant resigned from her position with respondent.
2. Complainant has represented, in an affidavit signed by her on March 22, 1996, and attached to her brief in opposition to the motion, that, some time between January 7 and 27, 1992, in a telephone conversation with an unnamed individual at the Personnel Commission, she told this individual "about the abusive language referring to my age and to the harassing acts," and was advised "because it was a white woman harassing a white woman, that there was no law against the harassment."
3. Complainant, in a five-page letter to State Senator Fred Risser dated January 27, 1992, summarized what she characterized as acts of harassment by a co-worker named Suzanne during her employment by respondent and requested assistance from Senator Risser in investigating the matter and in getting her job back. Complainant sent a copy of this letter to the Personnel

Commission. The only reference to complainant's age in this letter was as follows:

Suzanne would also take the Isthmus newspaper and read some of the personals columns out loud. (I am 50 years old and dye my hair blond.) So, she would sit there and say things like "Well this person's 50 God dam fucking years old if you can believe that and a dumb blond besides."

Complainant did not refer in this letter to a telephone conversation with Personnel Commission staff.

4. In a letter to complainant dated February 17, 1992, Kurt M. Stege, a hearing examiner on the staff of the Personnel Commission wrote as follows:

On February 13, 1992, the Personnel Commission received a copy of a letter you had addressed to State Senator Fred Risscr. I spoke with you on February 14th and during our conversation you indicated that you wished to have your letter treated as a disclosure under the whistleblower law. I advised you that the procedures in the whistleblower law, subch. III, Ch. 230, Stats., for making disclosures of improper governmental activity only apply to persons "employed by" a state agency. Because you have indicated that you are no longer employed by the state, I am not in a position to determine the appropriate agency for receiving a disclosure from you as provided in §230.81(1)(b), Stats. If you have any questions regarding this letter, please feel free to contact me.

5. In a letter to the Equal Employment Opportunity Commission (EEOC) dated October 14, 1992, complainant summarized certain actions by co-worker Suzanne during her employment with respondent which she characterized as acts of harassment, and mentioned her age and references this co-worker had made to age. In this letter, complainant also stated as follows:

Approximately three and a half years ago when Suzanne was harassing Jo Ann Bovee out of the office I called the State Personnel Commission. They told me if it's a white woman harassing a white woman, there is no law against that and that we couldn't do anything about it.

6. On October 20, 1992, complainant filed a complaint of discrimination with the Equal Rights Division (ERD), Department of Industry, Labor and Human Relations (DILHR). In this complaint, complainant indicated that she had been discriminated against because of her age.

7. In a letter to complainant dated November 4, 1992, ERD advised as follows:

The Wisconsin Equal Rights Division does not have jurisdiction over state government employees. If you need legal advice you will need to contact an attorney.

8. File notes created and maintained by the EEOC indicate as follows:

1 29 93 Called CP [complainant] - explained process to her. Informed her charge should have been with the Wisconsin Personnel Comm.

CP filed w[ith] DILHR. DOV [date of violation] was 3-1-90 - she said FEPA [ERD] dismissed as untimely.

CP says her DOV was 1/7/92 and that she did file timely. She said she was told by ERD that they would cross-file w[ith] WPC [Wisconsin Personnel Commission]

2 17 93 Called WPC to see if charge filed. No record.

Sent chg [charge] to WPC to review for filing.

9. The Personnel Commission received a copy of complainant's charge of age discrimination from the EEOC on February 18, 1993.

10. In a letter from the EEOC dated June 14, 1994, complainant was advised that the EEOC was going to discontinue processing the case under the Age Discrimination in Employment Act (ADEA) since conciliation had been attempted but had not been successful.

11. The Personnel Commission investigated complainant's complaint of age discrimination and, on July 24, 1995, issued an Initial Determination finding probable cause to believe that age discrimination/harassment had occurred as alleged.

12. On August 1, 1995, complainant filed an amendment to her complaint of age discrimination. This amendment alleged that the failure of her supervisor to take action to stop the harassment directed at complainant by co-worker Suzanne resulted from complainant's request to her supervisor that certain other co-workers be asked to stop wearing perfumes as an accommodation for complainant's handicap of vasomotor rhinitis. Complainant states that the following language in an affidavit filed by her supervisor with the Commission on March 23, 1995, led to her filing of the amendment:

June also complained about other employees of LIRC. Although she was a heavy smoker, she complained that the perfume worn by Theresa McConnell and Mary Vosen irritated her condition of vasomotor rhinitis. Both of these employees were upset and found other employment because of June's complaints.

Section 111.39, Stats., requires that an age discrimination complaint such as the one under consideration here be filed with the Personnel Commission "no more than 300 days after the alleged discrimination . . . occurred . . ." This 300-day filing requirement is in the nature of a statute of limitations and, as a result, subject to equitable tolling. Milwaukee Co. v. LIRC, 113 Wis. 2d 199, 205, 335 N.W. 2d 412 (Ct. App. 1983). See Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 28 FEP Cases 1 (1982).

Complainant argues, at least by implication, that the telephone conversations she had with a staff member of the Personnel Commission in January and February of 1992, and her discussion of age issues in these conversations, constituted a filing of an age discrimination complaint. However, §PC 2.02, Wis. Adm. Code, requires that such a complaint be filed with the Personnel Commission in written form. In Holubowicz v. DHSS (DOC), 88-0097-PC-ER (9/5/91), the Commission clarified that:

As a general proposition, discussions with Commission staff do not preserve the rights of a complainant in terms of timely filing of an appeal or a complaint. Commission rules require that appeals/complaints must be in writing and received within the statutorily specified time period (Chapters PC 2 and 3, Wis. Admin. Code).

Complainant also argues, at least by implication, that application of the principle of equitable estoppel would serve here to toll the 300-day filing period for an age discrimination complaint under the Fair Employment Act. This argument is apparently based on the advice allegedly given to complainant by Personnel Commission staff in the telephone conversation prior to January 27, 1992. However, the doctrine of equitable estoppel only comes into play in the statute of limitations tolling context if the defendant (respondent) takes active steps to prevent the plaintiff (complainant) from suing in time. Goeltzer v. DVA, 82-11-PC (5/12/82); Wright v. DOT, 90-0012-PC-ER (2/25/93) citing Cada v. Baxter Healthcare Corp., 920 F. 2d 446, 54 FEP Cases 961 (7th Cir. 1990), cert. den. 116 L. Ed 2d 6, 111 S. Ct. 2916. The Personnel

Commission is not the respondent in this matter but the non-party decision-maker and, as a result, the doctrine of equitable estoppel would not apply here to toll the 300-day statute of limitations. Moreover, as explained in the Wright decision cited above, the burden of establishing facts sufficient to justify tolling of the filing period is on the complainant. The information provided by complainant here would not be sufficient to sustain such a burden. This information leads to the conclusion that the conversation with Personnel Commission staff which complainant was relying upon did not occur in 1992 but three and a half years earlier, did not occur in relation to complainant's work situation at LIRC but to that of a former co-worker named Jo Ann Bovee, and did not relate to an issue of age discrimination but to an issue of sex discrimination. This conclusion is based on the following:

a. In a letter written by complainant in 1992 to the EEOC (See Finding 5, above), complainant refers to a contact with the Personnel Commission three and a half years earlier in which she was told that "if it's a white woman harassing a white woman, there is not law against that. . ." The reference to a January 1992 conversation first appears in complainant's 1996 affidavit and complainant uses the same language to describe the advice she received from the Personnel Commission that she used in her 1992 letter to the EEOC.

b. The advice alleged to have been given by Personnel Commission staff would have related to a complaint of sex discrimination, not to a complaint of age discrimination where the genders of the actors would have been irrelevant. In her 1996 affidavit, complainant represents that she discussed the issue of age discrimination, not sex discrimination, with the Personnel Commission in the January 1992 conversation.

c. Complainant fails to reference the January 1992 contact with the Personnel Commission in her letter to Senator Risser of January 27, 1992.

Complainant further contends that the copy of the Risser letter filed with the Personnel Commission constitutes a filing of an age discrimination complaint. Complainant cites Goodhue v. UW, 82-PC-ER 24 (11/9/83) in support of this contention. It is less clear in the present situation than in the situation in Goodhue that complainant alleged in her letter that she was treated differently because of her age and, as a result, less clear that the letter should be considered a complaint of discrimination under the standards enunciated in

Goodhue. However, the primary distinction between the two fact situations is that, in the present situation, the Personnel Commission contacted the complainant to inquire how she wanted the letter to be treated, and complainant indicated to the Personnel Commission that she wanted the letter to be treated as a whistleblower disclosure. (See Finding 4, above). The Personnel Commission confirmed this in writing and gave the complainant the opportunity to contact the Personnel Commission if she had any questions. The record does not indicate that the complainant took advantage of this opportunity or in any other way placed the Personnel Commission on notice that she wanted the Risser letter treated as anything other than a whistleblower disclosure. It is concluded that the Risser letter did not constitute a complaint of age discrimination.

A copy of the charge of age discrimination which complainant had filed with ERD and with the EEOC was received by the Personnel Commission on February 18, 1993. Section PC 1.02(10), Wis. Adm. Code, defines "filing" as "the physical receipt of a document at the commission's office." Consistent with this definition, complainant's age discrimination complaint was not filed with the Personnel Commission until February 18, 1993, more than 300 days after the date that she left state employment, and, as a result, was not timely filed.

Complainant contends that the date of her filing of a complaint of age discrimination with the Equal Rights Division (ERD) of DILHR should be construed as the date of the filing of her age discrimination complaint with the Personnel Commission because of the existence of formal worksharing agreements between ERD and the EEOC and between the Personnel Commission and the EEOC. However, the Personnel Commission and the EEOC do not have a formal worksharing agreement in the nature of the agreement between ERD and the EEOC. Although a complainant may request that a complaint filed with the Personnel Commission be cross-filed with the EEOC or vice versa, there is no authority for interpreting the filing of a complaint with one of these agencies as constituting a filing with the other.

In 1995, complainant filed an amendment to her complaint of age discrimination, alleging handicap discrimination. (See Finding 12, above). It is questionable whether the proposed amendment would be considered timely filed when the complaint it seeks to amend was itself untimely filed. However, even if the filing of the original complaint had been timely, the filing of this amendment would not be permitted. In analyzing whether an amendment


should be allowed, it must first be determined if the cause of action alleged in the amendment arises from the same circumstances as those alleged in the original complaint. (Jones v. DNR, 78-PC-ER-12 (11/8/79). Although the mention of the handicapping condition and the request for accommodation were not mentioned in the original complaint, the complainant does cite the same incidents of harassment in the amendment and, for purposes of this analysis, it is concluded that the same circumstances are involved. However, these circumstances were reasonably known to the complainant at the time of her resignation and it is this which would control here, not the date that she formed a belief that these circumstances constituted handicap discrimination/retaliation. See, Schroeder v. DHSS & DER, 85-0036-PC-ER (11/12/86); Wickman v. DP, 79-302-PC (3/24/80); Sprenger v. UW, 85-0089-PC-ER (12/30/86). Moreover, complainant did not file this amendment until more than 3 years had passed since her resignation and until after an Initial Determination had been issued by the Personnel Commission on her charge of age discrimination. Although complainant points to the fact that she was proceeding without legal counsel for a period of time, it should be noted here that complainant had contacted legal counsel at least as early as April of 1993 and had retained legal counsel at least as early as March of 1994, more than a year before the amendment was filed. The factors considered in concluding that this amendment would not have been permitted even if the original complaint had been timely filed are consistent with the factors considered in Johnson v. DHSS, 83-0032-PC-ER (6/30/85); Ferrill v. DHSS, 87-0096-PC-ER (8/24/89); and Chelcun v. UW, 91-0159-PC-ER (3/9/94).

Order

This complaint is dismissed.

Dated: May 2, 1996 STATE PERSONNEL COMMISSION


LAURIE R. MCCALLUM, Chairperson


DONALD R. MURPHY, Commissioner

LRM:lrn

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NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's

decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.

2/3/95