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MARA McDONALD,

Complainant,

v.

Chancellor, UNIVERSITY OF
WISCONSIN-MADISON,

Respondent.

Case No. 94-0159-PC-ER

* * * * *

RULING
ON
MOTION
TO DISMISS

This matter is before the Commission on respondent's motion to dismiss certain claims as untimely filed. Specifically, respondent contends that "most of the allegations... should be considered untimely" because they occurred prior to December 18, 1993. The parties have filed briefs.

The complaint of discrimination was filed with the Commission on October 20, 1994. On the complaint form, complainant described "each action that [she believed] was discriminatory" as follows:

- Jan 1992 Hired at \$24,000 (lowest pay in lab), without full benefits (as promised). I had more training, experience, credentials (PhD) than other personnel in lab.
- July 1992 Male -- Clay Glennon -- offered job for which I applied, given full benefits, \$27,000/yr salary. Clay has no college degree.
- Fall 1992 I was recommended for accelerated promotion to Asst. Researcher, \$32,000/yr, full benefits. Tim Kinsella concurred, without comment.
- 23 Dec 1992 Keith Kunugi (Lab Supervisor) became enraged with my promotion, cornered me, tried to coerce me to decline promotion, threatened to delay paperwork.
- Jan 1993 Clay officially hired -- delay due to lack of degree.
- Feb 1993 I was promoted.
- Feb-Dec 1993 I was subjected to harassment, humiliation, retaliation. When I sought relief, I was told I could "get another job." Affirmative Action channels a sham.
- 7 Oct 1993 Called into work from sick leave for purpose of humiliation.
- 10 Oct 1993 Kinsella confirmed I (and only I) would be laid off
- Dec 1993 Informed I did not have seniority over Clay because my academic staff appointment made after his; my previous appt did not count.

31 Dec 1993 Final date of employment.
10 Feb 1994 Kinsella wanted me to work for free, to finish
manuscript.

An Initial Determination of no probable cause to believe discrimination occurred was issued March 4, 1996. The Initial Determination concluded that most of the allegations were untimely and made a "non-substantive no probable cause determination" as to those allegations. The initial determination analyzed only one of complainant's allegations in terms of the probable cause standard. This allegation was characterized in the "Conclusions" portion of the Initial Determination as "respondent delayed completing complainant's research/manuscript in 1994." However, earlier in the Initial Determination, this allegation was characterized somewhat differently:

The facts of this case appear to present only one allegedly discriminatory/retaliatory action which falls within this three hundred day period:

- 1) From October, 1993 through to the time of filing this charge of discrimination in October, 1994, Kinsella did not complete complainant's research and/or manuscript.

.... Complainant's notice of termination (finalized in October, 1993) provided the focal point around which all of her circumstances circulated. With the notice of the end of her employment, complainant's discriminatory/retaliatory claims ended (unless they occurred within the 300 day period). The record does not reflect any clear adverse action within the week preceding complainant's last day of work.

Complainant appealed from the initial determination and respondent renewed its motion to dismiss.

The time limit for filing complaints of discrimination is derived from §111.39(1), Stats:

The [Commission] may receive and investigate a complaint charging discrimination... if the complaint is filed with the [Commission] no more than 300 days after the alleged discrimination... occurred.

As noted above, complainant filed her complaint on October 20, 1994. The 300 day filing period means that, as a general matter, events occurring before December 25, 1993, would not be timely. The 1992 hiring action, the conduct of

Keith Kunugi in December of 1992 and the decision, confirmed in October of 1993¹ to lay off the complainant, all are outside of this time period. However, complainant appears to contend that during approximately the last six months of her employment, which would include the last week of December in 1993 which is within the 300 day period, Kinsella failed to return her manuscript in a timely fashion, effectively refusing to work with her on the manuscript. Complainant also contends that this conduct continued after the end of her employment and that respondent denied her access to primary data. These allegations are implicit in the language of the complainant's response to respondent's motion to dismiss. The allegation relating to the refusal to work on the manuscript is also reflected in investigative findings 31 and 32 in the Initial Determination:

31. Complainant stated the substance of what is contained in this paragraph. In several conversations in Fall, 1993 and January, February, 1994, Kinsella indicated that he would have members of the lab finish her work. At the time of filing her charge of discrimination, no such action had occurred. Similarly, Kinsella refused to work with complainant on manuscripts. Complainant presented Kinsella with copies of her manuscript drafts in early summer, 1993, but he did not read it until after her departure.

32. Complainant identified the following conversations she had with Kinsella after her termination.

a) On January 6, 1994, Kinsella admitted that he had never gone through her first draft completely. He claimed the manuscript was unfocused. She asked him to re-write what he did not like and/or that he provide constructive comments.

b) Later on January 6, 1994, Kinsella told complainant that he had spent the last two hours reviewing her manuscript and that a lot of work still needed to be done.

c) On January 7, 1994, complainant picked up Kinsella's comments on her manuscript.

d) On January 24, 1994, Kinsella berated her, refused to work with her or give her help on her manuscript.

e) On February 10, 1994, Kinsella called complainant to ask her whether she had finished the manuscript. Complainant viewed this as a request that she work for free to finish her manuscript.

¹The period for filing a complaint relating to a layoff or termination decision commences on the date of notice, rather than on the date of the actual layoff or termination. Hilmes v. DILHR, 147 Wis 2d 48, 433 N.W.2d 251 (Ct. App., 1988) Here, notice was provided no later than October 10, 1993, with an effective date of December 31st.

The complainant's allegation that she was denied access to primary data does not appear to be referenced in her original complaint of discrimination, nor is it referenced in the Initial Determination. The Commission declines to allow the complainant the opportunity to amend her complaint at this point in the proceeding.²

Analysis of the respondent's motion to dismiss does not end after determining which alleged discriminatory conduct occurred within 300 days of the filing date. In its recent decision in Tafelski v. UW-Superior, 95-0127-PC-ER, 3/22/96, the Commission cited with approval the following analysis set forth in Selan v. Kiley, 59 FEP Cases 775, 778 (7th Cir., 1992)

The continuing violation doctrine allows a plaintiff to get relief for a time-barred act by linking it with an act that is within the limitations period. For purposes of the limitations period, courts treat such a combination as one continuous act that ends within the limitations period. . . . The first [continuing violation] theory stems from "cases, usually involving hiring or promotion practices, where the employer's decision-making process takes place over a period of time, making it difficult to pinpoint the exact day the 'violation' occurred." Courts have tolled the statute in such cases for equitable reasons similar to those underlying the federal equitable tolling doctrine. . . . The second theory stems from cases in which the employer has an express, openly espoused policy that is alleged to be discriminatory. . . . The third continuing violation theory stems from cases in which "the plaintiff charges that the employer has, for a period of time, followed a practice of discrimination, but has done so covertly, rather than by way of an open notorious policy. . . . In such cases the challenged practice is evidenced only by a series of discrete, allegedly discriminatory, acts." This brand of continuing violation has also been referred to as a "serial violation," and as a "pattern of ongoing discrimination." . . .

Under the third theory, the question is whether, in response to the defendants' motion for summary judgment, [the employee] produced sufficient evidence to establish that there existed a genuine issue of fact whether the defendants' acts were "related closely enough to constitute a continuing violation" or were

²Section PC 2.02(3), Wis. Adm. Code, provides:

(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.

"merely discrete, isolated, and completed acts which must be regarded as individual violations." The Fifth Circuit has suggested three factors to consider in making this determination:

The first is subject matter. Do the alleged acts involve the same type of discrimination, tending to connect them in a continuing violation? The second is frequency. Are the alleged acts recurring (e.g., a bi-weekly paycheck) or more in the nature of an isolated work assignment or employment decision? The third factor, perhaps of most importance, is degree of permanence. Does the act have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate?

This court and others have stressed the significance of the third factor:

What justifies treating a series of separate violations as a continuing violation? Only that it would have been unreasonable to require the plaintiff to sue separately on each one. In a setting of alleged discrimination, ordinarily this will be because the [employee] had no reason to believe he was a victim of discrimination until a series of adverse actions established a visible pattern of discriminatory treatment. [citations omitted]

The first of these theories relates to the complainant's allegation that respondent's failure to return her manuscript, both while she was employed and afterward, was discriminatory. This alleged conduct was in the nature of a decision-making process which took place over a period of time, making it difficult to say that the alleged discrimination occurred on any one particular day to the exclusion of other days. However, the complainant's other allegations are not susceptible to inclusion under the continuing violation doctrine. The promotion and termination were discrete, isolated and completed actions which must be regarded as individual violations. They both had a degree of permanence which should have triggered complainant's awareness of and duty to assert her rights. Likewise, the alleged response on December 23, 1993, by Keith Kunugi to the complainant's promotion is a separate incident that is not susceptible to other application of the continuing violation doctrine.

Other matters

In her arguments relating to respondent's motion, complainant alleges that respondent refused to work with her on a manuscript during the six month period before her employment ended on December 31, 1994, and that respondent continued to discriminate after her employment ended by denying

In its reply brief, respondent contends that the manuscript mentioned by complainant was "not a requirement of her employment and, as such, should be considered a part of her academic record and not related to her position with the University." To the extent respondent is contending that the respondent's conduct, relative to the manuscript, is unrelated to "terms, conditions or privileges of employment,"³ this contention is separate from the timeliness issue raised by respondent's motion to dismiss and complainant has not had an opportunity to offer her arguments on this point. Therefore, it will not be addressed in this ruling. Respondent may file a new motion if it decides to pursue the argument.

³The Fair Employment Act, in §111.322(1), Stats., defines employment discrimination to include the following:

- (1) To refuse to hire, employ, admit or license any individual, to bar or terminate from employment... any individual, or to discriminate against any individual in promotion, compensation or in terms, conditions or privileges of employment... because of any basis enumerated in s. 111.321.

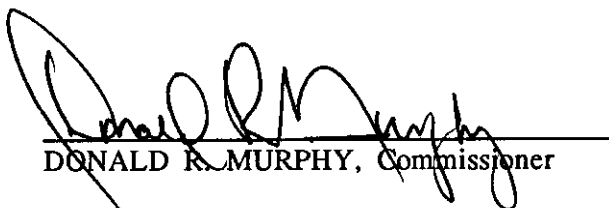
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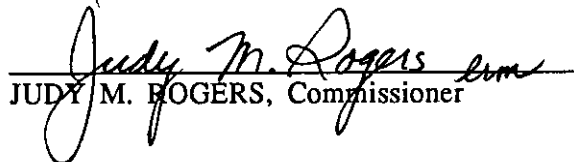
All of complainant's allegations are dismissed as untimely except her claim that she was discriminated/retaliated against during approximately the last six months of her employment as well as after the end of her employment when Kinsella failed to return her manuscript in a timely fashion, effectively refusing to work with her on the manuscript. A second prehearing conference will be scheduled.

Dated: August 5, 1996

STATE PERSONNEL COMMISSION

KMS:dpd


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner