

MARIA V. NELSON,
Complainant,

v.

**Secretary, DEPARTMENT OF
INDUSTRY, LABOR & HUMAN
RELATIONS [DEPARTMENT OF
WORKFORCE DEVELOPMENT],¹**
Respondent.

**RULING ON MOTION
TO DISMISS**

Case No. 95-0165-PC-ER

This is a complaint of discrimination based on national origin, race, and sex, and of retaliation for engaging in protected fair employment activities. On December 12, 1997, respondent filed a motion to dismiss for failure to state a claim and for untimely filing. The parties were permitted to file briefs in regard to this motion and the briefing schedule was completed on January 26, 1998. The following findings are derived from information provided by the parties, appear to be undisputed unless otherwise indicated, and are made solely for the purpose of deciding this motion.

1. This complaint was filed on November 2, 1995. An Initial Determination of No Probable Cause was issued by a Commission investigator on August 29, 1997.

2. At all times material here, complainant was employed as a Migrant Labor Inspector, Bureau of Migrant Services, JETS Division, Department of Industry, Labor and Human Relations (DILHR) [DWD] and was assigned to an office in Beaver Dam, Wisconsin.

¹ Pursuant to the provisions of 1995 Wisconsin Act 27 which created the Department of Workforce Development (DWD), effective July 1, 1996, some of the authority previously held by the Secretary of the Department of Industry, Labor & Human Relations is now held by the Secretary of the DWD.

2. Complainant alleges in her charge that the following actions were discriminatory/retaliatory:

a. Co-worker Rosa Guerrero harassed complainant about complainant's friendships with white women employees in the office, including but not limited to an occasion on or about February of 1992 in which Ms. Guerrero remarked to Mateo Cadena, Director of the Bureau of Migrant Services, DWD, that complainant was "sucking up to white women in the office again." No other specific incidents or their dates were provided by complainant.

b. Ms. Guerrero accused complainant of filing internal work complaints against her, and engaging in retaliatory harassment of complainant for filing the alleged complaints. Complainant has not indicated when this occurred.

c. Ms. Guerrero retaliated against complainant for complainant's friendship with Chuy Zavala and his family, including harassing complainant for her refusal to participate in the investigation of Ms. Guerrero's sexual harassment claim against Mr. Zavala. This occurred in August of 1992.

d. Ms. Guerrero informed Mr. Cadena as to when Mr. Zavala met with complainant for the purpose of monitoring migrant worker services. Complainant has not indicated when this occurred.

e. Ms. Guerrero accused complainant of affording the Zavala family special treatment due to complainant's relationship with the family. This occurred in July and August of 1994.

f. Ms. Guerrero verbally threatened to physically assault complainant. This occurred on December 7, 1994.

g. Dave Tousey, supervisor of the Beaver Dam office, informed another staff member that Ms. Guerrero was going to "nail complainant to the wall." This occurred on September 7, 1994.

h. Mr. Cadena harassed and intimidated complainant for refusing to support a sexual harassment complaint against Mr. Zavala, including commenting to complainant that she should have joined in the complaint because she could have "got a lot of money." This occurred in August of 1992.

i. Mr. Cadena pressured complainant to make derogatory statements about Mr. Zavala. This occurred in August of 1992.

j. Mr. Cadena harassed complainant about her association with Mr. Zavala, including asking complainant where the Zavala family lived, and stating that he wanted to find Mr. Zavala "doing something wrong." This was also generally alleged in the internal complaint filed by complainant with respondent on October 21, 1994, and must, therefore, have occurred prior to that date. Complainant has not indicated when this occurred.

k. Mr. Cadena commented to complainant that Mr. Zavala's girlfriend was pregnant, and that wouldn't complainant "want to be pregnant by him." Complainant has not indicated when this occurred.

l. Mr. Cadena refused to listen to complainant, called her a "cry baby," stated that "I thought you were a stronger person than that," and stated that, "Don't you have enough hairs on your 'ass' to tell Rosa off." when complainant voiced her opposition to him about Ms. Guerrero's, Mr. Tousey's, and Mr. Cadena's conduct. Complainant has not indicated when this occurred.

m. On or about September 22, 1994, complainant was singled out from the other workers in the office to participate in a meeting including Ms. Guerrero, Mr. Tousey, and herself. The purpose of the meeting was to discuss alleged "communication and coordination" problems between complainant and Ms. Guerrero.

n. In order to remove herself from the discriminatory and retaliatory conduct described above, complainant requested permission to work out of her home, and this permission was granted by respondent on or about July 31, 1995.

Section 111.39(1), Stats., requires that a charge of discrimination be filed no more than 300 days after the alleged discrimination occurred. In view of the November 2, 1995, filing date here, this complaint would be considered timely filed only in regard to those allegedly discriminatory/retaliatory actions which occurred on or after January 6, 1995.

Complainant has the burden to show that the allegations in her charge were timely filed. In view of the fact that she has provided no dates in regard to allegations

2.b., 2.d., 2.k., and 2.l., stated above, and none are apparent from the information provided by the parties, it is concluded that these allegations were untimely filed.

Complainant appears to offer two theories in support of her contention here that her charge was timely filed despite the fact that the remaining allegations (other than 2.m., above) occurred prior to January 6, 1995. Both of these theories rely on complainant's contention that she has alleged here a continuing course of conduct which has a link to the period of time between January 6 and November 2, 1995. Under her first theory, this link would be provided by her general assertion that harassment and retaliation of the type described in 2.a. through 2.m., above, continued into this period, and that she is not required to allege a particular incident which occurred during this period of time. The Commission has previously rejected such a theory. *See, Womack v. UW-Madison, 94-0009-PC-ER, 7/25/94; Getsinger v. UW-Stevens Point, 91-0140-PC-ER, 4/30/93; and Reinhold v. OCCDA and Bennett, 95-0086-PC-ER, 9/16/97.* Complainant's second theory is that the fact that the incident described in 2.n., above, occurred during the period of time between January 6 and November 2, 1995, is sufficient to support a continuing violation theory and a conclusion of timely filing here as to all allegations. However, the Commission agrees with respondent that allegation 2.n. does not describe an adverse action, i.e., complainant herself has described the series of events as consisting of her request for permission to work at home and respondent's granting of her request. Complainant does not contend, nor is it apparent to the Commission, that complainant suffered any injury as a result of this action. Moreover, complainant does not allege discrimination or retaliation in the processing of her request to work at home and has, as a result, failed to provide a link to the allegedly discriminatory/retaliatory actions which occurred prior to January 6, 1995. Complainant argues, however, that, since the basis for her request to work at home was the harassing environment to which she was subjected at the Beaver Dam office, allegation 2.n. should be regarded as an adverse action and as a link to the previous incidents of alleged discrimination/retaliation. However, this is a thinly veiled attempt by complainant to lend specificity to her

general allegations of discrimination/retaliation without actually citing a specific incident of discrimination or retaliation which occurred during the actionable time period. Complainant has failed to cite a specific incident of discrimination or retaliation which occurred during the actionable time period, and it is concluded, as a result, that this complaint was untimely filed.

ORDER


This complaint is dismissed.

Dated: February 11, 1998

STATE PERSONNEL COMMISSION

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LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

Parties:

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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.)

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