

DEBORAH HONER,
Complainant,

v.

**Secretary, DEPARTMENT OF
TRANSPORTATION,**
Respondent.

**RULING ON
COMPLAINANT'S
REQUEST FOR STAY**

Case Nos. 97-0005-PC-ER
98-0122-PC-ER

These cases are before the Commission to resolve complainant's request that the above-noted cases be held in abeyance until her related federal-court case is resolved. Respondent objected to the request.

BACKGROUND

1. Case number 97-0005-PC-ER involves a complaint filed with the Commission on January 9, 1997 (hereafter, the "First Case"). The First Case was cross-filed with the Equal Employment Opportunity Commission (EEOC) at complainant's request. The Personnel Commission investigated the case. An Initial Determination (ID) was issued on April 3, 1998, which included the following conclusions of law:

1. The issues raised in the complaint are moot.¹
2. The following non-substantive findings are made regarding the alleged handicap discrimination:
 - a. There is No Probable Cause to believe that discrimination occurred in regard to respondent's decision of May 21, 1996, to reassess complainant's accommodation needs.
 - b. There is Probable Cause to believe that discrimination occurred in regard to some of the accommodation changes made effective September 20, 1996, as detailed in this determination.

¹ The employment relationship had ended prior to issuance of the ID. This fact formed the basis for the conclusion that the issues were moot.

- c. There is Probable Cause to believe that discrimination occurred in regard to respondent's decision in May 1996, to deny complainant's request to install a shelf in the restroom and to require her to make up the time needed to go home to change her tam-pax.
 3. The following non-substantive findings are made regarding the alleged FEA Retaliation:
 - a. There is No Probable Cause to believe retaliation occurred in regard to the one-day suspension imposed on August 28, 1996.
 - b. There is Probable Cause to believe retaliation occurred in regard to a portion of respondent's decision on October 21, 1996, to investigate complainant as detailed in this determination.
 4. A non-substantive finding of Probable Cause is made in regard to the claim of handicap harassment as detailed in this determination.
2. The complainant did not appeal the No Probable Cause portions of the ID issued in the First Case.
3. Case number 98-0122-PC-ER involves a complaint filed with the Commission on June 26, 1998 (hereafter, the "Second Case"). The Second Case was cross-filed with the Equal Employment Opportunity Commission (EEOC) at complainant's request. The Second Case involved an alleged constructive discharge on the basis of disability and FEA Retaliation. The Personnel Commission has conducted no investigation of the Second Case.
4. A prehearing conference was held on September 21, 1998, and covered the First Case as well as the Second Case. It is noted in the resulting Conference Report (dated September 22, 1998) that complainant waived investigation of the Second Case so the cases could be combined for hearing.
5. Respondent, by letter dated October 20, 1998, moved that the First Case be dismissed as moot and that the Second Case be dismissed as untimely filed. These motions were placed on hold until complainant's attorney decided whether the case would be pursued in federal court.

6. On or about February 23, 1999, complainant's attorney requested a right to sue letter from the EEOC and, thereafter, filed an action in federal court. The federal trial is scheduled for March 22, 2000.²

7. Complainant's attorney provided a copy of the preliminary draft of the complaint filed in federal court (but did not provide a copy of the final document). The matters raised in the federal court action stem from the same set of circumstances as raised in the First and Second Cases and involve the same parties. The draft pleadings include claims under the Americans with Disabilities Act (ADA). The draft pleadings could have included, but did not specifically include, a claim of FEA retaliation.

OPINION

The Commission's usual practice is to hold a discrimination case in abeyance if related federal proceedings could have preclusive effect on the cases pending before the Commission. The rationale for this practice was discussed in *Tyus v. DER*, 97-0078-PC, 98-0062-PC-ER, 1/27/99, as shown below:

Petitioner's request reflects a decision to pursue her discrimination and retaliation claims in the federal forum. The Commission's usual practice is to hold the Commission's equal rights cases in abeyance if related federal proceedings involve claims under Title VII of the Civil Rights Act. In *Stoner v. DATCP*, 92-0041-PC, 1/27/93, the Commission made the following observations regarding a request for a stay in order to pursue claims in another forum:

It is not uncommon for the Commission to hold in abeyance a case that has been filed here while the employe proceeds through a trial in another forum (usually judicial) of a claim involving the same subject matter. Frequently the results in the other forum will either moot or preclude further proceedings before the Commission. Thus, staying proceedings before the Commission can in many cases effect judicial/administrative economy by avoiding a multiplicity of proceedings. (Citations omitted.)

² Respondent's attorney provided the information in this paragraph on September 14, 1999

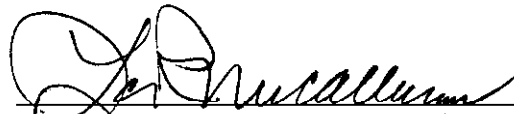
Respondent's present request for the Commission to proceed with pending motions to dismiss is contrary to the Commission's usual practice (as noted in the prior paragraph). Respondent has not alleged or articulated any theory to support a conclusion that granting complainant's request would harm respondent's litigation posture. Respondent could file the same motions in federal court regarding whether the First Case is moot and whether the Second Case was timely filed. The federal court's resolution of those motions presumably would have preclusive effect on the cases held in abeyance at the Commission.

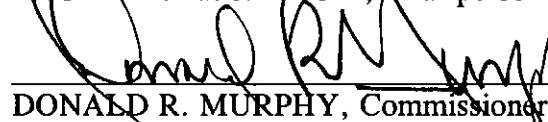
ORDER

Complainant's request to hold these cases in abeyance pending the result of parallel federal litigation is granted. Respondent's request to proceed with resolution of its motions to dismiss is denied without prejudice.

Dated: September 22, 1999.

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

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