

RICHARD A. FREIHOEFER,
Complainant,

v.

**Secretary, DEPARTMENT OF
CORRECTIONS,**
Respondent.

**RULING
ON MOTION
TO AMEND
COMPLAINT**

Case No. 99-0048PC-ER

This matter is before the Commission on the complainant's motion to amend his complaint to add a claim of discrimination based on race. The parties have had the opportunity to file arguments and the following findings of fact, made solely for the purposes of this ruling, appear to be undisputed unless otherwise noted.

FINDINGS OF FACT

1. On March 12, 1999, complainant, who was represented by counsel, filed a complaint of age discrimination with the Personnel Commission. The complaint was specifically denominated as a "Complaint of Age Discrimination" and it included the following language:

NATURE OF THE CASE

Complainant is an adult male resident of the State of Wisconsin. Complainant brings this action pursuant to the Wisconsin Fair Employment Act, §111 et seq., as well as 29 U.S.C. 623 et. seq. (ADEA), pursuant to the requirements of exhaustion of administrative remedies.

Complainant seeks redress for acts and/or omissions taken by the Respondent, through its agents and employees, in violation of Complainant's civil rights, privileges and immunities base on his age. Specifically, Complainant asserts that during his employment with Respondent, he performed his job according to Respondent's accepted method, but was terminated and replaced with a less qualified and younger individual. Additionally, Complainant asserts he was treated different than similarly situated employees in violation of his employment and civil rights.

2. An Equal Rights Officer on the Commission's staff investigated the complaint. Complainant was represented by counsel during the course of the investigation. On February 2, 2001, the Equal Rights Officer issued an initial determination of No Probable Cause to believe that age discrimination occurred when respondent decided to terminate complainant's probationary employment as a Probation and Parole Agent in May of 1998.

3. In correspondence to the Commission dated March 2, 2001, the complainant wrote:

I am currently working as a teacher in Mexico and since I just now received your letter I have to respond using the internet. I am hereby requesting a hearing on your determination of "no probable cause."

The grounds are that I was discriminated against and so were my clients. When my Spanish speaking clients receive no court ordered treatment because my supervisor will not allow me to provide the proper Spanish speaking treatment, that is discrimination. Furthermore, when I demand that the state furnish Spanish speaking counselors and my boss gets angry and fires me that is retaliation.

4. By letter dated May 8, 2001, the law firm of complainant's attorney informed the Commission as follows:

Attorney Thomas Rivera was the attorney in our office handling this matter. He is no longer with our office and has moved out of the state. Mr. Friehoefer has decided he will seek other counsel or handle this himself since Mr. Rivera is no longer practicing law in Wisconsin. We, therefore, wish to withdraw as counsel for Mr. Friehoefer.

Complainant now represents himself in this matter.

5. The Commission convened a prehearing conference on May 14, 2001. During the conference, complainant indicated he wished to file an amendment to his complaint and agreed to file the amendment by May 24th. Respondent objected to consideration of any claims beyond those discussed in the initial determination.

OPINION

Pursuant to §PC 2.02(3), Wis. Adm. Code, the Commission may exercise its discretion and not approve a request to amend a complaint:

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. (Emphasis added.)

Complainant's proposed amendment relates to the termination decision that was the subject matter of the original charge. However, permitting the amendment would require the Commission to conduct an investigation of the new allegation, unless there was waiver of the investigation. It is now 3 years after the termination decision that is the subject of the complaint. Complainant had a lengthy opportunity to seek to amend this matter at an earlier time. He was represented by counsel throughout the investigative process. In support of his request to amend, complainant submitted a copy of a letter he sent to his attorney in February of 1999 that referred to a "heated exchange" between complainant and his first supervisor "regarding the lack of treatment for Hispanic offenders." Complainant suggests that his attorney should have filed an amendment at that point in the proceeding. Yet no request to amend was actually filed until more than 2 years later, after the investigation was complete and after the initial determination had been issued. Respondent had no reason to preserve any evidence relating to complainant's race discrimination claim. Respondent argues that it would be prejudiced if complainant would be permitted to add a race discrimination claim at this time, and the Commission concludes that it would be unfair if respondent was now required to respond to complainant's description of a "heated exchange" that occurred in 1997 or early in 1998. Under these circumstances, the Commission declines to grant complainant's request to amend the complaint.

This result is consistent with previous rulings by the Commission. In *Ferrill v. DHSS*, 87-0096-PC-ER, 8/24/89, the Commission declined to permit the addition of a

race claim to a handicap and sex complaint arising from a resignation, where complainant made the amendment request after the initial determination had been issued and 2 years after the complaint had been filed. The Commission made a similar analysis in *Ziegler v. LIRC*, 93-0031-PC-ER, 5/2/96.

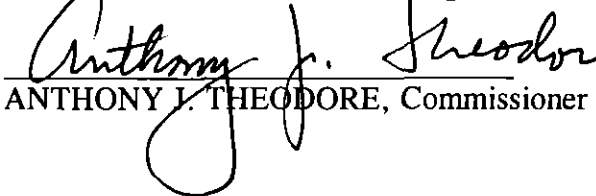
ORDER

Complainant's request to amend his complaint is denied. The Commission will contact the parties to reconvene the prehearing conference commenced on May 14, 2001.

Dated: November 7, 2001 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

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ANTHONY J. THEODORE, Commissioner