

**EQUAL OPPORTUNITIES COMMISSION  
CITY OF MADISON  
210 MARTIN LUTHER KING, JR. BOULEVARD  
MADISON, WISCONSIN**

<p>Vickie L Dunn 2849 Century Harbor Rd Apt 4 Middleton WI 53562-1825</p> <p style="text-align:center">Complainant</p> <p style="text-align:center">vs.</p> <p>South Central Library System 5250 E Terrace Dr #A Madison WI 53708-8340</p> <p style="text-align:center">Respondent</p>	<p>HEARING EXAMINER'S DECISION AND ORDER ON RESPONDENT'S MOTION TO DISMISS</p> <p>Case No. 19982195</p>
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### **BACKGROUND**

This is a determination of jurisdiction stemming from the Respondent's Motion to Dismiss for lack of jurisdiction. The Complainant is Vicki L. Dunn. In a complaint filed with the Madison Equal Opportunities Commission (Commission) on September 24, 1998, Dunn charged that the Respondent, the South Central Library System, terminated her employment in retaliation for her exercise of rights protected by the ordinance. The Complainant allegedly complained to her employer of age discrimination on the part of her supervisor.

The Respondent contends that the Complainant filed her complaint with the Commission beyond the 300-day limit provided for in Section 3.23(10)(c)1 MGO. The Complainant asserts that her complaint was timely filed or in the alternative that any late filing is excused. The complaint was transferred to the Hearing Examiner for resolution of the jurisdictional dispute.

### **DECISION**

When considering a motion such as this one, the Hearing Examiner must view the evidence in the light most favorable to the non-moving party, in this case, the Complainant. The inferences and statement of facts contained in this decision reflect this favorable treatment. The Hearing Examiner makes no final findings and at the time of a hearing, the findings may not be as reflected here.

The Complainant worked for the Respondent in some form of bookkeeping capacity. During September of 1997, Peter Hamon, the Complainant's supervisor, was developing the budget for the coming year. The Complainant was working a three quarters time position. The Complainant was comfortable with this schedule because it permitted the Complainant to spend more time at home with her husband who had been diagnosed with cancer. Under the budget proposed by Hamon, the Complainant would move to a full-time work schedule and a clerical position would be eliminated.

The Complainant told Hamon that she believed he was proposing the schedule change so that she would quit. It is the Complainant's belief that Hamon wanted a younger employee to take her place.

The Complainant prepared a memo setting forth her concerns about Hamon's treatment and sent it to the Respondent's Board. Hamon told the Complainant that if she took her concerns to the Board, he would see that her position was eliminated. At the Board meeting held on September 29, 1997, the Complainant was questioned about her memo and its allegations. Hamon was given a copy of the memo and was visibly angry. During his presentation, Hamon described the Complainant as a poor employee who had performance problems.

The Complainant was scheduled to be on vacation on October 1, 1997. Despite her scheduled vacation, the Complainant came to work to finish an assignment at the request of her direct supervisor, Char Paglini. When

she appeared at work Hamon confronted her and ordered her to leave. She attempted to complete her assignment, but was directed to leave instead. While the Complainant was attempting to complete her work, Hamon contacted someone by telephone and then informed the Complainant that she was terminated.

The Complainant exercised her right to appeal her termination to the Respondent's Board. Despite this appeal, the Complainant did not work for the Respondent after October 1, 1997.

In October of 1997, the Board referred the appeal to the Personnel Committee. In turn the Personnel Committee appointed a three person sub-committee to investigate the Complainant's appeal and the circumstances of her termination. At a meeting held in late October, 1997, the Complainant alleges that Dorothy Coens and Greg Crews, members of the sub-committee, told her that she was considered an employee until the Board took final action. This statement was allegedly made even though the Complainant was not actually working for the Respondent. Additionally, the Complainant alleges that Coens told her that if the Complainant retained an attorney or filed a complaint of discrimination, the sub-committee would do nothing to help the Complainant.

The Respondent's Board voted on December 8, 1997 to uphold the Complainant's termination. At the same meeting, the Respondent's Board agreed to fix the date of the Complainant's termination on December 8, 1997 so that the Complainant would have the greatest possible flexibility in exercising her COBRA rights. The Respondent did not pay the Complainant any wages for the period between October 1, 1997 and December 8, 1997.

Subsequent to the Board's vote on December 8, 1997, the Complainant and the attorney for the Respondent entered into discussions to attempt to resolve the dispute that eventually became this complaint. Those negotiations took a protracted period of time. During the negotiations, the Complainant was again told that if she retained an attorney or filed a complaint of discrimination, the negotiations would be terminated.

The negotiations resulted in an apparent agreement late in the Summer of 1998. The Respondent's attorney undertook to memorialize the apparent agreement. When a settlement document was presented to the Complainant, she contends that it did not accurately reflect the agreement reached between herself and the attorney. Shortly after her rejection of the settlement documents, the Complainant filed the present complaint.

The Respondent contends that the complaint was filed beyond the 300-day limitations period. In the Respondent's view, the limitations period began to run on October 1, 1997. This means that in order to be timely, the complaint would have needed to be filed on or before July 28, 1998.

The Complainant asserts that the limitations period should run from December 8, 1997, making the complaint timely. The Complainant also asserts that even if the time period would normally run from October 1, 1997, there are extenuating circumstances presented by the present complaint that are sufficient to excuse a late filing.

The limitations period for a claim of discrimination runs from the date of the act of discrimination or at least the date when a reasonable person would have known that he or she had been a victim of discrimination. Ennis v. Local 965 IBEW, MEOC Case No. 22118 and Ennis v. WP&L, MEOC Case No. 22119 (Ex. Dec. on Jur. 02/03/95, Ex. Dec. 03/17/95), Krebs v. Don Miller Pontiac Subaru, Inc., MEOC Case No. 22127 (Ex. Dec. on Jur. 03/29/96, Ex. Dec. on Jur. 03/16/95). It is when the discrimination occurs not when the effects are most acutely felt that the limitations period begins to run. Hilmes v. DILHR, 147 Wis. 2d 48 (Ct. App. 1988). Mere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination Mull v. ARCO Durethene Plastics, Inc., 784 F.2d 284 (7th Cir. 1986) citing Delaware State College v. Ricks, 449 US 250 (1980). Under the circumstances of this complaint, a reasonable person would have believed his or her termination on October 1, 1997 was motivated by retaliation for the Complainant's statements opposing her belief that she had been discriminated against by Hamon in both her memo to the Board and her testimony before the Board on September 29, 1997. The likely retaliatory motive should have been apparent to the Complainant immediately upon her termination. That indicates that the limitations period began on October 1, 1997.

The Complainant contends that the limitations period should run from December 8, 1997, rather than October 1, 1997. She bases her position on the theory that she was not actually terminated until after her appeal had been decided. In support of her contention, the Complainant points to the statements of Coens and Crews at

the October meeting of the sub-committee investigating her appeal to the effect that until the Board decided her appeal, the Complainant would be considered an employee of the Respondent. The Complainant also asserts that a provision of the Respondent's Personnel Manual indicating that decisions of the Board are final supports her claim to a termination date of December 8, 1997.

The Complainant's position is contrary to the clear statement of the law in this regard. The Complainant was reasonably on notice of her claim on October 1, 1997, when Hamon terminated her employment. The fact that subsequent appeals may have reversed Hamon's action may work to limit the Complainant's damages, but do not delay the limitations period. The policy that decisions of the Board are final is clearly meant to indicate that further appeals are not available and is not an indication that decisions made at levels below that of the Board are stayed pending action by the Board.

While for purposes of this motion, the Hearing Examiner must credit the Complainant's allegation about statements made by members of the sub-committee to the effect that the Complainant was still considered an employee pending Board action, the statement does not alter the outcome. The Complainant knew of the likely retaliatory nature of her dismissal and her hopes for a different result by way of her appeal do not change the date from which the limitations period runs.

The Mull case noted above is a good example of how the federal courts apply the rule for identifying the running of a limitations period. In that case, the employee was told in May that his employment would end on a date certain unless he accepted another assignment. The statement of termination was sufficiently unequivocal to place the employee on notice of the possibly discriminatory nature of the decision. Despite the employee's knowledge of the employer's intentions, he attempted to change the employer's mind and to seek different assignments than the one given by the employer. The court held that even though the employee remained employed by the employer for a number of months after the ultimatum was given, the limitations period ran not from the last day of employment or when the employee's alternative requests were exhausted, but from the date upon which he reasonably could have known that he might have been the victim of discrimination.

The Complainant presents no argument that the Hearing Examiner should not follow the federal decisions. The federal law in this regard tracks that followed by the State of Wisconsin and previous decisions of the Commission. Ennis, supra; Krebs, supra; Hilmes, supra. The Hearing Examiner concludes that the limitations period should run from October 1, 1997.

Having found that the limitations period should run from October 1, 1997, the Hearing Examiner will now turn to the Complainant's arguments that the Complainant's late filing must be legally excused. The first of these arguments is that the Respondent should be estopped from denying that December 8, 1997 was the Complainant's last day of employment and therefore should be used as the date for commencing the limitations period. The Complainant's position is premised upon the Board's decision to use December 8, 1997 as the final date of employment for purposes of giving the Complainant the greatest flexibility for extending her COBRA benefits.

On this record, the Hearing Examiner is unwilling to find that the Respondent should be estopped from asserting a defense based upon expiration of the limitations period because it assisted the Complainant with her COBRA benefits by adjusting her final date of employment. As is true in the Mull case, the Complainant knew of the retaliatory conduct long before the date which she wishes to trigger the limitations period. She makes no demonstration that she relied to her detriment on the Board's action and did not receive any benefit other than an extended period of COBRA benefits. To estop the Respondent under these circumstances might act to deter other employers from taking actions to assist employees who might be in difficult circumstances. Given the Complainant's concerns with her husband's health, it would be unfortunate to punish the Respondent for helping the Complainant in this small way.

The Complainant's final argument is that the Respondent should be estopped from asserting the lapse of the limitations period because of its own misconduct or conduct intended to cause the Complainant not to exercise her rights. The Complainant relies on the alleged statement of Coens during the October, 1997 meeting and the conduct of the Respondent's attorney while attempting to negotiate a resolution to demonstrate the Respondent's misconduct. This theory for extending the statute of limitations is recognized in the Mull case.

Mull and its predecessors establish a test for determining whether the statute of limitations should be extended or not. In order to apply this principle, the Complainant must establish either: 1) a deliberate design by the

employer to cause the employee to forego his or her rights or 2) that the employer undertook actions that the employer should unmistakably have understood would cause the employee to delay filing his or her charge. In the present case, the employer's actions in telling the Complainant, who was unrepresented by an attorney at the time, that filing her claim or retaining an attorney would result in first a lack of help from the sub-committee reviewing her appeal, and second a cessation of the settlement discussions that the Complainant hoped would resolve her claim, seem clearly intended to keep the Complainant from exercising her rights to proceed under the ordinance or other law. While it is true that the Complainant, perhaps, made an unwise choice in continuing to work with the Respondent or its representatives, under the circumstances, the Respondent must have known that its requirements for continuing discussions would lead the Complainant to delay in filing her claim.

It may not be specifically illegal for the Respondent or its attorneys to place limitations on its willingness to entertain settlement negotiations, but in the same way that the Hearing Examiner is unwilling to allow the Complainant to benefit from the Respondent's alleged act of kindness in extending her last day of employment for COBRA purposes, the Respondent should not be permitted to benefit from tying the Complainant's hands in exercising her rights. As a piece of social welfare legislation, the ordinance relies on individuals to act as public attorneys general. Conduct on the part of any respondent that chills an individual's willingness to bring a claim is contrary to the policy of the ordinance and similar civil rights laws.

The Hearing Examiner does not intend to absolve this or other complainants from timely filing of complaints. Also, the Hearing Examiner does not make findings as to the Complainant's credibility with respect to the alleged statements of Coens and Crews. At this stage, the Hearing Examiner must look at the record in the light most favorable to the Complainant. In that light, a reasonable person could find that the Respondent knowingly attempted to keep the Complainant from exercising her rights and understood that its actions could and were leading the Complainant to delay filing her claim.

The record also demonstrates that the Complainant acted reasonably promptly to file her claim once she believed that the Respondent had failed to honestly memorialize the agreement that she thought she had. The Respondent does not claim prejudice resulting from the Complainant's failure to meet the 300-day limitations period other than having to defend a "stale" claim. Since the Hearing Examiner concludes that the Respondent played a potentially significant role in the complaint's late filing, the Hearing Examiner is not swayed by the Respondent's claim.

### **ORDER**

For the forgoing reasons, the Hearing Examiner finds that the Complainant's filing of this complaint beyond the limitations period is excused by the conduct of the Respondent. The complaint may be processed and is hereby remanded to the Investigator/Conciliator for completion of the investigation and issuance of an Initial Determination.

Signed and dated this 24th day of June, 1999.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III  
Hearing Examiner