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

Kim Z. Ennis 927 Castle Dr. Sun Prairie, WI 53590 Complainant vs. Local 965 IBEW 3501 E. Washington Ave. Madison, WI 53704 Respondent	DECISION AND ORDER ON JURISDICTION Case No. 22118

and

Kim Z. Ennis 927 Castle Dr. Sun Prairie, WI 53590 Complainant vs. Wisconsin Power & Light 222 W. Washington Ave. Madison, WI 53703 Respondent	Case No. 22119

INTRODUCTION

On May 25, 1994, the Complainant, Kim Zink Ennis, filed complaints of discrimination with the Wisconsin Department of Industry, Labor and Human Relations Equal Rights Division (ERD) alleging discrimination on the basis of her sex in the terms and conditions of her employment. The complaints name as respondents her employer, Wisconsin Power and Light (WP&L), and her labor representative, Local 965 IBEW (International Brotherhood of Electrical Workers). The Complainant alleges that she was treated differently from a similarly situated male employee when he was extended the right to "bridge" seniority and benefits over a period of absence from employment. These complaints were transferred to the Madison Equal Opportunities Commission (Commission) for processing pursuant to a Work Sharing Agreement and contract between the ERD and the Commission.

In 1989, the Complainant wished to take a leave of absence after the birth of her daughter. She was told that she would have to resign and reapply. She wished to arrange the terms of her leave to permit

her to retain her seniority and other benefits when she returned to employment. Respondent WP&L refused to agree to the Complainant's request. The Respondent IBEW allegedly failed to assist the Complainant in obtaining the requested terms of leave. The Complainant returned to employment in the capacity of a special temporary employee on December 3, 1990. In February of 1991, the Complainant was transferred to a permanent position. The Complainant alleges that in December of 1993, she became aware for the first time that a "bridge" of benefits similar to that requested by the Complainant was granted to Donald Elliot, a male employee of Respondent WP&L. The Complainant alleges that the Respondent IBEW assisted Elliot in negotiating his return to work with a bridge of his seniority and other benefits.

The Respondents assert that the Respondent WP&L's decision to bridge seniority in the case of Donald Elliot created a considerable level of discontent in the work place. Respondent WP&L contends that it received several requests in early 1991 from both male and female employees for "bridging" along the lines provided to Elliot. The discontent reached such a point that on June 26, 1991, Edward Killeen, an official of WP&L, wrote to the Respondent IBEW to inform it that it would not permit "bridging" in the future.

On July 20, 1994, the investigator transferred the complaints in this matter to the Hearing Examiner for a jurisdictional determination. The investigator was concerned that the significant lapse in time from the return of the Complainant and Donald Elliot to employment with WP&L and the filing of the complaints might deprive the Commission of jurisdiction. The Hearing Examiner requested briefs from the parties on the jurisdictional issue. On February 3, 1995 the Hearing Examiner issued a Decision and Interim Order on Jurisdiction. In this decision, the Hearing Examiner set forth the standards used by the Commission to judge the timeliness of complaints filed with the Commission. The Hearing Examiner also concluded that the record did not contain sufficient evidence to make a final jurisdictional determination. He remanded the complaints to the investigator for further investigation on the jurisdictional issue.

On February 28, 1995, the investigator completed her investigation and transferred the complaints back to the Hearing Examiner for a final jurisdictional determination. The Hearing Examiner provided the parties with the opportunity to supplement their earlier arguments on the jurisdiction of the Commission. None of the parties submitted additional argument.

DECISION

In the Decision and Interim Order on Jurisdiction issued on February 3, 1995, the Hearing Examiner determined that a complaint was timely filed if it was received no more than 300 days after the date upon which the Complainant knew of the act of discrimination or reasonably should have known of the act of discrimination. In the present case, the Complainant contends that she did not know of Donald Elliot's preferential treatment until December of 1993. In their original briefs, the Respondents assert that the Complainant could and should have known of the treatment accorded to Elliot in late 1990 or early 1991. If the Respondents are correct, then the Commission would be without jurisdiction because the complaints were filed well after 300 days from when the Complainant knew or reasonably should have known of the discrimination in favor of a male employee.

The record before the Hearing Examiner as of the undersigned date demonstrates only that the Complainant could have known of Elliot's preferential treatment not that she actually knew or should have known. "Could have known" falls short of the requirement of actual knowledge or even the more lenient standard of reasonably should have known. On this record the Hearing Examiner concludes

that the complaints were timely filed and that the Commission has jurisdiction to investigate the merits of the complaints.

The most that either Respondent states with regard to the Complainant's knowledge is that there was much discussion in various work units about the fact that Elliot had been rehired and was permitted to bridge his seniority and benefits contrary to the usual practice of the Respondent WP&L. Neither Respondent points to any communication either written or oral that demonstrates that the Complainant knew of Elliot's treatment. Equally, neither Respondent makes any showing that the Complainant negligently failed to make any inquiry that would have led to her learning of Elliot's treatment. The fact that Elliot's favorable treatment was controversial and the subject of workplace comment fails to demonstrate that the Complainant took part or was privy to those discussions. The Respondent IBEW in its February 21, 1995 submission to the investigator indicates that Tony Bartels spoke to the Complainant in the fall of 1992 but could not recall whether the subject of Elliot's treatment was mentioned or not. "Might" does not lead one to the conclusion that the conversation actually made its way around to the critical subject.

At this point in the process, the Commission must accept the position of the Complainant if there is a dispute between her evidence and that of the Respondents. In this particular case there is not even a legitimate dispute. The Complainant states that she did not know of Elliot's preferential treatment until December of 1993. The Respondents only show that the Complainant could have known of Elliot's treatment within a few months of her return to work. They do not demonstrate that the Complainant either knew or reasonably should have known of Elliot's favorable treatment prior to December of 1992.

The Respondents have failed to carry their burden of proof to demonstrate that the Commission is without jurisdiction.

ORDER

The above captioned complaints are remanded to the investigator for investigation of the merits of the complaints and issuance of Initial Determinations of either probable cause or no probable cause to believe that discrimination has occurred.

Signed and dated this 17th day of March, 1995.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

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INTRODUCTION

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DECISION

While both the Wisconsin Fair Employment Act (WFEA) Wis. Stat. 111.39(1) and the Madison Equal Opportunities Ordinance (the Ordinance) MGO Sec. 3.23(9)(c)1 provide that claims of discrimination must be filed within 300 days of the act of discrimination, application of this standard is less clear than the language of the respective provisions. Both of the Respondents appear to concede that the period of time for measuring the 300 day statute of limitations should not begin to run until the Complainant knew or reasonably should have known that the decision not to grant her "bridging" may have been somehow discriminatory. Jicha v. DILHR, 169 Wis. 2d 284, 485 N.W.2d 256 (1992); Hilmes v. DILHR, 147 Wis. 2d 48, 433 N.W.2d 251 (1988); Coleman v. Clark Oil& Refining Co., Div. of Apex., 568 F. Supp. 1035 (E.D. Wis. 1983) Determinations of when someone knew or should reasonably have known that they had been the victim of discrimination must be made on a case by case basis. Where the record is not clear as to the date of the victim's actual or constructive knowledge, it is appropriate for an administrative agency to conduct an investigation into facts that would establish the agency's jurisdiction or lack of jurisdiction. Sacred Heart School Board v. LIRC, 157 Wis. 2d 638, 460 N.W.2d 430 (Ct. App. 1990); Ohio Civil Rights Comm'n v. Dayton Christian Schools Inc., 477 U.S. 619 (1986).

The record in these complaints is not clear. On one hand, the Complainant alleges that she had no knowledge of WP&L's treatment of Elliot and the union's assistance of Elliot until December of 1993. However the Respondents contend that the level of discontent in the work force over Elliot's apparently special treatment was high enough in the first half of 1991 that a reasonably aware employee should have known about Elliot's treatment. The discontent over Elliot's treatment allegedly generated a letter from Edward Killeen to the IBEW local 965 on June 26, 1991 in which Killeen indicated that the Respondent WP&L would not permit bridging rehires like that of Elliot again.

Assuming arguendo that what the Respondents indicate in their briefs can be demonstrated, it is not sufficient to demonstrate that the Complainant had actual or constructive knowledge of Elliot's treatment prior to the date on which the Complainant claims to have gained knowledge. The Respondents would have to show that either the Complainant actually knew of the discontent and the reason for it or that it is, for some reason, unreasonable for the Complainant not to have known about Elliot's treatment. The Respondents could also demonstrate that the Complainant received a copy of the June 26, 1991 letter from Killeen to the union. Obviously, Killeen's letter, unless the Complainant knew of it and its contents, cannot by itself begin the statute of limitations.

It appears that this matter was transferred to the Hearing Examiner prematurely. It is necessary for additional fact finding to be conducted to supplement the record with respect to the issue of when the Complainant actually or constructively knew of the different treatment provided to Elliot. This additional material could lead to different results for each of the Respondents. Once the record has been supplemented through investigation, this matter should be transferred to the Hearing Examiner for a final jurisdictional determination.

The Investigator may wish to address some or all of the following questions:

1. Did the Complainant receive a copy of the June 26, 1991 letter? If so, when did she receive it?
2. Was the Complainant aware of the controversy in the workplace caused by Elliot's preferential treatment? If so, when and how did she become aware of it?
3. Is there any other manner in which the Complainant could have reasonably been expected to know of Elliot's treatment prior to December of 1993?
4. If the Complainant did not become aware of Elliot's preferential treatment until December of 1993, is it unreasonable given the circumstances that it took her until then to become aware of it?
5. What is the earliest date that the Complainant could reasonably have known of Elliot's treatment? How could this have occurred?

The Complainant in her responsive letter brief dated September 7, 1994 argues that even if she had known of Elliot's treatment in December of 1990, it would have been meaningless information to her because she was then a special temporary employee who would not have been able to take advantage of "bridging" her seniority or other benefits. The Hearing Examiner need not directly address this contention at this time. However, if the Complainant knew of the preferential treatment afforded Elliot at the time she was rehired albeit in a temporary or lesser position, her knowledge would likely start the limitations period running. If the parties have any additional information with regard to this particular issue, they should make sure that the record is complete.

ORDER

This complaint is remanded to the Investigator for additional fact finding. Once the record is complete the Investigator is directed to transfer the record to the Hearing Examiner for a final jurisdictional determination.

Signed and dated this 3rd day of February, 1995.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner