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

Luke Krebs 1911 Schlimgen Ave. Madison, WI 53704-4021 Complainant vs. Don Miller Pontiac Subaru Inc. 801 E. Washington Madison, WI 53703 Respondent	HEARING EXAMINER'S DECISION AND ORDER ON RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION Case No. 22127

BACKGROUND

On July 8, 1994, the Complainant, Luke Krebs, filed a complaint of discrimination with the Wisconsin Department of Industry, Labor and Human Relations Equal Rights Division (ERD). The complaint alleged that the Respondent, Don T. Miller Pontiac Subaru, Inc., discriminated against him on the basis of his disability when it terminated his employment and when it gave a false reason for his termination to the Unemployment Compensation Division. The complaint was transferred for processing to the Madison Equal Opportunities Commission (Commission) pursuant to a Work Sharing Agreement and contract between the ERD and the Commission. At the same time that the Respondent filed its initial response to the complaint, it also filed a Motion to Dismiss asserting that the Complainant's complaint was filed in excess of the 300 day limit set forth in Wis. Stats. 111.39(1) and MGO Sec 3.23(9)(c)1.

The Complainant began working for the Respondent as a car salesman in May of 1992. Shortly after becoming employed with the Respondent, the Complainant discovered that he had multiple sclerosis (MS), a degenerative disease of the central nervous system. As a result of the MS, the Complainant became tired easily and suffered other effects of the condition such as being sensitive to heat and presumably had some difficulty with gross motor skills like walking. As a result he took time off from work to rest and for medical appointments. Because of the fatigue and the hours worked, the Complainant requested that his hours be reduced. This request was denied.

In the summer of 1993, the Complainant was particularly bothered by the heat and sought a transfer to a new lot owned by the Respondent. At this new lot, the Complainant would be able to stay out of the heat and look for prospects from inside the showroom. The lot itself was smaller and required less walking. The Complainant also offered to purchase an office air conditioner to help him with the regulation of temperatures. The Complainant stated all of these requests in the form of a request for accommodation of his MS. These requests were apparently denied by the Respondent.

The Complainant continued to work his scheduled hours taking time off in the form of sick leave. It appears that the Complainant was absent from work for some unusual period of time late in the summer of 1993. After returning to work, the Complainant was terminated from his employment

either late in August of 1993 (probably on or about August 30, 1993) or in early September of 1993 (probably on or about September 5). It is a subject of dispute what the Complainant was told at the time of his termination.

On September 16, 1993, the Complainant was told by an Unemployment Compensation Claims Investigator that the investigator had been told that the Complainant had been fired for violating a Respondent policy against taking "loaner" cars out of state. The Complainant states that he knew of no such policy and this caused him to suspect that the reasons for his termination might be discriminatory.

The Complainant waited until July 8, 1994 to file this complaint.

DECISION

The Respondent attacks the complaint on the basis of timeliness. It asserts that the complaint alleges no acts of discrimination that occurred within 300 days of the filing of the complaint or in the alternative that only one act of alleged discrimination occurred within the 300 day limit and that all other acts of alleged discrimination do not represent a continuing course of conduct that would bring all acts of alleged discrimination within the ambit of the Commission's jurisdiction.

The Complainant asserts that he has been the victim of a continuing course of discriminatory conduct beginning in the early summer of 1993 and running until at least September 16, 1993. Under the Complainant's theory, all of the acts of alleged discrimination including those that occurred more than 300 days prior to the Complainant's filing of his complaint are properly before the Commission.

In order for all of the acts of alleged discrimination to be properly before the Commission, there must be evidence showing a series of related discriminatory acts at least one of which occurred within the 300 day limit. Rangel v. City of Elkhorn, (LIRC 09/30/92); Jean Pierre v. City of Milwaukee, (LIRC 09/01/93); Poole v. DILHR, (Wis. Per. Com. 12/06/85). On this record, there is only one act that actually occurred within the 300 day period of limitation. This is the telephone conversation between the Respondent's corporate secretary, John McKegney, and an Unemployment Compensation Claims Investigator, Beth Witiger. In this conversation, McKegney allegedly told the investigator that the Complainant had been fired for the misconduct of taking his loaner car out of the state. McKegney indicated that while this was against the Respondent's policy and a reason to fire the Complainant, it should not be viewed as sufficiently serious misconduct to prevent the Complainant from receiving unemployment benefits.

The Respondent contends that even if these facts are true, they do not represent a violation of the ordinance. The Complainant asserts that these facts represent some undefined violation of the ordinance. Jurisdiction over an alleged violation based upon these facts is crucial to the Complainant's theory of a continuing course of conduct because it is the only alleged violation within 300 days of the filing of the complaint.

In reviewing the complaint, the Hearing Examiner notes that the Complainant did not specifically describe the September 16, 1993 conversation as a violation. At Question 5 in the original complaint, he indicates that the Respondent discriminated against him by failing to accommodate his disability and by terminating his employment. The Hearing Examiner will not consider this to be a fatal deficiency because the Complainant could simply amend his complaint to add this specific allegation and thus remedy the problem. The Respondent is not prejudiced by this action because it has sufficient notice of the allegation to have addressed it in its Motion to Dismiss and its reply brief. The

Complainant does rely on the incident in his explanation of what occurred that he believed was discriminatory. What is important is whether these facts might present a claim of discrimination cognizable under the ordinance.

The Complainant contends that unemployment compensation benefits are a privilege or benefit of employment that is earned by an employee. The general policy of the unemployment compensation system as stated in Wis. Stats. Sec. 108.01(1) indicates that an eligible employee is entitled to receive benefits from his or her employer's fund as a matter of right. Section 7(a) of the ordinance makes it illegal for an employer to discriminate against any individual in the privileges of employment. Giving this a broad interpretation, as is required when applying laws affecting social welfare, the provision reaches the allegations of this complaint.

The ordinance, as is Title VII, is specifically not couched in terms of discriminating against an employee. The section refers to discrimination against an individual. In the context of the case before the Hearing Examiner, the Complainant was no longer an employee. The section then goes on to enumerate some of the ways that an employer is prohibited from discriminating against an individual. This list appears to contemplate some form of employment relationship between the employer and the individual either current or past since the list includes compensation, terms and conditions and privileges of employment. In the present case, there was such an employment relationship and the "privilege" involved here was directly related to the Complainant's past employment.

The Respondent contends that the Complainant cannot be considered to have suffered any injury because he ultimately received his unemployment benefits. This argument ignores the practice of the Commission to award damages for emotional injuries that arise from an act of discrimination. Nelson v. Weight Loss Clinics of America, Inc. et al., Case No. 20684 (Ex. Dec. 09/29/89); Leatherberry v. GTE, Case No. 21124 (MEOC 04/14/93, Ex. Dec. 01/05/93); Chung v. Paisans, Case No. 21192 (Ex. Dec. 02/10/93). These damages could be awarded in this case even though there are no other economic damages.

The Respondent also argues that the actual words used by McKegney demonstrate a lack of discriminatory intent. He is alleged to have stated that the Respondent did not wish to deprive the Complainant of his unemployment benefits.

That is a determination that can only be made after investigation and issuance of an Initial Determination. It is premature for the Hearing Examiner to make such a factual determination of what was said and intended by a witness or participant.

The Hearing Examiner, by determining that a claim is possible, does not intend to convey in any manner a particular outcome for the claim. This complaint is before the Hearing Examiner on a Motion to Dismiss for lack of jurisdiction. There is much that must occur before there can be any finding of discrimination. This is only the beginning of the process.

Having established that the Complainant may pursue a claim for an alleged violation that occurred within the 300 day limit for filing, the Hearing Examiner must address whether the remaining claims of the complaint are properly before the Commission pursuant to the continuing course of conduct theory urged by the Complainant.

There are essentially three additional claims of discrimination. The first two are substantially similar to each other. They arise from the Complainant's allegations that the Respondent refused in 1993 to accommodate his disability. More specifically, the Complainant claims that the Respondent refused to

reduce his work hours during the early summer of 1993 and refused to permit his transfer to a new smaller car lot later in the same summer. The remaining allegation of the complaint is that the Complainant was terminated from employment because of his disability.

In order to establish that these additional allegations are part of the continuing course of conduct as alleged by the Complainant, there must be a finding that the violations are substantially related to each other as well as to the September 16 incident and are not isolated incidents of discrimination. Poole, supra. One method for helping to make the determination of "connectedness" is to examine whether the Complainant could have been expected to sue over individual violations in the chain. Malhotra v. Cotter& Company, 885 F.2d 1105 (7th Cir. 1989).

The best example of a continuing course of conduct where it would be unreasonable to expect separate suits for individual violations is an equal pay claim. In such a claim the respondent is alleged to have discriminated against a Complainant by paying the Complainant less for the same job performed by someone not in the Complainant's protected class. Each time the Complainant gets paid represents a separate violation. Under the circumstances of a typical employment, it would be unreasonable to expect a Complainant to sue each pay period. It makes more sense to accumulate the violations and sue at one time.

In the present case, the Complainant alleges three different types of violations of the ordinance: refusal to accommodate, termination and discrimination with regard to a privilege of employment. Of course the claims are to some degree similar because of the allegation that all of the conduct occurred because of the Complainant's handicap/disability. This similarity is insufficient to automatically tie the types of allegations together. The violations, themselves, are not inherently similar. The refusal to accommodate claims seek to correct a violation during the employment relationship. Actions in this realm most often seek to preserve or save the employment relationship. The termination claim seeks to redress a wrong that ended the employment relationship. This type of claim may seek to reestablish the relationship but more frequently seek money damages to compensate for the loss of employment. The discrimination in privilege claim seeks only to compensate the Complainant for an alleged emotional injury. Since it describes a violation that occurred subsequent to the employment relationship, it would have no affect upon an employment relationship.

It could be argued that the proximity of the events to each other demonstrates that they are all part of a continuing course of conduct. Such temporal nexity by itself is not dispositive of the question. It is a factor to be considered as in the above equal pay example.

A further possible connecting factor is motive. If the Respondent were seeking to rid itself of the Complainant and took several actions attempting to and finally accomplished that result by a more direct method, then one could conclude that the actions represented a continuing course of conduct. In the present case, an argument could be made that the refusal to accommodate was intended to force the Complainant to quit and when he did not quit, he was fired. The September 16, incident could fit into this pattern if the alleged falsehood was intended to cover up the Respondent's earlier actions. However, the Complainant has not explicitly made this argument though he hints at it in his brief when he asserts that the September 16 incident was a pretext for its earlier discrimination.

On this record the incidents are not sufficiently connected to represent a continuing course of conduct. Though the incidents occurred within a relatively short time period, they involve quite different actions and remedies. It is not inherently unreasonable to think that the Complainant could bring separate actions for each of the types of actions represented in the complaint. Certainly the refusal to accommodate claims are significantly different from the September 16 incident in what an action

would accomplish. As indicated above, there is one theory that could connect the various claims. The presence of a single motive for all actions would tie all of these claims together. The facts in the record at this time are insufficient to support this theory. Though there is a lack of factual support at this time, investigation could yield evidence of such a single motive. It would be premature to dismiss the complaint except for the September 16 incident at this time. The Complainant and the Commission should be given the opportunity to develop the facts to determine whether such a theory is supported. The Hearing Examiner will remand the complaint to the investigator with instructions about how to address this issue and possible alternative findings.

There is an additional basis for the Commission's jurisdiction over the termination claim though not the refusal to accommodate claims. The Commission has adopted the general approach to the timeliness issue that the 300 day period runs from either the date of the incident or when the Complainant reasonably should have known about the discriminatory motive in his or her adverse treatment. Ennis v. Local 965 IBEW, Case No. 22118 (Ex. Interim Dec. 02/03/95); Ennis v. WP&L, Case No 22119 (Ex. Interim Dec. 02/03/95). Assuming that the Complainant is unable to demonstrate a continuing course of conduct, if he can demonstrate that he did not know or could not have known of the discriminatory intent behind his termination until he was told of the September 16 conversation between McKegney and the Unemployment Compensation Claims Investigator, his claim based upon his termination would be considered timely.

The Respondent somewhat anticipates this theory of jurisdiction in its discussion of Hilmes v. DILHR, 147 Wis.2d 48, 433 N.W.2d 251 (Ct. App. 1988). The Respondent's reliance is misplaced. While Hilmes does stand for the proposition that discrimination that triggers the period of limitations occurs at the time of the act not when the consequences of the act become painful, it does not eliminate the "should have known" limitation to the definition of when an act occurred. Hilmes recognizes that the act of termination by itself is not discriminatory. It is only when the Complainant becomes aware of the discriminatory motivation for an action does discrimination occur. Hilmes, at 52. The Commission in the Ennis cases does maintain this basis for jurisdiction.

The record in the present complaint is not clear on this point. The Complainant states that he was not told a reason for his termination when he was fired. The actual date of his termination is in dispute. The Respondent states with equal firmness that the Complainant was told of the reasons for his termination at the time of his termination. At this stage of a complaint the Commission is obligated to resolve factual conflicts in favor of the Complainant. This is the same standard applied to Initial Determinations of either probable or no probable cause. This issue must be remanded to the Investigator for further investigation and findings.

The same theory does not support jurisdiction over the refusal to accommodate claims. Since a request to accommodate is made specifically for a disability, a refusal to accommodate clearly implicates the disability. A person who is refused an accommodation should know that he or she has a potential claim at that time. If a Respondent claims economic hardship as the reason for its refusal to accommodate, this could extend the period for the Complainant to know of the true reason for the refusal. However, there is nothing in this record to indicate that the Respondent used economic hardship as the basis for its refusal to accommodate.

ORDER

The Hearing Examiner remands this complaint to the investigator for further investigation and findings as follows:

1. If the investigator finds that there is probable cause to believe that the Respondent had a single motivation for all of the claims of discrimination, then she may address all claims of discrimination under a continuing course of conduct theory.
2. If the investigator determines that there is not probable cause to believe that there was a single motive for the Respondent's alleged actions, then she should investigate whether the Complainant was told of the reasons for his termination at the time of his termination.
3. If there is probable cause to believe that the Complainant did not know of the reasons for his termination at the time of his termination, then the investigator should investigate the allegations of the termination claim.
4. If there is probable cause to believe that the Complainant knew of the reasons for his termination at the time of his termination, then the Investigator should investigate only the allegations relating to the September 16, 1993 incident.

Signed and dated this 16 day of March, 1995.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner