

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 VERL R. W. FRANZ,
 Complainant,
 v.
 President, UNIVERSITY OF
 WISCONSIN SYSTEM (Oshkosh),
 Respondent.
 Case No. 86-0110-PC-ER
 * * * * *

INTERIM
 DECISION
 AND
 ORDER

This charge was filed on September 2, 1986. It alleges (in part) that complainant was denied tenure because of his age. Respondent has moved to dismiss this part of the charge on the ground that it was not timely filed.¹ Both sides have filed briefs.

It appears to be undisputed that respondent notified complainant by a letter dated May 17, 1985, that he had been denied tenure. Complainant responded to that letter by letter of May 22, 1985. In that letter, he requested that he be informed of the reasons for respondent's actions. The Chancellor responded with a statement of reasons in a letter dated May 29, 1985. Complainant's request for the reasons for denial of tenure was the first step in the in-house appeal or reconsideration process. However, complainant did not continue the process after he received the May 29, 1985 letter. His brief contains the following statement with respect to this aspect of the process:

¹ The charge also alleges that respondent discriminated against complainant when it denied him employment for summer session on August 27, 1989.

On May 22, 1985, according to my Department Chair's understanding of the process, I requested that I be informed of the reason for the non-renewal of my contract for 1986-87. My department colleagues and I were flabbergasted when the reason given was, "low teacher evaluations and lack of publication in significant journals", the direct opposite of their recommendations for my renewal. These charges were viewed by my colleagues as misrepresenting the evidence which I had presented to them for renewal consideration. We were required to answer these charges in seven days. We were not informed that that meant seven calendar days instead of working days. When we requested an extension of time we were informed by the Dean's Office that they would not extend the time period for reply.

After this ruling I attempted to negotiate with the College of Business for a position in their marketing department, having been considered for a joint appointment in the past, but was not encouraged. Likewise, I attempted to obtain other non-faculty positions but was summarily discouraged. It was at this point that I became convinced that my doom had been sealed because of my age.

In Hilmes v. DILHR, 147 Wis.2d 48, 433, N.W. 2d 251 (Ct.App. 1988), the court construed the time limit set forth in §111.39(1), Stats., as commencing on the date of notice of the alleged discriminatory act. In Harris v. UW-LaCrosse, Wis. Pers. Comm. No. 87-0178-PC-ER (11/23/88), the Commission discussed the application of this holding to a case involving the nonrenewal of a tenure track probationary faculty number. The Commission held, based on Hilmes, that the statute of limitations would begin to run when complainant received notice of the decision of the departmental Promotion, Retention and Tenure Committee that his contract not be renewed, unless, because of further steps in an in-house review process, it could be said that a reasonable person in complainant's position would not have been put on notice by receipt of the committee decision that it was the university's official and final decision on his status.

In the instant case, it is undisputed that complainant began the in-house review process when he requested to be informed of the reasons for his nonrenewal on May 22, 1985. However, it appears to be also undisputed that complainant did not pursue this process after he received the

statement of reasons dated May 29, 1985, and was unable to obtain an extension of the seven day period in which to respond. Therefore, it would have been clear to a reasonable person no later than June 6, 1985, when the time for further proceedings for internal review had expired, that there had been an official and final decision on his status. Since this was well over 300 days before complainant's charge of discrimination was filed (September 2, 1986), this charge was untimely filed.

Complainant argues in his brief that the statute of limitations should be tolled because of illness which occurred in 1986. However, assuming that complainant's illness was such as to have rendered him legally incompetent, the rule is that in the absence of a specific statutory exception, once the statute has begun to run, it cannot be tolled by a later incompetency. 51 AM JUR 2d LIMITATION OF ACTIONS §188.

Complainant also objects to the delay in raising the question of timeliness. While it is unfortunate that this issue was not raised earlier,² this delay does not amount to a waiver, cf. Milwaukee Co. v. Labor & Ind.Rev.Comm., 113 Wis. 2d 199, 335 N.W. 2d 412 (Ct.App.1983).

Complainant also contends he was never informed of the availability of the Personnel Commission during his negotiations with respondent. As the court pointed out in Hilmes, "Litigants must inform themselves of applicable legal requirements and procedures" 147 Wis.2d at 55.

Complainant attached to his brief a copy of a letter dated October 13, 1986, from the U.S. Equal Employment Opportunity Commission (EEOC) which acknowledges his having filed an age discrimination charge and states: "By

² For whatever it's worth, there arguably was some degree of ambiguity in this area of the law prior to Hilmes, which was published on December 5, 1988, since this was the first reported Wisconsin case construing this question under the Wisconsin Fair Employment Act.


virtue of this action, your private suit rights under the Federal Age Discrimination in Employment Act have been preserved" This statement concerning complainant's private suit rights under the federal law has no materiality with respect to the question of whether he filed a timely charge of discrimination under the Wisconsin Fair Employment Act.

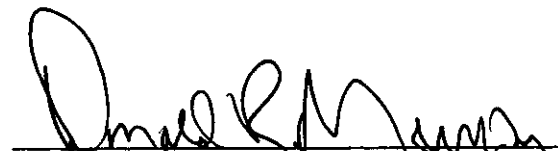
Finally, complainant objected to dismissal of his charge on the basis of "a legalistic 'trick'" However, under the circumstances the Commission has no choice but to dismiss this part of the charge because it was not filed within the time required by statute. To fail to do so would constitute reversible error which would undoubtedly result in the ultimate dismissal of this matter following judicial review.

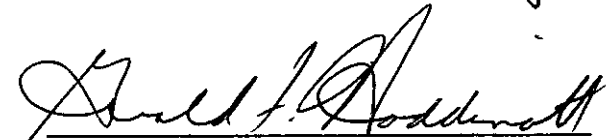
ORDER

So much of this charge as relates to the allegation that complainant was denied tenure because of his age is dismissed as untimely filed.

Dated: August 24, 1989 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

AJT:gdt
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