

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 *
 LOIS BENDER, *
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 Complainant, *
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 v. *
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 Secretary, DEPARTMENT OF *
 REVENUE, *
 *
 Respondent. *
 *
 Case No. 87-0032-PC-ER *
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INTERIM
 DECISION
 AND
 ORDER

This matter is before the Commission on respondent's motion to dismiss filed November 19, 1987. Both parties have filed briefs. The following findings are made for the purpose of deciding the motion and are based on matters which appear to be undisputed or on complainant's allegations.

FINDINGS OF FACT

1. Complainant filed a charge of discrimination on the basis of sex and Occupational Safety and Health Reporting retaliation on March 24, 1987.
2. A commission investigator investigated said charge and concluded there was no probable cause to believe that respondent had discriminated against complainant as alleged.
3. The commission mailed the no probable cause determination to complainant on July 22, 1987, under cover of a letter of that date. That letter included the following information:

If you feel that this "no probable cause" determination is in error and if you wish to have a hearing on the issue of probable cause, then you must, within 30 days of the date of this letter, file a letter of appeal with the Commission. The appeal must be in writing, must specifically state the grounds on which it is based, and must include your name, the case number, and a statement that you request a hearing on the "no probable cause" determination. The appeal must be actually received by the Commission within the 30 day period rather than merely

having been mailed within that period. (Section PC 4.03(3), Wis. Adm. Code.)

4. The Commission's offices are located on the second floor of a building with the street address of 121 East Wilson Street, Madison.

5. The 30th day after July 22, 1987, was August 21, 1987, a Friday.

6. On August 21, 1987, between 11:00 p.m. and 11:15 p.m., complainant went to 121 East Wilson Street and found the front doors locked. She then inserted a letter of appeal through a crack in the revolving door.

7. The Commission subsequently received said letter in its office on Monday, August 24, 1987.

DISCUSSION

The Commission rules during the period set forth above included the following provision:

"When there is an initial determination of no probable cause to believe that discrimination has been or is being committed, notice thereof shall be served upon the parties.... Within 30 days after the date of such service, the complainant may petition the commission for a hearing on the issue of probable cause...." §PC 4.03(3), Wis. Adm. Code. (emphasis supplied)

In Vesperman v. UW-Madison, No. 81-PC-ER-66 (6/4/82), the Commission construed this rule and held, that the term "service" meant the date the initial determination was actually received, as opposed to the date of mailing:

The manner of service referred to in [§PC 4.03(3)] is not specified within the terms of the Commission rules. There is a statement within §PC 1.08, Wis. Adm. Code, that "[s]ervice by mail is complete upon mailing." However, this provision relates to service of papers by a party and there is nothing within its terms suggesting that it should be applied to initial determinations issued by the Commission's equal rights officers.

Wisconsin case law indicates that in the absence of a statute, (or, presumably, an administrative rule) to the contrary, service of a notice does not become effective until the party receives it. Boeck v. State Highway Commission, 36 Wis. 2d 440, 444, 153 NW. 2d 610 (1967); Hotel Hay Corp. v. Milner Hotels, Inc., 255 Wis. 482, 39 NW 2d 363 (1949).

In the recent case of In re Proposed Incorporation of Pewaukee, 72 Wis. 2d 593, 241 N.W. 2d 603 (1976), the Court was faced with interpreting §227.16(1), Wis. Stats., which provides for filing a petition for judicial review "within 30 days after the service of the decision of the agency on all parties." The Court relied on a clear statutory provision (§227.14, Wis. Stats.) in concluding that service was complete on mailing.

In the present case, given the absence of any interpretative or qualifying administrative rule, the 30 day period referred to in §PC 4.03(3), Wis. Adm. Code, commences on the date that notice of the initial determination was received by the parties. There is no clear language defining "service" that would permit the opposite result.

In the instant case, the notice was mailed on July 22, 1987. Complainant could not have received it prior to July 23, 1987. Thirty days thereafter would have been August 22, 1987, a Saturday. By operation of law, §990.001(4),(b),(c), Stats., filing on the next business day, August 24, 1987, was timely.

The language in the July 22, 1987, letter from the Commission to complainant telling her she must file within 30 days of the date of the letter cannot override this interpretation of the §PC 4.03(3)¹, and the Commission sees no reason to overrule the Vesperman precedent at this time. Therefore, respondent's motion to dismiss must be denied.

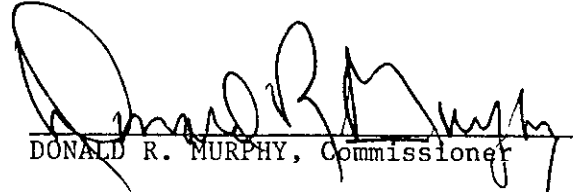
¹ The Commission used this language in this form letter notwithstanding the Vesperman holding because this language provides a more conservative approach to the interpretation of §PC 4.03(3) than the one set forth in Vesperman, and compliance with the letter's instructions would insulate a complainant from filing an untimely appeal if the Commission's construction of §PC 4.03(3) were overturned by a court on appeal.

ORDER

Respondent's motion to dismiss filed November 19, 1987, is denied.

Dated: March 23, 1988 STATE PERSONNEL COMMISSION

AJT:rcr
RCR02/1


DONALD R. MURPHY, Commissioner


LAURIE R. McCALLUM, Commissioner