STATE OF WISCONSIN PERSONNEL COMMISSION

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RALPH R. HARRIS,

Complainant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM (La Crosse),

Respondent.

Case No. 87-0178-PC-ER

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INTERIM DECISION AND ORDER

This matter, involving a complaint of age and handicap discrimination, is before the Commission on respondent's motion to dismiss on the ground of untimely filing. This motion was filed on June 24, 1988, and both parties, through counsel, have filed briefs, and neither party has requested an evidentiary hearing on the motion. It appears that the facts material to this motion are not in dispute and are set forth below. These findings are limited to the purpose of deciding this motion.

1. Complainant, who was a member of the UW-La Crosse faculty[1], was informed by letter dated November 14, 1986, and signed by the two-member retention committee of the UW-La Crosse Marketing Department, and received shortly thereafter, as follows:

> The Promotion, Retention and Tenure Committee of the Department of Marketing met at 10:30 p.m. in Room 432 North Hall, Wednesday, November 5, 1986, for the purpose of considering recommendations on your retention for the 1987-88 Academic Year.

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[1]It is not clear from the materials and briefs submitted by the parties exactly what complainant's status was. However, the Commission infers from the known facts that he was a tenure track probationary faculty member.

> Considering all things having a bearing on your potential and future performance and in relation to the University of Wisconsin - La Crosse Faculty Personnel Rules, Sections 3.06 and 3.07, it is the unanimous feeling of the Committee that you not be retained for the 1987-88 Academic Year.

2. Complainant appealed the aforesaid non-renewal decision and the same members of the retention committee held a hearing on this appeal on December 19, 1986. This committee issued a confirmation of the denial of reconsideration which complainant received on January 2, 1987.

3. Complainant appealed that confirmation decision and a hearing was held by the UW-La Crosse Hearing Committee on February 24, 1987. That Committee made findings on February 27, 1987, which included that complainant had been discriminated against, and recommended that Retention Committee of the Department of Marketing reconsider its decision.

4. On March 17, 1987, the Department of Marketing Retention Committee refused to reconsider its decision, and the UW-La Crosse Hearing Committee on March 25, 1987, referred the entire matter to the UW-La Crosse Chancellor for final decision.

5. The Chancellor has never rendered a decision in this matter due to the disability of complainant.

6. Complainant filed his complaint of discrimination with this Commission on December 30, 1987.

DISCUSSION

In Hilmes v. DILHR, Wis. Ct. App. No. 88-0575 (Oct. 5, 1988), the Court construed §111.39(1), Stats., which requires that complaints be filed within "300 days after the alleged discrimination... occurred," in a sex discrimination case involving a discharge. The Court held that the word "occurred" means the date of notice of the alleged discriminatory act. This decision in effect overrules the Commission's decision in Latimer v.

UW-Oshkosh, No. 84-0034-PC-ER (11/21/84), where the Commission held that in a non-tenure denial case, the operative date for limitations purposes was the cessation of employment.

Therefore, in order to resolve the issue presented by this motion, the Commission must determine when, as a matter of law, complainant had notice of the alleged discriminatory act.

Respondent contends complainant had such notice when he received the November 14, 1986, letter from the Promotion, Retention and Tenure Committee of the Department of Marketing, informing him of their position that he not be retained for the 1987-88 academic year. Complainant contends that this action by the Committee did not constitute a final decision on his status and that therefore notice of this action did not start the 300 day period of limitations, because of the further steps in the university procedure for reviewing nonretention decisions that were followed in this case.

In Delaware State College v. Ricks, 449 U.S. 250, 260, 66 L.Ed. 2d 431, 441, 101 S.Ct. 498 (1980), the Court rejected an argument that the period for filing an employment discrimination charge under Title VII concerning a tenure denial should not begin to run until an internal grievance had been denied:

> ...entertaining a grievance complaining of the tenure decision does not suggest that the earlier decision was in any respect tentative. The grievance procedure, by its nature, is a remedy for a prior decision, not an opportunity to influence that decision before it is made.
>
> ...the pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the running of the limitations period....

In an effort to avoid the stricture of this holding, complainant relies heavily on Carpenter v. Bd. of Regents, 529 F. Supp. 525, 27 FEP

Cases 1569 (W.D. Wis. 1982). In that case, involving a claim of employment discrimination under Title VII, the plaintiff was considered for tenure in his sixth year (of a possibly 7) of untenured employment. He had received a favorable recommendation by the department, but the college dean's recommendation was negative. The plaintiff, following established internal procedures, requested reconsideration, and after the dean refused to change his position, he obtained review by the "University Committee." After the Committee found there was nothing improper about the dean's decision, the complainant obtained review by the chancellor, who sustained the dean's decision.

The Court held as follows, 27 FEP Cases at 1573:

> ...When the legal process must be initiated by laypersons without professional legal advice, the limitations requirement should be construed in a manner comprehensible to such persons. See Oscar Mayer & Co. v. Evans, 441 U.S. 750, 761, 19 FEP Cases 1167 (1979); Love v. Pullman, 404 U.S. 552, 527, F FEP Cases 150 (1971). As the Supreme Court noted in Ricks, "the limitations periods should not commence to run so soon that it becomes difficult for a layman to invoke the protection of the civil rights statutes." 101 S. Ct. at 506 n. 16. Thus, it is appropriate to apply a "reasonable person" standard when determining the point at which the Title VII limitations period should begin to run.
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> The essential question to be resolved, then, is the date on which a reasonable person in plaintiff's position would have been put on notice of defendant's official and final decision on the merits, taking into account he Court's construction in Ricks of the Title VII limitations provision. More specifically, in light of the reasonable person standard and Ricks, should the limitations period begin to run at the time plaintiff was notified of the dean's decision, or at the time plaintiff was notified of the chancellor's decision? If it was reasonable for plaintiff to believe that yet another intra-institutional level of decision-making on the merits of his application remained after Dean Halloran had decided against granting plaintiff tenure, then the dean's decision did not trigger the running of the limitations period.

The Commission agrees with the Court's use of this reasonable person standard to determine the date of notice under the Wisconsin Fair Employment Act. Not to use this approach would leave the door open to the possibility of substantial unfairness to laypersons trying to deal with what can be confusing bureaucratic processes.

The Court rejected defendant's argument that the dean's decision was final and binding, finding no support for this in the university's internal rules. The Court also noted, 27 FEP Cases at 1574:

> The Wisconsin statutes, rules, and regulations do not clearly categorize Chancellor Baum's review as either a final level of decision on the merits of plaintiff's tenure application or as a review analogous to that performed by the grievance committee in Ricks. The laws and regulations are silent on the nature of a chancellor's review of a tenure application and apparently no standard practice existed characterizing that review. Plaintiff's belief that the chancellor's review was a continuation of internal consideration of the merits of his tenure application was reasonable. As a layperson, he could not have been expected to make the judgment that the chancellor's review was closer to a grievance mechanism than to a consideration of the merits of his qualifications for tenure. Indeed, the statutes and regulations would not permit even an attorney to make such a judgment with certainty....

There are some distinctions between this case and Carpenter. In Carpenter, the initial departmental recommendation was positive while here it was negative. However, in this case the Hearing Committee's ruling was essentially in favor of complainant. Carpenter involved a denial of a tenure application while this case involves a nonrenewal. However, the denial of tenure in Carpenter resulted in a nonrenewal. Section 3.07(1)(c), Wis. Adm. Code, provides that "[i]n the event that a decision is made resulting in nonrenewal, the procedures specified in UWS 3.07 ["Nonrenewal of probationary appointments"] shall be followed." Therefore, the basic process in each case was the same.

In the instant case, neither party has submitted a copy of any local (UW-La Crosse) rules or procedures governing this transaction. Therefore, in deciding this motion, the Commission must operate on the presumption that there are no local rules or that, if they do exist, they do not differ materially from the Wisconsin Administrative Code provisions. The administrative code provisions have not been amended since the Carpenter decision. The Wisconsin Administrative Code provides at §UWS 3.07(1)(a), inter alia:

> "... upon the timely written request of the faculty member concerned, the department or administrative officer making the decision shall, within a reasonable time, give him or her written reasons for nonrenewal...." (emphasis supplied)

The administrative code provides for reconsiderations and appeals of nonrenewal decisions, and, at §UWS 3.08(3), that "[t]he decision of the chancellor shall be the final decision." As the Court said in Carpenter:

> "... As a layperson, he could not have been expected to make the judgment that the chancellor's review was closer to a grievance mechanism than to a consideration of the merits of his qualifications for tenure. Indeed, the statutes and regulations would not permit even an attorney to make such a judgment with certainty. Defendant's answer in this lawsuit, filed by the Wisconsin Attorney General on defendant's behalf and submitted well after the issues in the case had crystalized, admits that the final level of review on the merits of plaintiff's tenure application was the chancellor's review...." 27 FEP Cases at 1574.

Accordingly, the Commission on this record concludes that a reasonable person in complainant's position would not have been put on notice of respondent's official and final position on the merits by notice of the department's position on his nonretention. Therefore, respondent's motion to dismiss must be denied.

ORDER

Respondent's motion to dismiss filed June 24, 1988, is denied.

Dated: November 23, 1988 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

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DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner