

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH 8

DANE COUNTY

*CV*

DEXTER GILLETT,

Plaintiff,

vs.

Case No. 89 CV 5650

DEPARTMENT OF HEALTH AND  
SOCIAL SERVICES, PATRICIA A. GOODRICH,

Defendants.

**RECEIVED**

JAN 16 1990

DECISION AND ORDER

Personnel  
Commission

This matter is before me on appeal from a decision of the Wisconsin Personnel Commission (Commission). The petitioner, Dexter Gillett, contends that the Commission erroneously dismissed his petition for rehearing. After reviewing the record, the parties' submissions and the relevant law, I conclude that the Commission's decision must be affirmed for reasons which follow.

LEGAL STANDARD ON MOTION TO DISMISS

A motion to dismiss for lack of jurisdiction over the subject matter is governed by sec. 802.06, Stats. Since the pleadings are to be liberally construed for purposes of such a motion, a claim will be dismissed only if it is quite clear that under no conditions can the plaintiff recover. Evans v. Cameron, 121 Wis. 2d 421, 360 N.W. 2d 25 (1985). On a motion to dismiss, no inferences can be reached with respect to the ultimate facts alleged until resolved by judge or jury. To

determine if the complaint should be dismissed, the facts plead are taken as admitted. Id. at 426.

#### DECISION

Dexter Gillett was employed as a correctional officer at the Kettle Moraine Correctional Institution until February of 1985. He filed a charge of handicap discrimination with the Commission on June 27, 1989, alleging that he was terminated in violation of the Wisconsin Fair Employment Act. On August 24, 1989, the Commission dismissed this charge as untimely filed. The Commission denied Mr. Gillett's petition for rehearing in September of 1989. On October 6, 1989, Mr. Gillett filed a petition for review with this court. A copy of the petition was served upon his employer, the Department of Health and Social Services (DHSS) and Patricia A. Goodrich, Secretary of DHSS. The Commission has not been served with a copy of the petition.

Defendants move to dismiss this proceeding on the grounds that this court lacks subject jurisdiction because the petition for review was not served upon the Commission. Because I agree that this court lacks subject matter jurisdiction, I do not reach defendants' additional claims.

Under chapter 227, Stats., a person seeking judicial review of an administrative decision must institute proceedings for review by serving a petition for review "upon the agency or one of its officials." Sec. 227.53(1)(a)1,

Stats. (Section 227.16(1)(a), Stats. (1983) was renumbered sec. 227.53(1)(a), Stats., by 1985 Wis. Act 182, sec. 37.) The petition must be entitled in the name of the person serving it as petitioner and in "the name of the agency whose decision is sought to be reviewed as respondent." Sec. 227.51(1)(b), Stats. Failure to meet these requirements within the time period set forth in sec. 227.53(1)(a)2, Stats., deprives the circuit court of subject matter jurisdiction. Cudahy v. Dept. of Revenue, 66 Wis. 2d 253, 259, 224 N.W.2d 470 (1974).

The Wisconsin Supreme Court has recognized that this section may be difficult to understand under some circumstances. Sunnyview Village v. Administration Dept., 104 Wis. 2d 396, 399, 311 N.W.2d 632 (1981) (Service of petition on Department of Administration satisfied service requirements where nursing home was found to be in violation of the Administrative Code by Division of Nursing Home Forfeiture Appeals, a subordinate entity of Department of Administration). I am satisfied however, that its provisions explicitly set forth the requirement that the Commission be served. The section clearly states that the review proceeding must be commenced by service upon the "agency or one of its officials." Sec. 227.53(1)(a)1, Stats. It is undisputed that the Commission is the agency which made the decision sought to be reviewed. See Cudahy, 66 Wis. 2d at 258.

Moreover, this is not a situation where the petitioner's

failure to comply with the statutory requirements was due to the agency's inadvertence, mistake, or negligence. Id. at 261. It is undisputed that the Commission followed all applicable procedures.

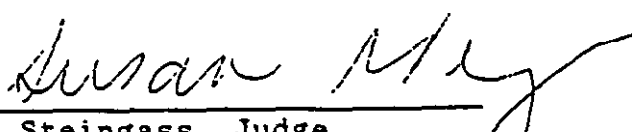
Although Mr. Gillett was also required to serve the petition for review upon the DHSS as a party who appeared before the agency in accordance with sec. 227.53(1)(c), Stats., doing so does not relieve him of the burden of meeting the requirements of sec. 227.53(1)(a)1, Stats. Therefore, because Mr. Gillett did not serve a petition for review upon the Commission as requirement by Sec. 227.53(1)(a)1, Stats., he cannot invoke the subject matter jurisdiction of this court.

#### CONCLUSION

Accordingly, defendants' motion to dismiss must be GRANTED. IT IS SO ORDERED. This decision may stand as my findings and conclusions.

Dated this 8<sup>th</sup> day of January, 1990.

BY THE COURT:

  
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Susan Steingass, Judge  
Circuit Court Branch 8