STATE OF WISCONSIN PERSONNEL COMMISSION

ALAN B. ZEUNER,

Complainant,

v.

Secretary, DEPARTMENT OF REGULATION AND LICENSING,

Respondent.

Case No. 91-0088-PC-ER

FINAL DECISION AND ORDER

NATURE OF CASE

This is a complaint of discrimination on the basis of race with respect to hire filed on July 19, 1991, under the FEA (Fair Employment Act). This matter is before the Commission on respondent's motion to dismiss on the ground of untimely filing. The parties have filed briefs and, for the purpose of deciding the motion, have stipulated to certain facts presented by complainant by affidavit. In its brief, respondent summarized that portion of complainant's affidavits to which it was stipulating for this purpose, as well as to facts to which it was stipulating for all purposes. While the Commission believes this summary adequately reflects the facts material to the issue of timeliness and will adopt these for the purpose of deciding the motion, in order to avoid any possible confusion it is noted that the Commission would reach the same conclusion on the basis of assuming as true all the facts alleged by complainant.

FINDINGS OF FACT

1. Alan B. Zeuner applied for a position as a Regulation Compliance Investigator (RCI position) in the Department of Regulation and Licensing (Department) in November, 1989. He was informed of the selection of another candidate for the position by a letter from the Department dated December 21, 1989.

2. Homer B. Zeuner is the father of Alan B. Zeuner. Homer B. Zeuner was employed as a Regulation Compliance Investigator in the Department's Division of Enforcement (Division) from July, 1975 to June, 1983 and is ac-

quainted with individuals who work in the Division during the time that his son Alan was being considered for the RCI position.

3. "That during the course of 1990, Homer B. Zeuner spoke with these individuals regarding the circumstances surrounding the recruitment, testing, interviewing, and evaluation of candidates and the final selection of a candidate to fill the position for which the Complainant had applied. During the course of these conversations, these individuals related to him that Willie A. Garrette, a black male, had been given an examination after the other candidates, that Willie E. Garrette had no experience relevant to the requirements of the position and that Willie A. Garrette had been "hand picked" for the position prior to the completion of interviews. This led him to believe that the recruitment, testing, interviewing, evaluation, and final selection process related to the filling of the position for which the Complainant had applied had been influenced by management employees of the Department in direct charge of, or with the authority to authorize and approve the process used in, the hiring of employees by the Department. Further, his conversations with these individuals led him to believe that the process had been influenced by these management employees so that Willie E. Garrette would be hired to fill the position, and that the Complainant had been discriminated against by virtue of the influences to which the process was subject in order to insure that Willie E. Garrette was hired to fill the position."

4. "That on November 23, 1990 Homer B. Zeuner related to Alan B. Zeuner what he had learned from these conversations as set forth above." (Paragraphs 3. and 4. quoted from Affidavit of Homer B. Zeuner, September 20, 1991.)

CONCLUSIONS OF LAW

1. The subject matter of this complaint is cognizable pursuant to §230.45(1)(b), Stats.

2. Based either on the foregoing recitation of findings or on all of the facts alleged by complainant, this complaint was not timely filed pursuant to §111.39(1), Stats., and must be dismissed.

DISCUSSION

Pursuant to §111.39(1), Stats., complaints of discrimination must be filed *within 300 days after the alleged discrimination occurred.* This time limit is not jurisdictional in nature but is akin to a statute of limitations. Milwaukee Co. v. Labor and Industry Review Commission, 113 Wis. 2d 199, 335 N.W. 2d 412 (Ct. App. 1983). In Sprenger v. UW-Green Bay, No. 85-0089-PC-ER (1/24/86), the Commission held that this time limit does not begin to run until the facts that would support a charge of discrimination are apparent or would be apparent to a similarly situated person with a reasonably prudent regard for his or her rights. In Oestreich v. DHSS & DMRS, 89-0011-PC (9/8/89), the Commission addressed this concept in a failure to hire case as follows:

> The general rule is that when a "reasonably prudent" person is affected by an adverse employment action such as a disciplinary action, denial of reclassification, failure to promote, etc., he or she could be expected to make whatever inquiry is necessary to determine whether there is a basis for believing discrimination occurred. In Sprenger, there obviously was no way complainant could have known at the time of his layoff that his position would be filled later by a younger person. However, in most cases an employe must look into the transaction at the time it occurs. See, e.g., Welter v. DHSS, 88-0004-PC-ER (2/22/89).

The instant case is not comparable to Sprenger, nor is it comparable to Reeb v. Economic Opportunity Atlanta, 516 F. 2d 924, 11 FEP Cases 235, 240 (5th Cir. 1975), cited both by the Commission in Sprenger and by complainant, where it was alleged that the employer "*actively sought to mislead*" (emphasis added) the complainant by telling her that adequate funds for her program were unavailable. Here, there is no allegation that respondent gave complainant any information at all about the transaction other than to tell him another candidate had been chosen. See Earnhardt v. Commonwealth of Puerto Rico, 571 F.2d 102, 30 FEP Cases 65, 57 (1st Cir., 1982)("Not giving any reason is altogether different from providing a specious one.")

Complainant also relies on Wolfolk v. Rivera, 729 F. 2d 1114, 34 FEP Cases 468 (7th Cir 1984), which followed Reeb. However, the facts in Wolfolk also are distinguishable. That case turned on the date complainant learned that other, white employes who were performing the same duties he was were being paid at a higher rate. The Court observed that "[e]mployees generally lack knowl-

edge about their co-workers' salaries, and employers are often reticent about disclosing this information." (citations omitted) 34 FEP Cases at 471. Unlike that situation, complainant was farced with an employment transaction that on its face was negative — he was turned down for a job. A "reasonably prudent person" in that position knows that the employer has exercised its judgment in a way that has denied the person a job that the person wanted. Typically the only information received is that someone else was appointed. If the person who was denied the job has any interest in keeping open the possibility of pursuing his or her right to challenge a possibly arbitrary or illegal exercise of the employer's judgment, he or she would make inquiry at the time.

This distinction between Wolfolk and the instant case is reinforced by Rudie v. DHSS & DER, 87-0131-PC-ER (9/19/90), a case whose facts parallel Wolfolk's. Mr. Rudie had found out in 1987 by happenstance that a younger officer in the same classification had a higher salary. His complaint was filed more than 300 days after the date of the last equity award to the younger employe, which had been responsible for, or had contributed to, the salary imbalance. The Commission denied respondent's motion to dismiss on timeliness grounds, noting that at the time of the transactions, complainant had no reason either to believe he was being paid less than younger officers or to inquire (presumably through the open records law) about other officers' salaries. The Commission further observed:

> This is not a situation where complainant himself was affected by a discrete transaction which directly affected him such as a denial of a discretionary performance award which perhaps would have alerted him to the possibility that younger officers might be moving ahead of him in connection with his rate of pay. Rather, this case involved equity awards made to other officers to deal with specific salary compression problems affecting them. These transactions did not involve complainant and he had no reason to have been aware of them, but they caused his salary to be lower than his younger colleagues. (footnote omitted)

Again, in the instant case, complainant was directly affected by a discrete adverse personnel transaction (nonselection), and he should have made inquiry into the matter in a timely manner in order to have preserved his right to file a complaint.

Finally, the policy implications of a holding that this complaint is timely are both far-reaching and negative. It would mean that in many if not all hiring situations where the employer provides no information to the non-selected applicants that would alert them to possible discrimination, the period of limitations would in effect be nonexistent until an applicant learned of suspicious circumstances, whether it be one, two or three years later. This in turn would have the practical effect of obliterating the period of limitations for a great many staffing transactions.

ORDER

This complaint is dismissed as untimely filed.

Dated: December 23, 1991 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

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