STATE OF WISCONSIN PERSONNEL COMMISSION

CREGG KURI,

Complainant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM (Stevens Point),

Respondent.

Case No. 91-0141-PC-ER

RULING ON MOTION TO DISMISS

This matter involves a charge of discrimination on the basis of sex and sexual orientation under the FEA (Fair Employment Act - Subchapter II, Chapter 111, Stats.) and "whistleblower" retaliation under the "Employe Protection" law (Subchapter III, Chapter 230, Stats.). Respondent has filed a motion to dismiss on the grounds that the complaint was not timely filed under the FEA, and fails to state a claim under either the FEA or the whistleblower law. Both parties have filed briefs.

The general rules for deciding this kind of motion are:

> [T]he pleadings are to be liberally construed, [and] a claim should be dismissed only if "it is quite clear that under no circumstances can the plaintiff recover." The facts pleaded and all reasonable inferences from the pleadings must be taken as true, but legal conclusions and unreasonable inferences need not be accepted.
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> ... A claim should not be dismissed ... unless it appears to a certainty that no relief can be granted under any set of facts that plaintiff can prove in support of his allegations.

Phillips v. DHSS & DETF, 87-0128-PC-ER (3/15/89) (quoting Morgan v. Pa. Gen. Ins. Co., 87 Wis. 2d 723, 731-32, 275 N.W. 2d 660 (1979) (citations omitted)); affirmed, Phillips v. Wis. Personnel Comm., 167 Wis. 2d 205, 482 N.W. 2d 121 (Ct. App. 1992).

This complaint was filed on September 19, 1991. It alleges, in summary, that complainant matriculated at UW-SP in September, 1984, that he became a student in a class taught by Assistant Chancellor of Student Life Frederick Leafgren, that they became involved in a long-standing sexual relationship, and that Dr. Leafgren arranged university employment for complainant. It

further alleges that complainant left UW-SP at some point for another university, but that:

> Dr. Leafgren induced Mr. Kuri to return from his masters program at Western Michigan University and participate in the practicum program at the University of Wisconsin-Stevens Point. Mr. Kuri began the practicum program the week of May 6, 1991. Since that date, he has had contact with Dr. Leafgren on a number of occasions through June, 1991.

The complaint alleges that Dr. Leafgren engaged in sexual harassment by making unwelcomed sexual advances which were a term or condition of employment. Complainant also alleges that respondent violated the whistleblower law by "threatening retaliatory action against him for revealing information to his attorney concerning Dr. Frederick Leafgren's sexual involvement with a student and sexual harassment."

Section 111.39(1), Stats., provides that FEA complaints have to be filed within "300 days after the alleged discrimination ... occurred." In support of its position that this complaint was untimely filed, respondent relies on certain testimony given in complainant's deposition. Respondent in its brief contends that complainant was employed at UW-SP on a limited term basis as a Clerical Assistant 2 from May 30, 1989, through December 30, 1989, that he left UW-SP to go to Western Michigan University (WMU) in January, 1990, that while at WMU, the relationship between complainant and Dr. Leafgren continued until February or March of that year, when complainant terminated it, and that: "Dr. Leafgren made no further sexual advances to Mr. Kuri, and any contacts they had were professional only. (Deposition of Cregg Kuri, pp. 107-109.)" Respondent further asserts that during complainant's period of employment as an Educational Services Intern from June 10 to September 30, 1991, in connection with his internship, it is uncontested that complainant "had no contact of a sexually harassing nature with Dr. Leafgren or any other UW-Stevens Point employee." Respondent therefore contends the complaint is untimely as it was filed on September 19, 1991, more than 300 days after December 30, 1989, the last date when any sexual harassment in employment could have occurred.

In his brief in response to the motion to dismiss, complainant does not dispute any of the material facts respondent asserts above with respect to the issue of timeliness. However, complainant argues that the 300 day time limit in §111.39(1), is not jurisdictional in nature. This is not in dispute, see Milwaukee

Co. v. LIRC, 113 Wis. 2d 199, 335 N.W. 2d 412 (Ct. App. 1983). Complainant then makes two specific points relating to the timeliness issue.

Complainant first states:

> UW-SP was informed of Dr. Leafgren's sexual harassment of complainant when he met with Mary Williams, Special Assistant to the Chancellor for Affirmative Action on July 8, 1991. At this time, complainant was a paid employee of UW-SP in the counseling center.

Since this point is not further developed, it is unclear how complainant believes this bears on the issue of timeliness. However, the fact that complainant was employed in some capacity on July 8, 1991, when he met with Ms. Williams, does not help the timeliness of his complaint, since it is undisputed that Dr. Leafgren did not sexually harass him during the course of his employment in 1991.

Complainant also argues:

> The last sexual encounter did occur in January 1991 [when complainant was not employed at UWSP] but the fear of subsequent attempts at sexual encounters by Dr. Leafgren continued during complainant's practicum at UW-SP. When complainant filed a complaint against UW-SP alleging sexual harassment, he was in fear for his life, based on previous incidents alleging involvement by Dr. Leafgren.[1]

Complainant cites no authority for the proposition that these kinds of fears of further harassment or fears of attempts on his life constitute either an independent basis for claims of harassment of or a basis for tolling the period of limitations, and the Commission is unaware of any such authority. Sexual harassment entails conduct by the employer within the context of an employment relationship involving "unwelcome sexual advances, unwelcome physical contact of a sexual nature," etc., §111.32(13), Stats. If an employe is sexually harassed by an agent of an employer in 1989, terminates employment at the end of 1989, and then returns to employment in 1991, the employer is not liable for the employe's fears of what might, but does not, recur in 1991.

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[1] It is not entirely clear to what complainant refers with respect to these "previous incidents." Presumably it has to do with an allegation earlier in complainant's brief that: "based on knowledge and belief, a person who was supervised by Dr. Leafgren died mysteriously after having initiated an investigation into financial affairs of the Student Life Division and after having been warned by Dr. Leafgren not to do so."

Furthermore, complainant's fears in 1991 of possible physical harm by Dr. Leafgren could not toll the running of the statute. Complainant had 300 days from December 30, 1989, in which to file a complaint regarding the alleged sexual harassment in employment that occurred while complainant was employed at UW-SP. During this 300 day period he was not employed at UW-SP and, in fact, was attending school in Michigan. However, he did not file a complaint during this time frame. The untimeliness of the claim he subsequently filed in September 1991, regarding employment discrimination in 1989, could not be affected by the allegation that: "When complainant filed a complaint ... he was in fear for his life, based on previous incidents alleging involvement by Dr. Leafgren."

Because it is concluded that the complaint was untimely filed as it relates to the claim of sexual harassment, the Commission will not address respondent's contention that the complaint fails to state a claim under the FEA.

With respect to the claim of whistleblower retaliation, respondent argues that the complaint fails to allege that any retaliatory action occurred or was threatened.

Section 230.83(1), Stats., provides: "No appointing authority, agent of an appointing authority or supervisor may initiate or administer, or threaten to initiate or administer any retaliatory action against an employe." Section 230.80(8) provides that "'Retaliatory action' means a disciplinary action...." Section 230.80(2) defines "disciplinary action" as:

> [A]ny action taken with respect to an employe which has the effect, in whole or part, of a penalty, including but not limited to any of the following:
>
> (a) Dismissal, demotion, transfer, removal of any duty assigned to the employe's position, refusal to restore, suspension, reprimand, verbal or physical harassment or reduction in base pay. (emphasis added)

In his brief in opposition to the motion to dismiss, complainant contends respondent verbally or physically harassed him. The brief sets forth numerous incidents of alleged harassment. While many of these incidents were not contained in, and postdate the complaint, the Commission will address all of them on the assumption, for purposes only of deciding this motion, that they are part and parcel of the claim of retaliation.

Complainant's alleged incidents of harassment fall into three basic categories: incidents that complainant interpreted as directed at him, and which caused him distress; incidents that complaint perceived as directed at co-employes, and which caused him distress; and incidents which were directed at his legal counsel, and which caused him distress. Before addressing whether any of these matters fall within the meaning of "verbal or physical harassment" as used in §230.80(2)(a), Stats., as complainant contends, it must be noted that complainant's second and last period of employment with respondent in 1991 as an Educational Services Intern 1 ended on September 30, 1991. Section 230.80(2) defines "disciplinary action" as "any action taken with respect to an employe which has the effect, in whole or in part, of a penalty...." (emphasis added) Most of the alleged incidents which occurred after the employment relationship ended on September 30, 1991, were in the category of alleged attempts by respondent to intimidate complainant's counsel and thus in some way to affect complainant, apparently by impeding his attorney's representation of him. For example, complainant's brief contains the following allegation:

> Because of the continuing controversies surrounding the relationship of the Wellness Institute and UW-SP, the UW-SP Investigative Committee recommended that a full-scale review of this relationship be completed. Howard Thoyre, in a memorandum dated February 5, 1992, accepted this recommendation and ordered the University Controller to review the relationship between the University and the Wellness Institute. Dr. Leafgren was and, based on knowledge and belief, still is, a director of the Wellness Institute, along with two other top Administrators in the Division of Student Life.
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> Gerald O'Brien is legal counsel for Dr. Sanders individually, Dr. Leafgren individually, the Wellness Institute, and the UW-SP Foundation. Based on Legislative Audit Reports, the UW-SP Foundation is also the subject of controversy regarding improper transfers of funds and the propriety of its relationship with UW-SP.
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> Attorney O'Brien is also a law partner of John E. Shannon, Jr. The correspondence written to Attorney Redfield on February 6, 1992,[2] based on knowledge and belief, was written in Attorney O'Brien's absence from the United States as he was traveling with John Noel, President of Travel Guard, Inc.
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> Attorney O'Brien is a business partner of John Noel, President of Travel Guard International, Inc. Attorney O'Brien is also legal counsel for Travel Guard International, Inc., a tenant in a building with one of the other tenants being the Redfield Law Offices, Complainant's counsel.

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[2] Complainant's brief alleges that this letter contains an "implied threat to file misconduct charges with the Wisconsin Bar Association by Attorney Shannon [which] caused complainant great distress as he believes it was designed to intimidate his legal counsel."

> During August, 1992, Travel Guard International, Inc., and through its legal counsel, initiated restrictions on parking and access to the Law Offices' facilities which Jared Redfield believed to constitute a constructive eviction. These restrictions involved rights which had been available to Redfield Law Offices throughout its lease term. The circumstances and timing of this lease dispute have convinced Complainant that it was an attempt to intimidate his counsel and disrupt his counsel's representation of him.

The Commission will assume for the purpose of deciding this motion that, as complainant contends, all of these incidents were deliberate attempts by respondent, its agents, and its agents' attorneys to intimidate complainant's counsel so as to "disrupt his counsel's representation of him." However, these all occurred after the termination of complainant's employment relationship with respondent, and could not as a matter of law constitute "disciplinary action" pursuant to the statutory definition found in §230.80(2)(a), Stats., which refers to "action taken with respect to an employe."

Furthermore, even if these alleged attempts at intimidating complainant's counsel had occurred while complainant was employed at UW-SP, such acts taken against an employe's attorney cannot reasonably be interpreted as a "disciplinary action" as defined in §230.80(2), Stats.:

> (2) "Disciplinary action" means any action taken with respect to an employe which has the effect, in whole or in part, of a penalty, including but not limited to any of the following:
> (a) Dismissal, demotion, transfer, removal of any duty assigned to the employe's position, refusal to restore, suspension, reprimand, verbal or physical harassment or reduction in base pay.
> (b) Denial of education or training, if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation or other personnel action.
> (c) Reassignment.
> (d) Failure to increase base pay, except with respect to the determination of a discretionary performance award.

A "disciplinary action" includes, but is not limited to the enumerated transactions. Notwithstanding the "not limited to" proviso, an action by the employer must be of the same general type as those enumerated in §230.80(2) to fall within the coverage of the statute, see Hatheway v. Gannett Satellite Network, 157 Wis. 2d 395, 400-01, 459 N.W. 2d 873 (Ct. App. 1990). In that case the Court interpreted the law defining place of public accommodation which included the following language: "'Public place of accommodation or amusement' shall be interpreted broadly to include, but not be limited to,

places of business or recreation, hotels ... and any place where accommodations, amusement, goods or services are available...." §942.04(2), Stats. (187-88) (renumbered as §101.22 (1m)(bp) by §9, 1989 Wis. Act 1947). The Court's opinion includes this discussion:

> We are aware that the plain language of the act makes clear that the businesses subject to the act are not limited to those identified. Nonetheless, we do not conclude that the legislature by adopting this language intended to subject every place of business where goods or services are provided to the provisions of the public accommodation act.
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> The interpretation urged by the plaintiffs requires that we ignore the illustrative list of businesses included in the act.... We conclude that the plain meaning of the statute requires that a place of public accommodation be of the same type as those identified in the statute. We decline to read the statute so as to render the entire listing irrelevant to the statute's meaning.
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> Another rule of construction supports our conclusion that this reading of the statute is most appropriate. Under the rule of *ejusdem generis*, where a general term is preceded or followed by a series of specific terms, the general term is viewed as being limited to an item of the same type or nature as those specifically enumerated. When the legislature lists a series of businesses subject to the provisions of the act, it intends to include businesses of a like kind, and not businesses that are totally dissimilar from those identified. This rule is sometimes stated as *noscitur a sociis*, which means that a word is known by the company it keeps. (citations omitted)

Similarly, in the instant case, that the legislature intended the use of the word "penalty" in the §230.80(2) definition of "disciplinary action" to mean a penalty in employment is made clear by the enumeration in §230.80(2)(a) of "demotion, transfer, removal of any duty," etc. This implies that for other kinds of actions not specifically enumerated to constitute a "disciplinary action," they must be "of the same type or nature as those specifically enumerated." 157 Wis. 2d at 400. At the very least, to be a "disciplinary action," the employer's act must be related to the complainant's employment. This would not include, for example, Chancellor Sanders calling the complainant's attorney a liar at a press conference or accusing his lawyer of knowingly filing a false complaint of sex discrimination, involving another employe, at a Kiwanis Club meeting.

Complainant in his brief appears to recognize that the alleged acts of harassment do not fall within the coverage of §230.80(2):

> The Complaint states a valid cause of action under the whistleblower statute. The list of actions cited as retaliatory meet the general definition of retaliation in Wis Stat Sec. 230.81 [sic]. In addition,

> Complainant believes that certain retaliatory acts were directed at his Legal Counsel as a means of intimidating both him and his attorney. If Respondent is resorting to such tactics in order to avoid the retaliation provisions of the statute, the Personnel Commission must react with vigor to ensure the safety and freedom from fear of persons who initiate and pursue complaints of this nature. (emphasis added)

However, this Commission is an administrative agency whose jurisdiction is strictly limited by statute. Board of Regents v. Wisconsin Personnel Commn., 103 Wis. 2d 545, 552, 309 N.W. 2d 366 (Ct. App. 1981) As discussed above, the whistleblower law does not simply prohibit retaliation in general, but limits the coverage of the law to specific forms of retaliation against an employe which has the effect of a penalty with respect to his or her employment status. The law does not cover harassment of an employe's attorney, and therefore the Commission simply has no authority with respect to such claims.

Other incidents that occurred after September 30, 1991, besides the alleged attempts to intimidate complainant's counsel, include the following allegation:

> On October 30, 1991, Dr. Sanders in addressing the faculty, and at a press conference held at UW-SP, said he was "unjustly accused" of sexual harassment by a female UW-SP employee. Dr. Sanders distributed copies of her Complaint to the faculty members at a General Faculty Meeting.
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> This incident contributed to the female complainant becoming depressed, anxious and fearful to the point of having to seek active support from her extended family and a licensed psychologist. On days when she reported to work, acquaintances of long-standing refused to speak to her in passing, causing great discomfort and a sense of undeserved shame and humiliation. This act of retaliation against someone who had filed a Complaint, as Complainant had, caused him great consternation and fear of reprisals against himself as well.

Laying to one side the question of whether Dr. Sanders' statement that he was unjustly accused of sexual harassment, and his act of distributing this complaint could constitute an "act of retaliation" against the employe in question, it could not have had anything to do with complainant's then-ended employment relationship with UW-SP, and therefore cannot as a matter of law constitute "disciplinary action" as defined in the whistleblower law at §230.80(2)(a), Stats.

In a similar vein, complainant alleges that the chancellor's statement in the UW-SP alumni publication that the "'allegations of discrimination and sexual harassment [have] promulgated accusations that are not true, but that nevertheless has inflicted unwarranted damage to the institutions' reputation

and programs,'" has "caused him great distress as he believes the statement implies he is being untruthful in his complaint." This alleged incident also has nothing to do with complainant's employment status with respondent and does not, as a mater of law, constitute "disciplinary action" under §230.80(2)(a).

Interspersed among the allegations of acts of harassment against complainant's counsel is the following:

> Complainant believes Dr. Sanders is having a sexual relationship with a former student. Complainant believes that this extra marital relationship, of at least the last two years, provided a motive for retaliation against Complainant as an investigation of Dr. Leafgren's sexual harassment might lead to the public revelation of Dr. Sanders' affair.
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> Complainant heard from numerous people on campus the rumors of Dr. Sanders' affair, as it was a much discussed subject. Complainant also believes that Dr. Leafgren was aware of Dr. Sanders' extra marital affair. Complainant believes Dr. Leafgren could have used this information to influence Dr. Sanders not to initiate an investigation on the charges against Dr. Leafgren, and to discourage others from initiating claims of sexual harassment against Dr. Leafgren.

This is not an allegation of the harassment of complainant by respondent, but an allegation of a possible motive for harassment. Since on a motion to dismiss for failure to state a claim, the allegations of the pleading must be accepted as true, this allegation lacks materiality to the decision of this motion.

Turning to the incidents alleged to have occurred prior to September 30, 1991, when complainant still was an employe of respondent, complainant alleges as follows:

> The following are specific incidents of verbal or physical harassment used in a retaliatory fashion by Respondents:
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> Despite being informed by Dr. Getsinger and Dr. Doherty on July 8, 1991, of the hostile work environment created by Dr. Leafgren and sexual harassment by Dr. Leafgren, Dr. Sanders allowed Dr. Leafgren to retire and receive thanks and praise and did not appoint a committee to investigate the charges until September of 1991. This delay perpetuated and encouraged a hostile work environment and constituted a retaliatory act against Complainant and others in the Division of Student Life who subsequently filed Complaints.
>
> At a meeting on July 31, 1991, among Academic Staff, including Dr. Getsinger, Dr. Sanders indicated that those who discussed the topic of Dr. Leafgren's leave of absence and the "unfounded rumors" concerning his leave were "not friends of the university." Complainant was informed of these statements by Dr. Getsinger and perceived them as threatening to himself.
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> In a press release printed in the Stevens Point Journal on August 7, 1991, Dr. Sanders said Dr. Leafgren "led our student life programs into national prominence. I wish him well in retirement."

> This praise of Dr. Leafgren by Dr. Sanders following revelations of Dr. Leafgren's sexual harassment of Complainant and Dr. Getsinger caused Complainant to be concerned about how seriously Dr. Sanders was taking his claim of sexual harassment and sex discrimination.

The first allegation, that Dr. Sanders "allowed Dr. Leafgren to retire and receive thanks and praise," and delayed in appointing an investigatory committee, which "perpetuated and encouraged a hostile work environment and constituted a retaliatory act" is at odds with the absence of any allegation that Dr. Leafgren subjected complainant to any mistreatment during the period of complainant's employment at UW-SP in 1991 (from June 10 through September 30)[3]. Therefore, on the face of complainant's allegations, there was no "hostile work environment" that could have been "perpetuated and encouraged" by Dr. Sanders' failure to have appointed an investigative committee between July 8, 1991, and September, 1991. See Phillips v. DHSS & DETF, 87-0128-PC-ER (3/15/89) (quoting Morgan v. Pa. Gen. Ins. Co., 87 Wis. 2d 723, 731-32, 275 N.W. 2d 660 (1979) (citations omitted)); affirmed, Phillips v. Wis. Personnel Comm., 167 Wis. 2d 205, 482 N.W. 2d 121 (Ct. App. 1992) ("'The facts pleaded and all reasonable inferences from the pleadings must be taken as true, but legal conclusions and unreasonable inferences need not be accepted.'").

Complainant also contends that Chancellor Sanders' statement in a press release that Dr. Leafgren "led our student life programs into national prominence. I wish him well in retirement" caused him "to be concerned about how seriously Dr. Sanders was taking his claim of sexual harassment and sex discrimination." Chancellor Sanders' statement about Dr. Leafgren had no connection with complainant's employment status. That the statement caused complainant "to be concerned about how seriously Dr. Sanders was taking his claim" concerning Dr. Leafgren cannot possibly make this statement into an act of verbal or physical harassment against complainant with respect to his employment. As noted above, "legal conclusions and unreasonable inferences need not be accepted." id.

Finally, complainant alleges that at an academic staff meeting on July 31, 1991, "Dr. Sanders indicated that those who discussed the topic of Dr. Leafgren's leave of absence and the 'unfounded rumors' concerning his leave

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[3] As discussed above, complainant's theory of discrimination during this period (which the Commission rejected) rested solely on the allegation that he was fearful of further acts by Dr. Leafgren.

were 'not friends of the university.'" Complainant alleges that he "was informed of these statements by Dr. Getsinger and perceived them as threatening to himself." The Commission concludes that, as a matter of law and on the basis of an objective standard, the alleged remarks of Chancellor Sanders in that context do not constitute "verbal or physical harassment" with respect to employment, as set forth in §230.80(2)(a), Stats. These remarks have nothing to do with complainant's employment. While the statements could be interpreted as implied public criticism of complainant for having revealed his allegations about Dr. Leafgren, it is not a reasonable inference to equate them with "verbal or physical harassment" with respect to employment under §230.80(2)(a). If complainant's position on this issue were upheld, then almost any public criticism by an employer of an employe's or group of employes' approach to a controversial issue could be harassment under the whistle-blower law. This is not a reasonable interpretation of verbal or physical harassment. Regardless of how complainant interpreted the Chancellor's remarks, an individual's subjective reaction to public discussion of this nature cannot turn them into "harassment."

ORDER

This complaint is dismissed for untimely filing pursuant to §111.39(1), Stats., as a charge of FEA discrimination, and for failure to state a claim as a charge of whistleblower retaliation pursuant to Subchapter III, Chapter 230, Stats.

Dated: April 30, 1993 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

AJT:rcr

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

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NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel

Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.