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DALE CHRISTENSEN,
 Complainant,

v.

President, UNIVERSITY OF
 WISCONSIN SYSTEM (Stevens Point),
 Respondent.

Case No. 91-0151-PC-ER

* * * * *

DECISION
 AND
 ORDER

After reviewing the Proposed Decision and Order, consulting with the hearing examiner, and reviewing the parties' objections and arguments, the Commission concludes that, in order to determine what relevant information was obtainable by complainant prior to the summer of 1991, certain credibility examinations would have to be made based on the hearing record. To that end, the Commission adopts the Proposed Decision and Order, a copy of which is attached hereto and incorporated by reference, with the addition of the following additional findings and discussion:

1. Christensen's background includes a bachelor's degree in psychology, a master's degree in divinity and state and national certifications as an alcohol and drugs counselor. More recently, Christensen received sexual addictions training at a national training center for addictions. As a staff member of the university's student counseling center, complainant was one of the people who interviewed Dr. Getsinger for the position of Executive Director of the center.
2. Afterwards as supervisor, Getsinger worked with complainant and developed a close friendship. They shared many commonalities, including similar educational and professional backgrounds. Getsinger had a degree in theology, had worked in addiction programs and was interested in social ethics.
3. Complainant and Getsinger met several times a week to discuss their programs. Getsinger thought student alcoholism was connected with sexual addiction and directed efforts in that direction.

4. In 1989, at the time of complainant's non-renewal, Getsinger believed Dr. Leafgren was not "attracted" to complainant, that Leafgren knew he wanted complainant on his staff and was playing mind games with him because he "was not giving (Leafgren) what he wanted -- programatically" and he believed it was "a slap in the face."

5. In January 1989, Getsinger viewed Dr. Leafgren's behavior toward him as "romantic" and "relational," not sexual. Getsinger thought Leafgren was giving him "double messages."

6. In the summer of 1989, Dr. Getsinger became responsible for the sexual harassment prevention and sexual assault prevention training and during the period when complainant's renewal was under consideration, Getsinger was working in the area of sexual harassment.

7. Dr. Getsinger recognized Dr. Leafgren's behavior toward him as inappropriate but never labeled it as sexual. In a November 1989 discussion with Dr. Leafgren about complainant's non-renewal, Dr. Getsinger offered to resign, but Getsinger testified, Leafgren said he loved him and did not want him to leave.

8. Dr. Getsinger never asked Dr. Leafgren why he did not renew complainant's employment contract. He believed it was directed toward him and took it personally. Dr. Leafgren knew Dr. Getsinger liked the complainant.

9. Dr. Getsinger was upset about complainant's non-renewal, believed it was improperly motivated and advised complainant of a way to seek additional information and redress. In prior conversations, Getsinger told complainant of his personal conflicts with Leafgren. Also he had told complainant that some of Leafgren's behavior was inappropriate and made him uncomfortable.

10. In seeking other explanations for his non-renewal, Christensen talked with several staff members of Student Life. He also made an appointment with an assistant to the chancellor, Donna Garr, in the university's affirmative action office. Christensen testified that "(he) was aware that (he) could raise the issues (of discrimination) and was afraid to do it." Christensen cancelled his appointment with Garr.

DISCUSSION

Credibility determinations frequently are important in controversies and no less so in this instance. In the instant case the

testimony of Dr. Getsinger appears vague or ambiguous at critical times. Dr. Getsinger testified that it wasn't until July or August 1991, after talking with Cregg Kuri, during a discussion with complainant about Dr. Leafgren's behavior toward him, that he understood it to be sexual in nature and sexual addiction. However, Dr. Getsinger also testified that, as early as 1989, he "felt" complainant's non-renewal was directed toward him, he thought the whole thing was "crazy" and that he did not want to make the connection that Dr. Leafgren's behavior toward him was sexual.

Dr. Getsinger testified that he did not make this connection because "(he) didn't want to make it," he just wanted Leafgren to be his boss and "(he)" did not want (Leafgren) to want anything more from (him)."

In other testimony regarding the period of 1989, Dr. Getsinger testified that he did not recall when he told complainant about Leafgren taking him to his house (inviting him to see the bedroom). However, he may have told complainant that Leafgren made him uncomfortable and his behavior was inappropriate, but never said Leafgren was harassing him until after his conversation with Cregg Kuri in 1991.

Complainant's testimony is also problematic. Complainant testified that he filed his complaint in the fall of 1991, after he came to believe he was non-renewed because of jealousy that Dr. Leafgren felt about him with Dr. Getsinger. The jealousy factor occurred to him in July 1991, when Dr. Getsinger told him about Cregg Kuri and the alleged sexual abuse he experienced from Dr. Leafgren. However, complainant testified that his friendship with Dr. Getsinger developed very quickly after his arrival and they talked about Getsinger's supervisory experiences with Dr. Leafgren, but it was in July 1991, that Dr. Getsinger "directly talked to (him) about his (Dr. Getsinger's) perception that Dr. Leafgren was harassing him."

It is clear that there are some inconsistencies and gaps between the testimony of Dr. Getsinger and complainant regarding what and when Dr. Getsinger told complainant about the alleged inappropriate behavior of Dr. Leafgren experienced by Dr. Getsinger. It is also clear that complainant and Dr. Getsinger, both addiction counselors, were very good friends, that they were both upset about complainant's non-

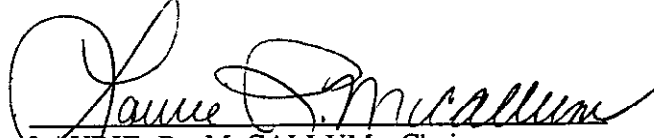
renewal and they discussed it, believed it was not based on work performance and considered various means of redress in 1989. Dr. Getsinger, believing the action to be a personal rebuff, offered his resignation to Dr. Leafgren, who refused and according to Getsinger said he loved him. Complainant's actions included making an appointment with the university's affirmative action officer.

Complainant's reasons for cancelling his appointment with the AA officer were that he was afraid, he didn't want to cause Dr. Getsinger difficulties and his wife was employed at the university. To the Commission, these reasons are questionable because Dr. Getsinger had offered his resignation to Dr. Leafgren and it was refused and complainant's wife was not employed in the Student Life division or supervised by Dr. Leafgren.

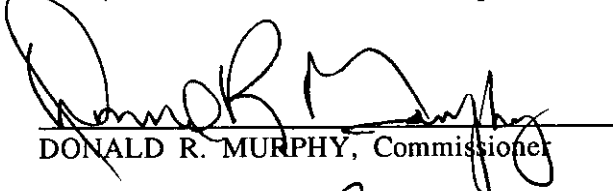
The question never directly answered was what prompted complainant to make an appointment with the university's AA officer. Based on complainant's and Dr. Getsinger's professional background as addiction counselors, their close friendship and their testimony, the Commission concludes that complainant, during 1989, was aware of Dr Leafgren's personal attraction to Mr. Getsinger and of certain of his actions evidencing that attraction, had formed the belief that something other than program considerations had prompted Dr. Leafgren's non-renewal decision, and had formed the belief that this something else was cognizable within the context of the equal rights matters handled by the affirmative action office. Keeping in mind that it is the time at which the information which would lead a person to believe that discrimination may have occurred was obtainable, not the time at which the belief was actually formed, which governs a timeliness determination, the Commission concludes that such information was not only obtainable to complainant in 1989 but had been formed at least in part and had led to a belief on his part that he had been discriminated against.

The Commission concludes, therefore, that the operative date for measuring the timeliness of complainant's filing of the instant complaint was some time in 1989 and, as a result, this complaint was not timely filed.

Dated: November 13, 1992 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

DRM: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.

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* * * * *

PROPOSED
DECISION
AND
ORDER

On November 14, 1991 respondent brought a motion to dismiss the captioned case grounded on law of subject matter jurisdiction and timeliness. By order dated January 24, 1992 the Commission denied respondent's motion to dismiss for lack of subject matter jurisdiction and deferred the question of timeliness pending a hearing. A hearing was held on April 16, 1992. Afterwards the parties submitted simultaneous briefs. The following findings, conclusions, discussion and order are based on the April 16, 1992 hearing before Donald R. Murphy, the hearing examiner.

FINDINGS OF FACT

1. Complainant, Dale Christensen, first began employment at UW Stevens Point in August 1987. His terms of employment were inclusive of a fixed term academic staff contract for the academic year, ending May 22, 1988
2. Christensen was appointed as Alcohol Education Program Coordinator/Counselor in the Counseling Center and reported to Dr. Dennis Elsenrath, the Director of the Counseling Center and Student Enrichment and Retention
3. In August 1988, Dr. Stephen Getsinger replaced Elsenrath and Christensen continued his assignment under Getsinger's supervision. Dr. Getsinger reported to Dr. Fred Leafgren, the Assistant Chancellor for Student Life.
4. In February 1988, Christensen was offered a contract for the 1988 and 1989 academic years. The 1988 contract term began August 29, 1988 and ended May 23, 1989; the 1989 contract term began August 28, 1989 and ended May 27, 1990. Christensen accepted the contracts.

5. During this same time, beginning with Getsinger's appointment, various administrators in Student Life began to express comments about Christensen's programs. The most vocal was Dr. Nicholson, Executive Director of Student Development. Christensen was being funded out of Dr. Nicholson's budget.

6. Christensen talked with his supervisor Dr. Getsinger about Nicholson's concerns. In January 1989, Getsinger proposed a more broad based "additions" program, which was not approved.

7. In the spring of 1989, Christensen discussed the proposed additions program with Dr. Leafgren. Leafgren told Christensen he had insufficient information to respond to his questions about the program.

8. By letter dated November 21, 1989, the complainant, Dale Christensen was notified by Dr. Leafgren that he (Christensen) would not be offered an appointment for the 1990-1991 academic year.

9. The letter was given Christensen at a meeting with Dr. Leafgren on November 22, 1989. Leafgren offered program changes as the reason for Christensen's non-renewal. Christensen did not believe this and sought other explanations for this non-renewal.

10. Dr. Getsinger first learned of Christensen's non-renewal at a meeting with Dr. Leafgren on November 21, 1989.

11. Dr. Getsinger was upset about Christensen's non-renewal and raised the question with other Student Life staff members on Christensen's behalf. Getsinger and Christensen talked on numerous occasions about Christensen's non-renewal.

12. Christensen's appointment for the 1990-91 academic year expired on May 27, 1990. Sometime during that spring, Christensen ceased to search for other explanations for his non-renewal.

13. In July 1991, Dr. Getsinger informed Christensen that a former student-employee had alleged he had been sexually harassed by Dr. Leafgren. Getsinger also told Christensen he (Getsinger) had also experienced some similar sexual overtures by Dr. Leafgren.

14. Based on his discussions in July 1991 with Dr. Getsinger, Christensen concluded he had been discriminated against on the basis of sex by Dr. Leafgren.

15. On October 3, 1991 complainant Dale Christensen filed a complaint with the Commission alleging respondent had discriminated against him on the basis of sex.

DISCUSSION

In a prior ruling on this motion on January 24, 1992, in which final determination was deferred pending factual findings, the Commission said:

With respect to the question of timeliness there is a facial issue presented inasmuch as the complaint was filed on October 3, 1991, and it alleges that complainant's position was eliminated in May, 1990, which is more than 300 days earlier. However, the fact that a complaint is filed within 300 days of the date of the discrimination does not compel the conclusion that it is untimely. The time for filing a complaint is not a matter of subject matter jurisdiction. Milwaukee Co. v. LIRC, 113 Wis. 2d 199, 335 N.W. 2d 412 (Ct. App. 1983). The time for filing does not start to run on the date of the alleged discrimination if "as of that date the facts which would support a charge of discrimination were not apparent and would not have been apparent to a similarly situated person with a reasonably prudent regard for his or her rights." Sprenger v. UW-Green Bay, No. 85-0089-PC-ER (7/24/86).

Therefore, under Sprenger, the time for filing a claim of discrimination under Wisconsin's Fair Employment Act (WFEA) commences on the date facts, which support the claim, were discoverable by a similarly situated person with a reasonably prudent regard for his/her rights. In Sprenger, this question turned on complainant's assertion that facts, which supported his claim of discrimination, were not available until sometime after the precipitating transaction. Also, the transaction in question — layoff because the position was eliminated — on its face was neutral and not one which would suggest any prohibited discriminatory animus.

Implicit in Sprenger is the holding that complainants have the burden of proof on the question of timeliness of appeals under WFEA. Section 230.44(3) provides, in part:

TIME LIMITS. Any appeal filed under this section may not be heard unless the appeal is filed within 30 days ... except that if the appeal alleges discrimination under subch. II of Ch 111, [WFEA] the time limit for that part of the appeal alleging such discrimination shall be 300 days after the alleged discrimination occurred.

Clearly, based on §230.44(3), Stats., complainant must establish that he/she has a right to be heard. Accordingly, in the present instance, respondent's motion compels complainant to prove he filed his appeal within the statutory time limit

Complainant contends that not until July 1991, when Dr. Getsinger informed him of a former student's allegations of sexual harassment by Dr. Leafgren and disclosed his own similar encounters with Dr. Leafgren, were the facts apparent, which supported his claim of discrimination. Claimant further argues that his non-renewal was the result of sexual discrimination in the form of a hostile environment and that this is a continuing violation, since he still is employed part-time by respondent.

Respondent posits that it is undisputed complainant filed his complaint more than 300 days after he was notified of his non-renewal, that complainant has the burden of proving grounds for equitable tolling exists, and that the facts of this case will not establish complainant meets the standards for equitable tolling as applied by the Commission, and expressed in Sprenger.

In sum, the evidence in this case establishes the following: Christensen received his notice of non-renewal on November 21, 1989. He testified that he believed the decision not to reappoint him was unfair and he sought reasons for his nonrenewal, other than those provided by Dr. Leafgren. His investigation included discussion with his immediate supervisor Dr. Getsinger. Getsinger also was upset with Christensen's nonrenewal and raised the question with other staff members. In the Spring of 1990 Christensen attended a Legal Issue Forum at UW Eau Claire. There he attended a session, where legal problems of state employees were discussed by an assistant attorney general and a lawyer in private practice. Finally, he decided not to grieve his nonrenewal because he felt he had no "tangible evidence" and he ceased further investigation. It is clear that prior to terminating his investigation, complainant was aware of respondent's sexual discrimination policies.

On October 3, 1991 Christensen filed a complaint with the Commission, after he came to believe Dr. Leafgren terminated his employment due to his friendship with Dr. Getsinger. The basis of this complaint was founded upon Dr. Getsinger's July 1991 accounting of a student's allegations against Dr. Leafgren and of Getsinger's own experiences with Dr. Leafgren.

Clearly the evidence presented by complainant fails to meet the Sprenger test. Information similar to that which was the basis for Christensen's complaint was available to Christensen before July 1991. Similar anecdotes about Dr. Leafgren were prevalent around the campus. Christensen testified, "I believe [I] began to be suspicious [about Dr. Leafgren] the end of [my] first year

— the end of 1988." Also Christensen testified that in early 1990 he was directly told by another about Dr. Leafgren's supposed sexual orientation.

Further, Dr. Getsinger testified that in January 1989 he was not getting along with Dr. Leafgren, that Leafgren was dissatisfied with his programs and that Leafgren was giving him "double messages," but that he did not make the connection until a former student charged Dr. Leafgren with sexual harassment. Similarly, this information was available to complainant before he ceased his inquiries in early 1990.

The Commission believes these circumstances do not fit the language in Sprenger for tolling the time limit for filing charges in WFEA cases. Information upon which complainant presented his complaint against respondent was available in the Spring of 1989.

Finally, non-renewal is a discrete transaction and does not constitute a continuing violation. Kimble v. DILHR, 87-0061-PC-ER, 2/19/88.

ORDER

Respondent's motion to dismiss on the grounds of timeliness is granted and complainant's charge of discrimination based on his non-renewal is dismissed.

Dated: _____, 1992 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DRM/gdt/2

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

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