STATE OF WISCONSIN PERSONNEL COMMISSION

DALE CHRISTENSEN,

Complainant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM (Stevens Point),

Respondent.

Case No. 91-0151-PC-ER

RULING ON MOTION TO DISMISS

This matter is before the Commission on respondent's motion to dismiss filed November 14, 1991. Both parties have filed briefs and complainant also has filed other documents in opposition to the motion. So much of the motion as is grounded on lack of subject matter jurisdiction will be denied. With respect to the contention that the complaint was untimely filed, the Commission concludes that there are disputes concerning the underlying facts material to this issue, and therefore either an evidentiary hearing will be required or these facts will have to be determined by some other means, such as by stipulation.

The complaint in this matter was filed October 3, 1991. It alleges, in part that complainant was employed by respondent as an "alcohol education program coordinator/counselor" and that the program in which he had been employed was eliminated in May 1990 by Assistant Chancellor Fred Leafgren due to the complainant's friendship with Dr. Stephen Getsinger. The complaint further alleges that Dr. Getsinger rejected sexual advances from Dr. Leafgren, and that: "Dr. Leafgren terminated the addictions program in May 1990, as well as Mr. Christensen's employment in retaliation for the failure of Dr. Getsinger to respond positively to sexual harassment."

Respondent's motion has two grounds: lack of subject matter jurisdiction and untimeliness. With respect to the first ground, respondent argues that complainant does not allege that any protected characteristic of complainant's was involved in the action allegedly taken by Dr. Leafgren, and

therefore the complaint fails to state a claim under the Fair Employment Act (FEA) Subchapter II, Chapter 111, Stats.).

In Oestriech v. DHSS, 87-0038-PC-ER (6/29/88), the Commission discussed the fact that the FEA prohibits discrimination "on the basis of age, race, creed . . .," §111.321, Stats., rather than, in the language used in Title VII, "because of such individual's race, color, religion, sex, or national origin." 42 USC §2000e-2(a)(1) (emphasis added). After noting that in other areas of the FEA the legislature has used language similar to the underscored language in Title VII, where the legislature obviously had intended to restrict the definition of discrimination to discrimination on the basis of, or because of, the individual employe's race, color, etc., the Commission stated: "there obviously is a strong presumption that, except for those specific provisions, the legislature did not intend to restrict the coverage of the . . . discrimination law to situations involving adverse employment actions against an individual because of that individual's [protected characteristic]."

The FEA prohibits discrimination on the basis of sex without restriction to discrimination on the basis of the sex of the complainant. If a claim of sex discrimination is otherwise valid, it should not be rendered invalid because the discrimination does not run against the sex of the complainant. As long as the complainant in such a case has standing, there is nothing in the text of the FEA which would render such a claim untenable.

For example, assume that as the result of an examination, an appointing authority has five applicants certified for appointment. Four of the five applicants are female. Not wishing to appoint a female to the position, and concerned that this would be too likely with an 80% female certification, the appointing authority decides to hire a male transfer applicant rather than to consider any of the five certified examinees. This would be a refusal to hire on the basis of sex, proscribed by §§111.322(1) and 111.321, Stats. The male examinee would have been a victim of sex discrimination. Since the FEA does not limit its prohibition on sex discrimination to discrimination on the basis of the complainant's gender, the male examinee should have just as viable a claim as the female examinees in this hypothetical.

Similarly, in the instant case, complainant is alleging that his position was eliminated as a direct result of an illegal act of sexual harassment against Dr. Getsinger. The alleged act was illegal, it resulted in an injury to

complainant (loss of employment), and there is nothing in the FEA that suggests that complainant's interests in this regard were not meant to be protected. Therefore, this complaint states a viable claim upon which relief could be granted.

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 not 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) (footnote omitted).

In opposition to the motion to dismiss, complainant contends in his brief as follows:

> Mr. Christensen was not aware until very recently of the sexual discrimination against him and further has had the burden of having been terminated without being given the right reasons for his termination and at a time when he was not represented by Legal Counsel. His wife continues to be employed by the University of Wisconsin-Stevens Point and Mr. Christensen was solicitous of her employment during a period of time when he perceived actions on the part of the Chancellor of the University as being hostile toward him and others who had filed a Complaint.

While the allegations concerning lack of counsel at the time of termination and concern about retaliation are, as a matter of law, inadequate to toll the time period for filing, the Commission cannot reach a conclusion about the application of the Sprenger holding concerning discovery of the facts that would support a charge of discrimination without some means of determining the underlying facts, presumably either through stipulation or hearing. Respondent contends that complainant should have looked into the situation surrounding his termination at the time it occurred, and that since

Dr. Getsinger was upset and concerned about the elimination of complainant's position, this can in effect be imputed to complainant. The parties' positions on these issues amount to conflicting conclusions. There is no specific factual basis that would enable the Commission to make detailed findings upon which to reach a conclusion as to whether the Sprenger tests have been met, including whether complainant knew about Dr. Getsinger's concerns about the elimination of his position.

ORDER

So much of respondent's motion as is grounded on lack of subject matter jurisdiction is denied. A ruling on so much of respondent's motion as is grounded on untimely filing will be deferred until after the determination of the underlying material facts.

Dated: January 24, 1992 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

AJT/gdt/2

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner