

STATE OF WISCONSIN

PERSONNEL COMMISSION

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KAREN CONNER,  
                   Complainant,  
 v.  
 WISCONSIN HOUSING AND ECONOMIC  
 DEVELOPMENT AUTHORITY,  
                   Respondent.  
 Case No.      93-0154-PC-ER

\* \* \* \* \*

**RULING ON  
 RESPONDENT'S  
 MOTION TO  
 DISMISS**

The above-noted case is before the Commission to determine whether the Commission has jurisdiction over the respondent, Wisconsin Housing and Economic Development Authority (WHEDA), as an employer under the Fair Employment Act (FEA), s. 111.31, et. seq. If the Commission concludes it has jurisdiction, then the Commission also must determine whether the complaint was filed timely.

Each party was provided an opportunity to submit written arguments. The last written argument was received by the Commission on September 8, 1994.

The "background" section of this decision is based upon a review and interpretation of copies of Ms. Conner's files at the Department of Industry, Labor and Human Relations, Equal Rights Division (DILHR-ERD). It is further based upon information asserted by the parties which appears to be undisputed.

**BACKGROUND**

1. Ms. Conner worked for WHEDA until she was terminated on August 3, 1992. Subsequently, she filed several discrimination complaints as noted in the following paragraphs.
2. Ms. Conner first attempted to file a complaint with the DILHR-ERD on September 2, 1992. DILHR-ERD returned the complaint to her for the following two main reasons: 1) to separate out her complaints under the Family Medical Leave Act (FMLA), s. 103.10, Stats., from her complaints under the Fair

Employment Act (FEA), s. 111.31, et. seq.; and 2) to have her FMLA complaint notarized.

3. DILHR-ERD received Ms. Conner's notarized FMLA complaint on September 22, 1992, which was designated as ERD-9203255. On November 5, 1992, DILHR issued an Initial Determination finding No Probable Cause to believe that she was retaliated against due to her requested medical leave or that she was denied rights granted under the FMLA. Ms. Conner did not appeal the Initial Determination.<sup>1</sup>

4. On October 23, 1992, Ms. Conner responded to DILHR-ERD's request for additional information (as mentioned in par. 2 above). DILHR-ERD processed the FEA claims as case number ERD-9203978. On November 4, 1992, DILHR-ERD sent another letter to Ms. Conner regarding remaining perceived deficiencies of the FEA complaint. The letter requested her response within 10 days. Ms. Conner did not respond within the requested period. Therefore, by letter dated January 29, 1993, DILHR-ERD informed Ms. Conner that her file was closed due to her failure to respond to the November 4, 1992, request for information. A dismissal order was not issued.

5. On August 27, 1993, Ms. Conner submitted additional information to DILHR-ERD which was treated as part of case number ERD-9203978, rather than as a new case with a new case-number. On September 3, 1993, DILHR-ERD informed Ms. Conner that her complaint was being forwarded to the Personnel Commission (Commission) for resolution.

6. The Commission received Ms. Conner's FEA complaint (described in the prior paragraph) on September 7, 1993. WHEDA did not receive notice of the renewed filing with DILHR-ERD (which was sent to the Commission) until receipt of correspondence from the Commission dated February 24, 1994.

7. The allegations contained in the complaint filed with DILHR-ERD on October 23, 1992, included the following: 1) a continuing practice of sex harassment in the working atmosphere which allegedly included numerous

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<sup>1</sup> Ms. Conner may contend that she appealed the Initial Determination by letter dated August 24, 1993, which was received by DILHR-ERD on August 27, 1993, and by the Commission on August 23, 1994. However, the letter referenced a different case number #9203978 and was received well after the 10-day period for filing the appeal, as was recited on the front page of the Initial Determination dated November 5, 1992.

inappropriate sex-based comments, 2) a continuing practice of unequal treatment based on sex which included claims that clerical support was provided for males but not for Ms. Conner, 3) alleged retaliation for reporting the sexual harassment and stating she would file a formal complaint, and 4) alleged failure to accommodate a handicapping hand condition.

8. The allegations contained in the renewed filing with DILHR-ERD on August 27, 1993, included the following: 1-4) all allegations contained in the October 23, 1992, complaint (as noted in the prior paragraph), 5) allegations re-asserted from her medical leave complaint, 6) allegations concerning failure to accommodate a perceived handicap of diabetes by failing to authorize regular periodic eating, 7) allegation of unequal treatment by sex because males were allowed to carry food with them and eat regularly, 9) potential FEA claim in relation to termination, and 10) claims of "general harassment" which included an allegation of physical threats from male co-workers. Some of these allegations were contained in Ms. Conner's "clarification" letter to DILHR-ERD, dated August 24, 1993.

6. The Commission on its own initiative, raised the issue of whether Ms. Conner's complaint was filed timely with the Commission. WHEDA raised the additional issue of whether the Commission has jurisdiction over WHEDA as an employer under the Fair Employment Act.

#### DISCUSSION

##### Does the Commission have jurisdiction over WHEDA?

Jurisdiction over employment-based discrimination complaints under the Fair Employment Act (FEA) is divided between DILHR and the Commission as follows: the Commission has jurisdiction over discrimination complaints filed against a state agency acting as the employer, while DILHR has jurisdiction over complaints against other entities (non state agencies) acting as the employer. See s. 111.375(2), and 230.45(1)(b), Stats. Accordingly, in Ms. Conner's case DILHR would have jurisdiction if WHEDA is not a state agency acting as an employer under the FEA and the Commission would have jurisdiction if WHEDA is.

The Commission's FEA jurisdiction is described in s. 111.375(2), Stats., as shown below in pertinent part.

[The FEA] applies to each agency of the state except that complaints of discrimination . . . against the agency as an employer shall be filed with and processed by the personnel commission . . . (Emphasis added.)

The meaning of an "agency of the state" is clarified further by the FEA's definition of "employer", found in s. 111.32(6)(a), Stats., and shown below in relevant part.

"Employer" means the state and each agency of the state and . . . any other person engaging in . . . [an] business . . . "[A]gency" means an office, department, independent agency, authority, institution, association, society or other body in state government created or authorized to be created by the constitution or any law, including the legislature and the courts. (Emphasis added.)

Wisconsin state government is comprised of three branches. The legislative branch establishes policies and programs. The executive branch carries out policies and programs established by the legislature. The judicial branch adjudicates conflicts from the interpretation and/or application of the laws. (See s. 15.001, Stats.) WHEDA clearly is not a member of the legislative or judicial branch of state government. Therefore, the focus of this inquiry is narrowed to whether WHEDA is a member of the executive branch of state government.

Chapter 15 of the Wisconsin Statutes creates the structure of the executive branch of state government, including the departments and other agencies which are part of the executive branch. WHEDA is not included under the executive branch. Rather, WHEDA's enabling legislation is found in Chapter 234 of the Wisconsin Statutes.

Other factors support the conclusion that WHEDA is not part of the executive branch of state government. WHEDA was created as a "public body corporate and politic", pursuant to s. 234.02(1), Stats., and is expected to operate on its own revenues. (See ss. 234.05, 234.14-17 and 234.93, Stats.) Also, the qualifications, duties and compensation of WHEDA employes are not subject to the civil service statute. (See s. 234.02(3), Stats., which provides that Ch. 230,

Stats., is inapplicable to WHEDA employes, except for the restrictions on political activities found in s. 230.40, Stats.)

Furthermore, the Wisconsin Supreme Court has ruled that WHEDA is an entity separate from the state and is not an arm or "agency of the state". State ex rel. Warren v. Nusbaum, 59 Wis. 2d 391 424-425, 208 N.W. 2d 780 (1973) In Nusbaum the court considered whether WHEDA's predecessor, the Wisconsin Housing Finance Authority<sup>2</sup>, could perform its statutory functions without violating the Wisconsin constitutional prohibition of state involvement in certain activities. The Nusbaum court concluded that no violation existed because the Wisconsin Housing Finance Authority was an entity separate from the state. The court explained as follows:

The legislature has the power to create separate entities designed to carry on a public purpose. The obvious purpose behind the creation of many such entities has been the indirect achievement of some purpose that the state cannot achieve directly because of various constitutional limitations place upon the power of the state. While it has been intimated that such plans are a subterfuge to evade the constitutional provisions, such attacks have been rejected on the theory that it is never an illegal evasion to accomplish a desired result, lawful in itself, by discovering a legal way to do it. (Cites omitted.)

In summary, WHEDA is not a "body in state government", within the meaning of s. 111.32(6)(a), Stats. and, therefore, is not an "agency of the state" over which the Commission has jurisdiction under s. 111.375(2), Stats. WHEDA is not listed as part of the executive branch in Ch. 15, Stats. It has its own enabling legislation in Ch. 234, Stats. And, the Wisconsin Supreme Court has declared WHEDA as separate from state government in the court's constitutional analysis of whether WHEDA functioned as an agency of the state.

The above analysis is consistent with prior Commission decisions. The status of the Medical College of Wisconsin, Inc., was considered by the Commission in Niroomand-Rad v. Medical College of Wisconsin, Inc., 88-0044-

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<sup>2</sup> WHEDA, as the successor to the Wisconsin Housing Authority, continues to be characterized by the Wisconsin Supreme Court as being separate from the state. See Development Dept. v. Bldg. Comm'n, 139 Wis. 2d 1, 12-17, 406 N.W.2d 728, \_\_\_ (1987).

PC-ER (5/5/88). The Commission noted the Medical College had its own enabling legislation (separate from the statutory description of the Executive Branch). The Commission further noted that the Wisconsin Supreme Court had determined in a constitutional analysis that the Medical College was not a state agency.

The Commission has used a similar legal analysis where the employing unit was claimed as part of the judicial branch of Wisconsin government. Novak, et al. v. Wisconsin Supreme Court, 90-0111-PC-ER (2/7/91) In Novak, employment by the Wisconsin Equal Justice Task Force (WEJTF) was at issue. The Wisconsin Supreme Court created WEJTF as a task force pursuant to its constitutional authority over the court system and its own rules. Starting on page 6 of the decision, the Commission considered whether the WEJTF was an "agency of the state" over which the Commission could exercise FEA jurisdiction. WEJTF was not mentioned as part of the Supreme Court in Ch. 751, Stats., nor as one of its agencies in Ch. 758, Stats. The Commission held that WEJTF was not part of the Supreme Court and, therefore, not an "agency of the state" subject to Commission jurisdiction, pursuant to s. 111.375(2), Stats.

Was Ms. Conner's complaint timely filed?

The Commission lacks jurisdiction over Ms. Conner's case for the reasons stated previously. Therefore, the question of the timely filing of her complaint is beyond the Commission's authority to decide. The proper authority to resolve the timeliness issue is the Equal Rights Division of the DILHR.<sup>3</sup>


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<sup>3</sup> Because this case was already administratively transferred from DILHR, this decision was discussed with DILHR in or near September 1994. On December 2, 1994, DILHR informed the Commission that DILHR is not opposed to this decision.

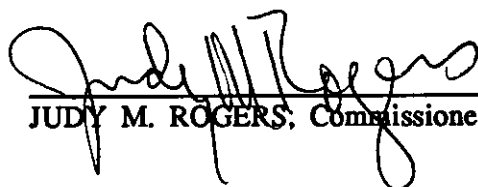
ORDER

Respondent's motion to dismiss is granted. Accordingly, this case is dismissed at the Commission, but Ms. Conner's complaint will be returned to DILHR for resolution of the timeliness issue.

Dated December 14, 1994.

  
LAURIE/R. McCALLUM, Chairperson

JMR:jmr

  
JUDY M. ROGERS, 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.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.)