

STATE OF WISCONSIN

PERSONNEL COMMISSION

EUGENE HANEY,
Complainant,,

v.

**Secretary, DEPARTMENT OF
TRANSPORTATION,**
Respondent.

DECISION
AND
ORDER

Case No. 94-0165-PC-ER

This is a complaint of race discrimination and fair employment retaliation. On July 30, 1997, respondent filed a motion to dismiss for untimely filing. The parties were permitted to file briefs and the briefing schedule was completed on September 19, 1997. The following findings are derived from information provided by the parties, appear to be undisputed, and are made solely for the purpose of deciding this motion.

1. In a letter of appeal to the Commission dated January 13, 1994, complainant's union representative stated as follows on complainant's behalf:

On January 12, 1994, Eugene Haney - an Auditor with the Department of Transportation in Madison - received notice that he was to be terminated from his employment at the Department, effective January 15, 1994.

2. Complainant filed this complaint on November 9, 1994.

3. Complainant alleges that he was advised by a Commission equal rights investigator before November 9, 1994, that the effective date of the termination would be the operative date for measuring the time period for filing; and after November 9, 1994, that this complaint was timely filed. Complainant made this allegation for the first time during a prehearing conference held on June 24, 1997.

This complaint alleges that complainant was discriminated/retaliated against in regard to numerous actions of the respondent over a period of years, culminating in

complainant's termination. Section 111.39(1), Stats., requires that a complaint of discrimination/retaliation under the Wisconsin Fair Employment Act be filed with the Commission "no more than 300 days after the alleged discrimination occurred." As a result, even if it were concluded that a continuing violation theory would be applicable here to enable the Commission to examine actions which occurred over a period of years, this complaint would have had to be filed within 300 days of one or more of these actions in order for the complaint to be considered timely filed. The latest action complained of here, and the one which would therefore control this timeliness determination, is complainant's termination. Consistent with the decision of the Wisconsin Court of Appeals in *Hilmes v. DILHR*, 147 Wis. 2d 48, 433 N.W. 2d 251 (Ct. App. 1988), the 300-day filing period is to be measured from the date of notice of termination, not the effective date of the termination. *Cf. Womack v. UW-Madison*, 94-0009-PC-ER, 7/25/94; *Harris v. UW-LaCrosse*, 87-0178-PC-ER, 11/23/88. As a consequence, the operative date here is January 12, 1994, the date complainant has acknowledged that he received notice of his termination, not January 15, 1994, the effective date of his termination.¹ Since November 9, 1994, is the 301st day after January 12, 1994, this complaint was not filed within the 300-day filing period.

This 300-day filing period is in the nature of a statute of limitations and, as a result, is subject to equitable tolling. *Sprenger v. UW-Green Bay*, 85-0089-PC-ER, 1/24/86; *Wright v. DOT*, 92-0012-PC-ER, 2/25/93. Here, complainant contends that the time period should be tolled because he received incorrect advice from a Commission investigator. In essence, complainant is arguing that respondent should be equitably estopped from relying upon his failure to file his complaint within the 300-day filing period to support this motion to dismiss because complainant was allegedly given incorrect information by the Commission. However, the actions of the Commission are not imputed in such a context to the respondent agency. The doctrine of equitable estoppel only comes into play in the statute of limitations tolling context if

¹ It appears that January 11, 1994, may be the actual operative date, i.e., in response to a Request for Admissions in complainant's companion civil service appeals (Case Nos. 93-0232-PC and 94-0012-PC), complainant admitted that he was given the letter of termination on January 11, 1994.

the respondent takes active steps to prevent the complainant from suing in time. Alleged misinformation provided by the Commission is not attributable to the respondent. *Ziegler v. LIRC*, 93-0031-PC-ER, 5/2/96. As a general proposition, discussions with Commission staff do not preserve the rights of a complainant in terms of timely filing a complaint. *Holubowicz v. DHSS*, 88-0097-PC-ER, 9/5/91.

Complainant has requested an evidentiary hearing to establish a factual record relating to the advice given to him by the Commission's investigator. However, in view of the conclusions reached above, such factual findings would not change the result here, and the Commission declines to order such a hearing.

Finally, in view of the above conclusions, it is not necessary to reach respondent's arguments relating to issue or claim preclusion.

ORDER

Respondent's motion to dismiss is granted and this complaint is dismissed.

Dated: September 24, 1997

STATE PERSONNEL COMMISSION

Laurie R. McCallum/jin
LAURIE R. McCALLUM, Chairperson

Donald R. Murphy
DONALD R. MURPHY, Commissioner

Judy M. Rogers
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 (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) 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.)

2/3/95