

STATE OF WISCONSIN

PERSONNEL COMMISSION

**STUART A. HOLMES,**  
*Complainant,*

v.

**Chancellor, UNIVERSITY OF  
WISCONSIN - Madison,**  
*Respondent.*

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

Case No. 97-0037-PC-ER

Mr. Holmes filed a discrimination complaint on March 20, 1997, in which he alleged that respondent harassed him, failed to promote him and, ultimately, failed to renew his employment contract. He alleged that respondent's actions were discrimination on the bases of age, national origin or ancestry, race and sex; as well as retaliation due to his participation in activities protected under the Fair Employment Act (Ch. 111.35, et seq.) and due to occupational safety and health activities protected under §101.055(8), Stats. (hereafter, OSH Retaliation). The allegations relating to OSH Retaliation were assigned to case number 97-0037-PC-ER, with all remaining allegations assigned to case number 97-0033-PC-ER. Respondent filed a motion to dismiss the OSH Retaliation claims as untimely filed. Complainant filed a reply on April 18, 1997. The motion is now before the Commission for resolution.

#### OPINION

Respondent notified Mr. Holmes on May 23, 1996 (by letter of the same date), that his employment contract would not be renewed resulting in the termination of his employment on February 28, 1997. Mr. Holmes felt the non-renewal decision was based (at least in part) on retaliation for bringing to Dr. Spritz' attention in 1991, "objections . . . regarding unsafe laboratory practices" and a complaint to Dean Susman in 1993, regarding "risk of accidental exposure to HIV infection in processing . . . samples of human blood."

OSH Retaliation is prohibited under §101.055(8)(ar), Stats., the text of which is shown below:

No public employer may discharge or otherwise discriminate against any public employe it employs because the public employe filed a request with the department, instituted or caused to be instituted any action or proceeding relating to occupational safety and health matters under this

section, testified or will testify in such a proceeding, reasonably refused to perform a task which represents a danger of serious injury or death or exercised any other right related to occupational safety and health which is afforded by this section.

For purposes of resolving the current timeliness motion, the Commission will assume that the activities described by Mr. Holmes meet the requirements of §101.055(8)(ar), Stats.

The Commission's jurisdiction over OSH Retaliation claims is noted in §101.055(8)(b), Stats., the text of which is shown below in pertinent part.

A state employe who believes that he or she has been discharged or otherwise discriminated against by a public employer in violation of par. (ar) may file a complaint with the personnel commission alleging discrimination or discharge, within 30 days after the employe received knowledge of the discrimination or discharge. . . .

Mr. Holmes received knowledge of respondent's non-renewal decision on May 23, 1996. The following 30-day period ended on June 22, 1996, a Saturday, but the limitations period would have been extended to the next working day of Monday, June 24, 1996. Mr. Holmes' complaint was filed on March 20, 1997, long after the 30-day period expired.

Mr. Holmes requests the Commission to accept the late filing of his complaint. His argument is shown below in pertinent part:

Complainant states, and is prepared to state under oath if required, that he did not know of the existence of the State Personnel Commission or of a 30 day statutory limitation for filing a public employee safety retaliation complaint during the 30 day period from May 23, 1996, that he did not learn of the existence of the State Personnel commission until mid-August 1996 when advised by an attorney to contact this Commission, and subsequently learned of the 30 day limitation; and that to the best of his knowledge, observation and belief, no summary of the protections and rights of §101.055, Stats., is posted in either the Biotechnology & Genetics Building (425 Henry Mall), where he worked, or the Genetics Building (445 Henry Mall), where the Genetics Department office is located, nor has complainant ever been informed of such a posting and its location if it existed in May and June, 1996, [even though] §101.055(7)(d), Stats., provides:

A public employer shall notify its employes of their protections and rights under this section by posting a summary of these protections and rights in the place of employment where notices to employes are usually posted.

The complainant argues that the respondent should not be given the benefit of the 30 day limitation where it neglected to inform complainant of his rights and remedy as required by the statute. Respondent does not show that its defense is at all impaired by the complainant's excusable failure to file within the 30 day period. Indeed, investigation will reveal that the safety abuses persist uncorrected or inadequately corrected in the laboratory of Dr. Richard A. Spritz. To dismiss this complaint on the claim of untimeliness would only permit the University and Professor Spritz to escape accountability for serious, ongoing violations and cavalier disregard of the safety and health of their employees, contrary to the spirit and purpose of §101.055, Stats.

As a general rule, an employee's lack of knowledge about his/her rights does not operate to excuse the late filing of a complaint. See, *Larson v. Industrial Comm.*, 244 Wis. 294, 298, 271 NW 835 (1937), *Gillett v. DHSS*, 89-0070-PC-ER, 8/24/89, and *Masko v. DHSS*, 95-0096-PC-ER, 4/4/96. Exceptions have been recognized under the doctrine of equitable estoppel using the following three-part analysis: 1) Has the party asserting the limitations period as a bar to litigation engaged in fraudulent or inequitable conduct 2) which was reasonably relied upon by the aggrieved party and 3) such reliance caused the aggrieved party's failure to timely file a claim? *Johnson v. Johnson*, 179 Wis. 2d 574, 582, 508 N.W.2d 19 (Ct. App. 1993), citing *State ex rel. Susedik v. Knutson*, 52 Wis. 2d 593, 598 (1971). An exception which warrants discussion here was made in *Seiger v. DHSS*, 90-0085-PC-ER, 11/8/91; reversed on other grounds *Sieger v. Wis. Pers. Comm.*, 181 Wis.2d 845, 512 NW2d 220 (Ct. App. 1994).

In *Sieger*, the Commission tolled the 30-day limitations period of the Family Medical Leave Act (FMLA) due to the employer's failure to comply with the FMLA posting requirements of §103.10(14), Stats. Important to the exception made in *Sieger* was the existence of an administrative rule which specifically provided for tolling the FMLA limitations period based on an employer's failure to comply with the posting requirement. The administrative code provision considered in *Sieger*, is shown below as noted on p. 22 of the *Sieger* decision:

Section Ind. 86.05, Wis. Adm. Code, provides, as follows, in pertinent part:

If an employer is not in compliance with the notice posting requirements of section 103.10(14)(a), Stats., at the time the violation occurs under section 103.10, Stats., an employee complaining of that violation shall be deemed not to "reasonably have known" that a violation occurred within the meaning of section 103.10(12)(b), Stats. [the 30-day limitations period for filing

FMLA complaints] until either the first date that the employer comes into compliance with section 103.10(14)(a), Stats., by posting the required notice, or the first date that the employee obtains actual notice of the information contained in the required notice, whichever date occurs earlier. If the employer is not in compliance with the notice of posting requirements of section 103.10(14)(a), Stats., at the time a violation occurs under section 103.10, Stats., the employer has the burden of proving actual knowledge on the part of the employee within the meaning of this section.

The circumstances of Mr. Holmes' case are different than those presented in *Sieger* in several ways. First, his case arises under the OSH Retaliation statute rather than under the FMLA. Second, there is no administrative code provision tolling the limitations period for an OSH Retaliation claim based on an employer's failure to meet the OSH posting requirement. Third, the administrative code applicable in *Sieger* interpreted specific language in the FMLA limitations statute (§103.10(14)(a), Stats.)<sup>1</sup> which differs from the statutory language in the limitations provision (§101.055(b), Stats.) pertaining to OSH Retaliation claims. The legal significance of these differences (if any) is unnecessary to decide here because even if the tolling principle discussed in *Sieger* were applicable in Mr. Holmes' case, he has not shown entitlement to its application in the context of his own case.

Accepting as true the facts alleged by Mr. Holmes and applying them to the tolling doctrine discussed in *Sieger*, the Commission might conclude that respondent's failure to comply with the OSH posting requirements of §101.055(7)(d), Stats., caused his failure to file an OSH Retaliation claim within 30 days of receiving notice that his contract would not be renewed. However, complainant consulted with an attorney in mid-August 1996, and was informed by the attorney to contact the Personnel Commission. Yet he waited until March 20, 1997, seven months after consulting the attorney, before he filed his OSH Retaliation complaint with the Commission. Mr. Holmes has not alleged, nor has he shown that he filed his OSH Retaliation complaint within 30 days after he became aware of the need to do so or that he acted within a reasonably prudent time after consulting with the attorney in August 1996. In short, the circum-

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<sup>1</sup> The 30-day limitations period under the FMLA is measured by the later of either the date the violation occurs or the date the employee should reasonably have known that the violation occurred, pursuant to §103.10(12)(b), Stats. The Commission noted in *Sieger* that an administrative code provision existed which interpreted the phrase "the date the employee should reasonably have known that the violation occurred." (See, *Sieger, Id.*, pp. 22-25 of the proposed decision and order adopted as part of the Commission's final decision.)

stances are insufficient for the Commission to accept Mr. Holmes' untimely-filed OSH Retaliation complaint.

ORDER

That this case be dismissed as untimely filed.

Dated: April 24, 1997.

STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

  
DONALD R. MURPHY, Commissioner

  
JUDY M. ROGERS, Commissioner

JMR  
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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 Com-

mission (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.)

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