

BARTHEL WAYNE HUFF,
Complainant,

v.

**President, UNIVERSITY OF WISCONSIN
SYSTEM (Superior),**
Respondent.

DECISION AND ORDER

Case No. 97-0105-PC-ER

NATURE OF THE CASE

This matter is before the Commission on respondent's motion to dismiss for failure to prosecute, filed February 8, 1999. The following findings of fact are based on documents filed by the parties. There do not appear to be any material facts in dispute.

FINDINGS OF FACT

1. At a pre-hearing conference held on October 14, 1998, this case was scheduled for a hearing on January 25 and 26, 1999, at the UW-Superior. The conference report referred to an earlier conference report dated August 5, 1998, for the statement of issue for hearing, to wit: "Whether complainant was discriminated against on the basis of age when he was rejected for a faculty position by respondent in 1997."¹

2. In a letter filed on January 19, 1999, complainant advised that he would not attend the hearing, which he characterized as "essentially meaningless." He also stated that he was not withdrawing his complaint.

3. Respondent filed on the same date a motion to dismiss for failure to prosecute.

¹ In a subsequent letter to the Commission filed February 5, 1999, complainant asserts that "The issue . . . is not now the merits of the charge of age discrimination. (Respondent refused to combine the appeal of the probable cause finding and the issue of merit.) . . ." This contention is inconsistent with the August 5, 1998, conference report, which notes that the parties agreed to the statement of hearing issue set forth above.

CONCLUSIONS OF LAW

1. Complainant has the burden of proof and is responsible for pursuing his discrimination complaint.
2. Complainant has failed to pursue this case.
3. This complaint must be dismissed.

OPINION

In a letter filed on February 5, 1999, in response to the motion to dismiss, complainant contends that his initial filing with the Commission established a prima facie case of age discrimination, that there was no need for a hearing, and the Commission could decide the case on the basis of “comparing the material submitted by respondent in response to discovery with the earlier claims.”

Puetz v. LIRC, 126 Wis. 2d 168, 172, 376 N. W. 2d 372 (Ct. App. 1985), includes the following discussion of the allocation of the burdens of proof in age discrimination cases:

The basic allocation of burdens and order of presentation of proof in employment discrimination suits brought under Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e (1982), was determined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *McDonnell Douglas* requires the complaining party to establish a prima facie case, which then raises a presumption of discrimination. To rebut the presumption, the defendant need only articulate a legitimate, nondiscriminatory reason for the action taken. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). The complainant then must be given the opportunity to prove that the proffered reason is merely a pretext for discrimination. *McDonnell Douglas*, 411 U.S. at 804, 805; see also *Hamilton v. DILHR*, 94 Wis.2d 611, 619, 288 N.W.2d 857, 861 (1980). *In age discrimination cases, the ultimate burden of persuading the trier of fact that age was a determining factor rather than merely a factor in the decision remains at all times with the plaintiff. La Montagne v. American Convenience Products, Inc.*, 750 F.2d 1405, 1409 (7th Cir. 1984). (emphasis added) (footnote omitted)

See also 2 Am Jur 2d Administrative Law, §360 (“Generally, the burden of proof is on the party asserting the affirmative issue.”).

Complainant also contends that it is up to the Commission to pursue this matter:

Respondent's claim that I have not "prosecuted" the charge of age discrimination is neither relevant nor true. The Personnel Commission is responsible for enforcing the laws against discrimination. The legal system does not dismiss murder charges because the victim does not himself prosecute.

However, the Commission is a quasi-judicial administrative agency which must adjudicate matters before it on the basis of proceedings conducted in accordance with the Administrative Procedure Act (Ch. 227, Stats.). In these proceedings, the complainant has the burden of proof as discussed above. *See also Jones v. UW System, 87-0102-PC-ER, 12/3/87* ("The Commission has no authority to prosecute a case on behalf of a party or on its own behalf but can only make a decision on a case after both sides have had the opportunity to present evidence in a hearing.").

ORDER

This case is dismissed for failure to prosecute.

Dated: March 10, 1999.

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

AJT:970105Cdec1

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 oc-

curred 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