

STATE OF WISCONSIN

PERSONNEL COMMISSION

GREGORY ACOFF,
Complainant,

v.

**Chairperson, UNIVERSITY OF
WISCONSIN HOSPITALS AND CLINICS
BOARD,**
Respondent.

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

Case No. 97-0159-PC-ER

This case is before the Commission on respondent's motion to dismiss which is based on timeliness issues and, in the alternative, a request to place the case in abeyance until resolution of a pending parallel federal lawsuit. Both parties were provided an opportunity to file written arguments with the final argument due by December 31, 1997, as measured by postmark. The following findings of fact appear to be undisputed by the parties unless specifically noted to the contrary.

FINDINGS OF FACT

1. Complainant initially filed a discrimination complaint with the Equal Rights Division of the Department of Workforce Development (DWD)¹ on October 10, 1997. DWD lacked jurisdiction over the complaint and referred it to the Personnel Commission (PC). The PC received the DWD complaint on October 15, 1997. Complainant also filed a complaint with the Madison Equal Opportunities Commission (MEOC) on October 14, 1997. MEOC lacked jurisdiction over the complaint and referred it to the PC by memo dated October 21, 1997, which the PC received on October 23, 1997. Complainant filed a perfected complaint which the PC received on October 31, 1997.

2. Complainant notes in his perfected complaint that the most recent date he believes respondent discriminated against him was June 21, 1996. (See Perfected Complaint, p. 1, box 4.) He claims respondent discriminated against him due to his

¹ DWD was formerly known as the Department of Industry, Labor and Human Relations (DILHR).

race in regard to terms and conditions of employment and due to his handicap in regard to the termination of his employment on June 21, 1996.

3. Complainant indicated in his perfected complaint that he wished his complaint to be cross-filed with the federal Equal Employment Opportunities Commission (EEOC). (See perfected complaint, page 2, 2nd note in box 5.) The PC forwarded the appropriate form for cross-filing with the EEOC on November 3, 1997, assigning the EEOC charge number of 26H980014. On November 10, 1997, the PC received the returned form in which the EEOC acknowledged receipt of the charge but decided not to "docket" the charge because it was filed untimely and because complainant has the same issues pending in federal court (case #97-C-0422).

4. Complainant sent the PC a handwritten letter dated October 29, 1997, which the PC received on October 31, 1997. The text of complainant's letter is shown below in pertinent part:

The timeliness of my complaint, surrounds me being put in jail, or arrested August 11, 1996. Also, my health had begun to fail me and cause me problems which kept me from filing. I had begun filling out the EEOC form prior to being arrested, but I failed to finish it. Being incarcerated slowed down my process to file because I didn't know what to do once I was incarcerated.

I filed my complaint in the U. S. District Court on June 6, 1997. It was received and filed as case #97-C-0422-C. My complaint in the District Court does arise out of the same set of circumstances. Yes! My case in the District Court includes allegations of race and handicap discrimination.

OPINION

Time limits exist for filing claims of discrimination under the Fair Employment Act (FEA), as noted in §111.39(1), Stats., which is shown below in relevant part.

The [PC] may receive and investigate a complaint charging discrimination . . . in a particular case if the complaint is filed with the [PC] no more than 300 days after the alleged discrimination . . . occurred.

The last day complainant worked for respondent was June 21, 1996, which complainant identified as the date of the last discriminatory act. It is undisputed that

the complaint filed with the PC was received more than 300 days after the final act of alleged discrimination occurred, regardless of whether PC receipt is measured by the complaint referred to the PC by DWD or by MEOC, or by the perfected complaint.

The sole question remaining is whether complainant's health or his incarceration are reasons sufficient to excuse the late filing of his complaint. The 300 day filing requirement is in the nature of a statute of limitations and, as a result, subject to equitable tolling. *Ziegler v. LIRC*, 93-0031-PC-ER, 5/2/96, citing *Milwaukee Co. v. LIRC*, 113 Wis.2d 199, 205, 335 N.W. 2d 412 (Ct. App. 1983). The burden of establishing facts sufficient to justify tolling of the filing period is on the complainant. *Ziegler, Id.*, citing *Wright v. DOT*, 90-0012-PC-ER (2/25/93), citing *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 54 FEP Cases 961 (7th Cir. 1990), cert. den. 116 L. Ed. 2d 6, 111 S. Ct. 2916.

Complainant's first contention is that his complaint was filed late because of his incarceration which began on August 11, 1996, which he claims slowed down the process because he did not know what to do. This is an argument that his complaint was filed late because he was unaware of the legal requirements. The Commission has never accepted such excuse as a reason to justify tolling of the statutory 300-day filing period unless the respondent mislead complainant about the filing requirements and complainant relied upon such misrepresentations to his/her detriment. *Holmes v. UW Madison*, 97-0037-PC-ER, 4/24/97; *Ziegler, Id.*; *Masko v. DHSS*, 95-0096-PC-ER, 4/4/96; and *Gillett v. DHSS*, 89-0070-PC-ER, 8/24/89. Mr. Acoff does not claim that respondent mislead him regarding the legal requirements for filing a complaint and, accordingly, his contention that he was unaware of the legal requirements is insufficient to toll the filing period.

Complainant next contends that his health had begun to fail and cause him problems which kept him from filing before his incarceration on August 11, 1996. Complainant (in the perfected complainant and the complaint filed with the MEOC) described his handicap stating he is a kidney transplant patient who was having immune system problems from the medication he took for the kidney condition. In the complaint he faulted respondent for failing to adjust his work schedule to allow him to work on a full-time basis but with a different daily schedule. He has not documented that his condition worsened between his termination on June 21, 1996, and his incarceration on August 11, 1996, to such degree as to conclude he was incapacitated and unable to file a complaint. See, *Masko v. DHSS*, 95-0096-PC-ER, 4/4/96; *Kirk v. DILHR*, 87-0177-PC-ER, 7/11/91; and *Franz v. UW-Oshkosh*, 86-0110-PC-ER,



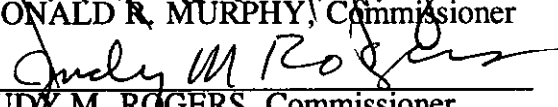
8/24/89. Nor does he claim that his health problems worsened to the point of incapacitation during his period of incarceration.

ORDER

Respondent's motion to dismiss is granted and this case is dismissed as untimely filed.

Dated: January 14, 1998.

JMR
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STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

Parties:

Gregory Acoff
Oshkosh Correctional Institution
P. O. Box 3310
Oshkosh, WI 54903

Jack Pelisek
Chairperson UWHCB
c/o Michael Best and Friedrich
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Milwaukee, WI 53202

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.

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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