

MATEO CADENA, JR.,
Complainant,

v.

**Secretary, DEPARTMENT OF
WORKFORCE DEVELOPMENT,**
Respondent.

**RULING ON MOTION
TO DISMISS**

Case No. 00-0082-PC-ER

This matter is before the Commission on respondent's motion to dismiss for failure "to state a prima facie case of discrimination," and for untimely filing. The motion was filed January 14, 2002. Both parties, through counsel, have filed briefs.

This case involves a complaint of WFEA (Wisconsin Fair Employment Act; Subchapter II, Chapter 111, Wis. Stats.) discrimination on the bases of sex and race with regard to salary. The complaint was filed on June 14, 2000. Following an investigation of this complaint, a Commission equal rights officer issued an initial determination on October 12, 2001, which found probable cause to believe respondent had discriminated against complainant on the basis of race with regard to his salary, but no probable cause to believe that respondent had discriminated against complainant with regard to his salary on the basis of sex. Complainant appealed the no probable cause portion of the initial determination pursuant to §PC 2.07(4), Wis. Adm. Code.

The complaint alleges that complainant is the Director of the Bureau of Migrant Services (BMS) in the Division of Workforce Excellence (DWE), that he is the lowest paid of the bureau directors, and that he was the only Hispanic bureau director until February 27, 2000, when a female Hispanic bureau director was appointed with less seniority than complainant but at a higher salary. It also alleges that there is another female bureau director who is also more highly paid than complainant. The complaint alleges that in a conversation about the alleged inequity with Eric Baker, the DWE Deputy Administrator, on or about March 29, 2000, the latter said "'Don't tell me you

didn't know this was going on,'” and the complainant replied that he “suspected” that other bureau directors had higher salaries until he got a “matrix form“ setting forth the bureau directors' salaries from Mr Baker. The complaint goes on to allege that complainant advised Mr. Baker that there were two cases where there was a nearly \$20,000 annual salary discrepancy, and the other bureau directors made nearly \$10,000 more. Complainant says Mr. Baker said “he would see what he could do for me,” but that nothing has been done. Complainant goes on to say that the pay discrepancies have been going on for years, and that the DWE administrators have been remiss in not redressing the situation through the use of “Discretionary Compensation Adjustments.”

I. Failure to state prima facie case

Respondent's motion sets forth factual information about the duties and responsibilities and salaries of the various bureau directors, and includes documents which support respondent's factual allegations.

Respondent argues that to establish a prima facie case of discrimination as to salary, a complainant must show that he or she was paid less than others outside his or her protected group for performing substantially the same work measured in terms of skill, effort and responsibility. Respondent asserts that the other bureau directors are different in a number of respects, including the fact that they administer different programs involving different laws and different constituent groups, and that all of the bureau directors except the complainant supervise at least one subordinate supervisor.

Respondent argues that:

The complaint should be dismissed because it does not allege any grounds by which the complainant's position should be regarded as involving substantially similar work as the other bureau director positions in opposition to the undisputed facts as to different job responsibilities, including but not limited to larger staffs and larger number of subordinate supervisors, of the other bureau director positions. There is absolutely no basis to begin making comparisons on the basis of race, sex, seniority and other factors if the complainant cannot first establish that his position involves substantially similar work as the other positions. Respondent's motion to dismiss, p. 8.

The general rules for deciding motions of this nature were discussed in *Phillips v. DHSS*, 87-0128-PC-ER, 3/15/89; affirmed, *Phillips v. Wisconsin Personnel Commission*, 167 Wis. 2d 205, 482 N. W. 2d 121 (Ct. App. 1992), which cited the following language from *Morgan v. Pennsylvania General Ins. Co.*, 87 Wis. 2d 723, 731-32, 275 N.W.2d 660 (1979):

For the purpose of testing whether a claim has been stated the facts pleaded must be taken as admitted. The purpose of the complaint is to give notice of the nature of the claim; and, therefore, it is not necessary for the plaintiff to set out in the complaint all the facts which must be eventually be proved to recover. The purpose of a motion to dismiss for failure to state a claim is to test the legal sufficiency of the claim. Because the pleadings are to be liberally construed, a claim should be dismissed only if 'it is quite clear that under no circumstances can the plaintiff recover.' The facts pleaded and all reasonable inferences from the pleadings must be taken as true, but legal conclusions and unreasonable inferences need not be accepted.

A claim should not be dismissed unless it appears to a certainty that no relief can be granted under any set of facts that plaintiff can prove in support of his allegations. (citations omitted)

Additionally, since this matter is an administrative proceeding, pleading requirements are less stringent than in a judicial proceeding, and pleadings should be even more liberally construed than in a judicial proceeding. See *Loomis v. Wisconsin Personnel Commission*, 179 Wis. 2d 25, 30, 179 Wis. 2d 25 (Ct. App. 1993); *Oakley v. Commissioner of Securities*, 78-0066-PC (10/10/78); *Association of Career Executives (ACE) v. DOA*, 1/12/93; 73A CJS Public Administrative Law and Procedure §122; *Hawk v. Docom*, 99-0047-PC-ER, 6/2/99:

In *Masuca v. UW (Stevens Point)*, 95-0128-PC-ER, 11/14/95, this Commission held as follows:

The pleading requirements for an FEA complaint of discrimination are extremely minimal. See, e.g., *Goodhue v. UW (Stevens Point)*, 82-PC-ER-24 (11/9/83) (document stating that complainant felt she was treated differently because of her

sex with respect to denial of tenure and promotion a sufficient complaint). Neither the WFEA nor this Commission's rules require that a complainant identify in the complaint the elements of a WFEA claim. The complaint in this case alleges that complainant was discriminated against because of his race with respect to criticism of his work and a transfer. This complaint is sufficient to withstand a motion to dismiss for failure to state a claim under the WFEA.

The instant complaint alleges that respondent terminated complainant's employment because of his national origin or ancestry or race. As set forth in *Masuca* and *Goodhue*, a complaint is not required to set forth the elements of a WFEA (Wisconsin Fair Employment Act) claim. [citation omitted] The Commission's rules do not require that the complaint state the facts upon which complainant rests his claim of WFEA discrimination: "Complainants *should* identify the facts which constitute the alleged unlawful conduct." (emphasis added) §PC 2.02(1), Wis. Adm. Code. The bottom line is the complaint in this case is not defective because it does not allege additional facts.

In this case, the complainant alleges that he has been paid less than the other bureau directors because of his race and sex. Consistent with the above cases, there is no requirement that a complainant set forth the elements of a prima facie case in his complaint. Respondent's attempt to draw a parallel between this case and *Meredith v. UWLC*, 90-0170-PC-ER, 9/15/93; affirmed, *Meredith v. Wis. Pers. Comm.*, Dane Co. Cir. Ct. 93CV3986, 9/6/94 (female basketball coach's equal pay claim) is unpersuasive because in that case there was a hearing, and the complainant failed to establish through the record evidence that the jobs being compared were of equal skill, effort and responsibility. In this case there has not been a hearing, and the complainant has not had the opportunity to present his evidence.

II. Failure to file timely complaint

This complaint was filed on June 14, 2000. The respondent bases this aspect of its motion to dismiss on complainant's statement in his complaint that:

On or about March 29, 2000, I spoke with Eric Baker, Deputy Administrator of DWE about the inequity of pay between myself and

other Bureau Directors. During our discussion, Mr. Baker stated to me "Don't tell me you didn't know this was going on." I responded that I suspected other Bureau Directors made more money than I but did not know for sure until he sent a matrix form (attachment A) thru email which gave information about the other Bureau Director's hourly rates.

Respondent argues as follows:

The complainant admits in his complaint that he suspected that other Bureau Directors had higher wage rates than he did before he received the matrix form. It appears from the complaint that he made no inquiry to his supervisor or to the respondent's payroll office, despite his suspicion and his apparent belief that a difference in salaries between bureau directors in itself constitutes discrimination. The complaint does not state how long the complainant had this suspicion, but the respondent submits that the complaint should be dismissed as untimely unless the complainant can establish that he had no such suspicion until some date within the 300 day period before the complaint was filed. (Respondent's brief, p. 9)

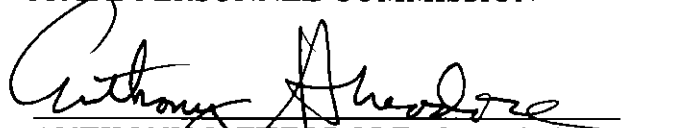
Respondent cites a line of cases holding that the time for filing a complaint starts to run when the facts that would support a charge of discrimination were apparent or should have been apparent to a person with a reasonably prudent regard for his or her rights similarly situated to the complainant. *See, e. g., Sprenger v. UW (Green Bay)*, 85-0089-PC-ER, 7/24/86. In the instant case, that complainant suspected that other directors were being paid more does not necessarily lead to the conclusion that the statutory time period for filing a complaint started to run when the complainant first entertained the suspicion. The question is whether the circumstances concerning the suspicion were such that a similarly situated person with a reasonably prudent regard for his or her rights would have made an inquiry into the relevant facts and determined whether those facts supported a claim of discrimination. This can not be determined on a motion to dismiss. Consistent with the above discussion of pleading requirements in WFEA proceedings, there is no requirement that complainant had to allege facts in his complaint that support a conclusion that his complaint is timely under the *Sprenger* line of cases.

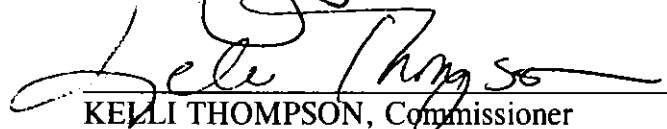
ORDER

Respondent's motion to dismiss filed January 14, 2002, is denied.

Dated: May 6, 2002

STATE PERSONNEL COMMISSION


ANTHONY J. THEODORE, Commissioner


KELLI THOMPSON, Commissioner

AJT:000082Cru11