

JANIS WEBER,
Complainant,

v.

**President, UNIVERSITY OF WISCONSIN
SYSTEM (Stevens Point)**
Respondent.

RULING

Case No. 00-0159-PC-ER

This is a complaint of sex discrimination. On March 8, 2001, respondent filed a motion asking the Commission to deny complainant's request for waiver of the investigation of her complaint. The parties were permitted to file arguments in relation to this motion. The following findings of fact are based on information provided by the parties, appear to be undisputed, and are made solely for the purpose of deciding this motion.

FINDINGS OF FACT

1. This complaint was filed November 24, 2000.
2. In a letter to the parties dated December 4, 2000, one of the Commission's Equal Rights Officers stated as follows, as relevant here:

Please let the Commission know in writing within 20 days of the date of this letter whether complainant wishes to waive the investigation or conciliate.

3. Complainant did not advise the Commission within the 20-day period specified in this letter that she wished to waive the investigation of her complaint.
4. Respondent filed its answer to the complaint on February 8, 2001, as required by the Commission in a letter dated January 8, 2001.

5. In a letter to the Commission dated May 7, 2001, complainant requested waiver of the investigation of her complaint.

OPINION

Section 230.45(1m), Stats., provides as follows:

230.45 Powers and duties of personnel commission.

(1m) The commission shall waive the investigation and determination of probable cause of any complaint that is filed by a complainant under sub. (1) or s. 103.10 (12) (b) at the complainant's request. If the commission waives the investigation and probable cause determination, the commission shall proceed with a hearing on the complaint. The commission's waiver of an investigation and probable cause determination does not affect the commission's right to attempt to resolve the complaint by conference, conciliation or persuasion.

Respondent argues here that, despite the apparent mandatory language of this statutory section and the absence of any time limitations, the failure of complainant to elect waiver during the 20-day time period specified in the Commission's letter of December 4, 2000 (See Finding 2, above) effected an implied or constructive stipulation upon which respondent relied to its prejudice. Respondent further argues that permitting complainant to waive the investigation of her complaint at this stage of these proceedings would thwart the public policy underpinnings of §230.45(1m). On the other hand, complainant argues that §230.45(1m) is mandatory and not subject to waiver

While §230.45(1m) does confer on complainant a right to waive an investigation that is ensconced in mandatory language, it is axiomatic that rights, whether constitutional or statutory, are subject to waiver or forfeiture if not exercised in a timely fashion, *see, e. g., U. S. v. Olano*, 507 U. S. 725, 731, 113 S. Ct. 1770, 123 L. Ed. 2d 508, 1993 U. S. LEXIS 2986 (1993) ("No procedural principle is more familiar to this Court than that a constitutional right, or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.' [citation omitted]).

The Commission must determine, in the exercise of its discretion, whether to allow complainant to exercise a waiver at this point, after the expiration of a deadline for waiver established by the Commission's investigator.

For the general criteria involved in this process, the Commission looks to *Verhaagh v. LIRC*, 204 Wis. 2d 154, 554 N. W. 2d 678 (Ct. App. 1996). This case involved an administrative proceeding under the workers' compensation act (WCA), Ch. 102, Stats. The employe (Verhaagh) claimed the Department of Workforce Development (DWD) erred when it refused to grant his motion for a default judgment after the employer failed to file its answer to his claim in a timely manner. The court of appeals upheld the agency's action. The court looked to §102.18(1)(a), Stats., which provides that "disposition of application *may* be made by a compromise, stipulation, agreement or *default* (emphasis added)."¹ The court held "the use of the term *may* clearly submits the issue of default orders to the LIRC's discretion." The court went on to hold:

In reviewing an administrative agency's discretionary decision, we defer to the administrative agency as we defer to trial courts because the exercise of discretion is so integral to the efficient functioning of both the administrative agency and the courts. The burden to demonstrate an erroneous exercise of discretion rests on the party claiming the exercise of discretion was improper. 204 Wis. 2d at 160-61 (citation omitted)

The court further held that the legal standard for the agency's determination of whether a default was appropriate was not the standard used in judicial proceedings--i. e., not surprise, mistake, or excusable neglect:

Rather, the agency is entitled to exercise its discretion based upon its interpretation of its own rules of procedure, the period of time elapsing before the answer was filed, the extent to which the applicant has been prejudiced by the employer's tardiness and the reasons, if any, advanced for the tardiness. *Id.* at 161.

¹ This language is very similar to the statute governing proceedings before this commission: "Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order or default." §227.44(5), Stats.

The equities and policy considerations here do not support denying complainant's request for waiver. Respondent is correct in characterizing the goals of the waiver process as providing a complainant an opportunity to avoid the delays inherent in the investigation process, and conserving limited Commission resources. Such goals would, however, be served by granting the waiver request at this point in the proceedings before any additional time or resources are devoted to investigating complainant's charge. Respondent also appears to be claiming prejudice since it has generated its answer which may not have been required had waiver been requested earlier. However, such prejudice is minimal since respondent could have been required to provide most if not all of the information it provided in its answer through discovery, and, even in the absence of a discovery request, would have assembled such information in preparation for hearing. The 20-day period set forth in the December 4, 2000, letter from the Commission's investigator was utilized as a processing tool. This letter set forth the same 20-day period in relation to a request for conciliation, but it would not serve the goals of the conciliation process, just as it would not serve the goals of the waiver process, if the Commission were to cut off the opportunity for conciliation if a request were to be made outside this 20-day period.

CONCLUSIONS OF LAW

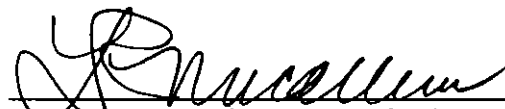
1. This matter is properly before the Commission pursuant to §230.45(1)(b), Stats.
2. Complainant's request for waiver should be granted pursuant to §230.45(1m), Stats.

ORDER

Respondent's motion to deny complainant's request for waiver of the investigation of her complaint is denied, and the investigation of this complaint is waived.

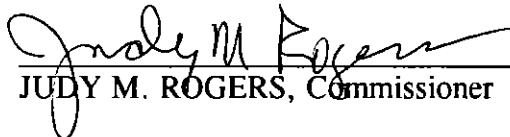
Dated: May 25, 2001

STATE PERSONNEL COMMISSION



LAURIE R. McCALLUM, Chairperson

LRM:000159Cru1.2



JUDY M. ROGERS, Commissioner

Parties:

Janis Weber
PO Box 610
Middleburg FL 32050

Katharine Lyall
President, UW System
1720 Van Hise Hall
1220 Linden Dr.
Madison, WI 53706