STATE OF WISCONSIN PERSONNEL COMMISSION

DANIEL E. ADAMS,
Complainant,

v.

Secretary, DEPARTMENT OF NATURAL RESOURCES,
Respondent.

Case No. 01-0088-PC-ER

RULING ON RESPONDENT'S MOTION TO DISMISS

Respondent filed a motion to dismiss contending that the above-noted sex discrimination case was untimely filed. Both parties submitted written arguments. The Commission received the final argument on October 24, 2001.

The facts recited below are made solely to resolve this motion. They are undisputed unless specifically noted to the contrary.

FINDINGS OF FACT

1. Complainant works for respondent as a Customer Service and Licensing Team Supervisor 3. He functions as the direct supervisor of two female subordinate supervisors, Susan Wallace and Linda Winters.

2. Money became available for supervisory personnel to be awarded on the basis of "parity for equity purposes for the worst cases and to fight pay compression." If the available money had been distributed equally, each supervisor's hourly wage would have increased by 86.5 cents per hour. (See §6 of complaint form.)

3. Complainant received a wage increase of 43.3 cents per hour and was informed of this adjustment by letter dated July 20, 2000 (Exh. 1, attached to respondent's motion). The effective date of the wage change was July 2, 2000.

4. As early as July 25, 2000, complainant initiated inquiries asking why he received less of a parity raise than his female subordinates (Wallace and Winters). Specifically, on July 25, 2000, he sent an e-mail message to William Smith and Julie Sauer.

Sauer responded the next day. The text of the e-mails is shown below (Exh. 3, attached to respondent's motion):

> Complainant's e-mail message: I was wondering who made the recommendation to Madison that gave Linda $1.249, Sue 86.6 cents and me 43.3 cents? I wish to look into this further and need to know where the recommendation came from so that I can make sense of it all. I would ask that any response be in writing and that I be given some indication of the logic or reasoning behind the numbers. If you can explain Parity and Equity to me, as it relates to this event that also would be appreciated.
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> Sauer's reply: Dan, I made a recommendation for my staff, and Bill reviewed and forwarded to Madison. For equity, I compared what the person was making to the average of the other staff in their same classification. Even though Sue was higher than average, I recommended the full amount for her because of her seniority and the fact that she was higher due to receiving past performance awards to bring her to that higher level. Linda was recommended for extra because of her being well below average.

5. The Commission received the discrimination complaint on June 4, 2001, in which sex discrimination is claimed with regard to complainant's wage adjustment as compared to those of Wallace and Winters, his female subordinates.

6. On August 29, 2000, Sauer wrote a memo to complainant (Attachment #2 to complainant's brief) which included an offer to attempt to address complainant's concerns on the wage adjustment at issue in this case. Her memo stated, in pertinent part as shown below:

> [T]he issue of parity/equity . . My understanding is that you are concerned that money received on the basis of parity should have been given to each employee in it's [sic]entirety as parity, and not split into parity and equity. In addition, you are concerned about the low average pay for the Customer Service and Licensing Teamleader [complainant's position] in comparison to the CS Supervisors 2 [Wallace and Winters' positions]. Your point is that the average between the two is only about 33.3 cents when there are two pay ranges between them, and that the Teamleader has much broader responsibility. I understand your concerns and would again be willing to help you take the issue further

7 Complainant recalls that Sauer told him she would waive time limits if complainant pursued the pay transactions in a formal setting. He attempted to obtain Sauer's

recollection on September 10, 2001, to which she responded with the following email message on September 18, 2001 (Attachment 3 to complainant's brief):

> Dan - I do somewhat remember the conversation. I reviewed my notes this last weekend. From what I remember, when we discussed the time limits, you were considering filing a grievance. I am able to waive the requirements to file a grievance within the time limits. I was not aware at the time that you were considering any other action. I was also not aware that there were any time limits for any other process.

CONCLUSIONS OF LAW

1. This matter is before the Commission pursuant to §230.45(1)(b), Stats.

2. A genuine issue of fact exists regarding whether complainant was told that respondent would waive time limits for filing a discrimination case.

OPINION

This action was brought pursuant to the Fair Employment Act, which requires that a complaint be filed with the Commission no more than 300 days after the alleged discrimination or retaliation occurred (see §111.39(1), Stats.). Complainant has the burden to demonstrate that the allegations raised in the complaint were timely filed. See, for example, *Wright v. DOT*, 90-0012-PC-ER, 2/25/93; *Acoff v. UWHCB*, 97-0159-PC-ER, 1/14/98; *Nelson v. DILHR*, 95-0165-PC-ER, 2/11/98; and *Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98. In the context of a motion to dismiss, it is appropriate to construe allegations in a light most favorable to complainant. *Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98.

The complaint in the present case was filed on June 4, 2001, a Monday. The resulting actionable period (the "300 day period") commenced on August 5, 2000 and ended on June 4, 2001. There is no dispute that complainant received notice of the wage transaction in July 2000, prior to the actionable period and, under this measurement, the case was untimely filed.

I. Continuing Violation Argument

Complainant contends his complaint should be considered timely filed because each bi-weekly paycheck constitutes a continuing violation. The Commission has issued what appear to be conflicting decisions on this question, as reviewed below. Complainant cites as support the Commission's decision in *Wis. Federation of Teachers (WFT) v. DP*, 79-306-PC, 4/2/82.

The *WFT* case was filed on November 5, 1979, contesting the pay range assignments for positions classified as librarians and as library associates, "primarily a female occupation" (*id.*, p. 1). The claim was filed as an appeal under §230.44(1), Stats., and the Commission found it lacked jurisdiction to consider the claim. The Commission went on to consider whether it had jurisdiction to consider the claim (if re-filed) as a discrimination complaint. As to a potential discrimination case, respondents raised a timeliness objection rejected by the Commission, as noted below (*id.*, @ 4-5):

> Respondent's third jurisdictional objection is based on the date that the Personnel Board approved the classifications in dispute. Respondent points out that the Library Associate classification that was in effect at the time of the instant appeal became effective late in 1969 and that the Librarian classifications became effective in 1973.
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> In the instant matter, the allegedly discriminatory violation occurred in a series of related acts during the entire period that the old Library Associate and Librarian classification levels were in effect. The persons holding positions in these series were paid bi-weekly, with each payment representing a basis for an allegation of sex discrimination due to unequal pay. The facts in this matter show that the November 5, 1979 letter constitutes a timely filing of a charge of discrimination on the basis of a continuing violation, *Dobbins v. DHSS*, Case No. 81-91-PC (6/3/81); *Jenkins v. Home Ins. Co.*, 24 FEP Cases 991 (4th Cir. 1980); thereof permitting the Commission to review the underlying assignment of salary levels to the classifications in question.

The above-noted excerpt recognizes that a bi-weekly paycheck could indicate the existence of a continuing violation. However, the Commission's later cases emphasized that a continuing violation cannot be based solely on continuing receipt of a paycheck.

The employee in *Junceau v. DOR*, 81-0112-PC, filed a §230.44(1), Stats., appeal on May 7, 1992, concerning salary regrade decisions made in 1979, 1980 and 1981. The Commission held that no continuing violation existed:

> In the Wisconsin civil service system, there are a number of personnel transactions which usually require base salary adjustments which can affect the employee's salary throughout his or her tenure with the state If these were considered continuing violations because of the fact that the impact of the alleged improper salary recalculation on the employee each payday, clearly the 30 day period of limitations contained in §230.44(3), Stats., would effectively be nullified. The employee may continue to be paid less each payday, but this is only a reflection of the continuing nature of the damages, not the continuing nature of the violation itself.

id. @ 10. *See also, e.g., Jacobus v. UW*, 88-0079-PC, 10/20/88.

In *Pelikan v. DNR & DETF*, 6/24/87, the employee contended he was forced into an early retirement on December 6, 1985. The Commission rejected complaint's contention that his complaint filed on April 30, 1987, was timely under the continuing violations doctrine. The crux of the complaint was described as noted below (*id.* @ 5):

> Mr. Pelikan is not complaining about how his salary is being computed now that he is retired; his complaint runs to the contention that he was forced into an early retirement, and as a consequence is realizing less compensation from the state
> Similarly, in the instant case, Mr. Pelikan is not pointing at any alleged *present* violation, only at a *present effect* of an earlier alleged violation.

The Commission clarified in *Pelikan* that the continuing violation theory required some ongoing policy during the actionable period that continues to impact on wages, as opposed to the present effects of a past, discrete event. The Commission explained (*id.* @ 4-5) (emphasis added):

> A great many personnel transactions have adverse economic impacts on employees that continue over time. For example, an employee who is involuntarily demoted for disciplinary reasons will continually be paid less than if he or she had not been demoted. These are the employee's monetary damages or loss, and the fact that they continue to accrue indefinitely obviously does not mean that the employee has an indefinite period in which to appeal. The

> difference between this hypothetical and a true continuing violation is that the reduction in salary in each paycheck following the demotion is essentially a neutral act. If the demotion has not been shown to have been improper, either because the employer demonstrated just cause following a hearing, *or because the employee failed to contest it in a timely manner*, there is no basis on which to contend that each paycheck constitutes a separate act of discrimination.
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> A true continuing violation typically involves an employer's ongoing policy that affects that employee continually. For example, an employer may have a salary schedule which calls for a higher salary range for stock clerks, a male-dominated classification. A woman hired into the latter classification presumably would not be limited to the 300 days after her hiring in which to file a sex discrimination charge, because there is an ongoing policy that continues to affect her over the course of her employment, so long as the employer continues to maintain the structural salary difference between the two classifications.

In *Kimble v. DILHR*, 87-0061-PC-ER, 2/19/88, the Commission stated that "decisions on salary increases are discrete transactions which cannot be characterized as continuing violations" *id.* @ 3.

Complainant also cites *Rudie v. DHSS & DER*, 87-0131-PC-ER, 9/19/90. Mr. Rudie, similar to the complainant here, contested the continuing present effects on his pay on equity awards granted in June of 1985 and 1986. Mr. Rudie's claim of age discrimination was not filed until September 15, 1987, one month after he became aware that younger, less senior employees were paid more than he was. The Commission rejected respondents' contention that the case was filed untimely using the reasonably prudent standard set forth in *Sprenger v. UW Green Bay*, 85-0089-PC-ER, 1/24/86 (the time limit for filing a charge of discrimination under the FEA begins to run when the facts that would support a charge of discrimination are apparent or should be apparent to a similarly situated person with a reasonably prudent regard for his or her rights). The Commission found that Mr. Rudie filed his case timely because he had no reason to believe he was being paid less than the younger employees until September 15, 1987

The Commission in *Rudie*, also concluded that there was another reason why the complaint was timely – i.e., it concluded there was a continuing violation. The Commission pointed out that there was no specific action taken with regard to Mr. Rudie's own salary. The

gravamen of his claim involved an act of omission by the employer. The agency failed or omitted to raise his salary by way of an equity award, in the context of having given equity awards to younger employees. However, there had been no explicit decision made either *not* to give Mr. Rudie an award, or to give the younger employees equity award to the exclusion of complainant. The situation in *Rudie* is unlike the situation here. Mr Adams' salary was directly and specifically impacted in July 2000, by a discrete salary transaction when he was given a wage increase 50% less than the female employees in question, and of which he was aware at the time of the transaction.

The Commission expressly overrules *Dobbins v. DHSS*, 81-0091-PC, 6/3/81 (which was cited in the *WFT* case). A specific decision was made regarding Mr. Dobbins' starting salary made on April 1, 1980. He filed an appeal on April 7, 1981 (over a year later) asserting that his "starting salary at Winnebago was unjust and arbitrary." The Commission found the case timely filed based solely on his ongoing receipt of a paycheck. The Commission now holds that *Dobbins* was wrongly decided and that his starting salary should have been viewed as a discrete salary transaction unsusceptible to application of the continuing violations doctrine.

II. Equitable Tolling

Complainant contends his complaint should be considered timely filed because he did not have all the information he needed to file a complaint until October 4, 2000. His argument is shown below in relevant part (pp. 2-5, brief):

> When I asked Julie Sauer and Bill Smith about the respective Parity Awards and who made them, their answers did not in any way show that the awards were discriminatory. The awards themselves, as such, were also not outright discriminatory. I was indeed aware of the award amounts and who made the awards by July 26, 2001 (sic). What I was not aware of was the rules for making the awards. My Supervisor told me that she made the decision under DLT and DER rules and followed them correctly. That had to be checked to see if it was fact
>
> I did take active steps to inquire and was not given the paperwork needed to ascertain the facts until October 4, 2000 (copy of four page document, dated and

> explanations for the reasoning behind the awards that clearly were not in line with the paperwork I had in front of me .
>
> [B]oth (Julie Sauer and Bill Smith) stated that they followed the rules put forth by the Department Leadership Team. I got the entire pack of rules from Bill Smith on 10/4/00 and until then was dealing with suspicion only Once I saw the rules on October 4, it was obvious that what was done in this case was not done in line with them. This is when I became aware that there had indeed been a violation of my rights
>
> I did feel then and do feel now that I could not have sent in a reasonable complaint if I had said I believed I was discriminated against because someone else got more equity money than I got. However, when viewed in light of the fact that it was done against the rules, which was not clear to me until October 4, 2000, it becomes obvious that I was discriminated against. There was clearly to me anyway, a misapplication of discretion in distribution of funds. I had no way of knowing this to be true until I had all of the information on "How things were supposed to have been done!" Up to that point anyone could have said that my feelings were simply hurt that others had gotten more than I, and so I was crying "Sour Grapes" while having no proof that things were not done correctly. And, they would have been right, if I hadn't gotten and provided that proof along with my complaint.

The above argument is raised under the doctrine of equitable tolling which permits an employee to avoid the bar of the statute of limitations if despite all due diligence he is unable to obtain vital information bearing on the existence of his claim.[1] The Commission, in *Tafelski v. UW-Superior,* 95-0127-PC-ER, 3/22/96, applied this theory as explained by Judge Posner in *Cada v. Baxter Healthcare Corp.* 920 F.2d 446, 54 FEP Cases 961, 963-4 (7th Cir. 1990) noting on p. 11 as shown below:

> If a reasonable man in Cada's position would not have known until July 7 that he had been fired in possible violation of the age discrimination act, he could appeal to the doctrine of equitable tolling to suspend the running of the statute of limitations for such time as was reasonably necessary to conduct the necessary inquiry. If a plaintiff were entitled to have all the time he needed to be *certain* his rights had been violated, the statute of limitations would never run -- for even after judgment, there is no certainty. (Citations omitted. Emphasis appears in the original.)

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[1] The 300-day filing requirement is in the nature of a statute of limitations and, as a result, subject to equitable tolling. *Milwaukee Co. v. LIRC*, 113 Wis.2d 199, 205, 335 N.W.2d 412 (Ct. App. 1983).

Complainant's argument here is unpersuasive because he does not disclose what information is contained in the document he received on October 4, 2000, which allegedly made it clear to him that the awards were made "against the rules" and a "misapplication of discretion in distribution of funds" (brief, p. 5). Indeed, the document is consistent with what he was told in July. A section entitled "2000-01 Discretionary Parity Awards" begins on page 2 of the document and states:

> These awards will be granted given the availability of funds at the time of the awards. As agreed by the DLT, employees will receive half of the parity award as generated for their position. The remaining generation will be used for pay compression and equity departmentwide.

III. Equitable Estoppel

Complainant contends his complaint should be considered timely filed because he was lead to believe that Ms. Sauer would help him resolve the problem and would waive time limits for formal filings. His argument is shown below in relevant part (p. 3, brief):

> I am taken aback by the DNR's use of an affirmative defense against my complaint. In fact I had been working with them all along to try to rectify this situation and early on was led to believe that it might be taken care of in house by those higher up in the agency. Julie Sauer on August 29, 2000 told me in a written memo that she would assist me in taking this matter forward. (copy attached as Attach #2) She also told me in conversation that she would "waive" time requirements if I decided to file something formal (copy of Sept. 18, 2001 email attached, as Attach #3, in which she recalls conversation).
>
> At the time I asked her about time limits, I asked if working with her and the DNR would preclude my filing something formal later and she said she would waive time limits. At the time, I do not recall stating grievance, but did mention formal filing and she could easily have taken that as meaning a grievance. I took her answer to mean she would not use time limits against me when I filed something formal. I feel that we were working together to solve a problem, not that we were taking an adversarial stance. Only after internal efforts to correct the problem failed did I consider how to file with the Commission.

Individuals claiming equitable estoppel against a state agency must show the following elements: 1) that the claiming individual relied, 2) to his/her detriment, 3) upon an action or inaction by a state agency, 4) that resulted in a serious injury, and 5) the public's interest would not be unduly harmed by application of estoppel. *Department of Revenue v. Moebius Printing Co.*, 89 Wis. 2d 610, 634 & 638, 279 NW2d 213 (1979). In the context of the present motion where genuine issues of disputed fact must be resolved in the employee's favor, the Commission would conclude that complainant established a claim of equitable estoppel by his reliance on Sauer's statement that she would waive time limits on formal actions and the resulting detriment (or injury) that this complainant otherwise would be considered as untimely filed. The Commission, however, reserves final ruling on this motion until after an evidentiary hearing is held as noted in the Order below.

ORDER

No final ruling on respondent's motion is made at this time. The Commission will contact the parties to schedule an evidentiary hearing to resolve the narrow question of what Sauer told complainant with regard to waiving any time limitations. If complainant prevails after the evidentiary hearing, the Commission will continue with the investigation of his discrimination case.

Dated: February 11, 2002.

STATE PERSONNEL COMMISSION

JMR:010088Crul1.31

JUDY M. ROGERS, Commissioner

CONCURRING OPINION

I agree with the above outcome and order. I do not agree with how the lead opinion addresses *WFT v. DP,* 79-0306-PC, 4/2/82, *see* p. 4, above. The lead opinion infers that *WFT* was wrongly decided, but stops short of overruling it. In my opinion, *WFT* was correctly decided, and is distinguishable from the present case.

In *WFT,* unlike this case, there were no discrete personnel transactions. There, the Commission rejected the respondent's contention that the appeal was untimely because it had been filed in 1979, and the Personnel Board had approved the classifications in question in 1969 and 1973. Approval of the class specifications by the Personnel Board was a quasi-legislative act by the administrative entity that was the predecessor to the current Commission. At that time, it was statutorily required that the Personnel Board approve the class specifications developed by the then Director of the Bureau of Personnel before the class specifications could become effective. *See, e. g.,* §16.07(2)(a), Wis. Stats. (1971). Thus, when the class specifications were approved in 1969 and 1973, these were not personnel transactions affecting the salaries of the employees then in those classifications. In fact, undoubtedly there were members of the teacher's federation employed in 1979 when the appeal was filed who had not been employed by the state as teachers in 1969 and/or 1973 when the approval occurred. In my opinion, *WFT* does not stand for the proposition that a continuing violation can be established solely by a bi-weekly paycheck. Rather, in that case there was a policy in place that was embedded in the classification structure, and which was manifested with each paycheck. In the case now before this Commission, the claim arises from specific, discrete personnel transactions which occurred when Mr. Adams' salary was adjusted by an individually-determined parity increase of $.433 per hour while the employees to whom he compares himself received increases of $1.249 and $.877 per hour.

ANTHONY J. THEODORE, Commissioner