STATE OF WISCONSIN PERSONNEL COMMISSION

DANIEL E. ADAMS,
Complainant,

v.

Secretary, DEPARTMENT OF NATURAL RESOURCES,
Respondent.

RULING ON RESPONDENT'S MOTION TO DISMISS AND FINAL ORDER

Case No. 01-0088-PC-ER

NATURE OF THE CASE

In a ruling entered February 11, 2002, the Commission addressed respondent's motion to dismiss this WFEA (Wisconsin Fair Employment Act, Subch. II, Ch. 111, Stats.) complaint of sex discrimination with regard to wages for untimely filing. In that ruling, the Commission held that complainant had not established the timeliness of his facially untimely complaint under either a continuing violation or an equitable tolling theory, but also held there were disputed facts regarding complainant's equitable estoppel issue, and ordered a hearing on the issue of what complainant's supervisor had told him about waiving time limitations. Subsequently, and prior to the hearing, the hearing examiner, over respondent's objection, ordered the issue amended to include complainant's request to reconsider that part of the February 11, 2002, ruling that rejected complainant's equitable tolling argument. The parties were advised to make a record on that issue at the hearing. After the hearing, the hearing examiner issued a decision pursuant to s. 227.46(2), Stats., and the complainant has filed objections and written arguments. The Commission now adopts the proposed decision and order, with a few minor changes, as its final disposition of this case. The Commission also adds some comments on the objections to the proposed decision and order The Commission has considered all of the complainant's objections, but here addresses only the most salient. Many of complainant's objections simply disagree with the factual determinations made by the Commission on the basis of the evidence that was presented at the hearing. In this connection, it must be kept in mind that not only does the complainant bear the burden of proof to establish the facts needed to

show that his complaint should be considered timely filed, but also the level of proof that is used to evaluate the evidence and to determine whether complaint satisfied his burden, is that of clear and convincing evidence. This is a more stringent test than the preponderance of the evidence standard used in most civil actions in court and administrative proceedings.

COMMENTS ON OBJECTIONS TO PROPOSED DECISION AND ORDER

Complainant's objects to Finding 9 as follows:

> There is no legal requirement for anyone to inform a supervisor of their intent to file with the Personnel Commission, or to state any cause of action which might be used in a filing with the Personnel Commission.
>
> The statement "file something formal outside the agency" would seem to be notice that this was not a grievance and that a person was looking beyond the agency grievance procedure. (Complainant's Objections, p. 1)

The Commission did not find there was any requirement for an employee to inform a supervisor of his or her intent to file with the Personnel Commission. What is involved here is an examination of the context in which the discussions between Ms. Sauer and complainant occurred, which is relevant to the expectation a reasonable person would have with regard to Ms. Sauer's waiver representation. With regard to the part of the finding where complainant says "file something formal outside the agency", this occurred in a November 14, 2000, email from complainant. Complainant has not established that Ms. Sauer's representation about waiver occurred after this email was sent. At the hearing he testified that he could not remember the date of the conversation, but that it could have been November 4th or sometime after he sent the November 14th email. This does not provide an adequate basis for a finding that the conversation occurred after the November 14th email. Also, complainant had made "repeated references to filing a grievance," (Finding 8), and he never said anything that would have indicated to Ms. Sauer that complainant was filing any kind of sex discrimination claim.

Complainant's objection to Finding 11 is:

> I stated under oath that the reason I filed when I did was that I was waiting until the absolute certainty that the DNR would not doing [sic] anything to help me was evident. I said that this was "the last thing I wanted to do." I did not want to create problems and did not want to subject myself to the rampant re-

> taliation and harassment I am now subject to within the DNR. I only filed when it was my last option. (Complainant's Objections, p. 1)

This objection is inconsistent with complainant's statement that he gave up on getting the issue resolved within DNR in November 2000. Also, the case law establishes that in an equitable tolling case of this nature, a complainant cannot wait until there is absolute certainty before filing. *See Cada v. Baxter Healthcare Corp.*, 920 F. 2d 446, 451 (7th Cir. 1990).

Complainant also objects on the ground that in any event his complaint was filed "9 days late on a 300 day timetable. I fail to see where a 9 day or 3% [i. e., 9/300 of the statutory period] late filing injures the DNR or the State of Wisconsin." (Complainant's Objections, pp. 2-3) He also analogizes to delays in meeting Commission-imposed deadlines that have been allowed. However, there is a difference between a Commission-imposed deadline and a statutorily imposed statute of limitations. *See, e. g., Colby v. Columbia Co.*, 202 Wis. 2d 342, 550 N. W 2d 124, 127-28 (1996):

> "The bar created by a statute of limitations is established independently of any adjudicatory process. It is a legislative expression of policy that prohibits litigants from raising claims—whether or not they are meritorious—after the expiration of a given period of time. Under Wisconsin law the expiration of the limitations period extinguishes the cause of action of the potential plaintiff and it also creates a right enjoyed by the would-be defendant to insist on that statutory bar " (citation omitted)

If a statute of limitations can be ignored whenever there was no prejudice to the opposing party and/or the filing was only nine days or less late, then the statute of limitations essentially would be meaningless.

FINDINGS OF FACT

At this time the Commission reiterates the findings from its February 11, 2002, ruling, and makes additional findings as necessary. The original findings are indented and single spaced; the new findings are double spaced and not indented, except for quoted material.

> 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.

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.

4(a). Complainant and Ms. Sauer met on July 26, 2000. Ms. Sauer advised complainant essentially as she testified at the hearing, as follows:

That the 50% of the money was awarded as parity and every employee that was in that grouping received that $.43. The other $.43 was distributed based on equity, and that he did not receive that portion.

Q And did he ask why others within his group received more or less than he?

A Yes.

Q And did you explain why they received more than he?

A He specifically requested about just one employee, Sue Wallace a Natural Resource Supervisor 2, an employee that Dan supervises.

> Q And did you explain why she received more than Mr Adams? exactly what did you explain?
> A I explained that when I looked at Sue's pay and looked at within her classification, these supervisors, that based upon Sue's seniority, which was many years, and the fact that she was paid on the high end of the scale because in the past she had received previous performance awards, that I felt it was inequitable that she should maintain that level.
> Q To the best of your knowledge, did he understand what you were explaining to him?
> A I believe so.
> Q Did he ever question the decision that was made at that time?
> A He told me that he disagreed with it.
> Q Is that [her explanation] consistent with the information that was eventually given to Mr Adams, the Bazzell memo[1] that was previously identified?
> A Yes.

4(b). At the time of the aforesaid conversation, in complainant's opinion his relationship with Ms. Sauer was not good, and he believed she had been treating him unfairly in a number of ways, as exemplified by his August 3, 2000, eight page, single-spaced, memo to Ms. Bauer on the subject of "Grievance" (Respondent's Exhibit 3), which covered many other subjects of dissatisfaction in addition to the salary issue, but which did not attribute his treatment to sex discrimination.

> 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

[1] This refers to a May 23, 2000, memo signed by DNR Secretary Darrell Bazzell entitled "Discretionary Award and Parity Adjustments Update," one copy of which complainant received on or about August 11, 2000, in response to a public records request (Respondent's Exhibit 2, pp. 2-5), and another copy of which complainant received on or about October 4, 2000 (Respondent's Exhibit 7, Attachment #1). These copies are not identical, as the latter contains some underlining and marginal notes.

> 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.

8. In the subsequent[2] conversation between Ms. Sauer and complainant concerning time limits, Ms. Sauer said she would waive time limits, and she did not state explicitly what time limit she was referring to. However, this statement was made in the context of a discussion about grievances. It also was in the context of complainant's repeated references to filing a grievance, including the following:

a) Respondent's Exhibit 3 is an August 3, 2000, memo from complainant to Ms. Sauer consisting of eight single-spaced pages and entitled "grievance." This document does not indicate that complainant believed the salary transaction in question constituted sex discrimination. The memo covers many subjects of complainant's dissatisfaction with Ms. Sauer besides the salary issue~~e~~. g., micromanagement, using complainant to do lower level tasks, not following the chain of command, overruling his decision as to the type of copier to be purchased at the Ladysmith office, etc. On the last page it includes the following:

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[2] Neither remembers the date of this conversation, but complainant testified "it could have been on November 4th or after I sent the final thing [November 14, 2000, email, Respondent's Exhibit 6] to Julie [Sauer] asking her what my next step should be."

> It was not and is not fair to punish me for being at a higher pay level and reward Sue for the same thing. And that is what I think was done—the parity pay raise was used to punish me. *My case smacks of retribution for not joining a team that higher management was attempting to force me to join, or for [not] rolling over and playing dead to the "whims" of management.* (emphasis added)

b) Respondent's Exhibit 4 is complainant's September 14, 2000, one page memo to Ms. Sauer which includes the following:

> On the issue of parity/equity you seem to miss the point completely. I do not take issue with the department so much as the way you personally interpreted and implemented their decision. I also feel that the entire CAER program and other CAER leaders let the CS Supv. 3's[3] down totally in this matter, in relation to withholding increases from two of them and not giving greater increases to others of them. This allows the next level of supervisors, who are two full pay grades below, to overtake all of the 3's except myself.
>
> This issue I fully intend to carry forward. I believe that the pay increases that were listed as parity/equity were issued based upon very poor criteria in the first place, and, more as bonuses or rewards than parity or equity increases under any definition of the words. No one has ever explained to me the DNR's definition of equity, or, who or what is to be made equitable with who or what else and how that was to be accomplished.
>
> If the parity/equity issue can be brought forward without filing a grievance, I may be willing to [do] that, provided that we discuss fully the past items I listed in my memo. I have had the feeling that things done in relation to me have not been totally fair in relation to other supervisors in the DNR in particular, and/or professionals in state service in general. As the things I mentioned are small items that taken individually may seem like nothing at all, yet taken as a whole seem to me to point in the direction that I am not being treated fairly, I wish to assure myself that this direction will be reversed.

c) Respondent's Exhibit 5 is complainant's September 25, 2000, one page memo to Ms. Sauer It includes the following:

> Recently I have sent you three items for consideration and review. The first was a listing of what I considered as a basis for a grievance, which I prepared and forwarded to you on August 16, 2000. The second was a response to your response to the first item listed here which I prepared and forwarded to you on

[3] This was the classification of complainant's position.

> September 14, 2000. The third item was the Pay and Parity Memo, which I prepared and forwarded to you on September 18, 2000.
>
> These three items list the reasons I feel I have a basis for a grievance. If I must file a grievance in order to obtain justice in the area of Pay and Parity, I will do so. If we can deal with the Pay and Parity issue (and obtain the 43.3 cents per hour for me) without filing a grievance, then I would be willing to do that.
>
> * * *
>
> It is my intention to regain the money I have lost due to this unfair and inequitable distribution. If the only way to do so is to show a pattern, then I will have to file a grievance. If you inform me that I can take another route and obtain the same result (the reinstatement of the lost 43.3 cents per hour), then I am willing to take that other route.

9. In his discussions and correspondence with Ms. Sauer, complainant never said anything about filing a complaint with this Commission, or about pursuing a sex discrimination claim of any kind. However, some of his communications referred generally to pursuing some kind of complaint or other proceeding outside of DNR. For example, a November 14, 2000, email from complainant to Ms. Sauer (Respondent's Exhibit 7 Attachment # 7), includes the following:

> I talked to Darrell[4] when I was in Madison for the meeting in October He said he would talk to Bill[5] about it. Did you ever hear any more from either of them? Next week when things are slowed down, I will most likely move forward with my efforts to obtain the 43.3 cents.
>
> What would be the next step now? Put everything on paper and forward to Madison for review by Darrell and others, or file something formal outside the agency?

10. In complainant's opinion he did not get an answer to this email,[6] and about this time (mid-November, 2000) he decided to pursue the matter outside DNR.

11. Complainant filed the complaint involved in this Commission on June 4, 2001. Complainant has not explained why he did not file his complaint sooner than he did.

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[4] This is a reference to Darrell Bazzell, the DNR Secretary.

[5] This presumably refers to Bill Smith, Ms. Sauer's supervisor.

[6] Ms. Sauer's email response on November 16, 2000, was to say "let's talk next week." (Respondent's Exhibit 7, last page [also marked Attach # 7]).

CONCLUSIONS OF LAW

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

2. Complainant has the burden of proof to establish that his complaint was timely filed.

3. The level of proof required as to the equitable estoppel issue is that complainant must establish the elements of that doctrine by clear and convincing evidence.

4. Complainant has not sustained his burden of proof.

5. Respondent is not equitably estopped from raising the affirmative defense of the statute of limitations.

6. Complainant has not produced any evidence or argument that would establish that the Commission's February 11, 2002, ruling was erroneous.

7 This complaint was untimely filed.

OPINION

This complaint was filed pursuant to the WFEA, which requires that a complaint be filed with the Commission no more than 300 days after the alleged discrimination or retaliation occurred. §111.39(1), Stats. Complainant has the burden of proof 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. The level or standard of proof required with regard to the equitable estoppel issue, is that complainant must establish the elements of equitable estoppel by clear and convincing evidence.[7] *See, e. g., Yocherer v. Farmers Insurance Exchange,* 2002 WI 41, para. 25, 252 Wis. 2d 114, 643 N. W 2d 457 (2002) (Defendant bears the burden of proving each element of equitable estoppel by clear and convincing evidence); *St. Paul Ramsey Med. Center v. DHSS,* 186 Wis. 2d 37, 47, 519 N. W 2d 681 (Ct. App. 1994). The latter case summarizes the test to be applied when a litigant attempts to establish equitable estoppel against a state agency:

[7] This is the intermediate level of proof in legal proceedings, in between preponderance of the evidence and beyond a reasonable doubt.

> The doctrine of equitable estoppel is not to be freely applied against government agencies. "Estoppel may be applied against the state when the elements of estoppel are clearly present and it would be unconscionable to allow the state to revise an earlier position." The elements of estoppel are (1) action or inaction by the person against whom estoppel is asserted (2) upon which the person asserting estoppel reasonably relies (3) to that person's detriment.[8] The party asserting estoppel has the burden of proving each element by clear and convincing evidence. *Id.* (citations omitted)

See also Stacy v. DOC, 99-0024-PC, 8/25/99:

> [U]nder certain circumstances the doctrine of equitable estoppel precludes an agency from arguing an appeal is untimely. See, e.g., *Kenyon v. DER*, 95-0126-PC, 9/14/95:
>
> According to *Gabriel v. Gabriel*, 57 Wis. 2d 424, 429, 204 N.W.2d 494 (1973) the three elements which are essential in order to apply equitable estoppel are: "(1) Action or nonaction which induces (2) reliance by another (3) to his detriment." The doctrine "is not applied as freely against governmental agencies as it is in the case of private persons," *Libby, McNeil & Libby v. Dept. of Taxation*. 260 Wis. 551, 559, 51 N.W.2d 796 (1952), and in order for equitable estoppel to be applied against the state, "the acts of the state agency must be established by clear and distinct evidence and must amount to a fraud or manifest abuse of discretion." *Surety Savings & Loan Assoc. v. State*, 54 Wis. 2d 438, 445, 195 N.W.2d 464 (1972). However, "the word fraud used in this context is not used in its ordinary legal sense; the word fraud in this context is used to mean inequitable." *State v. City of Green Bay*, 96 Wis. 2d 195, 203, 291 N.W.2d 508 (1980). The Supreme Court has also offered the following description of the analysis to be used when a party seeks to invoke equitable estoppel against governmental agencies:
>
> > [W]e have recognized that estoppel may be available as a defense against the government if the government's conduct would work a serious injustice and if the public's interest would not be unduly harmed by the imposition of estoppel. In each case the court must balance the injustice that might be caused if the estoppel doctrine is not applied against the public interests at stake if the doctrine is applied. *Department of Revenue v. Moebius Printing Co.*, 89 Wis. 2d 610, 638-39, 279 N.W 2d 213 (1979). (citation omitted)

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[8] A related aspect of the equitable tolling doctrine is that the party trying to establish equitable estoppel must show that his or her reliance on the conduct of the other party actually caused the first party to fail to file within the statutory time period, which is the "detriment" caused by the reliance. *See Bell v. Employers Mutual Casualty Co.*, 198 Wis. 2d 347, 373-74, 541 N. W 2d 824 (Ct. App. 1995)

See also DOR v. Family Hospital, 105 Wis. 2d 250, 255, 313 N. W 2d 828 (1982) ("It is elementary, however, that the reliance on the words or conduct of the other must be reasonable and justifiable." [citations omitted])

Thus, complainant must establish by clear and convincing evidence the elements of equitable estoppel, including establishing that his reliance on Ms. Sauer's statement was reasonable and justifiable, and the Commission must conclude that it would work a serious injustice if the respondent were allowed to raise the affirmative defense of untimeliness, and the public interest would not be unduly harmed if the equitable estoppel doctrine were applied in this case.

In its February 11, 2002, ruling, the Commission quoted the following from complainant's 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. (February 11, 2002, ruling, p. 9)

Because the parties did not agree on what was said about waiver of time limits, the Commission ordered that an evidentiary hearing be held on that subject.

At the hearing, Ms. Sauer's testimony about the substance of this conversation included the following:

Q Do you recall during the conversation my [complainant] ever asking if you could waive time limits for a grievance?
A Yes.
Q Are you absolutely certain that when you were asked about the time limits that the word grievance came up?
A I remember that we were discussing a grievance, and then you asked about time limits. You didn't specifically say time limits about a grievance.

* * *

Q When we discussed time limits do you ever recall me saying the word grievance or mentioning, or were we discussing grievances at that time?
A We were discussing grievances at that time.

Complainant's testimony included the following:

When I talked to Julie [Sauer] about extending the time limit for filing, I did not mention grievance at all, I'm absolutely certain of that, and it was not during a conversation about grievances, I'm also absolutely certain about that. The, it was a short conversation. I asked something along the lines of, if I file something formal with the state later, is my working with the DNR on all this going to hurt me timewise. I still don't recall the date of the conversation. It could have been November 4th or after I sent the final thing to Julie asking her what my next step should be.

* * *

Q There's been various documents that have been identified in the record that are authored by you that make reference to the grievance,[9] do they not?
A Yes.
Q So why wouldn't one assume then that you were talking grievance if you continued to supply memoranda which contain the term grievance?
A If you look at those same memoranda, you will see often, very very often, where I say if we can handle this without a grievance, that's my preferred way, I would rather do it that way. When we had the conversation about filing time limit, it was not during a conversation about a grievance, it was a separate conversation, it was a very short conversation where I just asked if I file something formal, is this going to hurt me working with the DNR, because I had spent months going through all the different steps talking to the next higher level person asking them if they could do something. I was trying my best to do it informally.

* * *

Q Did you ever reference the fact to Ms. Sauer that you thought she was discriminating against you on the basis of sex until you filed the [this] complaint?
A I have no idea, I don't recall.

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[9] *See* Respondent's Exhibits 3, 4, 5.

As discussed above, complainant has the burden of proof on the equitable estoppel issue, and must prove the facts necessary to establish equitable estoppel by clear and convincing evidence. Based on this record, complainant has failed to establish that his version of the conversation in question is more accurate than Ms. Sauer's partially inconsistent version. The record supports a finding that Ms. Sauer made her comment about waiver of time limits as she testified, i. e., in the context of repeated references to the grievance procedure, both oral and written, and in the absence of any indication from complainant that he was considering some kind of sex discrimination complaint, no less a WFEA complaint with this Commission. Also, the record supports a finding that Ms. Sauer had a good faith belief that she only was waiving the time limits for filing a non-contractual grievance. This weighs against any argument that it would be inequitable to allow respondent to assert the affirmative defense of untimeliness in this context—i.e., outside the realm of the grievance procedure, but rather under s. 111.39(1), Stats.

Complainant also has failed to establish that he was justified in relying on Ms. Sauer's comment about waiver as a waiver of the statutory time limit for filing a WFEA complaint with this Commission, as opposed to waiver merely of the time limit for filing a non-contractual grievance. In the context of Ms. Sauer's version of their interaction and what she said, a reasonable person would not reach the conclusion that she was expressing a willingness to waive any limitations period other than the time limits for filing a grievance.

Complainant also has failed to establish that there would be a serious injustice if the doctrine of equitable estoppel were not applied against respondent. The record reflects that Ms. Sauer thought she was committing DNR to waiving the 30 day time limit[10] for filing a noncontractual grievance, and was acting in good faith. There would be no injustice or inequity created by respondent's invocation of the 300 days statute of limitation under s. 111.39(1), Stats.

Finally, complainant testified that he decided to pursue his salary situation outside DNR in mid-November, 2000. In this case, it is clear that the statute of limitations began running no

[10] *See* Respondent's Exhibit 1 (DNR's rules for noncontractual grievances) para. II, p. 3)

later than July 25, 2000. At that time he knew what his raise was and what his subordinates received. Applying the 300 day statute of limitation to this date means he had to have filed his complaint no later than May 21, 2001. Complainant asserts he had a completed copy of what he has characterized as "smoking gun"[11] evidence on October 4, 2002, when he received what he considered a "complete" copy of DNR Secretary Darrell Bazzell's May 23, 2000, memo (Respondent's Exhibit 7, Attachment #1). At that time complainant had over seven months to file a WFEA complaint. He also testified he finally gave up on hopes of getting his grievance resolved in-house, and decided he would file a complaint, in mid-November, 2000. This was about six months before the statue of limitations ran on his claim. There is no explanation in this record why he waited until June 4, 2001, to file his claim.

This case is comparable to *Bell v. Employers Mutual Casualty Co.,* 198 Wis. 2d 347, 374, 541 N. W 2d 824 (Ct. App. 1995). That case involved a claim for injuries Randal Bell suffered in Iowa when, on August 22, 1989, he was injured in an accident involving another employee of the company for which he worked. The equitable estoppel claim was based on the plaintiffs' (Bell and his wife) contention that the employer's insurance company withheld notice of its dual role as worker's compensation carrier and third party liability carrier, and thus withheld its identity as a potential third party defendant. The plaintiffs ultimately were provided this information by the insurance company/defendant on December 4, 1990, when they received copies of the insurance policies. The suit was filed against the insurance company on February 24, 1992, which was several months after the expiration of the applicable statute of limitations.[12] The Court held as follows:

> Given that the Bells had copies of [the] insurance policies and believed they had a right to file a third-party action against Employers Mutual over seven months prior to the expiration of the Iowa two-year statute of limitations, *we conclude, as a matter of law, that the Bells' failure to timely commence their action was not caused by Employers Mutual's failure to notify them of their dual role* under s. 102.29(4), Stats. As we stated in *Johnson [v.Johnson,* 179 Wis. 2d 574, 508 N. W 2d 19 (Ct. App. 1995)], "litigants must inform themselves of applicable legal requirements and procedures, and they cannot rely

[11] Respondent's Exhibit 8, p. 3.
[12] Based on the Iowa statute of limitations, Bell had to file within two years of the date of the injury.

> solely on their perception of how to commence an action." *Johnson,* 179 Wis. 2d at 584, 508 N. W 2d at 23. (emphasis added)

The case before this Commission is similar to *Bell,* in that even if complainant had been able to establish that the statement by Ms. Sauer that she would waive time limits should be considered as a reference by her to the 300 day time limit under the WFEA, as opposed to the 30 day time limit under the non-contractual grievance procedure, the record does not establish that any such representation caused him to miss the 300 day time limit. Complainant had what he characterized as the "smoking gun" evidence of discrimination about seven months before the expiration of the time limit, and he says he decided that further efforts to resolve the matter in-house would be futile, and he would pursue his claim outside of DNR about six months before the statute expired. Even assuming one credited his version of what he and Ms. Sauer said about time limits, this could not be interpreted as some kind of blanket waiver of the statutory time limit. His testimony included the following:

> I asked something along the lines of, if I file something formal with the state later, is my working with the DNR on all this going to hurt me timewise. When we had the conversation about filing time limit, it was not during a conversation about a grievance, it was a separate conversation, it was a very short conversation where I just asked if I file something formal, is this going to hurt me working with the DNR, because I had spent months going through all the different steps talking to the next higher level person asking them if they could do something. I was trying my best to do it informally.

Since complainant stopped working within DNR to try to resolve his problem in mid-November 2000, when he still had six months left to file (until May 21, 2001) under the statute of limitations, that would have ended the tolling period, and his equitable tolling argument could not be considered to encompass his actual filing date of June 4, 2001.

This result is also consistent with cases such as *Schwetz v. Employers Insurance of Wausau,* 126 Wis. 2d 32, 38, 374 N. W 2d 241 (Ct. App. 1985), another case involving an equitable estoppel claim. The court held that "after the inducement for delay has ceased to operate, the aggrieved party may not unduly delay." In that case the plaintiff claimed the defendant insurance company caused the plaintiff's attorney to delay filing immediately after the accident by telling him it would be premature to file until after the expert's report on the accident

was released. The Court rejected the plaintiff's equitable estoppel claim: "This alleged statement cannot reasonably be construed to mean that counsel should ignore the statute of limitations. It is undisputed that counsel received the expert's report well before the three year limitation." *Id.* In the case before this Commission, the alleged "inducement for delay ceased to operate," *id.*, no later than mid-November 1990, when complainant decided that further efforts to resolve his claim in-house would be futile, and that he would file his claim outside DNR. However, he waited six months from then, and until after the 300 day statute of limitations had run, to file his complaint.

At this point the Commission will revisit the issue of equitable tolling pursuant to complainant's request for reconsideration, and in the context of the evidentiary record developed at the hearing that was held in this case. In its February 11, 2002, ruling the Commission noted that the doctrine of equitable tolling "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" (p. 8) (footnote omitted), and citing *Cada v. Baxter Healthcare Corp.*, 920 F. 2d 446, 451 (7th Cir 1990), as follows:

> 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. The qualification "possible" is important. 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)

The Commission concluded:

> 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 [Respondent's Exhibit 7, Attachment #1] 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 re-

> ceive half of the parity award as generated for their position. The remaining generation will be used for pay compression and equity departmentwide. (February 11, 2002, ruling., p. 9)

In the Commission's opinion, nothing came out as a result of the hearing that indicates that this ruling was erroneous. It is undisputed that complainant met with Ms. Sauer on July 26, 2000, the day after he had sent her an email on July 25, 2000, inquiring about the rationale for the distribution of the salary increments.[13] Her testimony at the hearing included the following:

> Q And what exactly did you explain to Mr Adams?
> A That the 50% of the money was awarded as parity and every employee that was in that grouping received that $.43. The other $.43 was distributed based on equity, and that he did not receive that portion.
> Q And did he ask why others within his group received more or less than he?
> A Yes.
> Q And did you explain why they received more than he?
> A He specifically requested about just one employee, Sue Wallace a Natural Resource Supervisor 2, an employee that Dan supervises.
> Q And did you explain why she received more than Mr Adams? And exactly what did you explain?
> A I explained that when I looked at Sue's pay and looked at within her classification, those supervisors, that based upon Sue's seniority, which was many years, and the fact that she was paid on the high end of the scale because in the past she had received previous performance rewards, that I felt it was equitable that she should maintain that level.
> Q To the best of your knowledge, did he understand what you were explaining to him?
> A I believe so.
> Q Did he question the decision that was made at that time?
> A He told me he disagreed with it
> Q Is that [her explanation] consistent with the information that was eventually given to Mr Adams, the [May 23, 2000] Bazzell memo that was previously identified [Respondent's Exhibit 7, Attachment #1]?
> A Yes.

In fact, Ms. Sauer's explanation, while consistent with the Bazzell memo, was more specific. In the Commission's opinion, complainant had enough information on July 26, 2000, as a re-

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[13] See Finding of Fact 4.

sult of this conversation, to have reached the conclusion he ultimately reached, that he had been discriminated against on the basis of gender with regard to the salary adjustments. It is certainly understandable that complainant would want to get additional information, and particularly the written guidelines provided by the Bazzell memo, to determine whether this was consistent with Ms. Sauer's explanation. However, this search for additional information does not constitute a ground for equitable tolling. As the Court stated in *Cada,* "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." *Cada,* 920 F. 2d at 452.

Furthermore, even accepting *arguendo* the premise for complainant's theory of equitable tolling, he first received the Bazzell "smoking gun" memo on or about August 11, 2000, in response to an open records request. *See* Respondent's Exhibit 2. Complainant contended that this copy of the memo lacked the fourth page, which he ultimately received with the copy of the memo he obtained on October 4, 2000 (Respondent's Exhibit 7, Attachment #1), and that the latter copy contained this critical statement which had been lacking on the first copy: "The recommendations will be evaluated across the department and may be moved between regions and divisions to deal with the most serious equity problems." However, the record does not support this contention. In the first place, the copy of the memo that is attached to DNR's response to complainant's open records request, Respondent's Exhibit 2, does include four pages. Furthermore, this copy of the memo appears to have been printed differently than the copy of the memo complainant received on October 4, 2000, and has what complainant considered the critical language[14] at the bottom of page three rather than most of the language being on the top of page four, as is the case with the copy received October 4, 2002.[15] Finally, the record does not establish that this provision had either anything to do with complainant or any real relevance to this case. Ms. Sauer testimony on this subject was not contradicted:

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[14] "The recommendations will be evaluated across the department and may be moved between regions and divisions to deal with the most serious equity problems."

[15] Complainant also argued that the underlining of a few parts of the second copy of the memo and a couple of marginal notes were significant to his theory of liability. In the Commission's opinion the

> My understanding of that statement is that there were certain classifications that the department felt were paid extremely less than what they should be, and that they [DNR management] were going to try to use some of this money to bring the entire classification of people to a higher level.
> Q And would this apply to Mr Adams' classification?
> A No.

Finally, even if complainant had established the elements of equitable tolling, his case is subject to a similar problem as was discussed above with regard to his equitable estoppel claim. He had a complete copy of the Bazzell memo on October 4, 2000, at the latest, and he did not file his complaint until June 4, 2001, eight months later In *Cada*, the court addressed this type of situation as follows:

> When as here the necessary information is gathered after the claim arose but before the statute of limitations has run, the presumption should be that the plaintiff could bring suit within the statutory period and should have done so. The presumption will be more easily rebuttable the nearer the date of obtaining the information is to the date at which the statutory period runs out. In this case the interval was eight months, huge under the circumstances. 920 F. 2d at 453.

To reiterate, there is no explanation in the record for the gap in this case. And even if complainant had been unsure for several months where to file his complaint, this would not be considered a viable reason for late filing, *see Hilmes v.DILHR,* 147 Wis. 2d 48, 56, 433 N. W 2d 251 (Ct. App. 1988) ("Ignorance of one's rights does not suspend the operation of a statute of limitations." (citation omitted))

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markings in question would at best fall into the category of information that runs to the establishment of the "certainty" to which *Cada* referred.

ORDER

This complaint is dismissed as untimely filed.

Dated: DECEMBER 20, 2002.

STATE PERSONNEL COMMISSION

ANTHONY J. THEODORE, Commissioner

AJT:010088Crul1.5

KELLI THOMPSON, Commissioner

Parties:

Daniel E. Adams
P. O. Box 376
Cameron, WI 54822

Darrell Bazzell
Secretary, DNR
101 South Webster St.
P O. Box 7921
Madison, WI 53707-7921

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.

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