STATE OF WISCONSIN PERSONNEL COMMISSION

ROBERT CHIODO,
Complainant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM (Stout),
Respondent.

Case No. 93-0124-PC-ER

RULING ON MOTIONS

This is a claim alleging age discrimination and retaliation for engaging in protected fair employment activities. On October 12, 2000, respondent filed a motion to dismiss for mootness or, in the alternative, a motion to deny attorneys fees. The parties were permitted to brief the 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 these motions.

FINDINGS OF FACT

1. This complaint was filed on July 28, 1993, and alleged that, in 1993, complainant was not selected for the position of Director of Computer Services at the University of Wisconsin-Stout due to retaliation for complainant's filing of an equal rights complaint, (Case No. 90-0150-PC-ER), with the Commission in 1990.

2. On January 11, 1994, complainant amended his complaint to allege age discrimination as well as fair employment retaliation in regard to the subject hiring decision.

3. On September 27, 1994, the Commission issued an Initial Determination which concluded as follows:

> There is Probable Cause to believe that complainant was discriminated against on the basis of age and retaliated against for fair

> employment activities when he was not hired for the position of Director of Computer Services by the respondent in 1993.

4. A prehearing conference was convened by the Commission on November 29, 1994, and the parties agreed to consolidate Case Nos. 90-0150-PC-ER and 93-0124-PC-ER for hearing on June 12-15, 1995; and agreed that the issue for hearing in Case No. 93-0124-PC-ER would be as follows:

> Did respondent discriminate against complainant on the basis of his age and/or retaliate against him for engaging in fair employment activities when respondent did not hire complainant for the position of Director of Computer Services in 1993?

5. The report of the November 29, 1994, prehearing conference states that the parties had agreed to the following statement of issue for hearing in Case No. 90-0150-PC-ER at a previous conference:

> Did respondent discriminate against complainant on the basis of his age when respondent did not appoint complainant as Acting Director of Administrative Computing in 1990?[1]

6. In a letter dated June 8, 1995, complainant requested that Case No. 90-0150-PC-ER proceed to hearing, but that Case No. 93-0124-PC-ER be held in abeyance "because we will be filing an ADEA action on that case due to some new information we have discovered and the much wider scope of remedies available under the ADEA for retaliation claims." Respondent did not object to this request and it was granted.

7 Case No. 90-0150-PC-ER was heard and decided by the Commission. The Commission ruled in *Chiodo v. UW (Stout)*, 90-0150-PC-ER, 6/25/96, that respondent had discriminated against complainant when it did not appoint him to the subject position in 1990; ordered that respondent appoint complainant to the subject position when it next became vacant; and, in a subsequent decision on remedy, awarded complainant back pay for fiscal year 1990-91 through fiscal year 1996-97, up to and

---

[1] The Director of Administrative Computing position was later renamed the Director of Computer Services.

including the date of hearing, as well as all benefits, including retirement benefits, he would have earned during this period of time. Respondent appealed the Commission's final decision and order to Dane County Circuit Court (*Univ. of Wis. Stout v. Wis. Pers. Comm.*, 97-CV-3386). While this appeal was pending, the subject position became vacant and respondent, in compliance with the Commission's order which had not been stayed by the court during the pendency of the appeal, appointed complainant to the position in early 1998. Subsequently, in March of 1999, the parties entered into a settlement agreement and, as the result of this agreement, complainant received the amount of back pay ($196,003) he would have received had he been appointed to the subject position in 1990 and served continuously in such position until his actual appointment in 1998; all relevant benefits; and all attorney's fees incurred to date ($160,109.94) in regard to Case No. 90-0150-PC-ER, and respondent's appeal of the Commission's decision.

8. In a letter dated January 4, 1999, complainant summarized the status of litigation relating to Case Nos. 90-0150-PC-ER and 93-0124-PC-ER, and attached another amendment to the charge in Case No. 93-0124-PC-ER, explaining that this amendment was intended to cure a technical defect. It subsequently became apparent that the technical defect related to the fact that counsel for complainant rather than complainant had signed the amendment filed with the Commission on January 11, 1994. Respondent did not object to the January 4, 1999, amendment, and the Commission accepted the amendment in a letter to the parties dated February 15, 1999.

9. On February 22, 1999, the federal EEOC issued complainant a right to sue letter for Case No. 93-0124-PC-ER (EEOC charge number 26H930108).

10. In a letter dated August 30, 1999, complainant notified the Commission that Case No. 93-0124-PC-ER was scheduled for trial in federal court.

11. In a letter dated July 20, 2000, complainant indicated that his federal case relating to Case No. 93-0124-PC-ER had been dismissed, and he wished to proceed with this case before the Commission.

12. Since 1998, complainant has been the incumbent of the position of Director of Computer Services for UW-Stout on either an acting or permanent basis.

OPINION

Respondent argues that Case No. 93-0124-PC-ER is moot, and that the award of further attorney's fees is unwarranted.

Since 1998, complainant has been the incumbent of the subject position, and he has received from respondent an award the parties agree represents the pay and benefits he would have received had he been appointed to the position in 1990 on an acting basis and in 1991 on a permanent basis, and had he served in the position continuously up until the date of his actual appointment to the position in 1998. Complainant has also received an award of attorneys fees which the parties have agreed represents the amount complainant incurred in litigating Case No. 90-0150-PC-ER, i.e., $160,109.94.

An issue is moot when a determination is sought which can have no practical effect on a controversy. *State ex rel. Jones v. Gerhardstein*, 135 Wis. 2d 161, 169, 400 N.W.2d 1 (Ct. App., 1986), citing *Warren v. Link Farms, Inc.*, 123 Wis. 2d 485, 487, 368 N.W.2d 688, 689 (Ct. App., 1985). The focus, generally, is upon the available relief in relation to the individual complainant (*see, e.g., Lankford v. City of Hobart*, 36 FEP Cases 1149, 1152 (10th Cir., 1996) *and Martin v. Nannie and the Newborns*, 68 FEP Cases 235, 236 (W.D. Okla., 1994)). The test for mootness is simple to state but sometimes difficult to apply. It is whether the relief sought would, if granted, make a difference to the legal interests of the parties (as distinct from their psyches, which might remain deeply engaged with the merits of the litigation). *Airline Pilots Association, International v. UAL Corporation*, 897 F.2d 1394 (7th Cir. 1990); *North Carolina v. Rice*, 404 U.S. 244, 30 L.Ed.2d 413, 92 S.Ct. 402 (1971). Unless the plaintiff has died and his cause of action has not survived, it is usually possible to conjure up a set of facts under which the relief sought would make a difference to the parties. But if it would be a very little difference, then to economize on judicial resources as well as to give expression to policies thought inherent in Article III of the

U.S. Constitution, the case will be declared moot and relief withheld. *Airline Pilots Association, International, supra; Moore v. Thieret,* 862 F.2d 148 (7th Cir. 1988); *James v. Department of Health and Human Services*, 263 U.S. App. D.C. 152, 824 F.2d 1132 (D.C.Cir. 1987).

In *Watkins v. DILHR*, 69 Wis.2d 782, 233 N.W.2d 360, 12 FEP Cases 816 (1975), the Wisconsin Supreme Court addressed the issue of mootness under the Wisconsin Fair Employment Act (FEA) in a situation where the complaining party had been subsequently transferred to the position she had alleged in her charge had been denied her due to discrimination, and would not qualify for an award of back pay or other monetary relief were she to prevail in the action. The Court ruled that her FEA action was not moot because, as a continuing employee, a finding of discrimination could have the practical effect of requiring her employing agency to consider her for all future vacancies on the basis of her qualifications and ability, and without regard to her race. The Commission has interpreted *Watkins* to require that there be a reasonable expectation that the complainant could be subject to future actionable discrimination or retaliation by respondent in order for the controversy to withstand a challenge based on mootness. *See, e.g., Burns v. UWHCA*, 96-0038-PC-ER, 4/8/98; *Wongkit v. UW-Madison*, 97-0026-PC-ER, 10/21/98.

Here, Case Nos. 90-0150-PC-ER and 93-0124-PC-ER were originally consolidated for hearing. In each of these cases, complainant alleges discrimination and/or retaliation in regard to his non-selection for the position now denominated as Director of Computer Services. Complainant subsequently requested that Case No. 93-0124-PC-ER be held in abeyance so he could file a federal ADEA action which offered him a broader potential remedy than the FEA. After hearing, the Commission determined that complainant had been discriminated against as alleged in Case No. 90-0150-PC-ER, and ordered that he be appointed to the position in question, and receive other make-whole relief.

The *Watkins* court did not abandon the tenet that a case is moot if its resolution could not have a practical effect on the controversy. Instead, the Court ruled that an

order requiring that Ms. Watkins be considered for all future transfers without regard to her protected status would have such a practical effect. The circumstances here do not mirror those in *Watkins*. There is already in effect, as the result of the Commission's decision in Case No. 90-0150-PC-ER, a determination that the complainant was the victim of discrimination, and he has been appointed to the position in question. Respondent is already required by the WFEA to consider the complainant for any future appointments without regard to his protected status or activities, and this requirement has been reinforced by the finding of discrimination in Case No. 90-0150-PC-ER. The adjudication of Case No. 93-0124-PC-ER would not affect this in any way. In addition, the adjudication of Case No. 93-0124-PC-ER would not serve the goal expressed by the *Watkins* court of discouraging employers from waiting until litigation is commenced before remedying the effects of discrimination since the remedy awarded here was not dependent upon the filing or resolution of this case but instead was derived from the filing and resolution of Case No. 90-0150-PC-ER.

The *Watkins* court did not rule that the desire of a complaining party to have his or her discrimination claim decided was sufficient *per se* to defeat a contention that the case was moot. However, it appears to be complainant's purpose to advance this argument and he cites in support the following language from *Marino v. Arandell Corporation*, 1 F.Supp.2d 947 (E.D.Wis. 1998):

> Just as WFEA claimants are entitled to a finding of discrimination even if the discriminatory conduct did not result in financially compensable harm, see, e.g., Watkins v Dept. of Indus., Labor, & Human Relations, 69 wis.2d 782, 233 N.W.2d 360 (1975), a plaintiff alleging an invasion of privacy may bring an action merely to restore his personal dignity or reputation, and to prevent future invasions.

However, the cited language is not inconsistent with the above characterization and application of the holding in *Watkins*; i.e., the *Watkins* court did conclude that there are circumstances under which a complaining party is entitled to a finding of discrimination, even if the discriminatory conduct did not result in financially compensable harm. The *Marino* court, which was considering a state law invasion of

privacy claim, is not stating in this excerpt from its decision that this is always the case and, in fact, in linking the *Watkins* result to the issue in *Marino*, specifically references the prevention of future wrongs; i.e., the practical effect relied upon by the *Watkins* court in concluding the controversy was not moot. What complainant is positing here is that litigation of Case No. 93-0124-PC-ER would satisfy his desire for personal vindication. This is the type of impact on the "psyche" which, as explained in the *Airline Pilots* case cited above, does not make a sufficient "difference to the legal interests of the parties" required for a controversy to survive a mootness challenge.

Complainant also argues that there is other potential relief available to him in Case No. 93-0124-PC-ER which would have a practical effect on the controversy, e.g., posting a notice describing the outcome of the complaint, training and counseling the complainant's own and other supervisors, and alteration of employment practices and mandatory reports, and cites certain decisions of the Labor and Industry Review Commission in support of such "affirmative relief" under the FEA. However, under the circumstances present here, with an eight-year-old hiring decision, an intervening determination that complainant had been discriminated against with concomitant relief, the departure of many of the actual and alleged wrongdoers, and three years of complainant's successful employment in the subject position, it appears that complainant has "conjured up a set of facts under which the relief sought would make a difference to the parties" but that this relief could have "very little" practical effect on this controversy. *See, Airline Pilots, supra.* It is concluded that complainant's articulation of possible "affirmative relief" which may be available to him is not sufficient here to defeat a finding of mootness.

Complainant argues that there are allegations other than those relating to the hiring action for the subject position which are not moot and which would remain unresolved if Case No. 93-0124-PC-ER were dismissed. However, this argument is not meritorious in view of the fact that the statement of issue for hearing in Case No. 93-0124-PC-ER to which the parties stipulated mentions only the hiring action.

Finally, complainant argues that Case No. 93-0124-PC-ER is not moot because he has incurred fees filing and advancing this case. The Commission addressed such an argument in *Wongkit v. UW-Madison*, 97-0026-PC-ER, 10/21/98, as follows:

> Practically, what complainant is arguing in regard to a surviving remedy is that, even though the underlying substantive issues are moot, these moot issues should be heard in order to determine whether complainant would have prevailed on these issues and, as a result, been entitled to attorney's fees and costs, most of which would have been generated as a result of having a hearing on the moot issues. Complainant cites no authority for her argument in this regard. This is not comparable to those situations where an employer has, during the course of litigation, provided the requested remedy, and where the courts have concluded, as a result, that the employee is entitled to an award of attorneys' fees. In those cases, the courts have held that it would be inequitable to permit an employer to walk away, without payment of the complainant's expenses, from a case in which an employee has expended considerable resources and has ultimately emerged as the prevailing party, i.e., the employee obtained the remedy he or she was seeking in the action. No such equities are at work here. ... Specifically, this case does not involve a situation where the litigation effort was a causal factor in achieving the complainant's objectives or improving her situation. *See, Klemmer v. DHFS*, 97-0054-PC, 4/8/98.

The circumstances here strongly suggest that the benefits achieved by complainant, i.e., appointment to the subject position, back pay and benefits, and the deterrent effect of a finding of discrimination, resulted from the filing and litigation of Case No. 90-0150-PC-ER, not the filing and pursuit of Case No. 93-0124-PC-ER. As a result, complainant is not entitled to be considered a "prevailing party" in Case No. 93-124-PC-ER and is not, as a result, entitled to reimbursement of attorneys fees he has incurred to date in this case. Moreover, neither these attorneys fees nor attorneys fees which may be incurred in future litigation of Case No. 93-0124-PC-ER justify a conclusion that this case is not moot.

Complainant has been successfully employed in the position at issue in both Case Nos. 90-0150 and 93-0124-PC-ER for three years now; he has received full back pay and benefits; he reports to a supervisor who has given him positive evaluations and

who was not involved in the 1990 or 1993 hiring decisions; and many of those who complainant feels participated in the discrimination/retaliation are no longer at UW-Stout. It is clear that the only reasons complainant has for going forward are vindication, reimbursement for attorneys fees accrued in Case No. 93-0124-PC-ER to date, and reimbursement for attorneys fees which would be incurred if this case were to go forward. These reasons are insufficient to support a conclusion that this case is not moot.

CONCLUSIONS OF LAW

1. This matter is before the Commission pursuant to §230.45(1)(b), Stats.
2. It is respondent's burden to show that this controversy is moot.
3. Respondent has sustained this burden.

ORDER

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

Dated: May 25, 2001

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

LRM:930124Crul1

JUDY M. ROGERS, Commissioner

Parties:
Robert Chiodo
412 21st Street North
Menomonie WI 54751

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

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