STATE OF WISCONSIN PERSONNEL COMMISSION

ROBERT S. GUTHRIE, ***Complainant,*** **v.** **President, UNIVERSITY OF WISCONSIN SYSTEM (Whitewater),** ***Respondent.*** Case No. 97-0164-PC-ER	FINAL DECISION AND ORDER

A proposed decision and order (PDO) was mailed to the parties on April 19, 2000. Complainant filed written objections. Both parties thereafter submitted written arguments. The Commission received the final argument on July 21, 2000.

The Personnel Commission (hereafter, the Commission) has considered the arguments filed by the parties and has consulted with the hearing examiner. The Commission agreed with the examiner's credibility assessments. The Commission adopts the findings of fact (FOF) in the PDO in this decision except ¶3 FOF was amended to correct the years that Dr. Kim was department chair and ¶48 FOF was amended to correct the sex of Dr. Atemie-Obuoforibo. New footnotes appear within the FOF to address some of complainant's objections to the PDO. Footnotes are used in the discussion section to indicate where changes have been made and to address certain other of complainant's objections to the PDO. Complainant's objections were numerous. All were considered. Only the major arguments are addressed in this decision.

The above-noted case originally was filed with the U. S. Equal Employment Opportunity Commission (EEOC) on October 8, 1997. It was cross-filed with the Commission on October 20, 1997. The EEOC issued a Dismissal and Notice of Rights on January 26, 1998. The EEOC did not provide the Commission a copy of their dismissal notice until December 7,

1998.[1] The Commission sent complainant a letter dated December 8, 1998, indicating that the Commission adopted EEOC's determination as the its own decision and that complainant could appeal the Commission's decision. Complainant filed a timely appeal.

Complainant filed a motion for judgment[2] by letter dated May 28, 1999. On June 2, 1999, the hearing examiner denied the motion for two reasons. First, it appeared most efficient to proceed to the scheduled hearing. Second, it appeared the motion was based upon a matter which was not part of the defined hearing issue. The complainant requested to amend his complaint by letter dated June 9, 1999. Respondent opposed the request. The hearing examiner granted the request by letter ruling dated June 24, 1999.

A hearing was held on July 7-9, and September 10, 1999. The parties' request to file post-hearing briefs was granted. The Commission received the final brief on February 23, 2000.

The hearing issues are noted below. Issue #2 is the amended hearing issue.

1. Whether complainant was discriminated against on the basis of age, race, or sex, or retaliated against for engaging in protected fair employment activities in regard to any of the following:
   a. The decision by respondent, communicated to complainant in May of 1996, that his academic staff appointment would not continue beyond the 1996-97 academic year.
   b. The decision by respondent that complainant would not be selected for either of the two tenure-track faculty positions for which he had applied in the fall of 1996.
   c. The decision by respondent not to appoint complainant to any vacant academic staff position in the Department of Economics at the University of Wisconsin-Whitewater between March 21, 1997, and September of 1997

2. Whether respondent violated §111.322(2), Stats., in regard to the following documents:
   a. memo dated 4/18/97, sent to complainant;
   b. letter dated 6/4/97, sent to complainant; and/or
   c. letter dated 7/11/97, sent to complainant.

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[1] The wording was changed here. Apparently, complainant felt the prior wording suggested he was being blamed for the delay. The wording was changed to clarify that it was the EEOC's failure to provide the Personnel Commission with a copy of the EEOC dismissal order which caused the delay.

[2] A change was made to correctly describe the nature of complainant's motion.

FINDINGS OF FACT

1. The complainant is a white male who was born on October 8, 1939.

2. Complainant began working for respondent in January 1994, in a 50% temporary appointment as a visiting assistant professor (hereafter, Teaching Position) in the Department of Economics at the University of Wisconsin's Whitewater campus (UWW). He was hired only for the second semester of the 1994-95 academic year (AY) which started on January 10, 1994 and ended on May 21, 1994. Complainant understood when he was hired that the position he filled was created to handle an over-enrollment of students. This was a teaching and not a tenure-track position, meaning he was not expected to perform research and he should have had no expectation of a permanent job.

3. Kirk Kim made the recommendation to hire complainant (Exh. R-103). Dr Kim has been a faculty member at UWW since August 1969. He served as the Economics Department Chair from 1975-1981, and from August 1993-August 1999. Dr. Kim is of the same sex as complainant and is older than complainant. He is Asian-American.

4. Joseph S. Domitrz, Dean of UWW's College of Business and Economics adopted Dr. Kim's recommendation to hire complainant. Final hiring approval was given by Chancellor H. Gaylon Greenhill. The appointment form (Exh. R-106) contained a disclosure that this was a fixed-term appointment with no intention of renewal (hereafter, referred to as "Disclosure"). Dean Domitrz is of the same sex and race as complainant and also is over 40 years old (but 7 months younger than complainant). Chancellor Greenhill is of the same sex and race as complainant and he is older than complainant.

5. It was Professor Sandra Snow who recommended that Dr. Kim consider complainant for the initial appointment. She met complainant in 1977 She and complainant have been domestic partners since 1989. Dr Kim approached Dr. Snow in December 1993, asking if she knew anyone who could teach. She shared a copy of complainant's resume with Dr. Kim. Dr. Snow has been a faculty member at the UWW since the fall of 1981.

6. Respondent knew complainant's date of birth at least as early as January 11, 1994 (Exh. R-105).

7. In June 1994, complainant was given a second contract, this time for a full-time Teaching Position for an entire AY The second contract was for the 1994-95 AY beginning on August 21, 1994 and ending on May 20, 1995. This hiring transaction was approved by Dr Kim, Dean Domitrz and Chancellor Greenhill. The appointment document (Exh. R-108) contained the same Disclosure as before (see ¶4 above). Complainant, by the end of this contract, worked for respondent for 1½ years.

8. In May 1995, complainant was given a third contract in a Teaching Position for the 1995-96 AY, beginning on August 20, 1995 and ending on May 18, 1996. This third hire was approved by Dr Kim, Dean Domitrz and Chancellor Greenhill. The appointment document (Exh. R-110) contained the same Disclosure as before (see ¶4 above). Complainant, by the end of this contract, worked for respondent for 2½ years.

9. Dean Domitrz wrote to complainant by letter dated July 7, 1995 (Exh. C-7). Attached to the letter was a copy of a draft Lateral Review in Business report, which contained the following excerpts:

> Minority Faculty: The recruitment and retention of minority faculty remains a major problem for the College .
>
> Female Faculty: The College of Business and Economics has been relatively successful in the recruitment and retention of female faculty . . Despite having the highest number of tenured female faculty among the accredited business programs in the State of Wisconsin, the College continues to seek a ratio of male to female faculty which more closely represents the proportion of male to female students.

Dean Domitrz testified that the hiring goal, in his mind, was to obtain female teachers in the same proportion as female students.

10. In or around April 1996, Dr Kim informed complainant that the Department of Economics planned to hire Jacqueline Agesa in a Teaching Position for the 1996-97 AY Dr. Agesa is a black female under the age of 40. Dr Kim further informed complainant that as a result of hiring Dr Agesa, the 1996-97 AY contracts for complainant and Dr Dunbar (both white males) would be reduced from full to half-time. Complainant informed Dr. Kim that he viewed the resulting reduction of his contract as discrimination. Mr. Dunbar was about 30

years old at this time. Dr Kim told complainant that he agreed with complainant's perception that discrimination was occurring. Neither complainant nor Dr Kim shared with Dean Domitrz that complainant or Dr. Kim felt discrimination was occurring.

11. Some time in April 1996, Dr Kim informed complainant that Dean Domitrz created a rule whereby incumbents in a Teaching Position would not be allowed to work for four or more years (hereafter referred to as the "4-year Rule").[3] This was the first complainant had heard of such a rule. He relayed the conversation to Dr Parks, a friend, and Dr. Snow. Drs. Parks and Snow had not heard of the rule before either.[4]

12. Dean Domitrz instituted the 4-year Rule sometime after August 1993.[5] Individuals who had a contract for a Teaching Position at the time the rule was instituted were grandfathered, including individuals who had less than a Ph.D. (such as a master's degree). Nine individuals were grandfathered,[6] including five males and four females. The race is in the record for only six of these individuals and they are white. The age of five individuals is in the record with four over the age of 40 and one about 40 years old. The group of nine grandfathered individuals included 3 white males over 40 years old. Complainant was the first individual against whom the rule could be and was applied. The rule subsequently has been applied regardless of the individual's age, race or sex.

13. On May 8, 1996, Dr Kim informed complainant that Dr Agesa would be offered a half-time appointment so that complainant and Dr Dunbar could each receive a three-quarter appointment. Complainant informed Dr Kim that he thought this option also constituted discrimination. Neither complainant nor Dr. Kim shared with Dean Domitrz their per-

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[3] Complainant objected to the description of the 4-year rule as stated in ¶11 FOF because it failed to say the limitation was to four *consecutive* years (5/15/00 brief, pp. 4-5). The finding, however, is complainant's own report of what Dr Kim told him on the referenced date. According to complainant's testimony, there was no mention of four *consecutive* years.

[4] The credibility note in the PDO for ¶11 FOF was deleted here and expanded upon in the discussion section of this decision.

[5] This paragraph has been changed. Complainant correctly noted that the rule's effective date could not have been before Dr Kim became Department Chair (5/15/00 brief, pp.5-6.)

[6] Dean Domitrz testified about 11 individuals. He was unsure whether two of them had been grandfathered <u>because the remaining two individuals may have gone to tenure-track positions instead of being grandfathered</u>. The underlined language was added in this footnote to address the "logic" argument raised by complainant (5/15/00 brief, p. 6). In short, the Dean's testimony did not suggest that these remaining two individuals might have been terminated rather than grandfathered under the 4-year rule.

ception that discrimination was occurring. Ultimately, respondent decided that complainant, Dr. Dunbar and Dr. Agesa would be hired in full-time Teaching Positions for the 1996-97 AY. The appointment document (Exh. R-112) contained the same Disclosure as before (see ¶4 above).

14. Dean Domitrz sent complainant a letter dated May 10, 1996 (Exh. C-8), which contained the following text:

> Please be aware the contract being issued to you for the 1996-97 academic year will be the last contract issued to you. We look forward to your participation in the activities of the Economics Department for the coming year. Have a great summer.

Complainant was unsure whether the memo meant he could not apply for tenure positions as well as Teaching Positions. He knew UWW intended to hire for two tenure track positions. He did not seek clarification at this time because he did not want to jeopardize his chances to apply for other positions at UWW [7]

15. On June 1, 1996, after complainant received the letter from Dean Domitrz (see prior paragraph), complainant signed his contract for the 1996-97 AY, which began on August 25, 1996 and ended on May 24, 1997 Dr Kim, Dean Domitrz and Chancellor Greenhill approved this hiring transaction. By the end of the 1996-97 AY, complainant would have worked for respondent for 3½ years.

Two Tenure-Track Openings

16. In the fall of 1997, UWW advertised for two tenure-track positions. The announcement (Exh. C-11) is shown below (with the same emphasis as shown in the original document):

[7] Complainant's objection to ¶14 FOF is without merit (5/15/00 brief, p. 6). It was complainant who testified at hearing that he did not seek clarification on whether he could apply for tenure-track positions because he did not wish to jeopardize his chances of being hired (hearing tape #1, approx. starting counter @ 2268). He now claims he followed up on this question with submission of Exh. C-9 to the Chancellor. The referenced document seeks clarification of what his contract included but does not ask specific questions about his eligibility for appointment to a tenure-track or any other position.

> The Department of Economics has two tenure track positions beginning August 24, 1997. **Position 1** requires specialization in Money and Banking. **Position 2** requires a specialization in Labor. For both positions, preference may be given to candidates with any of the following secondary fields: health economics; urban and regional economics; history of economic thought. A completed Ph.D. is preferred; otherwise, completion is expected by December, 1997. Whitewater is located in southeastern Wisconsin . The institution is particularly interested in individuals who combine a strong commitment to undergraduate teaching with an ongoing research program. Publications in refereed journals are required for tenure and promotion. A successful candidate will have a strong research and teaching record or be able to demonstrate clear potential . . Submit vita, 3 letters of recommendation, a copy of official graduate transcript, student and/or peer teaching evaluations, a statement of teaching philosophy, and a published or unpublished research paper. Application deadline is November 15, 1996. Interviews will be conducted at the ASSA meetings in New Orleans. An equal opportunity-affirmative action employer. **To be considered**, application must specify Money and Banking or Labor .

17 Dr Kim encouraged complainant to apply for the tenure track positions. Dr. Kim knew that money and banking was not complainant's field so he provided complainant with an opportunity to teach a class in that field to improve his chances of being selected. Complainant taught such classes over a two-year period. Respondent's decision to hire for a Labor Position was based on a legitimate goal to increase student interest in the field, as well as a desire to select a field which would attract a diversified applicant pool.

18. By letters dated November 12, 1996, the complainant submitted a separate application letter for both tenure-track positions. (Exhs. C-12 and C-13)

19. Thomas Schweigert chaired the search and screen committee for the two tenure-track positions. Mr. Schweigert is of the same sex and race as complainant and is over the age of 40, but about 10 years younger than complainant. The committee also included Drs. Parks (white female born on 1/13/45), Marks (age and race unknown), Weston (age and race unknown) and Kim. Drs. Kim and Schweigert conducted the initial review of applications for the Banking Position (position 1 in the job announcement). Drs. Parks, Marks and Weston conducted the initial review of applications for the Labor Position (position 2 in the job announcement.) The files were alphabetized by applicant name and each committee member was assigned a section of the alphabet for review. Each committee member was responsible for

deciding which files in their pool would be brought before the committee for further consideration.

20. Dr. Kim had responsibility for the initial review of complainant's application for the Banking Position. He presented complainant for further consideration to the full committee. (See Exh. 25.)

21 Dr. Parks had responsibility for the initial review of complainant's application for the Labor Position. She did not forward complainant's name to the full committee because, in her opinion, he did not meet the job specification requiring a major field in Labor Economics. (See Exhs. C-18 and C-19.) Dr. Parks has known Dr Guthrie since 1989, and is his friend.

22. In early January 1997, the search and screen committee interviewed candidates who made the initial cut at a conference in New Orleans - with the exception of complainant. The committee felt it was unnecessary to interview complainant in New Orleans because of limited resources for interviewing and because he had held Teaching Positions at UWW and was thereby known to committee members. None of the individuals interviewed in New Orleans were UWW staff.[8] Complainant was not given an interview even on UWW premises.

23. A department meeting was held on January 27, 1997 At the conclusion of the meeting Dr. Kim asked to speak with complainant in complainant's office with Dr. Schweigert. Dr. Kim told complainant at this meeting that he would not be considered further for the Labor Position. The complainant asked why and Dr. Kim answered that complainant did not have a major field in labor, which, at hearing, complainant conceded was true. Dr. Kim then said complainant would not be considered further for the Banking Position. The complainant asked why. Dr. Kim gave three reasons. First that complainant lacked recent research in the field of Money and Banking. Second, that complainant had no recent research at all. Third, that even though complainant had taught classes in Money and Banking, this was not his field.

24. Respondent informed complainant by letter dated February 3, 1997 (Exh. C-14), that he was not selected as a finalist for the Labor Position. Respondent did not send complainant a letter about the Banking Position.

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[8] This sentence was added for clarification.

25. Respondent hired Michelle Trawick for the Labor Position. Dr Trawick is white and was under the age of 40 when hired. Dr Trawick was more qualified for the Labor Position than complainant, an opinion shared by Dr Parks.

26. Respondent hired William Blankenau for the Banking Position. Dr Blankenau is white and was under the age of 40 when hired. Dr Blankenau was more qualified for the Banking Position than complainant, an opinion shared by Dr Parks.

Vacant Teaching Positions between 3/21/97 and 9/97, for the 1997-98 AY.

27. There were four Teaching Positions in the 1996-97 AY The incumbents were Jeremy Arkes (age and race unknown), complainant, Patricia Hallinan (white female over the age of 40) and Dr Dunbar Converting two of the four Teaching Positions created the two tenure-track positions mentioned previously A question remained as to which of the four incumbents would be retained for the two remaining Teaching Positions.

28. On or about February 20, 1997, the Advisory Committee of the UWW's Economics Department ranked the current incumbents in the four Teaching Positions. The ranking was based on peer opinion of demonstrated teaching ability The ranking in order of preference was 1) Dr Dunbar, 2) complainant, 3) Dr Arkes and 4) Dr Hallinan (Exh. C-70, p. 3). This ranking was important because the main factor for hiring in Teaching Positions was the teaching ability of the candidates. The committee was told at this meeting that complainant was ineligible for rehire because the Dean thought his 4-year Rule was legitimate.

29. On March 21, 1997, complainant sent a memo to Dr Kim (Exh. C-16) requesting clarification about his employment opportunities at UWW. The letter text is shown below

> In order to plan for the coming year and to try to take advantage of other employment opportunities, please provide information concerning my future employment in the Department of Economics.
>
> Specifically, I formally request written clarification of your intentions concerning my employment for the 1997-1998 academic year in the Department of Economics.
>
> Do you intend:

1. to offer me employment through renewal in my current position?
2. to offer me employment in any other position you currently have unfilled or in any other position that may be vacant in the future?
3. to consider my application for any position you currently have unfilled or any position that may be vacant in the future?

30. Dr. Kim responded to complainant's memo of March 21, 1997, by memo dated April 2, 1997 The memo stated that the UWW had "no plan to rehire" complainant for the "next academic year at this time."

31. Complainant considered filing a complaint with UWW's Affirmative Action (AA) Office and/or a grievance. He had UWW's written policy entitled "Equal Employment Opportunity and Affirmative Action Policy" (Exh. C-22), which explained how a complaint would be processed. On March 21, 1997, he sent a letter to Susan Moss, UWW's AA Officer (Exh. C-15), the text of which is shown below:

> Please send to me the specific procedures to file and to pursue a discrimination grievance and/or complaint. Please include any timetable for following steps in the procedure and indicate if there are any time restrictions (statute of limitations) on filing a grievance and/or complaint concerning previous acts of discrimination.

Dr Kim and Dean Domitrz, at all times relevant in this case, were unaware of the above-described contact complainant had with the AA Office.

32. Ms. Moss replied to complainant's request by memo dated April 4, 1997 (Exh. C-23). She attached a copy of UWW's procedures and indicated that the document was deficient because it needed to be updated to reflect specific enumerated changes. She provided a detailed explanation of how the process worked and encouraged him to contact her if he had further questions.

33. There was about a two-week period between complainant's memo to Ms. Moss and her response (between 3/21/97 and 4/4/97) and complainant's memo to Dr. Kim and his response (between 3/21/97 and 4/2/97). (See ¶¶29-32 above.) Complainant suspected that Ms. Moss told the Dean about complainant's letter to her and, as a result, the responses were delayed purposefully so the two vacant Teaching Positions could be filled before responses were made. His suspicions were based upon speculation by Drs. Snow and Parks, which they

relayed to him either as truth or as conjecture but he took it as truth. The delay most likely was due to the fact that complainant wrote the letters on the first day of UWW's spring break.[9]

34. Dr. Dunbar was given a contract for a Teaching Position in the 1997-98 AY By the end of this contract, Dr Dunbar worked for respondent 3 years.

35. Dr. Arkes was to fill the second Teaching Position. This changed sometime prior to May 5, 1997, when Dr Kim was told that Dr Arkes could not be rehired on an emergency basis without the UWW first conducting a search for candidates. (See Exh. C-40, p. 1.) Ultimately, Mr Arkes accepted a different position.[10]

36. By memo dated April 4, 1997, complainant requested that Dr. Kim provide, in writing, the reasons why he was not rehired. (Exh. C-21). Complainant renewed this request by memo to Dr. Kim dated April 16, 1997 (Exh. C-28), in which he also asked Dr Kim to reconsider the decision not to re-employ him. Dr Kim responded by memo dated April 18, 1997 (Exh. C-31), stating as shown below in relevant part (emphasis added):

> Sorry for the delay in response to your last memo, our situation has changed since I wrote you. At the present time only one Academic Staff vacancy remains in the department. I will request the affirmative action officer for emer-

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[9] Complainant objected to 33 FOF (5/15/00 brief, p. 7) contending that the delay "was not related to spring break since administrative employees including department chairs, do not receive a break." Complainant conceded at hearing (hearing tape 4, approx. counter @ 503-580) that the day he sent Dr Kim and Ms. Moss letters might have been the first day of spring break. As an attempt to refute the related presumption that the delay was due to people being gone on spring break complainant testified that administrative officers are not gone during spring break unless they take vacation days. No one asked Dr Kim who later appeared as a witness whether he was on vacation during the break. The hearing record did not establish that Dr Kim and Ms. Moss were at work during the break.

[10] Complainant objected to ¶35 FOF (5/15/00 brief, pp. 7-8). Such objections included the assertion that "The statement by Kim stating that the offer to Arkes was improper is part of this cover-up. There is no doubt that if Arkes had accepted the position that no mention of the improper hiring would have ever been made." This argument is misleading. Dr Kim had used the same improper procedures to ensure that complainant would continue in a yearly contract without competition (Kim testimony, hearing tape #10, approx. counter @ 314-635) a fact which Dr Kim reminded complainant of by memo dated 4/18/97 (Exh. C-31). Complainant incorrectly asserts that Dr Kim's testimony was shown to be false by Exhs. R-109 and R-111 Exhibit R-109 is the hiring contract for complainant's first contract in which a box was checked at the top of the form indicating that a national search was conducted. His later contracts did not contain the boxes and there is no indication of what type of search (if any) was conducted. Complainant's attempts to use the referenced exhibits to do so are unpersuasive.

> gency hiring (sic). You have the right to apply for the position (see attached search policies).[11]
>
> **It is the Economic Department's goal to hire a female or minority candidate into this vacancy to increase the number of role models for our female and minority students. A higher priority will be placed on hiring an academic staff member of Hispanic or African-American descent .**

Dr. Kim did not send a copy of the above memo to anyone but complainant.[12]

37 Complainant spoke with Richard Schauer, Chair of the Academic Freedom and Tenure Committee. As a result of their conversation, Mr. Schauer wrote a memo dated April 9, 1997 (Exh. C-24), to Chancellor Greenhill requesting a response to the following questions:

> 1. What policies of UWW or of the College of Business and Economics prevent the appointment of an academic staff teacher to the fourth year of university service? If such policies exist, I request copies of the documentation. Are there other academic staff employees in the College of Business and Economics recently appointed to a fourth year of university service?
> 2. Dr. Guthrie is a State of Wisconsin employee who serves in a state agency. What public policy prevents the consideration of his application for employment upon the same basis as that enjoyed by other applicants to currently available academic staff positions? What public policy allows a state agency to refuse an application for the reasons that have been communicated to Dr. Guthrie?
> 3. By the exclusion of Dr. Guthrie from the applicant pool in the Economics Department search for the reason of having completed three years of satisfactory service to the university, does the university remain in compliance with State of Wisconsin fair employment law? Is the university in full compliance with Title VII of the Federal Code?

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[11] The highlighted attached policy was for emergency searches. The policy stated as shown below:

> For exceptional circumstances in which a search is not feasible, a position announcement needs to be developed and approval given. Steps to follow relative to contacts to be made will be coordinated with the Assistant Vice Chancellor for Affirmative Action.
>
> Individuals hired on this basis may not be reappointed, unless successful in a new search for the same position.

[12] In objecting to ¶36 FOF, complainant contends that Ms. Kornhoff "refused to type" Exh. C-31. This is an improper reference to testimony that is not in the record. Ms. Kornhoff provided testimony at hearing at complainant's request. He never asked her whether she typed the document.

Complainant denied discussing the 4-year Rule with Mr. Schauer and could not account for where Mr. Schauer got the information for item #3 above. Mr Schauer sent a copy of his memo to Dr. Kim and Dean Domitrz.

38. On April 14, 1997, Chancellor Greenhill replied (Exh. C-26) to Mr. Schauer's letter (see prior paragraph). He sent a copy of his reply to Dr. Kim and Dean Domitrz. The entire text of the Chancellor's letter is shown below (emphasis added):

> Please be advised that you have been misinformed concerning employment in the Department of Economics. I regret that this misinformation caused you inconvenience and anxiety.
>
> UWW does not have any policy preventing Dr. Guthrie or anyone else from applying for any position open in this university. Hence, all the questions you raise in your memorandum are moot.
>
> It is my understanding that the Department of Economics had several tenure track faculty searches for which Dr. Guthrie was a candidate. I further understand that there are no academic staff vacancies at present but if one does occur he may be a candidate. **Eligibility to apply does not assure appointment, however, because the Department appropriately has established a high priority on the recruitment of minority and female role models.**

39. Complainant met with Dr. Schauer a second time. On April 20, 1997, Mr. Schauer wrote a memo to Dr. Kim (Exh. C-33), which contained the pertinent information noted below. Mr Schauer sent a copy of the memo to Dean Domitrz and Chancellor Greenhill.

> It is my understanding from recent exchanges of memoranda and from conversations with Chancellor Greenhill that Dr Robert Guthrie's application for employment to an available academic staff position may not be refused consideration for the reason that he has completed three years of satisfactory employment in the Economics Department at UWW .
>
> In his recent letter to me (copied to you) on this subject Chancellor Greenhill expressed the view that affirmative action considerations for members of protected classes would play a role in the decision to fill academic staff positions .
> Do you and I share a common understanding that the proper application of affirmative action policy is limited to the inclusion of minorities, women, the disabled and the aged into applicant and interview pools, and that, once so in-

> cluded, the employment decision is based upon the selection of the candidate best qualified? Do we share an understanding that Professor Guthrie may not be refused on account of his age? . . .

40. Complainant applied for Teaching Positions[13] by letter dated April 21, 1997, which he sent to Dr Kim (Exh. C-35). Complainant's letter states in pertinent part as noted below:

> Thank you for your memorandum of April 18, 1997 granting me permission to make an application for the mysteriously appearing academic staff vacancy, which the Chancellor is unaware of given his memorandum of April 14, 1997 to Richard Schauer which stated that ". there are no academic staff vacancies at present
>
> I, however, must point out that your memorandum of 5/18/1997 which states "It is the Economics Department's goal to hire a female or minority candidate into this vacancy . " indicates to me that you have no intention of seriously considering my application and that the probability of my application's success is extremely low, if not zero.

41. On April 21, 1997, Dr. Kim responded to complainant's application letter (see prior paragraph) stating as noted below (Exh. C-36):

> In regards to your memorandum of April 21, 1997 stating that your memorandum is your application for the academic staff position. I have not made a request to fill an academic position for emergency hiring as yet. There is no assurance that they (Dean & Affirmative action office) will grant us the request at this time. Thus, I currently do not have the position to fill. As soon as the position is approved, I will consider all the available candidates who have applied (including yours) (sic).

42. The complainant wrote to Chancellor Greenhill on April 28, 1997 (Exh. C-38), enclosing a copy of Dr Kim's April 4th memo and the Chancellor's reply to Mr. Schauer. In this memo, complainant stated that the language in bold type (see ¶¶36 and 38 above) showed that the UWW operated under a discriminatory hiring policy in violation of §§230.1(2) and 230.18, Stats. By memo dated April 14, 1997 (Exh. C-27) complainant asked Mr. Greenhill

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[13] The wording was changed to avoid the incorrect impression that the Commission found that a vacant Teaching Position existed at the time this letter was written.

to provide information on the procedures "to file and to pursue a discrimination grievance and/or complaint." Complainant did not mention in the April 14th memo what actions he suspected were discrimination.[14]

43. The Department of Economics held a meeting on May 5, 1997 The minutes of the meeting (Exh. C-40) indicate that the department had not yet received authorization to fill the vacant Teaching Position. The minutes further indicate that restructuring (or elimination) of certain classes could be necessary if no authorization is given to fill the position.

44.[15] On June 2, 1997, complainant filed a grievance (Exh. C-47).[16] Complainant disclosed in the grievance that he had requested information from Ms. Moss about the procedures to file a discrimination grievance and/or complaint. He stated in the grievance that he believed Ms. Moss informed Dean Domitrz that complainant requested the information. Based on this belief, he alleged in the grievance that he was not given a contract for a Teaching Position for the 1997-98 AY "in retaliation for" pursuing the potential of filing an internal discrimination complaint.[17] (See ¶¶30-32 above.) On June 11th, complainant filed an amended grievance (Exh. C-48) which specifically alleged that Dr. Kim refused to hire complainant in a Teaching Position for the 1997-98 AY, because of his sex, race and color[18] Age discrimination was not alleged in the initial or amended grievance. Dean Domitrz was aware of the allegations raised in the initial and amended grievance.[19]

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[14] In objecting to ¶42 FOF, complainant referenced Exh. C-27 (5/15/00 brief, p. 8). This exhibit was discussed at hearing (hearing tape #1, approx. counter @ 2545-2638). Respondent objected to admission of the exhibit as irrelevant. After taking arguments, the hearing examiner sustained the objection. Upon further reflection this ruling was erroneous and is hereby reversed. The document is pertinent to the question of when the Chancellor might first have known that complainant felt discrimination occurred. While this reason for offering the document may not have been articulated clearly at hearing, it is apparent in hindsight. Appropriate changes were made to ¶42 in recognition that the exhibit is now part of the hearing record.

[15] The paragraph numbers changed starting with this paragraph because the PDO had two paragraphs numbered 43.

[16] Evidence relating to respondent's processing of the grievance (e.g., whether it was processed timely) was ruled inadmissible as irrelevant to the hearing issues.

[17] Additional sentences were added for clarification.

[18] The date the amended grievance was filed was clarified based on Dr. Snow's testimony and Exh. C-94.

[19] Dean Domitrz testified that he was unaware of complainant's allegations of discrimination until 1998. He recalled seeing the initial grievance but was unsure if he ever saw the amended grievance. The initial grievance included an allegation of retaliation for pursuing an internal discrimination complaint.

45. Dr. Kim wrote to complainant by letter dated June 4, 1997 (Exh. C-49), stating in pertinent part as shown below (showing same emphasis as in the original document):

> This is a response to your memorandum of June 2, 1997 Early in April, I was anticipating one Academic Staff vacancy to fill, and I was hoping and planning to fill the vacancy with a female or minority candidate if that was possible (based on an Affirmative Action plan to provide diversity to our workforce). For this reason I told you I had no plan to rehire you at that time.
>
> It turned out that I do not have an Academic Staff vacancy to fill as of now. When I receive approval of an Academic position to fill, **a higher priority will be placed on hiring a female or minority candidate as I stated before**. However, as soon as the position is approved, I will consider all the available applications, including yours (see my memos of April 21, and May 14, 1997).

Dr. Kim sent a copy of this letter to Chancellor Greenhill, Provost Schallenkamp and Dean Domitrz.

46. On July 9, 1997, 1-½ Teaching Positions were allocated to the College of Business and Economics. (Exh. C-51)

47 On July 11, 1997, Dr. Kim wrote complainant a letter (Exh. C-52) advising him of the positions allocated (see prior paragraph). The text of the letter is shown below (emphasis added):

> This is to inform you that the Administrative Council at the last meeting (July 9, 1997) recommended that .50 of Weston's position and a 1.0 lecturer position be given to the Economics Department for the 1997 Fall semester due to enrollment pressures. Dean Domitrz has approved the allocation.
>
> I have five candidates to consider for the positions allotted, you will be considered as one of the candidates.

The Dean processed the grievance. While the passage of time may have blurred the Dean's recollection, it is probable that the Dean knew the contents of the grievance at the time he processed it. This finding leads to a re-examination and reversal of a ruling at hearing. Specifically, the examiner ruled that the Dean never received the amendment. The examiner at the time she made the ruling, however, had not yet recognized that the initial grievance mentioned discrimination and, accordingly, that the Dean's recollection had been unreliable in this regard. This degree of unreliability leads the examiner to reverse her prior ruling and to find that it is probable the Dean received a copy of the amended grievance as Dr. Snow testified.

> **Our objective is to fill these vacancies with a female or minority candidate if that is possible.**

Dr. Kim did not send a copy of this memo to anyone other than complainant.

48. Respondent hired Patricia Hallinan (for the full time position). Respondent hired Abernyiye Atemie-Obuoforibo for the half-time position. Dr. Atemie-Obuoforibo is a male of a different race than complainant and no comparison to complainant's age can be made because his age is not in the record.[20]

49. The contemplated hires of Drs. Dunbar, Arkes, Hallinan and Atemie-Obuofribo would not have been in violation of the Dean's 4-year Rule

50. A meeting was held on June 24, 1997, with complainant, Dr. Kim and Dean Domitrz. The purpose of the meeting was to give complainant an opportunity to discuss the issues raised in his grievance. Complainant was critical of Dr. Kim at this meeting. No mention was made of the 4-year Rule at the meeting. The only reference of discrimination raised by complainant at the meeting was Dr. Kim's statement in various memos that the goal was to hire a female or minority for vacant positions. Complainant also mentioned that he would not get a pension but he did not say at the meeting that he construed the pension issue as age discrimination.[21] Dean Domitrz sent complainant a letter dated June 27, 1997, as his response to the grievance (Exh. C-50). The full text of the memo is shown below:

> After reviewing all of the issues cited in your grievance against Dr. Kirk Kim, Chairperson of the Economics Department, I have concluded that the issues raised are not valid. In my opinion, Dr. Kim has followed the College's and University's employment and affirmative action policies. Your statement in our meeting on June 24 that you were "unjustly fired" and a factor in the action was an attempt to prevent you from becoming eligible to receive state retirement benefits is not true.
>
> As a result, I am upholding the position presented to you by Dr. Kim in his memo of June 4, 1997

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[20] This sentence was changed to correctly indicate Dr. Atemie-Obuoforibo's sex.

[21] This sentence was added to give a more complete description of what was discussed at the meeting. Complainant testified that age discrimination was discussed. When asked in what form, he indicated that they talked about the impact which non-renewal had on his pension (hearing tape #12, approx. counter @ 700-712).

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this claim pursuant to §230.45(1)(b), Stats.

2. Complainant has the burden to show his complaint was timely filed. He failed to meet this burden with respect to respondent's decision in May 1996 that his Teaching Position would not continue beyond the 1996-97 AY (hearing issue 1a).

3. Complainant has the burden to show he was not hired for either tenure-track position due to discrimination on the basis of age, race or sex, or that it was due to FEA retaliation. He failed to meet this burden.

4. Complainant has the burden to show that respondent's decision to hire Mr. Dunbar for a Teaching Position rather than complainant was due to discrimination on the basis of age, race or sex, or that it was due to FEA retaliation. He failed to meet this burden.

5. Complainant has the burden to show that respondent's decision to hire Mr. Arkes for a Teaching Position rather than complainant was due to discrimination on the basis of age, race or sex, or that it was due to FEA retaliation. He failed to meet this burden.

6. Complainant has the burden to show that respondent's decision to hire Dr. Hallinan for a Teaching Position rather than complainant was due to discrimination on the basis of age, race or sex, or that it was due to FEA retaliation. He failed to meet this burden.

7. Complainant has the burden to show that respondent's decision to hire Dr. Atemie-Obuofribo for a Teaching Position rather than complainant was due to discrimination on the basis of age, race or sex, or due to FEA retaliation. He failed to meet this burden.

8. Complainant has the burden to show that respondent violated §111.322(2), Stats., with regard to the memo dated April 18, 1997 and/or the letters dated June 4, 1997, and July 11, 1997. He failed to meet this burden.

OPINION

I. Last Contract Issue Was Untimely Filed

Hearing issue 1a involves allegations of discrimination and retaliation for participating in activities protected under the Fair Employment Act (hereafter, FEA Retaliation) in regard to the decision that Dr. Guthrie's contract for a Teaching Position for the 1996-97 AY would be

his last (hereafter referred to as the "Last Contract Issue"). Dr. Guthrie knew as early as April 1996 that he would not receive another contract when Dr. Kim told him about the Dean's 4-year Rule. Dean Domitrz provided formal notice to Dr. Guthrie by letter dated May 10, 1996, that the Teaching-Position contract for the 1996-97 AY would be his last (hereafter referred to as the Last Contract Letter). Dr. Guthrie received the Last Contract Letter sometime prior to June 1, 1996, when he signed his last contract. (See ¶¶11, 14 & 15 FOF).

As a general rule, complaints of discrimination or retaliation under the Fair Employment Act (FEA) must be filed no more than 300 days after the alleged discrimination occurred, as noted in §111.39(1), Stats. The Commission received Dr. Guthrie's complaint on October 20, 1997, which was about 16 months after he received the Last Contract Letter. Dr. Guthrie raised several arguments why this allegation should not be dismissed. (See pp. 1-5 of his final post-hearing brief.)

A. Respondent Did Not Waive the Timeliness Objection

Dr. Guthrie contends respondent waived the timeliness objection by failing to raise it in an answer to the complaint. He cites §PC 3.05, Wis. Adm. Code, as support for this argument. The cited code section, however, pertains to appeals filed under §230.44(1), Stats., and not to discrimination complaints.[22] Answers to complaints are mentioned in §PC 2.04, Wis. Adm. Code, which does not control where, as here, the complainant chose to have the EEOC conduct the investigation of his complaint.

Dr. Guthrie also argues that respondent raised the timeliness issue too late because it was raised for the first time at hearing. The Commission issued a recent ruling which held that a timeliness objection was waived by respondent's failure to raise it until the hearing, *Jensen v. DPI*, 99-0070-PC, 2/11/00. *Jensen* involved an appeal of the Department of Public Instruction's (DPI) decision to hire someone other than Ms. Jensen for a vacant position. Generally speaking, the time limit for filing an appeal is 30 days, pursuant to §230.44(3), Stats. The Commission's discussion of the timeliness issue in *Jensen* is shown below in relevant part:

[22] The statutory reference was added for clarification.

> The appellant filed her appeal with the Commission on July 16, 1999. The letter of appeal read as follows:
>
> > In January of this year, I applied for a Teacher Assistant position . I was interviewed in March and later congratulated by a member of the team who assured me I was definitely a contender for the job. I have since been informed a person who lives out of state was offered the position. I have not received a response from the Wisconsin School for the Deaf or DPI as to what the results of my interview were and I am concerned about why I was not chosen and why I did not receive even a letter of denial
>
> An untimely filing usually deprives the Commission of "competency" to hear an appeal. *Association of Career Executives v. Klauser*, 195 Wis. 2d 602, 608-09, n. 7, 536 N.W.2d 478 (Ct. App. 1995) Issues related to competency to proceed are in the nature of affirmative defenses and are subject to waiver (Citations omitted.) Therefore, if respondent waits too long to raise an issue of timeliness, the issue would be considered waived. The appellant has raised the issue of waiver by asking why respondent didn't raise their concern "at the very beginning of this process."
>
> While there is nothing on the face of the appeal to indicate it had been more than 30 days since appellant was notified of the personnel action, there is also nothing in appellant's letter tending to show the appeal was timely filed with the Commission The Commission concludes there was enough information in the letter of appeal to raise a question as to the timeliness of the appeal, a question respondent should have pursued. (Footnote omitted.)
>
> Respondent chose not to explore the issue of timeliness until appellant had rested her case after calling 8 witnesses during two days of hearing . Given these circumstances, the Commission concludes that the respondent has waived its objection to the competency of the Commission to hear the matter

The Commission's decision in *Jensen* (as shown by the above-noted excerpt) was rooted in concern for judicial economy – a goal that benefits the parties and the Commission. The parties share the responsibility to further this goal and recognition of this responsibility is one reason behind the precept that affirmative defenses are subject to waiver That respondent in *Jensen* allowed the hearing to continue for two days before raising the objection was viewed as a flagrant disregard of the concept of judicial economy Simply stated, those two days of

hearing would not have been conducted if respondent had raised the issue in a timely manner and had prevailed on the motion.

The circumstances of Dr. Guthrie's case differ from those in the *Jensen* case in several ways. First, Dr. Guthrie noted in his complaint that he did not have reason to suspect discrimination until 1997,[23] and, accordingly, there was insufficient information in the complaint to raise a question of timeliness. Second, the respondent here conducted discovery (unlike the respondent in *Jensen*). Two interrogatories specifically addressed the timeliness issue and Dr. Guthrie's response reinforced what he claimed in the complaint (Exh. R-199, Interrogatories 8 and 18).[24] His response to a different line of questions (for example, Exh. R-199, Interrogatory 11)[25] disclosed that he told Dr. Kim in April and May 1996, that respondent was discriminating against him in regard to the hire of Dr. Agesa (see ¶¶10 and 13, FOF). Under these circumstances, the Commission cannot conclude that respondent had sufficient information to raise the issue prior to hearing.

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[23] Dr. Guthrie did not provide a date in his complaint that he first suspected retaliation. Regarding his claims of discrimination, he wrote:

> On January 27, 1997, I learned that I would not be considered further for the tenure track position. On March 21, 1997, I made written inquiry to Respondent's Affirmative Action officer about procedures for filing a complaint of discrimination since one of the reasons I was given for being denied the tenure-track position was that Respondent was "looking for someone younger." My requests to be re-hired for my current Academic Staff position and for any other Academic Staff vacancies were subsequently denied. It was not until April 18, 1997, and again June 4, 1997 (sic), that I had reason to believe that my gender and race were also factors in Respondent's decision to discharge me from an Academic Staff position and in its decision not to consider me for further openings.

[24] Respondent asked Dr. Guthrie in Interrogatory #8, to disclose who made the statement (alleged in the complaint) that respondent was looking for someone younger, as well as when it was made. Dr. Guthrie responded that Dr. Kim made the statement on January 27, 1997. Interrogatory #18 asked Dr. Guthrie to provide information about the statement in his complaint that it was not until April 18 and June 4, 1997, that he had reason to believe that discrimination occurred. Dr. Guthrie responded by referencing Dr. Kim's correspondence of April 18 and June 4, 1997 (see ¶¶36 and 45, FOF).

[25] Respondent asked Dr. Guthrie in Interrogatory #11, to disclose whether any of respondent's employes told him he would not be hired for a fixed-term academic staff position between April 1996, and September 30, 1997. In response, Dr. Guthrie related the conversations he had with Dr. Kim where he told Dr. Kim that he believed respondent was discriminating against him (see ¶¶10 and 13, FOF).

A third difference between the circumstances in *Jensen* and this case is that even if the Last Contract Issue (hearing issue 1a) had been dismissed for untimely filing prior to hearing, a hearing would have been held anyway. Also, the hearing on the remaining issues likely would have included testimony relating to the dismissed hearing issue as background information. In short, there would have been no significant savings in terms of hearing preparation or hearing duration.

Dr. Guthrie advanced several alternative arguments for consideration if the Commission found that respondent did not waive the timeliness objection. His main arguments are discussed below.

B. Other Timeliness Arguments Raised by Complainant

Dr Guthrie next contends that the Last Contract Issue (hearing issue 1a) should be deemed timely filed as part of a continuing violation. He contends that the 300-day period did not commence until the last alleged act of discrimination, which he views as hiring for the Teaching-Position contracts for the 1997-98 AY The Commission rejects this argument.

The continuing violation doctrine, as explained in *Tafelski v. UW*, 95-0127-PC-ER, 3/22/96, allows an employee under some circumstances to obtain relief for an otherwise time-barred act by linking the time-barred act with an action that occurred within the limitations period. This doctrine, however, is inapplicable to discrete, isolated and completed actions with a degree of permanence which should trigger a complainant's awareness of and duty to assert his/her rights. The Commission previously has held that the continuing violations doctrine is inapplicable to transfer, promotion and termination decisions. For example, see *Tafelski*, Id., *McDonald v. UW-Madison*, 94-0159-PC-ER, 8/5/96; *Schultz v. DOC*, 96-0122-PC-ER, 4/2/97 and *Lawler v. UW-Madison*, 99-0131-PC-ER, 3/10/00.

Respondent's decision that the Teaching Position Contract for the 1996-97 AY would be Dr. Guthrie's last is akin to transfer, promotion and termination decisions. This was a separate, discrete event with a degree of permanence sufficient to trigger Dr. Guthrie's duty to assert his rights within 300 days after he received the Last Contract Letter. Dr. Guthrie did not seek clarification until May 21, 1997 (¶29, FOF), a little more than a year after he received notice of the Dean's decision. Accordingly, the limitation period expired prior to his

seeking clarification. Any confusion that may have existed thereafter regarding his "right" to apply for a Teaching-Position contract for the 1997-98 AY (for example, see ¶¶30 and 41, FOF) arose after the limitation period expired and cannot be said to be a contributing factor to the late filing of this allegation.

Dr. Guthrie also contends that the 300-day limitation period should not commence until he discovered the discriminatory practices. He claims it was not until the spring and summer of 1997 after he received Dr. Kim's memos (see ¶¶36, 45 and 47, FOF), that he knew the discrimination "was actually due to gender and race." (See final brief, pp. 4-5.) Late discovery of a discriminatory motive could toll the limitations period under a theory of fraudulent concealment (for example, where respondent takes active steps to prevent an employe from suing in time). Late discovery also could toll the limitations period under a theory of equitable tolling (for example, where a complainant, *despite all due diligence*, is unable to obtain vital information bearing on the existence of his claim). The Commission has recognized both theories as a basis for tolling the statute of limitations (see *Tafelski*, Id.) but rejects application of those theories in this case.

Under a theory of equitable tolling, a "reasonably prudent" standard is used to determine whether the limitation period should be tolled. The "reasonably prudent" standard requires a complainant to file a claim when he or she knows or *should have reasonably known* of the violation. (*Sheskey v. Wis. Pers. Comm. & DER*, Dane County Circuit Court, 98-CV-2196, 4/27/99).

Dr Guthrie knew or should have reasonably known of the violation on or about June 1, 1996, when he received the Last Contract Letter. As early as April 1996 when respondent wanted to hire Dr. Agesa, he already suspected respondent was discriminating against him in regard to contracts for Teaching Positions (see ¶¶10 and 13, FOF). He expressed his suspicions in April and May 1996, just days prior to the date of the Last Contract Letter. These circumstances provide a person with a reasonably prudent regard for his/her rights ample reason to have made inquiries in sufficient time to file a complaint within 300 days after receiving notice of the decision.

Dr. Guthrie contends the fraudulent concealment theory is applicable because Ms. Moss, respondent's AA Officer, informed him that the 300 days was measured from the "last

incident of which you complain." Ms. Moss' letter dated April 4, 1997 (¶32, FOF) did include the referenced language in connection with the EEOC guidelines and respondent's policy. This argument fails, however, because the limitation period already had expired prior to Dr. Guthrie's receipt of this letter. Under these circumstances the content of the letter could not be said to be a contributing factor to the late filing of this allegation.

II. The Tenure-Track Positions

Dr. Guthrie contends respondent discriminated against him on the basis of age, race or sex, or FEA Retaliation in regard to respondent's decision to hire other individuals for the two tenure-track positions. The legal analysis followed in assessing these claims is described below.

Under the FEA, the initial burden of proof is on the complainant to show a prima facie case of discrimination. If complainant meets this burden, the employer then has the burden of articulating a non-discriminatory reason for the actions taken which the complainant, in turn, may attempt to show was a pretext for discrimination. *McDonnell-Douglas v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973), *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 25 FEP Cases 113 (1981).

A. Prima Facie Case Analysis: Age, Race and Sex Discrimination

A prima facie case of discrimination in a hiring case typically is established if the record shows that: 1) complainant is a member of a group protected under the Fair Employment Act (FEA), 2) he applied for and was qualified for an available position and 3) was rejected under circumstances which give rise to an inference of unlawful discrimination. A prima facie case of discrimination was established for the Banking Position but not for the Labor Position.

Complainant is protected under the FEA by virtue of his age, race and sex. He applied for both tenure-track positions. That he was qualified for the Banking Position is established by the fact that he made the initial cut for further consideration (see ¶20, FOF). That he was not qualified for the Labor Position is established by the fact that he did not meet the requirement of having a specialization in Labor This requirement was stated in the job announcement (see ¶16, FOF) and it was Dr. Guthrie's friend, Dr. Parks, who made the determination

that Dr. Guthrie did not meet the requirement and would not be given further consideration (see ¶21, FOF.)

Dr. Guthrie also argued that discrimination in regard to the Labor Position occurred when respondent decided to create a vacancy in the labor field. He contends respondent made this decision not based upon course-enrollment needs but on respondent's desire to increase chances for a female or minority hire. A prima facie case for this allegation would not require complainant to show he was qualified for the position, but would require sufficient facts to establish an inference of discrimination. Dr. Schweigert testified that as chair of the search and screen committee he proposed recruiting for a Labor Position for two reasons. One reason was to increase representation of females and minorities in the applicant pool. The other reason was to increase student interest in the labor field. He testified that the current instructor had "killed" the popularity of the labor class and he felt a new instructor could help to reverse that trend.

A desire to expand the diversity of an applicant pool is insufficient to raise an inference of discrimination especially where, as here, the decision was made knowing there was no obligation to hire a female or minority candidate. Dr. Schweigert and complainant's friend, Dr Parks, testified that when an affirmative action officer met with them, the officer encouraged a diverse applicant pool. Dr. Parks also recalled the affirmative action officer said they should give serious consideration to a female hire. Both Drs. Schweigert and Parks testified that they understood there was no directive to hire a female or minority candidate.

Dr. Guthrie attempted to raise an inference of discrimination by attacking the other reason Dr Schweigert had for recommending the filling of a Labor Position. Specifically, Dr. Guthrie contends Dr Snow's testimony established that the real reason enrollments were down in labor classes was because respondent changed the undergraduate degree requirements by eliminating the need to take an economics class. Dr. Snow testified that there had been a requirement for students seeking a bachelor's degree to take a 3-credit elective course in economics. She said the most popular courses had been public finance, labor and money and banking. If Dr. Snow's theory accounted for the entire problem regarding decreased enrollments in labor classes, then you would not expect current enrollment demand to justify hiring

for the Banking Position either.[26] Analysis of the Labor Position ends here because Dr Guthrie failed to establish a prima facie case of discrimination.

The analysis of the Banking Position continues to determine whether the third element of the prima facie case (inference of discrimination) was established. The person hired for the Banking Position was William Blankenau who is of the same race and sex as Dr Guthrie. Accordingly an inference of race or sex discrimination is not present with regard to this hire and these claims of discrimination fail. Dr. Blankenau, however, was under the age of 40 and, accordingly, an inference of age discrimination was established.

B. Prima Facie Case Analysis: FEA Retaliation

Remaining for consideration is Dr. Guthrie's claim that respondent did not hire him for the tenure-track positions due to his participation in a protected activity. A prima facie case of FEA Retaliation may be established in a hiring case if the record shows that: 1) complainant engaged in a protected activity, 2) the employer subsequently did not hire complainant in a position for which complainant had applied and 3) a causal link exists between complainant's participation in a protected activity and respondent's decision not to hire complainant. A prima facie case of FEA Retaliation was established for the Banking Position but not for the Labor Position.

Dr. Guthrie participated in an activity protected under the FEA in April 1996 and on May 8, 1996, when he told Dr. Kim that respondent was discriminating against him in regard to the hiring of Dr. Agesa (see ¶¶10 and 13, FOF). Thereafter, on January 27, 1997, respondent informed Dr. Guthrie that he would not be hired for either tenure-track position (see ¶23, FOF). A causal link does not exist between Dr. Guthrie's protected activities and respondent's decision not to hire him for the Labor Position because it was Dr Parks (his friend) who made the decision that Dr. Guthrie did not meet the requirements to qualify for the Labor Position. Dr. Guthrie never alleged that Dr. Parks retaliated against him and the record does not support

[26] Changes were made to the content of this paragraph to clarify the testimony of record. Complainant contends the conclusion that the banking class would have suffered a similar fate (lower enrollments) as the labor class is "unwarranted" (5/15/00 brief, pp. 15-16). His argument is an improper attempt to provide testimony that was not given at the hearing.

such a conclusion. Accordingly, Dr Guthrie's claim of FEA Retaliation with respect to the Labor Position fails.

Analysis of the Banking Position continues to determine if the third element of the prima facie case (causal connection) was established. Dr Kim was aware of complainant's protected activity and he played a part in determining that Dr. Guthrie would not be hired for the Banking Position which is sufficient to raise an inference of retaliation. It is true that Dr Kim encouraged Dr Guthrie to apply for the tenure-track positions and provided Dr Guthrie with the opportunity to teach relevant courses. However, such actions on Dr Kim's part were initiated prior to Dr Guthrie's protected activity and, accordingly, are insufficient to dispel the inference of retaliation.

C. Respondent's Legitimate Reason and Pretext Arguments

The only claims surviving the foregoing prima facie analyses are whether respondent's decision to hire someone other than Dr Guthrie for the Banking Position constituted age discrimination or FEA Retaliation. The burden shifts to respondent to articulate a legitimate reason for hiring Dr Blankenau rather than complainant. Respondent met this burden by stating that Dr Blankenau was more qualified for the Banking Position than complainant.

The most striking argument of pretext is Dr Guthrie's allegation that at the meeting on January 27, 1997 (see ¶23, FOF) Dr Kim said one reason Dr Guthrie was not hired for the Banking Position was "We were looking for someone younger." Dr Kim denied making the statement. Dr Schweigert who also was present could neither affirm Dr Guthrie's nor Dr Kim's version of events. This factual dispute is difficult to resolve. On the one hand, Dr Kim ardently denied making the statement. On the other hand, there was the testimony of Drs. Snow and Parks who testified that Dr. Guthrie told them about the statement. Dr Snow thought he told her about it on the same day as Dr Kim allegedly made the statement. As long-time acquaintances of Dr Guthrie, both Drs. Snow and Parks said they would not suspect that he concocted the story

Dr. Guthrie has the burden of persuasion to establish that Dr Kim said they were looking for someone younger.[27] Three factors ultimately resulted in a conclusion that Dr Kim did not make the statement. First, Dr. Kim's demeanor as a witness on this particular dispute was persuasive. He conveyed genuine indignity that Dr. Guthrie would suggest he made such a statement. Second, Dr. Parks, complainant's friend, was part of the search and screen committee. She testified that candidate's ages were not a hiring factor except "very indirectly" due to the desire to "build a cadre of researchers who could work together." Her perceived indirect link to age was that candidates whose applications reflected recent research were "younger people." Yet, as discussed later in this section, Dr. Guthrie claims he had ongoing research, which demonstrates that the requirement for ongoing research *per se* would not necessarily work to his disadvantage based on his age.

There is a third reason for finding that Dr Kim did not say they were looking for a younger person as alleged. The record strongly suggests that Dr Guthrie would have reported such a blatant statement of discrimination to someone above Dr Kim's level. The record shows Dr. Guthrie was not shy in approaching the Chancellor or the Dean to seek redress of perceived wrongs, yet he never informed either of them that such a statement had been made. Dr. Guthrie also approached Mr. Schauer for assistance regarding continued employment for the 1997-98 AY. It would have been natural for Dr Guthrie to provide background information to Mr. Schauer including Dr. Kim's alleged statement that age was a reason complainant was not hired for the Banking Position. Yet the record does not indicate that Dr. Guthrie did so.[28] It also is noteworthy that even when discrimination was raised in the grievance, Dr. Guthrie did not mention age discrimination.

Dr. Guthrie also advanced as pretext his disagreement with the conclusion reached by the search and screen committee that he had no current research. The fact that he failed to dis-

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[27] Portions of this paragraph were changed to clarify the Commission's rationale.

[28] Complainant contends (5/15/00 brief p.16) that he did tell Dr. Schauer that Dr. Kim said he was looking for someone younger and this is why Dr. Schauer mentioned age discrimination in Exh. C-33. Complainant did not provide this information at hearing. He testified that he discussed discrimination with Dr. Schauer but provided no specifics of what was said (hearing tape 4, approx. counter @ 865). Nor is it an inescapable conclusion that Dr. Schauer's mention of age discrimination in Exh. C-33 was based upon complainant telling Dr. Schauer that Dr. Kim said they were looking for someone younger. It is just as likely that they talked about the pension plan (see footnote to ¶44 FOF).

close current research as part of his application materials is supported by the testimony of his friend, Dr. Parks. Dr. Parks had access to his application materials and she also concluded that the "biggest problem" was Dr. Guthrie's lack of current research. Dr. Guthrie attempts to circumvent his own responsibility for any misunderstanding created by his failure to disclose his research by contending that respondent should have gone outside his application materials to determine if other existing documents (such as Exh. C-58) showed that he had current research. Dr. Schweigert testified that the committee relied on the application materials and that it reasonably expected candidates to state their credentials in their applications. His statement is consistent with a prior Commission decision, which found that an employer did not abuse its discretion when it failed to search existing employment records and, instead, relied solely on application materials submitted by the employee. *Wedekind v. DOC*, 98-0091-PC, 2/24/99. Furthermore, it was no secret that respondent was looking for someone with ongoing research. The job announcement (see ¶16, FOF) included the following statement: "The institution is particularly interested in individuals who combine a strong commitment to undergraduate *teaching with an ongoing research program.*" Dr. Guthrie should have known to include information about current research in his application.

Dr. Guthrie suggests it was unreasonable for respondent to rely solely on his application materials when other candidates were given an in-person interview at the convention in New Orleans (see ¶22, FOF). This argument is another attempt to shift responsibility to respondent instead of himself for failing to provide complete information in his application. Without the committee knowing that he failed to disclose all his qualifications in his application materials, there was no reason for the committee to believe that a need existed to interview him as a means for him to complete his application materials. There was no evidence that the applications for candidates interviewed in New Orleans failed to demonstrate the research requirement stated in the job announcement. In short, the committee reviewed and relied on Dr. Guthrie's application materials as was done for every other candidate.

III. There was no Violation of §111.322(2), Stats.

Dr Guthrie contends respondent violated §111.322(2), Stats., in regard to a memo dated April 18, 1997 (¶36, FOF) and letters dated June 4, 1997 (¶45, FOF) and July 11, 1997 (¶47, FOF). The text of the cited statute is shown below (emphasis added).

> [I]t is an act of employment discrimination to do any of the following . . .
>
> (2) **To print or circulate** or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which implies or expresses any limitation, specification or discrimination with respect to an individual or any intent to make such limitation, specification or discrimination because of any basis enumerated in §111.321

The threshold question is whether the memo and letters meet the statutory requirement of "to print or circulate." In *Racine Unified School Dist. V LIRC*, 164 Wis.2d 567, 590-591, 476 N.W 2d 707 (Ct. App. 1991), the Court held that the "print or circulate" language in §111.322(2), Stats., is ambiguous. The Court said the offending conduct under §111.322(2), Stats., is not the *adoption* of a discriminatory policy but, rather, the *publication or circulation* of such policy The Court further stated that a violation of the statute "requires an affirmative act of volition by the employer in publishing or circulating its discriminatory statements," *Id.* By using the term "publish" for the term "print," the Court in effect interpreted the "print" provision in the sense of "to publish in print."[29]

The question then is whether a memo or letter from Dr Kim to Dr Guthrie meets the "publish in print" standard adopted by the Court in the *Racine Unified School District* case. The Commission addressed a similar question in *Williams v. DOC*, 97-0086-PC-ER (11/3/99), where Mr Williams contended that a last-chance warning in respondent's letter to him violated §111.322(2), Stats. In *Williams*, the Commission held that a letter to an employee is not a publication under the *Racine Unified School District* case. The memo and letters to Dr. Guthrie were not publications either

[29] The final sentence was deleted to avoid confusion. See *Williams*, Id.

A question remains as to whether the memo and letters were circulated in violation of the statute. In *Williams*, the Commission indicated that for a thing to be circulated, a relatively wide quantitative degree of distribution is required. The letter in *Williams* was copied to nine individuals who all had a "need to know" – i.e., primarily individuals in the supervisory chain over complainant or involved in personnel administration. The Commission concluded that the circulation under these circumstances did not violate §111.322(2), Stats.

In terms of whether the memo and letters were "circulated" in Dr. Guthrie's case, the circumstances here are weaker than in *Williams*. Dr. Kim sent his memo of April 4, 1997, only to Dr Guthrie and further dissemination of the memo was due to Dr. Guthrie's sharing copies with Chancellor Greenhill and Mr. Schauer As for Dr. Kim's letter to Dr Guthrie dated June 4, 1997, Dr. Kim sent copies to the Chancellor, the Dean and Provost Schallenkamp – all of whom were in the supervisory chain over Dr. Guthrie. The final letter dated July 11, 1997, was sent from Dr Kim to Dr Guthrie and to no one else. In summary, the memo and letters were neither printed nor circulated, within the meaning of §111.322(2), Stats.

IV Teaching Position Contracts for the 1997-98 AY

Dr. Guthrie contends respondent's decision to hire others for vacant Teaching Positions between March 2 and September 1997 constitutes discrimination on the basis of age, race or sex; or FEA Retaliation. The legal analysis for assessing these claims is the same as described in the prior section.

A. Prima Facie Case Analysis: Age, Race and Sex Discrimination

Respondent hired Dr. Dunbar for one of the vacant Teaching Positions (see ¶34, FOF). Dr. Dunbar is a white male and is younger than Dr. Guthrie (see ¶10, FOF). Complainant failed to establish a prima facie case of sex and race discrimination in regard to this hire because Dr. Dunbar is of the same sex and race as Dr. Guthrie. A prima facie case of age discrimination was established. Dr. Guthrie was qualified for the position as demonstrated by the high marks he received from colleagues (see ¶28, FOF). An inference of age discrimination was raised because Mr. Dunbar was about 30 years old at the time of this hire.

Respondent made two hiring decisions in relation to the second vacant Teaching Position. Respondent first wanted to offer the position to Dr Arkes (see ¶35, FOF), a male whose age and race are unknown (see ¶27, FOF). A prima facie case was not established in regard to this hire. Dr. Arkes is of the same sex as Dr. Guthrie. It was Dr. Guthrie's burden of proof to establish Dr Arkes' race and age and, accordingly, the lack of evidence defeats this claim.

After a problem surfaced with respondent's wish to hire Dr. Arkes and his later unavailability, respondent offered the second vacant Teaching Position to Dr. Hallinan (see ¶48, FOF), a white female over the age of 40 (see ¶27, FOF). A prima facie case of sex discrimination was established in regard to this hire. A prima facie case of age and race discrimination was not established.

There also was a ½ time Teaching Position filled by Dr. Atemie-Obuofribo, a male who is of a different race than complainant, but whose age is not in the record. A prima facie case of race was established in regard to this hire. A prima facie case of sex and age were not established.[30]

B. <u>Prima Facie Case Analysis: FEA Retaliation</u>[31]

The next question is whether Dr. Guthrie established a prima facie case of FEA Retaliation in regard to the above-noted hires. Drs. Dunabar and Arkes were hired in April 1997 The complainant engaged in three protected activities prior to respondent's decision to hire Drs. Dunbar and Arkes to fill vacant Teaching Positions. One activity occurred on March 21, 1997, when complainant wrote to the AA Office (see ¶31, FOF). Neither Dr Kim nor Dean Domitz was aware of this activity. The other protected activities occurred in April and on May 8, 1996, when complainant told Dr. Kim that respondent was discriminating against him in regard to the hiring of Dr. Agesa (see ¶¶10 and 13, FOF). Dr Kim was aware of these activities but Dean Domitrz was not.

[30] The analysis was changed in recognition that Dr. Atemie-Obuofribo is a male.

[31] Changes were made to this section. One change was to emphasize the dates upon which the hiring decisions were made. Another change was to conclude that prima facie cases of FEA retaliation were made for all hiring transactions. Additional discussion was added to address specific objections complainant made to the PDO.

Complainant contends that Dean Domitrz also was aware of his participation in protected activities in April and on May 8, 1996 (5/15/00 brief, pp. 3-4). His contention is unsupported by the record. Complainant testified as shown below (hearing tape #1, approx. counter @ 1480-2077):

> In the hiring, as I understand it, in the hiring process that were the final five candidates were female, there was in that group a black female by the name of Jacqueline Agesa . And in the second semester of the '95-6 academic year which would be somewhere between January and May of 1996, I was told and had reason to believe that I would be hired as 100% academic staff for the coming year . .
>
> I was told by Professor Kim sometime during that spring semester that Dean Domitrz had requested him in that list of 5 candidates for the tenure-track position, 5 female candidates, that Agesa was originally ranked #5 on that list. And Professor Kim told me that the Dean had requested, Dean Domitrz had requested that her name be moved to #3 on that list and I understood him to say that the Dean's reason was because it would look good. I do not say that's an exact quote but that was a similar statement or just a statement that it would look good or it would look better or something. And that combined with that she was a black female made some sense that he would say that. I believe that was in March of '96. I can't swear to it. I can't confirm it but I think it was in March. I understood from Professor Kim that he would approach the problem by letting the matter lie for awhile to see what happened and that is maybe Agesa would get another job. Maybe the problem would go away
>
> Sometime in April of that semester Professor Kim told me that Agesa would be hired as full time academic staff and I would be reduced to 50% academic staff appointment as would be Ronald Dunbar, another current academic staff He is a white male, I would say approximately 30 years old. I'm not sure but approximately
>
> I remember a discussion in Professor Kim's office about this situation and I indicated to Professor Kim that I thought this was blatant discrimination. Dr Kim indicated to me that he agreed but there was nothing that could be done about it, but he would try .
>
> I was also informed that Dr Kim was going to do this on recommendation of the departmental advisory committee . Dr Kim told me that the advisory committee had met and they had advised him, this is the advisory committee and I assume that they advise him and Kim makes the decision, they advised him that he should reduce Dunbar and me to 50% in order to make room for Agesa.

> And as I've stated, I protested this decision as blatant, I believe I might have even used stronger language but blatant discrimination and Dr. Kim agreed with me. After that there was another meeting - I believe this meeting was May 8th of that semester. Dr. Kim told me that he had talked to the Dean and had gotten the Dean to reduce Agesa's time to 50%, consequently Dunbar and I then would be hired on ¾ time positions [S]oon after this May 8th meeting I left town. When I got back, which would be I'd say I was away at least 2 weeks . . I came back and I received in the mail the contract for the following year from Chancellor Greenhill's office which indicated that I had 100% appointment for the coming year. And in a separate letter, in a separate envelope I received the letter which is document C-8. So I do not have knowledge of what happened during that period. In fact, while we were away on vacation we sort of joked with one another, Professor Snow and I, well - wonder what's happened? What's been going on? There was a lot of controversy and everything going on so we were speculating in that time period but I didn't have any further information because of that gap of time being on vacation.

Dr. Kim and Dean Domitrz appeared as witnesses at hearing. Neither was asked about the content of their conversations regarding the Agesa hire. They also were not asked whether Dr Kim told Dean Domitrz about complainant's opinion that discrimination was occurring. In short, the record does not support complainant's contention that Dean Domitrz knew of complainant's participation in protected activities in April and on May 8, 1996.

The next question is whether Dr. Kim's knowledge of complainant's participation in protected activities in April and on May 8, 1996, is sufficient to establish the causal link between complainant's participation in the protected activity and respondent's decision to hire Drs. Dunbar and Arkes in Teaching Positions. Dr Kim played a significant role in these hiring decisions, which is sufficient to establish a prima facie case in regard to the decisions to hire Drs. Dunbar and Arkes.

The remaining hiring decisions (Drs. Hallinan and Atemie-Obuofribo) were made after July 11, 1997 Dr Guthrie participated in additional protected activities by the time of these hires. Specifically, he wrote to the Chancellor on April 14, 1997, asking for information about how to pursue a discrimination grievance and/or complaint.[32] He wrote to the Chancellor again on April 28, 1997, objecting to statements, which he viewed as evidence that respondent

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[32] This sentence was added to conform to the change in ¶42 FOF, which reversed the examiner's ruling on the admissibility of Exh. C-27.

discriminated in its hiring policies (see ¶42, FOF). He engaged in additional protected activities through Mr Schauer from April 9-20, 1997 (see ¶¶37-39, FOF). The grievance filed by Dr. Guthrie on June 2, 1997, mentioned FEA Retaliation and was a protected activity, as was the amendment filed shortly thereafter (see ¶44, FOF). Dr Kim and Dean Domitrz were aware of all these protected activities. Chancellor Greenhill was unaware of the grievance but was aware of the remaining protected activities. The decision-makers' knowledge of Dr Guthrie's participation in these protected activities and the closeness in time between his participation and the later hiring decisions (Drs. Hallinan and Atemie-Obuofribo) are sufficient to establish the "causal link" required in the third element of the prima facie case of FEA Retaliation.

C. Respondent's Legitimate Reason and Pretext Arguments

The burden shifts to respondent to articulate a legitimate reason for not hiring Dr Guthrie for one of the vacant Teaching Positions. Respondent met this burden by saying he could not be considered for the positions because of the Dean's 4-year Rule.

Dr Guthrie offered pretext arguments specific to Dr Dunbar's hire. First, he noted that the hiring form for Dr Dunbar (Exh. R-182) was signed by Dr. Kim (who did not put a date next to his signature), by the Primary College Dean on April 1, 1997, by Ms. Moss for the AA Office and by the Provost/Vice Chancellor on April 2, 1997, and by the Chancellor on April 4, 1997 Complainant contends it is extremely unusual to obtain all required signatures in 3 days. Complainant ignores in this contention the fact that one of his own contracts was signed in 3 working days (Exh. R-111). Furthermore, the semester break had just ended and it would have been likely that all the signing individuals would be available for signatures. Complainant also contends contracts usually are issued in May each year, not April. The record supports a conclusion that May is the usual but not the only month when contracts are issued. The evidence recited in this paragraph is insufficient to establish that respondent's reason for hiring Dr. Dunbar instead of complainant was based on complainant's age.

Dr. Guthrie offers, as evidence of pretext, the following observations as argument that the 4-year Rule either did not exist or was invalid. The page references are to Dr. Guthrie's brief dated November 3, 1999.

1. Dr. Kim's memos of April 18, 1997 (see ¶36, FOF) and June 4, 1997 (see ¶45, FOF) contained no mention of the 4-year Rule as a reason for not hiring Dr Guthrie. (Brief, pp. 17)
2. Neither Dr. Kim nor the Dean mentioned the 4-year Rule at the grievance meeting. (Brief, p. 17)
3. It is inconsistent for Dr. Kim to say Dr Guthrie could apply for the 1997-98 AY Teaching-Position contracts if he truly were ineligible under a 4-year Rule. (Brief, p. 26)
4. The Dean's 4-year Rule conflicts with Ch. 3.01 of UWW's Academic Staff Personnel Policies and Procedures. (Brief, pp. 13-15)
5. The Dean's explanation for the 4-year Rule does not make sense. (Brief, pp. 15-16)
6. Dr. Clements gave an entirely different reason for the 4-year Rule. (Brief, pp. 16-17)
7. The Dean lacked authority under §36.09(4m), Stats., to implement a 4-year Rule without involving the incumbents in the Teaching Positions. (Brief, pp. 12-15)
8. Drs. Snow and Parks never heard of the 4-year Rule until it was applied to Dr. Guthrie. (Brief, p. 18)
9. Dean Domitrz testified that he presented the 4-year Rule to the Administrative Council for a vote and this action would be reflected in the meeting minutes yet the minutes record no such action. (Brief, p. 15)

Some of the reasons listed above do not suggest pretext, while others do. Each item is addressed in the following paragraphs.[33]

Dr Guthrie first contends that if the 4-year Rule existed, then Dr. Kim would have mentioned it in his memos of April 18 and June 4, 1997 He argues that the April 18th memo was a reply to his memo asking for reasons why he was not rehired in a Teaching Position. Dr Kim's memo, however, did not attempt to provide the requested reasons. That this argument is disingenuous, at best, is shown by the fact that Dr. Guthrie included, as part of his grievance, Dr Kim's failure to provide the requested reasons (Exh. C-47, p. 2). Dr. Kim's June 4th memo is a response to the grievance; not an intended list of reasons Dr. Guthrie was not rehired. Dr. Guthrie next points out that the 4-year Rule was not discussed at the grievance meeting (¶50, FOF). This fact does not raise a suggestion of pretext because this was Dr.

[33] This portion of the discussion section was reordered so the 9 arguments of pretext would be discussed in the same order as listed in the introductory paragraph.

Guthrie's opportunity to provide information, not vice-versa. Furthermore, these two arguments ignore the fact that Dr Kim already had provided the 4-year rule as a reason for his non-renewal back in April 1996 (see ¶11, FOF).[34]

Dr Guthrie's third argument of pretext is based on the perceived inconsistency between saying that complainant was free to apply for further Teaching Positions even though he was barred from receiving further Teaching Position contracts under the 4-year rule. Dr Kim's explanation was that the Dean and Chancellor viewed Dr. Guthrie's right to apply for a position as a separate issue from his eligibility for hire under the 4-year Rule. The Commission cannot say that this approach was incorrect from a legal standpoint because respondent might have been subject to additional allegations of discrimination if respondent had not allowed Dr Guthrie to apply for the positions.[35]

Dr Guthrie incorrectly contends that the 4-year Rule conflicts with Ch. 3.01 of UWW's Academic Staff Personnel Policies and Procedures. The language he relies upon (Exh. C-91, p. 2) is as follows: "[A]cademic staff may be reappointed without limit as fixed term academic staff " The word "may" means the decision is discretionary. This interpretation is consistent with the Chancellor's testimony and is supported by UWS 10.03(1), Wis. Adm. Code (Exh. C-89), which provides that fixed term appointments "shall be for a fixed term to be specified in the letter of appointment, and renewable solely at the option of the employing institution, and carry no expectation of reemployment beyond their stated term, regardless of how many times renewed."

Dr. Guthrie also questions the logic of the reasons for the 4-year Rule as advanced by Dean Domitrz and the contradictory reasons for the rule offered by Dr Clements. These are valid points. Dean Domitrz said the reason for the 4-year Rule was to increase the number of PhDs on staff. Yet he testified that the rule applied equally to incumbents in Teaching Positions whether they had a PhD or a lesser degree. Furthermore, the rule was applied for the first time against complainant who has a PhD while some of the individuals who were grandfathered had less than a PhD.[36] Dr Guthrie also is correct in his assertion that Dr Clements'

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[34] Changes were made to this paragraph to clarify the decision rationale.
[35] The wording of this paragraph was changed for clarity
[36] This sentence was changed for clarification.

recollection of the reasons given by the Dean for the 4-year Rule differed from the reasons given by the Dean.

Dr Guthrie seventh item of pretext is based on his argument that the 4-year Rule is invalid based on his perception that it is inconsistent with §36.09(4m), Stats., the text of which is shown below (with the same emphasis added as shown in Dr. Guthrie's brief, p. 12):

> ACADEMIC STAFF. The academic staff members of each institution, subject to the responsibilities and powers of the board, the president and the chancellor and faculty of the institution, shall be active participants in the immediate governance of and policy development for the institution. The academic staff members have the primary responsibility for the formulation and review, and **shall be represented in the development, of all policies and procedures concerning academic staff members, including academic staff personnel matters.** The academic staff members of each institution shall have the right to organize themselves in a manner they determine and to select their representatives to participate in institutional governance.

This argument has some persuasive power. The UWW by-laws for academic staff (Exh. C-88) specifically provide for a standing committee on job security and the 4-year Rule certainly presents a job-security issue. This suggests that the Dean would not have had the power to enact such a rule without discussing it with the standing committee.

Regarding complainant's eighth argument of pretext, it would not be surprising that Drs. Parks and Snow had not heard of the 4-year Rule until Dr. Kim's discussion with Dr. Guthrie in April 1996 (see ¶11, FOF). Drs. Parks and Snow were not members of the Administrative Council where the rule was discussed. The rule was never reduced to writing for dissemination to staff. Simply stated, Drs. Parks and Snow had no reason to be aware of the rule until it was applied for the first time against Dr. Guthrie.

Dr. Guthrie's final argument of pretext is based on the fact that he established at hearing that contrary to Dean Domitrz' testimony, the 4-year Rule was not noted in minutes for the Administrative Council.[37] It could be, as respondent's witnesses later suggested, that the rule

[37] Complainant contended in his objections to the PDO (5/15/00 brief, p. 4) that "undue bias against complainant here is exemplified by the omission of mention of Domitrz's lie concerning the publication of 'the 4-year rule' in the minutes of the Administrative Council." The topic was discussed in the PDO as retained in this decision.

was discussed but the discussion was not included in the minutes due to the "fault" or discretion of the person responsible for taking notes for the minutes of the particular meeting in question. It seems unlikely, however, that a discussion of such importance as a job-security issue would be excluded from the minutes. This evidence calls into question where and when the 4-year Rule was discussed, but not the prior existence of the rule. Dr. Clements testified that she knew about the rule before 1995, and there is no reason to doubt her testimony.[38]

Dr. Guthrie raised some valid points, as noted above. The valid points are sufficient for doubting the validity of the rulemaking process and the wisdom of the rule but are insufficient to establish pretext when put in context of the entire record. It is a complainant's burden to show through the pretext portion of the analysis that his/her rejection was in fact a cover-up for a discriminatory or retaliatory reason, *McDonnell-Douglas*, 411 U.S. at 970.

The valid points raised by complainant are insufficient to overcome the strong indices in the record, which show that no discrimination or retaliation occurred. Specifically, the 4-year Rule was advanced as a reason for Dr. Guthrie's ineligibility for another Teaching-Position contract in April 1996, long before the Dean knew of Dr. Guthrie's participation in any protected activity. Furthermore, the record does not indicate that the purpose of the rule was to get rid of white males or individuals over the age of 40. In fact, white males over the age of 40 were part of the group that benefited from being grandfathered and were thereby protected from application of the new rule. Although the Dean was aware of Dr. Guthrie's race, sex and age when the 4-year Rule was mentioned in April 1996, the rule itself is neutral on its face as equally applicable to individuals regardless of their race, sex or age. A new rule by its nature will have to be invoked a first time as it was here against Dr. Guthrie. Respondent's later application of the rule has been without regard to any basis protected under the FEA. Accordingly, even if the rulemaking process or the wisdom of the rule is debatable, Dr.

[38] Complainant contends (5/15/00 brief, p. 5) that Dr. Clements' testimony "is not relevant since she was not a member of the council before September 1995 and she testified that the rule was not discussed at Administrative Council while she was chair." That she was not a member of the council when the rule allegedly was discussed is the point being made. She knew of the rule's existence even without being part of the council, which supports the conclusion that such a rule did in fact exist before it was applied to complainant.

Guthrie has failed to establish that he was not given a Teaching-Position contract for the 1997-98 AY because of his participation in a protected activity or because of his age, race or sex.

D. Direct Evidence Analysis: Sex and Race Discrimination[39]

Dr Guthrie argued that an analysis of his claim should not require application of the *McDonnell Douglas* framework because of direct evidence of discrimination. Dr Guthrie claims as direct evidence Dr Kim's memo of April 18, 1997 (see ¶36, FOF), as well as Dr Kim's letters of June 4, 1997 (see ¶45, FOF) and July 11, 1997 (see ¶47, FOF). The specific language Dr Guthrie relies upon is repeated below:

> **April 18, 1997 memo**: It is the Economic Department's goal to hire a female or minority candidate into this vacancy to increase the number of role models for our female and minority students. A higher priority will be placed on hiring an academic staff member of Hispanic or African-American descent
>
> **June 4, 1997 letter**: [A] higher priority will be placed on hiring a female or minority candidate as I stated before.
>
> **July 11, 1997 letter**: Our objective is to fill these vacancies with a female or minority candidate if that is possible.

The concept of direct evidence was discussed in *Venters v. City of Delphi*, 74 FEP Cases 1095, 1107-8 (CA 7 1997), as noted below

> As in any other discriminatory discharge case, the plaintiff can establish that she was discharged on the basis of her religion through direct or indirect means. (Citations omitted.) Evidence which in and of itself suggests that the person or persons with the power to hire, fire, promote and demote the plaintiff were animated by an illegal employment criterion amounts to direct proof of discrimination. The most obvious and compelling example would be a remark to the effect that "I won't hire you because you're a woman," or "I'm firing you because you're not a Christian." (Citations omitted.) But the evidence need not be this obvious to qualify as direct evidence. Evidence of discriminatory motives must, it is true, have some relationship with the employment decision in question; inappropriate but isolated comments that amount to no more than "stray remarks" in the workplace will not do. *Randle v. LaSalle Telecommunications, Inc.*, 876

[39] Changes were made to this section by citing, adopting and applying the *Venters* court's analysis regarding the shifting burdens of proof in cases where direct evidence exists.

> F.2d 563, 569 (7th Cir. 1989), citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775 [49 FEP Cases 954] (1989). Still, remarks and other evidence that reflect a propensity by the decisionmaker to evaluate employees based on illegal criteria will suffice as direct evidence of discrimination even if the evidence stops short of a virtual admission of illegality. (Citations omitted.) Proof of this nature supports the inference that a statutorily proscribed factor - race, sex, age, or in this case, religion - was at least a motivating factor in the adverse employment action at issue. (Citations omitted.) This in turn activates a burden on the part of the employer to demonstrate that it would have taken the same action against the plaintiff even if the proscribed criterion had played no role in its decision. (Citations omitted.) The persuasiveness of that showing will normally be for the finder of fact to assess, unless the court can say without reservation that a reasonable finder of fact would be compelled to credit the employer's case on this point. (Citations omitted.)

The cited language from at least one of Dr. Kim's letters expressed a goal to hire a minority or female candidate, which suggests a propensity by the decisionmaker to evaluate employment candidates based on illegal criteria. This is direct evidence sufficient to raise an inference that sex or race discrimination occurred. The respondent may rebut this inference by showing that it would have rejected complainant for the Teaching Positions even if this propensity to hire a female or minority candidate had not existed. Respondent has met its burden. The record is clear that although complainant was not denied the opportunity to submit applications for the Teaching Positions, his appointment to the position was not considered solely because it was an option foreclosed by the 4-year Rule.

[40]There is an aspect of this case that deserves mention even though, as a technical matter, it does not need to be addressed to resolve the hearing issues.[41] The Commission shares Dr. Guthrie's concern about Dean Domitrz' and Dr. Kim's erroneous perception that affirmative action goals may be established to achieve balance between representation of minority/female faculty and students (see ¶¶9 and 38, FOF). In its post-hearing brief (pp. 18-19), respondent agreed that the use of such a student-role-model theory was rejected by the Supreme Court in *Hazelwood School District v. United States*, 433 U.S. 299 (1997). The hearing record shows that the EEOC had concerns about the UWW's affirmative action plan during the

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[40] The prior paragraph in the PDO (comprised of one sentence) was deleted here as duplicating the discussion in this paragraph.
[41] This sentence was modified for clarification.

times relevant to this case and that the UWW was coming into compliance. It is particularly disturbing, however, that Dean Domitrz even at the time of hearing felt that the role-model basis for affirmative action goals was not only desirable but also legal.

V Ruling Explained[42]

The hearing examiner excluded certain evidence at hearing. She did not provide a rationale at the hearing but agreed to do so in the PDO. The Commission disagreed with the examiner's rationale but found the exclusion of evidence to be proper as detailed herein.

Dr Guthrie wished to present Dr Snow's testimony regarding a conversation she had with Dr Kim on June 24, 1997, when he delivered her a message from the Dean. Her testimony also was intended to cover Dr. Snow's meeting with the Dean on July 2, 1997 Basically, Dr Snow's testimony and related exhibits were intended to show that Dean Domitrz improperly threatened Dr Snow with discipline (including termination) for showing support for Dr Guthrie.

The hearing examiner provided Dr Guthrie with an opportunity to make an offer of proof in regard to the admissibility of the evidence regarding Dr Snow and the Dean's alleged threats. The following are excerpts from Dr Guthrie's offer of proof. (The acronym "HE" is used for hearing examiner.)

> HE: We're back on the record to provide Dr Guthrie a chance to provide his offer of proof regarding Sandra Snow's testimony And you may proceed, Dr. Guthrie . The offer of proof that I was looking for was regarding what her potential testimony would be if she could talk about what she thought was retaliation against herself .
>
> C: Okay. Since there was a grievance . . . the next step in the procedure after the Dean had receipt of the grievance was that the Dean had to set up a meeting between Kirk Kim and me to discuss the grievance. When Dr. Snow met with the Dean on July 2, 1997, the Dean told her or reminded

[42] This section was changed. The examiner relied on Dr Guthrie's argument that Dr Snow's testimony would show that the Dean was vindictive due to his filing of a grievance. The Commission felt the examiner's viewpoint was too narrow due to the facts that the initial grievance filed on 6/2/97 mentioned FEA retaliation and the amended grievance delivered by Dr Snow on 6/11/97 mentioned discrimination. The Commission finds, however, that such error was harmless because Dr Snow's testimony is properly excluded by the consideration of "waste of time," within the meaning of §904.03, Stats.

her that I had filed a grievance and it was still going through the system. She would testify that she had this meeting with the Dean because she had a meeting with Kirk Kim. And Kim said at that meeting with Dr. Snow that he was delivering a message from the Dean. And that message was that because of Dr Snow's involvement in my grievance, that she was practicing risky behavior and this was potentially severe disciplinary situation. If you have any questions, Dr Snow was told by Dr Kim, then you should see Dean Domitz. I am just a messenger. I am just delivering a message.

So Dr Snow requested a meeting with the Dean which occurred on July 2nd Documents that are associated with this meeting are C-59, C-60, C-61, C-62, C-66.[43] Or I should say documents concerning the meeting with Kim and then the meeting with the Dean.

She would testify at that meeting with the Dean, the Dean repeated that she was practicing risky behavior and that it was a potentially severe disciplinary situation. And he was told this - he was saying this - or he told Kim to tell her - because he had talked to system counsel, Patricia Brady. And he and Kim were simply relaying what Patricia Brady had told them. This discipline that was put forth - possible discipline that was put forth - was possible dismissal of a tenured professor from the University In this meeting, the Dean presented to Dr Snow two newspaper articles, fairly current, I understand, from the Madison local newspaper the State Journal and we do have copies of those two articles.[44] Dean Domitz gave her copies at her request. And these involve 2 cases in the university Madison campus or in the system, what have you that concerns dismissal because of violations of the consensual relations' policy. And since Dr Snow and I are domestic partners then the Dean stated that Dr Snow had a conflict of interest, as was told to him by Patricia Brady. In that meeting, the subject of my future employment was discussed. And the Dean stated regarding my future employment that the administrative counsel meets next week to allocate positions - he had taken a position away from he economics department, and if they allocated - if they had any positions left over, then they would go back to the Economics Department. So if the Economics Department had a position, which it didn't on that date, but if it did have a position; then I could apply and be considered for that position.

JMR: An academic staff position?

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[43] Exhibits C-59, C-60 and C-61, are memos between Drs. Snow and Kim regarding what was said in his office on June 24, 1997 Dr. Kim did not agree with Dr Snow's summary of the meeting and vice-versa. Exh. C-62 is Dr Snow's memo to the Dean, which contains her summary of their meeting on July 2, 1997 Exh. C-66 is Dr Snow's memo dated August 8, 1997, reminding the Dean that he had yet to comply with her request for a copy of the UWW consensual relationship policy.

[44] Complainant did not include the referenced newspaper articles as part of the exhibits exchanged prior to hearing.

C: An academic staff, the same type we've been talking about throughout. But as of the date, July 2nd, of that meeting, the Administrative Council had not met to allocate the remaining positions so he did not know at that time whether anything would be given back to the Economics Department. But if there was positions given back to the Economics Department, I could apply and he told Dr Snow that I could be considered for that position. At no time during that meeting did he mention the 3-year rule.

After that meeting, during that meeting the Dean stated "I am only doing what the system lawyers told me to do." "I was following the directions of the lawyers." Dr Snow will testify that she was extremely disturbed by this meeting and also with the original meeting with Kirk Kim. And because she was so disturbed a lawyer was consulted. And the advice of the lawyer was to write memos detailing everything that occurs at these meetings and that's what the documents that I listed are a result of that advice.

HE: Okay

C: In the meeting the "risky behavior" she was practicing was I believer there were three. And she would testify that the one was delivering mail, two was taking minutes at a departmental meeting and three was making a motion at a departmental meeting. She would also testify that the motion that she made in the departmental meeting which is in document C-40, is essentially the same thing as a statement made by Dean Domitz in the Administrative Council minutes of April 19, 1995.

HE: Specifically?

C: Concerning the annual review of academic staff.

HE: And in particular?

C: And in particular, the motion that Dr. Snow made, she would testify, concerned the Department's previous lack of having review of academic staff even though it was mandated –

HE: Performance review?

C: Performance review, even though it was in the academic staff personnel rules. And the minutes of April 19, 1995 in C-95, the Dean states or the minutes state that the Dean said Departments should do performance review of academic staff. Essentially the same thing as the motion she was accused of giving in my support.[45]

HE: And so your point of having her testify would be to show the vindictiveness from your perspective of the Dean regarding your grievance?

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[45] The lack of performance reviews raised by Dr Snow at the Department meeting on May 5, 1997 (Exh. C-40), was included as a subject in the grievance Dr Guthrie filed (dated June 2, 1997) and continued to be a pending grievance issue at the time Dr Snow delivered the amended grievance on June 11, 1997

C: Yes.

HE: Any other reason why you think it would be relevant?
C: Why her testimony about the meeting is relevant?
HE: Right.
C: The 3-year rule was never mentioned. In fact, she was told, I understand she was told, that I could apply if there was a position . .

C: As a result of this meeting, Sandra Snow would testify that she wrote a letter to Pat Brady asking questions about what the Dean had said because the Dean had said I'm just doing what the lawyers told me to do. So she wrote Pat Brady a letter and that's document C-63. And Pat Brady's response which was not responsive at all is C-65. Essentially, she said she stood behind the privilege. I don't know if it could be argued that a client of a lawyer uses the lawyer in this way whether the privilege has been waived or not.

HE: Okay. Anything else in this regard?
C: Just one moment please.
HE: Sure. We'll go off the record.
(Off record. Back on record.)

HE: Anything further Dr. Guthrie?
C: Yes. She was accused of delivering mail as one of the three risky behaviors. She delivered the package, the grievance to the Dean as received by Mandy Kornhoff. That's what she was accused of delivering. So the argument that he had never seen the document seems to be extremely in question since she's accused of delivering that document. And this we did not – do not understand how that argument can be made.

HE: Is that it?
C: Unless I get more emotional.

HE: Okay. I think there's a potential for reversible error in one narrow area and I want to correct that. And that is Dr. Snow's testimony about what she delivered to Dean Domitrz. I still think this retaliation issue is too far removed to be relevant. I haven't heard anything that's relevant but it's certainly, regarding what Ms. Snow feels she might have delivered in Exh. C-94 to Dean Domitz is relevant and we need to take that testimony and let's do so right now .

The parties would have had to conduct a "mini-trial" on the questions of whether the Dean retaliated against Dr. Snow and, if so, whether this demonstrated the Dean's vindictive-

ness to such extent that it could have an impact on a finding of retaliation in complainant's case. Such deviation would constitute an unnecessary expenditure of time because it would not have the potential of changing the outcome of this case. Specifically, even if the Dean retaliated against Dr. Snow as alleged, the evidence still would be insufficient to establish that the Dean retaliated against Dr. Guthrie. Two of the four academic hires (Drs. Dunbar and Arkes) were made in April 1997, which was prior to the time that the Dean was aware through the amended grievance that Dr. Guthrie felt discrimination was a reason why he was not hired. Accordingly, it cannot be concluded that the Dean retaliated against Dr. Guthrie in relation to the first two hires. This conclusion reinforces the fact that the sole reason why Dr. Guthrie was not hired for any of the Teaching Positions was the application of the Dean's 4-year rule, as was communicated to Dr. Guthrie in 1996.

Dr. Guthrie's final argument in his offer of proof was that he wanted in the record the Dean's comment to Dr. Snow that Dr. Guthrie could apply for future vacancies. If such a comment had been made, it would involve the needless presentation of cumulative evidence. Other evidence clearly established that respondent was allowing Dr. Guthrie to apply for a Teaching-Position contract for the 1997-98 AY

VI. Exhibit R-143

Exhibit R-143 was not offered or admitted into the record. By letter dated October 31, 1999 (after the hearing record was closed), Dr Guthrie wrote to the hearing examiner requesting that Exh. R-143 be placed into the record "to correct the mistaken assumption" that R-143 is the same as Exhs. C-38 and C-39. Respondent objected to this request. The request is denied for the reasons noted below.

Exhibit R-143 is similar to Exhibits C-38 and C-39, which are in the record. The subject matter of Exh. C-38 is noted in ¶42, FOF. Exhibit C-39 is not mentioned in the FOF. It is a memo dated May 1, 1997, from the Chancellor to Dr. Guthrie, the text of which is shown below:

> Please be advised that UW-Whitewater does not hire employees based on discrimination but does have an affirmative action plan to provide diversity to our workforce.

> If you have any questions about or affirmative action policies, please consult Dr. Susan Moss.

The "cc" portion of the memo (Exh. C-39) indicates the Chancellor sent copies "with enclosure" to the following individuals: Provost Schallenkamp, Dean Domitrz, Dr. Kim and Ms. Moss.

At hearing, complainant thought that p. 1 of Exh. R-143 was the same as Exh. C-39, and that pp. 2-3 of Exh. R-143 were the same as Exh. C-38. Now that complainant has spent more time with the documents, he has discovered that Exh. R-143 has the potential to establish a fact not evident from Exhs. C-38 and C-39. Specifically, Exh. R-143 (in total) suggests that the "enclosure" sent with Exh. C-39, was complainant's letter to the Dean, Exh. C-38. If this were true, then the Dean in May 1997, would have had reason to know that Dr. Guthrie felt discrimination was occurring which is an earlier date than supported by information in the record. (See final footnote to ¶44, FOF.)

It is unfortunate that Dr. Guthrie did not notice the difference in these exhibits when the hearing commenced in July 1999, or when it re-commenced in September 1999. The attempt to "remedy" the situation by submitting the current request for admission comes too late. The record was closed in September 1999.

Furthermore, the basic problem here lies not with a mistake about the content of exhibits, but with Dr. Guthrie's failure to elicit relevant testimony at hearing. If Dr. Guthrie had wanted to have the "enclosure" sent with Exh. C-39 identified, he could have asked the Chancellor about this at the hearing using Exh. C-39. Similarly, Dr. Guthrie could have used Exh. C-38 to ask the Dean whether he received a copy of Exh. C-38. He did not ask the Chancellor or the Dean about either exhibit at the hearing.

VII. Complainant Objections to the PDO

The complainant raised many arguments in his objections to the PDO. The Commission considered all arguments. Some arguments already have been discussed in this decision. There are four additional matters raised in complainant's objections to the PDO that warrant further discussion.

The first matter relates to ¶11 FOF and the finding that Dr. Kim informed complainant of the 4-year rule some time in April 1996. Complainant disputes this finding (5/15/00 brief, p. 4.) An unofficial transcript of the relevant testimony was prepared for the Commission.[46]

Complainant was the first witness to testify at hearing. The following exchange occurred when he was cross-examined by respondent's counsel ("HE" is the abbreviation used for hearing examiner):

Q: Did you and Dr Kim ever have any discussion about the College of Business' 4-year rule regarding academic staff appointments?
A: Uhm, I think it was mentioned.

Q: So you were aware of that rule?
A. I am not aware of any rule.

HE: Somebody mentioned it - Dr. Kim mentioned it to you though?
A: Mentioned something about 4 years.

HE: Do you recall when that conversation occurred?
A. It would have been in that time period of late April to May of '96.

Q: And what's your recollection of the 4-year rule?
A: I deny that there is any rule.

HE: No, what's your recollection of what Mr. Kim told you about the 4-year rule?
A. He didn't tell me about any rule.

HE: Well, I thought you just answered me that yes, that Mr. Kim told you about the 4-year rule in late April or May of '96.
A. He mentioned something about a 4-year rule but the way I understand the questions that are being asked me I'm - if I answer

HE: Okay, just
A: If I answer I'm verifying that there is a rule.

HE: Okay, just listen to this. What did he tell you at that time?

[46] The unofficial transcript included more than the testimony recited in this decision. The unofficial transcript included: a) complainant's testimony on 7/7/99 (tape 3, approx. counter @ 2688-2783), b) Dr. Kim's testimony on 7/7/99 (tape 8, approx. counter @ 2173-2303), c) Dr. Snow's testimony on 7/9/99 (tape 10, approx. counter @ 1145-1207) and d) complainant's rebuttal testimony on 9/10/99 (tape 12, approx. counter @ 345-354).

A: He told me that I think Dean Domitrz had made up the rule.

HE: What kind of rule?
A: About 4 years.

HE: And what does that mean, made up a rule about 4 years?
A. Well, as I understood it was that academic staff couldn't work more than 4 years.

Dr. Kim testified later on the same day (July 7, 1999). He provided the following information in response to questions from complainant.

Q: When was the first time you mentioned that rule to me?
A: That I think that rule was discussed with the advisory committee and other senior members in the past, I think. But I had to tell you for sure when I visited you after my visit to the Dean's office.

Q: Well, could you give us a date?
A: I think that has to be sometime in April, late April.

Q: Of?
A. Of 1996, I believe. -96, I take it to be April 1996.

Q: That would be the same year that I got the letter
A: Yes

Q: from Dean Domitrz saying this will be
A: Well, sure.

Q: Your last contract?
A: Yeah, at that meeting.

Dr. Snow testified on July 9, 1999, two days after complainant and Dr. Kim. She provided the following information in response to complainant's questions:

Q: You've heard testimony in the last few days in reference to what was called the 3-year rule[47] and other names, but that rule. When was the first time you ever heard of that rule or the existence of that rule?

[47] The rule was referred to at hearing as the 3-year and as the 4-year rule. Some viewed it as a 3-year rule apparently because after 3 years the fourth contract said it would be the final one.

A. I can't be exact about that but it was some time in say April or early May of '96, when Professor Guthrie told me that he had had a talk with Professor Kim and then also it was in conjunction with the letter which is
Q: C-8?
A. Exhibit C-8.

As a rebuttal witness, complainant attempted to draw distinctions between when he first learned of the rule as an idea as opposed to a rule that is in force. The hearing examiner brought him back to his earlier testimony that in late April or May of 1996, Dr. Kim told him that the Dean had made up a rule limiting academic staff to 4 years. The following exchange occurred:

HE: When was the first time you heard about the concept or existence of the rule from Dr. Kim?
A: I don't know if I ever did. Now it is possible that in that meeting in April of '96, he made some comment about the same type - that the Dean doesn't want academic staff around for a long time. Something of that order. But in that meeting I think I would have remembered it because I know I never heard of the rule at that point in time. And I would have come home and I would have ranted and raved at Sandy and say: What's this rule? And I didn't. So and at that meeting when he said that this - that the contract that you only have one more year, my reaction was that I was only one semester away from the pension. Which at that time you had to work 5 calendar years to get vested. They changed the law but they didn't grandfather us in. Some of us are still without pension. Uhm, I went right into that. And talked to him about that and the discrimination because of either being cut back to 50% or 75 time or whatever at that point and what evolved. So I have no recollection that a rule was mentioned in that meeting. The first time that I might have recognized that it was a rule would have been probably in the summer of '98 when I learned from somebody it might have been Professor Snow, it might have been Professor Parks, it could have been Professor Laurent, it could be any of them who said that Dunbar and Hallinan were not going to be hired again.

The Commission understands that there could be a conceptual difference between being told of a 4-year employment limitation and knowing that the limitation is a policy or an officially-enacted rule. The crux of the matter, however, is what Dr. Kim told complainant in April or May 1996. Complainant's initial testimony was that late in April or May 1996, Dr Kim told him that the Dean had made up a rule limiting academic staff to 4 years. This testi-

mony was consistent with testimony from Drs. Kim and Parks. Complainant's rebuttal testimony noted above appeared to conflict with the prior testimony To the extent that any conflict existed, his rebuttal testimony was found to be incredible and unpersuasive.

The second matter which the Commission wishes to discuss is complainant's contentions regarding the hearing examiner's ruling that he could not ask Dean Domitrz to define the 4-year rule (5/15/00 brief, p. 5). The referenced exchange occurred on the final hearing date when rebuttal witnesses were presented to testify on narrowly defined topics (hearing tape #11, approx. counter @ 1730-1840). On July 15, 1999, the hearing examiner sent the parties a letter summarizing a telephone conference and outlining the scope of rebuttal testimony for continued hearing on September 10, 1999. The definition of the 4-year rule was not identified as a topic for rebuttal. Any question complainant had about this either was or should have been presented when Dr Domitrz previously appeared and provided testimony

The third matter relates to complainant's contention that an *ex parte* communication occurred when the hearing examiner granted an extension of time for respondent to file its brief (7/9/00 brief, p. 1). Respondent's counsel at hearing was off work for an extended leave. Respondent's new counsel telephoned the examiner in May 2000, explaining that he needed time to review complainant's extensive objections and to review the record due to the fact that he had not handled the case previously. The examiner knew complainant would be hard to reach due to his letter of May 16, 2000, which stated as shown below:

> I wish to inform you that I will be traveling extensively in the next three months and therefore will not have a single mailing address. There is no guarantee that any communication sent to the East Troy address (complainant's address of record with the Commission) will reach me in a timely manner during this period. Everything should return to normal after labor day.

The complainant left the examiner with no viable way of reaching him until "after labor day " The requested extension needed to be resolved before then. Accordingly, the examiner used the best tool at her disposal, which was to attempt to reach complainant by telephone at home and, upon reaching only the answering machine, recording the conference on the machine.

The final matter the Commission wishes to note relates to Dr. Guthrie's accusation that respondent's counsel "attempt(ed) to mislead the Commission with such unprofessional tactics

as manufacturing case law." This accusation is unfounded. Respondent cited the case of *Home Repair, Inc. v. Paul Davis Systems, Inc.*, No. 98-C-4074 (N.D. Ill. 2/1/2000) in its brief (dated 6/19/00, pp. 16-17). Complainant contended in a letter dated July 9, 2000, that no such decision existed. His contention was based on a conversation he had with "the Court in question" through which he "ascertained that no such decision exists for the simple reason that for this case, as of the date of this letter, no decision has been written because the case had not come to trial." Counsel for respondent sent the Commission and the complainant a copy of the case by cover letter dated July 11, 2000. Complainant responded by letter dated July 19, 2000, as noted below:

> Respondent's counsel has again demonstrated either ignorance and/or deliberate misrepresentation of the facts in the matter of the *Home Repair, Inc.* case. What he presents as "the decision" in this case is no more than a memorandum opinion associated with the denial of a motion for summary judgment. Since the case is ongoing, as demonstrated in the enclosed docket sheet obtained from the Court, no decision has been reached or written and for counsel to state otherwise is a continuation of his original subterfuge.

Respondent's citation to a court decision on a summary judgment ruling was not inappropriate. There is no requirement that only rulings or decisions which dispose of a case in total are appropriate for citation.

ORDER

This case is dismissed.

Dated: August 28, 2000.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

JUDY M. ROGERS, Commissioner

JMR:970164Cfdo.doc

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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 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 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