

STATE OF WISCONSIN

PERSONNEL COMMISSION

JOSEPH E. SABOL,
Complainant,

v.

**President, UNIVERSITY OF WISCONSIN
SYSTEM (Eau Claire),**
Respondent.

**RULING ON MOTION
TO DISMISS**

Case No. 99-0144-PC-ER

NATURE OF THE CASE

This matter is before the Commission on the respondent's motion filed October 13, 1999, for an order dismissing that part of the complaint that constitutes a claim under the State Public Employee Safety and Health Law (State OSHA). Both parties have filed written arguments on this motion. The following findings of fact are based on information which appears to be undisputed, and these findings are made for the sole purpose of deciding this motion.

FINDINGS OF FACT

1. This complaint of discrimination was filed with this Commission on September 2, 1999. It alleges discrimination on the bases of age, marital status, sex, and State OSHA retaliation with regard to failure to hire.

2. On July 27, 1999, respondent informed complainant by email from the Chemistry Department chairperson as follows:

Regarding the 100% academic staff position for which you applied.

I tried to call you at home today to have this conversation directly but could not reach you.

We have made an offer to another candidate for the 100% academic staff position for which you applied. The candidate has verbally indicated acceptance. Although nothing is final until the contract is signed and returned, I anticipate the offer will be accepted and do not expect that we will consider your application further.

You have my best wishes for finding another position that meets your interest and thank you for your work at UWEC.

3. On July 28, 1999, complainant sent an email to the chairperson which included the comment "The disappointing news that you offered the academic staff position to another candidate"

4. By letter dated August 11, 1999, the chairperson advised complainant as follows:

We have filled the 100% Chemistry Lecturer position to teach Chemistry during the Fall semester of 1999 and Spring 2000.

Thank you for your interest in this position. You have my best wishes for a successful search for an academic position.

OPINION

Section 101.055(8)(b), Wis. Stats., requires that a State OSHA complaint be filed "within 30 days after the employe received knowledge of the discrimination." Thus, respondent's motion raises the issue of when the complainant received knowledge of the discrimination. This issue in turn raises two questions. First, is the operative date the date of notice to the complainant (respondent's position) or the date the position in question was actually filled (complainant's position)?

The first question is controlled by *Cozzens-Ellis v. Wis. Personnel Comm.*, 155 Wis. 2d 271, 274, 455 N. W. 2d 246 (Ct. App. 1990). This case involved an appeal under §230.44(1)(d), Stats., of the denial of a promotion. The Commission held that the operative date was the date the appellant received notice she would not be hired, not the effective date of the promotion of a candidate other than appellant. The Court affirmed the Commission's decision, observing that "If a person is denied a promotion, the 'action' appealed from is the denial, not a later event stemming from it. This [the Commission's] interpretation is consistent with the focus of the appeal on the nonpromotion of the appellant rather than the promotion of another person." Similarly, the discriminatory act under the State OSHA is not the promotion of someone other than complainant, but the failure to appoint complainant.

The second question is whether notice of respondent's failure to promote complainant was provided by the initial email of July 27, 1999, or whether such notice was not provided

until complainant received the letter dated August 11, 1999. The complaint is timely if the time is measured by the latter event, but not if it is measured from the earlier event.

In *DuPuis v. DHSS*, 90-0219-PC, 10/18/90, the Commission held: "The general rule is that in order to be sufficient, notice must be 'clear, definite, explicit, and unambiguous.' 58 AM JUR 2d Notice §32." The July 27, 1999, email can not be considered effective notice to complainant that he would not be hired in the position in question. It states that "Although *nothing is final* until the contract is signed and returned, I *anticipate* the offer will be accepted and *do not expect* that we will consider your application further." (emphasis added) This language demonstrates that the decision not to promote complainant was not final, because it was contingent on some things happening in the future. It is consistent with the scenario that the candidate who "verbally indicated acceptance" could decide not to formalize his acceptance in writing, and respondent then would still consider complainant for the promotion. The failure to promote complainant was not finally communicated to him until he received the August 11, 1999, letter set forth in Finding #4, above. Therefore this complaint was timely filed.

ORDER

Respondent's motion to dismiss filed on October 13, 1999, is denied.

Dated: November 19, 1999.

STATE PERSONNEL COMMISSION


LAURIE R. MCCALLUM, Chairperson


DONALD R. MURPHY, Commissioner