

STATE OF WISCONSIN
EDWARD EGAN,
Complainant,

PERSONNEL COMMISSION

v.

**President, UNIVERSITY OF WISCONSIN
SYSTEM (Oshkosh),**
Respondent.

**RULING ON MOTION
TO DISMISS FOR
MOOTNESS AND
FINAL ORDER**

Case No. 00-0126-PC-ER

This matter is before the Commission to resolve respondent's April 22, 2003, motion to dismiss complainant's claim of WFEA (Wisconsin Fair Employment Act; Subch. II, Ch. 111, Stats.) discrimination on the basis of mootness. Via a letter filed May 11, 2003, complainant, through counsel, waived the opportunity to file a brief in opposition to the motion, and asked the commission to decide the motion on the basis of the existing record. The following findings of fact are based on information supplied by the parties on this motion and findings made on an earlier motion for summary judgment decided December 23, 2002, appear to be undisputed, and are made solely for the purpose of deciding this motion.

FINDINGS OF FACT

1. At all relevant times, complainant was employed by respondent in an academic staff position in the Center for Communicative Disorders (CCD), a division of the Communication Department at UW-Oshkosh, as a Clinical Supervisor in Audiology.
2. Complainant has responsibility for supervising clinical students, teaching, and maintaining a patient caseload.
3. In May 1999, Chancellor John E. Kerrigan appointed complainant to a 3 year rolling horizon contract beginning with the 1999-2000 academic year. Under a rolling horizon appointment, the employee does not receive an annual contract review. Instead, renewal operates automatically for the term of the rolling horizon to add another year to the contract each year, except when respondent interrupts the appointment.

4. The interruption of a rolling horizon contract must be completed by May 1 of each year.

5. In February 2000, CCD clinic manager Terry Sacks filed a formal complaint against complainant alleging a lack of respect and civility on complainant's part towards Ms. Sacks. Ms. Sacks' formal complaint was filed under Chapter 16 of respondent's Oshkosh campus academic staff personnel rules. Her complaint contained the specific information required by these rules, including a description of specific acts, evidence supporting the complaint, a listing of the specific rules alleged to have been violated, and a desired outcome.

6. On approximately February 28, 2000, Johanna Zuehls, a student in the audiology department at respondent's Oshkosh campus, filed a formal complaint against complainant alleging inappropriate behavior toward CCD students and staff.

7. Michael Zimmerman, Dean of College of Letters and Science, was also given a copy of the complaints filed against complainant.

8. Chancellor Kerrigan appointed Dr. William Kitz, an associate professor at respondent's College of Education and Human Services, and Ms. Becki Cleveland, a nurse and an academic staff member in respondent's College of Nursing, to investigate Ms. Sacks' and Ms. Zuehls' complaints.

9. Dr. Kerrigan advised complainant to prepare written responses to the complaints filed against him and to be prepared to provide information to Dr. Kitz and Ms. Cleveland.

10. On March 14, 2000, complainant provided a written response to Ms. Sacks' complaint. The response included a counterclaim against Ms. Sacks for sex and disability discrimination.

11. Complainant also responded in writing to the complaint filed by Ms. Zuehls. This response included a counterclaim against her for sex and disability discrimination, in which he expressed concern that there was collusion between Ms. Sacks and Ms. Zuehls against him.

12. In the spring 2000, Dean Zimmerman met with Ms. Sacks to discuss her concerns about complainant and the CCD. Dean Zimmerman also reviewed client evaluations of complainant.

13. Complainant's written responses to Ms. Sacks and Ms. Zuehls' complaints were forwarded to Dr. Kitz and Ms. Cleveland.

14. Dr. Kitz and Ms. Cleveland reviewed the written complaints and the written responses provided by complainant. Complainant met with Dr. Kitz and Ms. Cleveland early in the investigation and they heard complainant's responses to the complaints.

15. During the investigation, Dr. Rosetti, a professor within the department, made statements to the investigators that he believed Ms. Sacks and Ms. Zuehls were colluding against complainant.

16. Dean Zimmerman sent a memorandum, dated April 26, 2000, to Chancellor Kerrigan recommending complainant's rolling horizon appointment be discontinued. Dean Zimmerman's memorandum acknowledged that he was aware of the complaints pending against complainant, but noted "this action is independent of them and has absolutely no reflection on them."

17. Chancellor Kerrigan agreed with Dean Zimmerman and sent a letter to complainant, dated April 27, 2000, that stated, in part:

This is to inform you of the discontinuation of the automatic renewal portion of your rolling horizon appointment. . . . Since you have been informed of this notice of non-extension, your appointment shall have a fixed ending date of June 20, 2002.

This decision to discontinue the rolling horizon aspect of your current appointment is not a contract nonrenewal. As provided under section 2.A.(3)(g) of the Academic Staff Personnel Policies and Procedures, 1999 UW Oshkosh Faculty and Academic Staff Handbook, p. 313, your appointment shall next be subject [to] renewal in Spring 2001.

The rationale for this action is my concurrence with the Dean's observation that a number of significant questions have arisen about your work as a clinician. I concur with the notion that there should be an annual performance review and annual consideration of your contractual status for renewal or nonrenewal of your appointment.

18. Dr. Kitz and Ms. Cleveland drafted two reports addressing the complaints filed by Ms. Sacks and Ms. Zuehls separately, and made recommendations to Chancellor Kerrigan. Chancellor Kerrigan received the two reports as well as a summary report in June 2000.

19. In the report regarding Ms. Sacks' complaint, Dr. Kitz and Ms. Cleveland stated they were unable to corroborate harassment of Ms. Sacks by complainant. They concluded complainant and Ms. Sacks did not get along because of disagreements over their respective job responsibilities and further concluded there were serious personnel and managerial problems in the CCD.

20. With respect to Ms. Zuehls' complaint, Dr. Kitz and Ms. Cleveland determined complainant behaved inappropriately towards student and other employees.

21. Dr. Kitz and Ms. Cleveland included a number of recommendations in their reports. These recommendations included a written reprimand, discontinuation of complainant's rolling horizon appointment, and various affirmative steps be undertaken by the university and complainant to correct complainant's inappropriate behavior uncovered by the investigation.

22. In a letter dated July 27, 2000, Chancellor Kerrigan informed complainant of the results of the investigation into the two complaints.

23. Respondent formally disciplined complainant with a written reprimand that directed him to work with his department chair and college dean to identify a resource person to act as an advisor on professional issues and to assist complainant with developing a plan to improve his interpersonal skills. The letter also informed complainant of his right to appeal the discipline to the faculty senate as provided by university rules.

24. Chancellor Kerrigan also informed Ms. Sacks and Ms. Zuehls of the results of the investigation.

25. Complainant waived his right to appeal the sanctions to the faculty senate and stated that he would comply with the sanctions outlined in Chancellor Kerrigan's July 27 letter.

26. Complainant was eventually non-renewed effective June 30, 2002, and is no longer employed by respondent. The commission concluded in its December 23, 2002, ruling on respondent's motion for summary judgment that that transaction did not constitute an adverse employment action cognizable under the WFEA, and dismissed that claim from this case.

27. On April 2, 2001, CCD clinic manager Terry Sacks resigned from his employment with respondent. Student Johanna Zuehls graduated from the university in January 2001. Chancellor Kerrigan retired in 2000.

CONCLUSIONS OF LAW

1. This matter is properly before the commission pursuant to s. 230.45(1)(b), Stats.
2. There is no appreciable possibility that a final decision of this complaint would have a practical effect on any existing controversy.
3. Respondent has sustained its burden of showing that this controversy is moot.

OPINION

In its December 23, 2002, ruling on respondent's motion for summary judgment, the commission discussed the principles for deciding a dispositive motion as follows:

The Commission may summarily decide a case when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Balele v. Wis. Pers. Comm.*, 223 Wis. 2d 739, 745-748, 589 N.W. 418 (Ct. App. 1998). Generally speaking, the following guidelines apply. The moving party has the burden to establish the absence of any material disputed facts based on the following principles; a) if there are disputed facts, but the disputed facts would not affect the final determination, then those disputed facts are immaterial and insufficient to defeat the motion; b) inferences to be drawn from the underlying facts contained in the moving party's material should be viewed in the light most favorable to the party opposing the motion; and c) doubts as to the existence of a genuine issue of material fact should be resolved against the party moving for summary judgment. See *Grams v. Boss*, 97 Wis. 2d 332, 338-9, 294 N.W. 2d 473 (1980); *Balele v. DOT*, 00-0044-PC-ER, 10/23/01. The non-moving party may not rest upon mere allegations, mere denials or speculation to dispute a fact properly supported by the moving party's submissions. *Balele*, *id.*, citing *Moulas v. PBC Prod.*, 213 Wis. 2d 406, 410-11, 570 N.W. 2d 739 (Ct. App. 1997). If the non-moving party has the ultimate burden of proof on the claim in question that ultimate burden remains with that party in the context of the summary judgment motion. *Balele*, *id.*, citing *Transportation Ins. Co. v. Huntziger Const. Co.*, 179 Wis. 2d 281, 290-92, 507 N.W. 2d. 136 (Ct. App. 1993).

In *Balele*, the Commission discussed factors that need to be considered in this administrative, non-judicial forum, when addressing a summary judgment motion. In summary, these factors include:

(1) Whether the factual issues raised by the motion are inherently more or less susceptible to evaluation on a dispositive motion. Subjective intent is typically difficult to resolve without a hearing, whereas legal issues based on undisputed or historical facts typically can be resolved without the need for a hearing; (2) whether a particular complainant could be expected to have difficulty responding to a dispositive motion. An unrepresented complainant unfamiliar with the process in this forum should not be expected to know the law and procedures as well as a complainant either represent by counsel or appearing pro se but with extensive experience litigating in this forum; (3) whether the complainant could be expected to encounter difficulty obtaining the evidence needed to oppose the motion. An unrepresented complainant who either has not had the opportunity for discovery or who is not familiar with the discovery process is unable to respond effectively to an assertion by the respondent for which the facts and related documents are solely in respondent's possession; (4) whether an investigation has been requested and completed; and (5) whether the complainant has engaged in an extensive pattern of repetitive and/or predominately frivolous litigation. If this situation exists it suggests that the use of a summary procedure to evaluate his/her claims is warranted before requiring the expenditure of resources required for a hearing.

Balele v. DOT, 00-0044-PC-ER, 10/23/01; cited with approval in *Balele v. WPC and DNR*, 01-CV-3396, 7/29/02.

Egan, decision and order dated December 23, 2003, at pp4-6.

With respect to the present case, respondent's summary judgment motion does not run to an issue of subjective intent, but to the legal question of whether on the basis of undisputed facts, complainant's claim has been rendered moot. As to the second factor, the complainant is still represented by counsel. Respondent states, and it is not disputed by complainant, that the parties have engaged in extensive discovery, including depositions. The complaint was investigated by a member of the Commission's staff who issued an initial determination, with a finding of no probable cause for complainant's allegations. The Commission has no new information that complainant has engaged in frivolous or repetitive litigation. Therefore, this case appears suitable for a summary disposition on the issue of mootness raised by the instant motion.

In *Chiodo v. UW-Stout*, 93-0124-PC-ER, 5/25/01, *affirmed*, *Chiodo v. Wis. Pers. Commn.*, Dane Co. Circuit Court 01CV1662, 6/13/02, the Commission discussed the general principles regarding mootness as follows:

An issue is moot when a determination is sought which can have no practical effect on a controversy. *State ex rel. Jones v. Gerhardstein*, 135 Wis. 2d 161, 169, 400 N.W.2d 1 (Ct. App., 1986), citing *Warren v. Link Farms, Inc.*, 123 Wis. 2d 485, 487, 368 N.W.2d 688, 689 (Ct. App., 1985). The focus, generally, is upon the available relief in relation to the individual complainant (see, e.g., *Lankford v. City of Hobart*, 36 FEP Cases 1149, 1152 (10th Cir., 1996) and *Martin v. Nannie and the Newborns*, 68 FEP Cases 235, 236 (W.D. Okla., 1994)). The test for mootness is simple to state but sometimes difficult to apply. It is whether the relief sought would, if granted, make a difference to the legal interests of the parties (as distinct from their psyches, which might remain deeply engaged with the merits of the litigation). *Airline Pilots Association, International v. UAL Corporation*, 897 F.2d 1394 (7th Cir. 1990); *North Carolina v. Rice*, 404 U.S. 244, 30 L.Ed.2d 413, 92 S.Ct. 402 (1971). Unless the plaintiff has died and his cause of action has not survived, it is usually possible to conjure up a set of facts under which the relief sought would make a difference to the parties. But if it would be a very little difference, then to economize on judicial resources as well as to give expression to policies thought inherent in Article III of the U.S. Constitution, the case will be declared moot and relief withheld. *Airline Pilots Association, International, supra*; *Moore v. Thieret*, 862 F.2d 148 (7th Cir. 1988); *James v. Department of Health and Human Services*, 263 U.S. App. D.C. 152, 824 F.2d 1132 (D.C. Cir. 1987).

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

In the instant case, the sole surviving claim concerns a written reprimand. There is no possibility for the recovery of any monetary award, such as back pay, because there were no such damages. Complainant's contract was non-renewed and his last day of employment with the respondent was June 30, 2002. The commission dismissed complainant's discrimination claim concerning the step that preceded his non-renewal--the discontinuation of his rolling horizon appointment--as not constituting an adverse employment action in its December 23, 2002, ruling. Complainant has not indicated that he has challenged the non-renewal in any administrative or judicial proceeding. Complainant also has made no contention that he has or will be seeking to return to respondent's employment.

Under these circumstances, the only conceivable remedy for complainant if this case went to hearing and he prevailed on the merits of his claim, would be what would amount to a declaratory ruling, and a cease and desist order prohibiting the respondent from again discriminating against the complainant in the same manner if ever complainant would return to employment at UW-Oshkosh. The commission must conclude that the chance of complainant returning to employment at UW-Oshkosh is highly remote. Furthermore, the individuals implicated in complainant's discrimination claim are no longer employed at UW-Oshkosh, and there is no reason to think that, if complainant were ever again employed at that institution, that they would then be employed there. Complainant has not identified any special circumstances that would suggest there is some aspect of his or the university's circumstances that would make a final decision meaningful from a practical standpoint. *See, e. g., Ferguson v.*

DOCom, 98-0099-PC-ER, 3/22/00 (Where employee had been discharged and had not opposed the motion to dismiss, her claim of failure to accommodate in 1998 was dismissed as moot).

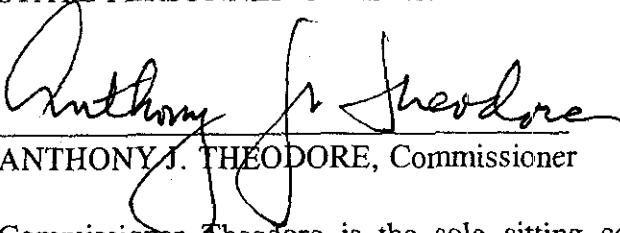
ORDER

This complaint is dismissed as moot.

Dated: June 13, 2003.

AJT 000126Cru14

STATE PERSONNEL COMMISSION


ANTHONY J. THEODORE, Commissioner

Commissioner Theodore is the sole sitting commissioner; the other two commissioner positions are vacant. Therefore, Commissioner Theodore is exercising the authority of the Commission. See 68 Op. Atty. Gen. 323 (1979).

Parties:

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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's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.)

2/3/95

IMPORTANT NOTICE: EFFECT OF 2003-2005 BUDGET BILL (Senate Bill 44)

The Governor has proposed, effective July 1, 2003, eliminating the Personnel Commission and distributing the Commission's authority between 1) the Wisconsin Employment Relations Commission

(WERC) and 2) the Equal Rights Division (ERD) of the Department of Workforce Development. The legislation proposes that WERC assume jurisdiction over all appeals (denominated by case numbers in the format of 00-0000-PC) and that ERD assume jurisdiction over all complaints (denominated by case numbers in the format of 00-0000-PC-ER). In the event this proposed legislation is signed into law, the rights of parties to petition for rehearing or judicial review will be modified to the extent that after the effective date of that legislation, the appropriate successor agency to the Personnel Commission would 1) receive any Petition for Rehearing, and 2) would be named in and would receive any Petition for Judicial Review.

5/21/2003

AFDec notice re judicial rev5.21.03.doc