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 CAROL A. DAHL,
 Complainant,
 v.
 Chancellor, UNIVERSITY OF
 WISCONSIN-MILWAUKEE,
 Respondent.
 Case No. 84-0205-PC-ER
 * * * * *

INTERIM
 DECISION
 AND
 ORDER

This matter is before the Commission for consideration of respondent's motion to dismiss on the ground that the complaint was not timely filed. The motion was filed on August 9, 1985. Both parties have filed briefs.

The facts relating to the question of timeliness appear to be undisputed. This complaint was filed on December 27, 1984. It alleges, in summary, as follows:

1. Complainant began employment at UW-Milwaukee in August, 1980. From the fall of 1981 through the spring of 1984 there were repeated incidences of male peers, less qualified than complainant, receiving higher salaries or promotion and tenure.

2. In 1982, the social science Divisional Committee recommended against granting tenure to the complainant, while recommending tenure for a less-qualified male. Her appeal of this decision was denied in January, 1983.

3. In February 1983, complainant took a leave of absence for employment at another institution as a visiting associate professor. In October 1984, she requested that her tenure and promotion be reconsidered. This was denied by the Department of Economics.

4. In February 1984, complainant received an offer from that institution as a tenure track associate professor. She asked the Department of Economics to reconsider her for tenure and to adjust her salary. This was not granted, while a male colleague received a raise to match an offer from another institution. Because she felt there was little chance of being treated in an equitable manner, she resigned in April of 1984.

As noted above, the instant complaint was filed with the Commission on December 27, 1984. The time period for filing complaints of discrimination is "300 days after the alleged discrimination occurred." §230.44(3), stats. Three hundred days before December 27, 1984, was March 2, 1984.

With respect to the question of tenure denial, it seems clear that this occurred finally in March of 1983. Letter of March 3, 1983, from Dean Halloran to complainant. This letter also notified the complainant that she would not be retained as a faculty member beyond the 1983-84 academic year:

"Since the 1983-1984 academic year will be the seventh year of probationary service and since a recommendation for your promotion and tenure effective at the start of the 1983-1984 academic year will not go forward, I am obliged to notify you that you will not be retained as a member of the faculty beyond the 1983-84 academic year."¹

The contents of this notice were consistent with the provisions of the Wisconsin administrative code §UWS 3.04, which provides in part as follows:

"Each institution's rules for faculty appointments shall provide for a maximum seven-year probationary period in a full-time position. . . A leave of absence. . . shall not constitute a break in continuous service. . ."

Now, if the alleged discrimination is deemed to have occurred when the respondent denied complainant tenure, since this occurred well before March 2, 1984, the complaint would be deemed untimely as to the tenure issue.

¹Due to the fact that the complainant was granted a leave of absence, the terminal year subsequently was extended to the 1984-85 academic year. Letter dated April 4, 1983, to complainant from Dean Halloran.

If the alleged discrimination is deemed to have occurred at the end of the complainant's terminal year of employment (whether this is considered the end of the 1983-84 academic year or the 1984-85 academic year), the complaint would be deemed timely as to the tenure issue.

There is no Commission precedent for this application of §230.44(3), stats., to a denial of tenure. However, there is extensive precedent developed by the federal judiciary in deciding similar issues under Title VII.

In Delaware State College v. Ricks, 449 U.S. 250, 66 L. Ed. 2d 431, 101 S. Ct. 498 (1980), the United States Supreme Court held that in a Title VII proceeding the "alleged unlawful employment practice occurred", and the period of limitations began to run, at the time the decision was made to deny tenure and this was communicated to the complainant. The Court rejected arguments that the period should be deemed to have commenced on the complainant's final day of employment.

This decision has been followed or cited with approval by a number of state courts, applying state fair employment laws similar to Wisconsin's. See, e.g., Ambrose v. Natomas Co., 202 Ca. Rptr. 217, 37 FEP Cases 1534 (Cal. App. 1st Dist., 1984); Board of Governors v. Rothbardt, 424 N.E. 2d 742, 98 Ill. App. 3d 423, 53 Ill. Dec. 951 (1981). The Commission has been unable to find any state cases that have declined to follow Ricks.

Wisconsin courts have not infrequently considered federal court precedents established under Title VII in interpreting the state Fair Employment Act. See, e.g., Ray-O-Vac v. ILHR Dept., 70 Wis. 2d 919, 236 N.W. 2d 209(1975); Bucyrus-Erie Co. v. ILHR Dept., 90 Wis. 2d 408, 280 N.W. 2d 142 (1979); Hiegel v. LIRC, 121 Wis. 2d 205, 359 N.W. 2d 405 (Ct. App. 1984). However, "[t]here is no 'ipso facto incorporation' of Title VII in the WFEA." Hiegel v. LIRC, 121 Wis. 2d at 216.

The Commission has refused to follow Ricks in an employment termination case that did not involve a denial of tenure. Latimer v. UW-Oshkosh, Wis. Pers. Commn. No. 84-0034-PC-ER (11/21/84). However, denial of tenure is a relatively unique employment transaction. See Chardon v. Fernandez, 454 U.S. 6, 12-13, 70 L. Ed. 2d 6, 11-12, 102 S. Ct. 28 (1981), J. Stevens, dissenting and citing the decision below of the First Circuit Court of Appeals:

"'. . .The [Ricks] majority held merely that the denial of tenure in the academic setting is fundamentally different from a notice of discharge; it is a distinct and separate employment action, with important and far-reaching consequences for all aspects of the employee's status. While denial of tenure is often followed by discharge, it is not always, and the consequences of denial of tenure are not dependent on its being followed by discharge. The Court found that Ricks' complaint was based on the denial of tenure, which was effective immediately; it followed, therefore, that the limitations period began as soon as Ricks received notice of that action. Here plaintiffs complain of discharges and demotions, not of any distinct event that occurred on an earlier date. The letters notifying them of the planned actions were notice and nothing more; they were not actions in themselves comparable to the denial of tenure.

* * * *

". . .plaintiffs' quarrel is with their demotions and discharges--not with the notices themselves. No actual harm is done until the threatened action is consummated. Until then, the act which is the central focus of the plaintiffs' claim remains incomplete. Such was not the situation in Ricks, where the denial of tenure was itself the completed act being challenged. . .' 648 F. 2d 765, 768-770. . ."

In the Commission's opinion, much the same kind of reasoning would apply to the instant case. Under the UWS rules, faculty appointments normally are for a maximum seven year probationary period. There is a detailed process for tenure review and determination. The focus of a complaint such as this is on the tenure review process and determination, not on the termination of probationary employment, although that is a concomitant of the tenure denial. The act of discrimination may be said to have occurred when tenure was

denied, not when the seven year (or extended) probationary period expired. The situation is not parallel to the discharge case, where the decision is made to terminate employment, effective at a later date.

In this case, the complainant alleges that she requested reconsideration of the tenure denial subsequent to the point in March 1983, when respondent made the decision to deny her tenure and communicated it to her. However, a request for reconsideration of an earlier decision normally does not toll the running of the period of limitations. Delaware State College v. Ricks, 449 U.S. 250, 260-261, 66 L. Ed. 2d 431, 441-442, 101 S.Ct. 498 (1980); Lee v. Human Rights Commn., 126 Ill. App. 3d 666, 81 Ill. Dec. 821, 467 N.E. 2d 943, 947 (Ill App. 1st Dist. 1984).

For the foregoing reasons the Commission concludes that so much of this complaint as relates to the denial of tenure was not timely filed and must be dismissed. Any of the remaining allegations, concerning matters other than the denial of tenure--i.e., male faculty receiving higher salaries or raises to match outside offers of employment--which relate to transactions which occurred prior to March 2, 1984, are also untimely and should be dismissed.

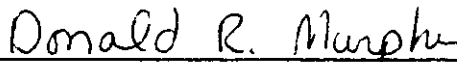
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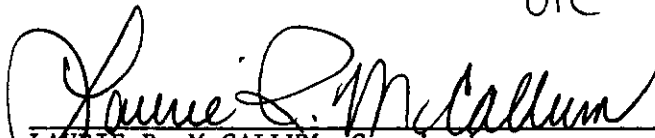
So much of the respondent's motion to dismiss filed August 9, 1985, which relates to the denial of tenure for the complainant and which relates to other aspects of the complaint that concern transactions which occurred before March 2, 1984, is granted, and said parts of this complaint are dismissed as untimely filed.

Dated: November 7, 1985

STATE PERSONNEL COMMISSION


DENNIS P. MCGILLIGAN, Chairperson


DONALD R. MURPHY, Commissioner VIC


LAURIE R. McCALLUM, Commissioner

AJT/vic
VIC01/2

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