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 EDWARD AMES,  
                     Complainant,  
 v.  
 Chancellor, UNIVERSITY OF  
 WISCONSIN - MILWAUKEE,  
                     Respondent.  
 Case No. 85-0113-PC-ER  
 \* \* \* \* \*

INTERIM  
 DECISION  
 AND  
 ORDER

This matter is before the Commission on respondent's July 24, 1986 motion to dismiss. Respondent contends that the complaint was not timely filed. The parties have filed briefs.

FINDINGS OF FACT

1. The complainant alleges that he was discriminated against on the basis of sexual orientation and arrest and conviction record in reference to respondent's decision not to reinstate him.
2. The complaint was filed with the Commission on Monday, July 22, 1985.
3. On September 10, 1984, respondent typed and mailed to the complainant a letter informing him of the results of an interview in August for a vacant Facilities Repair Worker 3 position. The letter was mailed to complainant's current (Booth Street) address. The letter stated, in its entirety:

The position of Facilities Repair Worker 3 has been filled.  
 Thank you for taking the time to be interviewed for the position.

4. The complainant's last date at his Booth Street address was September 25, 1984. On that date he provided a change of address card to the U.S. Postal Service for his move to Clarke Street the next day.

5. The complainant never received the September 10th letter. He first learned that he had not been selected for the Facilities Repair Worker 3 (FRW 3) position when he called respondent's personnel office and was notified that someone else had been hired.

#### CONCLUSION OF LAW

The complainant's July 22nd complaint was timely filed with the Commission as to the decision not to select the complainant for the FRW 3 position.

#### OPINION

In an interim decision and order dated November 7, 1985, the Commission denied respondent's motion to dismiss the complaint as untimely filed. The motion relied on the respondent's contention that the vacant FRW 3 position was filled on September 17, 1984 and that the complaint was untimely because it was filed more than 300 days after the position was filled. The Commission cited Grimmenga v. DOR, 83-0007-PC-ER(8/10/83) in holding that the period of limitations does not commence where the employe is unaware of the underlying transaction. The Commission instead looked to the date of notification:

While the decision not to select the complainant was apparently made on September 17th, the complainant did not know of the decision until he called the respondent on September 17th and asked whether he had been selected.

\* \* \*

Because the complainant filed his complaint within 300 days of the date he was notified of the Facility Repair Worker 3 selection decision, his complaint is timely as to that allegation.

On July 24, 1986, the respondent filed a second motion to dismiss. Respondent now contends that the complainant was notified of the selection decision by letter dated September 10, 1984. The respondent contends that it was unaware of the existence of the September 10th letter at the time of the original motion to dismiss, and that the letter represents "documentary proof ... which shows the actual notification date". Reply brief, page 1. The respondent's motion raises two issues.

1. Should the respondent be barred from reasserting its motion?

Complainant argues that the respondent should have presented its current argument relating to the notification date when it first moved for dismissal in November of 1985. In Milwaukee County v. LIRC, 113 Wis 2d 199 (Ct. App. 1983), the Court of Appeals held that the provision of the Fair Employment Act containing the 300 day time limit is a statute of limitations subject to waiver, rather than a statute concerning subject matter jurisdiction. The court stated:

It is well-settled law that the affirmative defense of statute of limitations must be raised in a pleading, or by a motion, or be deemed waived. In order for [Milwaukee] County to take advantage of the defense of statute of limitations it must plead this defense in its petition for review 113 Wis 2d 199, 206 (Footnotes omitted, emphasis supplied).

Here, the respondent's initial motion was premised on the argument that the 300 day time period commences on the effective date of the transaction in question. In its reply brief for that motion, respondent argued:

Regardless of which date is proven to be the actual date that the Complainant discovered he was rejected for employment, the University still contends that in hiring cases the operative act occurs on the actual hiring date and not the date a potential complainant is notified of rejection. Brief, page 1.

In light of respondent's statement effectively reserving the issue as to the actual date of notification and in light of the fact that the respondent's motions have both been filed well before any petition for judicial review,

the Commission concludes that the respondent is not prevented from reasserting its motion to dismiss on different grounds.

2. When was the complainant notified of the non-selection decision?

The burden of proof is on the respondent as to its statute of limitations defense. 29 Am Jur 2d 162. The respondent has established, by affidavit, that on September 10, 1984, a secretary typed and mailed a letter to the complainant stating that he had not been selected for the vacancy. The complainant denies having ever received the letter and avers that he first became aware of his non-selection by way of a telephone call he made to respondent's personnel office on September 27, 1986. Respondent simply has not met its burden of proof of showing that complainant was notified of the selection decision before September 23, 1984<sup>FN</sup> and, for that reason, the motion to dismiss must be denied.

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<sup>FN</sup>Notification on or after September 23rd makes the complaint filed on Monday, July 22, 1985 timely. The 300th day after September 23rd was Saturday, July 20th. However, pursuant to §990.001(4)(b) and (c), the time for filing is extended to the following Monday.


ORDER

Respondent's motion to dismiss filed on July 24, 1986 is denied.

Dated: September 17, 1986

STATE PERSONNEL COMMISSION

  
DENNIS P. MCGILLIGAN, Chairperson

  
DONALD R. MURPHY, Commissioner

  
LAURIE R. McCALLUM, Commissioner

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