

STATE OF WISCONSIN

PERSONNEL COMMISSION

**KEVIN G. SWENBY,**  
*Complainant,*

v.

**Chairperson, UNIVERSITY OF  
WISCONSIN HOSPITAL AND CLINICS  
BOARD,**  
*Respondent.*

DECISION  
AND ORDER

Case No. 98-0012-PC-ER

#### NATURE OF CASE

This matter involves a complaint under the Wisconsin Fair Employment Act (WFEA), Subchapter II, Chapter 111 Stats, and the "Whistleblower Law," §§230.80-89, Stats., of disability discrimination and retaliation. It is before the Commission *sua sponte* on the question of timeliness. Complainant filed a written argument asserting that his complaint was timely filed under the WFEA. The facts set forth below are based on documents and pleadings in the record and do not appear to be in dispute.

#### FINDINGS OF FACT

1. On January 2, 1998, complainant, Kevin Swenby, filed a discrimination complaint against the respondent, University of Wisconsin Hospital and Clinics Board (UWHCB), with the Equal Rights Division (ERD) of the Department of Workforce Development. The complaint was made on ERD form ERD-4206A (R. 07/95).
2. After receiving and reviewing the complaint, ERD determined that it did not have jurisdiction, and advised complainant of its decision and that it was forwarding the complaint to the Personnel Commission.
3. The Personnel Commission received complainant's complaint from ERD on January 21, 1998.

4. By letter dated January 22, 1998, the Personnel Commission informed complainant of its receipt of his complaint, instructed complainant on how to perfect his complaint at the Commission, and provided him forms and a filing deadline of February 5, 1998.

5. After several due date extensions, complainant filed a perfected complaint with the Commission on March 27, 1998.

6. In the perfected complaint, complainant lists the bases for his complaint as "Disability-arthritis/whistleblower law", and states that respondent's discriminatory acts toward him culminated when he received a letter of termination on March 8, 1997.

7. On April 1, 1998, the Personnel Commission sent complainant a letter advising him of its concern regarding the timeliness of his complaint. The letter, in pertinent part read as follows:

Your complaint indicates that the most recent date you believe respondent acted illegally against you occurred on March 8, 1997, when you received a letter of termination. Pursuant to §111.39(1), Stats., a complaint under the Fair Employment Act must be filed "no more than 300 days after the alleged discrimination occurred." Pursuant to §230.85(1), Stats., a complaint under the "whistleblower law" may be filed "within 60 days after the retaliatory action allegedly occurred or was threatened or after the employe learned of the retaliatory action allegedly occurred or was threatened or after the employe learned of the retaliatory action or threat thereof, whichever occurs last."

Based on the above, it appears that the complaint is not timely filed under either statute. If you have any arguments you wish to submit on the questions of whether your complaint should be considered to have been timely filed, please submit them in writing by **April 21, 1998**. If you decide that you no longer wish to pursue the complaint, you must inform the Commission of your decision in writing no later than **April 21, 1998**.

8. On April 21, 1998, complainant hand-delivered his arguments to the Commission.

OPINION

Complainant asserts that his complaint was timely filed. His argument in support of this position is as follows:

Please note that my original complaint received by the ERD on Jan. 2, 1998 does meet the time requirements set down by law. This complaint was filed on the 300<sup>th</sup> day.

I would not find it to be outrageous for the State Personnel Commission to recognize this date as it was (complaint) submitted in good faith, i.e., the ERD does have “share agreements” with other agencies.

I do not wish to terminate the complaint process.

Complainant offers no argument that his complaint was timely filed under the Whistleblower Law and he concedes he failed to timely file at the Commission within the 300 day WFEA requirement. Instead, complainant urges the Commission to recognize his January 2, 1998, filing at ERD as timely, on the basis of “good faith” and “share agreements.” A similar argument was rejected in *Ziegler v. LIRC*, 93-0031-PC-ER, 5/2/97. In that case the complainant contended the date of her filing a discrimination complaint with the ERD should have been construed as the date of filing at the Personnel Commission because of the existence of formal work sharing agreements between ERD and the Equal Employment Opportunity Commission (EEOC) and between the Personnel Commission and the EEOC. The Commission observed:

[T]he Personnel Commission and the EEOC do not have a formal work sharing agreement in the nature of the agreement between ERD and the EEOC. Although a complainant may request that a complaint filed with the Personnel Commission be cross-filed with the EEOC or vice versa, **there is no authority for interpreting the filing of a complaint with one of these agencies as constituting a filing with the other.** (emphasis added)

The Commission has consistently held that filing a claim with another entity, albeit a state or federal agency, does not constitute filing with this agency. *Radtke v. DHFS*,

97-0068-PC-ER, 6/19/97, *Casper v. UWS & DER*, 96-0013-PC, 6/28/96, *Gensch v. DER*, 87-0072-PC, 7/8/87.

CONCLUSIONS OF LAW

1. This matter is before the Commission pursuant to §§111.39(1) and 230.85(1), Stats.
2. This complaint was not timely filed.

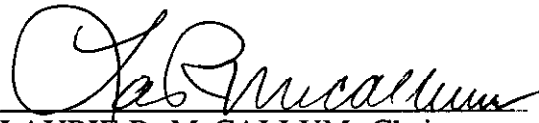
ORDER

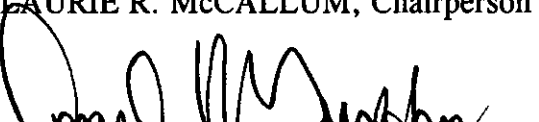
This matter is dismissed due to untimely filing.

Dated: May 20, 1998.

DRM:rjb  
980012Cdec1

STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

  
DONALD R. MURPHY, Commissioner

  
JUDY M. ROGERS, Commissioner

Parties:  
Kevin G. Swenby  
5649 Polworth St  
Fitchburg WI 53711

Jack Pelisek  
Chairperson, UWHCB  
c/o Michael Best & Friedrich  
100 E Wisconsin Ave Ste 3300  
Milwaukee WI 53202

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