

STATE OF WISCONSIN

PERSONNEL COMMISSION

DENNIS J. SHESKEY
Complainant,

v.

**Secretary, DEPARTMENT OF
EMPLOYMENT RELATIONS**
Respondent.

**RULING ON MOTION
TO DISMISS**

Case No. 98-0225-PC-ER

This is a complaint alleging sex discrimination in regard to a layoff and subsequent failure to recall. On February 12, 1999, respondent filed a motion to dismiss this complaint for untimely filing. The parties were permitted to file written arguments relating to this motion and the schedule for doing so was completed on March 31, 1999. The following findings are drawn from information provided by the parties, appear to be undisputed except where otherwise noted, and are made solely for the purpose of deciding this motion.

1. This complaint was filed on December 21, 1998.
2. This complaint relates to the following employment actions, as characterized by complainant:
 - a. Complainant's layoff which was effective August 19, 1995;
 - b. The transfer of Elaine Zimmerman to complainant's former position, then classified at the MIT 4 level, effective October 9, 1995;
 - c. The failure to recall complainant from layoff for appointment to the I.S. Professional Entry position filled by Ms. Gulan-Parker on or around June 23, 1997;
 - d. The failure to recall complainant from layoff for appointment to the MIT 2 position into which Ms. Lybert transferred on or around July 6, 1997; and

e. The second transfer of Elaine Zimmerman to complainant's former position, then classified at the I.S. Professional Intermediate level, on or around July 6, 1997.

3. Complainant filed charges of discrimination on March 6, 1998, alleging disability discrimination and whistleblower retaliation (Case No. 98-0063-PC-ER) and violation of the Family and Medical Leave (Case No. 98-0054-PC-ER) in regard to the same employment actions cited in finding 2., above. According to representations complainant made in these charges, he began his review of respondent's records relating to the actions at issue here on February 6, 1998.

4. Complainant continued his review of respondent's records relating to these actions on February 19 or 23, 1998.

Pursuant to §§. 230.44(2) and 111.39(1), Stats., discrimination/retaliation complaints brought under the Fair Employment Act, such as this one, must be filed within 300 days of the date of the discrimination. Since this complaint was filed on December 21, 1998, the act of discrimination must have occurred on or after February 23, 1998, for this charge to have been timely filed.

A motion to dismiss for untimely filing similar to the instant one was filed by respondent in Case No. 98-0054-PC-ER, referenced above. In its decision of this motion (*Sheskey v. DER*, Case No. 98-0054-PC-ER, 6/3/98; *aff'd* Dane Co. Circ. Ct, *Sheskey v. Wis. Pers. Comm. and DER*, 98 CV 2196, 4/27/99), the Commission stated as follows:

Complainant's claim with respect to his layoff per se is also plainly untimely. Complainant has not alleged there is anything that he needed to know to have made this claim in 1995 that he either didn't know in 1995 or couldn't have found out about if he had made inquiry at that time. Furthermore, complainant alleges in his complaint that he felt he was in a hostile environment at the time he requested layoff: "On July 26 [1995], I stated I could not endure the environment anymore and could we discuss during my performance result session about the possibility of me being laid off or working half time." Complainant's perception of a hostile environment reinforces the conclusion that a person with a reasonably prudent regard for his or her rights, similarly

situated to complainant, either would have known the facts necessary to have filed a claim, or would have made additional inquiry to attempt to ascertain those facts.

Complainant also alleges respondent denied him his recall rights. The potential operative dates of personnel transactions which arguably involved those rights all occurred more than 30 days prior to the filing of this complaint. Since complainant had formed the opinion he was being discriminated against prior to his layoff, a person with a reasonably prudent regard for his or her rights similarly situated to complainant would have made inquiry about this subject prior to February 19, 1998. Just as with respect to his claim concerning the performance evaluation, this situation is materially different than the situation in *Sprenger v. UWGB*, 85-0089-PC-ER, 7/24/86. In that case the complainant had no reason to have suspected age discrimination at the time of his layoff. A person with a reasonably prudent regard for his or her rights would not have been concerned about age discrimination until he or she had learned that his position, which ostensibly lacked funding, had been filled by a younger person.

The present case is more similar to *Kimble v. DILHR*, 87-0061-PC-ER, 2/19/88, where the complainant had formed the belief as of July 25, 1985, that his supervisor was discriminating against him, and should not have waited until January 1988 to inquire about coworkers' salaries.

This reasoning is equally applicable here. As a result, it is concluded that complainant failed to file this charge within the 300-day filing period and failed to sustain his burden to show that the filing period should be tolled here.

In view of this conclusion, it is unnecessary to address the parties' arguments relating to whether the first date complainant represented he began to review respondents' records relating to the subject actions or some subsequent date should control the measurement of the 300-day filing period.

CONCLUSIONS OF LAW

1. This matter is before the Commission pursuant to s. 230.45(1)(b), Stats.
2. Complainant has the burden to show that this charge of discrimination was timely filed.
3. Complainant has failed to sustain this burden.

ORDER


Respondent's motion to dismiss is granted.

Dated: May 5, 1999

STATE PERSONNEL COMMISSION

LRM
980225Cru11


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

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