

STATE OF WISCONSIN

PERSONNEL COMMISSION

**BRIAN SIME,**  
*Complainant,*

v.

**Secretary, DEPARTMENT OF  
ADMINISTRATION,**  
*Respondent.*

DECISION AND ORDER

Case No. 00-0108-PC-ER

This case is before the Commission to decide an issue of mootness. In a complaint of disability discrimination under the WFEA (Wisconsin Fair Employment Act; Subchapter II, Chapter 111, Stats.) filed August 17, 2000, complainant alleged as follows:

I interviewed for a gardener position with Mr Bockman on Jan. 27, 2000. Mr Bockman is a supervisor at the Capitol and I was interviewed based on test scores and background. I am disabled because of a head injury and Goodwill Industries also met with Mr Bockman explaining their role in job opportunities. Bill gave many reasons or excuses to Goodwill indicating I wouldn't be suitable. Nothing was mentioned about accommodations. I have never received a letter of rejection. Mr Bockman recently told Goodwill the position was reallocated and [he was] told not to send letters of rejection or explanation. This behavior by a state agency seems very irregular and an explanation is due.

Subsequently, DOA (Department of Administration) submitted through counsel an argument that this case should be dismissed for failure to state a claim. DOA asserts that this position was never filled due to a hiring freeze, which remains in effect, there was never a hiring decision, and complainant was never denied the appointment. DOA also states that none of the candidates was notified that the hiring process had been frozen and the position not filled. See DOA letter filed September 22, 2000.

In response to DOA, complainant submitted the following letter:

We would like to have a more complete answer to our complaint. Why were interviews held and then make a decision not to fill the position? Why was the job reallocated and the supervisor in charge told not to notify any of the applicants in writing? Letter from complainant filed October 30, 2000.

In deciding a motion to dismiss for failure to state a claim, the Commission must analyze the complainant's allegations liberally and in favor of the complainant and may grant the motion only if it appears with certainty that no relief could be granted. *Duran v. DOC*, 94-0005-PC-ER, 10/4/94.

A basic element of a discrimination claim is that the employer must have taken an adverse employment action against the employee. See *Klein v. DATCP*, 95-0014-PC-ER, 5/21/96. Pursuant to §111.322(1), Stats., "it is an act of *employment discrimination to refuse to hire, employ, admit or license any individual, to bar or terminate from employment or to discriminate against any individual in promotion, compensation or in terms, conditions or privileges of employment.*" (emphasis added). It appears to be undisputed that respondent did not refuse to hire complainant. Rather, respondent made no hiring decision with regard to complainant or anyone else, due to the occurrence of the hiring freeze. Furthermore, it does not appear there is any way that respondent's actions could be interpreted as having affected complainant's "terms, conditions or privileges of employment." Complainant did not have any "terms, conditions or privileges of employment" because he was never employed by respondent.

In his letter opposing dismissal of his complaint, complainant raises certain questions: "Why were interviews held and then make a decision not to fill the position? Why was the job reallocated and the supervisor in charge told not to notify any of the applicants in writing?" It appears that regardless of how these questions could be answered, there is no way that this could amount to an adverse employment action against complainant. Not only did respondent's actions not have "any concrete, tangible effect on complainant's employment status," *Klein*, at p. 6, they did not have *any* effect on complainant's employment status. While the Commission is mindful of the requirement that "[t]his subchapter [subchapter II, Chapter 111, Stats.] shall be liberally construed," §111.31(3), Stats., it does not perceive any reasonable way that §111.322(1), Stats., could be interpreted so as to make a decision to discontinue a staffing process due to a hiring freeze amount to an adverse employment action against the complainant

In conclusion, the Commission finds that respondent made no hiring decision with regard to the position for which complainant applied, and concludes there was no adverse employment action taken with regard to complainant, and therefore this complaint fails to state a claim under the WFEA.

ORDER

This complaint is dismissed for failure to state a claim under the WFEA.

Dated: February 26, 2001.

STATE PERSONNEL COMMISSION

Laurie R. McCallum, Jr.  
LAURIE R. McCALLUM, Chairperson

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Judy M. Rogers  
JUDY M. ROGERS, Commissioner

Parties:

Brian Sime  
6239 East Charing Cross Lane  
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George Lightbourn, Secretary  
Department of Administration  
101 East Wilson Street, 10<sup>th</sup> Floor  
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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