

STATE OF WISCONSIN

PERSONNEL COMMISSION

JULIE ZUEHLKE,
Complainant,

v.

**President, UNIVERSITY OF WISCONSIN
SYSTEM,**
Respondent.

**RULING
ON
MOTION
TO DISMISS**

Case No. 00-0167-PC-ER

This matter is before the Commission on the respondent's motion to dismiss the complaint as untimely filed. The parties have filed written arguments. The following findings of fact are made solely for the purpose of ruling on respondent' motion.

FINDINGS OF FACT

1. Complainant was hired as a faculty member in the Department of Mass Communications at the University of Wisconsin-La Crosse in 1994.
2. By letter dated June 16, 1997, UW-La Crosse Chancellor Judith L. Kuipers notified complainant that her probationary faculty appointment would not be renewed and that her employment would end on May 24, 1998. The letter stated, in part: "In accordance with UWS 3.08 my decision on this matter is final."
3. By letter dated June 9, 1997, complainant requested a two-year leave of absence without pay.
4. In a letter dated June 30, 1997, the Provost/Vice Chancellor of UW-La Crosse, wrote complainant:

On the recommendation of the Dean of the College of Liberal Studies and given that your appointment at the University of Wisconsin-La Crosse will end at the close of the 1997-98 academic year because of a nonrenewal decision, I am approving a one-year leave of absence without pay for you for the 1997-98 academic year. This is the final year of your probationary faculty appointment at the University of Wisconsin-La

Crosse and your employment relationship with the University will terminate on May 24, 1998.

5. In December of 1999, complainant applied for a faculty position in the Department of Communication Studies, UW-La Crosse. A search committee chaired by Department Chair Laura Nelson reviewed the applications of all of the candidates. The committee decided not to further consider the applications of complainant and several other candidates.

6. By letter dated January 26, 2000, Ms. Nelson informed complainant, in part, as follows:

All the applications for Position 01CST01 in the Department of Communication Studies have been carefully reviewed by the Search and Screen Committee. The committee has been pleased with the qualifications of the applicants. The task of screening the original list of applications to identify those most highly qualified has been difficult. Therefore, it is with regret that we inform you that you are no longer being considered for the position.

7 This letter to complainant, as well as similar letters to 4 other candidates, was mailed on either January 26 or 27, 2000.

8. Complainant received the letter prior to February 10, 2000.

9. A male candidate, younger than complainant, was hired to fill the vacancy in August of 2000.

10. Complainant filed a complaint of discrimination with the Commission on December 6, 2000. Complainant alleged that respondent had discriminated against her based on her sex and age with respect to the hiring decision as well as during the period prior to and including the termination of her employment.

CONCLUSIONS OF LAW

1. Complainant has the burden of establishing that his complaint was timely filed. *Benson v. UW(Whitewater)*, 97-0112-PC-ER, etc., 8/26/98.

2. Complainant has failed to sustain her burden.

OPINION

The time limit for filing complaints of discrimination under the Fair Employment Act is established in §111.39(1), Stats:

The [Commission] may receive and investigate a complaint charging discrimination if the complaint is filed with the [Commission] no more than 300 days after the alleged discrimination occurred.

Complainant contends she had 6 years to file a gender discrimination complaint. She does not supply any basis for this contention other than merely stating that she understood that 6 years was the applicable period. Complainant's understanding of the time limit conflicts directly with the requirements of §111.39(1), Stats. The Commission must apply the statutory time limit.

Complainant filed her complaint with the Commission on December 6, 2000. The actionable period covered by complainant's December 6th filing commenced on February 10, 2000. In other words, in order for the complaint to meet the 300 day time limit established in §111.39(1), Stats., the discrimination would have to have occurred no earlier than February 10, 2000.

Complainant's last day of work for respondent was well before February 10th. Therefore, that portion of her complaint relating to working conditions and the termination decision is untimely.

In construing the 300-day time limit for filing a claim under the Fair Employment Act, the word "occurred" means the date of notice of the alleged discriminatory act. *Hilmes v. DILHR*, 147 Wis.2d 48, 433 N.W.2d 251 (Ct. App., 1988) In *Sprenger v. UW(Green Bay)*, 85-0089-PC-ER, 1/24/86, the Commission held that the time limit does not begin to run until the facts that would support a charge of discrimination are apparent or would be apparent to a similarly situated person with a reasonably prudent regard for her rights.

Complainant argues that the time period for filing her allegations of discrimination relating to the hiring decision should commence when the successful candidate, who is male and is younger than complainant, was hired for the position. However, the allegedly discriminatory action against complainant was the decision to eliminate her

from the selection process. This decision occurred no later than January 26, 2000, and complainant was informed of the decision by a letter of the same date. After the Search and Screen Committee had eliminated complainant and several other candidates from the process, respondent went on to conduct a more thorough analysis of the remaining candidates. These later steps ultimately resulted in a hiring decision

The decision in question was not a neutral action in the sense that it was a distinct and clearly adverse personnel action that commenced the 300-day period. Normally, when a person is faced with a discrete personnel transaction, she has a responsibility to make any necessary inquiry to determine whether the transaction was illegal. *Sheskey v. DER*, 98-0054-PC-ER, 6/3/98; rehearing denied, 7/22/98; affirmed by Dane County Circuit Court, *Sheskey v. Wis. Pers. Comm. & DER*, 98-CV-2196, 4/27/99. The complainant learned shortly after January 26, 2000, that she had not been selected for the position. A similarly situated complainant, with a reasonably prudent regard for her rights would have been aware of the facts that would support a charge of discrimination. In *Zeuner v. DRL*, 91-0088-PC-ER, 12/23/91, the Commission addressed a question of timeliness where the first notice from the appointing authority to the complainant that he had not been selected for the position also notified him that another candidate had been selected. The Commission concluded that:

[C]omplainant was directly affected by a discrete adverse personnel transaction (nonselection), and he should have made inquiry into the matter in a timely manner in order to have preserved his right to file a complaint.

In the present case, the selection process included at least two steps or layers. The complainant was dropped from the pool of applicants at the first step and she was notified of that decision by letter. One of the remaining candidates was hired some time later. These facts are comparable to those in *Cozzens-Ellis v. Wis. Pers. Comm.*, 155 Wis.2d 271, 455 N.W.2d 246 (Ct. App., 1990). There an employee filed an appeal with the Commission under §230.44(1)(d), Stats., of her application for promotion within the classified civil service. The time limit for such an appeal is "within 30 days after the effective date of the action, or within 30 days after the appellant is notified of

the action, whichever is later " On May 5th, the appellant in that case was notified that two other persons had been selected for two supervisory positions. On May 13th, one of the two successful applicants began performing the duties of one of the positions. The appellant filed her appeal on June 11th. The Commission held that the appeal was too late because the "effective date of the action" was the date appellant received notice that she had been passed over for the promotion, not the day someone else actually began to work in the new job. The Court of Appeals affirmed, noting that the Commission's interpretation was "consistent with the focus of the appeal on the nonpromotion of the appellant rather than the promotion of another person." 155 Wis.2d 271, 274.

Under the circumstances of the present case, where complainant was notified by the January 26th letter that she had been eliminated from the selection process for the position in question, she had a responsibility at that time to make any necessary inquiry to determine whether the transaction was illegal. The 300-day filing period started at that point, rather than when another candidate was actually hired to fill the position.

The Commission also notes that respondent filed three separate affidavits to establish that it followed its standard procedures when it mailed the set of letters dated January 26, 2000, notifying complainant and certain other candidates that they were no longer being considered for the vacancy. These affidavits showed that the letter was mailed on either January 26 or 27, 2000, to complainant's residence in Winona, Minnesota, which is proximate to the UW-La Crosse campus. Complainant does not deny that she received this letter prior to February 10, 2000. All the materials in the case file are consistent with complainant having received the letter prior to that date.

ORDER

This matter is dismissed as untimely filed.

Dated: April 4, 2001 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

KMS: 000167Crull


JUDY M. ROGERS, Commissioner

Parties:

Julie Zuehlke
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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 appli-

cation 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