

STATE OF WISCONSIN

PERSONNEL COMMISSION

STEVEN M. WILLADSEN,
Complainant,

v.

**Chancellor, UNIVERSITY OF
WISCONSIN MADISON,**
Respondent.

**RULING ON
RESPONDENT'S
MOTION TO DISMISS**

Case No. 01-0078-PC-ER

The above-noted case is before the Commission to resolve respondent's motion to dismiss filed by cover letter dated August 20, 2001, and amended by cover letter dated September 24, 2001. Both parties submitted written arguments.

The facts recited below are made solely to resolve this motion. They are undisputed unless specifically noted to the contrary.

FINDINGS OF FACT

1. Complainant was employed by respondent from 1983 until January 24, 1998, when he resigned and moved to New Mexico.
2. Complainant initially filed his complaint with the Equal Rights Division of the Department of Workforce Development (DWD). The form he completed at that time bears a DWD stamped receipt date of May 21, 2001.
3. On May 21, 2001, DWD sent complainant a letter indicating that the Personnel Commission "has responsibility to investigate employment discrimination complaints filed by state employees." DWD forwarded to the Commission a copy of the letter and the complaint received by DWD and the Commission received these materials on May 22, 2001. The resulting actionable period (300 days before the complaint was received by the Commission) started on July 25, 2000 and ended on May 22, 2001.
4. On May 31, 2001, the Commission wrote to complainant acknowledging that DWD had forwarded the complaint he filed with DWD, and instructing him to complete the

Commission's complaint form. He complied and the Commission received the new form on June 15, 2001.

5. Iris Ost has been respondent's Purchasing Agent Supervisor since June 1998. Since that time five purchasing agents and procurement specialist positions have been filled, all with female candidates. (See, last page of the attachment to the complaint filed on June 15, 2001.)

6. Complainant claims he was not hired for certain positions due to his age and/or sex. The position titles are listed below, along with the date complainant was interviewed and, if provided, the date he was notified that he was not hired.

Position Title	Interview Date	Notification Date
a. Purchasing Agent Objective	July 6, 2000	July 24, 2000
b. Procurement Specialist-Senior	December 1999	No date provided
c. Purchasing Agent	Spring 2000	No date provided
d. Purchasing Agent Objective	November 2000	Not notified yet

7 The final item raised in the complaint is that respondent posted an opening for a purchasing agent senior on January 26, 2001, two days after complainant's reinstatement privileges expired. His description of the event as stated in the complaint filed on June 15, 2001, is shown below:

The epitome of this entire episode came about when the department posted an opening for a purchasing agent senior for the purchase of scientific equipment, the same area and pay range that I had been when I left UW-Madison. The reason this stands out is the position appeared on the contractual transfer list on January 26, 2001, two days after my re-instatement privileges expired.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in this case pursuant to §230.45(1)(b), Stats.
2. Complainant failed to meet his burden to establish that his complaint was timely filed with regard to respondent's hiring decisions listed as "a," "b" and "c" in ¶6 of the Findings of Fact.

3. At this stage of the proceedings, complainant has stated a claim upon which relief could be granted with regard to respondent's hiring decision listed as "d" in ¶6 of the Findings of Fact.

4. At this stage of the proceedings, complainant has stated a claim upon which relief could be granted with regard to the date respondent posted the vacancy described in ¶7 of the Findings of Fact.

5. The Commission lacks jurisdiction to consider complainant's libel or slander claim.

OPINION

I. Motion to Dismiss Certain Allegations as Untimely Filed

Respondent moved to dismiss as untimely filed, hiring transactions "a," "b" and "c" as listed in ¶6 of the Findings of Fact. Complainant has the burden to demonstrate that the allegations raised in the complaint were timely filed. See, for example, *Wright v. DOT*, 90-0012-PC-ER, 2/25/93; *Acoff v. UWHCB*, 97-0159-PC-ER, 1/14/98; *Nelson v. DILHR*, 95-0165-PC-ER, 2/11/98; and *Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98.

Complaints filed under the Fair Employment Act (FEA) must be filed no more than 300 days after the alleged discrimination occurred, as noted in §111.39(1), Stats. The statutory term "occurred" usually means the date of notice of the alleged discriminatory act; e.g., the date complainant was notified that his employment was terminated. *Hilmes v. DILHR*, 147 Wis. 2d 48, 53, 433 N.W. 2d 251 (Ct. App. 1988).

Complainant contends that the Commission should consider as the filing date, the date DWD received his complaint. The Commission's rules define "filing" as the "physical receipt of a document *at the Commission's office*," §PC 1.02(10), Wis. Adm. Code (emphasis added). The Commission has consistently held that receipt of a complaint by DWD¹ does not constitute

¹ Complainant also mentioned filing with the Equal Employment Opportunity Commission (EEOC), which appears to have been an erroneous reference (see complainant's clarifying letter dated 11/19/01). In any event, the Commission is unaware of any EEOC filing. Even if an EEOC filing were made, the result would be the same; to wit: it is the Personnel Commission's receipt of the complaint which constitutes the filing date; not receipt by a different entity.

filing with the Commission. *See, Ziegler v. LIRC*, 93-0031-PC-ER, 5/2/96; *Schultz v. DOC*, 96-0122-PC-ER, 4/2/97; and *Radtke v. DHFS*, 97-0068-PC-ER, 6/19/97

The Commission received the complaint on May 22, 2001. The resulting actionable period commenced on July 25, 2000 and ended on May 22, 2001.

Complainant received notice on July 24, 2000 that he was not hired for the Purchasing Agent Objective position (item "a" in ¶6, Findings of Fact). Since the Commission did not receive his complaint within 300 days after this occurrence, the allegation was untimely filed.

Complainant does not provide the date he was notified that he was not hired for the Procurement Specialist – Senior position (item "b" in ¶6, Findings of Fact). He interviewed for the position in December 1999, and does not deny receiving notice that he was not hired. He should have known that the date he learned of the rejection was important to disclose in determining if the complaint was filed timely (see, Commission's letter to complainant dated July 11, 2001 and respondent's brief dated 8/20/01, p. 2, 2nd full paragraph). The Commission has previously held that where a complainant fails to provide dates for certain alleged occurrences despite a motion to dismiss for untimely filing and where no dates are apparent from the information tendered by the parties; complainant's failure to provide the dates is fatal to those claims. *Tafelski v. UW (Superior)*, 95-0127-PC-ER, 3/22/96; *Nelson v. DILHR*, 95-0165-PC-ER, 2/11/98. Based on these principles, this allegation also is dismissed as untimely filed

Complainant was interviewed for a Purchasing Agent position in Spring 2000 (item "c" in ¶6, Findings of Fact). He does not recall whether he received a rejection letter but he does know that Linda Berg was hired. He further states that he "cannot, nor will not criticize Ms. Berg's abilities or experience." (See his letter dated September 13, 2001.) Even accepting as true complainant's suggestion that respondent did not send him a rejection letter, there is no dispute that he knew he was rejected when he found out that Ms. Berg was hired. His failure to provide the date upon which he learned Ms. Berg was hired is fatal to this claim.

Respondent's motion to dismiss the hiring transactions noted as "a," "b" and "c" in ¶6 of the Findings of Fact is granted.

II. Failure to State a Claim

Respondent contends that the remaining allegations should be dismissed for failure to state a claim for which relief can be granted. The Commission analyzes such a motion according to the procedure set forth in *Morgan v. Pennsylvania General Ins. Co.*, 87 Wis.2d 723, 731-32, 275 N.W. 2d 660 (1979):

For the purpose of testing whether a claim has been stated pursuant to a motion to dismiss under sec. 802.06(2)(f), Stats., the facts pleaded must be taken as admitted. The purpose of the complaint is to give notice of the nature of the claim; and, therefore, it is not necessary for the plaintiff to set out in the complaint all the facts which must eventually be proved to recover. The purpose of a motion to dismiss for failure to state a claim is . . . to test the legal sufficiency of the claim. Because the pleadings are to be liberally construed, a claim should be dismissed as legally insufficient only if "it is quite clear that under no conditions can the plaintiff recover." The facts pleaded and all reasonable inferences from the pleadings must be taken as true, but legal conclusions and unreasonable inferences need not be accepted.

Complainant has stated a claim in regard to the Purchasing Agent Objective vacancy (item "d" in ¶6 of the Findings of Fact). He interviewed for this position in November 2000 and has not received information about who was hired. Respondent provided no affidavit or information regarding this hiring decision or any explanation for why complainant has not yet been notified of the hiring results. Instead, respondent relies on the complainant's lack of such knowledge, which is solely known to respondent, as a basis for its motion. Respondent's argument is shown below (see, p. 3 of respondent's submission by cover letter dated 8/20/01):

Complainant notes in passing that he applied for a position in November, 2000 and claims he has yet to receive the results of that effort. Based on his knowledge at the time he filed the complaint, there is no indication that Complainant suffered an adverse employment action under the WFEA, and he has failed to state a sufficient claim upon which relief can be granted. For that reason, his complaint should be dismissed.

Respondent's argument is rejected. There is no requirement that a complainant know all facts relating to his claim when he files a complaint or during the investigation of his

complaint. To rule otherwise, would eviscerate a complainant's right to an investigation. This is true for facts solely within the respondent's knowledge, such as why respondent has not yet sent complainant a rejection letter, and is especially problematic where, as here, respondent has filed no Answer, where complainant has not had an opportunity to conduct discovery, and where respondent failed to provide such information as part of their motion to dismiss.

Complainant has stated a claim with regard to the job posting on January 26, 2001 (see ¶7, Findings of Fact). Respondent's argument is shown below (see, p. 3 of respondent's submission by cover letter dated 8/20/01):

An element of a claim of employment discrimination is that the employee has suffered an adverse employment action of some kind. *Klein v. DATCP*, 95-0014-PC-ER, 12/20/95. In this case, the posting of a position after Complainant's reinstatement privileges expired does not constitute an adverse employment action under the Wisconsin Fair Employment Act. The posting occurred two years after Complainant's resignation when there was no employer/employee relationship. The posting of the position was not in any way related to the expiration of Complainant's reinstatement privileges. To the extent that Complainant relies on this action as a basis for his assertion, he has failed to state a claim upon which relief can be granted, and the complaint should be dismissed.

The above argument is without merit in light of the information provided by complainant in his letter dated July 6, 2001.² Complainant represented (in pertinent part) as follows:

Below is an excerpt taken from an e-mail I received Monday, 7/2:

However, it sounds like some people do not want you to return to Purchasing Services and it sounds like some message is getting around to other places in the form of "Steve did not do a good job as a purchasing agent.

I can provide the particulars of the e-mail, as well as the source, if you need that

² Complainant's July 6, 2001 letter states it is tendered in reply to the Commission's letters of June 21, 2001 and June 26, 2001. The Commission has no record of sending out a letter to complainant on June 26th

During my entire tenure at UW-Madison, I never received any evaluation, which was negative. Standard practice was to identify the agents as 'meets expectations' or something similar, the belief being, "nobody is exceptional."

Complainant has not provided a copy of the e-mail message or disclosed who sent it to him. He has offered to provide additional information but the Commission has not required him to do so yet.

In the context of the present motion, reasonable inferences from pleaded facts must be construed in complainant's favor. A reasonable inference from the language of the e-mail is that there was a feeling shared by more than one person that complainant should not be rehired and that the reasons provided (poor work performance) were untrue. The potential exists at this stage of the proceedings (the case is pending investigation) that respondent chose a date after complainant's reinstatement rights expired to post the job opportunity in an effort to exclude him from the pool of applicants. Respondent's general denial that this was an intended result is insufficient to prevail on the motion.

III. Libel or Slander Allegation

Complainant indicated in his July 6th letter, that he considers that his reputation has been libeled or slandered. Her further states: "if the Personnel Commission does not wish to pursue this, and it is necessary to get an attorney of my own, I will be more than happy to do that."

An administrative agency has only those powers, which are expressly conferred, or which are fairly implied from the four corners of the statute under which it operates. *State (Dept. of Admin.) v. ILHR Dept.*, 77 Wis. 2d 126, 136, 252 N.W.2d 353 (1977). The various areas of the Commission's jurisdiction are noted in §230.45(1), Stats., and do not include authority to hear libel or slander cases. Such cases are reserved for review by the court system (see §802.03(6), Stats.).

ORDER

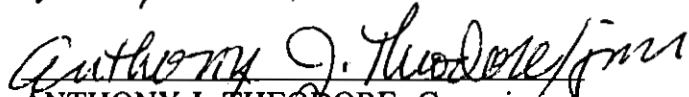
Respondent's motion to dismiss for untimely filing is granted and, as a result, allegations "a," "b" and "c" in ¶6 of the Findings of Fact are dismissed. Respondent's motion to dismiss the remaining allegations for failure to state a claim is denied and, as a result, the Commission will proceed to investigate those claims. Complainant's libel or slander claim is dismissed in this forum for lack of jurisdiction.

Dated: January 10, 2002.

STATE PERSONNEL COMMISSION

JMR:010078Cru11


JUDY M. ROGERS, Commissioner


ANTHONY J. THEODORE, Commissioner

Chairperson McCallum did not participate in the consideration of this ruling.