

STATE OF WISCONSIN

PERSONNEL COMMISSION

MARY LOUISE CURWEN,
Complainant,

v.

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

**RULING
ON
PETITION FOR
REHEARING**

Case Nos. 01-0098-PC-ER, 02-0027-PC-ER

These matters are before the Commission on the complainant's petition for re-hearing after the Commission dismissed the cases for lack of prosecution. The following facts are undisputed.

FINDINGS OF FACT

1. Complainant filed a complaint of Fair Employment Act discrimination with the Personnel Commission on June 14, 2001. The Commission assigned Case No. 01-0098-PC-ER to the complaint.

2. Respondent filed a motion to dismiss, dated August 8, 2001. In a ruling dated January 24, 2002, the Commission granted the motion in part and denied it in part.

3. Complainant filed a second complaint of Fair Employment Act discrimination with the Commission on February 21, 2002. The Commission assigned Case No. 02-0027-PC-ER to that complaint.

4. Respondent filed an answer to both complaints on June 21, 2002.

5. Complainant submitted a 7 page letter to the Commission on June 26, 2002.

6. By letter dated July 1, 2002, the equal rights officer assigned to the cases sent complainant a letter directing her to respond to the respondent's answer. The letter provided, in part:

A copy of your recent discourse has been provided to respondent by this letter.

Based on the information you recently provided, you have reviewed respondent's answer. You may now decide that the information you have provided serves as your complete and final rebuttal to respondent's answer[s], or you may decide that you wish to provide additional information. No matter what you decide, *you must inform the Commission* of your decision *in writing* no later than July 31, 2002. The Commission will provide respondent with a copy of your response.

If you decide to provide additional rebuttal information to respondent's answer[s], you must respond to the following so that the Commission receives your response no later than **July 31, 2002**:

1. If you disagree with any of the information provided by the respondent, identify the area of disagreement, state why you disagree, and state your position as it relates to each area of disagreement.
2. Provide any additional information you feel will support your allegations or refute the respondent's statement. The initial investigation relies on information developed by the parties, and most likely, no investigative interviews will be conducted.

Failure to respond to a request for information from the Personnel Commission may result in the imposition of the sanctions set forth in §PC 2.05(4)(b), Wis. Adm. Code. . (Emphasis in original.)

7 Complainant did not respond to the July 1st letter

8. By certified letter dated August 20, 2002, the equal rights officer informed complainant, in part, as follows:

The Personnel Commission previously wrote to you on July 1, 2002 and asked you to provide information regarding the above discrimination/retaliation complaint. To date, we have received no response.

If you wish to proceed with your complaint, you must submit the information as described in the enclosed correspondence dated July 1, 2002. Your response must be **received** by the Commission within 20 calendar

days of the date of this certified letter. If you do not file your response with the Commission within the 20 day time period (**by September 9, 2002**), I will recommend that your case be dismissed for lack of prosecution.

Pursuant to §111.39(3), Stats., which relates to claims filed under the Fair Employment Act:

The (commission) shall dismiss a complaint if the person filing the complaint fails to respond within 20 days to any correspondence from the (commission) concerning the complaint and if the correspondence is sent by certified mail to the last known address of the person. (Emphasis in original.)

9. On August 22, 2002, after she had received the certified letter, complainant took the letter and other documents relating to her cases to the offices of her union. She met with Maggie Merdler, a union representative. During the meeting, Ms. Merdler telephoned the Commission's equal rights officer who explained the reason for the August 20th certified letter. Ms. Merdler stated that she would fax or email a response to the Commission on the complainant's behalf. She also stated that complainant's letter received on June 26th should be considered complainant's response to respondent's answer.

10. The response to the August 20th certified letter was due on September 9, 2002.

11. Ms. Merdler never faxed or emailed the response and the Commission never received a response.

12. In an order dated September 25, 2002, the Commission dismissed the complaints for lack of prosecution because complainant and cited §111.39(3), Stats.

13. Complainant filed her petition for rehearing on October 3, 2002.

OPINION

In order to prevail on her petition for rehearing, the complainant must show that the Commission's September 25th order was premised on an error of law or of fact or

that the appellant has discovered new evidence of the nature described in §227.49(3), Stats.

In its September 25th order, the Commission held that the complainant had failed to satisfy the specific requirements of §111.39(3), Stats., relating to complaints that are filed under Wisconsin's Fair Employment Act. It is undisputed that the complainant failed to respond to the certified letter in writing. The only question raised by the complainant's petition is whether the August 22nd telephone conversation between Ms. Merdler, complainant's union representative, and the equal rights officer, satisfies the statute. Ms. Merdler told the equal rights officer that she would be faxing or emailing a response on complainant's behalf and that complainant's letter that was received by the Commission on June 26th should be considered as complainant's rebuttal to respondent's answer

The key precedent in this area is the Commission's decision issued in *Ganther v. DOR*, 99-0175-PC-ER, 10/3/2000, rehearing denied, 11/8/2000. In *Ganther*, the investigator had issued a 20 day certified letter on June 20, 2000. While the complainant never responded in writing, he did contact the investigator by telephone on June 26th, which was before he had received the 20 day letter. During that conversation, the complainant indicated that he would furnish a response to the letter. The complainant also telephoned the investigator on July 13th, which was after the July 10th date for responding to the June 20th certified letter and requested an extension. The investigator declined to grant the request. In its ruling issued on October 3, 2000, the Commission concluded that the complainant's failure to timely respond to the certified letter required dismissal pursuant to the language of §111.39(3), Stats. In its ruling on complainant's petition for rehearing, issued on November 8, 2000, the Commission addressed whether complainant's June 26th telephone call satisfied the statute:

Section 111.39(3), Stat., provides that the Commission shall dismiss a complaint if the person filing the complaint fails to *respond* within 20 days to any correspondence sent by certified mail. Complainant contends he did *respond* within the meaning of the statute when he telephoned the Commission on June 26th. The Commission disagrees. During the telephone call on June 26th, complainant did not provide any of

the information requested in the Commission's correspondence. Instead, he indicated that he would respond. The bald promise to respond provides no substantive response to the Commission's correspondence and, accordingly, does not meet the statutory requirements.

In contrast to the facts in *Ganther*, the complainant in the present case provided a substantive response, within the 20 day period, to the question posed in the certified letter. This response was in the form of the statement by Ms. Medler during her telephone conversation with the Commission's investigator on August 22nd that the complainant wanted her letter, that was received by the Commission on June 26th, to be considered as her rebuttal to respondent's answer. With this information, the complainant provided a substantive answer to the investigator's question as to whether the complainant wanted to rebut the answer and effectively supplied the rebuttal material. The investigator could proceed with her investigation.

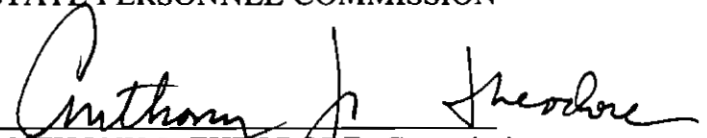
The complainant in the present case clearly wishes to pursue her case and she provided, within the statutory 20 day period, the information necessary for the investigator to proceed.

Under the circumstances of the present case, the language of §111.39(3), Stats., has been satisfied, and the Commission's Order dated September 25, 2002, was premised on an error of fact.

ORDER

Complainant's petition for rehearing is granted. The case files will be returned to the investigator so that the investigation can be continued.

Dated: OCT 18, 2002 STATE PERSONNEL COMMISSION


ANTHONY J. THEODORE, Commissioner

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KELLI S. THOMPSON, Commissioner