

STATE OF WISCONSIN

PERSONNEL COMMISSION

HELEN A. LEMMEN,
Complainant,

v.

**President, UNIVERSITY OF WISCONSIN
SYSTEM (Green Bay),**
Respondent.

RULING ON MOTIONS

Case No. 99-0170-PC-ER

This is a complaint alleging age discrimination and retaliation for engaging in protected fair employment activities. Respondent has filed a motion to dismiss and a motion to strike certain pleadings. The parties were permitted to brief the motion. The following findings of fact are based on information provided by the parties, appear to be undisputed, and are made solely for the purpose of deciding these motions.

FINDINGS OF FACT

1. Complainant first filed this charge with the federal Equal Employment Opportunities Commission (EEOC). This charge was received by the EEOC on September 17, 1999. Complainant requested that this charge be cross-filed with the Commission. A copy of complainant's unperfected charge was first received from the EEOC by the Commission on October 4, 1999. This unperfected charge was later perfected and the Commission received a copy of the perfected charge on October 20, 1999.

2. Complainant requested that the EEOC, rather than the Commission, investigate her charge. In a document dated March 29, 2000, the EEOC advised complainant that " the EEOC is unable to conclude that the information obtained establishes violation of the statutes."

3. In handwritten correspondence dated April 26, 2000, and received by the Commission on May 1, 2000, complainant stated, in relevant part, as follows:

I am requesting that you reinvestigate the charge of Discrimination #260990820 that was filed with the EEOC.

4. In a letter dated May 4, 2000, the Commission replied to complainant as follows, in relevant part:

Under the work-sharing agreement between this agency and the EEOC, this case was initially processed by the EEOC. Our usual procedure is to adopt the EEOC's determination and give the complainant an opportunity to appeal any adverse determination through the Personnel Commission's procedures. The Personnel Commission does not reinvestigate cases investigated by the EEOC. You submitted the document ("Dismissal and Notice of Rights") showing that at the end of its investigation, the EEOC was unable to conclude that the information it had obtained established violations of the statutes. The Personnel Commission adopts EEOC's determination.

The Commission is interpreting your April 26th letter as an appeal to this agency of the EEOC's determination. The next step in the Commission's procedure is to schedule a prehearing (in anticipation of a hearing in your case).

5. The charge complainant filed with the EEOC set forth three allegedly discrimination/retaliatory actions: (1) respondent failed to hire complainant for a position in the Bursar's Office, (2) respondent denied complainant the opportunity to work overtime, and (3) respondent changed complainant's work schedule from two or three full days a week to five half-days a week.

6. Complainant received notice that she was not the successful candidate for the position in the Bursar's Office no later than November 23, 1998.

7. On July 18, 2000, and again on August 10, 2000, in response to certain discussions which occurred during a prehearing conference, complainant provided the Commission a list of allegedly discriminatory/retaliatory actions taken against her by respondent which had not been set forth in her original charge.

OPINION

In the motions under consideration here, respondent advances the following three contentions:

(1) Complainant's appeal of the EEOC's adverse determination was not timely filed with the Commission;

(2) Complainant's charge is untimely filed as to the allegation relating to the position in the Bursar's Office; and

(3) Complainant should not be allowed to amend her charge at this stage of these proceedings to add the allegations set forth in the lists she provided the Commission on July 18 and August 10, 2000.

In regard to the appeal of the EEOC's determination as adopted by the Commission, the Commission's practice, upon notification from the EEOC that it has completed its investigation of a cross-filed charge and reached a determination that no discrimination/retaliation probably occurred, is to direct a letter to the complainant advising that the Commission had adopted the EEOC's determination and providing notice that an appeal of this determination must be filed within 30 days in order for the Commission to process the charge further. Contrary to respondent's contention in this regard, the timeliness of a complainant's appeal depends upon the date the Commission adopts the EEOC determination, not the date that the EEOC issues the determination, i.e., what the complaining party is appealing to the Commission is not the determination issued by the EEOC but instead the EEOC determination as adopted by the Commission. It is this adoption action which triggers the Commission's hearing process, not the action of the EEOC. Here, complainant's letter of April 26, 2000, which has been interpreted by the Commission as an appeal of the EEOC's determination, was actually received by the Commission prior to its receipt of the notice of determination from the EEOC. As a consequence, it would have to be concluded that the complainant's appeal of the EEOC's determination, as adopted by the Commission, was timely filed.

In respondent's second contention, the timeliness of complainant's charge, as it relates to the position in the Bursar's office, is at issue. Pursuant to §111.39(1), Stats., claims under the Fair Employment Act (FEA) must be filed "no more than 300 days after the alleged discrimination occurred." Here, complainant's charge was received by the Commission on October 4, 1999¹, and the actionable period under the FEA would, as a result, be December 8, 1998, through October 4, 1999. Since it is undisputed here that complainant received notice of her non-selection no later than November 23, 1998, the complaint is not timely filed as to this allegation.

Complainant argues in this regard that the date her charge was filed with the EEOC, i.e., September 17, 1999, should control. However, it is the date that the Commission receives the charge that determines the actionable period for purposes of the FEA. *Swenby v. UW HCB*, 98-0012-PC-ER, 5/20/98; *Ziegler v. LIRC*, 93-0031-PC-ER, 5/2/96.

Finally, in regard to the lists that complainant provided the Commission on July 18 and August 10, 2000, complainant clearly indicates more than once in her correspondence to the Commission that she submitted these "as supportive documentation" and not as "new or additional items." (Complainant's response dated December 1, 2000). In view of this, it is not necessary to address further respondent's contention in this regard since complainant has not offered the incidents or actions cited in these lists as additional actionable allegations.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.45(1)(b), Stats.
2. Complainant has the burden to show that her appeal of the EEOC's

¹ Although complainant's perfected complaint was not received by the Commission until October 20, 1999, the date of filing would relate back to the date that the unperfected complaint was filed, i.e., October 4, 1999. See, *Schultz v. DOC*, 96-0122-PC-ER, 4/2/97.

determination, as adopted by the Commission, was timely filed.

3. Complainant has sustained this burden.

4. Complainant has the burden to show that her charge was timely filed as to the allegation relating to the position in the Bursar's office.

5. Complainant has failed to sustain this burden.

ORDER

Respondent's motion to dismiss complainant's appeal of the EEOC's determination, as adopted by the Commission, based on untimely filing is denied. Respondent's motion to dismiss the allegation relating to the position in the Bursar's office as untimely filed is granted.

Dated: April 4, 2001

STATE PERSONNEL COMMISSION

Laurie R. McCallum/jr
LAURIE R. McCALLUM, Chairperson

LRM:990170Crul1

Judy M. Rogers
JUDY M. ROGERS, Commissioner