

STATE OF WISCONSIN

PERSONNEL COMMISSION

JAMES GANTHER,
Complainant,

v.

**Secretary, DEPARTMENT OF
REVENUE,**
Respondent.

**RULING
ON
LACK OF
PROSECUTION**

Case No. 99-0175-PC-ER

Complainant alleges discrimination based on disability, Fair Employment Act retaliation, and whistleblower retaliation with respect to his employment. The matter is currently before the Commission as a consequence of a 20-day certified letter sent to the complainant on June 20, 2000. The parties have had an opportunity to file written arguments and the following findings are based on materials in the case file and are made solely for the purpose of ruling on whether the complainant has fulfilled his responsibility to pursue his claims.

FINDINGS OF FACT

1. This complaint was filed on October 26, 1999.
2. By letter dated November 25, 1999, the Commission asked complainant to supply additional information by December 8, 1999.
3. On December 17, 1999, complainant was granted an extension to December 31, 1999, to respond to the November 5th letter.
4. Complainant's written response, dated December 30th, was received on January 3, 2000.
5. In a letter dated January 7, 2000, the Commission directed complainant to respond by January 18th to a series of additional questions in an effort to clarify his allegations.

6. Complainant did not respond to the January 7th letter. As a consequence, on January 27th, the Commission sent complainant a certified letter directing him to submit the information within 20 calendar days to avoid dismissal for lack of prosecution: "Your response must be received by the Commission within 20 calendar days of the date of this certified letter."

7. The Commission received complainant's written response, dated February 14, 2000, on February 16th, which was within the 20-day period established in the certified letter.

8. By letter dated February 23rd, the Commission directed respondent to file an answer to the complaint. The answer was due by March 27th

9. Respondent contacted the Commission on March 13th and obtained an extension until April 28th, obtained a second extension on April 26th until May 5th, and obtained a third extension on May 3rd until May 12th

10. On May 11, 2000, respondent filed an answer to the complaint and moved to dismiss the matter.

11. The respondent's motion was the subject of a telephone conference with the parties on June 1, 2000. During that conference, respondent asked that the investigator consider respondent's contentions when preparing the initial determination. The letter summarizing the conference states, in part:

During the remaining portion of the investigative process, the parties may provide input regarding the contentions raised in respondent's motion. The substance of the motion will be addressed by the investigator in the initial determination. Respondent may renew its motion in proceedings following the initial determination.

12. By letter dated June 2, 2000, the investigator directed the complainant to respond to the answer by June 19th:

After you review the respondent's answer, you may decide that you no longer wish to pursue the complaint, you may decide that you have no further information to add, or you may decide to rebut respondent's answer. No matter what you decide, you must inform the Commission of your decision in writing no later than **June 19, 2000**. The Commission will provide respondent with a copy of your response.

If you decide to rebut respondent's answer, you must respond to the following so that the Commission receives your response no later than **June 19, 2000**.

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. In your rebuttal please refer to page and paragraph (of the respondent answer) when stating your disagreement and listing your rebuttal information.
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.
3. On what date and in what manner were you made aware of the letter of 12/29/98?

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:

If a complainant fails to answer or to produce requested information necessary for an investigation, the commission may dismiss the complaint or make an appropriate inference and issue an initial determination. In the alternative, at any hearing arising out of the complaint the hearing examiner or commission may exclude any evidence which should have been offered in response to the discovery request.

If you have any questions, please contact me. (Emphasis in original.)

13. Complainant did not respond to the June 2nd letter, so on June 20th, the investigator sent complainant a certified letter, stating in part:

If you wish to proceed with your complaint, you must submit the information as described in the enclosed correspondence. 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, 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.

As requested, this complaint was also filed with the Equal Employment Opportunity Commission (EEOC). To protect your rights with that agency, you must comply with their enclosed letter. Please note that pursuant to EEOC regulations, you have 30 days in which to respond to the EEOC, as opposed to the 20 day period for responding to the Personnel Commission as set forth above. (Emphasis in original.)

14. Complainant's response to the 20-day letter was due no later than July 10, 2000.

15. Complainant did not file a written response to the June 20th letter.

16. Complainant contacted the Commission's investigator by telephone on both June 26 and July 13. The investigator described these calls in a July 13th letter:

On June 26, 2000, you contacted me by telephone about the June 20th letter. I explained to you that this letter was important and, as stated in the letter, you had to file your response within 20 days from the date of the letter. You indicated that you would furnish a response.

On July 13, 2000, you called me to request an extension to reply to the June 20th letter although you did not state a reason why you required an extension. I indicated I would not be able to grant an extension because of the statutory language in §111.39(3), Stats. I also advised you that I would send you a follow-up letter. This is that follow-up letter.

Because it does not appear that you complied with the 20 day requirement set forth in §111.39(3), Stats., you have until July 28, 2000 to both reply to the Commission's letter dated June 2, 2000 (copy enclosed) and to file any arguments you may have as to why the Commission should not dismiss your complaint.

17. Complainant filed written arguments on both July 28, 2000, and August 16, 2000, requesting that the Commission not dismiss his complaint. Complainant's submission did not supply the information requested in the June 2nd letter.

OPINION

Questions relating to whether a claimant is adequately prosecuting his/her complaint of discrimination during the investigative process are often resolved by relying simply on §111.39(3), Stats. That subsection reads:

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.

The 20 day period for responding to a certified letter from the Commission under §111.39(3), Stats., commences on the date of the Commission's letter rather than the day complainant received the certified letter. *Sloan v. DOC*, 98-0107-PC-ER, etc., 2/10/99. Here, the letter specified that the response period began on the date of the letter, or June 20th. Complainant's response was due by July 10th.

The facts of this case are comparable to those present in *Johann v. OMCD*, 97-0045-PC-ER, 10/9/97. There, an investigator for the Commission issued a 20-day certified letter on September 11, 1997, directing complainant to supply certain information. According to the Commission's ruling:

Complainant telephoned the Commission on September 12, 1997, and said she would be responding to the September 11th letter and requested a copy of the Commission's administrative rules. On September 17th, the Commission received a copy of a discovery request, dated September 17th, which complainant directed to the respondent. A member of the Commission's staff convened a conference with the parties on September 22nd because respondent had indicated it objected to portions of the discovery request. A schedule was established for respondent to respond to the complainant's discovery request and to file a preliminary motion. In addition, complainant "indicated she would respond to [the] September 11th letter."

Complainant has not filed a response to the September 11th letter.

Complainant has been sent three letters by the Commission, over the course of a three month period, requesting certain information relating to her complaint. She has failed to request additional time or to provide the requested information even though she has twice indicated, [orally], that

she would respond. Given complainant's conduct, the language of §111.39(3), Stats.,¹ and the lack of any reason for failing to respond, dismissal is appropriate.

¹ This provision is applicable to complainant's Fair Employment Act claims.

In the present case, the complainant telephoned the investigator on June 26th before he had received the 20-day letter. Complainant spoke with the investigator and indicated he would provide the requested information but never submitted it. He called the investigator again on July 13th, but this was after the 20-day period had run.

The Commission notes that the June 2nd letter to complainant directed him to respond to the answer and informed him of the possible consequences if he failed to respond. The case history shows that the June 20th letter was the second time the investigator resorted to use of a certified letter to obtain information from complainant. Complainant responded timely to the first certified letter (see ¶¶ 6 and 7 of Findings of Fact), but not to the second one. His disability and Fair Employment Act retaliation claims must be dismissed as required by the language of §111.39(3), Stats.

To the extent this conclusion may be inconsistent with the Commission's decision in *Jackson v. DOC*, 94-0115-PC-ER, 3/7/96, that decision was incorrect.

While the Commission finds that the complainant failed to meet the statutory requirement of §111.39(3), Stats., that conclusion does not apply to the question of whether complainant's remaining claim under the separate whistleblower law subchapter should also be dismissed. In analyzing the complainant's conduct in terms of his whistleblower claim, the Commission looks to the administrative rules it has issued to regulate the investigative process. The June 2nd letter to complainant referenced §PC 2.05(4)(b), Wis. Adm. Code, which provides:

If a complainant fails to answer or to produce requested information necessary for an investigation, the commission may dismiss the complaint or make an appropriate inference and issue an initial determination. In the alternative, at any hearing arising out of the complaint the hearing examiner or commission may exclude any evidence which should have been offered in response to the discovery request.

Here, complainant was directed, in letters dated June 2nd, June 20th and July 13th, to file a response to the written answer supplied by the respondent. Complainant still has not done so.

Complainant contends that he made a "good faith effort to respond" when he called the investigator on June 26th and asked for an extension with respect to the original June 2nd letter. Complainant states he did not receive the certified letter until later on June 26th and that the investigator denied the extension request. He states that the time periods for responding after both the June 2nd and June 20th letters were "not an adequate amount of time to prepare an appropriate response to the voluminous amount of information submitted by the respondent." Complainant received a copy of the answer on or about May 11, 2000. As of the date on which the Commission is issuing this ruling, the complainant has had approximately 3 months to rebut the answer since the first written directive from the investigator. Respondent's answer was 23 pages long and double-spaced. There were approximately 15 attached exhibits. Respondent's submission was not so extensive as to require more than 3 months to prepare a response. The Commission cannot agree that complainant has had an inadequate period of time in which to respond to and rebut the answer.

Complainant also states that he was subject to "medical problems:"

I have ongoing medical problems that make it difficult for me [to] prepare documents relating to this case. I suffer from headaches, depression, insomnia and allergies. I have experienced all of these medical problems in June and July 2000. These medical problems have made it difficult to prepare a response to the information submitted by the respondent.

Respondent notes that complainant provided "no verification to support his claim that medical needs prevented him from responding:"

If medical justification exists that claim could have been supported with verification of medical appointments during the relevant time period and a diagnosis that confirms a debilitating medical condition that may have precluded a timely response to the Commission.

Respondent's argument misses the mark because complainant is not contending his medical conditions prevented a response, only that the conditions made a response more difficult. The Commission understands that complainant may have been suffering from one or more medical conditions that made it more difficult for him to prepare a response to the June 2nd letter from the investigator. However, difficulties often exist that have some effect on a party's ability to prepare a submission. The Commission believes the complainant has had more than an ample opportunity to supply the information, despite encountering the medical difficulties he describes.

Given all of these circumstances, the complainant's whistleblower claim should also be dismissed. *See, Johann, supra.*

ORDER

This matter is dismissed for lack of prosecution.

Dated: October 3, 2000 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

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JUDY M. ROGERS, Commissioner

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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