STATE OF WISCONSIN
LABOR AND INDUSTRY REVIEW COMMISSION

RANDY HOEFS

Complainant

vs.

PERLMAN-ROCQUE, WHITEWATER

Respondent

ORDER

ERD Case #9100368

An Administrative Law Judge for the Equal Rights Division of the Department of Industry, Labor and Human Relations issued an amended decision in the above-captioned matter on August 12, 1992. Complainant filed a timely petition for review by the Commission.

Based upon a review of the record in its entirety, the Labor and Industry Review Commission issues the following:

ORDER

The decision of the Administrative Law Judge (copy attached) is affirmed and shall stand as the FINAL ORDER herein.

Dated and mailed at Madison, Wisconsin, this 16th day of September, 1992.

/s/
Pamela I. Anderson
Chairman

/s/
Richard T. Kreul
Commissioner

/s/
James R. Meier
Commissioner

NOTE: On appeal, in support of his position that the limitations period does not begin to run until the conclusion of the GFTP process, Complainant references the date "March 14, 1990" in his complaint which he lists as the date the alleged discrimination first happened, and the date "May 15, 1990" (Complainant meant to say May 31, the date of the final step under GFTP--see Post-Hearing Brief to ALJ dated 5/16/92), which he lists as the date the discrimination last happened, and asserts:

> "If the Statute of Limitations starts from the first date, the date of the accident, then why ask when did it last happen?"

The problem with this assertion by Complainant is that he has erroneously included the May 31, 1990 hearing under the GFTP process as part of the "occurrence" of alleged discrimination. As noted by the Administrative Law Judge, the discrimination occurs when the employer acts and the employe knows about it. What occurred under the GFTP process was irrelevant for purposes of the running of the statute of limitations.

125/A

STATE OF WISCONSIN
DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS
EQUAL RIGHTS DIVISION

Randy Hoefs
912 East Street
Fort Atkinson, WI 53538,

Complainant,

AMENDED
DECISION AND MEMORANDUM OPINION

vs.

ERD Case No. 9100368

Perlman-Rocque, Whitewater
729 E. Executive Drive
Whitewater, WI 53190,

Respondent.

In a complaint filed with the Equal Rights Division of the Department of Industry, Labor and Human Relations on February 13, 1991, the Complainant, Randy Hoefs (Hoefs), alleged that the Respondent, Perlman-Rocque, violated the Wisconsin Fair Employment Act, sec. 111.31--111.395, Stats., by discriminating against him in the terms and conditions of his employment on the basis of his age, by refusing to reasonably accommodate his handicap, and by terminating his employment because of his age and because of his handicap. An investigation was conducted by an agent of the Equal Rights Division and, on March 29, 1991, an Initial Determination was issued finding that there was no probable cause to believe that the Respondent had violated the Wisconsin Fair Employment Act as alleged in the complaint. Hoefs filed a timely appeal of the Initial Determination, and the case was then certified to hearing. A hearing on the issue of probable cause was scheduled to be held on March 19, 1992, in Elkhorn, Wisconsin, before Administrative Law Judge Larry R. Jakubowski. At that time, the Complainant appeared in person and without counsel. The Respondent appeared and was represented by its Attorney, Brian W. Bulger.

At the beginning of the proceedings, counsel for the Respondent raised the affirmative defense of the statute of limitations with regard to the timeliness of the complaint. The Complainant moved to bar the Respondent from asserting any affirmative defenses, based upon the Respondent's failure to file a timely answer, pursuant to Section Ind. 88.11 of the Wisconsin Administrative Code. The Administrative Law Judge ruled that the administrative rules do not require the filing of an answer to raise an affirmative defense prior to the hearing when a case has been certified for hearing on the issue of probable cause. The Complainant's motion was denied.

The Administrative Law Judge also decided to limit the initial testimony to be taken at this hearing to the issue of the timeliness of the complaint. Following the receipt of that evidence, the Respondent moved to dismiss based upon the statute of limitations, and moved to adjourn the hearing pending the

decision on the motion to dismiss. The Administrative Law Judge granted the motion to adjourn the hearing. By stipulation of the parties, a transcript was prepared and filed with the Department on May 11, 1992. The Complainant submitted a post-hearing brief, which was received on May 19, 1992. The Respondent filed a post-hearing brief on May 22, 1992.

Based upon the evidence received at the hearing in this matter, the Administrative Law Judge now makes the following:

FINDINGS OF FACT

1. The Respondent is a trucking operation based in Whitewater, Wisconsin, which employs truck drivers to deliver supplies to fast food restaurants.

2. The Complainant was employed as a semi-truck driver for the Respondent. Hoefs was hired on June 6, 1988. His last day of work for the Respondent was March 14, 1990.

3. On March 14, 1990, Hoefs had an accident while operating a semi-truck for the Respondent. On March 15, 1990, an accident review committee reviewed the circumstances of that accident and decided that it was a preventable accident. On March 15, 1990, Hoefs was advised that his employment was being terminated as a result of having three preventable accidents within a nine-month period, and was advised that the termination was pursuant to the Respondent's transportation safety policy.

4. On March 19, 1990, Hoefs received a termination letter advising him of his termination from employment and of his appeal rights. On that same day, Hoefs filed an appeal by a two-page handwritten letter. On March 21, 1990, Hoefs was advised by a letter from Ronald Winters, General Manager for the Respondent, that the decision to discharge him under the safety policy was being upheld.

5. The Respondent was a non-union facility in March 1990. The Respondent had initiated an employe procedure referred to as the Guaranteed Fair Treatment Procedure. That procedure was available to and applied to Hoefs. It provided a three step approach to resolving disputes between employes and the Respondent. The procedure was similar to a grievance procedure, except that there is no union representing the employe through the procedure. The Guaranteed Fair Treatment Procedure, as it applies to the appeal of a decision to discharge, is a post termination procedure which provides a possible remedy to an employe for a termination decision which has previously been made by the employer.

6. On March 23, 1990, Hoefs filed an appeal under the Guaranteed Fair Treatment Procedure, asking that his March 14, 1990 accident be reviewed and that he have the opportunity to present evidence to the accident review committee. The Respondent replied to this request on March 26, 1990, advising Hoefs that he would be allowed a second accident review committee hearing and that he could present information to the committee.

A second accident review committee met and heard the circumstances regarding the March 14, 1990 accident on March 26, 1990. That second committee also found the March 14, 1990 accident to be preventable. Hoefs was advised by a letter dated March 26, 1990, from Scott Miller, Operations Manager, that the decision finding the accident to be preventable had been upheld and that the decision to terminate his employment was upheld.

7. On April 16, 1990, Hoefs filed a second complaint under the Guaranteed Fair Treatment Procedure. At this time he requested that his discipline be converted from a discharge to a long-term suspension. His request was denied through the first two steps of the procedure, leading to a hearing which took place on May 31, 1990. On June 6, 1990, Hoefs was advised by a letter from David Scholtes that the appeals board of the Guaranteed Fair Treatment Procedure had concluded that the decision to discharge him was fair and was being upheld.

8. The Guaranteed Fair Treatment Procedure, printed by the Respondent, refers to the person filing the complaint as an employe. However, by its terms, the Guaranteed Fair Treatment Procedure applies to "all HAVI employes and ex-employes". HAVI is the parent company of Perlman-Rocque, the Respondent.

9. Within 10 days of his discharge on March 19, 1990, Hoefs filed for unemployment compensation benefits and received unemployment compensation benefits.

10. Hoefs filed a complaint with the Equal Rights Division on February 13, 1991, more than 300 days after the date of his discharge and more than 300 days after he was aware that his employment had been terminated. The complaint was not filed within 300 days of the occurrence of the alleged discrimination. Hoefs did not remain an employe of the Respondent while his appeal through the Guaranteed Fair Treatment Procedure was being considered.

Based upon the Findings of Fact made above, the Administrative Law Judge now makes the following:

CONCLUSIONS OF LAW

1. The Respondent, Perlman-Rocque, Whitewater, is an employer within the meaning of the Wisconsin Fair Employment Act.

2. The complaint in this matter was not filed within 300 days of the date of the alleged discrimination and, therefore, the Department lacks jurisdiction to hear and decide this complaint pursuant to Wis. Stats., Sec. 111.39(1).

Based upon the Findings of Fact and Conclusions of Law made above, the Administrative Law Judge now issues the following:

ORDER

1. That complaint in this matter be dismissed.

Dated at Milwaukee, Wisconsin AUGUST 12, 1992

Larry R. Jakubowski
Administrative Law Judge

LRJ:ER3373:6

cc: Complainant
Respondent
Brian Bulger, Attorney for the Respondent
Burton Wagner, Attorney for the Respondent

MEMORANDUM OPINION

The hearing in this matter, and this decision, is strictly limited to the issue of whether or not the complaint was filed in a timely manner under sec. 111.39(1), Wis. Stats. That statute provides that the Department may investigate and process a complaint if the complaint is filed no more than 300 days after the alleged discrimination "occurred". The dispute between the parties, as outlined in the briefs, is in regard to the application of the term occurred.

There is no dispute that the vehicular accident leading to discharge occurred March 14, 1990. There is no dispute that the Complainant received a letter of discharge from his employer on March 19, 1990. The Complainant clearly understood that letter to be a discharge of his employment, as demonstrated by the fact that he filed three forms of written appeal and filed a claim for unemployment compensation benefits following receipt of the March 19, 1990 letter. The complaint in this matter was filed on February 13, 1991. The filing was clearly more than 300 days after the March 19, 1990 occurrence of the discharge.

The Complainant's argument is based entirely on the existence of the "Guaranteed Fair Treatment Procedure". This is a procedure which the Respondent had initiated, as a non-union facility, to copy the procedures which might be available under a grievance procedure of a collective bargaining agreement. The procedure provides for a three-step appeal of various employment decisions. The Complainant argues essentially that the procedure referred to him as "an employe" and that he did not believe that his discharge became final until he received a final decision from the third-step appeal of the Guaranteed Fair Treatment Procedure. The Complainant states in his brief that since he had recourse to this internal procedure which could have resulted in his reinstatement and remedied the problem, he did not believe that the discrimination had occurred and that the Statute of Limitations should begin to run with the March 19, 1990 discharge letter.

The Guaranteed Fair Treatment Procedure refers to both employes and "former employes". The Complainant clearly fell in the category of former employe when he invoked the Guaranteed Fair Treatment Procedure. This procedure was clearly a post-discharge procedure which was available, as the Complainant admits in his brief, as a possible way to remedy the prior decision and to provide him with the method of being reinstated to the job from which he was terminated. It is clearly not part of the decision making process which led to the decision to discharge. That decision to discharge was clearly made and communicated by March 19, 1990.

The case law indicates that the Complainant's arguments cannot be sustained. It is well established in Wisconsin that the act of discrimination occurs at the time the employer acts and the employe knows about the alleged discriminatory action. Hilmes v. DILHR, 147 Wis. 2d 48, 433 N.W. 2d 251 (Ct. App., 1988); Ames v. UW-Milwaukee (Wis. Personnel Comm., 11/7/85); Goodhue v. University of Wisconsin (Wis. Personnel Comm., 11/9/83). Similarly, it is well established that the filing of a timely grievance does not toll or extend the Statute of Limitations. Landrum v. DILHR (Milwaukee Co. Cir. Ct., 3/6/89); King v. DHSS (Wis. Personnel Comm., 8/6/86); Hoepner v. Department of Health & Human Services (Wis. Personnel Comm., 6/30/81).

The June 23, 1992 decision of the Wisconsin Supreme Court in Jicha v. DILHR, ___ Wis.2d, ___, ___ N.W.2d ___, 1992 Wisc. Lexis 321 (1992), addresses the Complainant's arguments directly and requires dismissal of this complaint as untimely. In Jicha, the complaint was filed under the Wisconsin Family and Medical Leave Act. However, the Supreme Court noted that the general principles regarding interpretation of Statute of Limitation provisions in both that Act and the Wisconsin Fair Employment Act are similar. The Family and Medical Leave Act requires the filing of a complaint within 30 days after the discrimination occurs. In the Jicha decision, the employe received a letter of termination from his employer. That employer had an "open door policy", which allowed the employes to appeal their discharge directly to the company president for review. Although that policy provided fewer steps and less formality than the policy provided by Perlman-Rocque, the policy is similar in its intent and identical in its effect. The policy was found to be a post-termination procedure which applies after the discharge is effective. Jicha filed his complaint under the Family and Medical Leave Act after the president turned down his appeal under the open door policy. Jicha argued that it was reasonable for him to believe that the violation did not occur until he received the denial of his reinstatement from the president because he reasonably believed that he would be reinstated. The Wisconsin Supreme Court specifically found that the existence of a procedure for reinstatement does not change the fact that the employe was, in fact, terminated when he received the termination letter and it was not reasonable for the employe to conclude otherwise. The Wisconsin Supreme Court cited with approval the decision of the United States Supreme Court in Delaware State College v. Ricks 449 U.S. 250 (1980), in which the United States Supreme Court held that a post- termination procedure does not affect the finality of a termination decision or toll the running of the Statute of Limitations.

In the present case, Hoefs was clearly notified on March 19, 1992 that he had been discharged from employment. He performed no further work, he collected unemployment compensation and he filed three separate appeals of that termination. It is not reasonable for Hoefs to suggest that he was unaware that his discharge was final until after the Guaranteed Fair Treatment procedure had been completed. The complaint in this case was filed more than 300 days after the March 19, 1990 discharge letter. The existence of the post-termination procedure to remedy the employer's decision to terminate does not toll the Statute of Limitations. As a result, this complaint has not been filed in a timely manner and the complaint must be dismissed.