STATE OF WISCONSIN PERSONNEL COMMISSION

MICHAEL RAY,

Complainant,

v.

Secretary, DEPARTMENT OF HEALTH & SOCIAL SERVICES & Chairman, GROUP INSURANCE BOARD,

Respondents.

Case No. 83-0129-PC-ER

DECISION AND ORDER

NATURE OF THE CASE

On November 18, 1983, complainant filed a complaint of discrimination alleging that respondents had discriminated against him on the basis of marital status with respect to the health insurance coverage available to him as a state employee. On February 2, 1984, one of the Commission's Equal Rights Officers and the Commission's General Counsel determined that there was probable cause to believe that such discrimination had occurred. At a pre-hearing conference held on March 8, 1984, the parties agreed to waive an evidentiary hearing. The parties subsequently submitted written arguments to the Commission.

FINDINGS OF FACT

The following facts appear to be undisputed:

1. The complainant is employed by the Department of Health and Social Services (DHSS). His wife is also a state employee.

2. In October, 1983, the complainant advised DHSS that he wished to enroll in a "single coverage" health insurance plan with Jackson Clinic,

while his wife enrolled in a "family coverage" health insurance plan with Dean Clinic, which also would cover their children. The premiums for both plans are at least partially paid by the state as part of the employees' fringe benefits package.

3. DHSS informed the complainant that he could not do so. This was pursuant to §Grp 20.11, Wis. Adm. Code, which provides in part: "...if one eligible spouse elects family coverage, the other eligible spouse may be covered as a dependent but may not elect other coverage."

4. If the complainant and his spouse were divorced or simply unmarried, they apparently would be free to enroll in the health plans they desired, as set forth in finding #2.

5. If the state permitted eligible spouses to enroll in the health insurance plans of their choice, this might result in added expense to the state, as an individual employee who could be covered under a spouse's family plan with one provider, at no additional cost to the state, might elect single coverage with another provider, which would require an additional payment by the state.

6. The Group Insurance Board estimates that if one-half of the estimated 5% of eligible state employees who are state employee spouses opted for separate coverage, this would cost the state about $1.68 million in excess of current costs under the rule prohibiting such elections.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to sections 230.45(1)(b) and 111.322, Stats.

2. Respondent is an employer within the meaning of §111.32(6), Stats.

3. The complainant is entitled to the protection of §111.322 Stats., and §111.32(12), Stats., even though the action complained of is not based on the fact that he is a married person but on the fact that he is married to an employee of the State of Wisconsin.

3. Complainant has the burden of proving that respondent discriminated against him on the basis of marital status with respect to the health insurance coverage available to him as a state employee.

4. Complainant has not sustained his burden of proof.

OPINION

Jurisdiction

Respondents have advanced the argument that the Commission lacks subject matter jurisdiction over this complaint due to the fact that the action complained of was not based on complainant's marital status per se but on the identity of his spouse, i.e., it was not based on the fact that complainant is married but on the fact that complainant is married to a state employee.

The Fair Employment Act states in pertinent part:

> "Marital status" means the status of being married, single, divorced, separated, or widowed. Section 111.32(12), Stats.
>
> Notwithstanding §111.32, it is not employment discrimination because of marital status to prohibit an individual from directly supervising or being directly supervised by his or her spouse. Section 111.345, Stats.
>
> In the interpretation of this subchapter, and otherwise, it is declared to be the public policy of the state to encourage and foster to the fullest extent practicable the employment of all properly qualified...individuals regardless of age, race, creed, color, handicap, marital status, sex, national origin,...ancestory, sexual orientation, arrest record or conviction record. This subchapter shall be liberally construed for the accomplishment of this purpose. Section 111.31(3), Stats.
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> The legislature finds that the practice of...unfair discrimination in employment...against...properly qualified...individuals by reason of

> their...marital status...substantially and adversely...affects the general welfare of the state... Section 111.31(1), Stats.

The Commission finds extremely compelling the Legislature's requirement that the above-cited language be liberally construed and finds such requirement more indicative of legislative intent than trying to draw from drafting notes, fiscal notes, correspondence or other documents an inference as to what was in the Legislature's collective minds at the time the legislation was enacted.

This finding is consistent with that of state courts which have interpreted similar provisions in their state laws. In Kraft, Inc. v. State of Minnesota, 284 N.W. 2d 386, 21 E.P.D. 405 (Minn., 1979), the court found that by including marital status within the parameters of the Human Rights Act, the Legislature clearly intended to outlaw arbitrary classifications relating to marriage. It held:

> "We reject the view 'marital status' while it denotes the fact that one is or is not married, does not embrace the identity or situation of one's spouse."

In a recent Michigan Court of Appeals case, Miller v. C.A. Muer Corp., 336 N.W. 2d 215 (Mich. App., 1983), the court discussed the possibility of using either a narrow or broad interpretation of marital status and found that by looking to legislative intent, the broader interpretation outlawing discrimination based on a specific identity of the spouse should be adopted. The court reasoned:

> "The Elliott-Larsen Civil Rights Act presents a comprehensive legislative scheme designed to prevent, in part, discriminatory employment practices based on arbitrary classifications. The legislature's intent would be furthered by construing the term 'marital status' to include a prohibition against discriminatory employment practices based on the identity of one's spouse."

Similarly, the Montana Supreme Court in Thompson v. Board of Trustees, Mont. 627 P. 2d 1229 (1981), held that marital status as used in its state's employment law included the identity and occupation of one's spouse

as a protected classification. Particularly compelling for the Montana Supreme Court was the legislative mandate to liberally construe the provisions of the statute with a view to effecting its object and promoting justice. It noted:

> "We therefore hold that a liberal definition of the term 'marital status' as used in those statutes includes the identity and occupation of one's spouse. Both statutes are strongly worded directives from the legislature prohibiting employment discrimination and encouraging public employment to hire, promote and dismiss employees solely on merit." Id. at 1231.

This conclusion is also consistent with the rule that a statute be construed so that no word or clause is surplusage. Johnson v. State, 76 Wis. 2d 672, 251 N.W. 2d 834 (1977); State v. Ross, 73 Wis. 2d 1, 242 N.W. 2d 210 (1976). Respondent argues that the definition of "marital status" is not broad enough to include the identity of the complainant's spouse. If that contention were true, there would be no need to create the specific exception found in §111.345, Stats., which allows an employer to prohibit "an individual from directly supervising or being directly supervised by his or her spouse." This exception, introduced by the phrase "[n]ot withstanding §111.32", is clearly premised on the identity of the complainant's spouse rather than complainant's marital status per se. The word "notwithstanding" is defined in Webster's New Collegiate Dictionary as meaning "in spite of," making it clear that §111.345, Stats., is not merely restating or interpreting §111.32(12), Stats., but is carrying out a specific exception to that provision. In order to make sense out of the exception in §111.345, Stats., and so that that provision is not surplusage, the definition of marital status found in §111.32(12), Stats., must be read broadly enough to include the identity of the spouse.

The Commission concludes on the basis of the foregoing that it has subject matter jurisdiction over this complaint of discrimination.[FN]

Merits of the Complaint

Section 40.52(1)(a), Stats., directs the Group Insurance Board to establish a health insurance plan which provides "a family coverage option for persons desiring to provide for coverage of all eligible dependents and a single coverage option for other eligible persons." Section 40.02(20), Stats., defines the term "dependent" to include a spouse, dependent minor children, and dependent handicapped children of any age. Section GRP 20.11, Wis. Adm. Code, originally numbered section GRP 20.10, was created in 1960. Register, May 1960, No. 53, effective June 1, 1960. It was renumbered in 1978. Register, December 1977, No. 264, effective January 1, 1978. Sections 40.52(1)(a) and 40.02(20), Stats., as created by ch. 96, Laws of 1981, codify by statute this long-standing administrative rule that "[i]f one eligible spouse elects family coverage, the other eligible spouse...may not elect any other coverage." The spouse electing family coverage must cover "all eligible dependents." §40.52(1)(a), and the other spouse is an eligible "dependent," §40.02(20), Stats. Since the second spouse is covered by the first spouse's family coverage, the second spouse no longer is an "eligible person" for a "single coverage option." Section 40.52(1)(a), Stats.

The fundamental rule of statutory construction is that the intent of the Legislature is the controlling factor. Milwaukee County v. ILHR Dept., 80 Wis. 2d 445, 451, 259 N.W.2d 118 (1977). The aim of statutory con-

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FN In Arrowood and Islo v. HGCC of Wisconsin, ERD Case Nos. 845 0396 and 845 0397 (DILHR, May 17, 1984), this issue was considered and the opposite conclusion reached. The Commission is unpersuaded by the rationale of the hearing examiner in that case.

struction is to discern the intent of the legislature. Id. This is especially true when one is confronted with apparently inconsistent legislation. Cross v. Soderbeck, 94 Wis. 2d 331, 344, 288 N.W.2d 779 (1980).

The respondent agencies argue that by amending the Wisconsin Fair Employment Act to prohibit marital status discrimination, the Legislature could not have intended to nullify the restricted options for health insurance coverage which it created in secs. 40.52(1)(a) and 40.02(20), Stats.

The Commission supports this position for the following reasons:

First, it is a well-established tenet of statutory construction that when a general statute and a specific statute relate to the same subject matter, the specific statute controls. Raisanen v. Milwaukee, 35 Wis. 2d 504, 516, 151 N.W.2d 129 (1967). In this case, the specific restriction on health insurance options contained in secs. 40.52(1)(a) and 40.02(20), Stats., control over the general prohibition against marital status discrimination contained in the Wisconsin Fair Employment Act.

Second, repeal of the subject provisions in secs. 40.52(1)(a) and 40.02(20) could engender substantial costs. Such costs render it less likely that the Legislature would have intended to repeal secs. 40.52(1)(a) and 40.02(20) when it prohibited marital status discrimination in the same legislative session. Repeals by implication are not favored in the law. Patterman v. Whitewater, 32 Wis. 2d 350, 356, 145 N.W.2d 705 (1966).

The Commission is not unaware that the prohibition against marital status discrimination contains but one express exception, namely, where an individual directly supervises or is directly supervised by his or her spouse. Section 111.345, Stats. The Commission is also aware of the rule of statutory construction that the express mention of one thing implies

exclusion of all others. Gottlieb v. Milwaukee, 90 Wis. 2d 86, 95, 179 N.W.2d 479 (Ct. App. 1979).

The Wisconsin Supreme Court has decided that this rule should be applied in a flexible manner (State ex rel. West Allis v. Milwaukee Light, Heat & Tractor Co., 166 Wis. 178, 182, 164 N.W. 837 (1917); Columbia Hospital Asso. v. Milwaukee, 35 Wis. 2d 660, 669, 151 N.W.2d 750 (1967); Hathaway v. Green Bay School Dist., 116 Wis. 2d 388, 401, 342 N.W.2d 682 (1984)) and the Commission heeds such advice by the Court and, in the absence of any evidence that the Legislature intended the listing of the exclusion to be an exhaustive listing, the Commission declines to apply such rule of statutory construction to the facts of this case. The existence of a conflicting and more specific statutory provision is a better indication of legislative intent than guesses as to whether or not a listing of exclusions was meant to be exhaustive. Even if the Commission decided to make such a guess, it would be more logical to conclude that the Legislature's failure to include an exception relating to the insurance coverage available to state employee spouses was not a conscious decision but rather resulted from a failure to anticipate the situation under consideration here. Surely, a result which could have a $1.68 million impact to the state would have stimulated some debate or concern if it had been considered, yet the record reveals no such debate or concern by the Legislature in its consideration of the subject legislation.

ORDER

This complaint is dismissed.

Dated: Oct. 10, 1984 STATE PERSONNEL COMMISSION

DONALD R. MURPHY, Chairperson

LRM:jab
JEN3

LAURIE R. McCALLUM, Commissioner

DENNIS P. McGILLIGAN, Commissioner

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