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 \*  
 JERRI LINN PHILLIPS, \*  
 \*  
 Complainant, \*  
 \*  
 v. \*  
 \*  
 Secretary, DEPARTMENT OF \*  
 HEALTH & SOCIAL SERVICES, and \*  
 Secretary, DEPARTMENT OF \*  
 EMPLOYE TRUST FUNDS, \*  
 \*  
 Respondents. \*  
 \*  
 Case No. 87-0128-PC-ER \*  
 \*  
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FINAL  
 DECISION  
 AND  
 ORDER  
 FOLLOWING  
 REHEARING

In an order entered April 28, 1989, the Commission granted in part complainant's petition for rehearing and ordered additional briefs on the following issues:

"1. Whether the matters set forth in 'Complainant's Statement of Theories' filed March 22, 1989, under the headings: 'DHSS POLICY STATEMENT,' 'STATE CONSTITUTION,' and 'PUBLIC POLICY CONSIDERATIONS' are properly before the Commission.

"2. Whether complainant's sex discrimination claim should be dismissed for failure to state a claim upon which relief can be granted."

With respect to the first issue, complainant argues that the Commission should exercise "ancillary jurisdiction" over her contractual and constitutional claims to avoid the possibility of "creating a multiplicity of administrative actions with the possibility of inconsistent administrative determinations." In State ex rel Farrell v. Schubert, 52 Wis.2d 351, 358, 190 N.W.2d 529 (1971), the court held:

"...a power which is not expressed must be reasonably implied from the express terms of the statute; or, as otherwise stated, it must be

such as is by fair implication and intendment incident to and included in the authority expressly conferred.'...." (footnote omitted)

The Commission lacks the statutory authority to exercise ancillary jurisdiction, on either an express or implied basis.

With respect to the second issue, complainant begins her argument with the assertion that her "sex discrimination claim is inextricably related to her sexual orientation and marital status claims..." and then proceeds to reargue those claims. This is outside the scope of the rehearing. Complainant's only argument as to the sex discrimination claim as such is as follows:

Similarly, the term spouse is also gender biased, and is facially so by definition. Two persons of the same sex may not by definition become spouses. Consequently, because Complainant is female, she will be discriminated against and ineligible to receive an important benefit as a term and condition of her employment unless she chooses a male, instead of a female as her lifetime companion. If Complainant were a male, Tommerup could be Complainant's spouse. This is discrimination on the basis of sex prohibited by the WFEA." Complainant's Brief, pp. 5-6.

The Commission addressed this contention in its original decision of March 15, 1989 at p. 19:

This theory of discrimination in reality has nothing to do with complainant's gender. Rather, it is based on the theory that two persons of the same gender, whether male or female, cannot avail themselves of marriage in order to obtain family health insurance coverage. Therefore, there is no action being taken against complainant because of her gender, because the employer's policy facially treats males and females exactly alike. Also, there can be no claim of disparate impact. Therefore, the complaint fails to state a claim on which relief can be granted with respect to sex discrimination.

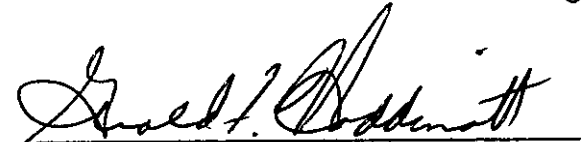
ORDER

This complaint of discrimination is dismissed for failure to state a claim upon which relief can be granted.

Dated: September 8, 1989 STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

  
DONALD R. MURPHY, Commissioner

  
GERALD F. HODDINOTT, Commissioner

AJT:gdt  
JMF02/1

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