STATE OF WISCONSIN PERSONNEL COMMISSION

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

RULING ON PETITION FOR REHEARING

This matter is before the Commission on complainant's petition for rehearing pursuant to § 227.49, Stats., filed April 4, 1989. Both the Department of Employe Trust Funds (DETF) and the Department of Health and Social Services (DHSS) oppose the petition.

On March 15, 1989, the Commission entered an order dismissing complainant's charge of discrimination on the ground that it failed to state a claim upon which relief can be granted. In her petition for rehearing, complainant contends the Commission's decision involved erroneous procedure and incorrectly decided the substantive issues.

In her charge of discrimination, complainant alleged that the denial of her application for family health insurance coverage to include her partner in a homosexual relationship constituted discrimination on the basis of marital status, sex, and sexual orientation. In its holding that this charge failed to state a claim upon which relief could be granted, the Commission relied to a large extent on specific statutory provisions regarding family insurance coverage which showed that the legislature did

not intend that the failure to extend family health insurance coverage to the spousal equivalents of homosexual employes was violative of the Fair Employment Act (FEA). In her petition for rehearing, complainant presents nothing really new by way of argument that the Commission's analysis of this legislation was erroneous, and the Commission cannot conclude that its earlier decision was incorrect. Furthermore, even without the specific statutory framework discussed in the decision, there still is no basis under which complainant's factual allegations state a successful claim under the Fair Employment Act.

This case involves a fringe benefit (health insurance for dependents of employes) which is available to two categories of employes:

1) married employes are able to cover their spouses;

2) employes with children meeting certain criteria are able to cover those children.

The employer has chosen to provide a fringe benefit (family health insurance coverage) which benefits only employes who have certain legally recognized categories of dependents -- spouses and children. These statuses (husband-wife, parent-child) are specifically recognized in Wisconsin law, which also imposes a duty of support on parents and spouses. See, e.g., § 767.08(1), Stats., In Matter of Estate of Stromsted, 99 Wis.2d 136, 299 N.W.2d 226 (1980); Sharpe Furniture, Inc. v. Buckstaff, 99 Wis.2d 114, 299 N.W.2d 219 (1980); Marshfield Clinic v. Discher, 105 Wis.2d 506, 314 N.W.2d 326 (1982).[1]

---

[1] While the employer provides family coverage to certain children for which there is no legal obligation of support, this is an extension of coverage beyond the legally-recognized age of support obligation with respect to a relationship the law recognizes rather than the creation of a different class of relationship for group health insurance coverage purposes.

Therefore, while the employer provides a fringe benefit (family health insurance coverage) that tends to benefit certain categories of employes (those who are married or who have children) more than others, eligibility is based on the existence of a legally-recognized interpersonal relationship. In the Commission's view, this situation is somewhat analogous to the line of cases under both Title VII and the Wisconsin Fair Employment Act (FEA) dealing with health or disability insurance coverage which tends to benefit one sex more than another. The general rule deriving from these cases is that such results are not discriminatory so long as eligibility for benefits is based on a legitimate factor other than sex.

For example, in Kimberley Clark Corp. v. Labor & Ind. Rev. Commn., 95 Wis.2d 558, 291 N.W.2d 584 (1980), the court discussed the question of whether a disability plan which covered pregnancy could be considered to discriminate against men:

> It is obvious that only women will benefit directly from that [pregnancy related] coverage and that those women who become pregnant will be subsidized by those employes, including women, who do not. It is equally apparent that those who incur other gender-related disabilities due, for instance, to prostate or menopausal problems will be subsidized by co-employes who do not suffer from such disabilities. The disparity between the subsidized and subsidizers in these examples is based on the factor of actual disability, however, and not on the factor of sex. (emphasis supplied) 95 Wis.2d at 572.

Similarly, in the instant proceeding it can be said that the disparity between married and unmarried employes situated like complainant is not based on marital status or sexual orientation per se but rather on the fact that Wisconsin family law does not accord legal status to a homosexual relationship like complainant's.

A fundamental difficulty with complainant's theories of sexual orientation and marital status discrimination is illustrated by the following argument from her brief:

> ". . . [i]f the unmarried employe with the spouse equivalent is identically situated to the married employe with a spouse, there can be no justification to treat them differently and to do so is to unlawfully discriminate. . ." (p. 19).

The problem with this contention is that an unmarried employe like complainant with a "spouse equivalent" can not be "identically situated to the married employe with a spouse" in one significant respect, regardless of how closely the relationship resembles a marital relationship, because the Wisconsin law does not recognize the status of "spousal equivalent" in a homosexual relationship. Complainant cannot insist that because the FEA prohibits discrimination on the basis of sexual orientation and marital status in employment that in its administration of its fringe benefit program the employer must recognize an interpersonal relationship status that is not recognized under Wisconsin non-employment law.

For example, suppose an employer decides to provide an employe day care program. There presumably could be a number of categories of employes who would desire to utilize such a program, in addition to the conventional situation involving parent and child. One example would be an employe who shares a house with a divorced sibling who has a minor child whom the employe helps raise and support. Another example would be an employe who is similarly situated except that he or she cohabits with a single parent of the opposite sex. A third example is an employe who is similarly situated except that he or she shares a homosexual relationship with a single parent of the same sex. A fourth example would be a single employe whose neighbor wants him or her to enroll the neighbor's child. If the employer decides to limit the provision of day care to the category of

parent-child recognized by Wisconsin substantive family law, and to deny this benefit to all of the foregoing hypothetical employes, it does not follow that there is employment discrimination on the basis of marital status or sexual orientation. This is because the hypothetical employes are not similarly situated to the employes who are accorded coverage, because the hypothetical employes do not have legally recognized parent-child relationships with the children involved. If an employer decides to limit the reach of a fringe benefit that covers employes' families by relying on substantive family law definitions of parent and child rather than to have to provide coverage for a myriad of legally inchoate relationships, which the foregoing hypotheticals only begin to exemplify, the employer is not liable under the FEA for marital status or sexual orientation discrimination because that substantive family law fails to recognize certain interpersonal relationships in which members of those groups may be involved, which resemble in many ways the legally-recognized relationships. It would be a different case if the employer chose to extend child care to employes not involved in a legally recognized parental relationship, but did not do so in an even-handed manner. For example, if the children of cohabiting heterosexual employes were covered, then the children of cohabiting homosexual employes also would have to be covered. However, the FEA does not require an employer to attempt to encompass all the categories of de facto familial relationships in which single and homosexual employes may be involved that parallel de jure relationships.

Complainant also claims procedural error in the processing of the motion to dismiss for failure to state a claim upon which relief can be granted filed by DHSS. In its initial motion and brief, DHSS sought dismissal of the entire complaint without limitation. However, while DHSS

separately briefed the merits of its motion with respect to marital status and sexual orientation discrimination, nowhere did it specifically address the sex basis of the complaint. In her brief, complainant stated that respondent DHSS had "not sought to dismiss the claim of sex discrimination on the merits," (note 4, p. 4) and that DHSS had "not challenged on the merits the charge of discrimination on the basis of sex." (note 12, p. 16) In its reply brief, DHSS reiterated that it sought dismissal of the entire complaint, including the sex discrimination claim, and presented some specific arguments against the viability of that claim.

On the basis of these circumstances, the Commission agrees that complainant did not have an adequate opportunity to respond to respondent's arguments on the merits of the sex discrimination claim. Therefore, the Commission will grant the petition for rehearing as to the sex discrimination portion of this matter. Respondent's treatment of this issue in its reply brief will be considered its brief in chief. Complainant will be given 25 days from the date of entry of this order in which to serve and file a responsive brief. Respondents will have 15 days after said date in which to serve and file any reply.

Complainant further contends as follows:

> "Although PHILLIPS raised state and federal, as well as contractual claims in COMPLAINANT'S STATEMENT OF THEORIES (3/15/88), neither DETF nor DHSS moved to dismiss them, nor were they addressed in the Commissions Decision and Order (3/15/89). If in fact it was DETF's and DHSS' position that this Commission had no jurisdiction over these claims, they should have properly raised them in their respective Motions to Dismiss so that all parties could have briefed those issues as well. This was not done, thus making the Personnel Commission's Decision and Order summarily disposing of PHILLIPS' claims premature and again violative of PHILLIPS' due process rights for failure to give notice, provide a hearing or an opportunity to respond."

Complainant commenced her "STATEMENT OF THEORIES," filed March 22, 1988, with the statement that she "alleges discrimination under three

theories: Marital status, sexual orientation, and sex." There followed three sections labeled "MARITAL STATUS CLAIM," "SEXUAL ORIENTATION CLAIM," and "SEX DISCRIMINATION CLAIM," after which were sections labeled "DHSS POLICY STATEMENT," "STATE CONSTITUTION," and "PUBLIC POLICY CONSIDERATIONS." These latter sections presented arguments that respondents' family health insurance coverage policy violated DHSS internal policies, the state Constitution, and certain public policy considerations.

In its decision, the Commission dealt with these contentions as follows:

> "Complainant also set forth theories of violations of the DHSS internal 'Affirmative Action and Equal Employment Opportunity Policy Statement' and the state Constitution, and asserted a number of public policy considerations. Since any Commission jurisdiction over this matter is limited to FEA claims of discrimination, these other theories are immaterial." Note 1, page 5.

When it entered its decision, the Commission did not perceive that these matters were being asserted as separately cognizable claims, but assumed that they were being set forth in support of the cognizable discrimination claims. Furthermore, even though DHSS did not specifically address these contentions in its brief in support of its motion to dismiss for failure to state a claim, it was clear that respondent sought dismissal of the entire complaint, and it would seem that if complainant believed that these matters were separately cognizable claims that would in any event survive the motion to dismiss the claims of discrimination, it should have pointed this out in its brief, just as it did with respect to the sex discrimination claim. However, since this issue was never specifically briefed by either side and rehearing will be granted with respect to the sex discrimination claim, rehearing will also be granted on this point, and complainant will be permitted to address in its brief why the aforesaid

theories, aside from the sex discrimination claims, should remain before the Commission.

ORDER

Complainant's petition for rehearing filed April 4, 1989, is granted in part and further briefing will be granted on the following issues:

1. Whether the matters set forth in "COMPLAINANT'S STATEMENT OF THEORIES" filed March 22, 1988, 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.

Complainant's brief is to be served and filed within 25 days of the date of this order. Respondents' reply, if any, is to be served and filed within 15 days after the aforesaid date.

Dated: April 28, 1989 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

AJT:dmg
JGF002/4

DONALD R. MURPHY, Commissioner

GERALD HODDINOTT, Commissioner