STATE OF WISCONSIN PERSONNEL COMMISSION

JERRI LINN PHILLIPS,

Complainant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES, and Secretary, DEPARTMENT OF EMPLOYE TRUST FUNDS,

Respondents.

Case No. 87-0128-PC-ER

DECISION AND ORDER

NATURE OF THE CASE

This matter is before the Commission on a motion to dismiss and jurisdictional objections filed by the respondents. The parties have filed briefs. The following facts either appear to be undisputed or are based on assertions by complainant which are assumed to be true for the purpose of deciding these objections and this motion.

FINDINGS OF FACT

1. At all times relevant to this proceeding, the complainant has been employed by the State of Wisconsin, Department of Health and Social Services in the Center for Health Statistics.

2. Complainant, a female, has a lesbian relationship with Lorri Tommerup. This relationship is based upon love and a lifetime commitment and is recognized by complainant's and Ms. Tommerup's immediate families, friends, neighbors and co-workers. Complainant and Ms. Tommerup share joint coverage for car and renters insurance, they pool their finances and they take their vacations together.

2. On October 20, 1986, complainant filed an application to change her health insurance coverage from individual to family coverage. The complainant supplied an attachment to her application which read:

> I am applying for a change from individual to family health coverage because my partner (spouse) is leaving her full-time job in December to return to school to work toward a graduate degree.
>
> Because ours is a lesbian marriage rather than a conventional one, there is no certificate on file to record it. Therefore, the purpose of this attachment to the application is to provide other evidence of our spousal relationship.
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> We understand that state law forbids denying any employment benefits solely on the basis of marital status or sexual preference. It is my impression that provision of family health coverage acknowledges two aspects of family relationships: (1) the existence of firmly-established emotional bonds and a consequent responsibility for the well-being of all family members, and (2) the unity of family finances.
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> Our marriage is based on love and lifetime commitment. If the option were available to us, we would be married conventionally. Our relationship is recognized by our respective families and by our friends, neighbors, and co-workers. I am attaching statements from my immediate supervisor (Doug Murray) and bureau director (Ray Nashold) acknowledging they are aware we consider ourselves a couple, equivalent to spouses.
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> We have the same joint coverage for car insurance and renters insurance as is ordinarily obtained by conventionally married couples. All of our finances are pooled--as evidenced by our joint checking, savings, and credit card accounts--and while Lorri is in school we will both be living on my income.
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> I have been a subscriber and a member of Group Health Cooperative since it was first included as an option for state employes. Lorri has been receiving her health care at Wingra Family Medical Center. Conversion to a family policy will allow both of us to continue health care with our current providers, and will allow them in turn to treat us as a cohesive family unit.

3. Complainant's application was forwarded by the Department of Health and Services to the Department of Employe Trust Funds for review.

4. By letter dated November 26, 1986, the complainant was informed that her application had been denied and that her "Health Insurance single coverage will continue in effect, unchanged, for January, 1987." Complainant also received a copy of a letter signed by the director of respondent DETF's Bureau of Health and Disability Benefits which provided, in part:

> This application lists only Lorri J. Tommerup as a dependent under this coverage. Ms. Tommerup does not qualify as a "dependent" under s. 40.02(20), Stats., nor under the rules of the department. Since Ms. Phillips has no other dependents at this time, she is not eligible for "family" coverage pursuant to s. 40.52(1)(a), Stats.
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> * * *
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> Notwithstanding the fact that Ms. Phillips chooses to personally define Ms. Tommerup as her "spouse", the State of Wisconsin does not legally recognize common law nor other non-traditional relationships as marriages. Therefore, for purposes of the State of Wisconsin employes group health insurance program, Ms. Tommerup is not a "spouse".
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> * * *
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> Since Ms. Phillips has, according to definition, no "eligible dependents," she may not be covered under the family coverage option and is therefore eligible only for the "single coverage option for other eligible persons".

5. Had the complainant been legally married to Ms. Tommerup, the complainant's application for family coverage would have been approved.

6. On September 14, 1987, the complainant filed a charge of discrimination with the Commission alleging she had been discriminated against based on her marital status, sex and sexual orientation.

7. Complainant also appealed the denial of her application by filing an appeal of the DETF action with the Employe Trust Funds Board.

DISCUSSION

At a prehearing conference held on January 21, 1988, it was determined that complainant would submit a statement setting forth her "theory of her case," and respondents would then file their jurisdictional objections. The parties agreed that if any jurisdictional issues were resolved favorably to complainant, the case would proceed directly to the stage of determining whether discrimination occurred: the parties agreed to waive the probable cause stage.

Complainant's "Statement of Theories" which was filed on March 22, 1988, contained the following claims under the Fair Employment Act -- (subch. II, ch. 111, Stats., hereafter referred to as the FEA):

> MARITAL STATUS CLAIM:
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> The marital status claim is based on the granting of "family" health insurance coverage to all married employees and their spouses simply on the basis of marital status. Single persons cannot obtain "family" coverage or purchase a separate individual policy for their partners, regardless of the duration of the relationship or actual economic dependence. Thus, a benefit is extended or denied to employees solely on the basis of marital status in violation of Wis. Stats. §111.321.
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> SEXUAL ORIENTATION CLAIM:
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> For the sexual orientation claim, heterosexual employees can choose to marry in order to obtain "family" coverage. Employees with same sex partners cannot choose to marry even if they are desirous of marriage because state law forbids such marriages. Thus, heterosexual employees have an available option, that being marriage, which would enable "family" coverage which homosexual employees do not have as an option. This difference in the availability of an employment benefit on the basis of sexual orientation also violates Wis. Stats. §111.321.
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> SEX DISCRIMINATION CLAIM:
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> The sex discrimination claim is similar to the sexual orientation claim. However, for this theory of the case, assume there is no sexual relationship between

> the employee and intended "family" member. For example, an employe may have a dependent friend or roommate for whom coverage is sought. In that instance, again only opposite sex friends/roommates can avail themselves of marriage and thus qualify for "family" coverage. Even though such a marriage would be one purely of convenience and not have the purportedly positive social goals of marriage, it is still available to any two competent adults of opposite gender. Same sex friends and roommates cannot marry and therefore cannot obtain coverage, whereas opposite gender persons can. This is an impermissible distinction based on sex and also violates Wis. Stats. §111.321.[1]

Respondent DETF filed a motion to dismiss for lack of jurisdiction based on the grounds that 1) DETF is not complainant's employer, 2) the Employe Trust Funds Board has exclusive authority to hear appeals from DETF determinations, and 3) the authority granted by the legislature to the Group Insurance Board to define the terms of state employe health insurance coverage is not subject to the FEA.

Respondent DHSS filed a motion to dismiss for lack of jurisdiction and for failure to state a claim on which relief can be granted, on the grounds that 1) the complaint fails to allege any act of discrimination by DHSS, 2) the labor organization which represents complainant is the only proper party respondent, 3) the legislative determination to extend "dependent" state employe health coverage only to spouses and children is "not justiciable" under the FEA, 4) the complaint fails to state a claim on the basis of marital status because the legislature did not intend the

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[1] 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.

prohibition against marital status discrimination to preclude an employer from providing greater health insurance benefits to its employes with spouses or dependents than to its employes without spouses and dependents, and 5) the complaint fails to state a claim of discrimination on the ground of sexual orientation. Respondent DHSS sought the dismissal of the entire complaint and reiterated in its reply brief that its motion to dismiss applied to the sex discrimination claim as well as to the sexual orientation and marital status claims.

FAILURE TO STATE CLAIM

As part of its asserted jurisdictional objections, respondent DHSS moved to dismiss the complaint on the ground that it fails to state a claim on which relief can be granted. Complainant responded substantively to this motion and argument in her brief. Respondent DETF opposed consideration of this motion because the game plan developed at the prehearing conference contemplated the submission of jurisdictional objections at this stage of the proceedings, with a hearing on the merits if the case survived the jurisdictional objections.

While the Commission agrees that the motion to dismiss for failure to state a claim on which relief can be granted is not jurisdictional in nature, it is not inappropriate to raise such a contention by motion prior to an actual hearing. Since both DHSS and complainant have briefed the motion, and there is no problem of notice, there does not appear to be any reason why it should not be decided. While DETF may prefer to have any substantive issues decided after a hearing on the merits, there is no reason to proceed to a hearing if it is clear from the face of the complaint that complainant cannot recover.

The general rules for consideration of a motion to dismiss for failure to state a claim upon which relief can be granted under §802.06(2)(f), Stats., are set forth in Morgan v. Pennsylvania General Ins. Co., 87 Wis. 2d 723, 731-732, 275 N.W. 2d 660 (1979), and can be utilized as well here:

> For the purpose of testing whether a claim has been stated... the facts pleaded must be taken as admitted. The purpose of the complaint is to give notice of the nature of the claim; and, therefore, it is not necessary for the plaintiff to set out in the complaint all the facts which must eventually be proved to recover. The purpose of a motion to dismiss for failure to state a claim is the same as the purpose of the old demurrer -- to test the legal sufficiency of the claim. Because the pleadings are to be liberally construed, a claim should be dismissed only if "it is quite clear that under no circumstances can the plaintiff recover." The facts pleaded and all reasonable inferences from the pleadings must be taken as true, but legal conclusions and unreasonable inferences need not be accepted.
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> ....A claim should not be dismissed... unless it appears to a certainty that no relief can be granted under any set of facts that plaintiff can prove in support of his allegations. (citations omitted)

Section 40.52(1)(a), Stats., provides:

> (1) The group insurance board shall establish by contract a standard health insurance plan in which all insured employees shall participate except as otherwise provided in this chapter. The standard plan shall provide:
>
> (a) A family coverage option for persons desiring to provide for coverage of all eligible dependents and a single coverage option for other eligible persons.

The term "dependent" as used in the above-quoted provision, is statutorily defined to mean:

> ...the spouse, minor child, including stepchildren of the current marriage dependent on the employe for support and maintenance, or a child of any age, including stepchildren of the current marriage, if handicapped to an extent requiring continued dependence. For group insurance purposes only, the department may promulgate rules with a different definition of "dependent" than the one otherwise provided in this sub-

> section for each group insurance plan. Section 40.02(20), Stats.

Pursuant to the rule-making authority contained in this definition, DETF has promulgated §ETF 10.01(2)(b), Wis. Adm. Code, which defines "dependent" as

> For health insurance purposes, an employee's spouse and an employee's unmarried child who is dependent upon the employee or the employee's former spouse for at least 50% support and maintenance. In this paragraph, "child" includes a natural child, stepchild, adopted child, child in adoptive placement...and a legal ward who became a legal ward of the employee or the employee's former spouse prior to age 19, and who is
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> 1. Under the age of 19,
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> 2. Age 19 or over, but less than age 25, if a full-time student, or
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> 3. Age 19 or over and incapable of self support because of a physical or mental disability which is expected to be of long-continued or indefinite duration.

On the basis of these provisions, the complainant's partner was not eligible for inclusion in family insurance coverage, since she is neither complainant's spouse nor child.

With respect to the marital status aspect of this complaint, complainant's theory of discrimination is as follows:

> The marital status claim is based on the granting of 'family' health insurance coverage to all married employes and their spouses solely on the basis of marital status. Single persons cannot obtain 'family' coverage or purchase a separate individual policy for their partners, regardless of the duration of the relationship or actual economic dependence. Thus, a benefit is extended or denied to employes solely on the basis of marital status in violation of Wis. Stats. §111.321.

Since the aforesaid provisions of state law clearly prohibit two non-married persons such as complainant and her partner from obtaining

insurance coverage, the issue of whether this result is violative of the Fair Employment Act is strictly a question of law.

Ray v. DHSS, Wis. Pers. Commn., 83-0129-PC-ER (10/10/84), affirmed, Dane Co. Cir. Ct., 84-CV-6165 (5/15/85), involved a complaint of marital status discrimination brought by an employe who had been denied enrollment in a "single coverage" health insurance plan because his wife also was a state employe who was enrolled in a "family coverage" plan, and §Grp 20.11, Wis. Adm. Code, provided: "...if one eligible spouse elects family coverage, the other eligible spouse may be covered as a dependent but may not elect other coverage." In ruling against complainant, the Commission relied heavily on the fact that the legislature by statute codified[2] the above rule as §§40.52(1)(a) and 40.02(20), Stats., in the same legislative session that it passed the more general provision adding the prohibition of marital status discrimination in employment to the FEA. This was seen as a strong indication of legislative intent that the FEA's prohibition on marital status discrimination not apply to the requirement that if one eligible spouse elects family coverage, the other eligible spouse must go with family coverage and cannot elect single coverage.

The specific statutory framework relied on by the Commission in Ray, which restricts an eligible spouse to family coverage, and thus imposes a differential treatment with respect to insurance coverage on the basis of marital status, also restricts family coverage to spouses and dependents, §§40.52(1)(a), 40.02(20), Stats. Laying to one side for the moment the question of whether it would have been feasible for DETF to have promulgated a rule which would have defined "dependent" in a way that would have

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[2] Chapter 96, Laws of 1981.

included complainant's partner, it is clear that from a general standpoint this statutory framework treats single employes less advantageously than married employes by providing the latter with a larger fringe benefit than the former. The Ray decision implies that such a differential, dictated by explicit, specific statutory language, was not intended by the legislature to be in conflict with the marital status provision of the FEA. The Labor and Industry Review Commission (LIRC) reached exactly this conclusion in Hartman & Lavine v. Mueller Food Services, 8351849, 8351850 (9/10/85), affirmed, Hartman & Lavine v. LIRC, Washington Co. Cir. Ct., 85CV515 (7/18/86).

In that case, the employer had previously paid 100% of the cost of health insurance coverage. In order to facilitate a change to a "co-pay" system whereby the employes would pay 30% of the insurance costs, the employer calculated the increased cost to the employe on an hourly salary basis of the change and offset that cost with a corresponding one-time wage increase. Employes who were single, without dependent children and entitled to single coverage only, received 25 cents per hour less of an increase than employes with a spouse and/or dependent children who were entitled to personal plus dependent coverage. Complainants were unmarried employes who received the smaller wage increase. LIRC rejected their claims of marital status discrimination.

LIRC recognized that there really was no difference for FEA purposes between the situations that existed before and after the transition to the "co-pay" system:

> ... when an employer provides greater benefits (i.e., opportunity for health insurance coverage of and partial or total premium payments for spouses and dependents) to its employes with spouses and/or dependent children than it does upon its single employes without dependent children, the fact that the benefit is provided by direct payment to the insurer does not change the fact that the reason for providing that greater benefit was based in part upon the employe's marital status. Some employes will still receive "more" than others based in part upon their marital status.

LIRC went on to address the question of whether this differential violated the FEA as follows:

> ... the Commission believes that the Legislature simply did not intend that the prohibition against marital status discrimination preclude an employer from providing additional or greater health insurance benefits to its employes with spouses and/or dependents (e.g., married employes) than to its employes without dependents (e.g., single employes). The Commission believes this to clearly be the case in view of the fact that the State of Wisconsin as an employer itself, with approval of the Legislature (see ss. 40.52(1), 40.05(4), 40.02(20), Stats.), extends to its own employes group insurance coverage that provides married persons with additional or greater benefits than those employes who are single and without dependents. The Commission takes this position despite the fact that the Act provides only one exception to the prohibition against marital status (namely, that it is not unlawful under the Act to prohibit an individual from directly supervising or being directly supervised by his or her spouse) and the rule of statutory construction that the express mention of one thing implies exclusion of all others.
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> * * *
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> Because of the Wisconsin Legislature's continued approval of the State's practice of providing its own married employes with additional or greater insurance benefits than its single employes, and the reasons cited by the Personnel Commission [in Ray], this Commission also concludes that the Legislature probably did not intend that s. 111.345, Stats., was meant to be an exhaustive list of exceptions to the prohibition against marital status discrimination.

Such a conclusion seems equally applicable to the situation in the instant case, where complainant contends she is being denied a benefit on the basis of marital status.

The Commission concludes that to the extent complainant was denied family coverage because she was not married to her partner and therefore did not fit within the statutory requirement of "spouse," the general thrust of the Ray and Hartman & Lavine cases applies and compels the conclusion that the legislature did not intend this kind of differentiation on the basis of marital status to be violative of the FEA.

Complainant contends that DETF could have by rule defined "dependent" to have included her partner and that the failure to have done so violates

the FEA. The Commission cannot agree. The legislature provided in §40.02(20), Stats., that "...the department may promulgate rules with a different definition of 'dependent' than the one otherwise provided in this subsection for each group insurance plan...." (emphasis added). This provision was added to the law effective June 16, 1982, by Ch. 386, Laws of 1981, §3. This was after the legislature had added marital status to the FEA by Ch. 334, Laws of 1981, effective May 6, 1982 (and also after the addition of sexual orientation via Ch. 112, Laws of 1981, §14, effective March 3, 1982). Certainly the legislature did not intend that the basic parameters of coverage set forth in §40.02(20), Stats., would contravene the FEA. Since DETF did not by rule expand those parameters of coverage (at least not in the direction sought by complainant to cover her spouse equivalent), and the rejection of complainant's requested insurance coverage was consistent with the parameters of coverage set forth in the statutes, specifically §40.02(20), Stats., it cannot reasonably be argued that the underlying rationale of the Ray and Lavine & Hartman decisions is weakened by the fact that the legislature provided rule making authority in §40.02(20), Stats., whereby DETF arguably could have enacted a rule enlarging the definition of dependent to include a spousal equivalent like complainant's partner.

The Commission also agrees with respondent DHSS that it is very unlikely the legislature intended by providing for rule-making in §40.02(20), Stats., that DETF could have by rule encompassed complainant's partner as a dependent for insurance purposes. An earlier version of the law in this area, §40.11(6), (1979-80 Stats.), defined dependent as "the spouse of an employe or an employe's unmarried child as defined by board rule." Pursuant to Chapter 96, Laws of 1981, §24, effective December 6,

1981, the legislature revised the definition of "dependent" at §40.02(20), Stats., as follows:

> ...the spouse, minor child, including stepchildren of the current marriage, dependent on the employe for support and maintenance or child of any age, including stepchildren of the current marriage, if handicapped to an extent requiring continued dependence. For group health insurance only, "dependent" also means an unmarried child, including stepchildren of the current marriage, dependent on the insured employe or the surviving spouse of an insured employe for support and maintenance until the end of the calendar year in which the child attains age 19 or, if the child is a full-time student in any school, age 25.

A "trailer bill" was enacted later in the same session which adopted the current definition of dependent now found at §40.02(20), Stats.:

> ...the spouse, minor child, including stepchildren of the current marriage dependent on the employe for support and maintenance, or child of any age, including stepchildren of the current marriage, if handicapped to an extent requiring continued dependence. For group insurance purposes only, the department may adopt by rule a different definition of "dependent" than the one otherwise provided in this subsection for each group insurance plan. Ch. 386, Laws of 1981, sec. 3, effective June 16, 1982.

On May 27, 1982, the Joint Survey Committee on Retirement Systems submitted a report on the foregoing trailer legislation pursuant to §13.50(6), Stats., which requires as follows:

> (a) No bill or amendment thereto creating or modifying any system for, or making and provision for, the retirement of or payment of pensions to public officers or employes, shall be acted upon by the legislature until it has been referred to the joint survey committee on retirement systems and such committee has submitted a written report on the proposed bill. Such report shall pertain to the probable costs involved, the effect on the actuarial soundness of the retirement system and the desirability of such proposal as a matter of public policy. (emphasis added)

The report stated:

> Section 3 also amends 40.02(20) which now defines the term "dependent" for retirement and insurance program

> purposes. The amendments would allow DETF to adopt by rule different definitions of the term for the various group insurance plans, thus providing greater flexibility in the insurance area--a minor policy change... (Emphasis added.)

The report concluded that the proposed legislation "would have no effect on the actuarial goals or balance of the [Wisconsin Retirement System]" and "would have no effect upon employer or employe contribution rates required for the [Wisconsin Retirement System]."

This legislative history strongly supports the theory that all the legislature intended by the grant of rule-making authority in §40.02(20), Stats., was to permit DETF to "fine-tune" the term "child" as used in the legislative definition of "dependent." It is extremely difficult to square this legislative history with the notion of the kind of sweeping rule complainant contends DETF should have enacted that would have included a homosexual relationship within the concept of dependency.

Complainant attempts to distinguish the Ray and Hartman & Lavine decisions because of the factual differences between the employes in those cases and herself:

> The Complainant herein is not claiming that an unmarried employe without a spouse or dependents should receive the identical benefits as a married employe with a "spouse" dependents; but rather, that an unmarried employe with a 'spouse equivalent' or dependents should receive the same benefits as a married employe with a spouse or dependents. If 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 on the basis of marital status. The decisions in Ray and Hartman & Lavine do not hold to the contrary. Complainant's brief, pp. 18-19.

While there are differences in the facts of those cases and the instant matter, these differences do not undermine the primary thrust of those

decisions that specific statutory provisions governing family insurance coverage demonstrate that the legislature did not intend that providing more extensive coverage to married persons than to single persons would conflict with the marital status provision of the FEA. Certainly at the time the legislature created the provision limiting family coverage to spouses, as opposed to the kind of "spousal equivalent" situation involved here, it could have been hypothesized that a broad range of "spousal equivalents" would be excluded from coverage under the law and that some of these would be similarly situated to married employes. It seems highly unlikely that the decision in Hartman & Lavine would have been any different if the complainants in that case had been situated more like complainant here.

In the Commission's opinion, what the legislature intended when it amended the FEA to include marital status was to prohibit the employer from basing employment decisions such as hire, discharge and salary on an attribute of the employe which should not have any bearing on such decisions-- i.e., the employe's marital status. What the legislature did not intend to do was to make it impossible for an employer to provide a fringe benefit package to employes that has the effect of providing a larger net benefit to married employes than non-married employes because of some kind of fringe benefit provision that encompasses the married employes' spouse. This was at the center of the Hartman & Lavine decision. Furthermore, the Wisconsin legislature has recognized the centrality of the legally-defined family at the core of our society:

> It is the intent of chs. 765 to 768 to promote the stability and best interests of marriage and the family....Marriage is the institution that is the *foundation of the family and of society.* Its stability is basic to morality and civilization, and of vital interest to society and the state. §765.001(2), Stats.

It is highly unlikely that the legislature, in adding the marital status prohibition to the FEA, intended that the provision of fringe benefits to an employe that also benefits his or her spouse would be illegal unless the employer extended the same benefits to an unmarried employe's "spousal equivalent." This conclusion is reinforced inferentially by a recent Wisconsin Supreme Court decision interpreting the Madison ordinance which prohibits discrimination in employment on the basis of marital status.

In Federated Rural Electric Insurance Co. v. Kessler, 131 Wis. 2d 189, 388 N.W. 2d 553 (1986), the Supreme Court had occasion to consider a decision of the Madison Equal Opportunities Commission which concluded that the employer's rule prohibiting the romantic association of any employe of one sex with a married employe of the opposite sex violated Madison's equal opportunity ordinance which prohibits employment discrimination on the basis of marital status. The Court concluded that the employer's rule did not impermissibly discriminate against the class of married employes and did not violate the Madison ordinance. Although the rule "is more restrictive of the conduct of married employes than it is of unmarried employes," 131 Wis. 2d at 211, the Supreme Court agreed with the trial court's reasoning "that a work rule which compels conformity with fundamental public policy cannot be considered an 'adverse' condition of employment," id. at 212-212, and that "[r]ather than being impermissibly restrictive as to married persons, however, the rule embodies a recognition of accepted public policy as stated in the Wisconsin Statutes and Madison General Ordinances," id. at 213, and concluding that:

> Federated's work rule is consistent with the public policy goals set forth in sec. 765.001(2), in that it attempts to prohibit extramarital affairs, which can lead to the impairment or dissolution of existing marital relationships. 131 Wis. 2d 189, 214.

Thus, even though the work rule in question had a more restrictive impact on the class of married employes, the Court refused to find that its application violated the ordinance prohibiting discrimination on the basis of marital status, because the rule was consistent with fundamental public policy embodied in a statute [§765.001(2), Stats.] outside the employment area. Obviously the same observation can be made about the restriction of family insurance coverage for state employes to their spouses and dependents, as opposed to the kind of spousal equivalent relationship sought by complainant. While such a limitation on coverage can be said to be more restrictive on single persons than on married persons, it is consistent not only with the specific statutory provisions set forth at §§40.52(1)(a) and 40.02(20), Stats., but also with the general policy set forth in §765.001(2), Stats.

With respect to the sexual preference aspect of this case, it can be argued that the statutes and rules limiting family insurance coverage to an employe's spouse and certain categories of children make no distinctions on the basis of sexual preference, and that none of the categories created are necessarily limited in operation on the basis of sexual preference. That is, like a heterosexual, a homosexual can have a legally-recognized spouse and dependents who would be eligible for coverage under a family insurance plan. Also, a heterosexual, like a homosexual, might be in a position of wanting to insure someone with whom he or she has a close relationship and supports but cannot marry. However, these comparisons miss the point that although the state's scheme of eligibility for family insurance coverage may be neutral on its face, it has the functional effect of treating homosexuals less favorably than heterosexuals, because homosexuals cannot marry their "spousal equivalents" and therefore cannot obtain family

insurance coverage for the people for whom they most likely would want coverage.

While the Commission will proceed on the theory that respondent's denial of family insurance coverage in this case can be characterized as a form of differential treatment on the basis of sexual orientation, the question remains whether this is violative of the FEA. Many of the same considerations apply to this question as were discussed above under the heading of marital status. The question is, did the legislature, in making illegal employment discrimination on the basis of sexual orientation, intend to prohibit an employer from making a fringe benefit available to an employe that would benefit the employe and the employe's spouse unless the same benefit were made available to the "spousal equivalent" of homosexual employes? Again, the answer must be "no." The intent of the law is to prevent the employer from making decisions such as hiring, firing and salary on the basis of a factor that should have no bearing on such a decision -- i.e., the employe's sexual orientation. However, the legislature has maintained in the statutes the specific provisions of §§40.52(1)(a) and 40.02(20), Stats., which limit family insurance coverage to the employe's spouse and dependents, with no indication, as discussed above, that it left the door open to DETF to define "dependent" by rule as a "spousal equivalent." The legislative history discussed above under the heading of marital status is inconsistent with the theory that DETF has the authority to write such a rule. Furthermore, the existing statutory and administrative code provisions are consistent with the legislative concept that marriage and the traditional family unit are the cornerstone of society as reflected in §765.001(2), Stats., which was relied on by the Supreme Court in the Federated Rural Electric case, and has been given

legislative recognition in many other enactments besides the above health insurance provisions.[3]

Complainant's theory of sex discrimination was stated in her "Statement of Theories" as follows:

> SEX DISCRIMINATION CLAIM:
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> The sex discrimination claim is similar to the sexual orientation claim. However, for this theory of the case, assume there is no sexual relationship between the employee and intended "family" member. For example, an employee may have a dependent friend or roommate for whom coverage is sought. In that instance, again only opposite sex friends/roommates can avail themselves of marriage and thus qualify for "family" coverage. Even though such a marriage would be one purely of convenience and not have the purportedly positive social goals of marriage, it is still available to any two competent adults of opposite gender. Same sex friends and roommates cannot marry and therefore cannot obtain coverage, whereas opposite gender persons can. This is an impermissible distinction based on sex and also violates Wis. Stats. §111.321.

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.

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[3] To cite but a few examples, §71.03(2)(d)1, Stats., permits a husband and wife to file a joint income tax return even though one of the spouses may have no gross income and no deductions; §29.146, Stats., provides for combined husband and wife resident fishing licenses.

While the Commission reaches the conclusion that this complaint fails to state a claim upon which relief can be granted, it will also address the other objections raised by respondents, at least in part in order to avoid the requirement for further treatment of those issues should the foregoing conclusion be disturbed on review.

PROPER PARTIES RESPONDENT

Both respondents contend they are not proper parties in this case. The FEA provides at §111.375(2), Stats., that:

> This subchapter applies to each agency of the state except that complaints of discrimination or unfair honesty testing against the agency as employer shall be filed with and processed by the personnel commission under s. 230.45(1)(b)....

Pursuant to §111.32(6)(a), Stats., the definition of the term "employer" includes "the state and each agency of the state." The FEA does not contain any functional definition of the term "employer" which sets forth the functional attributes of the employer-employe relationship.

Respondent DETF contends as follows:

> While the sec. 111.33(6)(a), Stats., definition of employer includes 'the state and each agency of the state,' sec. 111.375(2), Stats., limits the Commission's authority to complaints 'against the [employing] agency as an employer.' The DETF is not such an employer of complainant and thus not within the Commission's jurisdiction as established by the legislature.

In somewhat the same vein, respondent DHSS argues it had no role in the alleged discriminatory conduct, since it has no authority to make determinations as to eligibility for employe benefits.

The legislature has seen fit to divide authority for the administration of the state civil service employment program among a number of different state agencies. By way of example, the "appointing authority" (here, DHSS) has the authority to hire and fire employes and assign their

duties, §230.06(1)(a), Stats. The Department of Employment Relations (DER) has the authority to determine the classification level (and the concomitant salary level) of positions, §230.09, Stats. The administrator of the Division of Merit Recruitment and Selection (DMRS) has the authority to administer the examination function which determines who is eligible to be hired in the classified service, §230.16, Stats. The various agencies of the state are but arms of the state, and when an agency exercises its authority in a way that affects the conditions of employment of a state employe, that agency is acting as the employing agency of that employe, and its action is cognizable under the FEA. See Wisconsin Federation of Teachers v. DP, Wis. Pers. Commn., 79-306-PC (4/2/82):

> ...there are several cases interpreting the comparable language found in Title VII of the Civil Rights Act of 1964. While the Act [at 42 USC §2000(b)] defines employer in terms of 'a person engaged in an industry... and any agent of such a person,' the requirement:
>
> > *is not that the defendant be an employer* in the conventional sense; it suffices for purposes of Title VII that he 'control[s] some aspect of an individual's compensation, terms, conditions or privileges of employment.' Hannahs v. Teachers' Retirement System, 26 FEP Cases 527, 532 (S.D.N.Y. 1984) (citations omitted)

Since DETF has the authority to determine state employe health insurance coverage (within the parameters established by statute), the Commission rejects respondent DETF's contention that it is not a proper party to this proceeding.

The position of DHSS involves different considerations. DHSS argues that it took no substantive action with respect to complainant's health insurance coverage, but rather that the denial of coverage was by DETF:

> The secretary of DETF is empowered [to] administer the provisions of Ch. 40, Stats., including subch. IV, governing employee health care benefits. Section 40.03(2)(m), Stats. The role of the employer agency under Ch. 40, Stats., is limited to determining the amount of employer contributions toward employee benefits and preparing a voucher for payment to DETF employer agency appropriations of the amounts payable. Section 40.06(1)(c), Stats. Nowhere in Ch. 40, Stats., is there any reference to employer agency authority to make determinations as to eligibility for employee benefits....

The attachments submitted with DHSS's brief reflect that the eligibility denial decision was indeed made by DETF, and no party has contested this assertion.

However, complainant cites Ray v. DHSS, Wis. Pers. Commn., 83-0129-PC-ER (10/10/84), as impliedly rejecting the theory that DHSS has no role in this matter that is cognizable under the FEA. Complainant argues as follows:

> Thus, because the jurisdiction of the Board was upheld over the DHSS, there was an implied holding that §111.375(2) was not an impediment to jurisdiction over the DHSS who was responsible for any acts of discrimination occurring to an employee of its department, whether or not originating with a sister department.
>
> Furthermore, although the identify of the parties is not complete between this case and the Ray case, e.g., the Complainants are different, collateral estoppel should shield the Complainant herein, PHILLIPS, from the Respondents' attacks to the Personnel Commission's jurisdiction in this case.

While the Commission did rule in favor of jurisdiction in Ray, the jurisdictional objection was completely different from the argument DHSS makes in the instant case[4], and the Commission decision has no precedential

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[4] Respondent's argument in Ray was based on the fact that the action complained of was not based on complainant's marital status as such, but rather on the identify of his spouse.

or persuasive value whatsoever with respect to the issue here presented, and does not support any theory of collateral estoppel.

Since DHSS played no operative role in the denial of complainant's family coverage, since there has been no indication by the parties that DHSS would be a necessary party to grant any relief that may be ordered, and since a perusal of the statutes does not suggest such a conclusion, there does not appear to be any reason to retain DHSS as a party to this proceeding. However, because the Commission has concluded that the complaint must be dismissed for failure to state a claim upon which relief can be granted, there will be no further proceedings before the Commission and there is no practical need to dismiss DHSS as a party.

PRECLUSIVITY OF §40.03(1)(j) APPEAL

Section 40.03(1)(j), Stats., provides for appeals to the Employe Trust Funds Board from DETF eligibility determinations. Respondent DETF asserts that this "specific statutory method of appeal of DETF determinations precludes the Personnel Board [sic] from any concurrent jurisdiction."

The fact that administrative agencies which derive their authority from the same source (here, the state) have jurisdiction over the same transaction does not automatically give rise to the conclusion that the agency with the more specific grant of authority has exclusive jurisdiction. This is particularly true where the agencies are enforcing different statutes. See Warner-Lambert v. FTC, 361 F. Supp. 948, 952-953 (D. D.C. 1973).

In this case, the Commission's inquiry is limited to the question of whether there has been a violation of the FEA. The Employe Trust Funds Board has no statutory responsibilities under the FEA and cannot make that kind of determination. There is nothing inherent in the statutory

framework underlying the two proceedings (appeal to the Employe Trust Funds Board and charge of the discrimination before the Personnel Commission) that would make the two proceedings inconsistent, and there is no explicit statutory provision making one remedy exclusive.[5]

Carried to its logical extreme, respondent's position would strip FEA protection from an employe with respect to any transaction where the legislature provides an additional, specific remedy. For example, a county employe who has the right pursuant to §63.10(2), Stats., to a hearing before the civil service commission in connection with a disciplinary action presumably would not have the right to pursue a claim with the Department of Industry, Labor and Human Relations that the disciplinary action was unlawfully discriminatory. Such a result would substantially and arbitrarily undermine the FEA and many other protective labor laws.

ROLE OF LABOR UNION

Pursuant to §111.93(3), Stats., the provisions of a collective bargaining agreement supersede the civil service laws as to wages, hours and conditions of employment. It is undisputed that complainant is represented by a union (Wisconsin State Employes Union) that has negotiated a collective bargaining agreement that contains, inter alia, the following provision on health insurance:

> 13/1/2 The Employe agrees to pay 90% of the gross premium for the single or family standard health insurance plan offered to State employes by the group insurance board or 105% of the gross premium of the alternative qualifying plan offered under s. 40.03(6) that is the least costly qualifying plan within the county in which the alternate plan is located,

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[5] An example of such a provision is found in the Worker's Compensation law at §102.03(2), Stats.: "...the right to the recovery of compensation under this chapter shall be the exclusive remedy against the employer...."

> whichever is lower, but not more than the total amount of the premium. Employer contributions for employes who select the standard plan shall be based on their county of residence. Qualifying health insurance plans shall be determined in accordance with standards established by the Group Insurance Board.

Respondent DHSS argues that because fringe benefits, including health insurance, are a mandatory subject of bargaining pursuant to §111.91(1)(a), Stats., it would have been possible for the WSEU to have negotiated a definition of "dependent" that would have permitted the coverage complainant seeks. Since the FEA is applicable to labor organizations as well as employers, §111.321, Stats., it is urged that the labor organization is the only proper party.

The short answer to this contention is that regardless of whether the labor organization should be considered a party under a functional theory, this Commission has no jurisdiction over such an entity, since pursuant to §111.375(2), Stats., the Commission's authority is limited to complaints "against the agency [of the state] as an employer...." Acharya v. DHSS, Wis. Pers. Commn., 82-PC-ER-53 (5/29/86). The Commission does have jurisdiction over the employer, and to the extent that the employer has participated in negotiating a type of health insurance coverage, or has implemented a type of coverage to which the labor organization has simply acceded, it has taken an action which affects its employes' conditions of employment and for which it is responsible under the FEA.

LEGISLATIVE DETERMINATION OF "DEPENDENT" FOR HEALTH INSURANCE PURPOSES AS "NON-JUSTICIABLE" ISSUE

Respondent DHSS argues that the legislature has determined by statute not to extend family health insurance coverage to nonmarital "partners" of state employes, and therefore the issue raised by this proceeding is a "nonjusticiable" political question which is beyond the province of this Commission to decide.

In State ex rel. La Follette v. Parmann, 220 Wis. 17, 264 N.W. 627 (1936), the Court defined a "justiciable controversy" as "a controversy in which a claim of right is asserted against one who has an interest in contesting it." 220 Wis. at 22. In that declaratory judgment proceeding, there was a difference of opinion between the Governor and the Secretary of State as to whether the Governor had the authority to make certain appointments under certain circumstances, and the Secretary of State advised the Governor that he would not honor the appointments the Governor was about to make, and would refuse to approve payment of the appointees' salaries and expenses. The Governor alleged that he was unable to find people who would accept appointments under those conditions, and sought a declaratory judgment as to whether he could make valid appointments under the prevailing circumstances. The Court held there was no justiciable controversy because the difference of opinion between the two officers did not prevent the Governor from exercising whatever appointment powers he possessed.

In the instant case, there clearly is a controversy in that complainant's request for health insurance coverage for her partner was denied. Certainly respondent DETF had the authority to have denied her coverage request and therefore has an interest in contesting her FEA claim. Therefore, there does not appear to be any reason why this matter should be considered "non-justiciable."

The Commission is unable to discern any bearing on this case of two decisions cited by DHSS -- State ex rel. Fort Howard Paper Co. v. State Lake Dist. Bd. of Review, 82 Wis. 2d 491, 263 N.W. 2d 178 (1978); and State ex rel. Marin v. Giessel, 252 Wis. 363, 31 N.W. 2d 626 (1948). In both cases, the Court ruled on the constitutionality of statutes. In so doing, the Court reiterated the familiar axiom that:

> This court is not concerned with the political, economic or social wisdom of the act under consideration. Our only duty is to determine whether the statute clearly contravenes some constitutional provision.... 82 Wis. 2d at 505.

This principle has nothing to do with justiciability per se. In any event, the Commission in this proceeding is not called on to rule on the "political, economic or social wisdom" of any enactment, but rather to determine whether the denial of insurance coverage contravenes the FEA.

As part of its non-justiciability argument, respondent presented certain statutory analysis and legislative history to attempt to show that the result reached in this case was dictated by legislative enactment. In the Commission's opinion, this material really runs to the merits of this case, as drawn into focus by respondent's motion to dismiss for failure to state a claim on which relief can be granted, and was discussed under that heading.

ORDER

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

Dated: March 15, 1989 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

AJT:jmf
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Parties:

Jerri Linn Phillips
1510 Troy Drive, #3
Madison, WI 53704

Patricia Goodrich
Secretary, DHSS
P.O. Box 7850
Madison, WI 53707

Gary Gates
Secretary, DETF
P.O. Box 7931
Madison, WI 53707