STATE OF WISCONSIN PERSONNEL COMMISSION

CAROL A. BURNS,
Complainant,

v.

Chancellor, UNIVERSITY OF WISCONSIN-MADISON [Superintendent, WISCONSIN HOSPITAL AND CLINICS AUTHORITY)],[1]
Respondent.

RULING ON MOTION TO DISMISS

Case No. 96-0038-PC-ER

On April 3, 1996, complainant filed this charge of discrimination, alleging that she had been discriminated against on the basis of handicap and retaliated against for engaging in protected fair employment activities. An Initial Determination was issued finding both Probable Cause and No Probable Cause as to certain allegations in the complaint. The No Probable Cause findings were appealed by complainant. On February 2, 1998, during a prehearing conference, the parties agreed to the following hearing issues:

> Whether complainant was retaliated against for engaging in protected fair employment activities or discriminated against based on handicap in regard to any of the following:
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> a. delay in addressing complainant's accommodation request of August 10, 1995;
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> b. denial of complainant's request for her own office on February 16, 1996; or
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> c. information provided to complainant on February 16, 1996, that she could seek transfer as an accommodation.

[1] Effective June 28, 1996, the authority previously held by the UW-Madison Chancellor with respect to the position that is the subject of this proceeding is now held by the UWHCA Superintendent.

Also at this prehearing conference, respondent indicated an intent to file a motion to dismiss. This motion was filed by respondent on February 26, 1998, and the parties were permitted to brief the motion. The briefing schedule was completed on March 30, 1998. The following findings are based on information provided by the parties; appear to be undisputed; and are made solely for the purpose of deciding this motion.

1. At the time she filed this complaint, complainant was employed by the respondent in its Human Resources Department.

2. Effective December 6, 1996, complainant voluntarily resigned from her position with respondent in order to accept a position with the Department of Workforce Development (DWD).

3. The health condition which serves as the basis for complainant's charge of handicap discrimination is a hearing impairment.

Respondent argues here that, since complainant is no longer employed by respondent, her claim is moot. Specifically, respondent argues that:

> The Complainant's charges of employment discrimination are based primarily on the Respondent's alleged failure to accommodate her audiological disability. The nature of such a formal accommodation request requires very specific remedies; in this case, if found to have violated the law, the Respondent would presumably be ordered to provide the Complainant with a separate office within its larger facility. Since the Complainant has left the employment of the UWHC, any such injunctive relief would be of absolutely no benefit to the Complainant. Likewise, any declaratory relief ordering the Respondent to cease and desist from any future discriminatory conduct toward the Complainant would have no effect since she is no longer an employee of Respondent.

An issue is moot when a determination is sought which can have no practical effect on a controversy. *State ex rel. Jones v. Gerhardstein*, 135 Wis. 2d 161, 169, 400 N.W.2d 1 (Ct. App., 1986), citing *Warren v. Link Farms, Inc.*, 123 Wis. 2d 485, 487, 368 N.W.2d 688, 689 (Ct. App., 1985). The focus, generally, is upon the available relief in relation to the individual complainant (*see, e.g., Lankford v. City of*

Hobart, 36 FEP Cases 1149,1152 (10th Cir., 1996) and *Martin v. Nannie and the Newborns*, 68 FEP Cases 235, 236 (W.D. Okla., 1994)) but may shift to a consideration of others in the workplace when an overt policy of discrimination is alleged to impact on a category of employes (*see, e.g., Kennedy v. D.C.*, 65 FEP Cases 1615, 1617 (D.C. Cir., 1994), involving review of a grooming code.)

In *Watkins v. DILHR,* 69 Wis. 2d 782, 12 FEP Cases 816 (1975), it had been concluded that the complainant had been discriminated against by her state agency employer on the basis of her race when she was denied a requested transfer to a different position in 1969 and in 1970. The Wisconsin Supreme Court ruled that the controversy was not moot even though the complainant had been transferred to the position she sought in 1971 (which was after she had filed her complaint of discrimination). The basis for the Court's ruling was that, since the complainant remained an employee of DILHR, an order could be entered which would have the practical, legal effect of requiring that the complainant be considered for all future transfers on the basis of her qualifications and ability, and without regard to her race; that the complainant was entitled, having suffered frustration in her employment over an extended period of time, to know whether or not this was due to race discrimination; and that it would foster, not eliminate, discrimination if employers in such situations could escape liability by simply waiting until enforcement proceedings were begun and then remedying the subject adverse action.

In a case filed under the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973, the U.S. Court of the Appeals for the Sixth Circuit addressed a question similar to the one presented here, i.e., whether a case which presented an issue of handicap accommodation relating to the eligibility of a student for interscholastic athletic competition would survive the student's graduation from high school. *McPherson v. Mich. H.S. Athletic Assn.,* 7 AD Cases 77 (6th Cir. 1997). The court stated as follows in deciding this question:

> Under Article III of the Constitution, our jurisdiction extends only to actual cases and controversies. We have no power to adjudicate disputes which are moot. *Crane v. Indiana High Sch. Athletic Ass'n*, 975 F.2d

> 1315 (7th Cir. 1992) . . . The test for mootness 'is whether the relief sought would, if granted, make a difference to the legal interests of the parties . . . .'" *Crane*, 975 F.2d at 1318 (citation omitted). . . .
>
> As we observed in an earlier case presenting strikingly similar issues, the season is over, and there are no more games to be played. *See Sandison v. Michigan High Sch. Athletic Ass'n, Inc.*, 64 F.3d 1026, 4 AD Cases 1478 (6th Cir. 1995). Further,
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> > [t]he "capable of repetition yet evading review" exception to mootness does not apply to these plaintiffs because the exception requires not only that the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, but also that there was a reasonable expectation that the *same complaining party* would be subject to the same action again.
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> *Id.* at 1029-30 (some emphasis added) (citations and some internal quotation marks omitted). Since McPherson graduated from high school in June 1995, there can be no reasonable expectation of another controversy over his eligibility to play high school basketball.

The mootness question in relation to the case before the Commission is whether complainant's resignation, an event occurring after her complaint was filed, precludes the Commission from granting effective relief to complainant. *See*, 2 Am Jur 2d, *Administrative Law*, §519. Resolution of this question involves a review of complainant's claims and the available related remedies. If complainant were to prevail here, her remedies (other than attorneys' fees and costs) would apparently be limited to an order to respondent to provide the requested accommodation and to cease and desist from discriminating or retaliating against complainant in regard to any future accommodation requests. These potential remedies would be considered effective only if complainant were still employed by respondent. Since she is not, this controversy is moot. This conclusion is consistent with the holding in *McPherson, Id.*, and *LaRose v. UW*, 94-0125-PC-ER, 4/2/97.

ORDER

Respondent's motion to dismiss is granted.

Dated: April 8, 1998

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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Parties:

Carol A. Burns
921 Perry Center Road
Mount Horeb, WI 53572

Gordon Derzon
Superintendent, UWHCA
600 Highland Ave.
Madison WI 53792-0001

NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be

served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.) 2/3/95