STATE OF WISCONSIN PERSONNEL COMMISSION

ROBERT DARRINGTON, ***Complainant,*** **v.** **Secretary, DEPARTMENT OF CORRECTIONS,** ***Respondent.*** Case No. 97-0108-PC-ER	RULING ON RESPONDENT'S MOTION TO DISMISS

Respondent filed a motion to dismiss the above-noted case for failure to state a claim over which the Commission has jurisdiction. Both parties filed written arguments, with the final argument due on October 3, 1997.

The following findings of fact are made solely for resolution of the current motion. The facts appear to be undisputed unless specifically noted to the contrary.

FINDINGS OF FACT

1. This complaint was filed on July 14, 1997, alleging discrimination on the basis of creed in regard to terms and conditions of employment, in violation of the Fair Employment Act (FEA), Subch. II, Ch. 111, Stats. In particular, complainant wishes to wear a hat at work and has not been allowed to do so.

2. Complainant has worked for respondent for 20 years. At the time pertinent to this complaint, he worked as a Youth Counselor 3, in respondent's Youth Corrective Sanctions Program in the Division of Juvenile Corrections.

3. Since January 19, 1997, complainant has not been allowed to wear a hat at work. He was sent home on January 19th and 20th, for refusing his supervisor's direct order to remove his hat. Complainant has not alleged that he lost any wages for these dates.

4. The Youth Corrective Sanctions Program had no official work rule or policy on wearing hats at work until a "Policy and Procedure" was issued on February 7, 1997, which stated that everyone employed in the program "must remove their hats while in the building." Complainant contends the policy is invalid under the union contract and he has filed union grievances on the subject.

5. Only July 16, 1997, the Commission sent complainant a letter seeking clarification of his complaint. A relevant excerpt is shown below:

> In your complaint you claimed discrimination based on "creed (religious beliefs)." In the Fair Employment Act (FEA), §111.32(3m), Stats., "'Creed' means a system of religious beliefs, including moral or ethical beliefs about right and wrong, that are sincerely held with the strength of traditional religious views." With this definition in mind, please provide the following information by July 30, 1997:
>
> 1) What is your creed and/or religious belief? Identify the precept that requires you to wear a head covering at work.
>
> 2) Identify the requirement of employment that conflicts with your religious belief or practice. . . .

6. Complainant feels discriminated against because Muslim employees have been allowed to wear head coverings at work. In a submission to the Commission on July 28, 1997, complainant stated: "My personal creed has nothing to do with the claim. . . . I wanted to wear my head covering just because I wanted to express my personhood and individuality. . . .My creed and religious belief is such that it does not conflict with my employment requirements. There is no precept (in my religion) that requires me to wear a head covering at work. . . . This requirement is not inclusive of my religious belief, but does effect my civil beliefs. Which constrains me from wearing a hat if I choose to. . . . The only part of my employment that conflicts with my religious beliefs is that which is stated in the Constitution. "Under God All Men are Created Equal. I am not being treated equal to this population of Muslims that are being allowed to wear their hats in a State Facility." Complainant further stated (in a letter dated 9/17/97) as follows:

> I talked to (supervisor) about not being allowed to wear my hat when he allowed others to wear their hats under the excuse of being Muslim. It is (because of) the Muslim religion belief that the exception has been made. I was denied. It is because I am not Muslim. . . .

7. Complainant further notes that individuals who are not employees but who receive money from the state are allowed to wear hats in the building. He specifically mentions "service providers" (in his complaint and letter received by the Commission on 7/28/97) and an in-service trainer (see complainant's letter dated 9/17/97). There is nothing in the file to suggest that respondent has authority to establish dress-code policy for non-employees.

OPINION

Section 111.337, Stats., requires employers to "reasonably accommodate an employe's . . . religious observance or practice . . .". The information supplied by the parties indicates Muslim employees have been granted permission to wear head coverings at work as an accommodation under this statutory provision.

The United States Supreme Court considered the question of religious accommodation under Title VII of the Civil Rights Act in *Trans World Airlines, Inc. v. Hardison, et al.*, 14 FEP Cases 1697 (1977) (hereafter, "TWA" case). The Court concluded that religious accommodation was required but only if the requested accommodation would not pose an undue hardship on the employer. The Court said an undue hardship on the employer would occur when the accommodation required the employer to bear more than a *de minimis* cost. (14 FEP at 1705) The employe in *TWA* requested religious accommodation to observe his Sabbath. The Supreme Court held the employer's duty to accommodate does not require an employer to ignore the seniority system under the labor contract as a means of accommodation. The Court further held that other alternatives involving costs to an employer, either in the form of lost efficiency in other jobs or having to pay a substitute overtime wages, constituted an undue hardship for the employer. The dissenting opinion felt the majority had gone too far and stated as noted below (citations omitted):

> With respect to each of the proposed accommodations to respondent's religious observances that the Court discusses, it ultimately notes that the accommodation would have required "unequal treatment" in favor of the religious observer. That is quite true. But if an accommodation can be rejected simply because it involves preferential treatment, then the regulation and the statute, while brimming with "sound and fury," ultimately "signif[y] nothing."
>
> The accommodation issue by definition arises only when a neutral rule of general applicability conflicts with the religious practices of a particular employee. In some of the reported cases, the rule in question has governed work attire; in other cases it has required attendance at some religious function; in still other instances, it has compelled membership in a union; and in the largest class of cases, it has concerned work schedules. What all these cases have in common is an employee who could comply with the rule only by violating what the employee views as a religious commandment. In each instance, the question is whether the employee is to be exempt from the rule's demands. To do so will always result in a privilege being "allocated according to religious beliefs" unless the employer gratuitously decides to repeal the rule in toto. What the statute says, in plain words, is that such allocations are required unless "undue hardship" would result.

> The point is perhaps best made by considering a not-altogether-hypothetical example. Assume that an employer requires all employees to wear a particular type of hat at work in order to make the employees readily identifiable to customers. Such a rule obviously does not, on its face, violate Title VII, and an employee who altered the uniform for reasons of taste could be discharged. But a very different question would be posed by the discharge of an employee who, for religious reasons, insisted on wearing, over her hair a tightly fitted scarf which was visible through the hat. In such a case the employer could accommodate this religious practice without undue hardship - or any hardship at all. Yet as I understand the Court's analysis . . . the accommodation would not be required because it would afford the privilege of wearing scarfs to a select few based on their religious beliefs. The employee thus would have to give up either the religious practice or the job. This, I submit, makes a mockery of the statute.

The Commission reviewed cases which were decided after the TWA case to determine if the dissenting opinion's fears materialized. Specifically, the dissenting opinion feared the majority opinion would result in a finding of undue hardship based solely on resulting unequal treatment even when the religious accommodation would cost the employer nothing. Such fears have not materialized in cases where the religious accommodation involved permission to wear certain clothing, except where such clothing posed a safety problem or where some other compelling reasons existed for denying the request. *See*, for example, *Reid v. Kraft General Foods*, 67 FEP Cases 1367 (C.C.E.D. Pa. 1995) and *EEOC Decision*, 27 FEP Cases 1809 (1981) (where both cases held that a violation could be found when an employe's religious beliefs forbade her to wear pants, a request denied by the employer even though no safety concerns applied).

The Wisconsin Court of Appeals addressed the duty to accommodate an employee's religious beliefs under the FEA and such issue was analyzed in the context of the Wisconsin Constitution and the Establishment Clause of the First Amendment to the U.S. Constitution. See, *American Motors Corporation v. DILHR*, 21 FEP Cases 654, 93 Wis. 2d 14, 286 N.W.2d 847 (Ct. App. 1979), reversed on other grounds *American Motors Corp. v. ILHR Dept.*, 101 Wis. 2d 337, 305 N.W.2d 62 (S. Ct. 1980). The Court of Appeals indicated as follows:

> We hold that the Wisconsin Fair Employment Act requires employers to make reasonable accommodations to their employees' religious practices, that the burden of proving that a reasonable accommodation cannot be made is upon the employer, and that the burden is not met by showing inconvenience to the employer. It may be that a possible accommodation may be made at no expense or inconvenience to the

> employer but that it would result in considerable inconvenience to other employees. It may be that a possible accommodation could adversely affect customer or contractual relations. Whether accommodation under those or other circumstances would be reasonable will depend upon the circumstances of each case.

(93 Wis. 2d at 27-28.)

The potential inconvenience to other employees as contemplated by the Court of Appeals is not met under the facts of Mr. Darrington's case. Specifically, the significant rights associated with his position (such as his wages and length of employment) have not been affected by the religious accommodation made to the Muslim employees. In other words, the impact on Mr. Darrington is *de minimus*. *In accord*, *Kwasi Opuku-Boateng v. State of California*, 71 FEP Cases 1849 (9th Cir., 1996) (where the court held the employer was required to institute the shift-scheduling changes requested as a religious accommodation because all workers still would be required to work the same number of undesirable shifts and such accommodation would not impose more than a *de minimus* burden on other employees); *Brown v. General Motors Corporation*, 20 FEP Cases 94 (8th Cir., 1979) (where the court held that religious accommodation necessarily contemplates some degree of unequal treatment and would be considered a violation of Title VII only if the accommodation would either compromise other employees' contractual seniority rights as secured by a collective bargaining agreement or would confer more than a *de minimus* privilege to an employe solely because of the employe's religious beliefs); and *Nottelson v. Smith Steel Workers*, 25 FEP Cases 281 (7th Cir., 1981) (where the court followed the *de minimus* standard of hardship).

A contrary ruling would mean employers would have to eliminate all policies once an exception to the policy is granted to accommodate an employe's religious practices. The Commission does not believe such result was intended by the courts or by the Legislature.

ORDER

That respondent's motion be granted and this case be dismissed.

Dated: December 3, 1997.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

JMR
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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