

STATE OF WISCONSIN

PERSONNEL COMMISSION

**JUDY B. OLMANSON,**  
*Complainant,*

v.

**Chancellor, UNIVERSITY OF WISCONSIN-  
GREEN BAY, and Secretary, DEPARTMENT OF  
HEALTH AND FAMILY SERVICES,**

*Respondents*

Case No. 98-0057-PC-ER

**RULING ON MOTION TO  
DISMISS FILED BY DHFS  
ON MOTION FOR  
RECONSIDERATION**

#### NATURE OF THE CASE

This complaint of WFEA (Wisconsin Fair Employment Act; Subchapter II, Chapter 111, Stats.) discrimination was filed on March 11, 1998, and amended on August 10, 1998. Respondent UW-GB previously filed motions to dismiss both the initial complaint and the complaint as amended, and in a ruling dated October 21, 1998, the Commission entered the following order:

1. The original complaint which was filed on March 11, 1998, and asserts discrimination claims against UW-GB on the basis of sex, marital status and WFEA retaliation with respect to failure to hire is dismissed as against UW-GB for failure to state a claim, and UW-GB's motions to dismiss are granted to this extent.
2. The amendment set forth in the amended complaint which was filed on August 10, 1998, is allowed and will relate back to the date of filing of the original complaint—i. e., March 11, 1998.
3. The amended complaint, which asserts a claim of discrimination against UW-GB on the basis of disability, is not dismissed, and UW-GB's motions to dismiss are denied to this extent.

On November 16, 1998, respondent DHFS filed the following motion:

The Department of Health and Family Services (DHFS) hereby moves to dismiss Judy Olmanson's claims that DHFS discriminated against her on the basis of sex, marital status and WFEA retaliation for the reason that she has failed to state a claim upon which relief can be granted.

The motion is based upon Ms. Olmanson's submissions, DHFS's answers to the complaint and amended complaint, and the Personnel Commission's ruling on UW-GB's motion to dismiss. The Commis-

sion's reasoning in dismissing Ms. Olmanson's claims against UW-GB applies with equal force to her parallel claims against DHFS.

In a January 27, 1999, ruling the Commission stated: "Complainant has been given the opportunity to submit arguments if she wished to oppose this motion. She has not done so, and this motion will be granted for the same reasons as are set forth in the October 21, 1998, ruling." In a petition for reconsideration filed February 2, 1999, complainant correctly pointed out that she indeed had filed an argument in opposition to this motion.<sup>1</sup> Therefore, the Commission will proceed to address complainant's arguments.

The first substantive conclusion of law contained in the Commission's October 21, 1998, ruling is that complainant failed to state a claim of sex discrimination against UW-GB. In its discussion of this point, the Commission stated as follows:

In the course of her submissions as part of the investigative process, and in her arguments in opposition to the motion to dismiss, complainant has not enunciated any basis for the allegation of sex discrimination reflected in her complaint by a check mark in the box beside "sex." It is undisputed that complainant does not have the most frequent type of prima facie case of sex discrimination in hiring, because the person hired here was a female. No other type of prima facie case has been argued or appears from any of complainant's factual allegations. Therefore, the Commission concludes that the complainant has not stated a claim of sex discrimination against respondent UWGB. Decision, p. 3.

In addition to the fact that the successful candidate appointed to the position in question was female, it also is undisputed that the three candidates who were ranked highest by the search committee (one of whom was complainant) and whose references were checked were all female. Complainant's arguments of December 16, 1998, do not provide any indication of complainant's theory of sex discrimination but merely restate the allegation in conclusory fashion. Therefore complainant's claim of sex discrimination against DHFS will be dismissed for failure to state a claim.

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<sup>1</sup> The complainant's argument was inadvertently overlooked by the Commission's staff.

The Commission also concluded in its October 21, 1998, decision that the complaint failed to state a claim of marital status discrimination against UW-GB because the complainant alleges that she was discriminated against because “DHFS disapproved of her relationship with the other DHFS employe because *he* was a married person . . . the basis for this disapproval has nothing to do with *complainant’s* marital status.” Ruling, p. 4. Complainant’s December 16, 1998, submission does not address this point except to the extent it restates the conclusion that DHFS discriminated against her because of her marital status. Therefore, it must be concluded that the complaint fails to state a claim of marital status discrimination against DHFS

In its October 21, 1998, ruling the Commission concluded that the complaint failed to state a claim of WFEA retaliation against respondent UW-GB because complainant’s only basis for arguing that UW-GB was aware of her alleged activities was untenable as a matter of law. With respect to DHFS, the circumstances of this case involve the different question of whether complainant engaged in activities protected by the WFEA. In her December 16, 1998, argument complainant states her protected activities as follows:

My protest of discrimination included arguing with my supervisors about the discriminatory removal of assignments and discriminatory work restrictions and my resignation in protest of DHFS discrimination. I actively resisted the DHFS actions that the Commission has found in the Initial Determination to be discriminatory. Objection to motion to dismiss, p. 1.

Section 111.322(3), Stats., provides that it is an act of employment discrimination “[t]o discharge or otherwise discriminate against any individual because he or she has opposed any discriminatory practice under this subchapter or because he or she has made a complaint, testified or assisted in any proceeding under this subchapter.” While complainant’s allegations are stated in rather general terms, they must be considered in the context of a motion to dismiss for failure to state a claim:

“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 na-

ture of the claim; and, therefore, it is not necessary for the [complainant] 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 . . . 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 [complainant] recover'" . . . .

Accordingly, the Commission accepts as true for purposes of deciding this motion all the facts alleged in the complaint, as well as the facts alleged in opposition to the motion to dismiss. *Elmer v. DATCP*, 94-0062-PC-ER, 11/14/96. (citations omitted)

While it would have been preferable if complainant had fleshed out her allegations of WFEA protected activity, in consideration of the foregoing criteria and the fact that complainant is proceeding without counsel, the Commission concludes that it is not clear that complainant cannot prevail on the WFEA retaliation claim, and that the motion to dismiss should be denied as to this claim.

ORDER

1. The order entered on January 27, 1999, is vacated on motion for reconsideration.<sup>2</sup>

2. Respondent DHFS's motion to dismiss for failure to state a claim is granted to the extent that the claims in the original complaint which was filed on March 11, 1998, against DHFS on the basis of sex and marital status are dismissed, and denied to the extent that the claim against DHFS of WFEA retaliation with respect to failure to hire is not dismissed.

3. The amendment set forth in the amended complaint which was filed on August 10, 1998, is allowed and will relate back to the date of filing of the original complaint—i. e., March 11, 1998.

4. The amended complaint, which asserts a claim of discrimination on the basis of disability, is not dismissed.

Dated: February 10, 1999.

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STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

  
DONALD R. MURPHY, Commissioner

  
JUDY M. ROGERS, Commissioner

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<sup>2</sup> While parts of that order have not been disturbed by today's ruling, in the interests of lessening the possibility of confusion, the Commission vacates the entire order and then reinstates those parts which will remain in effect.