

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

**RULING ON MOTIONS
TO DISMISS**

Case No. 98-0057-PC-ER

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 has filed motions to dismiss both the initial complaint and the complaint as amended, and the parties have filed briefs. The following findings are made solely for the purpose of addressing these motions. The Commission has assumed the facts alleged in the complaint (as amended) and the supplementary materials complainant has submitted in the course of the investigation.

FINDINGS OF FACT

1. The original complaint filed on March 11, 1998, alleges discrimination on the bases of marital status, sex, and retaliation, with regard to failure to hire. The amended complaint, filed on August 10, 1998, adds the ground of discrimination on the basis of disability.

2. On March 7, 1997, complainant submitted a letter of interest to the search committee for the position in question, Training Specialist, NEW Partnership for Children and Families. The NEW Partnership is a contractual program between UW-GB and DHFS. UW-GB has ultimate appointment authority for positions in the pro-

gram. The program is funded by UW-GB, the counties it serves, and federal Title IV-E funds which pass through DHFS.

3. The search committee screened the candidates for the position in question. The three finalists for the position were Linda Cates, Ann Pratt, (the ultimate appointee), and complainant. After conducting reference checks, the committee deemed complainant as the third best candidate. Only the top two candidates were interviewed.

4. Complainant had been employed by DHFS at one time. She resigned from that employment prior to applying for the position in question. During the process of checking references, members of the search committee obtained opinions about complainant from some of complainant's former supervisors and co-workers at DHFS. These opinions were summarized in the committee's notes as follows:

- "problems with follow through"
- "highs and lows—results in inconsistencies"
- "Does not have high regard of many of her colleagues"
- "Personal issues interfere with prof. performance"
- "Abuse as a child still used to play victim role"
- "Poor performance under stress—known to leave work"

In addition to the foregoing, complainant alleges that Linda Hisgen of DHFS commented to a member of the search committee that complainant was a "mixed bag." She also alleges that this comment was intended to let UWGB know that DHFS opposed hiring complainant and that acting contrary to DHFS would jeopardize the program's funding.

5. Complainant identifies her marital status as divorced. It appears to be undisputed that the members of the search committee were unaware of her marital status.

6. Complainant states she has been diagnosed as having recurrent major depression and panic disorder. While respondent asserts that none of the search committee were aware complainant was disabled, complainant contends that the foregoing ref-

erences (see finding #4) created an inference that she had one or more mental impairments.

CONCLUSIONS OF LAW

1. Amendment of the original complaint by the amended complaint filed August 10, 1998, and relation back of the amendment to the original date of filing, March 11, 1998, is appropriate pursuant to §PC 2.02(3), Wis. Adm. Code.

2. On the basis of the complaint, as amended:

a) Complainant has failed to state a claim of sex discrimination against respondent UW-GB;

b) Complainant has failed to state a claim of marital status discrimination against respondent UW-GB;

c) Complainant has failed to state a claim of WFEA retaliation against respondent UW-GB;

d) Complainant has stated a claim of disability discrimination against respondent UW-GB.

OPINION

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.

As to marital status discrimination, complainant has not alleged, nor does it appear from anything else before the Commission, that anyone on the search committee was aware complainant was divorced. Complainant asserts that some members of

DHFS management disapproved of a relationship she had with another employe who was married when she had been employed in that agency, and that factor influenced the references she received from DHFS. Laying to one side the question of whether there would be any possible basis for liability on the part of UWGB for having relied on these references, the gravamen of her complaint simply does not give rise to a claim of marital status discrimination.

The WFEA defines “marital status” as “the status of being married, single, divorced, separated or widowed.” §111.32(12), Stats. Complainant does not allege or infer that her marital status as so defined played any role in the alleged disapproval of her relationship with the other DHFS employe. Rather, she claims that respondent DHFS disapproved of her relationship with the other DHFS employe because *he* was a married person. While it might be possible to base a claim of marital status discrimination on the basis of a marital relationship of a complainant with another person of whom the employer disapproved, complainant alleges she was being discriminated against because of the marital status of someone else. If the employer disapproved of complainant’s relationship with a married person, the basis for this disapproval has nothing to do with *complainant’s* marital status. *See Federated Elec. v. Kessler*, 131 Wis. 2d 189, 388 N. W. 2d 553 (1986). (Work rule prohibiting association with a married coemploye did not discriminate on the basis of marital status because both single persons and married persons were subject to the rule.) Therefore, the Commission concludes that this complaint fails to state a claim of marital status discrimination against respondent UWGB.

With regard to complainant’s retaliation claim, when she was asked what kind of protected activity in which she had engaged, she replied as follows:

I do not believe that anyone on the UW-Green Bay hiring committee or Ms. Baer was aware of my fair employment activities, marital status or discriminating actions taken against me by DHFS.

However, Mr. Sadlier told Ms. Baer on March 27, 1998, that I resigned my position with the Department because the Department would not let me train, and that this was “political.” Ms. Baer should have suspected

that Ms. Hisgen [of DHFS] was biased in some way. Complainant's letter dated April 28, 1998.

One of the necessary elements of a prima facie case of WFEA retaliation is that the employer was aware of the complainant's protected activity. *See e. g., Marfilius v. UW-Madison*, 96-0026-PC-ER, 4/24/97. In the Commission's opinion, the link complainant tries to make between her alleged protected activities and respondent UWGB's potential awareness of those protected activities—i. e., that respondent should have deduced from Mr. Sadlier's remark about a "political" reason for complainant's resignation that respondent "was biased in some way"—is too tenuous to even conceivably amount to this element of a prima facie case of retaliation discrimination. On a motion to dismiss, "[t]he facts pleaded and all reasonable inferences from the pleadings must be taken as true, but legal conclusions and unreasonable inferences need not be accepted." *See Morgan v. Pennsylvania General Ins. Co.*, 87 Wis. 2d 723, 731-32, 275 N. W. 2d 660 (1979).

Similarly, a prima facie case of disability discrimination requires that the employer was aware or should have been aware of the complainant's disability. *See, e.g., Bisbee v. DER*, 82-PC-ER-54, 6/23/84. Ms. Olmanson argues that the search committee must have inferred a handicap of mental impairment from the remarks provided to the committee by references—e. g., "highs and lows—results in inconsistencies," "personal issues interfere with prof. performance," "abuse as a child still used to play victim role." Respondent denies that anyone on the search committee perceived complainant as having a mental impairment, and contends that these comments do not give rise to an inference that complainant was disabled. Arguments can be made on both sides of this issue. At this stage of this proceeding it can not be concluded as a matter of law that there is no conceivable way that complainant could establish this element of a disability claim.¹

¹ In some of her documents, complainant asserts a claim under the federal Americans with Disabilities Act. This Commission has no statutory authority over such a claim.

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.

Dated: October 21, 1998.

AJT
980057Crull

STATE PERSONNEL COMMISSION


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner