

HEIDI M. FERGUSON,
Complainant,

v.

**Secretary, DEPARTMENT OF
COMMERCE,**
Respondent.

**RULING ON MOTION
TO DISMISS**

Case No. 98-0099-PC-ER

This matter is before the Commission to resolve respondent's motion to dismiss filed by cover letter dated November 2, 1999.

BACKGROUND

1. This complaint was filed on May 5, 1998. An Initial Determination (ID) was issued on August 18, 1999. The "Conclusions" section of the ID is shown below:

1. Because complainant did not file a timely charge of discrimination, the Personnel Commission cannot address whether sex discrimination occurred with respect to:
 - a. Complainant was not given a starting salary that took into account her qualifications and credentials, and
 - b. In June of 1997, complainant's request for mileage reimbursement was denied,but makes a non-substantive no probable cause determination.
2. There is Probable Cause to believe that complainant was discriminated against on the basis of her sex with respect to:
 - h. Respondent declined to pay complainant's membership fees to professional organizations.
3. There is No Probable Cause to believe that complainant was discriminated against on the basis of sex with respect to:
 - c) In October of 1997, Supervisor Solberg denied complainant's request to attend the NOWRA conference at full or partial state expense,
 - d) In November of 1997, Supervisor Solberg informed complainant that she would need to submit a medical statement in order for him to justify granting her four days of sick leave,

- e) In December of 1997, complainant was instructed that she was not to bring her dogs to work sites,
 - f) In February of 1998, Supervisor Solberg advised complainant that she would not be paid for extra hours she had worked as compensatory time because he had not previously approved her to work those hours,
 - g) In February of 1998, Supervisor Solberg denied complainant's request to attend an ASAE conference at full or partial state expense,
 - i) Respondent consistently assigned complainant projects that could not be completed within the established 40 hour work week, and
 - j) Three investigatory meetings were held to discuss complainant's medical condition, job performance and conduct.
4. There is No Probable Cause to believe that complainant was discriminated against on the basis of marital status.
 5. There is No Probable Cause to believe that complainant was sexually harassed by a male employee when the employee raised specific issues with management.
 6. There is Probable Cause to believe that respondent failed to reasonably accommodate complainant's disability when it directed her to work no more than forty hours within a five-day [rather than a seven-day] work week.

2. The cover letter mailed to complainant's attorney, included the following pertinent information regarding appeal rights (emphasis shown is the same as in the original document):

If the complainant feels that the "no probable cause" findings are in error and wishes to have a hearing on the issue regarding the no probable cause finding, then complainant must, within **30 days** of the date of this letter, file an appeal letter with the Commission . . .

3. Complainant (rather than her attorney) filed an appeal of the No Probable Cause Portions of the ID by notice dated September 19, 1999, which was received by the Commission on September 20, 1999.

4. Complainant's attorney participated in the conferences, which established the briefing schedule for respondent's motion to dismiss. No brief was filed on complainant's behalf.

OPINION

Respondent's motion contained three parts¹. Each part is addressed separately below.

1. Motion to Dismiss the No Probable Cause Findings

Respondent moves to dismiss the No Probable Cause findings in the ID contending that complainant's appeal was filed untimely. This portion of the motion covers items 1, 3, 4 and 5 of the Conclusions section of the ID (see ¶1 of this ruling under "Background").

Commission rules provide that appeals of No Probable Cause determinations must be filed within 30 days after service of an ID. See §PC 2.07(3), Wis. Adm. Code. Service by mail is complete upon mailing. See §PC 1.05(2), Wis. Adm. Code. Filing is defined as the date the Commission receives the appeal. See §PC 1.02(10), Wis. Adm. Code. The Commission has held that the 30-day timeline is discretionary, not mandatory so that a late appeal will be accepted if the filing party shows good cause for the late filing. Good cause in this context means the appeal was filed late due to reasons beyond the control of the filing party. *Allen v. DOC*, 95-0034-PC-ER, 11/7/97.

The ID in this case was served on August 18, 1999, the date the ID was mailed. A timely appeal would need to have been received by the Commission by 4:30 p.m. on September 17, 1999. The Commission did not receive the appeal until September 20, 1999. Furthermore, complainant has not shown good cause because she has offered no explanation as to why the appeal was failed late. Accordingly, this appeal was filed late and this portion of respondent's motion is granted.

II. Motion to Dismiss Allegation Regarding Payment of Fees

Respondent moves to dismiss the allegation of sex discrimination with respect to non-payment of membership fees in professional organizations. This portion of the motion covers item 2 of the Conclusions section of the ID (see ¶1 of this ruling under "Background"). This allegation was discussed on page 13 of the ID, as shown below:

¹ Respondent's motion contained four parts condensed here to three by combining respondent's first and fourth arguments.

In regard to allegation (h), (that respondent declined to pay complainant's membership fees to professional organizations), respondent did not provide a specific answer, stating only that it denied discriminating against complainant. This does not constitute a sufficient explanation. Therefore, an inference of sex discrimination exists with respect to respondent's failure to pay complainant's membership fees to professional organizations.

Respondent attempted to cure the lack of information by submitting, with its motion to dismiss, an affidavit of Randall V. Baldwin, Bureau Director. According to Mr. Baldwin's sworn affidavit, he has custody and control over records that would show whether respondent paid for any Wastewater Specialist's fees for membership in professional organizations. He avers that he reviewed the records from July 1, 1996 to the present and found that respondent made no such payments. He further averred he was unaware of respondent making such payments.

This second part of respondent's motion to dismiss is akin to a request for summary judgment. The Commission utilizes the following standard in reviewing a motion for summary judgment:

On summary judgment the moving party has the burden to establish the absence of a genuine, that is, disputed, issue as to any material fact. On summary judgment the [Commission] does not decide the issue of fact; it decides whether there is a genuine issue of fact. A summary judgment should not be granted unless the moving party demonstrates a right to a judgment with such clarity as to leave no room for controversy; some courts have said that summary judgment must be denied unless the moving party demonstrates his entitlement to it beyond a reasonable doubt. Doubts as to the existence of a genuine issue of material fact should be resolved against the party moving for summary judgment.

The papers filed by the moving party are carefully scrutinized. The inferences to be drawn from the underlying facts contained in the moving party's material should be viewed in the light most favorable to the party opposing the motion. If the movant's papers before the [Commission] fail to establish clearly that there is no genuine issue as to any material fact, the motion will be denied. If the material presented on the motion is subject to conflicting interpretations or reasonable people might differ as to its significance, it would be improper to grant summary judgment.

Grams v. Boss, 97 Wis.2d 332, 338-339, 282 N.W.2d 637 (1980), citations omitted.

Mr. Baldwin's affidavit indicates that respondent paid no fees for membership in professional organizations for any Wastewater Specialist which raises the inference that complainant was treated the same as males. Complainant filed no argument to contest the facts recited in the affidavit or the

reasonable inferences drawn therefrom. Respondent is entitled to summary judgment on this claim because the undisputed facts show that respondent's decision not to pay complainant's professional membership fee was not based on sex.

III. Motion to Dismiss Disability Accommodation Allegation

Respondent moves to dismiss the disability accommodation allegation. This portion of the motion covers item 6 of the Conclusions section of the ID (see ¶1 of this ruling under "Background"). This allegation was discussed on pages 15-16 of the ID, as shown below:

Reasonable Accommodation

Complainant contended that respondent failed to reasonably accommodate her disability by directing her to work no more than forty hours in a five day period when her physician had recommended no more than forty hours in a seven-day period. It is undisputed that complainant was disabled and that respondent needed to reasonably accommodate her disability. The initial recommendation of complainant's physician (dated 2/4/98)² had been that she work no more than forty hours per week. When complainant's time sheets indicated that she had been working more than forty hours per week, respondent sent her a memo explaining that in accordance with her physician's recommendation, she would be restricted to five eight-hour days per week. The memo also stated that respondent would be contacting her physician to get further clarification regarding her work restrictions. Months later, complainant's physician sent another letter to respondent (dated 5/4/98)³ indicating that complainant should work no more than forty hours within a seven-day period. Respondent then issued her a directive indicating that she was to work forty hours within five days. It was not clear from the evidence in the file if at the time the complaint was filed complainant was working forty hours in seven days or whether she was working the forty hours in five days to which respondent had last restricted her. However, the last directive issued by respondent ordered her to work forty hours in five days and this prevented complainant from spreading her hours out over seven days, as other employees were presumably able to do under the collective bargaining agreement. Because complainant's accommodation request appeared only to ask for what other employees under the labor agreement were already permitted to do, the denial of her request (in this case, an apparent failure to respond) on behalf of respondent is considered to be a failure to accommodate complainant's disability.

² See, ID, ¶21 of the Findings of Fact.

³ See, ID, ¶26 of the Findings of Fact.

Also pertinent to the above argument is the ¶20 of the ID's Findings of Fact, which is shown below:

20. The collective bargaining agreement states the following in regard to hours worked:

6/2/1 Hours of work are defined as those hours of the day, days of the week, for which the employees are required to fulfill the responsibilities of their professional positions.

6/2/2 The standard basis of employment for full-time employees is forty (40) hours in a regularly reoccurring period of one hundred and sixty-eight (168) hours in the form of seven (7) consecutive twenty-four hour periods, except that additional hours of work may be required by the Employer.

Respondent moves to dismiss the disability accommodation allegation based on the following arguments:

Complainant in this matter has either been unwilling or unable to work as an employee of the State of Wisconsin for approximately one and one-half years. The attached letters of March 16, 1999, April 28, 1999, May 5, 1999, September 9, 1999, September 17, 1999, October 5, 1999 and October 11, 1999 show three instances where the Respondent directed the Complainant to return to work and in each case the Complainant directly or through legal counsel advised the Respondent she would not return to work. The attached documents show Respondent's continued attempts to accommodate but to no avail. It appears that accommodation may not be the issue in any event as Complainant appears to be evidencing an inability to perform the essential functions of her job and in which case, again an issue of accommodation would appear moot.

Respondent avers that this item of the Complaint is moot for lack of legal significance to a complaint before the Commission as the accommodation addressed in this item of the Complaint is neither an accommodation that the Complainant appears either willing or able to comply with, is presented to the Commission as a hypothetical matter, and/or fails to stated and/or support a claim upon which relief can be granted.

This portion of respondent's motion is denied. The question of whether complainant would be able to return to work if respondent would accommodate her disability by allowing her to work a flexible schedule (of 40 hours a week over a 7-day period) remains a point of

contention between the parties. Complainant's attorney specifically stated in the referenced letter dated September 17, 1999, that there has been no medical contradiction to "the already well established fact that she requires accommodation as to the number of hours worked on any given day." Complainant's refusal to return to work cannot form a valid basis for dismissal of the accommodation request when respondent continues not to implement the complainant's request.

CONCLUSIONS OF LAW

1. It is complainant's burden to show that she filed a timely appeal of the No Probable Cause findings of the Initial Determination, or that good cause existed for failing to file a timely appeal. She failed to meet this burden.

2. It is respondent's burden to show entitlement to summary judgment regarding the allegation that respondent discriminated against complainant because of her sex when respondent did not pay her fees for membership in a professional association. Respondent met its burden.


3. It is respondent's burden to show entitlement to dismissal on complainant's claim that respondent failed to accommodate her disability by denying her permission to work 40 hours a week over a seven day period. Respondent failed to meet this burden (on any theory advanced by respondent).

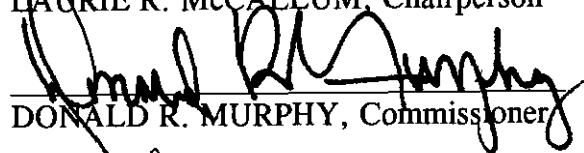
ORDER

Respondent's motion is granted in part and denied in part, as detailed in this ruling. The sole surviving claim is whether respondent failed to accommodate complainant's disability by not allowing her to work 40 hours a week over a seven-day period.

Dated: December 16, 1999.

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

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