STATE OF WISCONSIN PERSONNEL COMMISSION

**ANGELLA F. ELLIS,**
***Complainant,***

**v.**

**Secretary, DEPARTMENT OF HEALTH AND FAMILY SERVICES,**
***Respondent.***

RULING ON MOTION TO DISMISS CLAIM

Case No. 99-0080-PC-ER

This matter is before the Commission on respondent's motion to dismiss complainant's claim under the Family Medical Leave Act.

Complainant filed a complaint with the Personnel Commission on April 2, 1999. The initial complaint alleged Fair Employment Act discrimination based on race, age and disability as well as violation of the Family Medical Leave Act (FMLA). Complainant's FMLA claim was separated from the other claim and assigned Case No. 99-0080-PC-ER.

Complainant's allegations of discrimination based on race, age and disability, which are assigned Case No. 99-0066-PC-ER, are being investigated by the federal Equal Employment Opportunity Commission are not covered by this ruling.

## FINDINGS OF FACT

1. Complainant was hired by the University of Wisconsin Hospitals and Clinics Authority (UWHCA) as a Nurse Clinician 2 on October 1, 1997.

2. She worked in that position on a full time basis until March 1, 1998, when complainant began working at respondent's Central Wisconsin Center (CWC) as a Nursing Supervisor 2.

3. Complainant was injured as a result of an incident involving two dogs on the premises of CWC on June 14, 1998.

4. Complainant's employment with respondent ended on January 22, 1999.

5. Complainant did not work for respondent for more than 52 consecutive weeks.

## CONCLUSIONS OF LAW

1. The University of Wisconsin Hospitals and Clinics Authority and the Department of Health and Family Services are not the "same employer" for the purpose of §103.10(2)(c), Stats.

2. Complainant did not work the requisite 52 consecutive weeks with the State of Wisconsin in order to qualify for coverage under the Wisconsin Family Medical Leave Act.

## OPINION

The basis for respondent's motion to dismiss the FMLA claim is described as follows:

> The Commission has no jurisdiction to consider the claim because the claim is invalid due to the fact that the State of Wisconsin did not employ Ms. Ellis for fifty-two consecutive weeks prior to her claim.
>
> Section 103.10(2)(c), Stats., requires that an employee be employed by the same employer for more than fifty-two consecutive weeks before the FMLA law applies to the employee. Ms. Ellis was employed by Central Wisconsin Center from March 1, 1998 through December of 1998. This did not constitute fifty-two weeks.
>
> Prior to her employment with the respondent, DHFS, Ms. Ellis apparently claims that she was employed by the University of Wisconsin Hospital Authority. That entity is a "public body corporate and politic," [see §233.02(1), Stats.] but it is not the State of Wisconsin as an employer. Employees of the Authority have certain employment rights under section 233.10, but FMLA carry-over coverage with the State as an employer under the FMLA is not one of them.

There are two key provisions in the FMLA relating to this case. Pursuant to §103.10(1)(c), Stats:

> Except as provided in sub. (14)(b), "employer" means a person engaging in any activity, enterprise or business in this state employing at least 50 individuals on a permanent basis. "Employer" includes the state and any office, department, independent agency, authority, institution, association, society or other body in state government created or authorized to be created by the constitution or any law, including the legislature and the courts.

Pursuant to §103.10(2)(c), Stats:

> This section only applies to an employe who has been employed by the *same employer* for more than 52 consecutive weeks and who worked for the employer for a least 1,000 hours during the preceding 52-week period. (emphasis added)

The FMLA is remedial in nature, so its provisions should be liberally construed. *Butzlaff v. Wis. Pers. Comm.*, 166 Wis. 2d 1028, 1035, 480 N.W.2d 559 (Ct. App. 1992)

The question raised by this case is whether the complainant's employment by the University of Wisconsin Hospitals and Clinics Authority (UWHCA) and by respondent's Central Wisconsin Center constituted employment by the "same employer" for the purpose of §103.10(2)(c), Stats. The Commission has previously ruled that the state is to be considered one employer for the purposes of the FMLA and that a complainant's employment for two state agencies should be considered as work for one employer. *Butzlaff v. DHSS*, 90-0097-PC-ER, 9/19/90; reversed on other grounds by Dane County Circuit Court, *Butzlaff v. Wis. Pers. Comm.*, 90-CV-4043, 4/23/91; affirmed by Court of Appeals, 166 Wis 2d 1028, 480 N.W.2d 559 (Ct. App. 1992). There is no dispute that the Department of Health and Family Services is a state agency. However, only if complainant's work with UWHCA and DHFS can be combined does complainant meet the 52 consecutive weeks requirement for coverage by the FMLA.

Analysis of the issue in this matter is comparable to that applied by the Commission in *Conner v. WHEDA*, 93-0154-PC-ER, 12/14/94, which addressed whether the

Wisconsin Housing and Economic Development Authority was an agency of the state for purposes of the Wisconsin Fair Employment Act (FEA).

The Commission's FEA jurisdiction is described in §111.375(2), Stats., as shown below in pertinent part.

> [The FEA] applies to each *agency of the state* except that complaints of discrimination . . . against the agency as an employer shall be filed with and processed by the personnel commission . . . (Emphasis added.)

The meaning of an "agency of the state" is clarified further by the FEA's definition of "employer," found in §111.32(6)(1), Stats., and shown below in relevant part.

> "Employer" means the state and each agency of the state and . . . any other person engaging in . . . [a] business . . . . "[A]gency" means an office, department, independent agency, authority, institution, association, society *or other body in state government* created or authorized to be created by the constitution or any law, including the legislature and the courts. (Emphasis added.)

Wisconsin state government is comprised of three branches. The legislative branch establishes policies and programs. The executive branch carries out policies and programs established by the legislature. The judicial branch adjudicates conflicts from the interpretation and/or application of the laws. (See §15.001, Stats.) WHEDA clearly is not a member of the legislative or judicial branch of state government. Therefore, the focus of this inquiry is narrowed to whether WHEDA is a member of the executive branch of state government.

Chapter 15 of the Wisconsin Statutes creates the structure of the executive branch of state government, including the departments and other agencies which are part of the executive branch. WHEDA is not included under the executive branch. Rather, WHEDA's enabling legislation is found in Chapter 234 of the Wisconsin Statutes.

Other factors support the conclusion that WHEDA is not part of the executive branch of state government. WHEDA was created as a "public body corporate and politic," pursuant to §234.02(1), Stats., and is expected to operate on its own revenues. (See §§234.05, 234.14 to .17 and 234.93, Stats.) Also, the qualifications, duties and compensation of WHEDA employes are not subject to the civil service statute. (See §234.02(3), Stats., which provides the ch. 230, Stats., is inapplicable to

WHEDA employes, except for the restrictions on political activities found in §230.40, Stats.)

Furthermore, the Wisconsin Supreme Court has ruled that WHEDA is an entity separate from the state and is not an arm or "agency of the state." *State ex re. Warren v. Nusbaum*, 59 Wis. 2d 391, 424-25, 208 N.W.2d 780 (1973) In *Nusbaum* the court considered whether WHEDA's predecessor, the Wisconsin Housing Finance Authority,[2] could perform its statutory functions without violating the Wisconsin constitutional prohibition of state involvement in certain activities. The *Nusbaum* court concluded that no violation existed because the Wisconsin Housing Finance Authority was an entity separate from the state. The court explained as follows:

> The legislature has the power to create separate entities designed to carry on a public purpose. The obvious purpose behind the creation of many such entities has been the indirect achievement of some purpose that the state cannot achieve directly because of various constitutional limitations placed upon the power of the state. While it has been intimated that such plans are a subterfuge to evade the constitutional provisions, such attacks have been rejected on the theory that it is never an illegal evasion to accomplish a desired result, lawful in itself, by discovering a legal way to do it. (Cites omitted.)

In summary, WHEDA is not a "body in state government," within the meaning of §111.32(6)(a), Stats., and, therefore, is not an "agency of the state" over which the Commission has jurisdiction under §111.375(2), Stats. WHEDA is not listed as part of the executive branch in ch. 15, Stats. It has its own enabling legislation in ch. 234, Stats. And, the Wisconsin Supreme Court has declared WHEDA as separate from state government in the Court's constitutional analysis of whether WHEDA functioned as an agency of the state.

The above analysis is consistent with prior Commission decisions.

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[2] WHEDA, as the successor to the Wisconsin Housing Authority, continues to be characterized by the Wisconsin Supreme Court as being separate from the state. *See Development Dept. v. Bldg. Comm'n.*, 139 Wis. 2d 1, 12-17, 406 N.W.2d 728 (1987).

The operative definition of "employer" is comparable under the FMLA (§103.10(1)(c), Stats.) and the FEA (§111.32(6)(a), Stats.) Pursuant to §233.02(1), Stats., UWHCA is

"a public body corporate and politic," the same language used to create WHEDA under §234.02(1), Stats. The Personnel Commission is unaware of any reported case interpreting §230.02(1),. Stats., and is unaware of any reason to deviate from the analysis applied in *Conner*.

Therefore, the Commission concludes that the UWHCA is not the "same employer" as the respondent DHFS for purposes of the FMLA, and that complainant has not met the 52 consecutive weeks requirement for coverage by the FMLA.

ORDER

Respondent's motion to dismiss complainant's FMLA claim is granted and Case No. 99-0080-PC-ER is dismissed.

Dated: July 20, 1999 STATE PERSONNEL COMMISSION

Laurie R McCallum

LAURIE R. McCALLUM, Chairperson

KMS:990080Crul1

DONALD R. MURPHY, Commissioner

Judy M Rogers

JUDY M. ROGERS, Commissioner

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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.)