STATE OF WISCONSIN PERSONNEL COMMISSION

ROY A. HENCE,
Complainant,

v.

Chancellor, UNIVERSITY OF WISCONSIN-MADISON
Respondent.

Case No. 99-0116-PC-ER

RULING ON MOTION TO DISMISS

NATURE OF THE CASE

This case is before the Commission on a motion to dismiss for failure to state a claim of WFEA (Wisconsin Fair Employment Act) retaliation. The facts necessary to decide this motion appear to be undisputed and are set forth as follows, for the sole purpose of deciding this motion.

FINDINGS OF FACT

1. This discrimination complaint, filed on June 30, 1999, had the following boxes checked on the reverse side of the discrimination complaint form:

> Discrimination based on . . . Family leave or medical leave (includes retaliation).
>
> Retaliation based on . . . Activities protected by the Fair Employment Act.

2. This discrimination complaint goes on to state that complainant fractured some ribs and was unable to work and his limited term employment was terminated effective June 16, 1999, because of those circumstances. The complaint goes on to state: "I don't think it's fair that I was terminated because of a serious injury (rib) . . . the pain was too severe for me to work."

3. In a letter from the Commission to the parties dated July 12, 1999, complainant's position on this complaint was summarized as follows:

> Mr. Hence indicated that he wished to withdraw the Family/Medical Leave Act basis for his complaint and that he wished to amend his complaint to include fair employment act retaliation. Mr. Hence described his fair employment act activity as: he was injured and respondent retaliated against him because he was injured.

OPINION

In support of the motion to dismiss, respondent argues as follows:

> Sections 111.322(2m) and (3) of the Wisconsin Statutes identify those actions which constitute fair employment activities. The complainant's described activity—that he was injured—does not meet the definition of any of the statutorily required activities. The Complainant did not file a complaint or attempt to enforce any of the rights enumerated under §111.322(2m)(a) and (c). Nor did Complainant testify or assist in any action or proceeding held under or to enforce any of the rights enumerated §111.322(2m)(b) or (c). Likewise, the Respondent did not believe that Complainant engaged in any of the activities described in §111.322(2m)(a), (b) or (c). Finally, Complainant's described activity does not fit any of the activities defined in §111.322(3).

Section 111.322(2m)(a), Stats., provides that it is an act of employment discrimination: "To discharge or otherwise discriminate against any individual because . . . [t]he individual files a complaint or attempts to enforce any right under s. . . . 103.13." Section 103.13(11)(a), Stats., provides that "[n]o person may interfere with, restrain or deny the exercise of any right provided under this section." A motion to dismiss must be analyzed under the following standard:

> [T]he pleadings are to be liberally construed, [and] a claim should be dismissed only if "it is quite clear that under no circumstances can the plaintiff recover." The facts pleaded and all reasonable inferences from the pleadings must be taken as true, but legal conclusions and unreasonable inferences need not be accepted. *Phillips v. DHSS & DETF,* 87-0128-PC-ER, 3/15/89; aff'd., *Phillips v. Wis. Pers. Commn.,* 167 Wis. 2d 205, 482 N. W. 2d 121 (Ct. App. 1992).

In this case, the complainant alleges he was discharged because he was unable to work due to cracked ribs which he characterizes as a "serious injury." Following the precepts set forth in *Phillips,* it must be assumed that complainant had a serious health

condition which the FMLA covered and which entitled him to take leave during the period in question, and that respondent terminated his employment because he took that leave. This set of circumstances gives rise to a claim under the WFEA, *see Ripp v. UW,* 93-0113-PC-ER, 6/21/94:

> Here, the complainant appears to contend that her employment was terminated because of her prior action of taking medical leave. It would be contrary to the stated purpose of the FMLA not to protect those employes who are retaliated against because of exercising their right to medical leave under the act. The Commission acknowledges that the language used in §103.10(11) could have more explicitly included the type of allegation being made here. However, there is sufficient breadth in the reference to "interfere" in §103.10(11)(a), to include this claim. Paragraph (c) also references §111.322(2m), which in turn references "enforcing a right" under the FMLA. This language appears broad enough to include [this] claim.

See also, Marfilius v. UW-Madison, 96-0026-PC-ER, 4/24/97; *Preller v. UWHCB,* 96-0151-PC-ER, 8/18/98.

ORDER

Respondent's motion to dismiss filed August 18, 1999, is denied.

Dated: October 6, 1999.

STATE PERSONNEL COMMISSION

AJT.990116Crul1.doc

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

Parties:

Roy A. Hence
934 W. Dayton St. #3
Madison, WI 53715

David Ward
Chancellor, UW-Madison
500 Lincoln Dr, 158 Bascom Hall
Madison WI 53706