STATE OF WISCONSIN PERSONNEL COMMISSION

MARY VERHAAGH,
Complainant,

v.

Secretary, DEPARTMENT OF TRANSPORTATION,
Respondent.

Case No. 99-0127-PC-ER

RULING ON MOTION TO DISMISS

This is a complaint of age and sex discrimination in regard to respondent's failure to hire complainant in June of 1999 for either of two vacant Engineering Specialist positions. On December 8, 1999, respondent filed a motion to dismiss for failure to state a claim for relief. The parties were permitted to file written arguments in regard to the motion and the schedule for doing so was completed on February 25, 2000. The following findings of fact are based on information supplied by the parties, appear to be undisputed, and are made solely for the purpose of deciding this motion.

FINDINGS OF FACT

1. Complainant interviewed for the subject Engineering Specialist (ES) positions in June of 1999. During this interview, complainant expressed a strong interest in continuing her involvement in surveys, and indicated that her long-range goal was to be a survey crew chief. There were no vacant Surveyor positions at this time.

2. In October of 1999, complainant participated in interviews for four vacant ES positions and a vacant Surveyor position. The duties and responsibilities of these four ES positions were comparable to those of the ES positions for which complainant was not selected in June of 1999.

3. Complainant was offered appointment to the Surveyor position for which she had interviewed in October of 1999 and she accepted this offer. After accepting this offer, complainant was offered one of the ES positions for which she had interviewed in

October of 1999. She declined this offer since the Surveyor position paid more, she had a stronger interest in the Surveyor position, and she had already accepted the Surveyor position.

OPINION

The general rules for consideration of a motion to dismiss for failure to state a claim for relief are set forth in *Phillips v. DHFS & DETF*, 87-0128-PC-ER, 3/15/89; aff'd other grounds, *Phillips v. Wis. Pers. Comm.*, 167 Wis.2d 205, 482 N.W.2d 121 (Ct. App. 1992), as follows:

> 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 nature of the claim; and, therefore, it is not necessary for the plaintiff 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 the same as the purpose of the old demurrer – 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 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.
>
> ...A claim should not be dismissed...unless it appears to a certainty that no relief can be granted under any set of facts that plaintiff can prove in support of his allegations. (Citations omitted.)

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.

Respondent first argues, citing *Allen v. Prince George's County, MD,* 583 F.Supp. 833 (D.C.MD., 1982), aff'd, 737 F.2d 1299 (4th Cir. 1984), that, since complainant's statements during the interview for the subject positions and subsequent action in rejecting a comparable offer for an ES position demonstrate that she would not have accepted the subject positions had they been offered to her, it is a necessary conclusion that complainant would be unable to establish that she was "genuinely

desiring to work in the position," a necessary element of proof here. The facts here are not parallel to those in *Allen,* however. In *Allen*, which was decided after a lengthy trial, not on a motion for summary disposition, the court concluded that the complainant had failed to show that she had a genuine intention to accept employment by the respondent at any time during the period in question based on the fact that there were no openings when she first filed an application; on her failure to renew her application for several years; on her failure, when she finally did renew her application, to provide additional information despite being contacted for that purpose by respondent's personnel department; on her representation that she would not accept a salary of less then $9,500 when the subject position was then paying $6,000; and on her failure to interview for positions when contacted by respondent. Here, respondent contends that, because complainant later accepted a higher paying position in a field in which she had a stronger interest, she has demonstrated that she would not have accepted the subject ES positions had they been offered to her. However, complainant did what any reasonable person interested in promoting presumably would do once an employer tells her that she didn't get the job for which she was competing, i.e., continue searching for positions in her field. To equate this search with the failings of the complainant in *Allen* is clearly not merited. Although subsequent action by an employer to offer a complaining employee a position comparable to the one they were earlier denied may be relevant to the issue of remedy, it does not, under the circumstances present here, deny the complainant a forum for litigating her discrimination claim pursuant to the theory advanced by respondent.

Respondent also argues that complainant's appointment to the Surveyor position and refusal of the offer of appointment to an ES position comparable to the subject ES positions render this case moot. In support of this argument, respondent cites *Watkins v. ILHR Department*, 69 Wis.2d 782, 233 N.W.2d 360 (1975). In *Watkins*, in determining whether a decision in this race discrimination case, where the transfer the complainant had originally been denied had eventually been granted by her employer, could have "any practical legal effect upon the existing controversy," the court looked

beyond the fact that the remedy could not include back pay damages or appointment to the subject position and decided that, since Ms. Watkins was still employed by the same agency, "an order could be entered which would have the practical, legal effect of requiring that Watkins be considered for all future transfers on the basis of her qualifications and ability, and without regard to race." Here, not only would complainant be entitled a back pay award for the period of time between the effective date of the original hiring decision and the effective date of her appointment to the Surveyor position, but she is still employed by the same agency and, presumably, an order such as that contemplated in *Watkins* could be entered here as well. It is concluded, as a result, that this controversy is not moot.

CONCLUSIONS OF LAW

1. This matter is appropriately before the Commission pursuant to §230.45(1)(b), Stats.

2. Complainant has the burden to show that she has stated a claim for relief, and that the present controversy is not moot.

3. Complainant has sustained these burdens.

ORDER

Respondent's motion to dismiss is denied.

Dated: April 7, 2000

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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