STATE OF WISCONSIN PERSONNEL COMMISSION

MARGARET KING,
Complainant,

v.

Secretary, DEPARTMENT OF HEALTH AND FAMILY SERVICES,
Respondent.

Case No. 00-0165-PC-ER

RULING ON MOTION TO DISMISS

This is a complaint of disability discrimination. On April 4, 2001, respondent filed a motion to dismiss for failure to state a claim. The parties were permitted to brief the motion, and the schedule for doing so was completed on May 25, 2001. The following findings of fact are derived from information provided by the parties, appear to be undisputed, and are made solely for the purpose of deciding this motion.

FINDINGS OF FACT

1. At all times relevant here, complainant has been employed by respondent as a Social Worker-Senior with responsibility for providing intake assessment, placement and post-placement services to children in state guardianship; developing adoptive homes for special needs children; and providing concurrent planning consultation to assigned counties.

2. The parties agree that the following statement of issues for hearing accurately represents the complainant's allegations in this matter:

> **1.** Whether respondent discriminated against complainant on the basis of disability in regard to the following actions:
>
> **a.** Complainant was issued a letter of reprimand on October 24, 2000.
>
> **b.** Complainant was issued a letter of reprimand in lieu of a 3-day suspension on March 5, 2001.

2. Whether respondent discriminated against complainant on the basis of disability in regard to the following terms and conditions of employment:

a. On October 23, 2000, Mr. Langer allegedly said complainant would not be allowed to attend meetings required for private and public adoption workers in November and December of 2000, and perhaps for longer [1]

b. Beginning in May of 2000, Ms. Larsen-Corey allegedly decided not to assign new files to complaint.[2]

c. From August through November 2000, Mr Langer allegedly held complainant to set (inflexible) working hours

d. Mr. Langer allegedly limited complainant to working 20 hours a week since August 2000 without potential for overtime or compensatory time.

e. Mr. Langer allegedly decided to hold complainant to May 2000 performance standards.

f. Mr Langer and Ms. Larson-Corey allegedly failed to communicate with complainant by hanging up the phone when complainant called, failing to respond to complainant's e-mails, failing to communicate in a timely manner and failing to provide answers to complainant's job-related questions.

g. Ms. Larsen-Corey allegedly decided to eliminate complainant's name from the Western District List during 2000.

h. In September of 2000, Mr. Langer became complainant's supervisor

i. Complainant was placed on a concentrated performance planning and development program from August of 2000 through April 3, 2001

j. Respondent issued pre-disciplinary meeting notices to complainant on December 7, 2000, and January 5, January 12, and January 31, 2001

3. Respondent does not dispute that allegations **1.a.** and **1.b.** state cognizable claims under the Fair Employment Act (FEA).

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[1] These meetings included training which was "mandatory" but which apparently did not directly affect complainant's eligibility to perform the duties and responsibilities assigned to her position.

[2] This failure to assign additional case files to complainant as well as the removal of her name from the list of those to whom additional files could be assigned (allegation 2.g.) apparently resulted in a workload reduction but no significant change in the nature of the duties and responsibilities assigned to complainant's position.

OPINION

Complainant alleges here that she has been discriminated against on the basis of disability.

The initial burden of proof under the FEA is on the complainant to show a prima facie case of discrimination. If complainant meets this burden, the employer then has the burden of articulating a non-discriminatory reason for the actions taken which the complainant, in turn, may attempt to show was a pretext for discrimination. *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973), *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 25 FEP Cases 113 (1981).

A prima facie case of discrimination may be established if complainant shows that 1) he is a member of a group protected under the FEA, 2) he was subject to a cognizable adverse employment action and 3) circumstances exist giving rise to an inference that the adverse action was based on his race or color

Here, respondent is arguing that complainant has failed to state a claim because the actions she claims are discriminatory, other than **1.a.** and **1.b.**, are not cognizable adverse employment actions.

The general rules for deciding a motion to dismiss for failure to state a claim are:

> [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.
>
> . 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.

Phillips v. DHSS & DETF, 87-0128-PC-ER, 3/15/89 (quoting *Morgan v. Pa. Gen. Ins. Co.*, 87 Wis. 2d 723, 731-32, 275 N.W.2d 660 (1979) (citations omitted)); affirmed, *Phillips v. Wis. Pers. Comm.*, 167 Wis. 2d 205, 482 N.W.2d 121 (Ct. App. 1992).

The Commission discussed the concept of a viable adverse action under the FEA in *Dewane v. UW*, 99-0018-PC-ER, 12/3/99, as shown below:

> In order to prevail on a claim of discrimination or retaliation under the FEA, a complainant is required to show that he or she was subject to a cognizable adverse employment action. *Klein v. DATCP*, 95-0014-PC-ER, 5/21/97 In the context of a retaliation claim, §111.322(3), Stats., makes it an act of employment discrimination "[t]o discharge or otherwise discriminate against any individual because he or she has made a complaint, testified or assisted in any proceeding under this subchapter." In the context of a discrimination claim, §111.322(1), Stats., makes it an act of employment discrimination to "refuse to hire, employ, admit or license any individual, to bar or terminate from employment or to discriminate against any individual in promotion, compensation or in term, conditions or privileges of employment.
>
> The applicable standard, if the subject action is not one of those specified in these statutory sections, is whether the action had any concrete, tangible effect on the complainant's employment status. *Klein, supra*, at 6. In determining whether such an effect is present, it is helpful to review case law developed under Title VII, which includes language parallel to the statutory language under consideration here. 42 USC §2000e-2 .

Generally, the Seventh Circuit Court of Appeals has not required that an action be an easily quantifiable one such as a termination or reduction in pay in order to be considered adverse (*Collins v. State of Illinois*, 830 F.2d 692, 703, 44 FEP Cases 1549 (7th Cir 1987)), but has concluded that not everything that makes an employee unhappy is an actionable adverse action (*Smart v. Ball State University*, 89 F.3d 437, 71 FEP Cases 495 (7th Cir 1996)). In *Crady v. Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir 1993), the court, in requiring that an actionable employment consequence be "materially adverse," stated:

> A material adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.

See, Rabinovitz v. Pena, 89 F.3d 482 (7th Cir 1996) (plaintiff failed to establish prima facie case of retaliation under Title VII - lower performance rating and work restrictions were, at most, mere inconveniences, not adverse employment actions); *Flaherty v. Gas Research Institute*, 31 F.3d 451 (7th Cir 1994) (lateral transfer resulting in title change and employee reporting to former subordinate may have caused "bruised ego" but did not constitute adverse employment action); *Spring v. Sheboygan Area School District*, 865 F.2d 883 (7th Cir 1989) ("humiliation" claimed by school principal to result from transfer to another school did not constitute adverse employment action because "public perceptions were not a term or condition" of plaintiff's employment).

Allegations **2.a., 2.b.,** and **2.g.** relate to denial of training and reduced workload. None of these actions had a material adverse impact on complainant's eligibility to perform her assigned duties and responsibilities, on the level of such duties and responsibilities, or on any other relevant aspect of her employment. It is concluded that these actions, as alleged here, do not constitute cognizable adverse employment actions.

Allegation **2.c.** relates to complainant's loss of flex-time. This would not be considered a material adverse change in her employment. *See, Rabinovitz, supra.* Complainant argues that her inability to work flexible hours resulted in a work performance deficiency for which she was disciplined. This argument, however, could potentially be addressed within the ambit of the relevant discipline allegation.

Allegation **2.d.** relates to loss of opportunity for compensatory time or overtime. This could be considered a material loss of pay or benefits if, for example, complainant had a reasonable expectation, based on past experience or the experiences of similarly situated co-workers, that she would earn such compensatory time or overtime.

Allegations **2.e.** and **2.i.** relate to performance expectations and ratings. Generally, performance expectations, and performance ratings, even if unfavorable, do

not constitute adverse employment actions in the absence of some direct material consequence such as a material change in level of responsibility resulting from a change in performance expectations, or an automatic loss of pay resulting from an unfavorable performance evaluation. *See, Smart, supra; Bragg v. Navistar International*, 78 FEP Cases 1479, 7th Cir. 1998 (a supervisor's assessment of an employee's skills is not an adverse employment action); *Lutze v. DOT*, 97-0191-PC-ER, 7/28/99. No such direct material consequence has been alleged here.

Allegation **2.f.** relates to respondent's alleged failure to communicate with complainant. Again, complainant has failed to link this allegation with any material adverse change in her employment. If an unfavorable performance evaluation standing alone is not actionable, then obviously an allegation such as this which complainant argues resulted in an unfavorable performance evaluation, would not be a cognizable adverse employment action.

Allegation **2.h.** relates to a change in supervision. This action did not have any concrete, tangible effect on complainant's employment. *See, Flaherty, supra.*

Finally, allegation **2.j.** relates to pre-disciplinary hearing notices and proceedings. Again, the receipt of such notices and the participation in such proceedings, standing alone, do not constitute material adverse changes in complainant's employment comparable to the examples cited above, i.e., termination of employment, a demotion evidenced by a decrease in wage or salary, a material loss of benefits, or significantly diminished material responsibilities.

It should finally be noted in this regard that, even though some of these allegations are not separately actionable, evidence relating to them may be admissible as relevant to the allegations which remain at issue here.

Complainant also appears to be arguing for the first time here that some of the alleged actions constitute harassment. However, the definition of harassment, as relevant here, contemplates unwelcome conduct of a verbal of physical nature directed

at an employee due to a certain protected status. *See, Stark v. DILHR*, 90-0143-PC-ER, 9/9/94. None of the alleged actions here satisfy this definition.

CONCLUSIONS OF LAW

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

2. Complainant's charge fails to state a claim in regard to allegations **2.a., 2.b., 2.c., 2.e., 2.f., 2.g., 2.h., 2.i., and 2.j**.

3. Complainant's charge does state a claim in regard to allegations **1.a., 1.b.,** and **2.d.**

ORDER

Respondent's motion to dismiss is granted in part and denied in part as detailed above. The statement of issue for hearing is as follows:

> **1.** Whether respondent discriminated against complainant on the basis of disability in regard to the following actions:
>
> **a.** Complainant was issued a letter of reprimand on October 24, 2000.
>
> **b.** Complainant was issued a letter of reprimand in lieu of a 3-day suspension on March 5, 2001
>
> **2.** Whether respondent discriminated against complainant on the basis of disability when Mr. Langer allegedly limited complainant to working 20 hours a week since August 2000 without potential for overtime or compensatory time.

Dated: June 13, 2001

STATE PERSONNEL COMMISSION

Laurie R McCallum/jrs
LAURIE R. McCALLUM, Chairperson

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Judy M Rogers
JUDY M. ROGERS, Commissioner