

ROBERT H. PENDELL,
Complainant,

v.

**Chancellor, UNIVERSITY OF
WISCONSIN MADISON,**
Respondent.

**RULING ON
RESPONDENT'S
MOTION TO DISMISS**

Case No. 01-0114-PC-ER

Respondent filed a motion to dismiss based on mootness by cover letter dated October 19, 2001. The Commission established a briefing schedule by letter dated October 29, 2001, wherein complainant was advised that the Commission would not grant the motion if disputed material facts exist. Complainant was advised that the facts recited in respondent's brief would be taken as true unless he informed the Commission that he identified disputed facts and provided his version of events.

Complainant's brief was due by November 30, 2001. On December 6, 2001, the Commission checked the file and found that complainant had not submitted a brief. On the same date, the Commission was informed that complainant had not sent respondent a brief either. Complainant, however, has filed information in pleadings and correspondence, which is considered in this ruling.

The facts recited below are made solely to resolve this motion. They are undisputed unless specifically noted to the contrary.

FINDINGS OF FACT

1. This complaint (Case No. 01-0114-PC-ER) was filed on July 11, 2001 and, as supplemented on July 31, 2000, raised alleged violations of the Family Leave or Medical Leave Act (FMLA), as well as discrimination under the Fair Employment Act (FEA) based on a disability. He indicated in §5 of the complaint form, as supplemented, that the alleged acts

of discrimination were related to harassment and discipline. The narrative portion of the initial and supplemented complaint forms are shown below in pertinent part:

Original Complaint Form

I asked employer to be allowed to participate in AODA treatment program and was refused.

I have an artificial knee and was asked to perform tasks I cannot do – I have been constantly threatened with loss of my job. I have been told to climb ladders, which I will not do.

I just need someone to help me, sometimes.

Supplemental Complaint Form

I asked employer for Family Medical Leave without pay on a reduced work schedule – (73 hours off over a fourteen week period) for my own serious health condition and was refused.

I also have an artificial knee and (respondent) asked (me) to perform tasks that I cannot do, such as climb ladders. I have been constantly threatened with the loss of my job.

There are too many other discrimination acts to list in this space.

2. Complainant withdrew his FMLA claims (see Commission confirmation letter dated July 20, 2001).¹ On October 10, 2001, he added the allegation that he was retaliated against for engaging in FEA-protected activities.

3. Complainant was hired on March 20, 1996, as a Custodian 2 – Floor Cleaner in respondent's University Health Services (UHS). He disclosed at the time he was hired that he was a recovering alcoholic. (See p. 1, complainant's letter dated 9/10/01.)

4. On March 31, 1998, complainant was hit by a car and suffered a broken leg. He returned to work from October 19, 1998 until July 19, 1999. He had knee replacement surgery on August 3, 1999. He returned to work part time on October 18, 1999, and expected

¹ Some FMLA claims were treated as a separate case (Case No. 01-0137-PC-ER), which was dismissed on October 3, 2001.

to return to full time work on March 1, 2000. (See 5/10/00 letter to Anderson, attached to complainant's letter dated 9/10/01.)

5. Complainant was placed on paid administrative leave on or about February 25, 2000, while respondent investigated a co-worker's claim that complainant threatened to kill the co-worker. Complainant contends the accusation was false. Respondent imposed a 5-day suspension apparently believing the co-worker's version of events. Complainant's administrative leave continued during the investigation, after which the suspension was imposed, resulting in his being off work until June 2000. He was transferred to a vacant Area Cleaner position in UHS to keep his working area separate from the co-worker who made the claim. (See attachments to complainant's letter dated 9/10/01.) One duty of the new position involved climbing ladders and stepladders, a duty not performed in the prior position.

6. On October 31, 2000, respondent scheduled complainant for a pre-termination meeting on November 3, 2000, based on "Unexcused or excessive absenteeism." By letter dated November 8, 2000, complainant's physician provided medical documentation of the necessity for absences from July 4, 2000 through an anticipated return to work in December 2000. On November 15, 2000, respondent sent complainant a letter approving a leave without pay from July 4, 2000 through December 1, 2000. (See attachments to complainant's letter dated 9/10/01.)

7. On November 21, 2000, respondent scheduled complainant for a pre-disciplinary meeting on December 4, 2000, based on his appearance of intoxication at work on July 29, 2000. By letter dated December 12, 2000, respondent indicated that no disciplinary action would be taken based on additional information provided by complainant. (See attachments to complainant's letter dated 9/10/01.)

8. On June 7, 2001, respondent denied complainant's request (based on a medical recommendation) that he be granted 12 hours per week of medical leave without pay to participate in an AODA treatment program. Respondent indicated in the letter that his employment would be terminated if he were unable to work on a full-time basis and requested that complainant notify respondent of his intentions no later than June 11, 2001. Respondent's stated rationale is shown below (see attachments to complainant's letter dated 9/10/01):

You were informed on November 15, 2000, and on November 30, 2000, that we probably would not be able to approve any more leave without pay for the remainder of 2001. You have been granted hundreds of hours of leave, with and without pay, each year since 1999. Last year you exhausted leave entitlements under the contract (six months) and the FMLA (12 weeks). In fact you were ineligible for FMLA for the calendar year 2001 because you were not in work status enough hours in 2000 to qualify for FMLA.

Your current request was considered also under the ADA (Americans with Disabilities Act). Our determination is that your inability to be at work on a reliable basis means the functions of your full time position are not being performed. We have compensated the past three years by having other staff assume your responsibilities which has meant overtime pay in some instances. Long term we have been unable to meet the required standards and we are receiving an increasing number of complaints. Thus, we have concluded that your current request (for additional leave without pay) imposes an undue burden on the unit; thus, your request for leave without pay is denied.

9. Respondent scheduled complainant for a disciplinary meeting on June 26, 2001, due to his absences from work on June 4-5, 2001, due to intoxication. On July 13, 2001, he received a letter of reprimand for these unexcused absences. (See attachments to complainant's letter dated 9/10/01.)

10. Complainant filed another complaint form on October 10, 2001, which the Commission processed as a separate case (Case No. 01-0170-PC-ER).² He alleged violations of the FMLA, as well as FEA violations based on disability and retaliation for engaging in FEA-protected activities. He indicated in §5 of the form that the alleged acts of discrimination/retaliation were related to discipline, harassment, termination and other conditions of employment. The narrative portion of the complaint form is noted below (see attachments to complainant's letter dated 9/10/01³):

² This new complainant was filed after the Commission informed complainant that information he tendered regarding Case No. 01-0114-PC-ER, included allegations about events, which occurred after the complaint was filed. He was advised that if he wished to pursue the new events, he would need to file a new complaint. (See Commission letter dated October 1, 2001.)

³ The document was dated September 10, 2001, but was not received until October 10, 2001.

I have not been allowed to return to my originally hired job, which does not require ladder use. I feel I was forced to have my doctor write enclosed no restriction note to prevent from being fired on 10-27-01 although I have an artificial knee and always will have.

11. On August 3, 2001, respondent replied to complainant's formal accommodation request submitted on June 30, 2001. Complainant had indicated on the request form that his disability is "Recovering alcoholism, total right knee replacement, depression and anxiety disorder." He indicated that his disability impairs his ability to perform the following duties: climb ladders or things that may injure my knee such as lifting too much. He requested three accommodations: a) 73 hours without pay for AODA treatment, b) accommodation for lifting requirements and c) accommodation for climbing ladders. Respondent again denied the request for unpaid leave for AODA treatment (see ¶8 above). Complainant withdrew his request for a lifting accommodation. Respondent denied complainant's request to be excused from using ladders (including stepladders for the stated reason that it was an essential component of his Custodian 2-Area Cleaner position. (See attachments to complainant's letter dated 9/10/01.)

12. In its August 3rd denial (see prior paragraph), respondent informed complainant that transfer as an accommodation would be considered, stating as shown below:

Wisconsin Statutes 230.37(2) provides, in part, as follows:

"When an employee becomes physically or mentally incapable of or unfit for the efficient and effective performance of the duties of his or her position by reason of infirmities due to age, disabilities, or otherwise the appointing authority shall either transfer the employee to a position which requires less arduous duties, if necessary demoting the employee, place the employee on part-time basis and at a part time rate of pay or as a last resort, dismiss the employee from service."

Disability discrimination laws also require that transfer as an accommodation be considered when an employee cannot be accommodated in his or her current position. UW-Madison developed Transfer As An Accommodation procedures to comply with these requirements. The procedures include referral to the Classified Personnel Office (CPO) so we can work jointly with you to identify a counterpart position, a demotion and/or a part time position for which you are qualified. We will conduct a 60-day search at University Health Services (UHS)

and across the UW-Madison campus. If, after the 60-day search and all transfer options have been exhausted, a transfer has not been effected, regrettably, it will be necessary to terminate your employment with the University of Wisconsin-Madison.

13. On August 9, 2001, complainant requested a return to his prior position (which did not require climbing ladders). Apparently the co-worker who had alleged previously that complainant threatened his life (see ¶5 above) was no longer working in the unit. Respondent has never replied to this request. (See attachments to complainant's letter dated 9/10/01.)

14. On August 27, 2001, respondent wrote a letter to complainant reporting that no transfer opportunities existed at UHS and that transfer opportunities on the Madison campus would be explored next. Respondent granted a 60-day accommodation from ladder climbing in his job while the search for other jobs continued. Respondent indicated that complainant would be terminated if no transfer occurred by October 27, 2001. (See attachments to complainant's letter dated 9/10/01.)

15. On September 6, 2001, complainant gave respondent a medical excuse dated August 31, 2001, which indicated that he had no work restrictions. This is the medical excuse which complainant contends he felt forced to have his doctor write (see ¶10 above). Thereafter, respondent stopped the search for alternative jobs and returned complainant to full duty.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in this case pursuant to §230.45(1)(b), Stats.
2. Respondent has not met its burden to establish that the case is moot.

OPINION

Respondent claims that the issues raised in Case No. 01-0114-PC-ER are moot. For reasons unknown, respondent's present motion did not include the issues raised in Case No. 01-0170-PC-ER, but the allegations raised therein are pertinent here and, accordingly, were considered in resolving the pending motion.

Respondent has the burden to show that a controversy is moot. *Wongkit v. UW-Madison*, 97-0026-PC-ER, 10/21/98. An issue is moot when a determination is sought which can have no practical effect on a controversy. *Id.* Even where the initial controversy is resolved the case is not necessarily moot. The initial controversy could be resolved, for example, by the employer agreeing to hire complainant for the position sought, along with a payment for back pay and attorney fees. A complainant who continues in respondent's employment, however, may also be entitled to a cease and desist order and any other relief available under the FEA, which would have a practical legal effect on the continuing employment relationship. *Watkins v. DILHR*, 69 Wis. 2d 782, 793-796, 233 N.W.2d 360 (1975).

Respondent attempts to distinguish the present case from the principles noted in *Watkins, Id.*, as shown below in pertinent part (p. 3, motion):

[T]his case is distinguishable from *Watkins* because Complainant's work restrictions based on his disability no longer exist. Because Complainant can currently work with no restrictions, any future request for accommodation would be based on a different disability or one that Complainant might develop. An order from the Commission related to a different or currently non-existent disability would be overly speculative and better suited to an actual case or controversy should it be asserted in the future.

The Commission rejects respondent's argument. Complainant, who appears *pro se*, appears to be saying that his knee disability continues to exist but that he had his physician prepare a sham release without restrictions because he perceived that respondent had discriminated and retaliated against him in the past and, accordingly, he had no confidence that respondent's promise to search for another job was genuine. Furthermore, the release to return to work appears to pertain solely to complainant's knee injury and not to his status as a recovering alcoholic and his request for leave to undergo AODA treatment. The motion also fails to address complainant's retaliation claim.

The Commission also considered in reaching its decision that this case is pending investigation. Dismissal for mootness at this stage of the proceedings and under the other circumstances noted here would unfairly erode complainant's right to have his claims

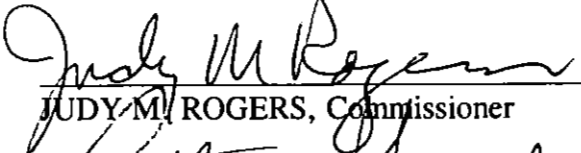
investigated. See, *Balele v. DOT*, 00-0044-PC-ER, p. 19, 10/23/01 (“The Commission does not wish to unfairly erode a complainant’s right in most cases to have his or her case investigated by the Commission.”).

ORDER

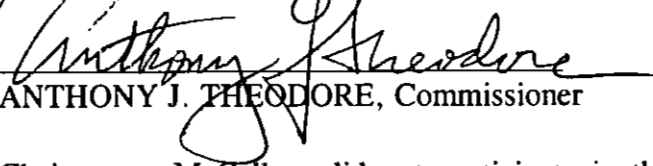
Respondent’s motion to dismiss is denied and the Commission will proceed with its investigation.

Dated: January 24, 2002.
JMR:010114Cru11

STATE PERSONNEL COMMISSION



JUDY M. ROGERS, Commissioner



ANTHONY J. THEODORE, Commissioner

Chairperson McCallum did not participate in the consideration of this case.