

STATE OF WISCONSIN

PERSONNEL COMMISSION

* * * * *

DEBRA THEILER (TOEDE),

Complainant,

v.

Secretary, DEPARTMENT OF
HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 87-0031-PC-ER

* * * * *

RULING
ON
MOTION
TO DISMISS

Complainant Debra Theiler (Toede) brought a claim of discrimination against her employer, Department of Health and Social Services, alleging that it violated the Wisconsin Fair Employment Act by discriminating against her on the basis of sex and retaliation. In an Initial Determination, the Commission concluded there was no probable cause to believe complainant was discriminated on the basis of sex and/or retaliation, but there was probable cause to believe complainant was discriminated against by DHSS on the basis of handicap -- failure to accommodate handicap.

A prehearing conference was held September 6, 1990, and the parties agreed to proceed to hearing on the issue of whether complainant was discriminated against on the basis of handicap in regards to respondent's failure to accommodate her handicap. Respondent moved to dismiss complainant's complaint for lack of jurisdiction.

For the purpose of this motion, the following facts put forth by respondent are taken as uncontested.

FACTS

1. Complainant was hired by respondent in March 1975 as a Youth Counselor 1 at Lincoln Hills School. Subsequently, she became a Youth Counselor 2 (YC 2).

2. As a YC 2, her duties included supervising work, living and leisure time activities of delinquent adolescents at Lincoln Hills School in a cottage and on the grounds.

3. In June 1983, complainant transferred to another YC 2 position. This position, entitled Youth Work Coordinator (YWC), did not involve supervising the residents, i.e., delinquent adolescents at the school.

4. In June 1986, complainant started a six-month maternity leave. A week prior to starting her leave, complainant was informed, due to staff shortages, it was contemplated returning her position to its former duties of supervising residents.

5. While complainant was on maternity leave, her YWC duties were distributed among other employes and her position was reassigned to its former YC 2 function.

6. Prior to her scheduled return from maternity leave, complainant was informed that her position had been reassigned its former YC 2 functions -
- cottage responsibilities.

7. In a letter dated January 15, 1987, complainant informed respondent she would not return to work unless she was allowed to continue in her YWC responsibilities and requested an extension of her leave.

8. Respondent refused to extend complainant's leave and ordered her back to work.

9. Complainant's physician, O. M. Francisco, M.D., informed respondent in a letter dated January 26, 1987, that he treated complainant in 1981 for a probable colitis and irritable bowel condition, which, he believes, is aggravated by stress.

10. Between January and March 1987, Dr. Francisco and respondent corresponded about complainant's medical condition within the context of her work as a YC 2.

11. Dr. Francisco believed complainant's duties were probably stressful for certain individuals and advised against complainant working in such an environment if the stress aggravated her symptoms.

12. At respondent's request for an independent medical evaluation of complainant, she was examined by Dr. William J. Peters, M.D. in October 1987. Dr. Peters concluded it would be very likely complainant would develop gastrointestinal upset and colitis if she performed regular YC 2 duties.

13. Complainant returned to work as a Clerical Assistant in December 1987.

DISCUSSION

Respondent argues that complainant's charge of discrimination under the Wisconsin Fair Employment Act, Subchapter II, Ch. 111, Stats., is barred by the exclusive remedy provision in §102.03(2), Stats., of the worker's compensation act. Section 102.03(2), Stats., provides an exclusive remedy against the employer in instances including the following:

- (a) Where the employe sustains an injury.
- (b) Where, at the time of the injury, both the employer and employe are subject to the provisions of this chapter.
- (c) 1. Where, at the time of the injury, the employe is performing service growing out of and incidental to his or her employment....
- (d) Where the injury is not intentionally self-inflicted.

(e) Where the accident or disease causing injury arises out of his employment....

More specifically, respondent argues that §102.35(3), Stats., was complainant's exclusive remedy and that her failure to have filed a claim under the worker's compensation act cannot avoid its effect. In support, respondent cites Gansch v. Nekoosa Paper Inc., 152 Wis. 2d 666, 449 N.W. 2d 307 (Ct. Apps., 1989) dissenting opinion; Schachtner v. DILHR, 144 Wis. 2d 1, 422 N.W. 2d 906 (Ct. Apps., 1990); Norris v. DILHR, 155 Wis. 2d 337, 455 N.W. 2d 665 (Ct. Apps., 1990). The Commission rejects respondent's arguments and denies the motion. The cases cited by respondent in support involved instances where an employe attempted to return to work after being absent because of a work-related injury. The exclusivity provision of the Worker's Compensation Law came into play when the employer refused to rehire, i.e., allow the employe to return to work.

The present case differs from those cited by respondent in many respects. Theiler was absent from work for reasons other than a work-related injury. She was pregnant and took maternity leave. After Theiler's maternity leave, respondent refused to return her to her former YC 2 post as youth work coordinator. Instead, respondent offered her a YC 2 cottage post. Theiler rejected respondent's offer on the medical advice that such duties might aggravate her colitis and irritable bowel. In contrast, Schachtner and Norris (supra) cited by respondent involve a employer's refusal to rehire a former employe after suffering an alleged work-related injury. Unlike Theiler, those cases involve compensating an employe for work-related injuries.

In Norris, the court said that the Worker's Compensation Act is designed to compensate persons for work-related injuries and that the Fair Employment Act is designed to eliminate the practice of unfair discrimination in

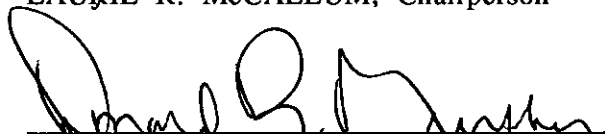
employment against properly qualified persons because of various factors generally having nothing to do with a work-related injury. This case has nothing to do with an employer's refusal to rehire a person after an on-the-job injury. Theiler did not leave her job because of an injury. This case is about an employer's refusal to accommodate a person with a particular medical problem which, under certain work conditions, has the probability of injury.

DECISION

For the reasons expressed above, respondent's motion to dismiss on jurisdictional grounds is hereby denied.

Dated: October 18, 1990 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner

DRM:rcr