

MARY JO ALDRICH,
Complainant,

v.

**Secretary, DEPARTMENT OF HEALTH
AND FAMILY SERVICES,**
Respondent.

**RULING ON
ISSUE
FOR
HEARING**

Case Nos. 01-0061-PC-ER, 02-0001-PC-ER

These matters are before the Commission on complainant's request to amend the issue for hearing.

Case No. 01-0061-PC-ER was filed with the Commission on April 23, 2001. The sole basis indicated was retaliation for having engaged in activities protected by the Fair Employment Act. The complaint covered conduct by respondent from March 19, 2001, until complainant's employment was terminated on April 13, 2001. The Commission conducted an investigation of complainant's allegations. On January 3, 2002, before that investigation was completed, complainant filed another complaint, Case No. 02-0001-PC-ER. That complaint alleged respondent had discriminated against complainant based on disability. Complainant described the alleged discrimination as follows:

On April 13, 01 I was terminated from my position as a Program Assist 1 (clerical support) person due to my daughter's disability of depression.

Between March 13, 2001 and March 19, 2001 I was taking care of my daughter Becky because of her severe reaction to her depression medication. My daughter was diagnosed with depression on Feb 27, 01. She was put on a medication to help her with her depression. My daughter's health condition is what prevented me from coming to work because of her illness.

In a letter dated February 5, 2002, complainant waived the investigation of Case No. 02-0001-PC-ER and requested a hearing on the merits, as provided in §230.45(1m), Stats. Case No. 01-0061-PC-ER and Case No. 02-0001-PC-ER were subsequently

consolidated for hearing and the parties agreed that a hearing would not be scheduled until after an initial determination had been issued in Case No. 01-0061-PC-ER. (Conference Report issued March 21, 2002)

A member of the Commission's equal rights staff issued an initial determination in Case No. 01-0061-PC-ER on August 27, 2002. The investigator reached the following conclusions:

There is No Probable Cause to believe that respondent retaliated against or engaged in retaliatory harassment against complainant in violation of the Fair Employment Act regarding the following:

- 1) on March 19, 2001, telling complainant that discipline or termination could occur if she took LWOP to go to a job interview at DNR;
- 2) on April 13, 2001, terminating complainant's probationary employment;
- 3) on April 13, 2001, harassing complainant during the computer "shut-down."

Complainant filed an appeal of the initial determination and Commissioner Thompson convened a consolidated prehearing conference on October 29, 2002. Commissioner Thompson issued a conference report on the same date that included the following information under the heading of "Issue":

The parties agreed to the following statement of issues, proposed by [counsel for respondent], for hearing:

1. Whether respondent retaliated against complainant in violation of the FEA when on March 19, 2001, complainant was allegedly told that discipline or termination could occur if she took LWOP to go to a job interview at DNR.
2. Whether respondent retaliated against complainant in violation of the FEA when on April 13, 2001, respondent's terminated complainant's probationary employment.
3. Whether respondent retaliated and/or engaged in retaliatory harassment against complainant in violation of the FEA on April 13, 2001, when complainant was allegedly harassed during her computer "shut-down."

The following issue for hearing was agreed to by the parties for the second case, Case No. 02-0001-PC-ER:

4. Whether respondent discriminated against complainant based on her daughter's disability when respondent terminated complainant's probationary employment on April 13, 2001.

Respondent stated that he may be filing a motion to dismiss on the proposed issue in Case No. 02-0001-PC-ER.

However, on the same date, Commissioner Thompson issued a letter to the parties that stated, in part:

I have enclosed the conference report which includes the information we discussed during our pre-hearing conference. After reviewing the conference report, I believe there may be a need for some clarification of the issues that have been agreed to by the parties for the scheduled hearing in the above-named matters. I am suggesting we schedule a status conference, via telephone, at 10:00am on February 10, 2003, to provide an opportunity to discuss such issues as well as [other] matters that may need to be addressed prior to the hearing. The status conference should not be taken in any way as interfering with respondent's option of filing a motion on the issue agreed to in Case No. 02-0001-PC-ER.

Commissioner Thompson resigned from the Commission in January of 2003, so another member of the Commission's staff convened the conference that was initially scheduled for February 10th. The conference was actually held on February 13th.

During the discussion at the conference regarding former Commissioner Thompson's letter, it became apparent that complainant also sought to allege that the decision not to allow her to take leave to attend a job interview at DNR was based, at least in part, on the disability suffered by complainant's daughter. Complainant proposed that the first issue be modified to include a disability discrimination claim:

1. Whether respondent retaliated against complainant in violation of the FEA *or discriminated against complainant's based on her daughter's disability* when on March 19, 2001, complainant was allegedly told that discipline or termination could occur if she took LWOP to go to a job interview at DNR.

Respondent objected to complainant's request based on its timing. The parties agreed to a short briefing schedule so that the dispute could be resolved prior to the hearing, which they agreed to reschedule from March 6, 2003, to March 3, 2003.

The question raised by complainant's request is whether the scope of the hearing should be expanded to include a claim of disability discrimination relating to the complainant's request for leave to attend a job interview on March 19th.

In deciding this question, the Personnel Commission is entitled to exercise its discretion.¹

Despite the timing of complainant's request, the Commission will grant the request and modify the previously agreed upon statement of issue. The Commission bases its decision on the interrelationship of Case Nos. 01-0061-PC-ER and 02-0001-PC-ER, as well as the fact that complainant appears *pro se* in this matter.

Complainant's allegation that respondent discriminated against her due to her daughter's disability was already an issue for hearing in Case No. 02-0001-PC-ER in the context of the respondent's action of terminating the complainant's employment. Complainant had waived the Commission's investigation in that matter and the 300 day² actionable period relating to that complaint covers the March 19th date referenced in complainant's request. In addition, respondent's conduct on March 19th that complainant contends violated the Fair Employment Act is already an issue for hearing in Case No. 01-0061-PC-ER in the context of the complainant's claim of FEA retaliation. Therefore, respondent already had to prepare a defense to both the conduct and the theory that complainant seeks to add to the statement of issue. The Commission does not perceive that granting complainant's request would cause significant prejudice to respondent even with the very brief time until the commencement of the hearing.

It is also noteworthy that complainant has, at all times in these proceedings, represented herself.

The Commission's conclusion is consistent with the decision in *Hiegel v. LIRC*, 121 Wis. 2d 205, 359 N.W.2d 405 (Ct. App. 1984). There, the complainant had filed a

¹ In *Verhaagh v. LIRC*, 204 Wis. 2d 154, 554 N.W.2d 678 (Ct. App. 1996), the court held that in determining whether to grant a motion for a default order, an administrative agency was entitled to "exercise its discretion based upon its interpretation of its own rules of procedure, the period of time elapsing before the answer was filed, the extent to which the applicant has been prejudiced by the employer's tardiness and the reasons, if any, advanced for the tardiness" rather than to apply a standard of surprise, mistake or excusable neglect. 204 Wis. 2d 154, 161

² The time period for filing a complaint under the Fair Employment Act is 300 days. §111.39(1), Stats.

sex discrimination completed relating to her rate of compensation in a group of positions (location attendants) filled predominantly by females in comparison to a group of positions (route service persons) performing essentially the same duties and filled predominantly by males. At the hearing, complainant, represented by counsel, sought to introduce evidence relating to the employer's hiring practices in an effort to show that the employer systematically hired females to the location attendant positions and males to the route service positions. The employer objected to the evidence on the ground that the complaint had failed to allege discriminatory hiring practices and the hearing examiner sustained the objection. The reviewing court held that the "exclusion of evidence regarding sex discrimination in hiring deprived Hiegel of her right to due process" and remanded the case for a supplemental hearing on the hiring claim. *Hiegel*, 121 Wis. 2d 205, 213.

While it certainly would have been preferable if complainant had earlier articulated a disability discrimination claim arising from the events of March 19, 2001, the Commission will allow complainant to amend the issue for hearing at this late date.

ORDER

Complainant's request to amend the issue for hearing is granted. In light of that ruling and in light of various changes agreed to by the parties during the conference held on February 13, 2003, the issues for hearing in these matters are as follows:

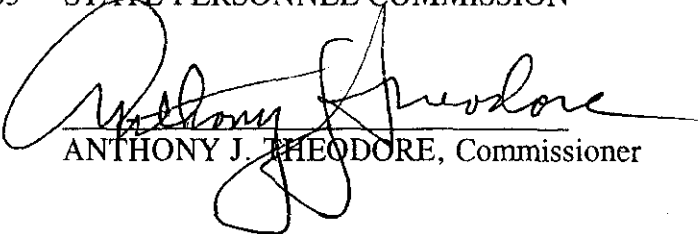
Case No. 01-0061-PC-ER

1. Whether respondent retaliated against complainant in violation of the FEA or discriminated against complainant's based on her daughter's disability when on March 19, 2001, complainant was allegedly told that discipline or termination could occur if she took LWOP to go to a job interview at DNR. .
2. Whether respondent retaliated against complainant in violation of the FEA when on April 13, 2001, respondent's terminated complainant's probationary employment.
3. Whether respondent retaliated against complainant in violation of the FEA on April 13, 2001, when complainant was allegedly harassed by Vicki Davis placing her hand on complainant's hand during the computer "shutdown."

Case No. 02-0001-PC-ER

4. Whether respondent discriminated against complainant based on her daughter's disability when respondent terminated complainant's probationary employment on April 13, 2001.

Dated: February 19, 2003 STATE PERSONNEL COMMISSION


ANTHONY J. THEODORE, Commissioner

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Commissioner Theodore is the sole sitting commissioner; the other two commissioner positions are vacant. Therefore, Commissioner Theodore is exercising the authority of the Commission. *See* 68 Op. Atty. Gen. 323 (1979).