STATE OF WISCONSIN PERSONNEL COMMISSION

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JOHN L. FULLER,
Complainant,
v.
UNIVERSITY OF WISCONSIN,
Respondent.
Case No. 78-PC-ER-55
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DECISION AND ORDER

NATURE OF THE CASE

This is a complaint under the Wisconsin Fair Employment Act alleging discrimination on the basis of handicap with respect to the termination of complainant. The equal rights officer issued an Initial Determination finding probable cause to believe discrimination occurred. A hearing on the merits was conducted by a hearing examiner appointed by the Commission.

FINDINGS OF FACT

1. Complainant, John Fuller, was employed by respondent University of Wisconsin-Madison, as a Building Maintenance Helper 2 (BMH 2) with probationary status from October 23, 1977 until his termination effective April 19, 1978.

2. On January 18, 1978, complainant fell and was injured in the course of his employment and suffered pain in his right elbow, shoulder and lower back.

3. Complainant stayed at home on January 20, 1978, and suffered pain in his neck and lower back.

4. On the next scheduled work shift on January 23, 1978, complainant worked approximately half of his eight hour shift and went home early because he was suffering pain in his neck and back.

5. Complainant returned to work for his scheduled shift on January 24, 1978, but again went home early due to pain.

6. On January 27, 1978, complainant was examined by Dr. Botham of the Dean Clinic in Madison. Dr. Botham recommended that complainant take one week off from work and then try to go back to work (Resp. Ex. 4). If the pain persisted, the doctor suggested complainant not continue to work until the pain lessened.

7. On January 26, 1978, complainant met with Robert L. Bender, Housekeeping Services Supervisor 3 in the University of Wisconsin Physical Plant Division (Complainant's third-line supervisor), at Mr. Bender's request. Mr. Bender inquired about the accident, about complainant's injuries, about the expected length of complainant's absence from work and asked complainant to submit a medical report describing the extent of his injuries.

8. Mr. Bender received a letter from Dr. Botham dated January 27, 1978, recommending that complainant take a week off from work (Resp. Ex. 4). Mr. Bender received no other medical report concerning complainant's condition between the time he received Dr. Botham's letter and the time of complainant's termination.

9. Complainant used his accumulated sick leave from prior employment with the respondent when he took time off from work from January 29,

1978, until February 6, 1978.

10. Complainant returned to work on February 6, 1978, but worked only half of his shift. He worked only half of his shift on February 7, 1978, because of pain in his back and neck.

11. Complainant did not report to work again, and used his previously accumulated sick leave for ten additional weeks, from February 8, 1978 until April 19, 1978. (Resp. Ex. 9).

12. After February 6, 1978, and during the period of time complainant was on sick leave, Mr. Bender called him at home at least once to inquire about his general condition and ability to work and to request complainant to submit a medical report clarifying these questions.

13. Complainant telephoned in to work from time to time to leave messages about his absence on a tape recorder unit, as required by his employer.

14. At the time of complainant's injury and during the period of time of his absence from work up to his termination, respondent through complainant's supervisors, had an unwritten policy of considering possible accommodation to employe needs based on recommendations from employes' physicians.

15. Complainant was requested verbally and in writing (Resp. Ex. 5) to provide the employer with medical evidence concerning the nature and duration of his disability, but the only medical report or document submitted by complainant was the January 27, 1978, letter from Dr. Botham.

16. Complainant wrote two letters to Mr. Bender in response to Mr. Bender's inquiries about his medical condition. In both of the letters complainant stated that his doctors had told him his injuries were permanent in nature, and suggested that Mr. Bender contact the doctors to obtain medical reports. (Resp. Ex. 6, 7). In the letter of April 10, 1978, (Resp. Ex. 7), complainant stated he was presently "unable to perform the tasks involved in the Janitor's job, and since the neck injury is getting more severe, despite treatment, it is doubtful I will be able to do this (sic) tasks in the future, since the medical report indicates the damage is permanent."

17. Complainant's supervisors did not ask him to fill out a medical release form authorizing them to obtain information from complainant's physician, nor did they attempt to find alternative work for him or to modify his existing position so that he would be able to continue to work.

18. Complainant's supervisors accepted his representation of permanent injury and inability to perform the tasks of his position as an accurate statement of his beliefs about his own condition and the decision to terminate him was based primarily on those statements.

19. Complainant was not restricted in the movement of his neck or back, but could not engage in certain types of movements because of the pain caused by such actions. The painful condition of his neck and back was a disadvantage which made achievement unusually difficult, particularly

in limiting complainant's ability to work, and therefore constituted a handicap.

20. Complainant was unable at all relevant times to perform the duties of his position as a BMH 2 and the inability to perform was due to his handicap.

21. Respondent could not reasonably accommodate to this situation.

22. The termination of complainant was based on his admitted inability to perform the duties and tasks of his position.

CONCLUSIONS OF LAW

1. This case is properly before the Commission pursuant to §111.33 (2) and §230.45(1)(b), Wis. Stats. (1977).

2. The complainant was handicapped as the term handicap is defined for purposes of the Wisconsin Fair Employment Act, §111.31 through §111.37 Wis. Stats. (1977). Chicago, M., St. P. & P. RR. Co. v. DILHR, 62 Wis. 2d 392 (1974).

3. Complainant's handicap was reasonably related to his ability to adequately undertake the job-related responsibilities of his employment and the employer's action in terminating him did not constitute discrimination because of handicap under §111.32(5)(f) 1, Wis. Stats. (1977).

4. Complainant failed to sustain his burden of proving by the greater weight of credible evidence that he was discriminated against because of his handicap.

OPINION

There are two issues before the Commission for decision. The issue on the merits is whether complainant was discriminated against by respondent because of handicap, in violation of §111.32(f)(1), Wis. Stats.[1] Included in this broad statement of issue are questions concerning the existence of a handicap and concerning the obligation of an employer to reasonably accommodate a handicapped employe to permit him or her to perform job-related duties. The second issue is the admissibility of certain evidence offered by complainant in rebuttal of evidence introduced by respondent. Included in this issue are questions concerning both the nature of the evidence offered in rebuttal and the nature of the evidence introduced by respondent.

Under the Wisconsin Fair Employment Act the intitial burden of proof is on complainant in the first instance to show a prima facie case of discrimination. The employer is then required to provide a non-discriminatory reason for the actions taken, which the complainant may in turn attempt to show was in fact a pretext for discrimination. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 936 Ct. 1817, 361 Ed. 2d 668 (1973). The formulation of the elements of a prima facie case,

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[1]Section 111.32(f) 1 , states:

(f) It is discrimination because of handicap:

(1) For an employer, labor organization, licensing agency or other person to refuse to hire, employe, admit or license, or to bar or to terminate from employment, membership or licensure any individual, or to discriminate against any individual in promotion, compensation or in terms, conditions or privileges of employment unless such handicap is reasonably related to the individual's ability adequately to undertake the job-related responsibilities of that individual's employment, membership or licensure.

stated in McDonnell Douglas, does not entirely meet the factual circumstances or legal requirements of an initial showing of handicap discrimination. As set out by the Supreme Court, the elements of a prima facie case are a showing that complainant 1) is a member of a protected group; 2) is qualified for the position; 3) was rejected despite his qualifications; and 4) the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. 411 U.S. at 802. These model elements are based on a Title VII case[2] involving a failure to hire because of race discrimination. They do not take into consideration the legal complexities involved in any definition of a handicapped person, or in the delineation of the scope of an employer's responsibility to such a person. In the context of handicap discrimination, the particular questions to be resolved are whether all handicapped persons are protected under the Wisconsin statute and to what extent does an employer have to accommodate to the handicaps of protected individuals.

The protected class consists of qualified handicapped persons. The concept of a qualified handicapped person represents a balancing of employe and employer interests. A person who is handicapped but can nevertheless perform required job duties if the employer provides a certain amount of reasonable accommodation of the handicap, is a qualified handicapped person.

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[2]Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. (1964) does not prohibit discrimination based on handicap, but does prohibit discrimination in employment practices because of race, color, religion, sex or national origin.

Wisconsin recognizes the concept of reasonable accommodation in the administration of the Fair Employment Act with respect to handicap discrimination. Teggatz v. Labor and Industry Review Commission, Case No. 159-497, Dane Co. Cir. Ct. (1978). The term qualified handicapped person is not specifically used in the Wisconsin statutes and case law, but comes from federal law and regulations.[3] The language of the Wisconsin statute nevertheless indicates recognition of the difference between a handicapped person and a qualified handicapped person when it states that certain actions are discriminatory ... "unless such [person's] handicap is reasonably related to the individual's ability adequately to undertake the job-related responsibilities of that individual's employment ..." §111.32(f)(a), Wis. Stats. The statute

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[3]Department of Education, Regulations on Nondiscrimination on the basis of handicap, 34 C.F.R. §104.3(k)(1) (1980):

> (k) "Qualified handicapped person" means:
> (1) With respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question;

E.E.O.C. Regulations, Prohibition Against Discrimination because of a Physical or Mental Handicap, 29 C.F.R. §1613.702(f)(1979):

> (f) "Qualified handicapped person" means with respect to employment, a handicapped person who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others and who, depending upon the type of appointing authority being used: (1) Meets the experience and/or education requirements (which may include passing a written test) of the position in question, or (2) meets the criteria for appointment under one of the special appointing authorities for handicapped persons.

Department of Health and Human Services, Handicap Rules for Federally-Assisted Programs, 45 C.F.R. §85.32 (1978):

> §85.32 Qualified handicapped person.
> "Qualified handicapped person" means (a) with respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question and (b) with respect to services, a handicapped person who meets the essential eligibility requirements for the receipt of such services.

therefore seems to contemplate a situation where an employe's handicap entirely prevents him or her from doing a job, and permits an employer to make personnel decisions based on the individual's ability to perform. Whether the employer's action is discriminatory and prohibited or is non-discriminatory and permitted depends on the facts presented on a case by case basis.

The term handicap as used in the Fair Employment Act, means a physical or mental "disadvantage that makes achievement unusually difficult."[4] The complainant was handicapped at and prior to the time of his termination by the pain in his back and neck which prevented him from comfortably doing the tasks of his position. (Findings 10, 11, 16, 18, 19, 20). Based on the record of this case, the Commission cannot determine that complainant was in any sense a qualified handicapped person. He declared himself unable to perform the duties required, and declared this in a manner which reasonably led his supervisors to believe that he was totally unable to perform. He did not provide requested medical information on his condition. He did not anticipate being able to return to work at any specific time in the forseeable future.[5] Even under the liberal construction of the Fair Employment

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[4] Chicago, M., St.P. & P. RR. Co. v. DILHR, 62 Wis. 2d 392, 398 (1974).

[5] For another case similar to the instant case, involving an employe incapacitated from performance, absent on extended sick leave and unable to return to work, where the court found no discrimination in the termination, see: J.C. Penny Co. v. DILHR, 12 FEP cases 1111 (Dane Co. Cir. Ct., 1976).

Act mandated by the legislature,[6] the Commission cannot find that the respondent discriminated against the complainant on the basis of his handicap, because the complainant failed to carry his burden of showing that he was a qualified handicapped individual who could have performed his job if his employer provided him with a reasonable degree of accommodation.

In view of the above discussion, the question of the admissibility of complainant's offered rebuttal evidence is resolved in favor of respondent. It is not admitted. The offered evidence consisted of a document allegedly used in a Worker's Compensation proceeding as the basis of a settlement on the degree of complainant's disability. Leaving aside consideration of the general problems with admitting such a document into evidence before this Commission, the document is clearly not rebuttal matter in the context of the hearing in this case. Complainant's termination was based on his prolonged absence from work and his own admission of his total and permanent inability to perform. At no point during the relevant time period, during his employment and up to the time of his termination, did complainant state to his supervisors or offer any medical report to support the existence of only a partial disability, on which his employer could base some expectation of his return to work and the need for some reasonable accommodation to enable complainant to perform. Complainant's offered rebuttal evidence is a

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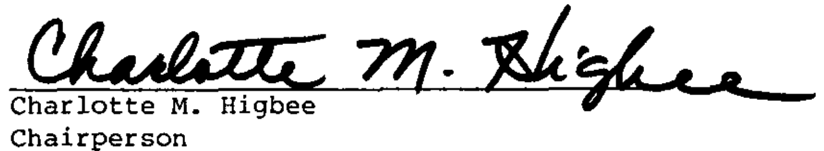
[6] Section 111.31(3), Wis. Stats.

rebuttal of his own statements made contemporaneously with his employment and termination, and not a rebuttal of any of respondent's evidence. The evidence did not even exist at the time the termination decision was made, and there was no showing at the hearing that the respondent was aware of similar information from any other source.

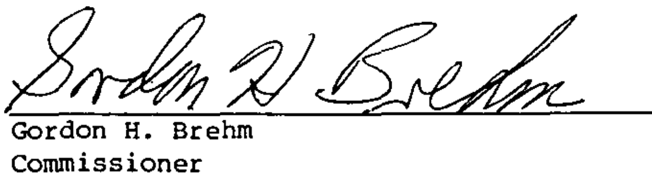
ORDER

The complainant having failed to carry the burden of persuasion to establish an initial showing of discrimination on the basis of handicap with respect to his termination, the complaint is dismissed.

Dated: March 13, 1980. STATE PERSONNEL COMMISSION



Charlotte M. Higbee
Chairperson



Gordon H. Brehm
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