

C-181

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GERALD GREEN, *

Complainant, *

v. *

Chancellor, UNIVERSITY OF *

WISCONSIN-MADISON, *

Respondent. *

Case No. 79-PC-ER-129 *

* * * * *

DECISION
AND
ORDER

NATURE OF THE CASE

This is a complaint of handicap discrimination filed under the State Fair Employment Act, §111.31 - 111.37, Wis. Stats. A hearing was conducted by a hearing examiner appointed by the Commission. The hearing was on the merits of an investigator's determination of probable cause to believe discrimination had occurred.

FINDINGS OF FACT

1. Complainant Gerald Green was employed by the Center for Health Science, University of Wisconsin Hospitals, as a Building Maintenance Helper 2 from November 6, 1978 until August 22, 1979.
2. During his employment, complainant suffered from, and still suffers from a personality disorder and associated depression; he is mentally ill, and has exhibited symptoms including withdrawal from contact with others, irritability, problems differentiating internal and external realities and has experienced suicidal urges. These manifestations of complainant's mental illness were a handicap in his employment.
3. Complainant was a school teacher before the onset of symptoms of his mental illness; he was employed as a Building Maintenance Helper as an interim situation until he was able to resume his professional work.

4. The respondent's stated reason for termination of Mr. Green is his abandonment of his job, based on Mr. Green's failure to contact his employer for a period of approximately three weeks after he left work on July 16, 1979.

5. On July 16, 1979, complainant left his job and checked himself into University of Wisconsin Hospitals because he was feeling suicidal. He was unable to initiate communication with the outside world until mid-August, 1979.

6. The employer knew or should have known on or about April 30, 1979, that Mr. Green was under the care of a psychiatrist. (TR. 96-97) (C. Ex. 4)

7. The employer knew or should have known on or about June 29, 1979 that Mr. Green was under the care of a psychiatrist. (C. Ex. 5)

8. On various occasions prior to July 16, 1979, complainant spoke with three supervisors about his family and emotional problems (TR 88-90).

9. Prior to July 16, 1979, complainant told Edgar Caire, Custodial Supervisor 1 that he had family and emotional problems, and on at least one occasion, Mr. Caire rode in a car with complainant when complainant was taken "home" to Madison General Hospital after work when Mr. Green was a patient at the hospital and going to work from there.

10. Mr. Green did not communicate his situation to his supervisors and to the management of the Department of Environmental Services in any great detail, but respondent did receive notice that Mr. Green had emotional problems.

11. Although Mr. Green had extensive absences from work for most of his term of employment (R. Ex. 1), he was only given one warning concerning his attendance, and this warning was before the major portion of his absences from work.

12. During the term of Mr. Green's employment, no individual in a supervisory or management position made efforts to discuss his problems with him or to offer any assistance to him by means of referral to the Employee Assistance Program (EAP) (C. Ex. 2)

13. The EAP is a confidential referral service provided by UW Hospitals which is available to employes with alcohol, drug or personal problems which affect job performance; the employe may refer himself or be referred by a supervisor.

14. The employer has no absolute obligation to refer any employe to EAP and does not normally refer to EAP any employe who is already receiving assistance from outside since the primary purpose of EAP is to provide referrals for employes in need of assistance.

15. When complainant left work on July 16, 1979, he could not find a supervisor to inform, so he requested Joe Mason, a union steward, to notify supervisory staff that he was going to the hospital because he "didn't feel right."

16. Joe Mason relayed the information to an employe who recorded it; no supervisor was informed directly by Mr. Green or Mr. Mason of Mr. Green's departure.

17. Mr. Rob Winters, Director of the Environmental Services Department sent a registered letter to complainant on August 2, 1979 as follows:

On July 16, 1979, you reported to work at your normal starting time. You left work without reporting to your supervisor or any other management person your reasons for leaving. This is a violation of the University of Wisconsin System Classified Employee Work Rules, Section II, A.

Through checking with several members of the house-keeping staff, we found out that you notified a fellow worker, who in turn notified our storeroom person that you "did not feel well and you were going home."

On February 19, 1979, you received a letter of warning for excessive use of sick time. You were notified at this time repeated violations could result in your termination.

We have made several attempts to contact you at your home, with no success. The Environmental Services Department has also had no contact from you as of this date. The abandonment of your job and failure to contact us is a violation of the University of Wisconsin System Classified Employees Work Rules, Section II, B.

If we have not heard from you by Monday, August 6, 1979, by 9:00 A.M., we will have no recourse but to terminate you effective your last day of work, July 16, 1979.

This action is appealable through the provisions contained in the WSEU contract.

The letter was signed by Rob Winters and Earl Kielley. (C. Ex. 3)

18. Although the letter of August 2, 1979 states that leaving work without notifying any management personnel was a violation of Work Rules, both Mr. Winters and Mr. Earl Kielley, Manager of Employee Relations for the Center for Health Sciences, testified that this was not a factor in the termination decision.

19. The August 2, 1979 letter also states that Mr. Green was warned on February 19, 1979, that continued excessive use of sick time could result in termination; Mr. Winters and Mr. Kielley testified that absenteeism was not a reason for termination.

20. Complainant's mother, Joy Green, contacted respondent before August 6, 1979 and informed Ms. Sherry Severson, who answered the phone as part of her duties, that complainant was in the hospital and that she did not know when he would be back to work.

21. On or about August 4 or 5, 1979, complainant telephoned Charles Elvord, co-director and day-to-day administrator of the Employee Assistance Program and told Elvord, among other things, that he did not want his job back.

22. Mr. Elvord spoke with Earl Kielley and with Rob Winters after August 6, 1979 about complainant. Mr. Kielley had not been informed of complainant's hospitalization until he learned of it from Mr. Elvord. Mr. Winters told Mr. Elvord that he did not want the complainant to return to work at the Environmental Services department; Mr. Elvord told Mr. Winters that complainant did not want his job back.

23. Despite the August 6, 1979, deadline given to complainant by which to contact his employer, the termination decision was still being discussed with Mr. Elvord on August 10, 1979.

24. The process of terminating complainant was not commenced until the respondent had received a return receipt of the August 2, 1979, letter; the complainant did not receive the letter until mid-August, 1979 and the actual termination date was August 22, 1979.

25. Complainant did not ask for his job back.

26. Respondent did not discriminate against complainant on the basis of handicap in the August 2, 1979 decision to terminate him from his employment.

27. Respondent did not discriminate against complainant on the basis of his handicap when it did not reconsider the decision to terminate him.

OPINION

The complainant's case in support of a finding of handicap discrimination is built on two major arguments. First, he asserts that he should have been referred to the Employee Assistance Program while he was employed. Second, he

asserts that the respondent should have known that the failure to respond to the August 2, 1979 termination notification letter was not voluntary and that, once his mother and Mr. Elvord had contacted respondent, the termination decision, should have been rescinded. Both of these arguments are grounded on the premise that referral to Employee Assistance and rescission of the termination were reasonable accommodations which the employer was obligated to provide to Mr. Green.

Respondent argues that the complainant did not inform his supervisors of his handicap in a manner which could reasonably lead them to conclude that he was in need of the Employee Assistance Program. Respondent also asserts that the events which occurred after July 16, 1979 did not show that he wanted his job back and therefore the employer had no obligation to consider the possibility of accommodation by means of rescission of termination.

The burden of persuasion in a discrimination case is always on complainant. Texas Department of Community Affairs v. Burdine, 450 US ___, 25 FEP Cases 113 (1981). The prima facie case which the complainant must show as a prerequisite to recovery varies depending on the nature of the alleged discrimination. In this case, the complainant must show that he was handicapped, that he could perform his job but was nevertheless terminated. The employer may then come forward with evidence of a legitimate non-discriminatory reason for its actions. The complainant must show that such asserted reason is a pretext for prohibited discrimination. See Burdine. There is some question under Wisconsin law of whether an employer has a duty to reasonably accommodate a handicapped employee. American Motors Corp. v. DILHR, 101 Wis. 2d 337 (1981). The decision in this case does not depend on whether or not there is such a duty to accommodate. The language of the statute imposes a duty on the employer to determine whether the handicap is related to the employee's ability to perform.

The determinative question is therefore whether the employer properly made such a determination and whether such a determination, if made, was in fact the basis of the termination decision.

There is no dispute that complainant suffers from mental illness and is handicapped, as handicap is defined under the Fair Employment Act, §§111.31 - 111.37, Wis. Stats. Complainant's illness made achievement unusually difficult for him. Chicago, M., St. P. & P. RR. Co. v. DILHR, 62 Wis. 2d 392 (1974). He was physically able to perform the tasks called for in his job but his handicap interfered with his ability to regularly attend work, and with his attitude toward his job.

The complainant was first absent from work due to family problems and then due to recurrent hospitalizations for depression. (See R. Ex. 1). The respondent only warned him once about excessive use of sick leave. The extent of complainant's absences from work certainly should have raised questions in the mind of the employer about the causes of the absences. Nevertheless, during the term of his employment, complainant was given what appears to be a great deal of leeway with respect to his frequent absences. The one warning he received about excessive use of sick leave was prior to his first hospitalization. After the first hospitalization, respondent had notice that Mr. Green was receiving psychiatric treatment (See. C. Ex. 4). The Employee Assistance Program is a referral service (See C. Ex. 2). Respondent had no obligation to send complainant to a referral service once it had notice that he was already under private psychiatric care. Although the complainant did establish that he was handicapped within the meaning of Wisconsin law, he has failed to show, under the facts and circumstances of this case, that the employer had any obligation to him under the Employee Assistance plan. Therefore, with respect to this issue, Mr. Green failed to make a prima facie case

and respondent did not have to come forward with any evidence to meet Mr. Green's evidence. The failure to refer Mr. Green to the Employee Assistance Program was not discrimination.

* As of August 2, 1979, the respondent reasonably concluded that complainant had abandoned his job. Nevertheless, the letter of August 2nd was written to attempt to confirm that conclusion. Mr. Green's supervisors had not previously disciplined him for absences caused by his handicap. The unexplained failure to contact the employer for two weeks was cause for discharge.

The information which respondent received from both Mr. Green's mother and from Mr. Elvord could have, and apparently did lead Mr. Winters to conclude that Mr. Green was indefinitely unavailable for work and had no intention of returning to his job.

While Mr. Elvord told Mr. Winters on or about August 5, 1979 that Mr. Green did not want his job back, Mr. Kielley testified that he did not commence the final termination process until after he received the return receipt of the August 2, 1979 letter, well after August 5, 1979.

The Fair Employment Act, §111.31 - 111.37, Wis. Stats. states in relevant part that an employer may terminate a handicapped employe if:

... the handicap is reasonably related to the individual's ability adequately to undertake the job-related responsibilities of that individual's employment. §111.31(5)(f), Wis. Stats.

The burden of persuasion at a hearing is on complainant. If he makes out a prima facie case, the employer has to come forward with evidence of a legitimate, non-discriminatory reason for its actions. In this case, it is a close question whether complainant made out a prima facie case. Even giving

him the benefit of the doubt on that issue, the Commission finds that respondent presented evidence, unrebutted by Mr. Green, which showed the employer could have and did reasonably conclude that Mr. Green could not perform his job at all since there was no apparent prospect of his returning to work. The employer has an initial obligation to make the decision whether the handicap is reasonably related to the employe's ability to do the job.

There is no evidence in the record that complainant ever asked to return to his job. All of the evidence supports a contrary conclusion. Complainants treating psychiatrist testified that he felt his job as a building helper was demeaning to him. Complainant did not contradict this testimony. He did not argue that he was not competent to tell Mr. Elvord he did not want his job back, or that Mr. Kielley and Mr. Winters should not have credited Mr. Elvord's message that complainant was not interested in his job.

The respondent did give complainant an opportunity to contact his supervisors personally and explain his situation. The actual process of terminating Mr. Green from employment was not begun on respondent's records until after respondent received the return receipt of the August 2, 1979, letter, but did not receive any additional communication from complainant which modified the information received from Mr. Elvord that Mr. Green did not want his job back. The only evidence offered by Mr. Green concerning any request to come back to work, was part of an offer of proof, made at the hearing after the hearing examiner's ruling excluding evidence of settlement discussions from the record. Under the facts and circumstances of this case, the Commission holds that respondent cannot be held liable under the Fair Employment Act for failing to settle the case by rehiring complainant.

Complainant's first contact with his employer after his termination was after he filed this complaint with the Personnel Commission and during the time the equal rights investigator was attempting to settle the case. Respondent cannot be held liable under the Fair Employment Act for failing to settle the case by rehiring complainant.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction of the complainant pursuant to §230.45 and §§111.31 - 111.37, Wis. Stats.
2. The burden of persuasion is on complainant to show by a preponderance of credible evidence that respondent discriminated against him on the basis of handicap.
3. Complainant was and is handicapped, as handicap is defined under §§111.31 - 111.37, Wis. Stats.
4. The complainant failed to carry his burden of persuasion to show that respondent discriminated against him on the basis of his handicap when it did not refer complainant to the Employee Assistance Program.
5. Complainant failed to carry his burden of persuasion to show that respondent discriminated against him on the basis of handicap when respondent failed to reconsider its initial decision to terminate him and did terminate him effective August 22, 1979.

Green v. UW
Case No. 79-PC-ER-129
Page Eleven

ORDER

The decision and action of the respondent in terminating complainant from his employment is affirmed and the complaint is dismissed.

Dated: May 13, 1982 STATE PERSONNEL COMMISSION

AR:jmf

Laurie R. McCallum /ers
LAURIE R. McCALLUM, Commissioner

James W. Phillips
JAMES W. PHILLIPS, Commissioner

Parties:

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Commissioner Murphy abstained from voting in this decision due to his employment with the University of Wisconsin at the time this complaint was filed.