

* * * * *

BARRY KLEINER, *

Complainant, *

v. *

Secretary, DEPARTMENT OF *

TRANSPORTATION, *

Respondent. *

Case No. 80-PC-ER-46 *

* * * * *

ORDER

The Commission adopts and incorporates by reference as if fully set forth as its final decision and order in this matter the attached proposed decision and order, with the following addition to the opinion:

With respect to the question of whether subchapter II, chapter III, stats., provides a requirement of accommodation as to a handicapped employe, the Commission is aware of a decision of the Columbia County Circuit Court in the wake of American Motors v. DILHR holding that there is no such requirement. See Samens v. Labor and Industry Review Commission, No. 80 CV3325 (9/30/81). This decision conflicts with two earlier decisions of the Dane County Circuit Court preceding American Motors which held that there was a duty of accommodation under the Wisconsin Fair Employment Act. See Teggatz v. LIRC (1978), and Fischer v. DILHR (1979).

The Commission disagrees with the conclusion set forth in the Samens decision that the law with respect to religious discrimination is indistinguishable from the law with respect to handicap discrimination. The conceptual differences in these provisions are well set forth in a decision of the Washington Supreme Court which found a duty of accommodation under a Washington statute similar to §111.32(5)(f), Wis. Stats. See Holland v. Boeing Co., 583 P.2d 621, 622, 624 (Wash. 1978) (en banc):

RCW 49.60.180 is part of a comprehensive law by which the legislature declared it is an individual's civil right to be free from various types of discrimination. RCW 49.60.030. The express purpose of the law is the elimination of discrimination. RCW 49.60.010. And the legislature has directed liberal construction of the provisions of RCW 49.60 in order to accomplish its purpose. RCW 49.60.020.

In 1973, the legislature amended the law against discrimination, RCW 49.60, to include a prohibition against discrimination in employment because of physical, mental, or sensory handicaps. It recognized that the disabled, like many minority groups, face serious problems in seeking employment. Laws of 1973, 1st Ex.Sess., ch. 214, § 1, p.1648. Comment, RCW 49.60: A Discriminating Look, 13 Gonzaga L.Rev. 190 (1977). Legislation dealing with equality of sex or race was premised on the belief that there were no inherent differences between the general public and those persons in the suspect class. The guarantee of equal employment opportunities for the physically handicapped is far more complex.

The physically disabled employe is clearly different from the nonhandicapped employe by virtue of the disability. But the difference is a disadvantage only when the work environment fails to take into account the unique characteristics of the handicapped person. See Potluck Protections for Handicapped Discriminatees: The Need to Amend Title VII to Prohibit Discrimination on the Basis of Disability, 8 Loy.Chl.L.J. 814 (1977). Identical treatment may be a source of discrimination in the case of the handicapped, whereas different treatment may eliminate discrimination against the handicapped and open the door to employment opportunities.

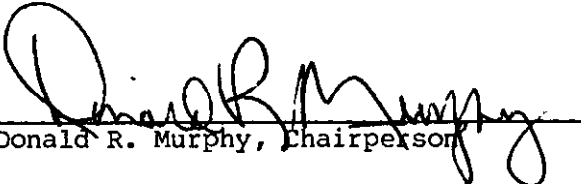
RCW 49.60 contains a strong statement of legislative policy. See RCW 49.60.010 and .030. When, in 1973, the legislature chose to make this policy applicable to discrimination against the handicapped, we believe it is clear it mandated positive steps be taken. An interpretation to the contrary would not work to eliminate discrimination. It would instead maintain the status quo wherein work environments and job functions are constructed in such a way that handicaps are often intensified because some employes are not physically identical to the "ideal employe."

In this state, handicap is defined as "a disadvantage that makes achievement unusually difficult; esp.: a physical disability that limits the capacity to work." Chicago, M.St.P. & P. RR. Co. v. ILHR Dept., 62 Wis. 2d 392, 398, 215 N.W. 2d 443 (1974). This underscores the point stressed in Holland v. Boeing Co., above, that the handicapped employe is indeed different from other employes. In the absence of some duty of reasonable accommodation, it would seem that in many cases a handicapped employe, for whom achievement was "unusually difficult" and who had a limited "capacity to work" would be considered "physically or otherwise unable to perform his duties," see §111.32(5)(c), stats. Given these inherent conflicts between the basic concept of a handicapped employe and the statutory provision that an employer is not required to retain in employment an employe who is unable to do the work required, the absence of an accommodation requirement would greatly decrease the protection afforded by the act. An employe with a limited "capacity to work" would receive no protection unless that limitation either had no relationship at all to his or her work, or limited the capacity to work so little that the employe was able to perform his or her work with little or no diminution of his or her ability to "perform his [or her] duties." Such an employe can hardly be said to be handicapped in the first place.

Kleiner v. DOT
Case No. 80-PC-ER-46
Page Four

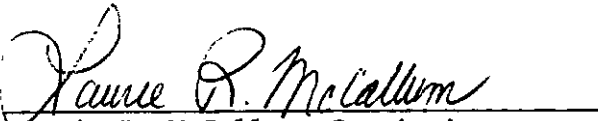
For these reasons, the Commission rejects the motion that the Wisconsin law prohibiting discrimination on the basis of handicap does not include a requirement of reasonable accommodation.

Dated: Jan 28, 1982 STATE PERSONNEL COMMISSION


Donald R. Murphy, Chairperson

Parties:

Barry Kleiner
9415 Sleepy Hollow Lane
Milwaukee, WI 53217


Laurie R. McCallum, Commissioner

Owen Ayres, Secretary
DOT
Rm. B120, 4802 Sheboygan Avenue
Madison, WI 53702

employment with the respondent.

3. The condition of complainant's back resulted in great pain and discomfort to him and he was unable to perform certain tasks included in the overall scope of duties of an Engineering Technician 4. His back condition was a handicap to his employment.

4. The complainant's most recent back surgery occurred in June, 1978.

5. On March 14, 1977, Mr. Kleiner filed a charge of discrimination against respondent at the Department of Industry, Labor and Human Relations (DILHR), alleging discrimination by respondent on the basis of his creed with respect to promotion and wages. In May, 1977, he filed a complaint alleging retaliation by respondent in response to the original complaint.

6. Prior to and after complainant's 1978 surgery, respondent requested the professional opinions of complainant's treating physicians with respect to complainant's limitations in performing engineering technician duties.

7. From approximately the fall of 1977 until March 1980, respondent assigned complainant to as much office work as possible rather than to field work in order to accommodate limitations created by his back condition.

8. After the 1978 surgery, respondent attempted to determine the extent of the physical limitations imposed on complainant as a result of the surgery and of his condition as a whole. On March 20, 1979, complainant met with several of respondent's employes to discuss the

situation. (Complainant's Exhibit 6).

9. In March, 1979, complainant wanted to return to a field position in the road maintenance section to which he had previously been assigned. Respondent did not agree with complainant's assessment of the relative difficulties in performing field duties in the maintenance section as opposed to the construction section, and did not believe that complainant was physically capable of performing all required duties in maintenance.

10. At the March 20, 1979 meeting, Mr. Kleiner was primarily interested in discussing the possibility of being promoted to a higher classification position as a means of accommodating his handicap, and in stating his dissatisfaction with the conduct of his supervisors. Representatives of respondent, particularly Mr. James Zegers, attempted with little success to elicit information from Mr. Kleiner concerning the nature and extent of his physical limitations and to convince Mr. Kleiner of the need for a current medical opinion about his handicap. Mr. Zegers attempted with little success to communicate to Mr. Kleiner the fact that a promotion was not available under the civil service laws as a means of accommodating a handicap but that a promotion could be requested through regularly available means.

11. At the March 20, 1979 meeting, Mr. Zegers stated that the purpose of the meeting was to determine what the employer could do to appropriately respond to complainant's situation to fulfill the obligation imposed by §230.37, Wis. Stats., which sets forth options for the employer to examine and act on where an employe is unable to

efficiently perform his or her duties because of physical disabilities (among other reasons).

12. On April 28, 1978, Dr. Harry B. Sadoff, an orthopedic surgeon, responded to a request for information by respondent and, after examining complainant, concluded that Mr. Kleiner should not perform any heavy manual labor, not stand or walk for long periods, and not to lift frequently and not to lift more than 25 pounds at one time. (Complainant's Exhibit 19).

13. In October, 1978, respondent requested an evaluation of complainant's limitations from one of his treating physicians, at the Veterans Administration Hospital in Wood, Wisconsin. (Complainant's Exhibit 18). The response of Dr. Maiman was that complainant should not lift more than 25 pounds at one time, not walk for more than three blocks, not stand for more than 30 minutes. (Complainant's Exhibit 17).

14. In April, 1979, Dr. Maiman informed respondent that complainant could inspect manhole covers, cross freeways, climb fences, and drive in stakes. (Complainant's Exhibit 16).

15. Respondent received sufficiently different evaluations by complainant's physicians that it was decided to arrange for another independent evaluation of complainant's limitations and sent him to the Theda Clark Regional Medical Center in November, 1979.

16. The examination process conducted by Theda Clark concluded that he could lift a maximum of 50 pounds but on a frequent basis should only lift only up to 25 pounds, that he could stand/walk 4-6 hours per day, sit for 5-8 hours per day and drive 3-5 hours per day. (Complainant's Exhibit 3).

17. In April, 1980, after complainant was involved in a car accident in December, 1979, Dr. Maiman informed respondent that complainant could not lift more than 25 pounds, walk more than three blocks, stand in one position for more than 30 minutes, he could not walk or stand for more than 3 hours, that he could sit for 4-8 hours per day, and could occasionally bend, squat or climb as necessary. (Complainant's Exhibit 5).

18. After the automobile accident, a second Theda Clark evaluation reiterated the recommendations contained in its November, 1979, report. (Complainant's Exhibit 4).

19. After receiving all of the above information, respondent concluded that the variety of tasks available in the construction section would be better adapted to complainant's physical limitations, and obtained the approval of Theda Clark for tasks to be performed by complainant in the construction section and transferred him accordingly. The time and effort expended by respondent to try in good faith to determine how best to accommodate complainant's handicap supports the position that the transfer to the construction section was not a retaliatory action. There is no relevant evidence in the record to support an inference that the transfer was probably based at least in part on retaliatory or discriminatory motives.

20. In preparation for the complainant's transfer, Mr. James Zegers, of the personnel department of respondent, showed the Theda Clark reports to Mr. Rampetstreiter, DOT district area construction supervisor. Mr. Zegers did not give Mr. Rampetstreiter specific

recommendations for individual tasks to be performed by complainant.

21. Mr. Rampetsreiter did not supervise complainant on a daily basis, but did occasionally observe him resting from his daily tasks. Mr. Rampetsreiter testified that complainant did perform pounding of stakes for periods of 8-8½ hours per day.

22. Complainant did not report any problems in his work assignments to Mr. Zegers, although Mr. Zegers had told him to do so.

23. Mr. Rampetsreiter showed the Theda Clark recommendations concerning Mr. Kleiner's physical activities to Mr. Don Hack, project engineer and complainant's first line supervisor in the construction section.

24. While Mr. Rampetsreiter did observe occasions where complainant took a break from work in order to rest because of pain, he admitted he did not attempt to verify with Mr. Hack whether Mr. Hack was conforming complainant's duties to the Theda Clark recommendations. Yet Mr. Rampetsreiter testified that complainant was not required to carry surveying instruments, but he knew that complainant did have to perform staking functions for 8-8½ hours per day and that he was aware that other employes complained about Mr. Kleiner's need to sit and rest. At one point in his testimony, Mr. Rampetsreiter stated that he did talk to both Mr. Hack and complainant about the Theda Clark report, yet he also testified that he did not discuss with Mr. Hack the times when complainant had to work overtime.

25. The testimony of Mr. Rampetsreiter is full of inconsistencies and presented a picture of a situation where Mr. Rampetsreiter did know

of complainant's limitations, had received instructions to treat Mr. Kleiner in accordance with the Theda Clark recommendations but nevertheless failed to fulfill the assignment given him by his supervisors. His testimony reveals a lack of concern and lack of willingness to carry out his supervisory responsibilities with respect to Mr. Kleiner. The tenor of his testimony strongly suggests that he did not intend to "coddle" Mr. Kleiner, that he did not take seriously Mr. Kleiner's complaints and his job-related problems and was, in fact, testing Mr. Kleiner to see how much discomfort and stress he could handle.

26. Mr. Rampetsreiter did discriminate against complainant on the basis of his handicap when he deliberately failed to carry out his designated responsibilities and demonstrated a negative discriminatory attitude toward him. The respondent is responsible for discriminatory actions of its supervisory employees.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction pursuant to §230.45 and §111.31-111.37, Wis. Stats., to hear and decide the issues in this complaint.

2. There is no probable cause to believe the respondent's transfer of complainant to the construction section in April, 1980, was in retaliation for having previously filed complaints of discrimination against respondent.

3. The complaint is handicapped as the term is defined for purposes of §111.31-111.37, Wis. Stats. (1977). Chicago, M., St. P. & P. RR. Co. v. DILHR, 62 Wis.2d 392 (1974).

4. The respondent discriminated against complainant on the basis

of his handicap with respect to the duties he was required to perform in the construction section commencing in April, 1980.

OPINION

I. Retaliatory Transfer.

The question of the transfer to construction presents only the narrow issue of whether there is probable cause to believe discrimination occurred. Probable cause exists:

"... where there is a reasonable ground for belief supported by facts or circumstances strong enough in themselves to warrant a prudent person in the belief that discrimination probably has been or is being committed." Wis. Adm. Code, CH PC, §PC 4.03(3).

In this case, the record facts clearly show that respondent went to considerable lengths to be well informed before deciding where to assign complainant. Whether the respondent reached a right or wrong conclusion is irrelevant, if it acted in good faith, with an absence of retaliatory motive. The evidence introduced by complainant on this issue did not show probable cause. Complainant's own testimony indicates that he insisted on being allowed to return to maintenance from his 1978 operation and to go back to field work in order to prove he could do the job. This is when respondent decided to look at the overall situation to determine the best course of action to take. Complainant has argued that respondent's failure to use state of the art diagnostic tools which were not yet in common use, shows a lack of good faith in respondent's attempts to understand the nature of his handicaps. Respondent need not use state of the art diagnostic tools in order to show good faith. Respondent took reasonable steps to obtain input

from complainant's own physicians and from another source to which it commonly referred the type of problem at issue here. The actions of respondent do not indicate probable cause to believe it acted with retaliatory intent.

II. Assignment of Duties in Construction Section.

Mr. Zegers, at the March 20, 1979, meeting, specifically stated that he was attempting to carry out the respondent's positive obligations under Chapter 230, Wis. Stats. No reference was made to the prohibitions against discrimination under the Fair Employment Act, §111.31-111.37, Wis. Stats. Because the complaint in this case is brought only under the Fair Employment Act, it is not the job of this commission to determine whether respondent acted correctly pursuant to the requirements of Chapter 230, Wis. Stats.

Nevertheless, without deciding that issue, it is possible to determine whether Mr. Rampetsreiter's attitude, his acts or his failures to act constituted handicap discrimination under Chapter 111.31-111.37, Wis. Stats.

Mr. Rampetsreiter had been, by his own admission, informed by his superiors, of certain policy decisions and was instructed to carry them out. He was himself in a position of authority over complainant and in a position to act in a discriminatory manner to affect the terms and conditions of Mr. Kleiner's employment. Mr. Rampetsreiter's testimony, including his demeanor as well as the inconsistencies with respect to what he knew and didn't know about Mr. Kleiner's daily activities and the problems which had arisen, strongly suggests that his failure to

carry out his instructions was based, not on confusion, or lack of understanding but on antagonism directed against Mr. Kleiner because of his handicaps. The supreme court in Hamilton v. DILHR, 94 Wis. 2d 611 (1980), while holding that complainant had failed in her proof of the existence of sex discrimination, accepted the proposition of law that, had the proof been sufficient, the employer would have been liable for actions of complainant's supervisor. In this case, the evidence leads to the conclusion that Mr. Rampetsreiter did act as he did for discriminatory reasons. Respondent is liable to complainant for a supervisor's discriminatory actions.

Respondent has argued that the recent supreme court decision in American Motors Corp. v. DILHR, 101 Wis. 2d 337 (1981), stands for the proposition that under the Fair Employment Act, there is no employer duty to accommodate an employe's religious needs or an employe's handicap. The decision actually addresses only the question of accommodation of religious requirements. The basis of decision, while the subject of extensive discussion, is nevertheless a narrow and specific line of reasoning which does not automatically apply to handicap discrimination. The language in that part of the statute which deals with handicap discrimination is different from the language concerning creed [religion]. The statute prohibits discrimination on the basis of handicaps unless the handicap is "reasonably related to the individual's ability adequately to undertake the job-related responsibilities of that individual's employment" Section 111.32(f)(1), Wis. Stats. This language is certainly more subject to interpretation than is the terse prohibition

against discrimination based on creed, in which no attempt was made by the legislature to define the term or explain the operation of the prohibition.

Without stretching too thinly the arguments in favor of a liberal construction of the statute, the duty of reasonable accommodation to an employe handicap may be retained in the interpretation and application of the statute. At this stage in the history of judicial interpretation of the statute, the commission does not believe it is necessary to reverse its position, the position of the Department of Industry, Labor and Human Relations (DILHR) and the position of the circuit court by holding there exists no duty of reasonable accommodation.

The respondent, while making a reasonable effort to accommodate complainant's handicap at several supervisory and management levels, is nevertheless responsible for the failure of Mr. Rampetsreiter to continue to carry out the effort. This liability is distinct from the liability discussed above, with respect to Mr. Rampetsreiter's discriminatory motivation in not carrying out the employer's directions specifically given for the purpose of complying with requirements of Chapter 230, Wis. Stats.

During the post-hearing briefing period, both parties requested the hearing examiner to take administrative notice of the decisions of other administrative agencies concerning Mr. Kleiner's employment. None of those decisions will be noticed for purposes of contributing to either the findings of fact or conclusions of law in this case. One decision involves a Worker's Compensation appeal which has no direct bearing on

Kleiner v. DOT
80-PC-ER-46
Page Twelve

the actions of the employer at issue here. Another decision involves a review of an Initial Determination of a DILHR equal rights officer concerning discrimination charges filed by complainant in 1977. The existence of prior complaints was included in the findings of fact solely for the purpose of setting forth one of the factual requirements for an allegation of retaliation. Any further consideration of the prior decisions would not be relevant to this case.

ORDER

Respondent is ordered to cease and desist from assigning duties to complainant which do not conform with the recommendations contained in the report which was shown to complainant's supervisor.

Dated: _____, 1981

STATE PERSONNEL COMMISSION

Donald R. Murphy
Chairperson

AR:jmg

PARTIES

Barry Kleiner
9415 North Sleepy Hollow Lane
Milwaukee, WI 53217

Owen Ayres
P.O. Box 7910
Madison, WI 53707