

4. On October 17, 1980, respondent issued a memorandum explaining the new department policy that the salaries of correctional officers who voluntarily demoted to a lower classification would be reduced. Prior to this, such salaries had not been reduced. This memorandum was posted in the GBCI time room for a period of at least one year. Complainant was in this room at least twice each day that he was on duty and read the notices posted in this room every day that he was on duty.

5. On October 28, 1981, complainant requested a voluntary demotion from his classification as an Officer 3 to that of Officer 2. Complainant did not offer at that time any reason for making the request.

6. On several occasions prior to October 28, 1982, complainant had stated to other employes at GBCI that he planned to request a voluntary demotion from Officer 3 to Officer 2 so that he would have an opportunity to work more overtime hours. Since there are more positions at GBCI classified at the Officer 2 level than the Officer 3 level, Officer 2s have more opportunity to work overtime hours than Officer 3s.

7. On October 28, 1981, and immediately prior to that date, complainant had been experiencing headaches, earaches, and breathing difficulties. Prior to October 28, 1981, complainant had set up an October 30, 1981 appointment with his physician.

8. At no time on or before October 28, 1981, had complainant discussed his continuing health problems with any of his supervisors at GBCI and at no time did complainant request that respondent make reasonable accommodation for such problems.

9. On several previous occasions, respondent, when made aware of a health or other physical problem of a GBCI employe, had made appropriate job

accommodations for such employes, including reassignments to other areas and duties.

10. On October 28, 1981, respondent granted complainant's request for voluntary demotion to be effective November 1, 1981.

11. On October 29, 1981, complainant asked that he be allowed to rescind his request for a voluntary demotion. In his letter to respondent, complainant stated the following:

I am hereby requesting that the letter I sent to you dated October 28, 1981 requesting a voluntary demotion be rescinded. At the time I requested the demotion I was not aware of the roll back in pay I would have to take.

My reason for requesting this demotion was that I am having medical problems which I feel might be related to the post I am currently assigned to. I am going to my doctor tomorrow to get his opinion.

Any consideration in this matter would be greatly appreciated.

12. When complainant visited his physician, Dr. Richardson, on October 30, 1981, he was advised that his job site had nothing to do with his health problems. This opinion was later confirmed by a Dr. Weininger. Complainant did not make this information available to respondent because he felt it was his personal business.

13. The record shows that complainant's job performance as an Officer 3, as observed by several of complainant's supervisors, was inadequate: he was slow in carrying out his duties, he was inattentive, he had on at least two occasions left his post without permission, he was unprofessional in conducting business over state-wide radio, he had on occasion become too familiar with inmates, and he had submitted false travel vouchers.

14. On November 2, 1981, respondent denied complainant's request for a rescission of his request for a voluntary demotion. The basis for

respondent's action was the inadequacy of complainant's job performance as an Officer 3. The fact that complainant was experiencing problems with his health did not influence respondent's decision.

15. A similar request for rescission of a voluntary demotion request had been granted by respondent when made by GBCI correctional officer Ronald Schroeder. Respondent granted such request because the pay reduction policy had been in effect only two months when Mr. Schroeder had made his request on December 22, 1980, and Mr. Schroeder's job performance, although not outstanding, had been adequate.

16. Respondent's action in relation to complainant's request for a voluntary demotion and subsequent attempt to rescind the request did not involve discrimination on the basis of handicap.

17. Respondent did not fail to meet the requirements for reasonable accommodation of a physical problem as set forth in §230.37(2), Wisconsin Statutes.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §§230.45(1)(b) and 111.33(2), Wisconsin Statutes.

2. The respondent is an employer within the meaning of 111.32(3), Wisconsin Statutes.

3. The complainant has the burden of proving that, with respect to the refusal to allow a rescission of a request for a voluntary demotion, the respondent discriminated against him on the basis of handicap.

4. The complainant has not satisfied his burden of proof.

OPINION

In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973), the United States Supreme Court set forth the analytical framework for evaluating an employment discrimination complaint. The complainant, by a preponderance of the evidence, must first establish a prima facie case: (1) that he is a member of a protected class; (2) that he was the subject of an adverse personnel action by the respondent/employer; and (3) by facts from which a reasonable inference can be drawn that the adverse personnel action was caused by his membership in the protected class.

In the instant case, complainant has shown that he was the subject of an adverse personnel action by respondent, i.e., respondent refused to allow complainant to rescind his request for a voluntary demotion. To satisfy the requirement that he be a member of a protected class, complainant would have to show either that he was handicapped at the time of the adverse personnel action, or that respondent perceived him to be handicapped at that time. The Wisconsin Supreme Court has defined "handicap", for purposes of the state Fair Employment Act, as "a disadvantage that makes achievement unusually difficult; esp.: a physical disability that limits the capacity to work." Chicago, Milwaukee, St. Paul and Pacific Railroad Company v. ILHR Dept., 62 Wis. 2d 392 (1974). The record in this case does not show that complainant's occasional headaches, earaches, and breathing difficulties limited his capacity to work or made achievement difficult. In addition, the record does not show that respondent perceived complainant to be handicapped. Although respondent was obviously aware that complainant had sustained a head injury since the injury occurred while complainant was on duty at GBCI, there was no showing that complainant ever advised anyone at GBCI that his health problems

were interfering with his ability to carry out his job duties or that anyone at GBCI arrived at such a conclusion independently. The only allusion by complainant to any relationship between his job assignment and his health problems occurred in his letter of October 29 in which he stated that:

My reason for requesting this demotion was that I am having medical problems which I feel might be related to the post I am currently assigned to. I am going to my doctor tomorrow to get his opinion.

Complainant alleges that this letter: (1) served as notice to respondent of complainant's handicap; (2) imposed a duty on respondent to make further inquiry as to the results of the referenced doctor's visit; and (3) required respondent to take action to accommodate complainant's handicap as specified in §230.37(2), Wisconsin Statutes. However, in view of the uncertain and hypothetical manner in which this letter was phrased, it would be unreasonable to conclude that respondent, on the basis of this letter alone, must have perceived complainant to be handicapped. In addition, the letter implies that complainant would be making available to respondent the results of his October 30 doctor's visit. It was reasonable for respondent, in view of this implication and of the hypothetical nature of the letter, to wait for complainant to make such information available. The reasonableness of respondent's decision to await further confirmation before attributing complainant's request for voluntary demotion to his health problems is further reinforced by the fact that respondent was aware that complainant was requesting the voluntary demotion at least in part to obtain the opportunity to work more overtime hours. Complainant did in fact visit his physician on October 30 and was advised by Dr. Richardson that his job site had nothing to do with the health problems he was experiencing. Complainant did not share this information with anyone at GBCI because he felt it was "his personal

business." In regard to the third allegation, the duty of accommodation under the cited statutory section arises only when "an employe becomes physically or mentally incapable of or unfit for the efficient and effective performance of the duties of his or her position by reason of infirmities due to age, disabilities, or otherwise..." It has already been established that there was no showing in the record that complainant was in fact physically incapable of or unfit for the efficient of effective performance of his duties or that complainant's October 29th letter put respondent on notice of the existence of such a physical problem. Moreover, the uncertain and hypothetical nature of the information offered in the October 29th letter would not be sufficient by itself to impose a duty of accommodation in the absence of additional information from complainant reinforcing his suspicions regarding the relationship between his job site and his health problems. It is worth noting that, on other occasions when advised of an employe's physical disability or other health problem, respondent made appropriate job accommodations for such employes, including reassignments to other areas and duties. Finally, it is incongruous for an employe who charges that his employer refused to accommodate his physical disability to refuse to share with his employer information pertinent to his disability and to actually state that such information is none of the employer's business.

If complainant had been successful in showing that he was in fact handicapped or perceived by respondent to be handicapped and that it was reasonable to infer that the adverse personnel action was due to his handicap, the burden would then have been respondent's to prove that the reasons offered by respondent for taking the adverse personnel action were not pretextual. There is ample evidence in the record that complainant's job

performance as an Officer 3 was inadequate. This evidence considered in conjunction with complainant's failure to prove the existence of or perceived existence of a handicap force the conclusion that respondent relied on complainant's inadequate job performance, not his health problems, in making the decision not to allow complainant to rescind his request for a voluntary demotion.

Complainant also alleges that the fact that another GBCI correctional officer, Ronald Schroeder, was allowed to rescind a request for a voluntary demotion, indicates that respondent discriminated against complainant when denying complainant's similar request. The record shows that the policy regarding salary reductions upon voluntary demotion had been in place only two months when Officer Schroeder made his request, that complainant made his request more than a year after this new policy had gone into effect and had been posted in the GBCI employe time room, and that Mr. Schroeder's job performance as an Officer 3 at the time of his request had been adequate while complainant's had not. The facts relating to Mr. Schroeder's request are thus distinguishable from those relating to complainant's request and discriminatory animus cannot be attributed to the fact that respondent took different action on the two requests.

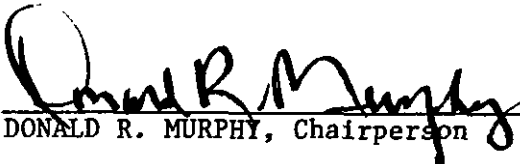
Complainant also implies that at issue here is the fact that sufficient grounds for complainant's demotion did not exist. However, the issue in this case is limited to whether or not respondent's refusal to allow the voluntary demotion request to be rescinded constituted discrimination based on handicap. Whether the demotion could have been sustained if done involuntarily or whether respondent's action was sound from a personnel management standpoint are not at issue here.

ORDER

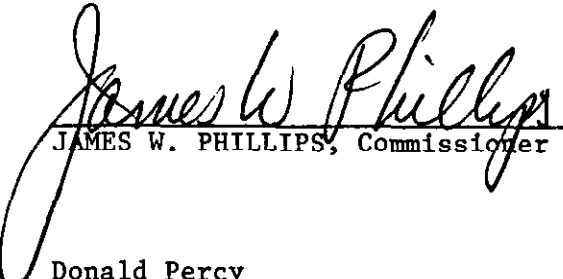
This complaint of discrimination is dismissed.

Dated: December 29, 1982

STATE PERSONNEL COMMISSION


DONALD R. MURPHY, Chairperson


LAURIE R. McCALLUM, Commissioner


JAMES W. PHILLIPS, Commissioner

LRM:ers

Parties

Maurice Rasmussen
P.O. Box W-2
DePere, WI 54115

Donald Percy
Secretary, DHSS
P.O. Box 7850
Madison, WI 53707