STATE OF WISCONSIN PERSONNEL COMMISSION

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*
GREGORY GIESE, *
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Complainant, *
* DECISION
v. * AND
* ORDER
Secretary, DEPARTMENT OF *
NATURAL RESOURCES, *
*
Respondent. *
*
Case No. 83-0100-PC-ER *
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This matter is before the Commission as an appeal from an initial determination of no probable cause. In a complaint filed on August 23, 1983, the complainant alleged that he was not re-hired by the respondent as a limited term employe due to his handicap. In an initial determination issued on May 31, 1984, an Equal Rights Officer employed by the Commission concluded that there was no probable cause to believe that discrimination had occurred. The complainant subsequently filed a timely appeal of the initial determination. The parties agreed to the following issue for hearing:

> Whether or not there is probable cause to believe the respondent, DNR, discriminated against the complainant when it did not re-employ him for a Limited Term Employment (LTE) position in April of 1983 because of his handicap (epilepsy) in violation of the Fair Employment Act, Subch. II, Ch. 111, Wis. Stats.

FINDINGS OF FACT

1. The complainant has epilepsy and occasionally he experiences seizures in which he becomes limp and loses consciousness. The seizures usually last a matter of a couple of minutes.

2. Complainant began working as a Natural Resources Assistant 1 (NRA 1) seasonal limited term employe (LTE) with respondent in either 1977 or 1978. From that time until he was not reemployed in the spring of 1983, he worked

for the respondent at its office in Spooner every year. He was one of a number of LTE employes who were employed during a given year.

3. The general responsibilities assigned to NRA 1 LTE's at Spooner include spending approximately 2 months collecting fish eggs beginning as soon as the ice melts off of lakes in the areas. During the same period, some LTE's take care of fish eggs in the hatchery. For the rest of the summer the LTE's gather forage minnows for muskie feed from local ponds and lakes or work on a walleye seining crew which harvests and stocks walleyes. LTE's may also perform stream habitat work which may entail building wing dams, clearing brush, building and maintaining fencing and assisting a dredge operator. The bulk of these LTE responsibilities involve working in or near water.

4. Essentially all of the time he was employed as an LTE, the complainant worked as part of a crew rather than by himself. The vast majority of the LTE work was also performed by crews.

5. While employed during in the summer of 1982 complainant experienced an increasing number of seizures. One co-worker observed the complainant having seven seizures during the period from May through September, 1982. Several seizures occurred when the complainant was wearing waders and standing in water. In these cases, the complainant was rescued by co-workers. Without the action of his co-workers, the complainant could have drowned. In one instance, a rescuer suffered a severe back injury as a result of the rescue.

6. At some point during the summer of 1982, complainant's second line supervisor, Mr. Sather, asked complainant whether he was taking his epilepsy medication. Complainant said that he was. Complainant's third line supervisor, Mr. Johnson, contacted complainant's physician.

7. While he was employed during 1982, complainant's supervisor prohibited the complainant from driving. Complainant, along with his co-workers, was required to wear a standard life jacket when he worked in a boat.

8. Complainant was not rehired as a seasonal LTE in March of 1983 because of his epilepsy. Respondent concluded that complainant's seizures endangered himself and his co-workers in light of the proximity of his work to water. At the time he was not rehired, the complainant was physically able to perform the duties of the position. The 8 or 9 open LTE positions were filled by other applicants.

9. Special life jackets (personal flotation devices) that keep the head of the wearer above water were available to the respondent for purchase but were not provided to the complainant. The special life jacket would have decreased the hazard to the complainant and his co-workers arising from complainant's seizures.

10. Respondent made no effort to accommodate the complainant's handicap by utilizing protective equipment such as special life jackets.

11. If he had been reasonably accommodated, the complainant's employment as an LTE seasonal worker for respondent in Spooner would not have constituted an unreasonable hazard to the complainant or to his co-workers.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.45(1)(b), Stats.

2. Respondent is an employer within the meaning of §111.32(6), Stats.

3. The complainant is handicapped within the meaning of §111.32(8), Stats.

4. The complainant has the burden of showing there is probable cause to believe that the respondent discriminated against him on the basis of handicap when it decided not to reemploy him as an LTE in April of 1983.

5. The complainant has met his burden of proof.

6. There is probable cause to believe that the respondent discriminated against the complainant when it did not reemploy him for a LTE position in April of 1983 because of his handicap.

OPINION

In order to make a finding of probable cause, there must exist facts and circumstances strong enough in themselves to warrant a prudent person in believing that discrimination probably has been, or is being committed. PC 4.03(2), Wis. Adm. Code.

In this case, Mr. Giese alleges he was discriminated against because of his handicap.

The Wisconsin Fair Employment Act provides that it is employment discrimination to refuse to hire or employ an individual on the basis of handicap, or to refuse to reasonably accommodate a prospective employe's handicap (unless the employer can show that accommodation would pose a hardship to its program). However, the statute makes certain exceptions regarding handicap discrimination. The relevant portions of the Fair Employment Act provide:

> §111.34 Handicap; exceptions and special cases.
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> (1) Employment discrimination because of handicap includes, but is not limited to:
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> * * *
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> (b) Refusing to reasonably accommodate an employe's or prospective employe's handicap unless the employer can demonstrate that the accommodation would pose a hardship on the employer's program, enterprise or business.

(2) (a) Notwithstanding §111.322, it is not employment discrimination because of handicap to refuse to hire, employ, admit or license any individual, to bar or 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 if the handicap is reasonably related to the individual's ability to adequately undertake the job-related responsibilities of that individual's employment, membership or licensure.

(b) In evaluating whether a handicapped individual can adequately undertake the job-related responsibilities of a particular job, membership or licensed activity, the present and future safety of the individual, of the individual's coworkers and, if applicable, of the general public may be considered. However, this evaluation shall be made on an individual basis and may not be made by a general rule which prohibits the employment or licensure of handicapped individuals in general or a particular class of handicapped individuals.

In order to establish that an applicant was discriminated against because of handicap, the facts must show: (1) that the complainant is handicapped within the meaning of the Fair Employment Act, §111.32(8); (2) that the employer rejected the individual because of his/her handicap; and (3) that the employer's action was not legitimate under the Fair Employment Act (FEA). See Samens v. LIRC, 117 Wis. 2d 646, 657-58 (1984), citing Boynton Cab Co. v. ILHR Dept., 96 Wis. 2d 396, 406 (1980).

In the present case, testimony established that the complainant has epilepsy. Respondent did not contest the complainant's assertion that he meets the statutory definition of "handicapped individual" set forth in §111.32(8), Stats. It is also not disputed that the epileptic seizures experienced by the complainant were the basis for the respondent's decision not to rehire him in 1983. The issue therefore becomes one of whether the respondent's decision was legitimate under the Act. In Samens, the court noted that once the complainant has demonstrated that he was rejected because of his handicap, the burden of proof shifts to the employer to justify the

rejection under the statute. The inquiry then focuses on whether the complainant was able to adequately perform the duties of the job, that is: (1) Was the applicant physically able to perform the duties, and (2) Would hiring the applicant constitute a hazard to himself or others? Id. at 664.

There is no question that the complainant was physically able to perform the duties of the position. This conclusion is based on the fact that the complainant had satisfactorily performed the duties assigned to the position during each of the previous five or six years.

Because the facts indicate that Mr. Giese was able to physically accomplish the tasks which make up the job duties, the respondent must present evidence which shows there is a reasonable probability that employing Mr. Giese in the LTE position would be a hazard to Mr. Giese's health or safety, or the health or safety of others. Chicago & N.W. Railroad v. LIRC, 91 Wis. 2d 462 (Ct. Apps. 1979), aff'd 98 Wis. 2d 592 (1980).

Testimony established that the complainant suffered at least seven seizures while working during the summer of 1982. Several of the seizures occurred while the complainant was in water and one resulted in a severe injury to the co-worker who rescued him. In each case, without the action of his co-workers, the complainant could have drowned. Based on this testimony, one must conclude that during the summer of 1982, complainant's employment posed a safety hazard to himself and to his co-workers, although not to the public. Any hazard to the public was eliminated by respondent's decision not to permit the complainant to drive a motor vehicle. In addition, the hazard to the complainant was lessened to a degree by the fact that he always worked in a crew so that potential rescuers were nearby.

Regardless of whether the complainant posed a hazard in 1982, the issue is whether there is a reasonable probability he would have posed a hazard if reemployed in 1983. It would have been preferable if the respondent had sought to reevaluate the complainant's handicap in the spring of 1983 rather than relying on information obtained over six months earlier during the course of his prior year's seasonal employment. Nevertheless, the number of seizures that occurred during 1982 and the absence of any information known to the respondent that the complainant's epilepsy had been successfully treated leads one to conclude that there was a reasonable probability that reemploying the complainant would be hazardous, assuming no reasonable accommodation was available.

The availability of reasonable accommodation is the final issue before the Commission. The question is one of whether any reasonable accommodation could have been made which would have made it possible for the complainant to perform the duties of the position safely. As noted above, it is illegal for an employer to refuse "to reasonably accommodate [a] ... prospective employe's handicap unless the employer can demonstrate that the accommodation would pose a hardship on the employer's programs." §111.34(1)(b), Stats. Because in this case the accommodation question relates to the larger question of safety, the burden of proof must rest on the respondent to show that no reasonable accommodation was feasible. As noted above, the burden is placed on the employer to show a reasonable probability that a handicapped individual would pose a safety hazard. Boynton Cab Co. v. DILHR, 96 Wis. 2d 396, 408-09; Samens v. LIRC, 117 Wis. 2d 646, 664. Although the facts of the present case are such that the accommodation question can be viewed as a

subissue within the question of whether complainant's re-employment would be hazardous, (§111.34(2)(b), Stats: "present and future safety"), case law also suggests that, as a general matter, the burden of proving inability to accommodate rests with the employer. Prewitt v. U.S.P.S., 662 F.2d 292, 27 FEP Cases 1043 (5th Cir., 1981). In Prewitt, the court interpreted 29 C.F.R. §1613.704, an EEOC administrative regulation issued under Section 501 of the Rehabilitation Act of 1973. The regulation provided that "[a]n agency shall make reasonable accommodation ... unless the agency can demonstrate that the accommodation would impose an undue hardship..." The court concluded:

> [T]he burden of proving inability to accommodate is upon the employer. The administrative reasons for so placing the burden likewise justify a similar burden of proof in a private action based upon the Rehabilitation Act. The employer has greater knowledge of the essentials of the job than does the handicapped applicant. The employer can look to its own experience, or, if that is not helpful, to that of other employers who have provided jobs to individuals with handicaps similar to those of the applicant in question. Furthermore, the employer may be able to obtain advice concerning possible accommodations from private and government sources.
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> Although the burden of persuasion in proving inability to accommodate always remains on the employer, we must add one caveat. Once the employer presents credible evidence that indicates accommodation of the plaintiff would not reasonably be possible, the plaintiff may not remain silent. Once the employer presents such evidence, the plaintiff has the burden of coming forward with evidence concerning his individual capabilities and suggestions for possible accommodations to rebut the employer's evidence. (Citations omitted) 27 FEP Cases 1043, 1054-55.

In the present case, testimony established that the respondent failed to even consider the appropriateness of safety equipment as a means of accommodating the complainant's handicap. At hearing, the complainant argued that he could wear a special life jacket that keeps the wearer's head above water whenever he was near water. The respondent acknowledged that the life

jackets were available even though they were not on hand at the Spooner headquarters. Mr. Johnson, complainant's thirdline supervisor, admitted that the life jacket would be a good safety measure in many instances but he went on to state it was possible that the life jacket would not work if the wearer also had on waders or became entangled in a seining net. These observations may be accurate but they fail to meet the "reasonable probability" standard established in Chicago & N.W. Railroad, 91 Wis. 2d 462 (Ct. Apps. 1979), aff'd 98 Wis. 2d 592 (1980). There is no indication that by wearing a special life preserver the complainant would be less safe than a non-handicapped employe performing similar duties without the benefit of the life jacket. Respondent failed to establish that providing the life jacket to the complainant would work a hardship on its program.

The evidence presented at hearing would warrant a prudent person to believe that the respondent refused to reasonably accommodate the complainant's handicap when it refused to reemploy him in 1983. Therefore, a finding of probable cause is required.

ORDER

The initial determination of "no probable cause" is reversed and the parties will be contacted for the purpose of scheduling a conciliation/ prehearing conference.

Dated: Jan. 30, 1985

STATE PERSONNEL COMMISSION

DONALD R. MURPHY, Chairperson

LAURIE R. McCALLUM, Commissioner

DENNIS P. McGILLIGAN, Commissioner

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