STATE OF WISCONSIN PERSONNEL COMMISSION

JOHN HUMPHREY.

Complainant,

v.

Chancellor, UNIVERSITY OF WISCONSIN - MADISON,

Respondent.

Case No. 84-0040-PC-ER

INTERIM DECISION AND ORDER

This matter arises from a charge of discrimination alleging that respondent discriminated against the complainant based on handicap, in reference to a decision to terminate complainant's employment. An initial determination of "no probable cause" to believe that discrimination occurred was issued on February 25, 1985. Complainant appealed and a prehearing conference was held on May 13, 1985. At that time a hearing was scheduled for July 18 and 19, 1985.

In June of 1985, respondent moved to dismiss the complaint, arguing that complainant was not a "handicapped individual," as that phrase is used in Wisconsin's Fair Employment Act. The facts set out below appear to be undisputed and are based upon documents submitted with respondent's motion.

FINDINGS OF FACT

1. As of January, 1984, the complainant was employed by the State Laboratory of Hygiene, University of Wisconsin Center for Health Services.

2. Complainant's work brought him into contact with the chemical carbon disulfide. Carbon disulfide is a potent skin irritant.

3. In January and again in February of 1985, the complainant was treated for a blistering dermatitis of the fingers. On February 13, 1984, complainant was examined by Dr. Larry Lantis, a dermatologist. Dr. Lantis also examined the complainant on February 15, February 20, March 1, March 6, March 12, April 4, April 19, May 16 and June 27, 1984.

4. On February 13, 1984, Dr. Lantis wrote the following report:

> The Jan. '84 episode involved the right index finger and that area has healed, though the ... skin has not yet had time to achieve its full thickness. The Feb. '84 episode shows involvement of the tips of the thumb and first 3 fingers of the left hand as well as a less severely involved area in the center of the (left) palm. The distribution and pattern is clear evidence of a contact reaction.
>
> Carbon disulfide is a potent primary irritant of the skin. The burn-like blisters of the finger tips are evidence of that. I would not suspect an allergic reaction in his case. Carbon disulfate is very rarely a sensitizer.
>
> Treatment is protection to prevent accidental exposure to the solvent, e.g. gloves may be worn, a test tube clamp clasp may be used.

5. After the February 15th examination of "a more extensive dermatitis" Dr. Lantis wrote:

> The eruption is dyshidrotic eczema-like and I suspect represents either an eczematid reaction due to the irritant contact dermatitis or an eczematous reaction to the occlusive effect of the gloves he wore at work to protect his hands.

6. After the February 20th examination, Dr. Lantis wrote:

> He will remain off work another ten days. After that he may be better suited to assuming an alternative job since he appears to be unable to tolerate wearing protective occlusive gloves while handling the carbon disulfide solvent.

7. After the March 6th examination, Dr. Lantis wrote:

> He encountered reirritation of the left middle finger tip on 5 March 84 after returning to work and despite wearing examination gloves for protection.

* * *

> Recommend: off work for 7 days.... Re: work. He should be given work that avoids contact with known irritants to his hands and does not require the use of protective gloves.

8. By letter dated March 6, 1984, complainant's employment with the respondent was terminated effective March 7, 1984. A copy of that letter is attached hereto and incorporated as if it were set out in full below.

9. In a letter dated April 23, 1984, and relating to complainant's worker's compensation claim, Dr. Lantis stated:

> As discussed in my last letter to you, he can work now. He should not do work that requires handling irritants, doing wet work, or wearing protective gloves. If he is to return to that type of work then he should allow three months (from the beginning of April) to elapse before attempting such work again. Even so, he may break out again but that would be sufficient healing time to reduce the likelihood of his re-erupting.

10. In January of 1985, complainant's rehabilitation counselor posed the following questions to Dr. Lantis:

1. Do you feel that Mr. Humphrey could work in a chemistry lab where he was not involved with carbon-disulfide and wore occlusive gloves for handling other potentially irritating chemicals?
2. Do you feel Mr. Humphrey could work in a chemistry lab where he might have occasional exposure to carbon-disulfide, but was able to wear occlusive gloves whenever this might occur?
3. Do you feel Mr. Humphrey could return to work in a chemistry lab without any extra precautions regarding the types of chemicals he may handle, or extra-ordinary use of occlusive gloves?

Dr. Lantis responded:

> Your recent letter (7 January 1985) asked three specific questions regarding Mr. Humphrey's potential for future re-employment. The answer to the questions is yes.
>
> Since his primary problem was an irritant reaction to a specific agent, he would naturally need to avoid contacting that agent as well as other known irritants (which is standard and appropriate procedure in a chemistry laboratory). Now that the skin has healed his likelihood of breaking out should not be any greater than normal.

OPINION

The respondent has moved to dismiss the complaint for failure to state a claim upon which relief may be granted, arguing that complainant is not a handicapped individual within the meaning of §111.32(8), Stats., and therefore cannot bring a claim under §111.34, Stats.

As provided in §111.32(8), Stats:

> (8) "Handicapped individual" means an individual who:
> (a) Has a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work;
> (b) Has a record of such an impairment; or
> (c) Is perceived as having such an impairment.

Respondent contends that complainant's "sensitivity to carbon disulfide... only prevents him from performing a certain type of laboratory job, not all laboratory jobs nor many other forms of employment." Reply brief, pg. 1. In support of this contention, complainant cites American Motors Corp. v. LIRC, 119 Wis 2d 706, 713 (1984) where the Wisconsin Supreme Court ruled:

> [A] handicap within the meaning of the Act is a physical or mental condition that imposes limitations on a person's ability to achieve and capacity to work beyond the normal limitations that might render a person unable to make certain achievements or perform every possible job. All persons, given their individual characteristics and capabilities, have inherent limitations on their general ability to achieve or perform certain jobs. All persons have some mental or physical deviations from the norm. However, such inherent limitations or deviations from the norm do not automatically constitute handicaps (emphasis added).

However, the most recent pronouncement by the Wisconsin Supreme Court on this topic is the case of Brown County v. LIRC, slip opinion filed June 28, 1985. In the Brown County case, the complainant, a Mr. John Toonen, was not hired for a position as deputy sheriff because he failed to meet the county's uncorrected vision requirement of 20/40 in the better eye and 20/100 in the poorer eye. Mr. Toonen's uncorrected vision in each eye was

20/400, although by wearing glasses or contact lenses, it was corrected to 20/20. The issue before the court was whether there was a rational basis for LIRC's conclusion that Mr. Toonen's visual acuity constituted a handicap under the Fair Employment Act, "either in actuality or as an impairment of function which was perceived by the prospective employer as a handicap." Slip opinion, pg. 9. (citations omitted).

> In the instant case, the situation that presents itself is that Toonen has an actual impairment--the 96.7 percent loss of distance vision in each eye--which the employer mistakenly perceives as limiting the capacity to work, or mistakenly believes will make achievement unusually difficult when in fact all the evidence thus far adduced indicates that, despite the impairment--which is real--the work can be performed efficiently by the use of corrective lenses.
>
> In the instant case, because the court of appeals erroneously found that Toonen was not handicapped within the meaning of the W.F.E.A., it never explored the question of whether Brown county erroneously and without proof concluded that Toonen was not qualified to perform. The only question before us is whether Toonen is a handicapped person entitled to protection of the Act. We conclude that he is handicapped and protected, because he is, without doubt, visually impaired to a serious degree. He met the test of perceived handicap restated by this court in American Motors. The impairment was actual, but the employer was, arguably at least, mistaken in its perception that he was handicapped, because with corrective lenses his capacity to work was unimpaired.
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> Under the definition of what is to be considered under the Act as a perceived handicap, as established in Dairy Equipment and American Motors, Toonen must initially be treated as a handicapped person. Here, the complainant proved that he had an actual impairment of visual acuity; and, although that impairment might well have not disqualified Toonen from work generally, the evidence is clear that Brown county perceived the impairment as one that limited Toonen's capacity to work at the specific job for which he applied. While that perception, in light of the actual impairment, is sufficient to establish that Toonen was "handicapped," it should be remembered that this step in the process of proof under the Act only permits a complainant to bring suit as a handicapped person under the W.F.E.A. and does not guarantee him a successful outcome in the sense that he is to be afforded the particular job sought. The employer still has the opportunity under the Act to prove that the standard it has set in respect to uncorrected vision is not discriminatory, because it is reasonably related to Toonen's ability to actually perform the job requirements. Thus, on remand the court of appeals must consider the county's proof that Toonen is not,

> under the terms of the Act, properly qualified to perform the duties of a traffic officer.
>
> In conclusion, then, Toonen was perceived by the prospective employer as being handicapped, because he had an impairment which the county believed would limit his ability to perform the particular job.
>
> Accordingly, under our cases, he must be considered handicapped within the meaning of the W.F.E.A. There is no doubt that the county perceived him as handicapped, because it rejected him solely for his failure to meet the uncorrected vision standards which it required for employment eligibility. The county believed, in other words, that Toonen's visual impairment limited his ability to perform on the job. Therefore, under the facts as developed to date in these proceedings, it appears that Toonen has been categorized as a handicapped person and, on the basis of that categorization, has been denied the opportunity to work at a particular employment, even though he may, in fact, be properly qualified. This is exactly the type of treatment which the Wisconsin Fair Employment Act denominates as discriminatory and prohibits. The burden, accordingly, now falls upon the county to show that Toonen cannot perform the work. Slip opinion, pp. 11-13.

In the instant case, the documents available for deciding respondent's motion indicate that at the time his employment was terminated, the complainant had been directed not to work by his physician for seven days due to complainant's existing dermatitis condition. In addition, the physician indicted the complainant should be given work that "avoids contact with known irritants to his hands and does not require the use of protective gloves." According to the March 6th termination letter, complainant was discharged "[b]ased on the information received from Dr. Lantis and because your continued contact with carbon disulfide solvent cannot be avoided."

These facts, in light of the current case law, provide a sufficient basis for denying respondent's motion to dismiss. The available record suggests that the complainant was physically impaired on the date of discharge. Even though this impairment presumably would not have disqualified the complainant from work generally, complainant's physician apparently felt it prevented complainant from performing his old job for at

least a period of seven days. The letter of discharge suggests that the respondent perceived the impairment as one that limited complainant's capacity to work at his former position. As noted by the court in the Brown County decision, there is no requirement that complainant's condition prevent him from performing most jobs, as long as the respondent perceived the impairment as barring employment in the particular job in question.

To the extent that the respondent's decision may have been premised on the conclusion that complainant was susceptible to future injury if retained in his position, this case parallels Dairy Equipment Co. v. DILHR, 95 Wis 2d 319 (1980). There, the employer had discharged an employe because he only had one kidney. The court held:

> In this case the circuit court ruled that the respondent (having only one kidney) was handicapped because he had :... a perceived sensitivity to injury in the future." We agree with the trial court's conclusion. It would be both ironic and insidious if the legislative intent in providing the protection of the Fair Employment Act were afforded to persons who actually have a handicap that makes "achievement unusually difficult" or limits their capacity to work, but the same protection is denied to those whom employers perceive as being handicapped.
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> * * *
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> A review of the record in this case discloses that the Dairy Equipment Company perceived and/or regarded the respondent's condition as a handicap and terminated his employment solely for that reason. The company stipulated that: "[t]he Complainant's work performance was satisfactory. The complainant would not have been terminated if he had two kidneys." The company discharged the respondent as they concluded that he could not work on top of the steel tanks for if he fell he might injure his remaining kidney. Thus, they perceived the respondent's physical condition as a handicap that limited his capacity to work. 95 Wis. 2d 319, 330-31.

Based on the record before it, the Commission must deny the respondent's motion. The parties should realize that the existence of handicap, perceived or otherwise, must still be established via evidence presented at hearing.

ORDER

Respondent's motion to dismiss is denied.

Dated: July 12, 1985 STATE PERSONNEL COMMISSION

DENNIS P. McGILLIGAN, Chairperson

DONALD R. MURPHY, Commissioner

LAURIE R. McCALLUM, Commissioner

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Parties:

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University of Wisconsin Center for Health Sciences

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465 HENRY MALL
MADISON, WISCONSIN
53706

March 6, 1984

John C. Humphrey
425 West Johnson Street
Madison, WI 53703

Dear John:

It is indeed unfortunate that you have encountered an extensive dermititis which your physician presumes to be caused by working with carbon disulfide solvent at our OSHA laboratory. Because of the medical reports, we have made a thorough review of your job responsibilities as well as the possibility of changing your work assignments and determined it is impossible to reassign duties to avoid continued contact with the substance.

Dr. Lantis' note of March 1 indicates you may return to work on March 5, 1984. However, his February 20 letter to Dr. Schumacher, your referring physician, states "He will remain off work another ten days. After that he may be better suited to assuming an alternative job since he appears to be unable to tolerate protective occlusive gloves while handling the carbon disulfide solvent." Because of conflicting medical determinations Dr. Lantis was again contacted on March 6, 1984. He advised that you were in to see him this morning because you encountered irritation to your left middle finger tip. He stated you should perform work that avoids contact with known irritants to your hands and does not require the use of protective gloves.

Based on the information received from Dr. Lantis and because your continued contact with carbon disulfide solvent cannot be avoided, we are releasing you from serving your probationary period effective March 7, 1984.

It is suggested that you contact the State Division of Personnel and request to have your name restored to the Laboratory Technician I certification list.

Sincerely yours,

Ronald H. Laessig, Ph.D.
Director, State Laboratory of Hygiene
Professor, Preventive Medicine and Pathology

RHL/ss

cc: Classified Personnel