

STATE OF WISCONSIN

PERSONNEL COMMISSION

* * * * *

PARRY LUEDERS, *

Complainant, *

v. *

Secretary, DEPARTMENT OF *

HEALTH AND SOCIAL SERVICES, *

Respondent. *

Case No. 84-0095-PC-ER *

* * * * *

DECISION
AND
ORDER

NATURE OF THE CASE

On August 7, 1984, complainant filed a charge of discrimination with the Personnel Commission alleging that respondent terminated his employment because of his handicap in violation of the Fair Employment Act, Subch. II, Ch. 111, Wis. Stats.

On August 15, 1984, complainant filed an amendment to correct the date of termination which appeared on his initial charge of discrimination.

On May 24, 1985, the Commission issued an Initial Determination finding of No Probable Cause to believe that respondent discriminated against complainant on the basis of his handicap in regard to his termination on January 26, 1984. Complainant filed a timely appeal from said Initial Determination. A prehearing conference was held on July 24, 1985, before Anthony J. Theodore, General Counsel, at which time the parties agreed to the following issue:

Whether there is probable cause to believe respondent discriminated against the complainant on the basis of handicap in connection with his termination of January 26, 1984.

Hearing in the matter was completed on October 21, 1985. The parties filed written arguments.¹

FINDINGS OF FACT

1. The complainant was hired by respondent's Division of Corrections (DOC) at the Fox Lake prison on May 19, 1980, as a Correctional Officer 1. He had earlier been diagnosed as an insulin dependent diabetic.

2. On September 6, 1981, the complainant was promoted to a Correctional Officer 3 (CO 3) position in the DOC's Correctional Camp System. The position was located in the security ward at the University of Wisconsin Hospital & Clinics (Hospital) in Madison, Wisconsin. At the time of his hire as a CO 3, Jim Lizak, Personnel Manager for the Correctional Camp System, was aware that complainant was a diabetic.

3. The primary responsibilities of complainant's position involved the provision of security and safety of the correctional patients as well as providing safety to Hospital personnel and the general public. The correctional patients are primarily located in the Hospital's security ward, although there were occasions when these patients would be located in other areas of the Hospital as well. The security ward is entered through a set of doors which are locked at all times. The officers on duty have a key to the entrance as does the nurse on duty at the nurse's desk located near the entrance, but outside the ward. Once inside the ward, there is a lounge off to the left where patients receive visitors and a secured room

¹ In arriving at a decision in this case the Commission did not consider respondent's letter brief dated February 27, 1986, because it was untimely.

to the right which serves as an office for the duty officers. The main entrance opens to a long corridor off from which the patients' rooms are located. Doors exist on the corridor leading to the patients' rooms which lock automatically when closed. On the second and third shifts on which complainant worked, the doors to the patients' rooms, as a general rule, were kept locked. Each CO 3 has a set of keys to each of the rooms.

4. The Hospital's security ward has several alarm systems. There is voice communication via an intercom device between the officer's desk and the nurse's desk. If a telephone is left off the hook for a few seconds, a telephone rings in the University of Wisconsin (UW) Police office. The CO 3 on the second and third shifts must routinely check in with UW Police; if they do not, the UW Police investigate. Hospital Security Officers make random checks during their rounds. Each of the inmate rooms has a wall speaker with a call button. Each speaker has a built-in sound detector which goes off automatically at any loud sound. The alarm would be triggered by the sound of a body hitting the floor or a yell. When the sound detector is triggered, call lights in the CO's office and at the nurse's desk outside the ward are turned on and must be responded to. A person at the CO 3's desk or in the hallway looking into the ward can see into the open areas of the ward. Each inmate's door is locked on second and third shifts and only a CO 3 or a nurse can open the door to the inmates' rooms.

5. The record indicates that when a person is diabetic, the goal is to achieve a normal blood sugar level. If the individual's blood sugar is below normal, reactions are likely to occur, such as blackouts. If the individual's blood sugar is above normal, reactions are less likely to occur; but a high blood sugar level can cause long-term medical problems.

Blackouts can occur even when an individual maintains a normal blood sugar level, if the individual is exposed to such factors as stress, physical exertion, illness, injury or disruption of normal sleep patterns.

6. On or about November 15, 1983, Lieutenant Kyle Davidson became the complainant's immediate supervisor at the security ward. Correctional officers worked three shifts at the security ward. The other officer working second and third shift relief with the complainant had more seniority at this time than the complainant. This correctional officer complained to Davidson that he was working too many third shifts. After reviewing pertinent records, Davidson concluded that the most senior relief officer worked primarily on third shift relief and that the complainant worked mostly on second shift relief.

7. In late November, 1983, Lieutenant Davidson talked to the complainant and the more senior correctional officer mentioned in Finding of Fact 6 above. He told them that on January 1, 1984, they would begin rotating between second and third shift relief on a monthly basis. The complainant would work third shift relief in January, 1984.

8. During the meeting with Lieutenant Davidson noted above, the complainant stated that he would prefer to work permanent second shift relief. Davidson replied that since the other CO 3 had more seniority than complainant, complainant was lucky not to be working straight third shift. At no time during this discussion did the complainant make any mention of his diabetes.

9. From November 30, 1983, to December 4, 1983, two "Transfer Opportunity Notices" for a CO 3 and a CO 3-Relief at Oregon State Camp were posted on a bulletin board on the wall directly across from the COs' desk

in the security ward. These positions were for 7:00 a.m. to 4:30 p.m. shift.

10. Correctional officers working the security ward customarily and routinely read "Transfer Opportunity Notices" posted on the bulletin board described above. The complainant read the aforesaid notices and did not sign for the positions listed thereon.

11. Complainant began having trouble controlling his diabetes in May of 1983 while employed at the Hospital. This continued into the Fall of 1983. Part of his difficulty was due to the fact that he had to rotate shifts at the Hospital which disturbed his normal sleep patterns. Complainant's physician, Dr. Russell M. Dixon, recommended that complainant attempt to get his blood sugar down to the normal range and felt this could best be done if complainant was not working.

12. On or about December 1, 1983, Dr. Dixon wrote a letter to James Mathews, Superintendent of the Correctional Camp System. In the letter, Dr. Dixon stated, in pertinent part, as follows:

I am writing to indicate my continued provision of care to a corrections officer under your charge, specifically, Parry F. Lueders. The problem for which I see Mr. Lueders is diabetes mellitus of the insulin dependent type.

I am writing to indicate my awareness of Mr. Lueders fluctuations in blood sugars as a result of shift changes, and to indicate to you that I am presently working with him in an effort to identify what the appropriate steps are which would provide maximum control for his diabetes in the situation of changing shifts.

This matter arises frequently with diabetics who need to have a reasonably established routine and/or a very flexible insulin regimen to permit the changes associated with changes of shift times. It often takes a little bit of time and adjustment to achieve an appropriate change of the insulin regimen. Mr. Lueders and I have begun and will proceed to identify an appropriate combination of insulin, diet, rest, activity, etc. which permits his optimum functions for the corrections system. I believe that we can achieve this given a short period of time and that there should be no impairment in terms of Mr. Lueders'

ability to adequately perform all his assigned correctional duties.

13. On or about December 22, 1983, the complainant asked Lieutenant Davidson for permission to go on sick leave in order to gain control of his blood sugar. The complainant indicated that if he couldn't resolve the problem with his blood sugar he might have to quit his job. Davidson granted him permission to go on sick leave. This was the first time complainant mentioned any problems with his diabetes to Davidson.

14. Between December 22, 1983, and January 1, 1984, Lieutenant Davidson spoke to the complainant's physician, Dr. Dixon, about the complainant's physical condition. Dr. Dixon told Davidson that the complainant was making good progress in controlling his blood sugar and would be ready to return to work soon.

15. The complainant returned to work at the security ward on January 2, 1984 and worked eight hours. On January 3, 1984, complainant worked only six and one-half hours and left work ill. This fact was communicated to Jim Lizak by Lieutenant Davidson.

16. On or about January 4, 1984, Lieutenant Davidson received a telephone call from the complainant who asked Davidson if he could use up the balance of his sick leave. Davidson, after telling complainant that he had no problem with complainant taking the sick leave, offered complainant a permanent straight third shift position. Davidson felt this would make it easier for complainant to control his diabetes. Complainant refused the offer, said corrections work was not for him because of the stress and responsibility and stated that if he was allowed to exhaust his sick leave he planned on resigning.

17. On or about January 4, 1985, Jim Lizak telephoned Dr. Dixon and, among other things, informed Dr. Dixon that complainant left work early on

January 3, 1984. Dr. Dixon expressed surprise because he felt complainant had his diabetes under control. Lizak asked if a straight third shift would help and Dr. Dixon responded favorably to the idea because the regularity of such an assignment would help the complainant control his diabetes.

18. From early January, 1984, onward, Jim Lizak was concerned that the complainant by taking sick leave and claiming his diabetes made it unsafe for him to work as a CO 3, was attempting to lay the groundwork for a \$40.65, Stats., disability. Under a \$40.65, Stats., disability, persons in protective occupations, such as a CO 3, may receive 80 percent of their salary, minus certain deductions, for the remainder of their life. They may also work at another job while receiving this disability. Such a disability is also very expensive for the state. Lizak knew of cases in the past where, in his opinion, unqualified persons had attempted to obtain such a disability; he did not feel the complainant was eligible for these benefits and he began to couch his responses to complainant's communications in such a way as to avoid conceding the disability issue.

19. On or about January 5, 1984, Lieutenant Davidson talked to Jim Lizak and conveyed to Lizak the substance of his conversation with the complainant on January 4th noted above.

20. On January 5, 1984, Jim Lizak telephoned the personnel manager at the DOC's Oregon State Correctional Camp and Oakhill Correctional Institution to see what demotion or transfer opportunities existed. No demotion opportunities existed and the only transfer opportunities involved third shift, a shift Lizak knew complainant had already turned down. Accordingly, Lizak did not offer at this time a straight third shift position to complainant.

21. On January 11, 1984, Jim Lizak wrote a letter to Dr. Dixon which stated, in pertinent part, as follows:

We believe Mr. Lueders is trying to obtain a disability. When I spoke to you on January 4, 1984, you specifically stated there was no way that you would support a disability for him.

After your January 5, 1984 meeting with Mr. Lueders, you had a conversation with Lieutenant Davidson in which you made the statement that there was no way you could guarantee that Mr. Lueders would not "black out at any time." As the correctional officers at U.W. Hospital Security Unit must at times work by themselves being in charge of the inmate patients in the maximum security ward this, of course, is not permissible. The question then, in your professional medical opinion is whether or not Mr. Lueders can safely and satisfactorily perform the duties and responsibilities of a correctional officer. Attached for your review is a copy of Mr. Lueders' position description.

22. Dr. Dixon replied to Jim Lizak's request for information by letter dated January 18, 1984, stating, in pertinent part, as follows:

Mr. Lueders has made considerable progress in controlling his blood sugars in the appropriate range. He has also had some low sugars leading to reactions during this time. None of these have been severe. When asked whether or not an insulin dependent diabetic in good control could be reaction-free, I had to advise Mr. Lueders that this could not be promised, because the fact is that diabetics do have reactions from time to time which on occasion can be severe.

Mr. Lueders has indicated that in his present employment, he feels that maximum control of his diabetes and the adequate performance of his job are potentially incompatible. Indeed if he were to have a reaction (severe) while behind locked doors, there would be no way to adequately meet his needs for glucose at the time without outside help.

I have tried to indicate the basis of my understanding of the process through which Mr. Lueders has passed recently as he accepted responsibility for optimal control of his diabetes. I believe that his conclusions have been honestly derived. I have indicated that I would communicate the above events to the appropriate authorities and that I would, and have been available for purposes of clarification of any medical implications of these events as is needed. I can be reached via the Endocrine Section of the UW Hospital (608) 263-2460.

Lizak did not contact Dr. Dixon any further regarding complainant's condition.

23. Camp Superintendent Mathews concluded after reading Dr. Dixon's letter dated January 18, 1984, that Dr. Dixon in effect stated that complainant had accepted responsibility for optimal control of his diabetes and that as long as complainant disciplined himself, complainant could safely perform the duties of his CO 3 position.

24. Jim Lizak telephoned complainant on or about January 20, 1984, and inquired about the status of his resignation. During this conversation Lizak told complainant that he would shortly be receiving a letter ordering him back to work. He also offered the complainant a straight third shift CO 3 position at the Oakhill Correctional Institution. Complainant turned down the offer. In turning down the offer, complainant stated that he could do the work but felt that the possibility of a "black out" posed, in his mind, a threat to his safety and that of his co-workers. The third shift CO 3 position noted above could have led to a second shift job after a few months (6) on the job.

25. On January 23, 1984, complainant sent Jim Lizak a short letter which stated as follows:

I have considered the information by Dr. Dixon and yourself.

It is true that my control has improved in past years and hopefully will continue to do so. I am physically able to do the work, as my performance at Fox Lake and on the ward have shown. Nevertheless, there will be a risk, as stated by Dr. Dixon, of a reaction in a secured setting. In your letter dated January 11, 1984, you stated the risk of blacking out by a correctional officer is not permissible. Does this mean I will be terminated by the department?

26. On January 26, 1984, Superintendent Mathews sent complainant a letter which stated as follows:

In our communications with Dr. Dixon, both via telephone and letter, he feels that you have made considerable progress in controlling your diabetic condition and have accepted the responsibility for optional (sic) control of your diabetes. He has stated though he could not guarantee that you would be reaction

free, he feels that there should be no impairment in terms of your ability to adequately perform all your assigned job duties. In your January 23, 1984, letter to Mr. Lizak, you yourself stated that you are physically able to perform your correctional officer duties. The fact that an insulin dependent diabetic may have reactions is not, in itself, a disability, but a condition both you as an employee and we as an employer can accept.

Your last day of sick leave expired January 25, 1984. You are, therefore, to report to your work shift at U.W. Hospital Security Unit on Monday, January 30, 1984 at 11:00 p.m. Failure to report by February 5, 1984, will be considered as abandonment of your position, according to Wisconsin statutes 230.34(am) and you will be terminated as of January 25, 1984.

27. On January 30, 1984, complainant sent a letter to Superintendent Mathews which stated as follows:

This is to inform you that I will not be reporting for work on January 30, 1984 at 11:00 p.m.

It is my position that although I can satisfactorily (sic) perform my duties, the working conditions in a correctional setting present a hazard to my safety and the safety of my co-workers and others because of the risk of insulin reactions.

28. The hazard which complainant perceived in his returning to work was the possibility of blacking out when he was working alone. However, complainant did not have a single "black out" of any kind while working over three and one-half years as a CO for the DOC. Respondent followed the general policy of having two officers on duty on each shift. These officers, however, were not always physically located together. Duties would arise, such as checking on inmate patients scattered throughout the Hospital, which would necessitate their physical separation. There were also times when only one officer worked on a shift. This would occur when the second officer called in sick or took vacation.

29. On January 31, 1984, Superintendent Mathews sent complainant a letter of termination for job abandonment based on complainant's letter of January 30, 1984.

30. At all times material herein respondent was aware that complainant was a diabetic.

31. At no time material herein did respondent offer to accommodate complainant's handicap by transferring or demoting him to a different position, by allowing him to work part-time or by permitting him to take an unpaid leave of absence. Nor did complainant request any such accommodation from respondent.

32. Complainant testified at hearing that he did not want to quit his employment but that he wanted to gain control of his diabetes and return to work although he did not know in what capacity (except not security or correctional officer work). However, complainant did not communicate this to respondent at any time material herein.

33. Complainant's concern about his and co-workers' safety was reasonable given his diabetes and its side effects despite the lack of any "black outs" in his prior three years of employment with respondent. However, his physical condition generally did not pose a hazard to himself or others at the hospital.

CONCLUSIONS OF LAW

1. The Personnel Commission has jurisdiction over this discrimination complaint pursuant to §230.45(1)(b), Stats. and §PC 4.03(3), Wis. Adm. Code.

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

3. The complainant has the burden of proving that there is probable cause to believe that respondent discriminated against him on the basis of handicap in connection with his termination on January 26, 1984.

4. The complainant has not satisfied his burden.

OPINION

Section 4.03(2), Wis. Adm. Code defines probable cause as follows:

(2) Probable Cause Defined. Probable cause exists when there is 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.

In a probable cause proceeding such as the one before us, the evidentiary standard applied is not as rigorous as that which is required at a hearing on the merits. Nonetheless, it is useful to use the legal standard enunciated by the Court in Brown County v. LIRC, 124 Wis. 2d 560, 369, N.W. 2d 735 (1985) in footnote 5 at 564, in analyzing the record before the Commission in this complaint. In said footnote the Court stated that in a handicap discrimination case arising under the Wisconsin Fair Employment Act there are three essential elements of proof:

... First, there must be proof that the complainant is handicapped within the meaning of the Fair Employment Act. Boynton Cab Co. v. ILHR Dept., 96 Wis. 2d 396, 406, 291 N.W.2d 850 (1980); Samens v. LIRC, 117 Wis. 2d 646, 658, 345 N.W.2d 432 (1984). The burden of proving a handicap is on the complainant. American Motors Corp. v. LIRC, 119 Wis. 2d 706, 710, 350 N.W.2d 120 (1984). Second, the complainant must establish that the employer's discrimination was based on the handicap. Boynton Cab, supra; Samens, supra. The burden then shifts to the employer to establish, if it can, that its alleged discrimination was permissible under sec. 111.32(5)(f), Stats., 1979-80, which allows an employer to refuse to hire a handicapped applicant if "such handicap is reasonably related to the individual's ability adequately to undertake the job-related responsibilities of that individual's employment..." Boynton Cab, supra; Samens, supra; American Motors Corp., supra.

Handicap

The initial question before the Commission is whether the complainant is handicapped. Section 111.32(8), Stats. 1983-84, provides:

(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 argues that the complainant failed to show he is handicapped. Complainant takes the opposite position.

The record supports a finding that complainant is handicapped. In this regard the Commission points out that there is no dispute over the fact that complainant is an insulin dependent diabetic. Respondent was aware of complainant's condition at all times material herein. As a diabetic complainant is subject to reactions, such as blackouts. Consequently, complainant was concerned about the safety of himself and co-workers if he should have a black out while working shift as a correctional officer. Respondent granted complainant permission to go on sick leave in late December of 1983 in order to gain control of his diabetes and so that he would be better able to perform his work as a correctional officer at the hospital. Respondent also offered complainant a permanent straight third shift position in early January, 1984, to make it easier for complainant to control his diabetes and perform corrections work.

In view of the above, and the aforesaid statutory definition of a "handicapped individual" the Commission finds it reasonable to conclude that complainant has met the first element of his case by establishing that he was diabetic and that this condition limited his capacity to work at the Hospital.

Employer Discrimination Based on the Handicap

Complainant also bears the burden of establishing that respondent's action in terminating his employment was based on complainant's handicap. Brown County, supra.

Complainant has failed to meet the second element of his case. Respondent argues that it was complainant's failure to return to work which led to his termination, rather than his handicap. The Commission agrees. Complainant essentially abandoned his job as a CO 3 at the Hospital. He told respondent when he first took sick leave that if he couldn't control his diabetes he would quit. Later in early January '84, complainant told respondent that if he could exhaust his sick leave he planned on resigning. When finally ordered to report to work, complainant refused.

It is true that complainant's handicap created a fear in him for his safety (and that of his co-workers) should he return to work as a correctional officer. However, the record supports a finding that complainant could safely perform security work with a minimum of risk to himself and to others. Complainant argues that he should have been offered some other type of job outside of security work. However, there is no persuasive evidence in the record that he had such an interest at any time material herein or communicated same to respondent.

Complainant maintains that respondent's inconsistent statements and unfounded assumptions about him support the conclusion that it discriminated on the basis of handicap. There does appear to have been some inconsistencies in respondent's position. For example, there appears to be a conflict between respondent's position as stated in Jim Lizak's letter of January 11, 1984, that complainant would pose a hazard if he continued in his employment with the possibility of a blackout and respondent's position as stated in Superintendent Mathew's letter of January 26, 1984, that the possibility of a blackout was an acceptable condition. However, it appears that this change in attitude was due to

respondent's fear that complainant was contemplating the possibility of applying for a disability retirement.

Complainant argues that Mathews made legal decisions about his ability to perform as CO 3 based on his own conceptions or misconceptions about what members of his family had experienced regarding diabetes. However, the record indicates that Mathews considered more than just his personal experience in reaching a decision to order complainant to report to work. These considerations included Dr. Dixon's communications which respondent perceived as indicating complainant could return to work and safely perform the duties of a CO 3 as well as a need to adequately staff the security ward.²

Finally, complainant contends that respondent made no attempt to accommodate his handicap. The record, however, does not support a finding regarding same. To the contrary, considering the fact that respondent thought complainant was going to quit his employment during most of the relevant time period, its efforts to accommodate complainant's handicap were satisfactory. These efforts included granting sick leave in order for complainant to have time to gain better control of his diabetes; offering him a straight third shift at the security ward for the same purpose and offering him another position. These efforts also included unsuccessful attempts to find a position that complainant could demote into or work part-time at.³ In conclusion, the Commission points out that complainant had transfer opportunities which he failed to pursue.

² Unrefuted testimony of Jim Lizak and James Mathews.

³ Unrefuted testimony of Jim Lizak and James Mathews.

Based on all of the foregoing, the Commission finds that the answer to the issue as stipulated to by the parties is NO, there is no probable cause to believe respondent discriminated against the complainant on the basis of handicap in connection with his termination of January 26, 1984.

ORDER

The initial determination of "no probable cause" is affirmed and this case is dismissed.

Dated: MAY 29, 1986 STATE PERSONNEL COMMISSION


DENNIS P. MCGILLIGAN, Chairperson


DONALD R. MURPHY, Commissioner

DPM:jmf
ID4/1

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