STATE OF WISCONSIN PERSONNEL COMMISSION

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CECIL HARRIS,

Complainant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case Nos. 84-0109-PC-ER
85-0115-PC-ER

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DECISION AND ORDER

NATURE OF THE CASE

These charges of discrimination on the basis of age, handicap, and retaliation were consolidated for hearing. Complainant charges that respondent harassed him in an attempt to pressure him to retire before age 65 and that respondent denied him accommodation for his handicap (back problem). He also asserts that he was harassed in retaliation for having filed his first charge with the Commission.

An initial determination entered April 23, 1986, made the following determinations as to probable cause:

> 4. There is probable cause to believe that complainant was discriminated against on the basis of age and handicap in regard to respondent's failure to accommodate him in the course of his employment resulting in complainant's constructive discharge.
>
> 5. There is no probable cause to believe that complainant was discriminated against on the basis of retaliation in regard to the terms and conditions of his employment or his resulting termination.

A hearing was held on May 19-21, 1987, on the following stipulated issues:

85-0115-PC-ER
Whether there is probable cause to believe respondent discriminated against complainant on the basis of retaliation with respect to harassment resulting in a forced resignation/constructive discharge.

84-0109-PC-ER
Whether respondent discriminated against complainant on the basis of age and handicap with respect to failure to accommodate, and whether there was any resulting forced resignation/constructive discharge.

Following the hearing, a briefing schedule was established. Briefing was interrupted by respondent's filing on July 17, 1987, of a motion for a stay of proceedings. This motion was grounded on complainant having filed a complaint in federal court under the Age Discrimination in Employment Act (ADEA) (29 USC 3621 et. seq.) and the provision at 29 USC 633 that "upon commencement of action under this chapter such action shall supercede any state action." On August 18, 1987, the examiner entered an order granting the motion in part and staying so much of No. 84-0109-PC-ER "as involves a claim of age discrimination under §§111.325, 11.33, Stats." during the pendency of the federal proceeding, and resuming the posthearing briefing process on the matters remaining before the Commission. Accordingly, this decision does not address the age discrimination portion of this matter. The briefing schedule was completed on October 6, 1987.

FINDINGS OF FACT

1. Complainant at all relevant times was employed by respondent in the classified civil service at Lincoln Hills School (LHS), a juvenile correctional facility in the Division of Corrections (DOC), until his retirement effective January 3, 1985.

2. Complainant was employed as a Youth Counselor 5 (YC 5) shift supervisor. As a YC 5, he supervised employes classified at the YC 1, 2 and 3 levels. He was required to respond to emergencies that occurred

during his shift and frequently had to get physically involved in breaking up fights and subduing violent students. Complainant suffered many back injuries over the years as a result of his involvement in these occurrences, most recently approximately six times between January 1984 and his retirement.

3. Complainant had a back condition consisting of mild to moderate arthritis in the lumbar spine which was aggravated by the intense physical activity typically associated with his involvement in restraining students. This pattern gradually became worse in the last few years of complainant's employment at LHS, and his back problems were frequently associated with bouts of myositis and muscle spasms of moderately severe nature in the lumbo-dorsal muscle of the low back. Complainant's back problems would usually respond positively to a few days of rest and sometimes physiotherapy. As a result of complainant's condition and his relatively frequent involvement in violent incidents with students, he frequently had to take sick leave during the last few years of his employment at LHS.

4. In March, 1984, the YC 5 who had been handling the scheduling duties moved to the night shift. This assignment (scheduling duties) primarily involved administrative tasks and there was much less involvement in subduing confrontative students than with regular shift supervisor work. Complainant and several other YC 5's expressed an interest in this assignment to Kenneth Miller, the Residential Care Director, who had the authority to decide who would get these duties. Management considered this a reassignment of duties as opposed to a transfer of employes between positions. No formal civil service process was used to effect the transaction.

5. Mr. Miller explained the position to complainant and also had him discuss the nature of the job with Ms. Smick in the LHS personnel office.

Both stressed the point that the job involved a lot of "detail work" and impending computerization. They did so because they believed that complainant was neither particularly good at nor particularly liked this kind of work, and they wanted to be sure he was aware of what was involved with this position.

6. Complainant had a second conversation with Mr. Miller, who offered complainant the assignment. After giving the matter further consideration, complainant subsequently declined the offer, and YC 5 Jack Swope was given it. This occurred in March or April, 1984.

7. Approximately contemporaneously with the foregoing transactions, complainant remarked to certain rank and file YC's that he was disappointed he did not get the assignment, and also remarked to Ms. Ellenbecker, the LHS personnel manager, and Mr. Swope, that he was not interested in the assignment.

8. There was a greater likelihood of disturbances and risk of injury on the second shift than on the first shift. Notwithstanding this, complainant preferred to work the second shift and frequently would arrange to switch to the second shift when he had been assigned to the first shift. This preference was based at least in part on the greater independence of the second shift due to the fact that most of the higher level administrators were not at the institution during the second shift.

9. On June 15, 1984, Ms. Meier, then security director, wrote the following letter to complainant:

> It has been brought to my attention that since the beginning of this year, you have been absent 26 days due to illness. This causes considerable hardship with other supervisors in that they must replace you during those days off. It is my feeling that at this time we will need from your physician a statement indicating whether or not you are physically able to perform the duties of a Youth Counselor 5. In particular, I am asking that your doctor address the following concerns.

YOUTH COUNSELOR 5 DUTIES OF CONCERN

> Youth Counselor 5's must be prepared to intervene in combative situations.
>
> May at times be required to do a considerable amount of walking.
>
> Must be capable of handling heavy objects.
>
> Is expected to respond to emergencies such as first aid, CPR, lifting a body, and getting students in and out of buildings.
>
> Must have the ability to quickly retreat or physically restrain an assault by a student.
>
> We cannot provide a Youth Counselor 5 with a safe (free from attack) environment and, in fact, the Youth Counselor 5 is responsible for responding to unsafe situations that arise. We are concerned about Mr. Harris' safety, the safety of students and other staff.

I hope this is not perceived by you as a reflection on your past performance as a Youth Counselor 5. However, we have a responsibility to be concerned for your welfare and the welfare of others.

Please have your physician forward this information to us by June 28, 1984. A copy of your position description is attached for your physician's review. Exhibit 21.

10. In a letter dated June 29, 1984, to Ms. Meier, Dr. Bigalow reported that in recent years complainant had been experiencing low back pain and discomfort after involvement in restraining students, but that it seemed that a day or two of rest and physiotherapy was sufficient for him to recover and return to work, and such arrangements were recommended whenever such low back pain should arise. Another possible alternative mentioned was early retirement. The concluding diagnosis was as follows:

> My impression of this man's illness is mild to moderate arthritis in the lumbar spine with intermittent bouts of myositis and muscle spasm of moderate severe nature involving the lumbo-dorsal muscle of the low back... Exhibit 62.

11. Dr. Bigalow referred complainant to Dr. Kranendonk, an orthopedic specialist. He prepared a report dated June 21, 1984, which was sent to LHS, and which included the following:

> He is not a surgical candidate. His x-rays look better than the average 63-year-old man. However, at age 63, as he describes his employment, it seems rather unrealistic that he would be able to fight and restrain young teenagers. He is a supervisor, and most of the time this does not have to be done. He does not describe his work as being heavy, otherwise.
>
> I feel that functioning in a supervisory capacity without the risk of physical violence is most appropriate for him. If he has to be put into a situation where physical restraint of young people is necessary, I can understand the reasons for his back pain. He does have what I would describe as mild-to-moderate arthritis in his lumbar spine.

12. Complainant returned to work and on June 25, 1984, wrenched his back while he was involved in subduing a student. He then took sick leave and returned to work on June 28 and 29, 1984. Complainant then took sick leave from July 1 to July 20, 1984, and vacation to July 28, 1984, when he returned to work.

13. In a July 19, 1984, report Dr. Kranendonk stated, in part, as follows:

> My dictation of June 21, 1984, is still pretty much my present feeling. He is not a surgical candidate. He does have arthritis in his back. However, his necessity to intermittently enforce physical restraints on young people is the reason for his present back problems. I am sure that it aggravated his pre-existing condition of mild to moderate arthritis. He is presently in a remission and would do well if he would not get into aggravative situations again. Exhibit 29.

14. Complainant subsequently returned to work on July 28, 1984 and continued at work through the date of his retirement. During this period he had one back injury which necessitated the use of about two days of sick leave.

15. During July 1984, complainant requested a temporary reassignment of about 30 days to a vacant represented YC 2 communications officer

position. Complainant felt that since this position was much less likely to be involved in restraining students than the shift supervisor position, it would enable him to recuperate from his back injury while continuing to work.

16. Respondent denied this request because such a reassignment would have violated the collective bargaining agreement. Respondent made no attempt to approach the union concerning a possible waiver of objection to such an action. Respondent noted that complainant could have voluntarily demoted into this position, but complainant declined this course of action.

17. Complainant filed his first charge of discrimination (Case No. 84-0109-PC-ER) with this Commission on August 22, 1984. Shortly therefore a copy of this document was served on respondent and was circulated among LHS management staff, including Ms. Ellenbecker.

18. In October 1984, complainant left his state retirement papers at the LHS personnel office to be filled out. It had been the policy in the LHS personnel office, for several years, pursuant to departmental directive, not to fill out retirement papers or to answer specific questions about retirement, but rather to refer them to the Department of Employe Trust Funds. However, through inadvertence nothing was said to complainant and the papers remained in the office without any action being taken. Twelve days after dropping off the papers, complainant picked them up and filled them out himself.

19. Complainant also requested of the LHS personnel office information concerning his health insurance after he retired. In response he was given information concerning his current health insurance program, which information was not responsive to his inquiry. This was due to inadvertence or miscommunication.

20. Complainant had made arrangements approximately a year previously to have Christmas Eve off as a vacation day. By memo of December 10, 1984 (Exhibit 26), Ms. Meier informed complainant that because he had exhausted all his vacation, holiday, and sick leave, he would not be able to take December 24, 1984, as a vacation day but would have to work.

21. After complainant objected to this, he was allowed to remain off on December 24, 1984, and this was recorded as leave without pay.

22. Respondent has provided a number of LHS employes with accommodations for handicaps. In 1984, YC 5 Warmke was severely injured on the job and had to take leave. At the request of his doctor and DVR counselor, LHS provided a back-up for Mr. Warmke when he returned to work as a shift supervisor. This arrangement lasted for two days before Mr. Warmke left and did not return.

23. During the last 2 or 3 years of his employment at LHS, complainant was frequently outspoken in criticism of LHS management with respect to staffing policies and other management policies.

CONCLUSIONS OF LAW

1. These matters are properly before the Commission pursuant to §230.45(1)(b), Stats.

2. Complainant has the burden of proof as to all matters except that respondent has the burden of proof as to the issue of whether there was a reasonable accommodation available with respect to complainant's handicap.

3. Complainant was a handicapped individual under §111.22(8), Stats.

4. The reassignment of scheduling duties to complainant was a reasonable accommodation under §111.34(1)(b), Stats.

5. Respondent did not refuse to reasonably accommodate complainant's handicap, and there was no resulting forced resignation or constructive discharge.

6. There is no probable cause to believe respondent retaliated against complainant for having filed his first charge of discrimination by harassing him, resulting in a forced resignation or constructive discharge.

DISCUSSION

84-0109-PC-ER

In light of the interim decision of August 18, 1987, staying the age discrimination part of this matter, the remaining part of the issue is as follows:

> Whether respondent discriminated against complainant on the basis of handicap with respect to failure to accommodate, and whether there was any resulting forced resignation/constructive discharge.

In a case involving an alleged failure to accommodate, the first question is whether the complainant was handicapped. The definition of handicap is set forth at §111.21(8), Stats., as follows:

> (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 complainant does not meet this definition because he "was handicapped only when injured. It was after he suffered an injury that his capacity to work was limited...." Respondent's brief, p. 20. Respondent cites particularly Dr. Kranendonk's statement in his June 21, 1984, report, Exhibit 29, that:

> His x-rays look better than the average 63-year-old man. However, at age 63, as he describes his employment, it seems rather unrealistic that he would be able to fight and restrain young teenagers....

If complainant had a normal back and were simply more prone to back muscle injury when involved in restraining students due to his age, as is implied in this letter, the Commission might agree with respondent that he was not handicapped under the FEA definition. However, this is not the entire medical evaluation. In his July 19, 1984, report, Dr. Kranendonk stated:

> ...his necessity to intermittently enforce physical restraints on young people is the reason for his present back problems. I am sure it aggravated his pre-existing condition of mild-to-moderate arthritis.... (emphasis added)

In his June 29, 1984, letter, Dr. Bigalow stated:

> ...x-ray studies reveal no unusual bony changes in this man's low back. The suggestion was however that it would appear to be a mild to moderate arthrities [sic] in the lumbar spine. In view of these observations, it is again quite understandable that this man should have occasional low-back discomfort following involvements in restraining actions with teenagers.... (Exhibit 62).

Therefore, it can be concluded that complainant's lumbar spine arthritis was a causal factor with respect to his back problems which frequently occurred after physical exertion restraining students.

Turning to the definition set forth at §111.21(8)(a), Stats., it may be said that complainant has a "physical... impairment" -- i.e., lumbar spine arthritis -- which "limits the capacity to work" -- i.e., the impairment is a causal factor with respect to his back injuries and his resultant inability to be at work.

These facts also fit within the analytical framework provided by La Crosse Police Comm. v. LIRC, 139 Wis. 2d 740, 741 (1987). The Court held that to establish that a particular physical condition constitutes a handicap, complainant must first show there is an impairment by showing there is "a real or perceived lessening or deterioration of damage to a normal bodily function or bodily condition...." This element is satisfied

by complainant's showing he has arthritis of the lumbar spine. The second element (as applicable here) requires that complainant establish that the impairment "limits the capacity to work" at the particular job in question. This is satisfied here because of the causative role complainant's lumbar spine arthritis plays in his back injuries and subsequent absences from work.

Section 111.34(1)(b), Stats., provides that employment discrimination because of handicap includes:

> 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.

The only accommodations suggested by complainant's physicians involved either changes in his job requirements that would eliminate the necessity to physically restrain students, or the allowance of time for recuperation:

> I feel that functioning in a supervisory capacity without the risk of physical violence is most appropriate for him.... June 21, 1984, report by Dr. Kranendonk, Exhibit 29.
>
> * * *
>
> ...following these occurrences, if his complaint of low-back discomfort should arise, arrangements should be available whereby Mr. Harris can obtain a day or two of rest with physiotherapy prior to returning to work... a possibility would be consideration of early retirement.... Letter of June 29, 1984, by Dr. Bigalow, Exhibit 62.
>
> * * *
>
> He is presently in a remission and would do well if he would not get into aggravative situations again. Report dated July 19, 1984, by Dr. Kranendonk, Exhibit 28.

In his posthearing brief, complainant contends that respondent could and should have accommodated him by giving him the YC 5 Scheduling Officer position, which would have substantially reduced the risk of getting physically involved with combative students. In its posthearing brief, respondent argues that the duty of accommodation under the FEA does not

require an employer to reassign job duties or transfer employes, and thus there was no obligation to have offered him the scheduling job.

Resolution of this question is not without difficulty. The FEA does not define accommodation. Section 11.34(1)(b), Stats., merely provides that handicap discrimination in employment includes:

> 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, business or enterprise.

Given the lack of definition and ambiguity as to the meaning of "accommodate" in §111.34(1)(b), Stats., it is appropriate to resort to extrinsic aids to statutory construction.

Therefore, it is appropriate to consider statutory provisions which are _in pari materia_:

> Sections and acts in pari materia, and all parts thereof, should be construed together and compared to each other. Because the object of the rule is to ascertain and carry into effect the legislative intent, it proceeds upon the supposition that the several statutes were governed by one spirit and policy, and were intended to be consistent and harmonious in their several parts and provisions. Under this rule, each statute or section is construed in the light of, with reference to, or in connection with, other statutes or sections.... 73 Am Jur 2d STATUTES §188.

Section 111.34(2)(a), Stats., provides that it is not unlawful to discriminate on the basis of handicap 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. (emphasis added)

In other words, if an employe's capability to perform his or her job-related responsibilities are sufficiently impaired by the handicap, the employer will not be liable for its discrimination. The following subsection, §111.34(2)(b), Stats., requires that the employe's capabilities be

evaluated on a case-by-case basis, and refers specifically to the employe's capability to perform his or her job:

> 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 co-workers, and, if applicable, of the general public may be considered.... (emphasis added)

Therefore, a typical discrimination case will involve the following analysis:

1) Whether the complainant is a handicapped individual;

2) Whether the employer discriminated against complainant because of the handicap;

3) Whether the employer can avail itself of the exception to the proscription against handicap discrimination in employment set forth at §111.34(2)(a), Stats., -- i.e., whether the handicap is sufficiently related to the complainant's ability to adequately undertake the job-related responsibilities of his or her employment (this determination must be made in accordance with §111.34(2)(b), Stats., which requires a case-by-case evaluation of whether the complainant "can adequately undertake the job-related responsibilities of a particular job");

4) If the employer has succeeded in establishing its discrimination is covered by this exception, the final issue is whether the employer failed to reasonably accommodate the complainant's handicap. Now, it seems obvious that in the usual case[1] it never will be

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[1] The instant case is different from the more usual case because here the employer did not discharge, refuse to hire, etc., complainant, who could perform the duties of his job when he was not on sick leave. The only theory of handicap discrimination operative here is failure of accommodation.

necessary to address the issue of handicap unless it has first been established that the exception set forth at §111.34(2)(a), Stats., is available. If the employer can not show that there was a reasonable relationship between the handicap and the duties of the complainant's job, it should not have discriminated against the complainant in the first instance. For example, in a hire case, it should have hired the complainant. Therefore, in such a case there would be no need to consider whether there was some accommodation that would have permitted the employment of the complainant notwithstanding his or her handicap. Again, at this third step that precedes consideration of accommodation, the focus according to §111.34(2), Stats., is on whether this particular complainant has the capability to perform the duties of the particular job held or sought. It would be anomalous at the fourth step to construe "accommodation" in a way that would result in consideration of a far broader type of inquiry -- not whether there is a reasonable accommodation that would permit the complainant to perform the particular duties of the job which it had just been determined he or she could not adequately expect to undertake because of his or her handicapping condition, but rather whether there was some reasonable accommodation that would permit the complainant to obtain or retain some form of employment with the employer through such means as job restructuring, transfer, or even creation of a new job. Such a construction would be inconsistent with the rest of the section.

A construction of accommodation in §111.34(1)(b), Stats., consistent with the remainder of §111.34, Stats., so that the employer's obligation is limited to the job-related responsibilities of the handicapped individual's employment vis-a-vis the particular job he or she occupies or for which he

or she is applying is also consistent with the rather limited case law that is available on the subject.

In Mc Fayden v. Madison EOC, Dane Co. Cir. Ct., No. 81CV3744 (11/15/82), the Court in construing the Madison ordinance on handicap discrimination which contains basically the same language as the state FEA held as follows:

> The EOC adopted the examiner's reasoning that with respect to a discharged handicapped employee, an employer must show that "the employee cannot with reasonable accommodation adequately undertake the job-related responsibilities of that individual's employment" -- but that "[t]he key phrase... is 'of that individual's employment.'" Id. at p. 12. The examiner concluded, and the EOC agreed, that this key phrase means that the employer's duty of reasonable accommodation applies only to the job in which the handicapped employee is actually employed. Id.
>
> I find this analysis of the language of the ordinance fair and reasonable. Further, I can find no reason in the relevant case law for disturbing it. As the examiner observed, the typical accommodation case involves assistance designed to enable an employee to carry out the duties of his or her particular position. The cases do not contemplate an employer developing a new position for the employee. The EOC's conclusions that no such duty exists under the ordinance and that UBS did not discriminate against plaintiff by failing to transfer him to a new job [for which he was not qualified] are therefore affirmed. (footnote omitted)

Federal cases under the Rehabilitation Act of 1973, 29 USC 701-796, must be read with some care because this law contains a requirement for affirmative action not found in the Wisconsin FEA. Furthermore, federal regulations issued under the act includes a more specific definition of reasonable accommodation which includes the following language, 29 C.F.R. §1613.704 (1982):

> (b) Reasonable accommodation may include, but shall not be limited to: (1) Making facilities readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified equipment or devices, appropriate adjustment or modification of

> examinations, the provision of readers and interpreters, and other similar actions.

However, the consensus of the federal court cases is that the requirement of accommodation is limited t the parameters of the employe's job.

For example, Bento v. ITO Corp., 36 FEP Cases 1031, 1041 (D.R.I. 1984), involved a longshoreman whose heart condition made heavy labor unsafe. The decision contained the following discussion:

> Plaintiff has also argued that ITO could have employed Bento, availing itself of his job skills and accommodating his disability, by hiring him in a light duty position. While the imperatives of the Rehabilitation Act require employers to make reasonable accommodations for an employee's disability... they do not obligate companies materially to rewrite job descriptions....
>
> The nub of the Rehabilitation Act in this wise is that the employer must make a reasonable good-faith effort to adjust its legitimate needs to a handicapping condition which does not fairly viewed, debar the putative employee from doing the job. It does not demand that an employer settle for a worker who cannot effectively perform essential functions of the position....

Also see Jasany v. U.S. Postal Service, 33 FEP Cases 1115, 1117 (N.D. Ohio 1983):

> The requirement of 'accommodation' refers to adjustments within the job for which the handicapped individual was hired. Accommodation does not include the requirement that the hiring agency create a new position or that other workers to perform [sic] the handicapped individual's duties....

Finally, in Rau v. UW-Milwaukee, Wis. Pers. Commn., No. 85-0050-PC-ER (2/5/87), the Commission held that the employer was not required to permanently assign some of the handicapped individual's work to other staff as an accommodation.

While the employer is not required to create a new job or transfer an employe to a completely different position as an accommodation, there is another line of cases which suggests that where the employer normally

exercises a degree of flexibility in assigning duties to employes, and in a particular case can do so without hardship, it may be required to do so as an accommodation.

In See v. Vollrath, Labor and Industry Review Commission (LIRC) (1979), the complainant was employed in the general labor group. Workers in this group were "assigned to work in various departments depending upon the availability of the work." He was discharged for refusing a permanent assignment to the Draw-Cote department because the work there involved bending and lifting which he was unable to perform due to a back problem. LIRC found the employer violated its duty of accommodation based in substantial part on the following finding:

> As a member of the general labor group, complainant had been assigned to various departments including shipping, the warehouse, and he had also been assigned to work with ground crew. These assignments all involved physical labor with which complainant had no difficulty. Respondent could have moved complainant to any job at its discretion. Respondent presented no evidence to show that no work was available for complainant besides work in the Draw-Cote department or that it could not have continued to utilize him as a member of the general labor group with the exception that he not be assigned to the Draw-Cote department.

In Cappell v. Consolidated Papers, Inc., LIRC No. 8301304 (12/18/84), affirmed, Consolidated Papers, Inc. v. LIRC, Court of Appeals, Dist. IV, No. 85-1384 (April 17, 1986) (unpublished decision), the employer declined to rehire into its labor pool an employe laid off when its Appleton division was closed down. The employe was a handicapped individual with a 60 pound lifting restriction due to a hernia. The employer had a requirement for rehiring of no physical restrictions. LIRC's conclusion that the employer had violated its duty of accommodation rested in large part on the following findings:

> The actual entry level position for a new hire without divisional seniority (which is what the rehired Appleton employes were deemed to be) is laborer in the labor pool. There is no particular job description for this position since what it involves is assignment on an as needed basis to any number of the many entry level positions in the respondent's many lines of occupational progression... Respondent could have rehired the complainant into a labor pool position and had him perform job functions within his physical capabilities without any significant disruption of the work assignment process.

This line of cases is also consistent with Jasany v. U.S. Postal Service, 33 FEP Cases 1115, 117 (N.D. Ohio 1983), cited above. Although the Court held that the employer was not required to create a new position or assign other employes to do the handicapped employe's work, the decision also included the following:

> Jasany asserts he could have been accommodated easily by being transferred to another position within the post office. Jasany's argument would be well-taken if he had been hired as a general postal employe to serve various functions within the post office. If that were the case, the USPS could easily accommodate Jasany by assigning him to duties other than operation of the LSM-ZMT machine. However, Jasany was employed specifically as a Distribution Clerk, Machine Trainee. Jasany was aware when he was hired permanently by the USPS that one of his primary duties would be the operation of the LSM-ZMT machine.

With respect to the instant case, the record establishes that one of the YC 5's was required to perform scheduling duties, and that management did not consider this transaction to be a transfer of an employe from one position to another, as defined at §ER-Pers 15.01, Wis. Adm. Code, but rather a reassignment of duties, Tr. 52. In other words, this duty could be assigned to any of the YC 5's, so long of course as the individual assigned had the capability of performing this task. Respondent did not contest that complainant had this capability. Furthermore, respondent did not contend there would have been any hardship involved in giving

complainant this job. At the time complainant pursued this assignment the employe who had been doing this work had moved to another assignment, and somebody had to pick up these duties. It was not a question of respondent having to "restructure" existing jobs or reshuffle employes' assignments. These circumstances bring this case much closer to the latter line of cases cited above, where employers were required to exercise flexibility that was readily available and that could be exercised without hardship in their personnel management. Therefore, the Commission concludes, based on the facts in this case, that respondent's duty of accommodation required it to offer complainant the scheduling assignment.

The record contains a sharp conflict between complainant and his supervisor (Mr. Miller) as to whether complainant was offered the scheduling assignment. It is the Commission's view that a preponderance of the evidence supports respondent's position -- i.e., that complainant was offered, but declined, this assignment. This conclusion is based primarily on the following factors:

1) Both Mr. Swope and Ms. Ellenbecker testified that complainant told them more or less contemporaneously with the event that he was not interested in being the scheduling officer. These would have been statements against his interest which support respondent's contention that complainant declined the job offer. While complainant has by no means acceded to these statements having been made, he did not deny that he made the statement to Mr. Swope.

2) When complainant filed his first charge of discrimination on August 22, 1984, which was shortly after this transaction, he never mentioned it. His second charge, filed July 23, 1985, does mention

the transaction but never specifically alleges that he was actually denied the job:

> During 1984 the position of Scheduling Officer became vacant. This would have been a good position for me as it would reduce my shift work to one week end a month. I applied for the position and was interviewed by Ken Miller. Miller did his best to discourage me and then set me up for an appointment with Rita Smick in the personnel dept. who continued to discourage me by pointing out the bad aspects of the position. According to Miller & Smick there were no good features of the position. I returned to Miller and said "You want to give this job to John Swope, don't you?" His reply was "yes". Swope was appointed to the job the next day. I possessed several years more of seniority than Swope.

3) While it can be argued that it would be unlikely that complainant would decline the job because of his need and desire for an accommodation, it must be remembered that complainant preferred to work the second shift and when assigned the first shift frequently would arrange to switch to the second shift, notwithstanding that there were more disturbances and risk of injury on the second shift than on the first shift. Complainant preferred to work more independently and with less interference from the higher level administrators who were not around on the second shift.

4) Even if complainant made the remarks to the rank and file YC's that he was disappointed at not getting the scheduling assignment, this is consistent with his feeling that respondent was trying to discourage him from taking the job and would have preferred to have given it to Mr. Swope -- i.e., he may have viewed management's actions as a constructive denial. Also, being generally at odds with management during this period, it is likely that he would be reluctant to characterize management in other than a negative manner.

Since the Commission finds that respondent did offer the scheduling assignment to complainant, it follows that there was no violation of the

FEA with respect to handicap accommodation, and no constructive discharge or forced resignation.

85-0115-PC-ER

The issue for hearing is:

> Whether there is probable cause to believe respondent discriminated against complainant on the basis of retaliation with respect to harassment resulting in a forced resignation/constructive discharge.

Complainant in his post-hearing brief cites the following matters:

1) The continuing failure to have reassigned complainant to the scheduling officer position;

2) The failure of the LHS personnel office to have processed his retirement papers after having held them for an extended period;

3) The fact that the LHS personnel office gave him information about his current health insurance benefits rather than what they would be after retirement, as he had requested;

4) The fact that he "lost the chance to have Christmas Eve scheduled as a day off even though he had asked for it one year previously."

In order to establish a prima facie case, complainant must establish that 1) he engaged in a protected activity, 2) his employer was aware of this, 3) he suffered an adverse employment action, and 4) there was some indication (such as a close proximity in time between 2) and 3)) of a causal connection between the protected activity and the adverse action.

Complainant has established a prima facie case as to each instance cited above except the last one. In point of fact, there was no adverse employment action because he was given that day off after he complained about the notice from management advising him that he would have to work

that date due to having used up all of his leave. While he was in leave without pay status on that date, this was inevitable given the prior exhaustion of his leave.[2]

As to the other matters, respondent has, articulated a legitimate, non-discriminatory rationale for each one, and there is no evidence of pretext.

As to the continuing failure to reassign complainant to scheduling officer, this is resolved by the finding that complainant had previously been offered the job but turned it down. There was no reason for respondent to have continued to pursue this with complainant over the next several months.

With respect to the retirement papers, respondent asserted that departmental policy precluded LHS from filling out these papers, and that the delay in informing complainant of this was due to inadvertence. There is no reason to think that this was not the case.

Finally, respondent contends that the health insurance information given complainant was the result of either miscommunication or inadvertence. There is nothing to suggest that this was not the case and that complainant was deliberately given the wrong information.

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[2] Even if it were considered there was an adverse action against complainant, there is nothing to suggest that respondent's explanation for its action was pretextual.

ORDER

These charges of discrimination are dismissed except as to the allegation of age discrimination in Case No. 84-0109-PC-ER.

Dated: February 11, 1988 STATE PERSONNEL COMMISSION

DENNIS P. McGILLIGAN, Chairperson

DONALD R. MURPHY, Commissioner

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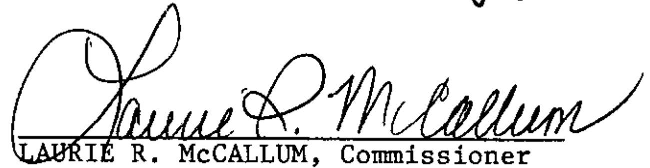
LAURIE R. McCALLUM, Commissioner

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