STATE OF WISCONSIN PERSONNEL COMMISSION

WILLIAM SNOW, Complainant, v. Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES, Respondent. Case No. 86-0051-PC-ER	INTERIM DECISION AND ORDER*

This matter is before the Commission following the promulgation of a proposed decision and order by the hearing examiner. The Commission has considered the parties' objections and arguments with respect to the proposed decision and order and consulted with the examiner. The Commission now adopts the proposed decision and order, a copy of which is attached hereto and incorporated by reference, with the following changes to the findings to better reflect the record and with the concurrence of the examiner. The Commission also will add language to the discussion section of the proposed decision in response to certain of the objections.

The following findings are amended to better reflect the record:

5. Prior to being admitted into the counselor training program, complainant, in answering one of the questions in the application for the counselor training program, wrote that he had been in prison due to alcohol.

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* In order to facilitate any motion that may be filed pursuant to §227.485, Stats., this decision is being issued in non-final form.

24. On February 2~~4~~8, 1986, the same Manitowoc County detective called Ms. Frank and advised her that complainant was a suspect in a felony investigation, and that he had served a prison term in Waupun for sexual assault.

29. At a meeting on March 4th, attended by Ms. Frank, Ms. Delores Borreson and Mr. Hupfer, complainant's first-line supervisor, complainant was told that he was being relieved of his duties, and placed on suspension with pay, pending investigation of the ~~unofficial~~ criminal ~~charges~~ allegations against him.

37. The decision of WMHI personnel to discharge complainant, if he were the person named in the 1980 complaint and judgment, was formed without input from complainant about the prior conviction except as described in the preceding finding.

DISCUSSION

In its objections, respondent argues:

> "Assuming *arguendo* no policy [regarding arrest and conviction records] existed whether formal or informal, the decision of the hearing examiner holds that the employer is barred from taking any action, no matter how related the crime is to the work. This is poor public policy. The purpose of the exceptions under s. 111.335 is clearly to protect the employer. The employer does not have to take the risk or even continue the risk once the conviction is discovered, if it meets the substantial relation test."

Respondent's argument misapprehends the proposed decision which by no means holds that an agency has to have a developed policy on arrest/ conviction records in place before it can discharge an employe pursuant to the exception set forth at §111.335(1)(c), Stats. Rather, the proposed decision addresses a (presumably) highly unusual set of circumstances, where an employe was initially hired at an institution by a member of management who knew about a criminal conviction which had occurred a few years earlier (in 1980).

After more than two years of employment he is arrested, and while this charge is pending, the employer decides to terminate him, ostensibly because of management's concerns about the 1980 conviction, which had occurred six years earlier and of which a member of management was aware when complainant was hired originally. Perhaps not surprisingly under these circumstances, complainant charges that the employer's real concern was his pending criminal charge. Under these circumstances, in determining whether the employer's professed reliance on the earlier conviction as a basis for discharge was pretextual, it certainly is legitimate to consider, as the proposed decision does, that the employer had no policy in place concerning conviction records, including no practice of screening job applicants with respect to conviction records. These omissions are not consistent with respondent's stated concern about such a prior conviction. This obviously does not mean that management has to have such a policy or practice in place in order to be able to exercise its right under §111.335(1)(c), Stats., but only that their absence may weaken the employer's case in a proceeding where the real question is whether the employer's purported reliance on a prior conviction is a pretext for an illegal reason for discharge (e.g., race, sex, arrest record), as opposed to the question of whether the employer's reliance on the prior conviction meets the §111.335(1)(c), test of whether the circumstances of the prior conviction "substantially relate to the circumstance of the particular job or licensed activity."

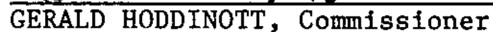
Respondent also argues in effect that there was no adverse employment action because appellant chose to resign rather than face imminent discharge. In addition to the discussion in the proposed decision at note 1 on this topic, the Commission underscores that this is not a case involving

a constructive discharge per se, where the employer is required to carry the burden of showing just cause for discharge notwithstanding that, nominally, the employe resigned. The proposed decision simply acknowledges that where an employer tells an employe in all likelihood he will be terminated, and the employe chooses to protect himself as best he can by resigning rather than have the stigma of a discharge on his employment record, it cannot be gainsaid that the employer has taken some kind of adverse employment action against the employe.[1] See Lopez v. U.S.B. Thomas, Inc., 831 F. 2d 1184, 1188-1189 (2d Cir. 1987), where after the employe was told he would be fired at the end of his probationary period he left his employment to take a job at another company, but was not precluded from challenging the employer's decision that lead to his separation.

Dated: April 11, 1989 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner


GERALD HODDINOTT, Commissioner

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[1] This is not to say that under such circumstances the parties could not have negotiated a release and discharge of liability which would have the effect of foreclosing subsequent charges, claims or litigation. However, there was no such agreement involved on this record.

STATE OF WISCONSIN PERSONNEL COMMISSION

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WILLIAM SNOW,                  *
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              Complainant,     *
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v.                             *
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Secretary, DEPARTMENT OF       *
HEALTH AND SOCIAL SERVICES,    *
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              Respondent.      *
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Case No.  86-0051-PC-ER        *
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PROPOSED DECISION AND ORDER

This matter is before the Commission on a claim by complainant that respondent discriminated against him because of his criminal record when they accepted his resignation under threat of imminent discharge. A hearing was held on complainant's claim, testimony was given under oath, exhibits were received into evidence. Also, the parties stipulated that testimony and exhibits received at the probable cause hearing, March 7, 1988, be received and considered as part of the record in this proceeding. Afterwards, the parties submitted post-hearing briefs. The following findings of fact, conclusions of law, opinion and order are based on the record.

FINDINGS OF FACT

1. Complainant, William Snow, was a permanent classified civil service employe with respondent at Winnebago Mental Health Institute (WMHI) from April 30, 1984 to March 13, 1986.

2. Respondent is a state agency responsible for a variety of state social services which impact on many individuals and families, who are inhabitants of this state. These responsibility areas include physical and

mental health, services to the aged, corrections, public and medical assistance, children's services, and vocational rehabilitation.

3. Complainant first started employment with respondent in July 1983. He became interested in the alcohol and drug abuse counselor training program at WMHI, while being counseled by Jeffrey Ohmstedt, a division rehabilitation counselor. Ohmstedt encouraged complainant to seek admittance into the counselor training program. Respondent hired him as a work incentive employe in its ROAD Program.

4. In November, 1983, he was officially admitted into the training program. A month later he acquired limited-term employe status in the ROAD Program, a ninety-day alcohol and drug treatment program for residential adolescents.

5. Prior to being admitted into the counselor training program, complainant, in answering one of the questions in the counselor training program, wrote that he had been in prison due to alcohol.

6. Dan Malesevich, a Social Service Supervisor at Winnebago Institute, was one of the people administering the counselor program. He received complainant's application and interviewed him.

7. Malesevich kept an employment record file on complainant in his office and knew complainant had a criminal record. He had discussed complainant's criminal record with him at some length. Malesevich knew complainant had been convicted of a felonious offense and he knew the nature of the offense.

8. Complainant's criminal record was common knowledge to other persons in the counselor training program. He made no secret of his criminal record.

9. On December 16, 1983, complainant, while in the ROAD Program, was hired by respondent as an LTE Institution Aide. Later, in February, 1984, he transferred to the nursing department, where he began working forty hours per week. Formerly, he had worked sixteen hours per week.

10. Before complainant transferred, the nursing department personnel staff asked Dan Malesevich numerous questions about complainant. None of the questions brought up the subject of complainant's criminal record.

11. Malesevich had a positive opinion of complainant's work record at the institute and recommended him for the position.

12. Complainant was interviewed for the Institution Aide 1 position in the nursing department by two of its supervisors.

13. Neither job interviewer asked complainant any questions to ascertain whether complainant had a conviction record. The job interviewers were not instructed to inquire about possible criminal convictions of any applicant.

14. Upon being asked of his work experience in a mental health setting, complainant advised the interviewers that he had done voluntary work with alcohol and drug abuse individuals in the community and in jail.

15. No information was provided in complainant's job application about his work history after September 1980 except for his current job in respondent's training program.

16. No questions were asked by the job interviewers about complainant's work history prior to his employment in the training program.

17. A primary concern of the interviewers was to determine if a job candidate could handle abuse from patients, without losing his temper and without causing any harm to the patient.

18. Winnebago Mental Health Institute is a unit of DHSS, which is responsible for the care of mentally ill, emotionally disturbed and chemically dependent individuals. It houses approximately 275 patients, both sexes, ages three to sixty-four.

19. Winnebago Mental Health Institute had no written policy regarding employment of persons with arrest or conviction records and did not employ any method of screening job applicants or employes on the basis of arrest and conviction records.

20. Approximately 140 minimum security prison inmates are housed on the grounds. Prison inmates are restricted to specific areas and are excluded from patient areas. On occasion, prison inmates are used to perform tasks such as painting and plastering in various buildings on the grounds. Other prison inmates work in a creamery, which is adjacent to WMHI.

21. The two job interviewers recommended hiring complainant based upon his interview and the recommendation of his supervisor, Dan Malesevich.

22. Complainant was hired by the director of the nursing department and transferred into the nursing department. He continued working as an LTE Institution Aide 1 - LTE until April 30, 1984, when after being placed on the certification list, he was appointed to a permanent Institution Aide position. His duties included providing care and assistance to WMHI patients.

23. In mid-February 1986, Ms. Yvonne Frank, the Director of Nursing at WMHI, received a telephone call from a Manitowoc County detective inquiring about complainant. Several days later the detective again called Ms. Frank and asked for certain information about complainant.

24. On February 24, 1986, the same Manitowoc County detective called Ms. Frank and advised her that complainant was a suspect in a felony investigation; that he had served a prison term in Waupun for sexual assault.

25. Immediately after receiving it, Ms. Frank reported each of the detective's telephone calls to Mr. Goers, the Director of WMHI.

26. After the third phone call, Ms. Frank was directed to conduct an investigation of complainant's work hours and schedules. Delores Borreson was responsible for obtaining the official charges by Manitowoc County against complainant.

27. During this same period, WMHI staff contacted Division of Care and Treatment Facilities staff and the department's legal counsel for instructions on how to proceed with complainant as an employe.

28. After input from its division personnel and legal counsel, Mr. Goers decided to place complainant on suspension with pay status.

29. At a meeting on March 4th, attended by Ms. Frank, Ms. Delores Borreson and Mr. Hupfer, complainant's first-line supervisor, complainant was told that he was being relieved of his duties, and placed on suspension with pay, pending investigation of the unofficial criminal charges against him

30. A few days later, WMHI received the requested copy of the Manitowoc County criminal complaint issued against complainant.

31. Mr. Goers reviewed the complaint and, based on the nature of the alleged offense, decided to call complainant in for a predisciplinary meeting. The predisciplinary meeting was held on March 10, 1986.

32. At the March 10, 1986 meeting, attended by Ms. Frank, Ms. Borreson, the complainant and Ms. Carol Bullock, a union representative,

complainant was given written notification of the meeting agenda, read the complaint, which he acknowledged, and told that he would probably be suspended without pay.

33. On March 11, 1986, complainant was given written notification of suspension without pay. The suspension went into effect the same day.

34. The next day, Ms. Frank received written confirmation of statements made in February, by a Manitowoc County detective, that complainant had been convicted of a felony in 1980 and had served time in prison. This written confirmation was presented to Mr. Goers, who directed scheduling of another meeting with complainant.

35. The complainant was contacted and directed to appear in the office of the Nursing Director on March 13th. At that meeting, which was attended by those who attended the March 10th meeting, complainant was handed copies of his 1980 criminal complaint and judgment.

36. After complainant acknowledged that he was the person named in the complaint and judgment, he was told that in all likelihood he would be terminated from employment with WMHI.

37. The decision of WMHI personnel to discharge complainant was formed without input from complainant about the prior conviction except as described in the preceding finding.

38. During that same meeting, questions about the possibility of complainant resigning and the nature of WMHI's response to prospective employers were discussed. Later that day complainant tendered his resignation effective March 13, 1986, and it was accepted.

39. On May 15, 1987, complainant was acquitted by a jury of the criminal charges filed in Manitowoc County in March, 1986 against him.

CONCLUSIONS OF LAW

1. The Personnel Commission has jurisdiction over complainant's claim of discrimination under §230.45(1)(b), Wis. Stats.

2. Complainant's resignation was coerced by respondent and constituted a constructive discharge.

3. Complainant has the burden of proving respondent discriminated against him because of his criminal record, when it forced him to resign in March, 1986.

4. Complainant has met his burden of proof and established by the preponderance of evidence that respondent discriminated against him on the basis of his criminal record, when he was coerced to resign in March, 1986.

DISCUSSION

Complainant claims that he was discriminated against by respondent in violation of the Wisconsin Fair Employment Act (Act), secs. 111.31 - 111.395 (1983) when he was forced to resign from his position at Winnebago Mental Health Institute. The record is clear. Respondent's stated reason for deciding to discharge complainant was its discovery that he had been convicted of second-degree sexual assault. And complainant was under emotional duress and imminent threat of discharge when he resigned.[1]

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[1] Respondent contends this was not a coerced resignation as that concept has been used in certain past cases, e.g., Biesel v. Bartell, Wis. Pers. Bd. No. 77-115 (9/15/77). It has been held that a resignation must be coerced before there is a constructive discharge for jurisdictional purposes in an appeal of a discharge under §230.44(1)(c), Stats., where the employer has the burden of proving just cause for the disciplinary action taken, but this is not such an appeal. When an employer gives an employe an option of resigning or being discharged, this is an adverse employment action, and the employe has the right to pursue, and to attempt to prove a charge of discrimination which alleges that the employer's action, which can be called a constructive discharge in a non-§230.44(1)(c), Stats., appeal context, was illegal under the Fair Employment Act.

Sections 111.321 and 111.322 of the Act make it plain that it is unlawful for an employer to discriminate against an individual on the basis of a conviction or arrest record. These facts in consonant with the Act establish the appearance that respondent discriminated against complainant.

Respondent argues that it did not rely on the pending charge but that its reliance was on the past conviction, which was not unlawful because it came within the circumstances expressed in sec. 111.335(1)(c), which provides an exception to the general rule that it is unlawful to discriminate on the basis of a conviction record. Section 111.335(1)(c) (1985), Stats., provides:

> Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to refuse to employ or license or to bar or terminate from employment or licensing, any individual who:
>
> 1. Has been convicted on any felony, misdemeanor or other offense the circumstances of which substantially relate to the circumstances of the particular job or licensed activity;

The evidence regarding the concern of respondent about employing persons with conviction records is: Respondent had no policy or procedure for eliciting information about any conviction records of its job applicants. Respondent has no policy or procedure for eliciting information about any conviction record of its employes. Respondent uses prison inmates to do certain maintenance jobs in its buildings at WMHI. Prison inmates work in a creamery adjacent to WMHI. May 16, 1983, complainant, on a ROAD Program training application, informed respondent that he had been in prison: "due to the alcohol." December 16, 1983, complainant was hired as an Institution Aide 1 - LTE, by a WMHI staff person who was familiar with complainant's prison record. February, 1984, complainant was transferred to the nursing department, after being interviewed by department supervisors. No questions were asked which would elicit information about any criminal

record. April 30, 1984, complainant was appointed to a permanent Institution Aide position. No questions were asked which would elicit information about any criminal record.

The evidence does not support respondent's claim that is it concerned about protecting WMHI residents from individuals with certain prison records. Clearly respondent made no effort toward practical application of the concepts expressed in s. 111.335, Stats. Also there is no evidence of its prior use by respondent. In fact, respondent knew complainant had been incarcerated in jail before it hired him. At least one of its staff -- the supervisor who recommended him to the nursing department -- knew the details of complainant's prior criminal record. Any critical concern by respondent about complainant's criminal record occurred after respondent had been advised by the police that complainant had been charged with another criminal offense.

Based on this record, the Commission finds and concludes that respondent's stated reliance on complainant's earlier criminal conviction is pretextual, and the motivating factor behind respondent's decision to force complainant to resign was his pending criminal charge. The Commission further finds and concludes that even if respondent had relied on complainant's prior conviction to some extent in its decision to constructively discharge, said conviction was not the most significant reason for the constructive discharge, and complainant would not have been constructively discharged but for the pending criminal charge.

ORDER

Based on the Commission's determination that unlawful discrimination occurred, respondent is ordered to restore complainant to his employment and to reimburse complainant for all lost pay and benefits, subject to the provisions concerning mitigation and offset set forth in §111.39(4)(c), Stats.

Dated: ______________________, 1989 STATE PERSONNEL COMMISSION

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LAURIE R. McCALLUM, Chairperson

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DONALD R. MURPHY, Commissioner

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GERALD HODDINOTT, Commissioner

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