

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

The Commission, after reviewing the record and consulting with the hearing examiner, adopts the proposed decision and order as its interim decision and order, with the following changes:

1. The words "an Indian" in Finding of Fact 1 and in the last sentence of the third full paragraph on page 7 are deleted in view of the fact that discrimination on the basis of race was not alleged and the Commission's decision does not rest on considerations of complainant's race.

2. The following Conclusion of Law is added:

"Complainant's resignation was coerced by respondent and constituted a constructive discharge from complainant's last position with respondent."

3. The first full paragraph on page 7 beginning with "From the evidence..." and ending with "... in respondent's argument." is deleted and the following language substituted to more accurately reflect the hearing examiner's findings in this regard:

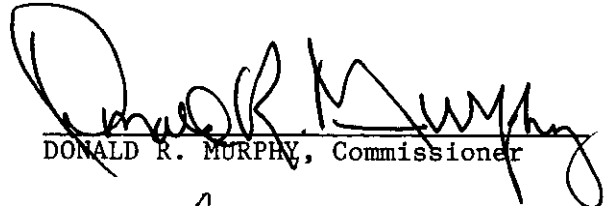
"From the evidence in the record, it is possible, but not necessary, to conclude that the circumstances of complainant's 1980 felony conviction substantially relate to the circumstances of complainant's position at WMHI from which he was constructively

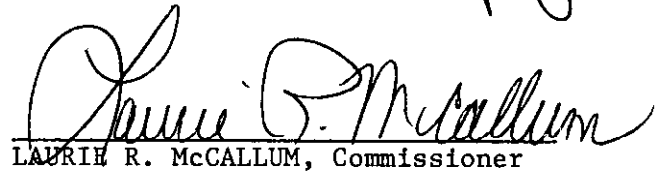
discharged, within the meaning of §111.335(1)(c), Stats. Militating against such a conclusion, however, is the fact that, despite respondent's contention that the fact of such a conviction is such an important consideration vis a vis the employment of a person in complainant's former position that its discovery is sufficient basis for the employee's termination, respondent has no policy or procedure for eliciting this type of information from applicants for such a position. If this fact is as critical and dispositive as respondent contends it is, why is information relating to it not part of the applicant screening process?"

The Commission also denies at this point of the proceedings complainant's motion for attorney's fees and costs in view of the fact that this decision and order finding probable cause does not constitute a final decision and order on the merits and, as a consequence, the motion is premature.

Dated: June 20, 1988 STATE PERSONNEL COMMISSION

LRM:rcr  
DPM/l

  
DONALD R. MURPHY, Commissioner

  
LAURIE R. McCALLUM, Commissioner

STATE OF WISCONSIN

PERSONNEL COMMISSION

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WILLIAM SNOW, \*

Complainant, \*

v. \*

Secretary, DEPARTMENT OF \*

HEALTH AND SOCIAL SERVICES, \*

Respondent. \*

Case No. 86-0051-PC-ER \*

\* \* \* \* \*

PROPOSED  
DECISION  
AND  
ORDER

The captioned matter is before the Commission on an agreement by the parties to waive investigation of complainant's claim of discrimination, provided in §111.39, Wis. Stats., and go to hearing on the question of probable cause. The agreed upon issue by the parties in this claim was: Whether there is probable cause to believe respondent discriminated against complainant because of his criminal record when they accepted his resignation. A hearing was held on complainant's claims, testimony was given under oath, exhibits were received into evidence and the parties made oral arguments at the close of the hearing. The following findings of fact, conclusions of law, opinion and order are based upon the record made at the above-mentioned hearing.

FINDINGS OF FACT

1. Complainant, William Snow, an Indian, 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 at the institute with respondent in July 1983. He was interested in respondent's alcoholic and drug rehabilitation counselor training program and was hired by respondent as a work incentive employe.

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 Institutional 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 continued working for respondent as a LTE Institute Aide (IA) until April 30, 1984, when after being placed on the IA certification list, he was appointed to a permanent Institutional Aide position.

13. In mid-February, 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.

15. 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.

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

17. 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.

18. 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 employee.

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

20. At a meeting on March 4th, attended by Ms. Frank, Ms. Delores Borreson and Mr. Hupfner, 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.

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

22. 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.

23. 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.

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

25. 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.

26. 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.

27. 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.

28. 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 and it was accepted.

29. 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. Constructive discharge

3. Complainant has the burden of proving there is probable cause to believe respondent discriminated against him because of his criminal record when he tendered his resignation and respondent accepted it in March, 1986.

4. Complainant has met his burden of proof and there is probable cause to believe respondent discriminated against him in March, 1986, because of his criminal record.

#### DISCUSSION

Mr. Snow, the complainant claims that his resignation from WMHI was the product of discrimination against him by respondent because of his 1980 criminal conviction. The parties waived the initial determination investigation provided under ss. 111.375(2) and 111.39, Wis. Stats., and requested

a hearing on the question of whether there was probable cause to believe DHSS discriminated against Snow because of his criminal conviction.

Section PC 1.02(16), Wis. Adm. Code, defines probable cause as "reasonable ground for belief, supported by facts and circumstances strong enough in themselves to warrant a prudent person to believe that discrimination ... probably has been or is being committed."

Sections 111.321 and 111.322, Wis. Stats., read together, prohibit an employer from discriminating against an individual because that person has an arrest or conviction record, except as provided in ss. 111.33 to 111.36.

Snow's case in chief established a prima facie showing of discriminatory behavior by respondent just before he resigned. Respondent, in response to its burden of presenting legitimate reasons for its actions prior to complainant resigning, introduced evidence and argued that its actions were not discriminatory, but were legitimate under the exceptions to employment discrimination provided in ss. 111.335(1)(b) and (c), Wis. Stats., which provide in particular part:

(b)...it is not employment discrimination because of arrest record to ... suspend from employment any individual who is subject to a pending criminal charge if the circumstances of the charge substantially relate to the circumstances of the particular job....

(c)...it is not employment discrimination because of conviction record to refuse to employ ... or terminate from employment ... any individual who:

1. Has been convicted of any felony ... the circumstances of which substantially relate to the circumstance of the particular job....

The undisputed evidence established that Mr. Snow in April, 1980 was convicted of second degree sexual assault and that in March, 1986 he was subject to a pending criminal charge of third degree sexual assault. The evidence also establishes that shortly after the director of WMHI learned



of Snow's conviction record, a series of meetings ensued regarding Snow's employment which led to his eventual resignation.

From the evidence introduced, which included considerable evidence of a conjunction between Snow's conviction and his job requirements, respondent appears to establish facts sufficient to qualify under the exception expressed in s. 111.335(1)(c), Wis. Stats. However, putting that question aside, there remains a basic weakness in respondent's argument.

Respondent introduced no evidence demonstrating that, to ensure the safety of WMHI residents, it screened job applicants and monitored employees on the basis of arrest and conviction records. To the contrary, the evidence introduced demonstrated that WMHI had no written policy regarding employment of persons with arrest or conviction records and did not screen job applicants or employees on the basis of arrest and conviction records. Also the evidence established that prior to Mr. Snow's employment, his conviction record was known to a WMHI staff member, who recommended Snow for the position. Clearly the WMHI personnel office had full opportunity to know of Snow's conviction record before it hired him.

Respondent's failure to screen job applicants and employees on the basis of arrest and conviction records, coupled with probable constructive notice of Mr. Snow's conviction record prior to his hire, calls into question the position it takes in this matter for placing Mr. Snow, an Indian, into a position resulting in his resignation.

Based on the reasons stated, the evidentiary record and complainant's burden, which is less than at a hearing on the merits, the Commission finds in favor of complainant.

ORDER

Because the Commission finds probable cause of discrimination, this matter is to be scheduled for hearing proceedings.

Dated: \_\_\_\_\_, 1988 STATE PERSONNEL COMMISSION

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DENNIS P. MCGILLIGAN, Chairperson

DRM:rcr  
RCR03/5

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DONALD R. MURPHY, Commissioner

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LAURIE R. McCALLUM, Commissioner

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