STATE OF WISCONSIN PERSONNEL COMMISSION

JONATHAN KEUL,

Complainant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES [DOC*],

Respondent.

Case No. 87-0052-PC-ER

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 and consulted with the examiner. The Commission adopts the proposed decision and order, a copy of which is attached hereto and incorporated by reference, as its final resolution of this matter, with the addition of the following comments.

The primary thrust of respondent's contentions with respect to the proposed decision is that there was no reasonable accommodation available because complainant simply was unable to work at all during the period in question. However, the record only establishes that complainant was unable to perform his CO3 (Correctional Officer 3) job.[1] Respondent contends that the record supports a broader finding of total disability based on the fact that complainant qualified for and received income continuation benefits. However, Ms. Smick testimony on her handling of his application for these benefits did not include any reference to having seen any medical certification or medical evidence consistent with total disability. To the extent

[1] To the extent that the record does not contain an explicit finding to this effect, as respondent contends, it is so found.

that respondent is contending that, on the basis of complainant's qualification for income continuation benefits, it can be inferred or official notice can be taken that complainant must have been totally disabled, the Commission finds nothing in the administrative code or statutes that requires a total disability to perform any gainful employment as a prerequisite for income continuation benefits.

Respondent seems to be contending that complainant failed to apply for a part-time recreational assistant position, and that this affected its liability for accommodation. However, the record reflects that when complainant found out about this opening, it was too late to have pursued it. In any event, there was no offer to accommodate complainant by way of providing him with other employment. Rather, there was a vacancy for which he could have been considered on the same basis as any other applicant. Under these circumstances, there was no offer of accommodation, and complainant did not waive an accommodation or refuse a reasonable offer of accommodation when he did not pursue this position.

Finally, with respect to the issue of the retroactivity of McMullen v. LIRC, 148 Wis. 2d 270, 434 N.W. 2d 830 (Ct. App. 1988),[2] the proposed decision examined the three factors to be considered under the holding in McKnight v. General Motors Corp., 157 Wis. 2d 250, 458 N.W. 2d 841 (Ct. App. 1990), in deciding whether a judicial decision operates retroactively: whether the decision established a new principle of law, whether retroactive application would impede or retard the rule established or recognized by the decision, and whether retroactive application would produce inequitable results. The Commission further notes that in Browne v. WERC, 169 Wis. 2d 79, 112, 485 N.W. 2d 376 (1992), the Supreme Court held: "Because there is a presumption in favor of retroactive application all three...factors must be satisfied in order for a decision to apply retroactively." (emphasis added) (citations omitted). Since in this case there is only one factor (whether the decision established a new principle of law) that is even arguable, this decision reinforces the conclusion that McMullen operates retroactively

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2 In McMullen the court held that the duty of accommodation can involve a transfer.

ORDER

The attached decision and order is adopted as the Commission's resolution of this matter, as augmented by the above comments. The parties are to advise the Commission within 30 days of the date of this order as to whether they can reach agreement on remedy and attorney's fees. If they cannot, the Commission will entertain such further proceedings as are necessary to resolve any of those matters that are in dispute. In the meantime, the Commission will not enter a final order, but will retain jurisdiction for those purposes.

Dated: June 23, 1993 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

AJT:dkd

DONALD R. MURPHY, Commissioner

Parties:

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*Pursuant to the provisions of 1989 Wis. Act 31 which created the Department of Corrections, effective January 1, 1990, the authority previously held by the Secretary, Department of Health and Social Services with respect to the position(s) that is the subject of this proceeding is now held by the Secretary, Department of Corrections.

STATE OF WISCONSIN PERSONNEL COMMISSION

JONATHAN M. KEUL,

Appellant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 87-0052-PC-ER

PROPOSED DECISION AND ORDER

This matter was initiated on May 13, 1987, when complainant filed a charge of discrimination, alleging that respondent had discriminated against him based on handicap in connection with his discharge from his position as Correctional Officer 3 at Oakhill Correctional Institution, in violation of the Fair Employment Act, Subchapter II, Chapter III, Stats., and Sec. 230.37(2), Stats.

On February 24, 1988, the Commission issued an Initial Determination (I.D.), finding no probable cause to believe respondent had discriminated against complainant on the basis of his handicap and that Sec. 230.37(2), Stats., was outside the scope of an FEA complaint. On March 2, 1988, complainant requested the Commission to process his complaint of violation of Sec. 230.37(2). Respondent moved to dismiss and complainant responded by posing an amendment to his prior response to the I.D. and requesting reconsideration of the I.D.

By order dated June 1, 1990, the Commission granted respondent's motion to dismiss, only to the extent it applied to the civil service aspect of respondent's failure to have complied with Sec. 230.37(2), and granted complainant's request to amend his response to the I.D. and appeal the Commission's conclusion in the I.D. that Sec. 230.37(2) was outside the scope of the Fair Employment Act.

The question before the Commission is:

> Whether respondent discriminated against complainant on the basis of handicap in violation of the Fair Employment Act 1) in connection with failure to accommodate complainant during the period subsequent to his surgery for disc and vertebral problems in May 1983 and prior to and

including the date of his termination effective May 4, 1987; 2) in connection with respondent's termination of complainant's employment effective May 4, 1987; and 3) in connection with respondent's failure to have extended complainant's leave of absence beyond May 4, 1987.

FINDINGS OF FACT

1. At all times relevant, Jonathan Keul was employed as a Correctional Officer at Oakhill Correctional Institution, a unit in respondent's Division of Corrections.

2. On April 10, 1983, during off-work hours, Keul was injured in an automobile accident, causing him to not go to work for approximately two weeks.

3. When Keul returned to work, he told his supervisors that he was experiencing back pain and they accommodated him by switching him from his regular job to foot patrol and mail pickup and allowing him to lie down at night, while on third shift duty.

4. On March 31, 1984, Keul, having been diagnosed as experiencing disk and vertebral compression problems, went on sick leave and the following April had surgery on his back.

5. After exhausting his sick leave, Keul commenced medical leave (without pay) on May 4, 1984.

6. In late summer 1984 -- August and September -- respondent set a new policy, requiring correctional officers returning from medical leave to provide medical verification of their fitness to work.

7. Between May 4, 1984 and May 4, 1987, Keul underwent four surgical operations on his back and during this period he remained on medical leave until May 4, 1987, when respondent terminated his employment because of his medical condition.

8. Medical leaves were granted Keul by respondent in six-month increments. Each leave grant was predicated upon a declaration by Keul that he was physically unable to return to work for the specified time period requested.

9. Keul requested renewal of his medical leave, commencing May 4, 1984, six consecutive times.

10. Respondent denied Keaul's sixth renewal request because of respondent's determination it was contrary to its administrative rule, which permitted a maximum of three years.

11. On May 4, 1987, Keul went to work on crutches, but since he had not provided a doctor's statement confirming he could resume his duties without restrictions, he was sent home.

12. Keul's employment with respondent was terminated on May 4, 1987, for medical reasons, based on a March 30, letter from his physician stating Keul could not perform the duties required of his occupation and required further convalescence of three to five months.

13. During much of this period in question, Keul searched for jobs he believed he could perform with his physical disabilities and advised respondent he was interested in alternative employment of that nature.

14. Keul's search for a job included a telephone call to Rita Smick, Personnel Manager, Oakhill Correctional Institution. They discussed vacant positions and his training and background. Keul did not know the extent of his medical restrictions and provided no specifics about them to Smick.

15. Keul also contacted the Department of Vocational Rehabilitation (DVR). Hamdy Ezalarab, Director of respondent's Office of Human Resources. Ezalarab directed Equal Opportunity Specialist Susan Stemper to assist Keul in his job search.

16. Susan Stemper met with Keul and his attorney in April 1986, and was provided Keul's resume and some personal description of Keul's physical limitations. Stemper advised Keaul about job search techniques and later sent job announcements to him. Stemper also sent a memorandum to other agency Personnel Managers and AA/CRC officers, with a resume of Keul and his list of positions sought, informing them of Keul's injury suffered off the job and his search for a position. Respondent never actively sought to transfer complainant into a position that he could have performed in the context of his disabilities because it did not believe this was a required part of its duty of accommodation.

17. Stemper's last contact with Keul was no later than May 1987, when she left DHSS for another position out-of-state.

18. Keul never found an appropriate state job.

19. A release to work with restrictions was never written by Keul's physician during the period in question.

CONCLUSIONS OF LAW

1. The Commission has authority to hear this matter pursuant to §230.45(1)(b), Stats.

2. Complainant is "handicapped" within the meaning of §111.32(6), Stats.

3. Respondent is an "employer" within the meaning of §111.32(6), Stats.

4. Respondent terminated complainant on May 4, 1987, because he could not perform duties required of his position as Correctional Officer 3.

5. Respondent has the burden of proof regarding requirements of reasonable accommodation and hardship within the meaning of §111.34.

6. Respondent failed to meet its burden of proof with respect to reasonable accommodation.

DISCUSSION

It is undisputed that Jonathan Keul, complainant, was a "handicapped individual" as defined in §111.32(8), Stats., during the period in issue -- April 1984 to May 1987. It is clear that Keul was discharged by respondent for medical reasons based on his handicapping condition, which his physician stated caused him to be unable to perform duties required of his position as Correctional Officer 3. As a consequence, this case is focused on the question of accommodation as provided in §111.34(1)(b), and as potentially applicable under §230.37(2), Stats., as they pertain to transfers.[1] Under §111.34(1)(b),

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[1] Sec. 230.37(2), Wis. Stats., provides:

> "When an employe becomes physically or mentally incapable of or unfit for the efficient and effective performance of the duties of his or her position by reason of infirmities due to age, disabilities, or otherwise, the appointing authority shall either transfer the employe to a position which requires less arduous duties, if necessary demote the employe, place the employe on a part-time service basis and at a part-time rate of pay or as a last resort, dismiss the employe from the service. The appointing authority may require the employe to submit to a medical or physical examination to determine fitness to continue in service. The cost of such examination shall be paid by the employing agency. In no event shall these provisions affect pensions or other retirement benefits for which the employe may otherwise be eligible."

Complainant never obtained a medical release to return to his CO 3 position. In addition, complainant testified that he was on income continuation and would not accept a part-time position or other positions that would not provide

Stats., as interpreted by the Commission in Geise v. DNR, 83-0100-PC-ER (1/30/84), the burden of proving inability to accommodate rests with the employer.

Respondent argues that it had no legal duty to accommodate complainant under §230.37(2), Stats., or under McMullen v. LIRC, 148 Wis. 2d 270, 434 N.W. 2d 830 (Ct. App. 1988), claiming §230.37(2), Stats., does not apply to represented employees such as complainant, and McMullen does not apply because complainant's physician said that he could not work and the decision was prospective. Further, respondent argues that it did, in fact, accommodate complainant by granting complainant medical leaves for a total of three years, by considering non-security positions and providing job notices and job counseling, and by standing ready to return complainant to work upon medical release by his physician.

Whether §230.37(2), Stats., is co-extensive with the WFEA need not be resolved here. Under McMullen the court concluded that: "reasonable accommodation" may include a transfer of a handicapped employee to another position for which he is qualified, depending on the facts of each individual case. The court based its conclusion on the recognition of §111.34 (WFEA) as a remedial statute and the legislative intent to "encourage and foster to the fullest extent practicable the employment of all properly qualified individuals regardless of any handicap." Therefore, addressing respondent's argument that McMullen is only applicable prospectively, the general rule is that: '[c]ourts apply the law as it is at the time of the transaction underlying the lawsuit." McKnight v. General Motors Corp., 157 Wis. 2d 250, 253, 458 N.W. 2d 841 (Ct. App. 1990). (citation omitted) In Hanson v. Madison Service Corp., 125 Wis. 2d 138, 140, 370 N.W. 2d 586 (1985), the Court discussed the issue of retroactivity of a United States Supreme Court interpretation of 42 U.S.C. §1983 as follows:

> Wilson's [Wilson v. Garcia, 471 U.S. 261, 85 L. Ed. 2d 254, 105 S. Ct. 1938 (1985)] interpretation of sec. 1983 is retroactive. This is so because the court's analysis was of the legislative intent behind sec. 1983: "Had the 42d Congress expressly focused on the issue decided today, we believe it would have characterized sec. 1983 as conferring a general remedy for injuries to personal rights." [471 U.S. at 278, 85 L. Ed. 2d at 268] Though the Supreme Court only recognized in 1985 the

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comparable income. Therefore, the only option under this statute that could be involved in this case is transfer.

> requirement of sec. 1983 that state personal injury statutes of limitation govern sec. 1983 claims, that requirement must have been present in 1871, when sec. 1983 was enacted.

Since McMullen was based on the perceived legislative intent behind §111.34(1)(b), Stats., Hanson constitutes precedent for a retroactive application of McMullen here.

Pursuant to McKnight however, there are certain circumstances when a judicial decision should not be given retroactive application. The first factor that must be considered is whether the decision in question (McMullen) establishes a "new principle of law":

> A decision is not a new principle of law under the *Chevron* analysis unless it has overruled "clear past precedent on which litigants may have relied," or has decided "an issue of first impression whose resolution was not clearly foreshadowed." *Id*, 404 U.S. at 106. A decision has overruled "clear past precedent" when the supplanted rulings were, in fact, *precedent*; that is, *binding* on the tribunal faced with the decision of whether to apply the new decision retrospectively. 157 Wis. 2d at 254.

Since McMullen was the first reported case on this issue, it obviously did not overrule any precedent. However, an argument could be made that McMullen decided "an issue of first impression whose resolution was not clearly foreshadowed," id., in that this commission had held before McMullen that an employer is not required by §111.34(1)(b), Stats., to transfer an employe to a different job as an accommodation. Harris v. DHSS, 84-0109-PC-ER, 85-0115-PC-ER (2/11/88). However, this decision was issued subsequent to Mr. Keul's termination on May 4, 1987. Furthermore, the Commission noted in Harris that the "[r]esolution of this question is not without difficulty," and discussed the issue for five pages before reaching its conclusion. The only Commission decision cited was Rau v. UW-Milwaukee, 85-0050-PC-ER (2/5/87), for the proposition that "the employer was not required to permanently assign some of the handicapped individual's work to other staff as an accommodation." While Rau supports the holding in Harris, it also can be harmonized with McMullen.

Therefore, while there are arguments on both sides of the issue, in the Commission's opinion, the circumstances do not support a conclusion that the first factor for a prospective-only approach to McMullen is present.

The second factor under McKnight is "whether retrospective application of the decision will 'further or retard its operation.'" 157 Wis. 2d at 258 (citations omitted) The Commission does not perceive how a retroactive application of the McMullen holding would retard its operation.

The third factor is "whether retrospective application ... would 'produce substantial inequitable results.'" 157 Wis. 2d at 259. (citations omitted) Beyond the imposition of liability for a course of conduct that was not known to have been in violation of the WFEA at the time it occurred, which is usually the case where a holding is applied retroactively, there is no substantial inequity involved in imposing a retroactive application of McMullen. The Commission notes in this regard that the civil service code long has imposed a requirement that disabled employes who are unable to perform the duties of their jobs be transferred, if possible, prior to termination. §230.37(2), Stats.[2]

Turning to the merits of the issue of accommodation involving transfer, the evidence establishes that respondent believed it had no legal responsibility, but assisted complainant through job counseling. Susan Stemper, an Equal Opportunity Specialist of respondent, over a period of several months beginning in April 1986, worked with complainant in search of a position he could perform with his physical disabilities. She talked with complainant and his attorney, she talked with Tom Newman, a counselor from respondent's Division of Vocational Rehabilitation, she sent job announcements to complainant and she sent a memorandum to all state agencies regarding complainant and his search for a job.

It is the view of the Commission that this evidence regarding respondent's actions to accommodate complainant falls short of "the duty to reasonably accommodate" expressed in McMullen. Respondent failed to determine whether an appropriate job opening was available through transfer and to offer any such vacancy to complainant. Instead, it left the pursuit of such matter to complainant, and it is, in this respect, the Commission believes respondent failed to meet the McMullen test of reasonable accommodation. Respondent failed to prove its inability to accommodate complainant. Therefore, we must find in favor of complainant. Since

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[2] While this provision arguably was inapplicable to complainant because of his status as a represented employe, it still is material to the issue of whether the requirement that the employer attempt to transfer a disabled employe is particularly opprobrious.

respondent discharged complainant prior to having discharged its duty of accommodation, the discharge accordingly was illegal in that respect.

ORDER

Respondent's decision discharging complainant is rejected and remanded for action in conformance with this decision.

Dated:_____, 1993 STATE PERSONNEL COMMISSION

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LAURIE R. McCALLUM, Chairperson

DRM:rcr

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DONALD R. MURPHY, Commissioner

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GERALD F. HODDINOTT, Commissioner