STATE OF WISCONSIN PERSONNEL COMMISSION

WILLIAM E. SHEVLIN,

Complainant,

v.

State Public Defender, OFFICE OF PUBLIC DEFENDER,

Respondent.

Case No. 87-0101-PC-ER

FINAL DECISION AND ORDER

This matter is before the Commission following promulgation of a proposed decision and order by the hearing examiner. The Commission has considered the parties' written submission concerning the proposed decision and order and has consulted with the examiner. While the Commission agrees with the manner in which the proposed decision and order resolves this case, certain additional comments are appropriate with respect to certain legal aspects of the matter.

Conclusions of Law #2 and #3 state that complainant has the burden of proof as to both aspects of this case. It is correct that in a handicap discrimination case the complainant initially has the burden of proof. If the complainant establishes certain elements of his or her claim, the burden shifts to the employer.

The parties stipulated to the following issues in this case (Prehearing Conference Report dated May 9, 1989):

1. Whether respondent discriminated against complainant in violation of the FEA on the basis of handicap, with respect to failure of accommodation, in connection with his discharge.

2. Whether there is probable cause to believe respondent discriminated against complainant on the basis of handicap in violation of the FEA with respect to its determination that he could not "adequately undertake the job-related responsibilities of [his] employment," §111.34(2)(a), (b), Stats., in connection with his discharge.

The examiner considered the second issue first and directly addressed the question of whether complainant could "adequately undertake the job-related responsibilities of [his] employment." The framework for analysis of cases of this nature is set forth in Harris v. DHSS, No. 84-0109-PC-ER, 85-0115-PC-ER (2/11/88), as follows:

> 1) Whether the complainant is a handicapped individual;
>
> 2) Whether the employer discriminated against complainant because of 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 . . . .

If the complainant successfully establishes the first two elements, the burden of proof as to the third element shifts to the employer, Samens v. LIRC, 117 Wis. 2d 646, 664, 345 N.W. 2d 432 (1984), and unless there is a special duty of care, the standard is to a "reasonable probability." Dairy Equipment Co. v. DILHR, 95 Wis. 2d 319, 332, 290 N.W. 2d 330 (1980).

The proposed decision's discussion of the second issue goes directly to the third element which was the focus of the stipulated issue, and does not explicitly address the first two elements. The Commission agrees with the examiner that this is the correct approach to take in view of the stipulated issues which govern this case.

In regard to this third element, the Commission agrees with the examiner's finding that complainant could not or would not "adequately undertake the job-related responsibilities of [his] employment, based on his "substantial problems with his attendance, with his aversion to working with certain clients, with his accessibility and with his reluctance to handle jury trials."[1]

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[1] Complainant cites the case of "another staff attorney who went to trial on only two cases in five years and regularly was either late for or totally missed court appearances without just cause" but who was not disciplined, objections p. 16. This apparently refers to a situation that occurred under Mr. Reid's predecessor, and has little relevance to the question of whether complainant satisfied its burden on this record with respect to complainant's performance.

As to the first issue (accommodation), if the complainant can establish that he is a handicapped individual and that he was discharged because of his handicap, the employer has the burden not only of proving that the handicap is reasonably related to his ability to adequately perform his job, but also the burden of proving that it has satisfied its duty of accommodation, Vallez v. UW-Madison, 84-0055-PC-ER (2/5/87). This issue was heard on the merits, and the Commission agrees with the examiner that complainant did not establish that he is a handicapped individual or that he was discharged because of his handicap, due to the inadequacy of the medical evidence of record.[1]

Assuming, arguendo, that complainant had established that he is a handicapped individual and that he was discharged because of his handicap, the Commission would find that respondent has satisfied its burden of proving that it had satisfied its duty of accommodation. The Commission agrees with the examiner that the record does not establish a sufficient connection between the accommodations requested by complainant and his alleged handicapping conditions. The Commission also agrees with the examiner that the potential options under §230.37(2), stats., were unavailable to respondent.

ORDER

The attached proposed decision and order is incorporated by reference and adopted, as modified above, as the Commission's final disposition of this matter, and this charge of discrimination is dismissed.

[1] The Commission notes that an acknowledgement by complainant that "at the time of his discharge, that his physical ailments were treatable and under control," proposed decision at p. 19, would not necessarily be inconsistent with a finding of handicap if sufficient other evidence were available.

Dated: April 17, 1990 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

AJT:gdt

Parties:

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Wausau, WI 54401

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PROPOSED DECISION AND ORDER

Complainant initially filed charges with this Commission, alleging respondent discriminated against him on the basis of handicap, Fair Employment Act (FEA) retaliation and age with respect to denial of promotion and, later, discharge from employment. Complainant's charges against respondent were investigated by an Equal Rights Officer of the Commission. After the investigation was completed, the Equal Rights officer issued an Initial Determination (ID) in which he concluded there was probable cause to believe respondent failed to accommodate complainant, but there was no probable cause to believe respondent discriminated against complainant on the basis of age or retaliation. Also, he concluded complainant's allegation concerning denial of promotion was untimely.

This matter is before the Commission on the following issues:

1. Whether respondent discriminated against complainant in violation of the FEA on the basis of handicap, with respect to failure of accommodation, in connection with his discharge.
2. Whether there is probable cause to believe respondent discriminated against complainant on the basis of handicap in

violation of the FEA with respect to its determination that he could not "adequately undertake the job-related responsibilities of [his] employment," §111.34(2)(a),(b), Stats., in connection with his discharge.

A hearing was held on complainant's appeal and charge of discrimination, testimony was given, exhibits were received into evidence and post-hearing briefs were submitted. The following findings of fact, conclusions of law, decision and order are based on the record of that hearing.

FINDINGS OF FACT[1]

I

[1] Complainant's date of birth is April 20, 1943.

[2] Complainant was employed by respondent State Public Defender as an Assistant State Public Defender from August 6, 1979, until his discharge effective September 25, 1987. He worked in the Wausau office from the fall of 1980.

[3] Complainant had a number of medical problems since 1979 which required frequent medical attention. A June 4, 1984, medical evaluation by Dr. David D. Jenkins of Wausau, after complainant reported to the emergency room with a variety of symptoms including chest pains, included the following assessment:

1. Essential hypertension
2. Bronchospastic lung disease
3. Exogenous obesity
4. History of gout
5. Anxiety state

It would appear that his work load and problems with this have lead to an intolerable situation he has not been able to adequately handle. Counseling was carried out as concerns this end.

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[1] Finding of Fact 1-10, 12-28 were stipulated by the parties.

Complainant's medications at that time were noted as Tenormin, Indocin, Zyloprim, Hydrochlorothaizide, Brethine and Theodur.

[4] Dr. Jenkins strongly recommended that complainant get away from his work environment. Dr. Jenkins summarized his conclusions in a June 14, 1984, letter as follows:

> Mr. William Shevlin is a 41 year old gentleman that I had occasion to see in the emergency room for anterior chest pain. When he was reviewed by me, he had a number of very significant factors for cardiovascular events, including significant hypertension, chronic obstructive pulmonary disease and exogenous obesity.
>
> While his physical examination was not remarkable, other than for the problems mentioned above, he was in an extreme agitated and emotional state which obviously could precipitate further medical complications and problems. After discussion with Dr. G. H. Schroeder, it was recommended that Mr. Shevlin seek a medical leave of absence, not only to stabilize his emotional state, but to insure that any of his stated medical problems are not exacerbated. A period of time free from job responsibilities was suggested.

[5] On June 6, 1984, complainant submitted a written request for a medical leave of absence for a period of at least 6 weeks.

[6] Respondent granted complainant medical leave from June 7, 1984, to July 20, 1984.

[7] By letter to complainant dated July 27, 1984, complainant's supervisor (John M. Leonard, First Assistant State Public Defender, Wausau) informed complainant that he and the chief of the trial division (Marcus Johnson) had "decided to ask you to submit a medical certificate from your physician, verifying that your medical condition is now such that you are fit to resume your regular duties as a public defender and trial attorney." The letter further advised that in the event that complainant's doctor declared complainant not fit to resume the full performance of his duties without risk of harm to himself, his time off work would be extended to permit full recovery, and his position would be held open until complete recovery, "so

long as that period is not so excessive as to conflict with the needs of the agency."

[8] The letter which Mr. Leonard enclosed described the duties of a staff attorney and asked the doctor to certify whether complainant was medically fit to resume full performance of those duties, and, if not, when he would be likely to resume those duties.

[9] By letter dated August 6, 1984, Dr. Gerald H. Schroeder of Wausau advised Mr. Leonard, in part, as follows:

> I have seen Mr. William Shevlin as a patient intermittently since September of 1982. He is under treatment for chronic medical problems, including essential hypertension and bronchospastic lung disease. It has been noted by me, as well as other physicians who have treated Mr. Shevlin that at times he has showed signs of fairly extreme stress and nervous exhaustion. In discussing the situation with him, a lot of the symptoms seem to be related to this work situation.

Dr. Schroeder stated that complainant was medically fit to return to work as of July 27, 1984, but that ". . . some consideration regarding this work load, driving, etc., should be given because of his chronic medical problems. . . ." Thereafter, complainant returned to work.

[10] By letter dated August 19, 1985, to Carla Blum-Aslam, respondent's personnel manager, complainant forwarded a "handicapped self-identification survey form" with supporting documents. This form claimed handicapped status which was described as follows:

> Chronic obstructive pulmonary disease, bronchospastic lung disease, ulcerative colitis, hypertension (essential), gout, peptic ulcers, gastrointestinal bleeding, side effects of meds., exogenous obesity, poor night vision, nervousness, sleep disorder."

In said document, complainant claimed the following changes in job duties were needed to help him perform his job better:

> Stress reduction to reduce risk of significant cardiovascular events from above, limit travel to Marathon County, limit intake to walk-ins when incontinent, i.e., during moderately severe active ulcerative

> colitis, reduce case load as necessary when lung condition and/or cardiovascular condition (CVC) is exacerbated, rest room in close proximity.

[11] On September 10, 1986, complainant made a written request to be considered for the position of First Assistant State Public Defender in Wausau, a position Mr. Leonard just vacated. He was not hired for the position. It was filled by a co-worker, John R. Reid, who then became complainant's supervisor.

[12] By a letter dated September 29, 1986, complainant alleged there was discrimination on the basis of age and handicap in the hiring process for the position. Judith P. Collins, Deputy State Public Defender and the agency's Affirmative Action Officer, responded to this charge in a letter dated October 23, 1986, which included the following:

> I have concluded that there was no discrimination based on handicap or age. The decision was based on a review of the resume, the interview, the applicant's performance within the agency, and general knowledge about the person in the agency. In filling this position, we were looking for management skills, knowledge of the region, an understanding of the role of the First Assistant in our system, trial skills, interpersonal communication skills, and the demonstrated respect of his/her peers. Based on these factors, you were not selected for this position.
>
> As you know, this agency has a strong demonstrated commitment to affirmative action, both in hiring and promotion. In our hiring processes, the concept of expanded certification for any of the affirmative action groups, including women, minorities, and handicapped persons, applies as a factor once a minimum threshold of qualifications are met for the position being filled. In this case, you did not meet the minimum threshold of qualifications, so the concept of expanded certification did not apply.

[13] Complainant was incensed by this response, particularly the assertion that he lacked "the minimum threshold of qualifications (management skills, knowledge of the region, an understanding of the role of the First Assistant in our system, trial skills, interpersonal communication skills, and the demonstrated respect of his/her peers"). By memo to Mr. Reid

dated December 19, 1986, complainant stated that the memo from Ms. Collins had effectively certified him as incompetent to handle a complicated felony case on which he was working at the time, and had caused him a great deal of emotional and physical stress that had aggravated his pre-existing conditions. Complainant detailed a number of problems he was experiencing, including the following:

> . . . I now have reason to believe that I have a heart arrhythmia and am experiencing symptoms related to a prolonged reduced flow of oxygen to the brain. The arrhythmia has been noticeable in blood pressure tests wherein missed beats are evident. In spite of my having taken all medication as prescribed, even my resting blood pressure has frequently been dangerously high over the past few weeks, probable because of the tremendous difficulty I have had getting enough oxygen with each breath. Symptoms of oxygen reduction to the brain have included speech problems, memory lapses, inability to identify my house key, unexplained dropping of items I have picked up, occasional inability to figure out what a number is or which way it should be held, and transversing several miles of road in an apparent (nonalcohol related) blackout.

He requested that pending upcoming medical evaluations scheduled for January 7-9, 1987 (Mayo Clinic), and January 15, 1987 (Marshfield Clinic), he be replaced on the aforesaid complicated felony case, and that the "only felony work I do be limited to garden variety burglaries, OMVWDCs, etc."

[14] Mr. Reid refused to replace complainant on the felony case in question, but told him he would fill in for him while complainant took care of his medical needs, and would reassess the situation after complainant had completed his medical consultation.

[15] Complainant was absent from work only a few days in January. He commenced a general medical examination at the Mayo Clinic but did not complete the entire course of examination due to logistical problems. The Mayo Clinic physician made some preliminary or tentative conclusions that noted asthmatic bronchitis, proctitis, the possibility of an ulcer, and also

observed that his "insomnia may be from the stresses in your work and your work schedule but sometimes can be a sign of early depression." The doctor recommended that complainant's physician evaluate the possibility of a change in medication.

[16] When complainant returned from the Mayo Clinic, he advised Mr. Reid that he was trying a change in medication and he felt he could handle the aforesaid felony litigation, which he reassumed. Complainant canceled his Marshfield Clinic evaluation for his sleep disorder because he was hopeful it would respond to the change in medication.

[17] Complainant proceeded to try the aforesaid felony case which resulted in a not guilty verdict after a complicated four day trial which concluded on February 19, 1987.

[18] In a formal performance evaluation for the period of 1986 and through March 1987 which was completed on April 29, 1987, Mr.©10

Reid rated complainant as satisfactory or better in a number of areas, but stated that:

A. Complainant needed to improve in the area of pretrial motion practice. Mr. Reid stated that of 60 criminal cases closed since January 1, 1987, apart from the aforesaid complex criminal matter, complainant filed 16 computerized discovery motions, and no evidentiary, illegal arrest or suppression motions, and that in Mr. Reid's experience this was highly unusual.

B. Complainant's willingness to try cases was inadequate. Mr. Reid stated that complainant had had only 2 jury trials in almost 3 years, and that he should be trying at least 5 to 10 cases per year.

C. Complainant tended to maneuver in such a way as to get rid of difficult clients, causing problems for the other lawyers in the office.

D. Complainant's office attendance and work hours were not acceptable and complainant would henceforth be required to be in the office or other work station between 8:00 a.m., and 5:00 p.m.

[19] Subsequent to this evaluation, Mr. Reid felt that complainant's performance did not improve except for the fact that he complied with this directive regarding being in the office between 8:00 and 5:00. Mr. Reid consulted with Mr. Johnson concerning complainant on an ongoing basis, and when Mr. Johnson became aware of complainant's memo of December 19, 1986, he directed Mr. Reid by letter dated June 10, 1987, to conduct a "performance review" of complainant to address the quality of representation provided by complainant and whether he could perform all the duties of Assistant Public Defender. Mr. Johnson also directed that all complainant's cases be reassigned and that he not be assigned any new cases.

[20] Mr. Reid completed this performance review, which is set forth in a letter to Mr. Johnson dated June 18, 1987, which contained the following conclusions of inadequate performance:

A. Pre-trial motion practice. Mr. Reid referred to the 60 files he reviewed as part of the aforesaid performance evaluation, and also cited a review of 30 pending criminal files he reviewed on June 12, 1987, which revealed 7 computerized discovery motions and one motion to dismiss.

B. Willingness to try cases. Mr. Reid cited the 2 jury trials in 3 years referred to in the April performance evaluation. He stated that other

attorneys in the Wausau office average between 5 and 10 trials per year Mr. Reid also said:

> By Bill's own admission, his preference is not to deal with difficult clients or complex criminal cases. My observation is that many times a "difficult client" translates into one who is not willing to negotiate a settlement of his case, and a "complex criminal case" is one which is likely to be tried. Obviously, such an attitude is not acceptable for one who is employed to provide effective and aggressive trial representation.
>
> In the past, Bill has shed himself of difficult clients by requesting to be removed from their cases. Other times, the clients themselves have complained that they desired an Attorney other than Mr. Shevlin. Bill has repeatedly expressed the desire that this problem be resolved on a long-term basis by some administrative action to relieve him of stressful clients or cases. Such a step is not feasible, since it would force those cases on the other members of the Wausau Office staff, all of whom carry their own large case loads and their own fair share of stress-causing problems. Such a transfer of responsibilities would also not address Bill's underlying reluctance to try cases.

C. Office attendance. Mr. Reid cited chronic absenteeism, much of it connected to illness, including being absent 15 out of 48 working days between November 3, 1986, and January 16, 1987, and 14 of the next 16 working days after completion of the aforementioned complex felony trial on February 19, 1987. He stated that this caused considerable problems for other staff, and referred to an attached letter of complaint dated May 26, 1987, from Assistant Public Defender Edmonds. He also referred to complainant leaving the office prior to its closing (5:00 p.m.), and being unavailable by phone or otherwise after work hours. Mr. Reid acknowledged that complainant had complied with his April 29, 1987, directive to be at work between the hours of 8:00 a.m. and 5:00 p.m.

D. Effectiveness of client interactions. Mr. Reid stated that complainant falls particularly short in his handling of problem cases,

frequently precipitating situations where a "conflict" develops or the client requests a different lawyer, causing undue workload and problems for other staff in covering for him and having to take a disproportionate share of difficult clients.

[21] Mr. Reid concluded his performance review by stating: "I must conclude that Bill cannot presently perform all duties of an Assistant State Public Defender."

[22] After Mr. Johnson received Mr. Reid's June 18, 1987, performance review, he and Mr. Reid scheduled a meeting on July 10, 1987, with complainant in Madison to discuss the situation. Mr. Reid notified complainant of this meeting on July 9th. There is a dispute as to whether Mr. Reid characterized this meeting as tentative and subject to confirmation by complainant. In any event, complainant surmised the meeting would involve his discharge. Complainant had some non-work-related matters scheduled, and he elected not to attend the July 10th meeting.

[23] Subsequently, Mr. Johnson and Mr. Reid spoke to complainant by phone on July 28, 1987, and informed him verbally of their recommendation for complainant's discharge. They had provided complainant a copy of Mr. Reid's June 18, 1987, performance review referred to in paragraph 20, above, sometime on July 28th prior to this conversation.

[24] On August 6, 1987, complainant filed a "complaint" with respondent to challenge the proposed disciplinary action. Pursuant to respondent's internal disciplinary process, Richard Phelps, State Public Defender, convened a hearing on September 3, 1987, at which evidence was taken with respect to the allegations set forth in the June 18, 1987 performance review.

[25] Complainant made a request during the course of the hearing for the application to his case of §230.37(2), Stats., which 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 required 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.

[26] By letter dated September 9, 1987, complainant made a post-hearing submission to Mr. Phelps which included the following:

a) Charts correlating respondent's time and attendance exhibits with his own work and medical records. This showed such things as that when respondent's records showed he had called in sick or had left early, he in fact had documented medical problems, had worked late at night or early in the morning and/or at home, had taken informal comp. time, etc;

b) Copies of additional medical records;

c) A list of 3 cases prepared but not tried;

d) A list of 6 1987 contested hearings (mental commitments, etc.);

e) Further comments on 3 cases cited by Mr. Reid.

Complainant reiterated that regarding the waiver hearing, he had appeared and had been advised that the state had dismissed the case. With respect to the letter from the client complaining about him not returning calls, he stated he had tried to return her calls but had been unable to make contact and eventually everything had been resolved

satisfactorily. With respect to the case about which Mr. Reid had criticized him for failing to have filed a motion to suppress a statement by the defendant, complainant stated that such a motion could have been made at any time prior to or during trial, and there were in the file incriminating statements from two other witnesses in addition to the arguably tainted admission by the defendant.

[27] On September 25, 1987, Mr. Phelps issued a written decision which concurred in the discharge recommendation and discharged complainant effective September 25, 1987. This decision was based on the following conclusions concerning complainant's performance reached by Mr. Phelps:

A. Inadequate motion practice, citing the statistics set forth by Mr. Reid in his performance review and Mr. Reid's estimate that the typical practice in the Wausau office was to file discovery motions in 70% - 80% of cases and evidentiary motions in 15% - 20%.

B. Insufficient willingness to try cases, citing complainant's 3 jury trials over 5 years as opposed to Mr. Reid's estimate that the attorneys in the Wausau office averaged 5 - 10 trials per year.

C. Inadequate relationship with clients, citing complainant's attempts to transfer or avoid difficult clients ("clients who call often, are aggressive, have mental problems, are assertive as to their procedural and legal rights including the right to trial by jury"). Mr. Phelps also referred to complainant's "client aversion" and quoted complainant's reference in his complaint challenging his discharge to "the extraordinarily high number of mouthy, unbathed, shit-eating, mental, hostile and resistive clients."

D. Inadequate punctuality and attendance. Mr. Phelps referred to complainant's frequent absences, irregular hours and failure to be adequately available to clients and to keep them informed of the status of their cases.

E. Lack of cooperation with other staff. Mr. Phelps cited complainant's frequent request on little or no notice to have staff either fill in for him or to attempt to get matters postponed.

F. Failure to keep accurate time records. Mr. Phelps concluded that complainant failed to follow agency rules on keeping appropriate time records by ordering the office secretary to automatically mark his time records to represent eight hour days and 40 hour work weeks. Mr. Phelps noted that complainant terminated that practice when he was confronted with it.

G. Unreasonable failure to arrange case load backup coverage when on authorized leave. This basically involved the same conduct discussed above under subparagraphs D and E.

[28] Mr. Phelps further concluded with respect to complainant's assertions regarding handicap accommodations that it was unclear whether complainant's condition fit the definition of a handicap under the Fair Employment Act, but that in any event, the accommodations sought by complainant would "pose a hardship on the employer's program" pursuant to §111.34(1), Stats. The accommodations sought by complainant were set forth as follows:

> no week long trials;
> no "aggressive" clients;
> adequate time off after each trial so that he can recover;
> the ability to transfer or avoid "difficult" clients who call a lot;
> a system of communication to be arranged so that he not be bothered at home;

permission to continue to conduct his work with the present unusual hours;
a recognition that his condition will deteriorate over time (in particular the bronchial problems)

Mr. Phelps concluded that the accommodations complainant sought would not allow complainant to do the same job as the other attorneys in the office, but rather would redefine his job to the detriment of the other attorneys in the office, who would have to absorb a disproportionate share of the problem clients, difficult cases, etc. Mr. Phelps did not address in this document or elsewhere complainant's request for the application to him of §230.37(2), Stats.

II

[29] John M. Leonard supervised complainant from August 1980 to September 1986. It was Leonard's belief that complainant suffered from a variety of physical, emotional and psychological problems. Mr. Leonard believed complainant's medical problems included lung and chest problems, high blood pressure, gout and, in 1985, incontinence.

[30] Mr. Leonard believed complainant's medical and emotional problems generally did not cause complainant to miss work, but such conditions sometimes affected his capacity to work.

[31]] Mr. Leonard was willing to accommodate complainant. He granted complainant's request to limit his travel to Marathon County and allowed complainant to restrict his office hours.

[32] Prior to 1985, few complaints were made by office staff about the accommodations granted complainant.

[33] The office staff changed in 1985. Later, two office staff members began to complain about complainant's office hours and his availability.

[34] Mr. Leonard's one criticism of complainant was that complainant was not as available as necessary for business calls when he was at home.

[35] Most of complainant's requests to Mr. Leonard for accommodations were made orally and in most cases they were granted.

[36] To Mr. Leonard's knowledge, complainant never requested appellate work or part-time status, while Leonard was complainant's supervisor.

[37] Prior to September, 1986, when Mr. Leonard left the Wausau office, there were no part-time attorney positions in his office or region. The Wausau office was in a regional division, which consisted of six offices.

[38] John Reid, who supervised complainant from September 29, 1986 until complainant was discharged, was generally aware of complainant's medical complaints, but he took no position on the cause of complainant's work performance problems.

[39] Complainant complained to Mr. Reid on numerous occasions about feeling great stress. Mr. Reid believed complainant should have sought medical treatment. He accommodated complainant based on the doctor's medical treatment program.

[40] In January, 1987, complainant was given a general medical examination at the Mayo Clinic, including some blood work. Complainant's Mayo Clinic medical report indicated no serious medical problems which would prevent complainant from work. The medical report did contain recommendations to complainant regarding medication and additional testing.

[41] Complainant has a number of chronic medical conditions, which were treatable.

[42] In September, 1987, complainant's lung problems, blood pressure and incontinence were under control.

[43] Complainant believed he could manage a normal public defender case load, except, because of the increased stress factor, cases involving aggressive clients or protracted litigation.

CONCLUSIONS OF LAW

1. This Commission has jurisdiction over these parties and their matters pursuant to §230.45(1)(b), Stats.

2. Complainant has the burden of proving there is probable cause to believe he was discriminated against, on the basis of handicap, in violation of the Wisconsin Fair Employment Act (WFEA) by respondent with respect to its discharge of him.

3. Complainant has the burden of proving respondent discriminated against him in violation of the Wisconsin Fair Employment Act (WFEA) on the basis of handicap with respect to failure of accommodation.

4. Complainant has failed to meet his burden of proof in both respects: there is no probable cause to believe he was discriminated against by respondent in violation of the WFEA, on the basis of handicap with respect to his discharge and he was not discriminated against by respondent in violation of the WFEA on the basis of handicap with respect to failure to accommodate.

DECISION

Complainant argues that he has established there is probable cause to believe the respondent discharged him because of his handicap and that respondent discriminated against him by failing to make accommodations for his handicap. In turn, respondent asserts that complainant has failed to prove he is handicapped and that complainant was discharged because of his poor job performance, which was not connected to his medical condition. With

respect to complainant's charge of failure to accommodate, respondent answers that no accommodations were available.

DISCHARGE

The issue which governs this aspect of the case is:

Whether there is probable cause to believe respondent discriminated against complainant on the basis of handicap in violation of the FEA with respect to its determination that he could not "adequately undertake the job-related responsibilities of [his] employment," §111.34(2)(a),(b), Stats., in connection with his discharge.

The Commission finds that complainant, notwithstanding his excellent abilities as a lawyer, was discharged because of his overall inability to adequately perform his job. Complainant's position in regard to this issue is confusing. He contends that he is able to adequately perform his job as an Assistant State Public Defender as long as he doesn't have to handle difficult clients or jury trials and can have flexible hours. However, it is clear from the record that consistent attendance, working with difficult clients, accessibility to clients and office staff, and representing clients at jury trials are part and parcel of the job of an Assistant State Public Defender.

The Commission looked beyond complainant's representations in this regard to his actual performance in order to decide this issue.

The testimony of witnesses of both parties made it clear that complainant failed to handle job responsibilities in several important areas.

Complainant presented Mr. Leonard and Ms. Carol Wakely, a former part-time secretary, who attested to complainant's ability and capacity to manage his duties as a public defender. However, Leonard also testified that complainant's medical problems sometimes affected his capacity to work but

did not hurt matters short of jury trials. Both Leonard and Wakely testified to complainant's lack of accessibility to clients. Leonard said the office accommodated complainant and was committed to his rehabilitation. Also, Leonard testified that beginning in 1985, the staff began to complain more about complainant's irregular hours and inaccessibility. He said the office morale declined, but continued to perform well.

Complainant also cross-examined John Reid, complainant's supervisor from September 29, 1986, until complainant's discharge. Complainant's cross-examination of Reid centered upon respondent's stated reasons for discharging complainant and attempted to put into question the validity of respondent's analysis of complainant's job performance. Through Reid's cross-examination, complainant established that respondent's assessment of complainant's job performance had some flaws. It was clear that it is difficult to determine a lawyer's effectiveness through a statistical analysis of his case load on the basis of motion practice and jury trials. However, the record shows that, while complainant possessed some excellent lawyering skills, he had substantial problems with his attendance, with his aversion to working with certain clients, with his accessibility and with his reluctance to handle jury trials.

It is clear from the record that complainant was unable or unwilling to "adequately undertake the job-related responsibilities" of his position within the meaning of §111.34(2), Stats. Consistent attendance, working with difficult clients, accessibility to clients and office staff and representing clients at jury trials are part and parcel of the job of an Assistant State Public Defender.

ACCOMMODATION

Under the FEA, §111.34(1)(b), Stats., employment discrimination because of handicap includes refusing to reasonably accommodate an employe's handicap.

As proof of being handicapped, complainant presented, as exhibits, medical reports from October 1982 through June 1987. These reports contained descriptions of several kinds of medical conditions possessed by complainant. Also, complainant and other witnesses testified to complainant's physical behavior during periods corresponding to his medical reports.

The evidence showed that Mr. Leonard, complainant's supervisor prior to September, 1986, perceived complainant as handicapped, but Leonard's successor, John Reid, did not. Except for testimony of a temporary impairment in late 1986, complainant presented no evidence, for the period after 1985 until discharge, showing a medical condition which would merit his classification as a handicapped person as defined in §111.32(8) of the Wisconsin Fair Employment Act. There is even evidence to the effect that complainant acknowledged, at the time of his discharge, that his physical ailments were treatable and under control.

If complainant had proved he was handicapped, the question would then become one of whether respondent failed to accommodate his handicap. Complainant argues that respondent could have accommodated him by adjusting his duties or transferring him to the appellate division. The evidence does not support this position. The trial office accommodation would have required other staff attorneys to represent the difficult clients and litigate the protracted cases. And, at the time complainant's discharge was under consideration, no appellate division attorney positions were open. In

fact, the head of the appellate division testified there were no vacant attorney positions in his unit after June, 1986.

The evidence supports a conclusion that respondent met its responsibilities with respect to accommodation. Complainant wanted accommodations, as directed by his medical conditions at any given time, including reduced litigation and no difficult clients. Later, in a predisciplinary hearing, complainant testified he would consider transferring into the appellate division. These requirements of accommodation within the office would have caused many uncertainties in the daily operation of the office and would have required other staff attorneys to take the troublesome duties assigned complainant's position. It is the belief of the Commission that the FEA §111.34(1)(b), Stats. does not require respondent to make such accommodations.

Whether respondent's duty of accommodation to complainant under §111.34(1)(b) includes provisions provided in §230.37(2)[2] Stats., need not be considered here. The clear evidence shows that options of transfer, demotion and part-time service were not available to respondent. No appellate division positions were available and complainant's argument that he could have been placed on a waiting list, for some undetermined period, appears to extend beyond the pale of respondent's duty to accommodate. Demotion was not an option since Assistant Public Defenders function as trial lawyers or in the

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[2] Section 230.37(2) provides, inter alia: When an employe becomes physically or mentally incapable of or unfit for the efficient and effective performance of the duties of his 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 a medical or physical examination to determine fitness to continue in service. . . (emphasis added)

appellate division and there are no other attorney positions within the agency to which to demote. Nor was reducing complainant's position to part-time an option. This change would not have satisfied complainant's need to be relieved of troublesome clients and lengthy litigation. Also, it would have placed an even greater burden on the other attorneys in the office.

Finally, if §230.37(2), Stats., is applicable to this matter, complainant would have to prove he was physically or mentally incapable or unfit to perform the duties of his position. The Commission believes insufficient medical evidence was presented to establish this predicate. In addition, the record shows that complainant acknowledged, at the time of his discharge, that his physical ailments were treatable and under control. Based on this record and for the reasons stated, Commission must find against complainant.

ORDER

Complainant's charges of handicap discrimination in this matter against respondent are dismissed.

Dated:_____, 1990 STATE PERSONNEL COMMISSION

_____
LAURIE R. McCALLUM, Chairperson

_____
DONALD R. MURPHY, Commissioner

_____
GERALD F. HODDINOTT, Commissioner

DRM:gdt

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