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RICKY G. OLSON,

 Complainant,

v.

President, UNIVERSITY OF
WISCONSIN SYSTEM (UW-Stout),

 Respondent.

Case No. 87-0176-PC-ER

* * * * *

DECISION
AND
ORDER

On March 19, 1991, respondent filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction. The parties were permitted to file briefs in relation to the Motion and a briefing schedule was established. This schedule called for appellant to file his brief on April 16, 1991, but he did not do so and this Decision and Order was prepared on the basis of the information in the case file and on the basis of the information provided by respondent in its Motion and accompanying argument.

The following facts appear to be undisputed:

1. In June of 1987, complainant began to experience pain in his right wrist.
2. On or around December 10, 1987, complainant's physician concluded that the pain in his right wrist was caused by or exacerbated by his use of a buffing machine and his mopping of floors and he should no longer engage in these activities. Appellant was employed as a Building Maintenance Helper 2 (BMH 2) by respondent at this time and a significant part of his duties and responsibilities involved the use of a buffing machine and the mopping of floors.
3. In response to this information from complainant's physician, respondent advised complainant not to report to work, and complainant did not work as a BMH 2 or in any other capacity for respondent from December 12, 1987, until May 8, 1988.

4. On April 22, 1988, respondent was advised by complainant's physician that he could return to work but that his buffing duties should not exceed two hours per day or one hour at any one time. On the basis of this information, respondent appointed complainant to the next available vacancy in a BMH 2 position effective May 8, 1988, and he was assigned to an area where his buffing duties could be carried out in accordance with the time restrictions imposed by his physician.

5. Complainant received Worker's Compensation benefits from December 12, 1987, to May 8, 1988, based on the pain in his right wrist.

6. The issue in the instant complaint is whether complainant was discriminated against on the basis of handicap when respondent did not permit him to return to work between December 12, 1987, and May 8, 1988. The handicap upon which this complaint is based is complainant's pain in his right wrist.

Section 102.03(2), Stats., provides in pertinent part:

Where such conditions exist [establishing the employer's liability for worker's compensation] the right to the recovery of compensation under this chapter shall be the exclusive remedy against the employer . . . (emphasis supplied)

Section 102.35(3), Stats., provides:

(3) Any employer who without reasonable cause refuses to rehire an employe who is injured in the course of employment, where suitable employment is available within the employe's physical and mental limitations, upon order of the department and in addition to other benefits, has exclusive liability to pay to the employe the wages lost during the period of such refusal, not exceeding one year's wages.


As a result of these provisions, where an employer refuses to rehire an employee who has suffered a compensable injury, the employee's exclusive remedy for the failure to rehire is under the Worker's Compensation law. Cornejo v. Polycon Indus., Inc., 109 Wis. 2d 649, 327 N.W. 2d 183 (Ct. App. 1982); Schachtner v. DILHR, 144 Wis. 2d 1, 422 N.W. 2d 906 (Ct. App. 1988); Norris v. DILHR, 155 Wis. 2d 337, 455 N.W. 2d 665 (Ct. App. 1990). Implicit in the law is the principle that exclusivity comes into play only when the refusal to rehire has a causal relationship to the work-related injury. Franke v. Durkee, 141 Wis. 2d 172, 413 N.W. 2d 667 (Ct. App. 1987).

In the instant case, the respondent's refusal to employ complainant from December 12, 1987, to May 8, 1988, was the sole result of complainant's pain in his right wrist; it was solely for this pain in his right wrist that complainant was awarded Worker's Compensation benefits from December 13, 1987, through May 8, 1988; and complainant's pain in his right wrist forms the sole basis for this complaint of handicap discrimination. It is difficult to imagine a fact situation that would fit more squarely within the exclusively provision of §102.03(2), Stats., or more squarely within the requirements for application of the exclusivity provision enunciated and explained in the Cornejo, Schachtner, Norris, and Franke cases cited above. For that reason, the Commission concludes that complainant's exclusive remedy was the one which he pursued under the Worker's Compensation law and that the Commission, therefore, lacks subject matter jurisdiction over this complaint of handicap discrimination.

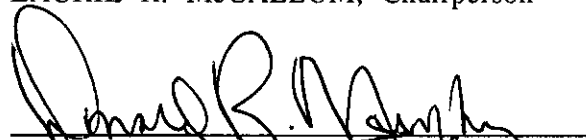
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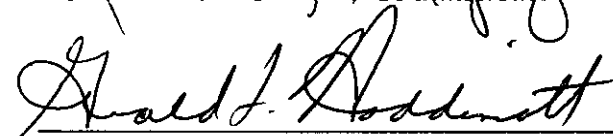
Respondent's Motion to Dismiss for Lack of Subject Matter Jurisdiction is granted and this complaint is dismissed.

Dated: May 1, 1991 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

LRM:irm:dah


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

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