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THOMAS McCLURE,

Complainant,

v.

Chancellor, UNIVERSITY OF
WISCONSIN SYSTEM (Madison),

Respondent.

Case No. 88-0163-PC-ER

* * * * *

DECISION
AND
ORDER

After reviewing the Proposed Decision and Order and the objections thereto, and after consulting with the hearing examiner, the Commission adopts the Proposed Decision and Order with the following additions and modifications for the purposes of clarification:

I. The first sentence of the second paragraph on page 14 should read as follows:

In proving discrimination pursuant to either of these models, complainant would first have to prove that respondent was aware of or should have been aware of complainant's handicap

II. The following sentence is added to the beginning of the first paragraph on page 15:

After showing that the employer was aware or should have been aware of complainant's handicap, complainant, pursuant to the first model discussed above, would have to show that respondent's awareness or perception that complainant was handicapped was a motivating factor in the discharge.

III. The first sentence of the second full paragraph on page 18 should state:

If the complainant had shown such discrimination, the next question under the Harris analysis would be whether respondent 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.

IV. The following sentence should be added as the second sentence of the first full paragraph on page 19:

Since complainant has failed to show that respondent was aware or should have been aware of complainant's handicap, the Commission concludes that such duty of accommodation does not exist here.


V. The second sentence of the first full paragraph on page 19 (which has become the third sentence as the result of IV., above) should be modified to state as follows:

If such a duty existed, complainant has failed to show that respondent would have been required to do something to accommodate complainant other than what they did.

VI. The next to the last sentence of the Opinion section should be deleted and replaced with the following:

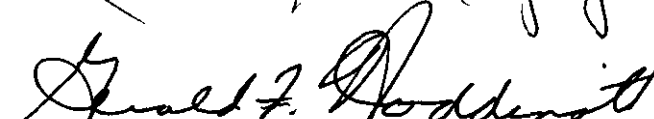
There is no showing in the record that there was a BMH 2 position or any other position at the Physical Plant to which complainant could have transferred which met the criteria complainant argues his handicap demands. Complainant is correct in asserting that any duty of accommodation would have extended to positions at the University of Wisconsin, not just positions at the Physical Plant. The record is silent as to any positions not in the Physical Plant. However, in view of the fact that the Commission has not concluded that respondent had any duty of accommodation, this point is not significant to the outcome of this case.

Dated: April 21, 1992 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

LRM/lrm/gdt/2


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

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Parties:

Thomas McClure
2232 Fox Ave
Madison WI 53711

Donna Shalala
Chancellor UW Madison
158 Bascom Hall
500 Lincoln Dr
Madison WI 53706

* * * * *

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PROPOSED
DECISION
AND
ORDER

Nature of the Case

This is a complaint of discrimination on the basis of handicap. On February 28, 1991, one of the Commission's Equal Rights Officers issued an Initial Determination finding Probable Cause to believe that discrimination had occurred as alleged. A hearing was held on November 8 and 11, 1991, before Laurie R. McCallum, Chairperson. The parties were required to file briefs and the briefing schedule was completed on January 24, 1991.

Findings of Fact

1. Complainant was employed by the DnS Janitorial Service from June 25 to September 23, 1985, from November 7, 1985, to February 18, 1986, and from March 7 to some time in May of 1988. During these periods of employment by DnS, complainant performed general janitorial, i.e., building cleaning and maintenance, duties in a variety of different locations. His supervisors considered the quality of his cleaning and maintenance work to be satisfactory and considered complainant to be an enthusiastic, hard-working, cooperative, and dependable employee who was able to do his work well with a minimum of supervision. Prior to his employment by DnS, complainant had successfully managed his own janitorial business for more than two years, performing cleaning and maintenance work for a church.

2. Some time in 1986, complainant made application to the Division of Vocational Rehabilitation (DVR) for vocational assistance. Prior to accepting complainant as a client, DVR referred complainant to Edwin Morse, Ph.D., for a

psychological evaluation. Dr. Morse, in a written evaluation, stated as follows, in pertinent part:

. . . The history this client provides is one of many irrelevant tangents, vagueness regarding actual experience, and a continuous underlying theme that his history of losing jobs is the fault of those who did not explain the work carefully enough to him. This individual basically says that he has had approximately seventy-five jobs since 1970. . . . While trying to get some history from this individual, the client spontaneously went on about how he knew that he was probably one of the oddest or craziest people I have ever met. . . .

. . . In relationship to stated occupational goals, this client sees himself as having the capacity to become a mail carrier within office buildings or an individual who could do some form of minor clerical work. He states emphatically he wants to get out of janitorial work and out of jobs such as dishwashing.

* * * * *

Verbal IQ, 82, dull-normal range
Performance IQ, 85, dull-normal range
Full Scale IQ, 83, dull-normal range

As is seen from the IQ scores outlined above, this individual functions consistently within the dull-normal range of intellectual capabilities. This individual's scatter between subtests is reflective of this individual's ongoing underlying emotional conflict and turmoil. . . .

The basic MMPI profile returned by this individual appears to be invalid. The lack of validity in the profile would appear to emanate from this individual's extremely poor reading capacity. It is felt that if this individual is not displaying characteristics consistent with a thought disorder (Schizophrenia), he is displaying profound compensatory mechanisms for a significant, longstanding learning disability. The client basically is a person with very weak ego-strength, extreme emotional sensitivity and reactivity, poor impulse control and judgment, and an individual who lacks any significant degree of understanding or insight into himself. . . . It is felt that this individual will need significant structure and repetitious training before he would be capable of following through in a consistent manner in very simple tasks.

. . . These results clearly suggest that this individual does experience a significant learning disability and would have a great deal of trouble understanding any form of written instructions in his work. Similarly, this individual would appear to have trouble retaining any complex oral instructions and would have

to have extensive repetitious training in whatever placement he obtains.

. . . , it is felt that this individual needs close supervision, repetitive work, and tasks that are not complex and need self-direction and self-control.

3. Complainant's application for DVR services was referred to Rehabilitation Counselor Raquel Tomasini. Based on Dr. Morse's evaluation and her evaluation of complainant, Ms. Tomasini completed a Functional Assessment Inventory of complainant. On the Function Limitation Rating Scale, Ms. Tomasini scored 28 of the 30 factors as a "0", i.e., no significant impairment, or a "1" i.e., mild impairment. These 28 factors included learning ability ("can learn complex, employable skills but not at a normal rate of speed"), perceptual organization (difficulty with perceptual organization rules out tasks requiring fine discrimination, but no gross behavioral evidence of impairment), memory, and judgment. Two factors were scored as a "2." These two factors were "accurate perception of capabilities/limitations" in which the rating indicated that this person "has an unrealistic understanding of his or her vocational capacities (e.g., may rule out all vocational possibilities or deny important limitations.); and "work history" in which the rating indicated that this person's "work history includes negative aspects, such as frequent tardiness or frequent job changes with periods of unemployment." In Ms. Tomasini's handwritten case notes in regard to complainant dated January 2, 1987, she indicated that complainant had a personality disorder, mild mental retardation, and a long-standing learning disability; that complainant displayed inappropriate behavior, with constant disruption of routine; that complainant had extremely poor reading and writing skills and an extremely poor work history; that, with a pre-training period of psychological counseling and therapy, continued vocational counseling and guidance, and a closely supervised, repetitive type of training, it was possible that complainant may be helped to successfully obtain and maintain employment. Ms. Tomasini accepted complainant as a client and met with him once every 30 days thereafter.

4. Some time in April of 1988, Sharon Gaulke, a Housekeeping Services Supervisor 3 with the Physical Plant Division of the University of Wisconsin-Madison, interviewed complainant for a Building Maintenance Helper 2 (BMH

2) position. None of complainant's application materials which were available to Ms. Gaulke at that time indicated that he had a handicap or that he had experienced any problems in his previous employment. During the interview, complainant did not indicate that he had a handicap or that he had experienced any problems in his previous employment but did indicate that he had received some janitorial training from Goodwill Industries. During the interview, complainant did not indicate that he was a DVR client. Ms. Gaulke checked complainant's employment references and none of these references referred to a handicap or to any work-related problems during complainant's employment with them. Ms. Gaulke recommended complainant for a second interview with one of her subordinates.

5. Complainant was then interviewed by Terry Snowden, an HSS 1, and Steve Keller, an HSS 2, at the Physical Plant. During this interview, complainant did not mention that he was handicapped, that he was a DVR client, or that he had obtained janitorial training from Goodwill Industries. Complainant did mention that he had previous janitorial experience working for DnS Janitorial Services. Mr. Snowden recommended that complainant not be hired since he felt that the information complainant had given during the interview relating to his military service was suspicious. Mr. Keller, however, recommended that complainant be hired and complainant was offered the BMH 2 position.

6. After receiving the offer of the BMH 2 position, complainant contacted Ms. Tomasini. Ms. Tomasini then contacted the Physical Plant and spoke to a staff person in the Personnel Office. Ms. Tomasini indicated to this person that she was complainant's DVR counselor and she was calling to get more information about the BMH 2 position which he'd been offered. She discussed the duties of the position, the salary, and the shift with this person. Ms. Tomasini did not indicate to this person that complainant was handicapped or needed any accommodation.

7. Complainant accepted the BMH 2 position and his first day of work was May 16, 1988. Complainant was assigned to the 5:00 p.m. to 1:30 a.m. shift on Crew 3 which was supervised by Mr. Snowden who was responsible for training complainant. Crew 3 consisted of 10 BMHs. Each BMH was assigned to work independently in a particular area except those assigned to work as a team on floor care. Each crew at the Physical Plant was chronically

understaffed and responsible for cleaning and maintaining a very large area on each shift. On May 16, 1988, complainant signed his position description and completed a Personal Data Questionnaire on which he indicated that he did not have a handicap which required an accommodation.

8. Complainant's BMH 2 position was responsible for performing custodial duties in the Music Hall and part of the Law School. These duties included emptying trash, dusting, vacuuming, routine and periodic floor care, restroom maintenance, and related general cleaning and associated security. Some tasks were performed daily, others weekly, others as assigned by the supervisor. Work sheets detailing these routines for specific rooms and common areas were posted in each janitorial closet along with a floor map of the building which was color coded to indicate which rooms were "detail" cleaned on each day of the week.

9. Mr. Snowden was responsible for training complainant. Most of the initial training occurred on May 16 and 17, 1988, and was consistent with the initial training provided by Mr. Snowden to new BMH 2s. During this initial training, Mr. Snowden first explained each task, then performed the task himself, then observed the trainee performing the task and offered suggestions and corrections. This training technique has been successfully employed by Mr. Snowden to train BMH 2s with limited reading skills or limited facility with the English language.

10. As part of his regular supervisory duties, Mr. Snowden conducted Period Quality Assurance Reviews of the work of each of the BMH 2s under his supervision. Such a review of complainant's work was conducted by Mr. Snowden on May 24, 1988. This review indicates that complainant's performance was satisfactory in regard to each of the tasks reviewed and that, "overall, work is good, especially quantity. Watch office cleaning schedule and pay attention to detail, particularly dust in restrooms."

11. Mr. Snowden's 30-day probationary performance review of complainant which was completed on June 13, 1988, indicated that complainant's performance was rated as average in all categories except the categories of quality of work and quantity of work in which it was rated as below average. Mr. Snowden's written comments on this review stated that, "The quality and quantity of Mr. McClure's work has been slightly below average, otherwise his performance has been satisfactory. Tom works well with others, is

dependable, and learns quickly. Mr. McClure's attendance has been good, and, in spite of one unusual incident, he has practiced safe working habits. Through better organization of his time, Mr. McClure should improve the quantity of his work, particularly in areas of floor care and special projects. He can improve the quality of his work by paying more attention to detail. Tom should continue his attendance trend and try to be more congenial with crew members during break periods."

12. Mr. Snowden conducted a Period Quality Assurance Review of complainant's work on June 30, 1988. This review rated complainant's performance as excellent in regard to two tasks, as satisfactory in regard to 15 tasks, and as needing improvement in regard to six tasks and stated that complainant should "Concentrate and clean all areas thoroughly." Mr. Snowden discussed this review with complainant and instructed him to correct all of the deficiencies during his next shift which was scheduled for July 1, 1988.

13. Near the end of the shift on July 1, 1988, Mr. Snowden inspected the areas he had indicated needed improvement and found that the classroom had not been mopped and had been poorly dust mopped, that table tops had not been cleaned, and that the floors had not been damp mopped. Mr. Snowden then located complainant and concluded that complainant was behind schedule and would not be able to complete all of his assigned work during that shift. Mr. Snowden assigned two other BMH 2s to assist complainant in completing his work that evening. Complainant told Mr. Snowden that he had gotten behind schedule because he had cleaned all the utility closets in an area. Cleaning utility closets was to be done only after the required work had been completed.

14. On July 5, 1988, Mr. Snowden met with complainant to discuss these recent performance problems. The complainant indicated that he had been having some problems at home which were distracting him at work. Mr. Snowden reminded complainant that he was on probation and that this type of performance was unacceptable.

15. The complainant's assigned area included Mr. Snowden's office which was the only office scheduled for "detail" cleaning on Mondays. Detail cleaning involves emptying trash, dusting, dust mopping, and damp mopping. The complainant always cleaned Mr. Snowden's office first on Mondays and only Mr. Snowden used that office during complainant's shift. On Monday,

July 11, 1988, at 7:00 p.m., Mr. Snowden entered his office and found that only the trash had been emptied. At 7:20 p.m., Mr. Snowden encountered complainant cleaning the Student Commons of the Law School. Mr. Snowden asked the complainant if he had detail cleaned his office and the complainant answered that he had. Mr. Snowden directed complainant to clean the office again and to page Mr. Snowden when he had finished the area he was working on. Complainant paged Mr. Snowden at 12:25 a.m., and they met at the Student Commons. Complainant told Mr. Snowden that he had completed all his work. Mr. Snowden then pointed out to complainant an unacceptable job of cleaning a baseboard in room B36, areas of the Student Commons which had not been damp mopped and had several stains, and a set of stairs which had not been swept or mopped. Complainant and Mr. Snowden then went to Mr. Snowden's office where Mr. Snowden took a paper tissue, wiped it across the floor, and showed complainant the dirt and dust on the paper. Mr. Snowden indicated that this type of performance was unacceptable and could prevent him from passing probation, and asked complainant if he knew what the problem was. Complainant indicated that he did not know but it might be helpful if he were assigned to a smaller area. Mr. Snowden told him that he was already assigned to the smallest area. Mr. Snowden issued complainant a verbal reprimand for a violation of Work Rule I. G. "Negligence in performance of assigned duties." Mr. Snowden also suggested that complainant contact the Employee Assistance Program. Complainant said that he would do this as well as contact his DVR counselor. Mr. Snowden had been unaware until this time that complainant was a DVR client. Mr. Snowden did not ask why complainant was seeing a DVR counselor but assumed it was due to the problems at home that he had mentioned previously to Mr. Snowden.

16. In a Performance Quality Assurance Review of complainant's work on July 21, 1988, Mr. Snowden rated complainant's performance as excellent in regard to one task and satisfactory in regard to each of the others. Mr. Snowden's written comment was that complainant should "now try to finish sooner without a reduction in performance."

17. In his 90-day probationary performance review of complainant completed on August 11, 1988, Mr. Snowden rated complainant as below average in quality of work, quantity of work, response to supervision, relations with co-workers, and dependability; and as average in initiative, safety, and

proficiency (rate of learning and skill attainment); and stated that "Mr. McClure has occasionally required assistance completing his work and failed to clean thoroughly when required, which resulted in a verbal reprimand for negligence. His performance improved somewhat since the reprimand, but still lacks consistency. . . . Mr. McClure must concentrate on his assignments and thoroughly complete his work every day." Mr. Snowden discussed this evaluation with complainant.

18. On August 19, 1988, complainant's assignment was to do the cleaning run in Music Hall and then thoroughly clean the URPL stairwell and the furniture in room 212 of the Music Hall. Complainant's shift was scheduled to end at 9:00 p.m. Mr. Snowden inspected the Music Hall at 7:45 p.m. and found that certain trash receptacles had not been properly cleaned or the liners replaced, that toilet bowl bases had not been cleaned in any of the restrooms, and that an office which had been scheduled to be detail cleaned the day before had a very dirty desk and the rug had not been vacuumed. Mr. Snowden located complainant who told him that he had finished all his work except cleaning the banisters of the stairwell. Mr. Snowden then walked with complainant through the Music Hall and pointed out the areas which had not been cleaned properly. Mr. Snowden then instructed complainant to correct the deficiencies Mr. Snowden had pointed out to him before the end of his shift. Mr. Snowden saw complainant in the break room at 9:15 p.m. and complainant advised him that he had completed all the work. On August 18, 1988, a co-worker of complainant's who had been assigned to do floor care with him told Mr. Snowden that she had to continuously urge complainant to work so that they would be able to finish on time. When Mr. Snowden observed the two of them during the shift, complainant was watching his co-worker rather than working and Mr. Snowden had to remind him that it was a two-person job.

19. From May 16, 1988, through July 18, 1988, complainant had participated in five counseling sessions with Ms. Tomasini. Complainant had not shown Ms. Tomasini any of his performance reviews or told her of any performance problems he was having.

20. On August 22, 1988, complainant called Ms. Tomasini and told her that, all of a sudden, he was having problems at work and that nothing he did seemed to satisfy his supervisor. Complainant asked Ms. Tomasini to discuss

this with his supervisor and she agreed. To this end, Ms. Tomasini set up a meeting with John Erickson, Ms. Gaulke's supervisor at the Physical Plant, for August 23, 1988.

21. During the evening of August 22, 1988, Mr. Snowden was inspecting part of the area to which complainant was assigned and discovered that the doors to a utility closet and the door to an office had been left open and that cleaning equipment had been left unattended. Mr. Snowden told complainant that this was an unacceptable lapse in security procedures. In addition, Mr. Snowden told complainant that he was taking too long to complete his assigned tasks and failing to stay on schedule.

22. On August 23, 1988, Ms. Tomasini, Mr. Erickson, Mr. Snowden, and Bill Rowe, a personnel specialist employed by respondent, met to discuss complainant's work as a BMH 2 at the Physical Plant. Ms. Tomasini was asked to identify and describe the nature and extent of complainant's disability. Ms. Tomasini explained that complainant had a learning disability characterized by spatial dyslexia or a difficulty in identifying and interpreting spatial relationships and that the result of this learning disability was poor reading skills. Ms. Tomasini did not refer to any other disability or to any other manner in which complainant's learning disability would affect his ability to perform the duties and responsibilities of a BMH 2 position. Ms. Tomasini did indicate that complainant's learning disability should not affect his ability to perform tasks he had already learned. Ms. Tomasini suggested that complainant's performance might benefit from the assistance of a job coach provided by DVR; by clear and repetitive instructions from his supervisor; and by a "nurturing supervisor." Mr. Snowden stated his opinion that he thought it would be more helpful to complainant if the coaching were done by someone who was familiar with the Physical Plant's procedures. Ms. Tomasini agreed with this suggestion and Mr. Snowden was assigned to retrain complainant taking into account his limited reading capabilities.

23. Ms. Tomasini called Mr. Erickson some time between September 6 and 8, 1988, to set up a follow-up meeting regarding complainant's work performance. Ms. Tomasini requested that this meeting be scheduled during the first part of October but, because of Ms. Tomasini's vacation schedule and commitments Mr. Erickson had for October 5-7 and October 10-13, the meeting was scheduled for October 14, 1988.

24. Mr. Snowden began re-training complainant on August 23, 1988. Mr. Snowden first explained to complainant what was discussed at the meeting with Ms. Tomasini that day and that those present at the meeting agreed that Mr. Snowden should re-train complainant taking into account his limited reading capabilities. Mr. Snowden provided the complainant with simplified written instructions for posting in each janitorial closet in his assigned area; verified that complainant had color-coded floor charts for his assigned area; provided complainant with a copy of step-by-step instructions for his assigned area for complainant to take home and study; spent the first four hours of the shift retraining complainant on each aspect of area cleaning in Music Hall using his orientation procedure of task-by-task oral instruction, instruction by example, and observation and critique of the trainee performing the tasks; spent a substantial part of the October 24 shift retraining complainant on each aspect of area cleaning in the Law Building using this orientation procedure; and, for several weeks thereafter, provided much closer supervision and more frequent feedback to complainant on his work performance than that provided to other BMH 2s.

25. After the retraining period during the August 24, 1988, shift, Mr. Snowden determined that complainant had not detail cleaned certain offices despite the fact that complainant had told Mr. Snowden that he had done so.

25. On August 29, 1988, Mr. Snowden, after receiving a complaint from a building occupant, reminded complainant that it was not acceptable to spend work time engaging in idle conversation with building occupants.

26. On September 12, 1988, Mr. Snowden discovered that computer equipment had been stolen from an office in the Law Building within complainant's area of responsibility. The police officer investigating the theft indicated to Mr. Snowden that the window to the office must have been left open. It was part of complainant's responsibility to assure that all office doors and windows in his assigned area were locked.

27. On September 12, 1988, Mr. Snowden, in inspecting complainant's assigned area, noticed the following deficiencies in the Music Hall: none of the eight offices scheduled for detail cleaning had been dust mopped or damp mopped, the trash container in one of these offices had not been emptied, classroom 208 had much debris on the floor and the chalk tray had not been

emptied, classroom 212 had gum or tar and coffee stains on the floor. When Mr. Snowden inspected the janitor closets, he discovered that all restroom mops were dry and concluded that either the four restrooms were not damp mopped or were damp mopped without the required disinfectant. Mr. Snowden then noticed the following deficiencies in the Law Building: classroom 225 had been poorly dust mopped and there was a light out, orange peelings in an ash tray and a week-old stain on the floor; classroom 231 had been poorly dust mopped and the chalk tray not cleaned; classrooms 239, 250, and 260 had not been dust mopped; the faculty lounge had not been vacuumed; and the men's restroom had dust on the stalls and window ledges, soap scum on faucets and debris in the urinals, and sufficient acid bowl cleaner had not been used in the toilets and urinals.

28. In a memo to Mr. Keller dated September 13, 1988, Mr. Snowden recommended the termination of complainant citing the declining quality of his work performance despite retraining.

29. On September 14, 1988, due to the recent computer theft, Mr. Snowden inspected all of the windows in the area assigned to Crew 3. Mr. Snowden discovered that 13 windows in complainant's area were unlocked. Although one of these windows couldn't be locked, complainant had not reported this as required.

30. In a final probationary performance evaluation completed on September 14, 1988, Mr. Snowden rated complainant's performance as unsatisfactory in quality of work, judgment, quantity of work, dependability, rate of learning, and work habits and as poor in initiative and ability to get along with others in work environment and noted that:

The quality of Mr. McClure's work has continued to decline, and he is unable to complete his assignments on time. He does not retain what he has been taught, even after retraining. He does not work well with others and has wasted much time talking idly with building occupants, security guards, etc. Mr. McClure does not respond well to supervision in that he seems to lack honesty when questioned, and does not follow directives or instructions. Mr. McClure has received a verbal reprimand for negligence in performance of assigned duties, yet continues to be negligent. Requiring close and constant supervision, Mr. McClure's overall performance is unsatisfactory.

31. In a letter to complainant dated September 15, 1988, Mr. Sprang advised him that his employment was terminated effective September 16, 1988, due to unsatisfactory work performance during his probationary period. For a period of two months following this termination, complainant was employed by DnS Janitorial Services.

32. In November of 1988, complainant's mother was diagnosed as suffering from terminal cancer. Shortly thereafter, complainant's father was diagnosed as having Alzheimer's disease. From November of 1988 until February of 1991, complainant was the primary home care giver for his parents. Complainant did not actively seek employment during this period of time or thereafter and was not employed during this time or thereafter.

33. In October of 1989, complainant applied for Social Security Disability Insurance payments and began receiving benefits in February of 1990. As of the date of hearing, complainant had continued to receive these benefits.

34. During his employment with respondent, complainant did not tell anyone at the Physical Plant that he had a learning disability, a reading disability, or that he was a slow learner because he didn't feel that it was anyone else's business. During his employment with respondent, complainant did not ask for any special treatment because he didn't feel that he needed any and didn't feel that his disability limited his ability to do janitorial work. During his employment with respondent, complainant couldn't understand why he should clean an office thoroughly that, in his opinion, wasn't dirty.

35. Mr. Snowden was considered by his supervisors to be an outstanding HSS 1 and to do an outstanding job training his subordinates. Mr. Snowden's supervisors had never received a complaint about his work performance or work relationships. Mr. Snowden had successfully trained and supervised BMH 2s with limited English language and/or reading skills and BMH 2s who were DVR clients. Mr. Snowden never made the statement about another Physical Plant employee that, "That retard can't do anything."

Conclusions of Law

1. This matter is properly before the Commission pursuant to §230.45(1)(b), Stats.

2. Complainant has the burden to prove that respondent discriminated against him on the basis of handicap in terminating his employment.

3. Complainant has failed to sustain this burden.

Opinion

The issue in this case is:

Whether respondent discriminated against complainant on the basis of handicap in connection with the termination of his employment effective September 16, 1988.

Subissue: Whether respondent failed to accommodate complainant.

As the Commission stated in Harris v. DHSS, Case Nos. 84-109-PC-ER, 85-0115-PC-ER (2/11/88), a typical handicap discrimination case will involve the following analysis:

- (1) Whether the complainant is a handicapped individual;
- (2) Whether the employer discriminated against complainant because of the handicap;
- (3) Whether the employer can avail itself of the exception to the prescription 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 (this determination must be made in accordance with §111.34(2)(b), Stats., which requires a case-by-case evaluation of whether the complainant "can adequately undertake undertake the job-related responsibilities of a particular job");
- (4) If the employer has succeeded in establishing its discrimination is covered by this exception, the final issue is whether the employer failed to reasonably accommodate the complainant's handicap.

The first question then is whether complainant is handicapped within the meaning of the Fair Employment Act. Section 111.32(8), Stats., defines a "handicapped individual" as an individual who:

- (a) Has a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work;
- (b) Has a record of such an impairment; or
- (c) Is perceived as having such an impairment.

Respondent has conceded that complainant is handicapped within the meaning of the Fair Employment Act.

The second issue is whether the respondent discriminated against the complainant because of his handicap. There are two ways that discrimination on the basis of handicap under this element can occur. The first would occur if respondent's discharge of complainant had been motivated by complainant's handicap. The second would occur if respondent terminated complainant for performance reasons that were causally related to his handicap. See Conley v. DHSS, 84-0067-PC-ER (6/29/87).

In proving discrimination pursuant to the first model, complainant would first have to prove that respondent was aware or should have been aware of complainant's handicap. The record shows that Mr. Snowden became aware that complainant had a DVR counselor on July 12, 1988, and became aware that complainant had a learning disability which resulted in limited reading capabilities on August 23, 1988. The record does not show that anyone at the Physical Plant involved in the decision to terminate complainant had any reason to suspect, prior to July 12, 1988, that he had a handicap, or had any knowledge, prior to his termination, that complainant was mildly mentally retarded or had a personality disorder. Although Ms. Tomasini testified that she called the Physical Plant prior to complainant's hire and identified herself to the woman answering the phone as complainant's DVR counselor, complainant has failed to show that this Physical Plant employee was involved in any way in the decision to terminate complainant. Complainant asserts that he told Ms. Gaulke during his interview with her that he was a DVR client but Ms. Gaulke denies this. In addition, the record shows that, even if Ms. Gaulke had this information, she did not pass it on to Mr. Snowden who was the only individual who evaluated complainant's performance during his employment with respondent and who was the individual who made the recommendation to terminate complainant. Complainant argues by implication that complainant's behavior at work or his work performance problems should have put respondent on notice that complainant had a handicap. In this regard, it should first be noted that complainant completed a form on his first day on the job which indicated that he had no handicapping condition which required accommodation. The record does not show that there was anything in complainant's behavior or speech which should have alerted anyone at the Physical Plant that complainant had a handicap. Even when Mr. Snowden asked complainant if there was some problem which was interfering with his ability to do his job,

complainant only made some vague reference to a problem at home. To conclude that the existence of performance problems alone should require an employer to aggressively investigate whether the employee has a handicap is not what the law requires. To hold otherwise would require an employer to engage in intrusion and guesswork.

Prior to July 12, 1988, when he first became aware that complainant had a DVR counselor, Mr. Snowden, on June 13, 1988, rated complainant's work as average in regard to six factors and as below average in regard to two factors; on June 30, 1988, rated complainant's work as excellent in regard to two tasks, as satisfactory in regard to 15 tasks, and as needing improvement in regard to six tasks; on July 1, 1988, discovered that complainant had not completed his tasks on schedule, had omitted certain tasks, and had decided to clean utility closets instead of completing his assigned tasks; and on July 11, 1988, gave complainant a verbal reprimand for negligently performing his assigned tasks during that evening's shift. The deficiencies and inconsistencies that Mr. Snowden pointed out in complainant's work performance prior to July 12, 1988, were consistent with the deficiencies and inconsistencies pointed out after July 12, 1988. The counseling and assistance provided by Mr. Snowden to complainant did not decrease after July 12, 1988, but actually increased as a result of the decision to re-train complainant. The information provided by Mr. Snowden to complainant regarding the consequences of his failure to meet performance expectations did not change after July 12, 1988. Finally, and most importantly, complainant did not show that complainant's performance deficiencies and inconsistencies were not as they have been represented to be by respondent or that complainant was treated differently than any other BMH. Complainant has not shown that he performed the work respondent has alleged he did not perform; that the work respondent has alleged did not meet performance standards actually did meet those standards; or that he was provided less training, different training, evaluated more strictly, or evaluated by different standards than any other BMH. Complainant has failed to show that he was treated differently by respondent due to his handicap or that any factor other than his inadequate work performance was the basis for his termination.

Complainant argues in this regard that the fact that Mr. Snowden advised against hiring complainant indicates his bias against complainant.

However, the record does not show that Mr. Snowden had any reason at the time the hiring recommendation was made to suspect that complainant was handicapped in any way.

Complainant also argues that the fact that Mr. Snowden made the statement "That retard can't do anything." about another Physical Plant employee demonstrates Mr. Snowden's bias against mentally handicapped people. Although complainant attempted to characterize Mr. Snowden's testimony as indicating he "didn't recall" making such a statement, Mr. Snowden's testimony was actually that he "never said that." The Commission finds Mr. Snowden's testimony in this regard to be credible and consistent with the evidence relating to his work performance and work relationships at the Physical Plant.

Complainant also argues that the use of a white tissue by Mr. Snowden to wipe across the floor of his office and his "preoccupation" with the detail cleaning of his office show a bias by Mr. Snowden against complainant. However, the record shows that this incident took place prior to complainant mentioning to Mr. Snowden the fact that he was a DVR client and prior, therefore, to Mr. Snowden having any reason to believe complainant had a handicap. As a result, Mr. Snowden's actions in this regard could not have been based on handicap discrimination.

The complainant also argues that respondent discriminated against him by failing to await the results of the scheduled October 14, 1988, meeting between Ms. Tomasini and Mr. Erickson before terminating him. However, the results of the August 23, 1988, meeting were very clear, i.e., respondent intended to terminate complainant if his performance did not improve. There was no agreement that respondent would await Ms. Tomasini's return from her vacation before taking this action. In fact, this October 14, 1988, meeting was not scheduled at the August 23, 1988, meeting but was requested by Ms. Tomasini of Mr. Erickson some time during the first week of September. Although, in her testimony, Ms. Tomasini stated that those present at the August 23, 1988, meeting agreed then to the scheduling of the October 14, 1988, meeting for the purpose of determining whether to assign a DVR job coach to complainant, the written summaries of the August 23 meeting prepared by Mr. Rowe, Mr. Erickson, and Mr. Snowden within one or two days of the meeting do not so indicate. Neither Mr. Rowe's nor Mr. Snowden's summaries

refer to the scheduling of a subsequent meeting with Ms. Tomasini nor to an agreement to delay taking any action in regard to complainant's employment until a future meeting could be held. In fact, both summaries indicate that Ms. Tomasini was told that complainant would be terminated if his performance did not begin to meet basic performance expectations. Mr. Erickson's summary specifically provides that Ms. Tomasini called him some time between September 6 and 8, 1988, to schedule a follow-up meeting. Mr. Erickson's testimony indicated that a follow-up meeting was not scheduled during the August 23 meeting. Although Ms. Tomasini's case notes relating to the August 23 meeting state in the last sentence that, "Counselor will provide continuous counseling to client until next appointment with J. Erickson and supervisor arranged for 10/14/88.", this entry does not indicate when this arrangement was made and does not indicate when Ms. Tomasini wrote these case notes. Although Ms. Tomasini testified that the October 14 follow-up meeting was scheduled at the August 23, meeting, Ms. Tomasini's recollection of what occurred at the August 23 meeting is somewhat suspect since, for example, she testified that Ms. Gaulke and Mr. Keller were present at the meeting and she attributed certain statements to them when, in fact, neither Ms. Gaulke nor Mr. Keller was present at the meeting. In addition, neither Mr. Erickson, Mr. Snowden, nor Mr. Rowe left the August 23 meeting with the impression that the use of a DVR job coach was still being considered. These three individuals each left the meeting with the impression that any coaching of complainant would be done by Mr. Snowden. The only specific suggestion Ms. Tomasini made during the August 23, 1988, meeting, i.e., the retraining of complainant through the use of repetitive instructions and taking into account his limited reading skills, was implemented immediately and the results of such retraining known before the termination decision was made.

In order to establish the second type of handicap discrimination, it would be necessary for complainant to show a causal link between his handicap and his poor work performance in order to prove that he was discriminated against as alleged. Although the written psychological evaluation indicates that complainant's handicap would cause him to have a great deal of trouble understanding any form of written instructions and to have trouble retaining any complex oral instructions, and would require him to obtain employment which would involve extensive repetitious training, close

supervision, simple tasks, and no self-direction and self-control, complainant's work history indicates that these limitations did not significantly affect complainant's ability to independently perform janitorial tasks. Complainant had his own janitorial service business at one point in time and his primary client indicated that his performance was very satisfactory. This business could not have involved repetitious training, close supervision, and no self-direction or self-control. Complainant was employed by DnS Janitorial Services and independently carried out janitorial work when he was employed by them. Once again, this work did not involve close supervision, extensive repetitious training, and no self-direction or self-control. In addition, while employed at the Physical Plant, complainant showed that he was able to learn the required tasks at an average pace and to perform them independently at an acceptable level at certain points during his employment without close supervision or repetitious training. Ms. Tomasini advised respondent during the August 23, 1988, meeting that complainant's handicap only interfered with his ability to read and interpret written instructions and that, once a task was learned, this reading problem should not interfere with complainant's ability to carry it out. However, complainant's performance deficiencies related to tasks that he performed satisfactorily at one point in time but not at another, tasks that he showed he had mastered but did not consistently carry out at an acceptable level. Complainant testified at the hearing that he doesn't feel that his handicap limits his ability to do janitorial work. Complainant has failed to show a clear causal relationship between his handicap and his performance deficiencies.

The Commission concludes that complainant has failed to show that he was discriminated against on the basis of his handicap.

If the complainant had shown such discrimination, the next question would be whether respondent 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. Such a conclusion would not be consistent with the evidence in the record that, at more than one point during his employment, complainant was actually performing the duties and responsibilities of his position in a satisfactory manner and with the evidence in the record that complainant was

able to perform similar duties and responsibilities satisfactorily in previous employment.

The final issue under the Harris analysis is whether respondent failed to reasonably accommodate the complainant's handicap. Complainant has failed to show that respondent would have been required to do something to accommodate complainant other than what they did. One of the accommodations suggested by Ms. Tomasini was to provide a job coach for complainant. When Mr. Snowden indicated during the meeting of August 23, 1988, that it would be more appropriate for him to do the coaching since he was an experienced trainer and he was very familiar with the procedures and standards of the Physical Plant, Ms. Tomasini readily agreed. This coaching was done by Mr. Snowden but complainant's performance did not improve. The only other accommodations suggested by Ms. Tomasini to the Physical Plant were that complainant be provided clear and repetitive instructions by his supervisor and that he be provided a "nurturing supervisor." It is implicit from Ms. Tomasini's testimony that, by "nurturing supervisor," she meant one who would be located at all times in close physical proximity to complainant to provide constant feedback and retraining. The record indicates that complainant's supervisor provided clear instructions to complainant and repeated these instructions to complainant during his initial training, after his initial training when complainant's performance was deficient in some way, and during his retraining. Despite providing these clear and repetitious instructions at these times, complainant's performance did not improve. In regard to the proposed "nurturing supervisor" accommodation, respondent argues that providing such an accommodation to complainant would pose a hardship on respondent. Section 111.34(1)(b), Stats., states that it is employment discrimination based on handicap to refuse to reasonably accommodate an employee's handicap "unless the employer can demonstrate that the accommodation would pose a hardship on the employer's program" Given the chronic understaffing of the Physical Plant cleaning crews, the size of the crews supervised by Mr. Snowden and the other HSS 1s, and the large area required to be cleaned by these crews each night, the Commission concludes that this proposed accommodation would pose a hardship on respondent's program. Ms. Tomasini did not disclose the nature of any handicapping condition other than the learning disability which imposed limitations on complainant's

reading capabilities and respondent not only had no basis from which to conclude that any other handicapping condition existed but no duty to attempt to discover any other such condition. In addition, neither Ms. Tomasini nor complainant suggested any other accommodation. The duty of reasonable accommodation does not require an employer to go beyond the recommendations of a vocational expert to determine what other reasonable accommodations would be available or practical. Complainant cites the Commission's decision in Betlach-Odegaard v. UW, Case No. 86-0114-PC-ER (12/17/90), for the proposition that respondent, under the facts of the instant case, had a duty to suggest, evaluate, and determine appropriate accommodations for complainant and could not discharge this duty by reliance on the suggestions of complainant's vocational expert. The Commission disagrees. In the Betlach-Odegaard decision, the Commission related its conclusion that the respondent in that case had a duty to suggest, evaluate, and determine appropriate accommodations to the fact that the complainant in that case had an obvious handicapping condition and had not suggested an accommodation. The Commission concluded that, to impose a duty upon an employee or prospective employee in those circumstances, "would appear to have the effect of rendering the Fair Employment Act nugatory as to persons who are not legally sophisticated enough to be aware of the FEA's accommodation requirement, or not sophisticated enough in terms of vocational rehabilitation to be aware that a particular accommodation would be available that would allow him or her to perform the job." Such a fact situation does not exist here, i.e., the complainant in the instant case was receiving the services of a vocational rehabilitation expert and this expert had evaluated and determined what accommodations she felt would be appropriate. Under the circumstances of this case, respondent's duty to accommodate extended only to consideration of those accommodations proposed by Ms. Tomasini. Even if a duty to consider other accommodations existed, complainant has failed to show that such other reasonable accommodations existed. Complainant argues that transferring complainant to a different position (which was not specifically suggested by Ms. Tomasini) would have been a reasonable accommodation. The record shows that each of the BMH 2 positions at the Physical Plant has the same duties and responsibilities and the same performance expectations as appellant's position, i.e., the record shows that there are no BMH 2 positions at the Physical Plant which would meet

complainant's stated requirements. Once respondent made this showing, the burden would shift to complainant to rebut it. Prewitt v. USPS, 662 F. 2d 292, 27 FEP Cases 1043 (5th Cir. 1981). This complainant has not done. There is no showing in the record that there was a BMH 2 position or any other position to which complainant could have transferred which met the criteria complainant argues his handicap demands. The Commission concludes that respondent did not fail to reasonably accommodate complainant's handicap.

Order

This complaint is dismissed.

Dated: _____, 1992 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

LRM/lrm/gdt/2

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

Parties:

Thomas M McClure
2232 Fox Ave
Madison WI 53711

Donna Shalala
Chancellor UW Madison
158 Bascom Hall
500 Lincoln Dr
Madison WI 53706