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DENNIS JOHNSON,
 Complainant,

v.

Secretary, DEPARTMENT OF
 HEALTH AND SOCIAL SERVICES,
 Respondent.

Case No. 89-0080-PC-ER

* * * * *

DECISION
AND
ORDER

This matter is a claim of discrimination brought under the Wisconsin Fair Employment Act (WFEA), whereby complainant Dennis Johnson alleges that respondent Department of Health and Social Services (DHSS) failed to select him for a Laundry Worker position based upon a perceived handicap. The following is based on evidence presented at a hearing on this matter. Post-hearing briefs were filed by the parties. To the extent any of this opinion constituted a finding of fact, it is adopted as such.

FINDINGS OF FACT¹

1. At the time relevant to this complaint and at the present time, complainant is employed as a Food Service Laborer at respondent's Central Wisconsin Center for the Developmentally Disabled (CWC).
2. In February 1989, complainant applied for a Laundry Worker 3 position in CWC's laundry and interviewed in early April. Later in April, complainant received a letter informing him that he had not been selected. There were three Laundry Worker 3 positions being filled in this hiring process.
3. On February 14, 1989, the CWC Administrative Bulletin identified a transfer/demotion opportunity for a Laundry Worker 3 position. Complainant requested to be considered on a transfer basis. Nine candidates were certified and interviewed on March 28 and 29, 1989. Three additional candidates were eligible for consideration as transfers and were interviewed on April 7.

¹ Findings of Fact 1-12 were stipulated by the parties and entered into the record as Joint Exhibit 1.

4. The candidates were ranked after the interviews according to their responses to questions during the interviews. The top three candidates in rank order were Kevin Jones, Roberta Myren and Richard Fandrich. Complainant tied for fourth place with another candidate, Linda Pierce. While Fandrich ranked third, and complainant and Pierce tied for fourth place, Webber, who ranked fifth, was selected because of her excellent reference. Respondent states that "information obtained through references in the areas of attendance, quality and quantity of work, and ability to get along with supervisors and coworkers were considered most important. After references were reviewed, Jones, Myren and Webber were offered the positions."

5. According to complainant, he has been employed at CWC from October 13, 1986, to present. On February 17, 1988, he sustained a work-related injury for which he lost minimal work time. He was again injured on the job in August 1988 and remained off work from August 13, 1988 to August 31, 1988. Subsequently, the decision was made to deny him the Laundry Worker 3 position. At the time he was working his regular hours with no restrictions and had over 200 hours of sick leave accumulated.

6. Respondent submitted as evidence in this case job reference forms the candidates were required to have filled out by their current employers around the time of the interviews. The form asks the candidates' supervisors for information regarding the candidates' dates of employment; position held; reason for leaving; would he/she be rehired; attendance and tardiness; cooperation with supervisors and coworkers; quality and quantity of work; communication skills; potential for advancement; health and safety record during employment; the general emotional stability of the employee; and additional comments.

7. Complainant's job reference form was signed by a supervisor, Arlene Moura. By the heading "Attendance and Tardiness," Moura wrote, "Off on workman's compensation a few times." By the question, "Did this person have a good health and safety record while in your employ?", Moura wrote, "Not too good." The questions, "Would you rehire?" and "Did this person show potential for advancement?" and the area for "Additional Comments", were not answered by Moura on the form. With respect to the other questions asked on the form, Moura wrote "Satisfactory."

8. Webber's reference indicates that by the heading "Attendance and Tardiness," her supervisor wrote, "Excellent attendance -- no tardiness."

By the question, "Did this person have a good health and safety record while in your employ?", it is written, "yes." With respect to the other questions asked on the form, it was written, "excellent, very good or good." The questions, "Would you rehire?" and "Did this person show potential for advancement?" were both answered with "Yes." Under "Additional Comments," it was written, "Karen has been part of this restaurant since before I arrived. She was very supportive during the transition and very stable in the last year. I hope any position she takes outside of the restaurant is only for her betterment."

9. Richard Fandrich ranked third after the interviews, after Jones and Myren. His reference form shows no comments by any of the questions. Under "Additional Comments," it was written, "Richard always did an excellent job with Service Master on any of our cleaning. He was honest and dependable."

10. Linda Pierce tied with complainant for fourth place after the interviews, but she was not selected. Pierce's reference indicates that by the heading "Attendance and Tardiness," her supervisor wrote "Good." By the question, "Did this person have a good health and safety record while in your employ?", it was written, "Yes." The question, "Did this person show potential for advancement?", was answered, "Not much room for advancement at this line of work." With respect to the other questions asked on the form, it was written, "Good" or "Fair." Under "Additional Comments," it was written, "Linda was a dependable employee."

11. The other successful candidates, Kevin Jones and Roberta Myren, received favorable comments to all the questions on their reference forms.

12. On July 10, 1989, complainant filed a charge of discrimination with the Personnel Commission alleging respondent, Department of Health and Social Services, discriminated against him because of a perceived handicap when it did not transfer him into the position of Laundry Worker 3. The Personnel Commission found, in its Initial Determination dated June 5, 1992, probable cause to believe that complainant was discriminated against on the basis of perceived handicap when he was not hired for a position as a Laundry Worker 3.

CONCLUSIONS OF LAW

1. This matter is before the Commission pursuant to §230.45(1)(b), Wis. Stats.
2. Complainant has the burden to prove he was discriminated against by respondent on the basis of a perceived handicap in regards to its decision to select a candidate other than him for a Laundry Worker position in April 1989.
3. Complainant has failed to sustain his burden.
4. Complainant was not discriminated against as alleged.

OPINION

The issue in this case is whether respondent discriminated against complainant on the basis of perceived handicap when they failed to select him for a Laundry Worker position. The Commission has consistently used the analytic framework contained in McDonnell-Douglas v. Green, 411 U.S. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973), and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 25 FEP Cases 113 (1981), adopting it to the particulars of the case when deciding discrimination cases under WFEA; and we do so here.

The unambiguous evidence establishes complainant was qualified for the Laundry Worker position and was not selected. The remaining questions are: Whether respondent perceived complainant to be handicapped and, if so, whether the perceived handicap was the reason for complainant's non-selection.

With respect to complainant's allegation of perceived handicap discrimination, he argues that with the exception of a one-day absence due to a cold, his 1988 and 1989 attendance record was caused by work-related injuries covered under the Workers' Compensation law. In support, complainant points to the written reference of supervisor Arlee Moura (F.F.A 7, Complainant's Exhibit 15) and verbal reference of supervisor Susan Moritz and concludes: Respondent did not look at one day of absence in 1988 but at several work-related injuries to conclude that Johnson was not physically capable of performing the functions of the position. Respondent perceived Johnson to be impaired and this was the sole reason why Johnson was denied the position of Laundry Worker 3.

The evidence presented does not support complainant's allegation. No evidence was presented establishing that respondent perceived complainant to be handicapped. Respondent's witness, Alvin Kohlman, Director of Housekeeping, Laundry Security and Sewing, who directly supervised the position and was one of the four interviewers, testified that he did not perceive complainant as handicapped. He testified that near the end of the interview complainant advised the interviewers of his prior Workers' Compensation claims and stated that he had no work restrictions. In response, Kohlman told complainant that these claims would not be considered in reviewing his work record and in making the selection for the position. Kohlman testified the laundry position is unskilled work, requiring on-the-job training. He stated the primary requisite is good work ethics, being on time and high attendance. He testified that the oral interview was designed to acquaint the candidates with the position, find out more about them, and then ask if they were still interested.

Further, Kohlman testified, after the selection was made, Mary Ann Barkus, a union representative, talked to him on at least two occasions. In the first conversation, Barkus brought up the issue of WC claims and Kohlman testified that he told her the claims had no bearing on complainant's non-selection. Kohlman also testified that on another occasion Barkus asked him to reconsider his selection and he told her he would not change his mind.

The record shows that complainant's job references were less positive than those of the successful candidate. Complainant urges the Commission to conclude that respondent did not look at his one or two days' absence in 1988 but at complainant's injuries resulting in WC claims and then perceived complainant was physically incapable of functioning as a laundry worker. However, complainant presented scant evidence in support. Other than complainant's argument that respondent perceived him as being handicapped no direct evidence was provided to support it. Many factually unsupported inferences other than that suggested by complainant could be drawn from this record.

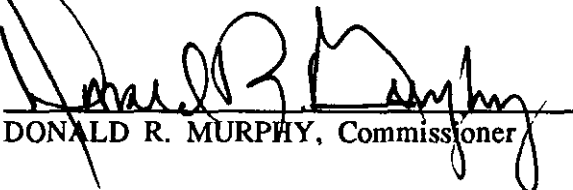
ORDER

Complainant's claim of perceived handicap discrimination against respondent, when it failed to select him for the Laundry Worker 3 position in April 1989, is dismissed.

Dated: October 4, 1994 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

DRM:rcr


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

Parties:

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**NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION**

Petition for Rehearing. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except

that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.)