

STATE OF WISCONSIN

PERSONNEL COMMISSION

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VICKI R. SMITH,
 Complainant,
v.
Chancellor, UNIVERSITY OF
WISCONSIN-Madison,
 Respondent.
Case No. 90-0033-PC-ER

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DECISION
AND
ORDER

This matter is before the Commission upon the complainant's objections to the Proposed Decision and Order and her request to reopen the hearing for further evidence. After consideration of the parties' written submissions as well as their oral arguments, the Commission denies the request to reopen, adopts the Proposed Decision and Order (a copy of which is attached hereto) in its entirety and makes the following observations.

The complainant appeared *pro se* at the hearing in this matter. After the proposed decision was issued, she retained counsel. She was represented by counsel for both her objections to the proposed decision and at oral arguments.

The complainant argued that she was unable to present testimony from her physician, Dr. Juanita Halls, who is employed by the University Hospital. The record reflects that at the commencement of her case, complainant stated that she was not going to call Dr. Halls or anyone else as a witness.¹ Then, after the conclusion of her own testimony, complainant stated she was going to call Dr. Halls, as well as another physician, Dr. Deborah Schaeffer, and Detective Tom Casper. The examiner sustained respondent's objection to complainant calling anyone other than Dr. Halls as part of her case-in-chief, because the complainant had failed to comply with §PC 4.02, Wis. Adm. Code,

¹ Complainant offered the following explanation as to why she was not going to call Dr. Halls as a witness: "[A]fter speaking with her I have informed her that I felt it would be harmful to her career to have her come in here and testify for me, based on what I feel has happened to me dealing with the University Hospital. Dr. Halls is a physician at University Hospital. I felt obligated to protect her safety."

which requires the parties to exchange witness lists and documents at least 3 working days before the commencement of the hearing. Complainant also had failed to identify Dr. Schaeffer and Detective Casper as witnesses in response to respondent's discovery request. (Respondent's exhibit 38, pp.7-8).

Complainant indicated that Dr. Halls was not available to testify at that time. The hearing proceeded with respondent's case and the complainant was given the opportunity to produce Dr. Halls at a later point.

On the second day of hearing, Dr. Halls advised the hearing examiner by telephone that she was unwilling to appear, that she had patients scheduled back-to-back all day and did not have the time to participate as a witness. After speaking with the complainant, Dr. Halls reiterated to the Examiner her decision not to testify, whereupon the complainant indicated she was going to subpoena Dr. Halls. The examiner then properly ruled that the completion of the hearing would not be delayed where the complainant had specifically indicated at the commencement of the hearing that she was not going to call Dr. Halls. In addition, the complainant was advised in a conference report dated March 22, 1993, that the Commission could issue letters requiring the attendance of state employees to provide testimony. It was also unreasonable of the complainant to expect that her physician could appear without prior specific notice in order to provide testimony.

In both her objections to the proposed decision and in oral argument, the complainant contended that she had been denied the opportunity to present her case and that she was not allowed to testify on her own behalf at hearing. Contrary to her contentions, the complainant had a full opportunity to offer evidence in support of her allegations of discrimination. She simply did not make use of the opportunity provided her. She did, in fact, testify at the hearing. Her testimony extended over a period of more than an hour and she was asked questions on cross-examination as well as questions by the examiner. Had complainant properly prepared her case by identifying her witnesses in advance of the hearing and making arrangements to ensure their attendance, she would have been able to offer additional witnesses.²


² The March 22, 1993 prehearing conference report provided the complainant with explicit instructions regarding these procedures. At the same time, complainant was provided a copy of the Commission's pamphlet entitled "Instructions for Unrepresented Appellants."

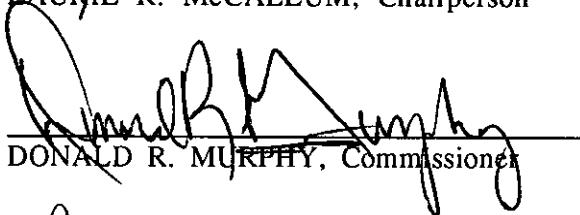
The complainant chose to represent herself at the hearing. She may not now, after the conclusion of the hearing and after having received the adverse proposed decision, be provided a second opportunity to present her case.

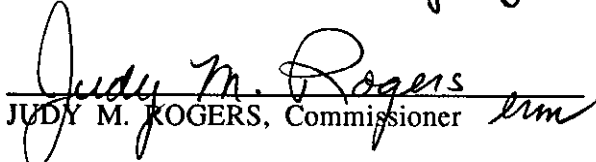
Finally, the complainant suggested that she was denied access to certain pharmacy and medical records maintained by respondent. The content of these records is only peripherally related to the merits of this case. The existence of complainant's handicap has already been established. In addition, finding 8 of the proposed decision specifically references complainant's history of taking both non-narcotic and narcotic drugs for her condition. The relevant issue is whether these prescription records were improperly accessed by those persons making the hiring decisions in question here. Finding of fact 27 concludes that no such access occurred. This finding is supported by the consistent testimony of the persons who made the hiring decisions (who denied having accessed such records) and by the Director of Medical Records who stated that it would be illegal to obtain such records. In addition, the complainant admitted that in none of her interviews was there any question raised about her migraine headaches or any suggestion that her medical or pharmacy records had been accessed.

Dated: July 30, 1993

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner *erm*

KMS:kms
K:D:temp-8/93 Smith

(continued on page 4)

Parties:

Vicki Smith
2506 North 124th Street, #126
Wauwatosa, WI 53226

David Ward
Chancellor, UW-Madison
158 Bascom Hall
500 Lincoln Drive
Madison, WI 53706

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.

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VICKI R. SMITH,

Complainant,

v.

Chancellor, UNIVERSITY OF WISCONSIN-Madison,

Respondent.

Case No. 90-0033-PC-ER

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PROPOSED
DECISION
AND
ORDER

This matter arises from a complaint of discrimination filed with the Commission on March 2, 1990. The parties agreed to the following issue for hearing:

Whether respondent discriminated against complainant on the basis of handicap when she was not selected for one of three Pharmacy Technician positions filled in 1989-90.

FINDINGS OF FACT

1. Respondent provides pharmacy services as part of University Hospital and Clinics.

2. The pharmacy is divided into a "central" unit, which performs inventory and control and distribution to the "decentral" units, which then administer the medications to the patients and interact with other medical staff in the hospital.

3. Positions classified at the Pharmacy Technician 2 (PT 2) level in the central unit are responsible for the "preparation of intravenous additives and drawing up injections using aseptic technique." A Pharmacy Technician 2 position assigned to a decentral unit "controls and administers medications in patient care areas; teaches patients about drug(s) indication and schedules and observes changes in patient's condition."

4. Newly hired PT 2's complete a training period of less than one month. It is common to hire PT 2's who have no previous pharmacy experience or training.

5. In filling PT 2 positions, respondent seeks persons who will get along well with others, including other staff.

6. At least 3 or 4 pharmacists employed as assistant/associate directors by respondent in both the central and decentral units are responsible for selecting individuals to fill vacancies in their areas of responsibility. These pharmacists may share information with each other about candidates.

7. Certification lists for PT 2 vacancies frequently contain names of persons who have previously been considered for a different position within the work unit. Respondent's standard procedure is that if the person has already been interviewed for the previous vacancy, respondent will rely on the materials from that prior interview.

8. Complainant suffers from migraine headaches, episodes of which have caused her to stay home from work and school and to postpone exams and have prevented her from engaging in recreational activities. Complainant takes prophylactic non-narcotic drugs in an effort to prevent the headaches and ingests narcotics when a migraine episode occurs.

Vacancies prior to 1989

9. During all relevant periods, Al Liegel served as assistant director for various areas within central pharmacy. Approximately 80% of the persons employed by Mr. Liegel are women.

10. In February of 1987, Mr. Liegel interviewed the complainant as one of the candidates for a "central" PT 2 vacancy. Based upon the interview, Mr. Liegel reached the general conclusion that the complainant was not friendly and that, based upon her ranking on the certification list, she expected to be hired. Mr. Liegel also understood the complainant to state that she was allergic to cigarette smoke and concluded that this was inconsistent with complainant's work record which showed that she was working as a bartender.

11. Mr. Liegel also contacted a reference listed by complainant on her application materials. The reference was provided by Wally Wallerman and related to complainant's employment as a bartender at a restaurant. According to Mr. Liegel's notes, Mr. Wallerman indicated that complainant "does extras" and is organized, but that sometimes she "was not as outgoing" and possibly "cold." Mr. Wallerman also indicated that complainant "frequently takes medication for headaches... migraine headaches [and] has missed at least two shifts due to this."

12. Mr. Liegel also contacted a second reference for complainant's work at West Bend Country Club. According to Mr. Liegel's notes, that reference indicated that complainant was a pretty good employe but that she "didn't like women."

13. Based upon his impressions from the interview and the comments by the references, Mr. Liegel decided to hire another candidate for the position. Even without the reference by Mr. Wallerman to complainant's migraine headaches and medication, Mr. Liegel would not have hired the complainant for the vacancy.

14. In August of 1987, Paul Piszewicz, another assistant director of the Pharmacy, hired a PT 2 candidate who indicated during her interview that she suffered from migraine headaches.

15. Early in August of 1988, Bill Check, a third assistant director with responsibilities over certain pharmacy functions, conducted interviews for one or more PT 2 vacancies for decentral positions. Complainant was one of those interviewed.

16. Mr. Check knew that complainant had not been selected for one or more prior PT 2 vacancies but otherwise knew no other information about the complainant.

17. Mr. Check received a slightly unfavorable impression of complainant based upon his interview with her. This impression was based on complainant's comments regarding previous employers and several statements by the complainant to the effect that she was intolerant of unrelentingly pushy people.

18. Mr. Check was only able to contact one of complainant's references, Mr. Schutz, who was the proprietor of a retail pharmacy where she had worked as a technician for nearly 4 months. The evaluation called for Mr. Schutz to rate the complainant on a scale of 1 to 5 with respect to 9 separate areas. In the areas of "ability to work with others," "handling stress" and "independence," he rated the complainant at the 3 level. Mr. Schutz rated complainant at the 4 level for the remaining areas except one which was inapplicable. Mr. Schutz also indicated that complainant was still in training, that she was intelligent but could do better in terms of common sense, and that he would rehire her.

19. Evaluation ratings at or below the 3 level are considered negative by respondent.

20. Complainant was not hired for the vacancy, and the other assistant directors were so notified.

21. Also in 1988, complainant was interviewed by Lucy Hazebrook, an assistant director for the decentral units. During the interview, Ms. Hazebrook found it difficult to communicate with complainant, in that complainant was unfriendly and indicated that she deserved the job because of her background. Ms. Hazebrook also contacted one or more references who confirmed Ms. Hazebrook's suspicion that complainant had difficulty dealing with people. Complainant was not offered the position.

22. By letter dated September 6, 1988, Associate Director of Pharmacy Pam Ploetz drafted a letter to the personnel director for the University Hospital and Clinics requesting that 5 individuals, including the complainant, be removed from the pharmacy technician register. The reasons expressed in the letter for removing the complainant's name were as follows:

Negative reference from previous pharmacy employer limited in her ability to work with others; does not deal well in a stressful situation; does not do well in an independent work environment; still training after two months; no teaching abilities.

At the time she prepared the letter, Ms. Ploetz was unfamiliar with complainant's history of migraine headaches.

Vacancies in 1989 and 1990

23. In 1989, complainant was considered for additional PT 2 vacancies on the basis of her position on a new PT 2 register.

24. Pursuant to her standard procedure, Ms. Hazewood contacted the complainant and determined she was interested in two PT 2 vacancies during 1989 and 1990. Ms. Hazewood considered complainant on the basis of materials from her previous interview and reference check as well as information from Bill Check but chose not to hire her. The two successful candidates for these vacancies were as follows:

a.) Candidate B had worked two years as a pharmacy technician in an Illinois hospital. Ms. Hazewood found Ms. B to be very congenial. Ms. Hazewood testified that she contacted Ms. B's references and they were favorable. However, one of the reference forms attached to Ms. Hazewood's inter-

view notes of Ms. B was filled out by Ms. Liegel and includes a rating of 3 for "handling stress," a 3-4 rating for "reliable/conscientious" and a "?" for "ability to work with others." The remaining ratings were predominantly at the 5 level. Mr. Liegel's reference check also included the following observation: "between this and her feeling that she would not get a good reference from [a second employer] I am reluctant to hire her." The second reference, from a financial institution, was completed by someone who did not personally work with Ms. B. The ratings in that reference were equally distributed between "3", "3-4" and "inapplicable."

b.) Candidate E had worked for a lengthy period at an extended care facility which was closing. She was highly recommended by a reference from that job as well as by one of respondent's current employees. Ms. Hazebrook felt Ms. E exhibited "a lot of maturity and and ability to get along well with others" during the interview.

25. In December of 1989, Mr. Liegel contacted the complainant regarding another vacancy and scheduled an interview with her. Complainant failed to appear at the interview and during a follow-up call from Mr. Liegel, complainant stated that she was not going to attend an interview because she felt she would not get fair consideration.

26. Mr. Liegel went ahead and considered complainant for the vacancy based upon the materials prepared by Mr. Check during his interview and reference check in August of 1988. Mr. Liegel did not hire complainant. The successful candidate, Ms. S, had previously worked at Central Wisconsin Center, had a very positive interview with Mr. Liegel. Mr. Liegel completed two reference checks, which included only one rating as low as "3", with most ratings at either 4-5 or 5.

27. The respondent never accessed the complainant's pharmacy or medical records located at University Hospital and Clinics for the purpose of evaluating her suitability for employment.

CONCLUSIONS OF LAW

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

2. The complainant has the burden of proof except that the respondent has the burden with respect to the ability to perform and reasonable accommodation.

3. The respondent did not discriminate against the complainant based on her handicap when it did not select her for any vacant Pharmacy Technician 2 positions in 1989 and 1990.

OPINION

In Harris v. DHSS, 84-0109-PC-ER, 85-0115-PC-ER, 2/11/88, the Commission stated that a typical handicap discrimination case would 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 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 (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 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.

If the complainant establishes that she is a handicapped individual and that she was not hired because of the handicap, the employer has the burden not only of proving that the handicap is reasonably related to her ability to adequately perform the 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. As to the third element, unless there is a special duty of care, the standard is to a "reasonable probability." Samens v. LIRC, 117 Wis.2d 646, 662, 345 N.W.2d 432 (1984).

The first element that must be addressed is whether complainant is a "handicapped individual." The complainant showed that she suffers from migraine headaches, that she has received medical treatment for this condition

and it has required her to stay home from work and school. For purposes of this analysis, the Commission will assume that the complainant has established the existence of a handicapping condition as defined in §111.32(8), Stats. The next issue is whether respondent discriminated against complainant because of her handicap.

Other than the one reference obtained by Mr. Liegel in 1987 from the restaurant, there is no indication that, at the time of any of the hiring decisions mentioned above, the decision-makers were aware of the complainant's history of migraine headaches or of the medications she used in an effort to control them. The issue before the Commission relates to hiring decisions made during 1989 and 1990. There was no testimony that the complainant brought up the topic of her headaches or medication use during these interviews. There is no evidence to the effect that Ms. Hazebrook was aware of complainant's migraines or use of medication at the time of her non-selection decisions in 1989. Ms. Hazebrook testified that the potential presence or absence of migraine headaches on the part of the complainant did not enter into her deliberations at all.

The record indicates that the decisions not to select the complainant for the PT 2 vacancies in 1989 and 1990 were based on reasons other than her handicap. The key distinction between complainant and the two successful candidates selected by Ms. Hazebrook, as described in finding of fact 24, was the attitude and level of friendliness expressed during the interviews. Nothing presented at hearing was inconsistent with the testimony by Ms. Hazebrook (and Mr. Liegel) that complainant presented an unfriendly attitude during an interview. The assistant/associate directors were unanimous that the ability to get along with others was very important in the various PT 2 positions. Candidate E had both better references and a better interview than the complainant. The reference check for candidate B which was completed by Mr. Liegel reflected approximately the same ratings as received by the complainant. Ms. Hazebrook testified that she contacted Ms. B's references and they were favorable. This information plus the distinction between the interview of the complainant and Ms. B supports the conclusion that the decision not to select the complainant was based on relative qualifications rather than on complainant's handicapped status.

Mr. Liegel also declined to hire the complainant for a vacancy in 1990, and instead selected candidate S, who had both a very favorable interview and very positive references. Mr. Liegel testified that in considering the complainant's qualifications, he relied on the materials prepared by Mr. Check in 1988, including the reference check. Mr. Liegel denied that he relied on the information he obtained in his 1987 interview of the complainant and the reference check which he made at that time. It is also noteworthy that the complainant simply failed to show up for the interview which Mr. Liegel had scheduled with her in December of 1989. Obviously this did not enhance the complainant's chances for hire.

Finally, the record showed that he respondent had, in 1987, hired a PT 2 candidate who suffered from migraines. This decision was made by Paul Piszczewicz rather than by either Mr. Liegel or Ms. Hazewood. However, it clearly establishes that the respondent did not have some sort of policy against hiring persons suffering from migraines.

The existence of the September 8, 1988 letter requesting that complainant's name be removed from the PT 2 list does not support a finding of discrimination. This letter is consistent with §ER-Pers 11.04(1), Wis. Adm. Code, which provides:

In addition to the reasons given in s. ER-Pers 6.10, the administrator may remove a name from a register or refuse to certify an applicant under any of the following circumstances:

* * *

(d) *Non-selection after 3 appointments.* For each 3 appointments made from a register, up to 2 persons who have been considered for appointment 3 times and not selected may be removed from the register. Such removals shall be based upon a job-related reason reported to the administrator by the appointing authority.

The complainant was one of five persons who were covered by the letter. There was no reference in the letter to complainant's handicap, nor was the person who wrote the letter, Pam Ploetz, even aware of the complainant's medical condition.

Complainant argued that the process used to fill the vacancies was unfair because it did not require personal interviews for each vacancy, because

there was undue reliance on the one reference from Mr. Schutz, because there were no "objective proven negative bases" for her non-hire and because there was a refusal to notify the complainant as to the exact reasons for her non-selection. These arguments do not advance complainant's handicap claim. There is nothing in the record that the practices followed in reviewing the complainant's application were any different from the procedures followed for all PT 2 applicants.

Complainant also pointed out that the decision-makers could have accessed either her medical or pharmacy records and relied on them when making their selection decisions. The witnesses on this topic testified that it would be highly improper to obtain records for such a purpose. There was no evidence that these records were actually obtained by any of the assistant/associate directors and they denied having done so.

Finally, the complainant argued that it "is reasonable to assume that by virtue of human nature, societal pressure, prejudice and training involving becoming a pharmacist, my headaches and Schedule 2 use were indeed a factor in the decision not to hire." As noted above, there is nothing in the record indicating that anyone making the subject hiring decisions was aware of complainant's use of narcotics to control her migraines. This argument was also effectively countered by testimony from Ms. Ploetz that the key determinant in deciding whether to hire a person who is taking prescribed narcotics is, assuming all else is equal, whether they are able to perform the job they are being considered for. Mr. Liegel testified that in 1987, he never reached the point of exploring further the concerns he had regarding the reference by Mr. Wallerman to complainant's migraine headaches and medication, because the complainant was not a satisfactory candidate in terms of the other aspects of the interview and references. Mr. Liegel went on to testify that if complainant had measured up in the other areas, he would have had to get additional information about the headaches and medication.

Given this record, the Commission concludes that the respondent chose not to select the complainant for PT 2 vacancies in 1989 and 1990 for reasons other than her handicap.

ORDER

This complaint is dismissed.

Dated: _____, 1993 STATE PERSONNEL COMMISSION

LAURIE R. MCCALLUM, Chairperson

KMS:kms
K:D:Merits-ER hcp (Smith)

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner