STATE OF WISCONSIN PERSONNEL COMMISSION

KARSTEN R. H. SCHILLING,

Appellant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM (Madison),

Respondent.

Case No. 90-0248-PC

ORDER ADOPTING PROPOSED INTERIM DECISION AND ORDER

KARSTEN R. H. SCHILLING,

Complainant,

v.

Chancellor, UNIVERSITY OF WISCONSIN - Madison,

Respondent.

Case No. 90-0064-PC-ER

This matter is before the Commission following the promulgation of a proposed interim decision and order, a copy of which is attached hereto, by the examiner. The Commission has considered the parties' objections and arguments, and now adopts the proposed interim decision and order as its own.

In its objections and arguments, respondent makes several contentions concerning the extent of accommodation via transfer that is required under both the WFEA and §230.37(2), stats.

Section 230.37(2), stats., provides, in part:

> (2) When an employe becomes physically or mentally incapable of or unfit for the efficient and effective performance of the duties of his or her position by reason of infirmities due to age, disabilities, or otherwise, the appointing authority shall either transfer the employe to a position which requires less arduous duties if necessary demote the employe, place the employe on

> a part-time service basis and at a part-time rate of pay or as a last resort, dismiss the employe from the service.

The proposed decision contains the following discussion of respondent's responsibility to "accommodate" imposed by §230.37(2):

> [T]he duty of using a less drastic alternative to dismissal, if possible, extends to transfer to any other suitable position within the agency. That is, s. 230.37(2) refers to the appointing authority's duty to seek a less onerous alternative. The term "appointing authority" is defined as "the chief administrative officer of an agency unless another person is authorized to appoint subordinate staff in the agency by the constitution or statutes," s. 230.03(4), stats. In this case, the statutorily-defined appointing authority is obviously at a higher level than UWHC, and therefore respondent failed in its obligation under s. 230.37(2), stats., when it did not consider a transfer to positions outside UWHC.

In its objections to the proposed decision, respondent argues as follows:

> The proposed decision says that there is a duty under sec. 230.37(2), Wis. Stats., to consider a transfer to a "position within the agency." Nowhere does that statute mention the "agency." The statute refers to the obligations of the "appointing authority." The appointing authority is defined in sec. 230.03(4) to include those "authorized to appoint. . ." Sec. 230.06(2) allows for delegation of the power and Bugge testified that she had been delegated this authority "including discipline and removal." Sec. 230.06(2), Wis. Stats. Clearly then, Bugge acts as the appointing authority according to the statutes and any duty to consider transfers is only within the scope of her authority. She cannot compel a transfer to UW-Milwaukee, for example. Respondent's objections, pp.6-7.

Section 230.37(2), stats., imposes certain obligations on the appointing authority, and at the same time creates concomitant protections or rights for the employe who is unable to perform the duties of his or her position due to "infirmities due to age, disabilities, or otherwise." The employe has the protection or right to be considered for employment options short of discharge, including transfer to another "position which requires less arduous duties." The "appointing authority" has the duty or responsibility of utilizing an option short of discharge, including the transfer of the employe to such a position. Since the "appointing authority" is defined as the agency head unless another person has been authorized statutorily or constitutionally to make appointments, the employe's right to be considered for transfer, and the

appointing authority's corollary duty in this regard, runs throughout the agency, except in cases where there is a subdivision whose head has been given statutory or constitutional authority to make appointments. Under §230.06(2), stats., an appointing authority has the power to delegate administratively his or her "power of appointment." In this case, the appointing authority delegated the "power of appointment" for UWHC to the Associate Director for Human Resources at UWHC, Ms. Bugge. Thus respondent argues that because the extent of the power of appointment that was delegated to Ms. Bugge was limited to the UWHC, the scope of the original appointing authority's responsibility for transferring an employe under §230.37(2), stats., also has been reduced to the boundaries of the UWHC. This argument is faulty because it attempts to reduce a statutorily imposed responsibility by an act of administrative delegation.

As discussed above, the agency head's/appointing authority's responsibilities under §230.37(2), stats., involve what amounts to a limited form of accommodation of a handicapped or disabled employe. While the original appointing authority can delegate his or her "power of appointment" under §230.06(2) to various subordinates, there are only two possible alternatives as to what this would involve with respect to the original appointing authority's responsibility of "accommodation" under §230.37(2). Either the delegation includes authority necessary to discharge the full scope of the original appointing authority's responsibilities under §230.37(2), which includes the responsibility of canvassing the entire agency for suitable positions for transfer, or the delegation does not include such authority, and it, as well as the corresponding responsibility, is retained by the appointing authority. However, it is not conceivable that an administrative officer can reduce the scope of his or her statutory responsibility and concomitant employe right or protection by the act of delegating some limited segment of his or her authority to a subordinate. This point is illustrated by a few examples.

An appointing authority has a constitutionally-imposed obligation to provide a pretermination hearing in most discharge cases. Cleveland Bd. of Education v. Loudermill, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985). The appointing authority does not have the capacity to eliminate that obligation by delegating the power of appointment (which includes the power to terminate) to a subordinate but by not also delegating the authority to hold a hearing. As

another example, a permanent employe who receives a notice of layoff has certain transfer rights pursuant to §ER-22.08(1)(a)2., Wis. Adm. Code, that are agency-wide in scope. The original appointing authority/agency head cannot reduce this protection by delegating "appointing authority" to the administrator of the division in which the reduction in force is to occur, and then arguing that the division administrator lacks the authority to appoint staff in other divisions, and that therefore the employe's transfer rights are limited to vacancies in the division rather than agency-wide.

The foregoing result is reinforced by the absurd results that could result under §230.37(2), stats., from the adoption of respondent's approach. For example, in agency A, the Secretary has just taken over and has not gotten around to signing any letters delegating his or her appointing authority to any subordinates. As a result, a disabled employe has potential transfer rights to any position in the agency. In agency B, the Secretary has delegated his or her appointing authority to all division administrators. As a result, a disabled employe has potential transfer rights only to any position in his or her division. In agency C, the Secretary has delegated his or her power of appointment to all supervisors. Therefore, a disabled employe has potential transfer rights only to any position in his or her unit, section, squad, etc. Thus, the scope of the employe's transfer rights depends solely on the agency head's completely discretionary decision as to how far down the organization chart to go with the delegation of the power of appointment.

With respect to the extent of accommodation by transfer required under the WFEA, the proposed decision contains the following discussion:

> While Ms. Bugge, who had been delegated the power of appointment for UWHC, did not have the authority to have appointed complainant to a position outside UWHC, respondent's responsibility of accommodation under WFEA was not so limited. Under the WFEA, the "employer" is "the state and each agency of the state," s. 111.32(6)(a), stats. Those prohibited from discriminating include the employer, s. 111.321, stats. Also, the specific provision on handicap accommodation, s. 111.34(1)(b), stats., provides:
>
> > Employment discrimination because of handicap includes .... Refusing to reasonably accommodate an employe's or prospective employe's handicap unless the employer can demonstrate that the accommodation would pose a hardship on the employer's program, enterprise or business. (emphasis added)

> The "agency" which employed complainant was not UWHC. Section 15.01(9), stats., defines "[i]ndependent agency" as "an administrative agency within the executive branch created under subch. III." Subchapter III of Chapter 15 includes s. 15.91, which creates the "board of regents of the university of wisconsin system"

Respondent argues that since §111.32(6)(a), stats., goes on to identify an "agency" as "an . . . institution. . . or other body in state government created or authorized to be created by the constitution or any law," and §36.25(13), stats., "creates or at least authorizes the creation of UWHC. Thus, UWHC is the 'agency' or 'employer' for purposes of the WFEA. Thus, the duty of accommodation is with UWHC, not the system." Respondent's objections to proposed decision, p.5.

Section 111.32(6)(a), stats., includes the following:

> "Employer" means the state and each agency of the state .... In this subsection, "agency" means an office, department, independent agency, authority, institution, association, society or other body in state government created or authorized to be created by the constitution or any law. . . .

Pursuant to this subsection, each "agency" of the state is considered an "employer" under the WFEA. Respondent's contention raises the question of whether, if the constitution or a law creates both an agency and one or more subdivisions within that agency, each such subdivision is considered a separate, exclusive employer under the WFEA.

Looking first solely at the language of §111.32(6)(a), stats., if a body in state government (like the board of regents) is considered an "agency" under the WFEA because it is an "independent agency" created by a statute (i.e., §15.91), it is anomalous to include a statutorily-created subdivision of the board of regents within the concept of "agency," because this would amount to breaking up an "agency" into "agencies," which is somewhat akin to saying a subdivision of a "division" is also a "division." The main purpose of §111.32(6)(a), stats., was to bring the state as an employer under the umbrella of WFEA coverage, and the enumeration of the various bodies in state government included therein was intended to identify which entities would be considered part of the state for the purposes of coverage, not to subdivide each

agency into smaller and exclusive employment units for the purpose of restricting responsibilities, obligations, and potential liability under the WFEA.

This reading of §111.32(6)(a) is reinforced by a number of factors. First, respondent's interpretation could lead to absurd results. There are a number of statutorily-created subdivisions of what clearly are independent agencies or departments that have been given no appointing authority under the statutes. For example, the division of merit recruitment and selection (DMRS) is a statutorily recognized subdivision of the department of employment relations (DER), see §15.173(1), stats., but appointing authority for DMRS staff is vested explicitly in the secretary of DER by §230.04(7), Stats. However, the result of respondent's theory of interpretation is that DMRS would be considered the sole employer for WFEA purposes with respect to a claim of employment discrimination by a DMRS employe who was discharged by the secretary of DER. In the same vein, respondent argues that §36.25(13), stats., authorizes the creation of UWHC and hence it is the employer under the WFEA. However, §36.25(13) does not vest any appointing authority in the UWHC, although this authority ultimately was administratively delegated to UWHC. If this had not been done, this would lead to the absurd result of UWHC being the exclusive respondent with respect to all claims of employment discrimination filed by UWHC employes, notwithstanding UWHC would have no authority to hire or fire.

Another factor that must be considered with respect to this issue is the liberal construction clause contained in the WFEA at §111.31(3), stats. It obviously would not be a liberal construction of §111.32(6)(a), stats., to accomplish the public policy behind the WFEA, to define "employer" to include all statutorily-created subdivisions of independent agencies, that may not even have the power of appointment, the results of which would include the arbitrary restriction of a handicapped employe's right to be considered for transfer to another position as accommodation.

Finally, it should be noted that if one accepted respondent's argument that, since the statutes authorize the creation of UWHC, it should be considered for WFEA purposes to be an "agency" within an "independent agency," it could just as well follow that the independent agency (the board of regents) could continue to be considered as an employer — i.e., both the board of regents and the UWHC would be considered "employers" for WFEA purposes and the scope of

handicap accommodation transfer consideration still would not be limited to the UWHC.

The last point to be address in this area is respondent's argument that McMullen v. LIRC, 148 Wis. 2d 270, 434 N.W. 2d 830 (Ct. App. 1988), which established the precedent that the duty of accommodation under the WFEA can include a transfer, was wrongly decided and should not be followed. Since this is a published decision of the Court of Appeals, the Commission does not have this authority. Respondent also tries to distinguish McMullen by arguing that the employe repeatedly had requested transfer to a specific job. However, the McMullen decision did not appear to rely on that point. Furthermore, in the instant case when respondent told complainant he was being discharged, the respondent advised him categorically that "they could not place him in a suitable alternative position." Finding #31.

ORDER

The proposed decision and order, a copy of which is attached hereto and incorporated by reference as if fully set forth, is adopted as the Commission's resolution of this matter on the merits. The Commission will retain jurisdiction to take up the question of attorney's fees.

Dated: November 6, 1991 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

AJT/gdt/2

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Complainant,

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Case No. 90-0248-PC

PROPOSED INTERIM* DECISION AND ORDER

This is a claim by Karsten R. H. Schilling as complainant, that respondent, University of Wisconsin - Madison, discriminated against him on the basis of handicap and sexual orientation; and an appeal by Karsten R. H. Schilling, as appellant, that respondent, University of Wisconsin System discharged him without just cause. The following findings of fact, conclusions of law, opinion and order are based on the evidentiary record made at a hearing on these matters. To the extent any of the opinion constitutes a finding of fact, it is adopted as such.

* This is being issued as an interim decision and order to provide the appellant/complainant with an opportunity to file a motion for costs under §227.485, Stats.

FINDING OF FACT

1. Complainant/Appellant Karsten Schilling began working for respondents in 1980 at the University of Wisconsin-Madison Hospital and Clinics (UWHC).

2. At all times relevant, complainant worked at UWHC, in Central Services, as a Stores Supervisor I (SSI), a position in state classified civil service.

3. Central Services is one of five major service departments at UWHC. Its primary function is to provide supplies and services to the patients.

4. As Stores Supervisor, complainant served as the P.M. supervisor — 3:00 p.m. to 11:30 p.m. — for Central Services. His main function was to supervise the P.M. personnel in the distribution, decontamination, and reprocessing and packaging units of Central Services. Some Central Services employes work in the supply quarter and materials processing unit of the Operating Room.

5. Complainant's first line supervisor was Don Klimpel, the Director of Central Services. In Klimpel's absence, complainant was directed to report to Karl Mosbacher, Assistant Director of Materials Management for Central Processing.

6. On the evening of January 24, 1990, complainant, while working, discovered the method for reprocessing surgical instruments had changed. Over the next few hours complainant attempted to intervene and affect the cancelation of surgery the following morning.

7. Complainant called or talked to several UWHC staff personnel at their homes that evening. They were: Patty McCarthy, Assistant Director of Central Services, who was in charge of the reprocessing area; Karl Mosbacher, the Assistant Director of Materials Management for Central Processing; Steve Stetzer, Director of Surgical Service, whose duties included administration of the Operating Room; and Gordon Derzon, Superintendent for UWHC. Complainant told these people there was a crisis in the Operating Room, or there was a need to cancel the surgeries scheduled the following day.

8. At UWHC, complainant told the OR Charge Nurse and Dr. William Sykes, the anesthesiologist on call, the next morning's surgeries needed to be canceled. This initiated a call by the Charge Nurse to Mr. Stetzer.

9. Complainant's contacts that evening with UWHC staff caused other phone calls between staff to determine the need to cancel surgeries the next day. These calls included calls between the Superintendent of UWHC, Gordon Derzon and the Associate Superintendent Faisal Kaud.

10. Complainant was told by Mr. Stetzer that surgery cases did not need to be canceled, the change in processing would not cause any problem.

11. The next morning complainant, on two occasions, interrupted a staff meeting being held by Stetzer to discuss remodeling of the reprocessing room. First complainant inquired if he should attend the meeting, then later he returned two papers and a memo to Karl Mosbacher.

12. Shortly afterwards, University Police Sergeant Gary Johnson was directed to bring complainant to Kaud's office. Sergeant Johnson found complainant in the office and seated at the desk of Don Klimpel, Director of Central Services, who was on military leave. Complainant was going through papers on Klimpel's desk.

13. Complainant refused to report to Kaud's office and requested to talk with his attorney.

14. Later, complainant was discovered in OR without authorization. Two police officers were required to remove complainant from OR after a brief struggle. Complainant was then escorted to the locker room, where he changed into street clothes before leaving the building. He was told not to return until further notice.

15. Complainant was placed on administrative leave until January 30, 1990 and directed to meet with Renae Bugge, and Faisal Kaud on January 31, 1990.

16. Renae Bugge, Associate Director of Human Resources, UWHC, who had been delegated appointing authority for UWHC, was given the responsibility of investigating complainant's conduct.

17. Complainant failed to report to the meeting on January 31, 1990 as directed.

18. Subsequently, complainant's administrative leave was extended through February 9, 1990.

19. On February 12, 1990 complainant attended a pre-disciplinary meeting with Renae Bugge and Jessica LaRocque, an Employment Relations Specialist, in Bugge's office.

20. At this meeting, Bugge recounted complainant's behavior in January, and advised him of numerous rules respondent believed were violated by his conduct, and told him such conduct was cause for possible discharge.

21. Later, by letter Bugge set forth the substance of the February 12, 1990 meeting, informed complainant of concerns about his physical and emotional ability to work and of an appointment to see Dr. Warren Olson.

22. Dr. Olson diagnosed complainant as suffering from a brief psychotic episode, probably as part of a Bipolar Affective Disorder (BPD) or related to a cyclothymic disorder.

23. Bipolar Affective Disorders are treatable conditions, but with a high probability of recurrence of psychotic episode, especially in instances of prior episodes.

24. Dr. Olson also described complainant as "disorganized and rambling," and "display[ing] paranoid delusions in regards to coworkers and supervisors, and his special relationships with certain members of the medical staff and his belief that he was being persecuted for his personal political beliefs."

25. Previously, in 1984 complainant suffered a psychotic episode while working for respondent in the Emergency Room area of UWHC.

26. During that period in December, 1984 complainant was cited for several work infractions, including performing patient procedures, clearly outside his job description and authority.

27. Subsequently, the matter was settled and complainant received a 30 day suspension without pay and was reassigned as a Material Reprocessing Assistant 2.

28. Prior to the settlement agreement, complainant was refused a position in the Operating Room because of his performance history and a belief that he could not be trusted to perform safely in the OR environment.

29. Renae Bugge had several telephone conversations with Dr. Olson. Afterwards Olson's evaluation and conclusions about complainant were conveyed to Bugge by letter.[1]

30. Upon completing her investigation, Bugge conferred with Associate Superintendents Smith and Kaud, and legal counsel.

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[1] Bugge made her decision to terminate complainant before receiving Dr. Olson's written evaluation.

31. On March 20, 1990, Renae Bugge met with complainant and Jessica LaRocque in Bugge's office. Bugge summarized Dr. Olson's report, told complainant she determined his impairment caused him to be incapable or unfit for his position and that he was being discharged because they could not place him in a suitable alternate position. She had decided that any employment of complainant at UWHC posed an unacceptable risk due to his condition and the nature of his behavior during psychotic episodes. She did not explore transfer to another position outside UWHC.

32. Following the meeting, Bugge, by letter dated March 24, 1990 gave complainant written notification of his discharge.

33. On April 18, 1990 complainant filed a charge of discrimination against respondent, concerning his discharge, with the Commission.

CONCLUSIONS OF LAW

1. These matters are properly before the Commission pursuant to §§230.44(1)(c) and 230.45(1)(b) Stats.

2. Complainant has the burden of proving its claims of discrimination against him by respondent, in violation of the Wisconsin Fair Employment Act (WFEA).

3. Complainant has failed to meet his burden of proving respondent discriminated against him on the basis of sexual orientation in violation of the WFEA. Complainant has satisfied his burden of proving respondent discriminated against him on the basis of handicap in violation of the WFEA.

4. Respondent has the burden of proving there was just cause for discharge of appellant.

5. Respondent has failed to sustain this burden.

DISCUSSION

Complainant/appellant's claims of wrongful discharge under §§230.44(1)(c) and 230.45(1)(b), Wis. Stats. will be dealt with separately. First, in order for complainant to establish he was discharged because he was discriminated against under a claim provided pursuant to §230.45(1)(b) Wis. Stats., complainant must demonstrate that he was handicapped, that respondent discharged him because he was handicapped and if respondent proves its

discrimination is covered by an exception, that respondent failed to reasonably accommodate his handicap. The Commission believes the evidence clearly establishes that complainant suffers from a condition, which if not a handicap was perceived by respondent as such an impairment. In fact, respondent virtually concedes this point by focusing its initial argument on the contention it meets the exception to handicap discrimination expressed in §111.34(2)(a), Wis. Stats. This section as applicable provides:

> Notwithstanding s. 111.322, it is not employment discrimination because of handicap to. . . terminate from employment. . . any individual. . . if the handicap is reasonably related to the individual's ability to adequately undertake the job-related responsibilities of that individual's employment. . . .

Sections 111.34(2)(b) & (c) set forth the parameters for determining exceptions expressed in 111.34(2)(b). It in pertinent part is as follows:

> (b) In evaluating whether a handicapped individual can adequately undertake the job-related responsibilities of a particular job. . . the present and future safety of the individual, of the individual's coworkers and, if applicable, of the general public may be considered. However, this evaluation shall be made on an individual case-by-case basis. . . .
>
> (c) If the employment . . . involves a special duty of care for the safety of the general public . . . this special duty of care may be considered in evaluating whether the employe . . . can adequately undertake the job-related responsibility of the

Respondent argues that complainant's position, as other positions in UWHC, involves a "special duty of care" as viewed under §111.34(2)(c) and that complainant's impairment is "reasonably related" to his ability to adequately perform his job. In support respondent references testimony regarding complainant's behavior in January 1990. On the question of whether the subject employment "involves a special duty of care . . .," respondent argues that employment in a hospital, like UWHC, is archetypical of an employment setting expressed by this language of the statutes.

The evidence shows that on the evening of January 24, 1990, complainant engaged in some abnormal behavior, disrupting the work of several UWHC staff members in an attempt to cancel surgery the following morning. This was diagnosed as symptomatic of a psychotic-manic episode most probably

caused by a bipolar affective disorder. Dr. Olson testified that bipolar affective disorder (mania-depression) is a major mental illness characterized by discrete episodes of mania and depression. The episodes are triggered by psychological stress and biological stresses, like other illnesses, drugs or alcohol. Main symptoms include hyperactivity, obsession with own perception of creativity and power, grandiose thinking, hallucinations and impaired judgment. Dr. Olson testified, under treatment the episode may be resolved in two to four weeks. Left untreated, it might take three months. With treatment, complainant's prognosis is good, but there is a virtual certainty of future unpredictable episodes.

In many respects, this case is similar to Samens v. LIRC, 117 Wis. 2d 646, 345 N.W. 2d 432 (1984). Samens applied for the position of truck driver/groundman with the Wisconsin Power and Light Company. He had a history of having suffered from a series of epileptic seizures. The court held WP&L had legitimately refused to hire Samens under the exception to handicap discrimination. That decision was based upon the court's interpretation of a 1973 statute and the applicable standard for resolving the dispute. In contrast, the current statute prohibits the use of a general rule and requires an analysis based on the particular circumstances of the case.

The Commission believes that UWHC has a particular responsibility as a health care facility, which is subsumed by the "special duty of care" clause in §111.34(2)(c), Stats. Appellant's position, which was involved in reprocessing and decontaminating surgical implements constitutes employment that "involves a special duty of care for the general public." Also, the Commission believes, whether under the standard set out in Boynton Cab Co v. ILHR Dept, 96 Wis 2d 396, 291 N.W. 2d 850 (1980) or the standard expressed in Bucyrus-Erie Co v. ILHR Dept, 90 Wis. 2d 408 N.W. 2d 142 (1979), the evidentiary facts in this matter support the conclusion that respondent's actions are within the exceptions to prohibited discrimination against handicapped persons, as set forth in §111.34(2)(a), Stats. The testimony of Dr. Olson establishes that complainant, at the time of the examination, because of impaired judgment, while in a manic episode, would pose a danger to himself and others in that work setting. This testimony also establishes that complainant has a high probability of suffering future unpredictable manic episodes. This would place UWHC's patient-care environment in jeopardy.

Under §111.34(1)(b), Stats., employment discrimination because of handicap involves refusing to reasonably accommodate an employe's handicap. UWHC appointing authority, Renae Bugge, testified that after obtaining an evaluation of complainant's physical and mental health from Dr. Warren Olson, a psychiatrist, she considered various types of employment for complainant within UWHC. Further, she testified that complainant's impairment and his prior history of stepping outside the bounds of his authority caused her to rule out all positions at UWHC. Bugge's authority was limited to UWHC.

In determining whether respondent satisfied its duty of accommodation under the FEA, it is necessary to consider not only whether there was some means of accommodation that would have enabled complainant to perform his SS 1 job, but also whether arrangements could have been made to move him to another position, see, McMullen v. LIRC, 148 Wis. 2d 270, 434 N.W. 2d 830 (Ct. App. 1988). The employer has the burden to proof on the issue of accommodation. Betlach-Odegard v. UW, No. 86-0114-PC-ER(12/17/90); Vallez v. UW, No. 84-0055-PC-ER(2/5/87).

Respondent has failed to sustain its burden with respect to the issue of accommodation. The Commission cannot fault respondent's initial determination that it was inappropriate to return complainant to his position of employment as of the time of, and immediately following, Dr. Olson's mental status examination of February 21, 1990. However, it is difficult to see how respondent could possibly have satisfied its duty of accommodation without a further medical evaluation of complainant before terminating his employment. The Commission takes this view because Dr. Olson's evaluation, while clearly recognizing the danger of further psychotic episodes, was qualified by the facts that there had been a limited opportunity for evaluation, and that complainant had received no treatment.

Respondent's position on accommodation basically was that since Dr. Olson could not rule out the likelihood of a recurrence of another psychotic episode, even if complainant were under treatment, that in itself constituted an undue risk in light of complainant's previous behavior while involved in psychotic episodes. However, Dr. Olson also testified: "treatment could be expected to ameliorate the symptoms to some degree so that the severity of the symptoms would likely be less under treatment." He further testified that he had successfully treated physicians with the same kind of illness as

complainant who had been able to continue their employment at UWHC. Respondent argues that the latter testimony lacks significance because the record does not reflect that the condition of these physicians was comparable to complainant's. This argument ignores the point that respondent has the burden of proof on the issue of accommodation. It was respondent's obligation to demonstrate there was no available reasonable accommodation. Given the qualified nature of Dr. Olson's evaluation and his successful treatment of other health care providers at UWHC itself, it must be concluded that respondent had insufficient medical information when it concluded there was no possibility of an accommodation. This conclusion is further reinforced by Dr. Olson's testimony that his opinion was also limited by the fact that without a medical evaluation he could not rule our the possibility that complainant's psychotic-appearing symptoms were actually secondary to a physical problem.

Another reason why respondent failed in its duty of accommodation is that it failed to consider the possibility of putting complainant in another position outside UWHC. While Ms. Bugge, who had been delegated the power of appointment for UWHC, did not have the authority to have appointed complainant to a position outside UWHC, respondent's responsibility of accommodation under the WFEA was not so limited. Under the WFEA, the "employer" is "the state and each agency of the state," s. 111.32(6)(a), stats. Those prohibited from discriminating include the employer, s. 111.321, stats. Also, the specific provision on handicap accommodation, s. 111.34(1)(b), stats., provides:

> Employment discrimination because of handicap includes . . . Refusing to reasonably accommodate an employe's or prospective employe's handicap unless the employer can demonstrate that the accommodation would pose a hardship on the employer's program, enterprise or business.(emphasis added)

The "agency" which employed complainant was not UWHC. Section 15.01(9), stats., defines "[i]ndependent agency" as "an administrative agency within the executive branch created under subch. III." Subchapter III of Chapter 15 includes s. 15.91, which creates the "board of regents of the university of wisconsin system." The duty of accommodation can include a transfer to another position maintained by the employer, and is not limited to the particular division where the employe is currently employed. McMullen v. LIRC, 148 Wis. 2d 270, 276, 434 N.W. 2d 830 (Ct. App. 1988). Therefore, when respondent

failed to consider any positions outside the particular subdivision of UWHC, this constituted another facet of failure to accommodate under the FEA.

Regarding complainant's claim of sexual orientation discrimination, he has failed to establish a prima facie case. It is undisputed that complainant was terminated after respondent became aware of his sexual orientation. However, the record does not reflect that he was replaced by an employe who was, or was perceived by the employer as, heterosexual. Also, there is no other evidence in the record that creates an inference that the termination was based on complainant's sexual preference. There is nothing to suggest that respondent's concerns about institutional safety were not genuine. In the same vein, even if a prima facie case were assumed, there is nothing to suggest that respondent's rationale for its action was so lacking in substance as to be a mere pretext for sexual orientation discrimination.

Turning to the civil service appeal, No. 90-0248-PC, regardless of whether complainant was charged with misconduct, he was permanently separated from his employment and the appeal is cognizable under s. 230.44(1)(c), stats., cf. Smith v. DHSS, No. 88-0063-PC(2/9/89). In appeals of this nature, the employer satisfies its burden of proof to establish "just cause" under s. 230.44(1)(c), stats., by showing that it complied with the applicable law (here, s. 230.37(2), stats.), and that the "exercise of that authority has not been arbitrary and capricious." Weaver v. Wisconsin Personnel Board, 71 Wis. 2d 46, 52, 237 N.W. 2d 183(1976); Smith, p. 13. In order to show that it complied with s. 237.37(2), stats., respondent must demonstrate first that appellant had become "physically or mentally incapable of or unfit for the efficient and effective performance of the duties of his position due to . . . disabilities," and second that there were unavailable any of the less drastic approaches set forth in the statute.

For basically the same reasons discussed above, the commission concludes that respondent sustained its burden of showing that due to his mental illness, appellant was unable to effectively perform the duties of his position[2] at the time of his termination. However, the duty of using a less drastic alternative to dismissal, if possible, extends to transfer to any other suitable posi-

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[2] This showing also would presumably satisfy the employer's burden of showing just cause in the general sense as set forth in Safransky v. Personnel Board, 62 Wis. 2d 464, 215 N.W. 2d 379 (1974).

tion within the agency. That is, s. 230.37(2) refers to the appointing authority's duty to seek a less onerous alternative. The term "appointing authority" is defined as "the chief administrative officer of an agency unless another person is authorized to appoint subordinate staff in the agency by the constitution or statutes," s. 230.03(4), stats. In this case, the statutorily-defined appointing authority is obviously at a higher level than UWHC, and therefore respondent failed in its obligation under s. 230.37(2), stats., when it did not consider a transfer to positions outside UWHC.

In conclusion, in the commission's opinion respondent acted prudently when it determined that at the time complainant/appellant could not safely be returned to his position of employment. However, by failing to obtain further medical evaluation before making a decision on his permanent employment status, and by not considering positions outside UWHC, respondent failed in its duty of accommodation under the FEA and failed to discharge its obligation under s. 230.37(2), stats., of exhausting less drastic measures short of discharge. Therefore, on remand complainant/appellant is entitled to restoration and respondent is to discharge its obligations under these laws.

ORDER

1. Respondent's action discharging complainant/appellant is rejected and this matter is remanded for action in accordance with this decision.

2. Complainant/appellant is to be restored to his position of employment and is to be made whole with respect to lost pay and benefits, subject to the mitigation requirements set forth in ss. 230.43(4) and 111.39(4)(c), stats.

3. Nothing herein prohibits respondent from placing complainant/appellant in some form of leave or other status that will facilitate evaluation of his capacity to safely and effectively perform the duties and responsibilities of his position of employment prior to his actual return to those duties and responsibilities.

4. Respondent is to cease and desist from in the future failing to accommodate complainant under the FEA.

Dated:_____, 1991 STATE PERSONNEL COMMISSION

_____
LAURIE R. McCALLUM, Chairperson

DRM/AJT/gdt/2

_____
DONALD R. MURPHY, Commissioner

_____
GERALD F. HODDINOTT, Commissioner

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