STATE OF WISCONSIN PERSONNEL COMMISSION

JAMI BELL-MERZ,

Complainant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM (Whitewater),

Respondent.

Case No. 90-0138-PC-ER

DECISION AND ORDER

NATURE OF THE CASE

This is a complaint of discrimination on the basis of handicap with respect to discharge.

FINDINGS OF FACT

1. Complainant was employed by respondent in the classified civil service from November 1977 through July 11, 1990, the effective date of her discharge. At the time of her discharge, she had permanent status in class in a Library Services Assistant 3 (LSA 3) position at the University of Wisconsin - Whitewater Library and Learning Resources Center, commonly referred to as the library.

2. Throughout her period of employment as aforesaid, respondent considered complainant's job performance to be good when she was at work.

3. During her period of employment by respondent, complainant frequently was absent from work. From 1979 to the time of her discharge in 1990, complainant's sick leave and leave without pay usage exceeded the amount of sick leave earned in every year except 1980 and 1986 when she had positive balances of 1/2 hour and 25.15 hours, respectively. At the time of her discharge, she had used up all of her earned sick leave (1093.3 hours) and had been absent in leave without pay status an additional 2030.52 hours, all of which was in addition to leave on personal holidays and vacation. As of the time of her discharge, complainant had used up all her 1990 sick leave, vacation and personal holiday time. Complainant had been granted a formal leave of absence without pay during the period of July 11, 1988 - September 5,

1988, and then extended through October 24, 1988, and then was allowed to work part-time from October 24, 1988 - February 1, 1989.

4. During her employment with respondent, complainant was reprimanded or warned with respect to her attendance on a number of occasions, including the following:

a. November 26, 1984, letter of warning with respect to "unexcused or excessive absenteeism." (Respondent's Exhibit 3)

b. May 18, 1988, letter of warning regarding unexcused absence. (Respondent's Exhibit 5)

c. June 22, 1988, letter providing notice of a June 27, 1988, meeting to consider termination on the grounds of "unexcused or excessive absenteeism" and "failure to notify the supervisor promptly of unanticipated absence or tardiness." (Respondent's Exhibit 6) (This was followed by a leave of absence, as noted above.)

d. May 11, 1989, letter providing notice of intent to terminate, citing complainant's inability to return to work and the library's operational requirements. (Respondent's Exhibit 19) (Complainant was not terminated at this time because she returned to work.)

e. December 20, 1989, letter of reprimand for "unexcused or excessive absenteeism." (Respondent's Exhibit 40)

5. Respondent's May 11, 1989, letter (Respondent's Exhibit 19), referred to above, includes the following:

> Your current physician has informed us that you need an indefinite medical leave of absence. You have not been back to work from your last medical leave of absence for one full year; under provisions of §13/8/12 of the bargaining agreement between the State of Wisconsin and the Wisconsin State Employes Union, you are therefore not entitled to another medical leave at this time.
>
> Dean Shno has indicated that operational requirements prevent her from granting you another medical leave, as the work in the Cateloguing unit is very heavy, the unit currently has two other positions vacant, and you have been absent extensively in the past year, creating a hardship on the others in the unit.

The aforesaid collective bargaining agreement provides at §13/8/12 as follows:

> Employes shall be granted a medical leave of absence without pay, up to a maximum of six (6) months, upon verification of a medical doctor that the employe is not able to perform assigned duties. Upon review by the Employer the leave may be extended. Any extension of

> the medical leave of absence or application for a medical leave of absence within one (1) year of the employe's return to work shall be at the Employe's discretion.

As a consequence of Dean Shno's decision, complainant returned to work.

6. Beginning on June 6, 1990, complainant no longer came to work. When all of her paid leave was exhausted on June 25, 1990, she was directed to appear on June 29, 1990, for an investigatory interview concerning her absenteeism, see June 25, 1990, letter (Respondent's Exhibit 49). After having failed to appear and to have contacted her supervisor in this regard, she was directed by a July 2, 1990, letter (Respondent's Exhibit 5) to appear on July 9, 1990, for a predisciplinary hearing concerning excessive absenteeism and failure to notify her supervisor of absences or tardiness. Complainant later failed to appear at the July 9, 1990, meeting and to provide notice of a reason therefore, and was terminated, effective July 11, 1990, by a letter of that date (Respondent's Exhibit 52) for "insubordination, including disobedience, or failure or refusal or carry out instructions or assignments, failure to provide accurate and complete information, whenever such information is required by an authorized person, unexcused or excessive absenteeism, failure to notify the supervisor promptly of unanticipated absence or tardiness."

7. The last "Classified Employe Performance and Development Review" form concerning complainant dated April 24, 1990, (Complainant's Exhibit 2) does not mention complainant's attendance. It includes four "key responsibilities" ("Do matched copy catologuing at the DCLC terminal," etc.), "Expected Results," and "Actual Results."

8. At and for some time prior to her discharge, complainant suffered from depression.

9. At and for some time prior to her discharge, complainant was perceived to be an alcoholic by the UW-Whitewater Director of Personnel Services, Elizabeth J. McGlynn.

10. In a "to whom this may concern" letter dated June 20, 1990, (Respondent's Exhibit 48) which complainant's primary care physician, Dr. Mack Dickmeyer, wrote at complainant's request to document her medical situation, he describes her treatment for depression, and in a handwritten note at the bottom notes that:

> Jami has worked out with her employer that she have a part-time leave of absence; that is for her to work half time for a period of time. From a medical point of view, this seems a reasonable course of action, in view of her ongoing fatigue and anxiety.

11. Respondent received the aforesaid letter sometime prior to the time the decision to terminate complainant was finalized. Respondent rejected the concept of granting some kind of leave of absence or reduced hours (which the letter mistakenly states had already been granted), or of taking some other action short of discharge because, due to complainant's previous work record, management was frustrated concerning complainant's attendance problems and doubted whether further efforts to allow an additional leave of absence and/or part-time work would result in a resolution of these problems. Also, complainant's absences were causing an operational problem at the library.

12. Following complainant's discharge, respondent hired a limited term employe (LTE) who worked on a 3/4 time basis. Subsequently, the library lost 1 1/2 permanent positions due to budgetary reasons. However, the library was able to use LTE's to provide coverage for those positions.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §§230.45(1)(b), 111.375(2), Stats.

2. Respondent is an "employer" pursuant to §111.32(6)(a), Stats.

3. Complainant is a "handicapped individual" pursuant to §111.32(8), Stats.

4. Complainant has the burden of proof to establish by a preponderance of the evidence that respondent discriminated against her on the basis of handicap in violation of §§111.34, 111.322(1), and 111.321, Stats., in connection with her discharge.

5. Complainant having failed to sustain her burden, it is concluded that respondent did not discriminate against complainant on the basis of handicap in connection with her discharge.

OPINION

The issue in this case is whether respondent discriminated against complainant on the basis of handicap with respect to her discharge. Pursuant

to Conley v. DHSS, 84-0067-PC-ER (6/29/87), the Commission must first address whether complainant was handicapped and whether respondent discriminated against complainant because of her handicap. If both of these subissues are answered in the affirmative, the Commission then must address whether respondent can establish under §111.34(2)(a), Stats., that the handicap was "reasonably related to [complainant's] ability to adequately undertake the job-related responsibilities of [complainant's] employment," and, if so, whether respondent can establish that there was no reasonable accommodation available pursuant to §111.34(1)(b), Stats.

It is undisputed that complainant had a diagnosis of depression and that drugs had been prescribed for its treatment. It also is undisputed that complainant was perceived as an alcoholic by the UW-Whitewater Director of Personnel Services, who played a role in the discharge decision. Clearly, complainant was a "handicapped individual" as defined by §111.32(8), Stats.

With respect to the second factor, the evidence is overwhelming that complainant was discharged because of her poor attendance. To the extent that complainant's absences from work were attributable to her handicap, an adverse employment action because of those absences was in legal effect because of her handicap, see Conley v. DHSS ("[A]n employer cannot prevent a complainant from establishing the second element ... simply by stating that its motivation for discharging the complainant was his inability to perform his duties where any such inability has resulted directly from the handicapping condition.") Complainant did not establish that each and every one of her absences was due to her handicap. Many of the absences were due to other medical problems (colds, etc.) or were not sick leave at all. Also, there were substantial amounts of her absenteeism with respect to which she was not under continuing medical treatment and for which there was no medical opinion whether her depression was causal. However, Dr. Dickmeyer testified that some of her absenteeism was related to stress, which in turn was related to her depression. Furthermore, her formal leave of absence from July 11 - October 24, 1988, was predicated on a medical opinion related to the need for treatment for her mental condition. Therefore, the record reflects that a substantial portion of her absenteeism could be attributed to her depression, and it can be concluded that her discharge was substantially attributable to her handicap.

At this point it is necessary to diverge from the four-step analysis outlined in Conley v. DHSS to address complainant's contentions that her discharge was motivated in whole or in part by the employer's perception that she was an alcoholic. Since respondent has denied that it was motivated by anything besides her attendance (and related issues such as failure to call in), it is necessary to examine the question of the employer's motivation using the type of analysis set forth in McDonnell Douglas v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668, 5 FEP Cases 965 (1973). Since the case has been tried fully, it will be assumed that complainant has established a prima facie case and the Commission will move directly to the question of whether respondent's articulated rationale for its decision -- complainant's poor attendance and related matters -- was a pretext for a different motivation for discharge -- her perceived alcoholism.

It is clear that complainant had a very poor attendance record. After approximately 13 years of employment, she had used up all of her earned sick leave (1093.3 hours), plus an additional 2030.52 hours of leave without pay. This was not a case of an employe with a borderline absentee problem. However, complainant contends there are a number of things which are indicative of pretext.

Complainant argues that the veracity of respondent's professed concerns about her absenteeism is undermined by the fact that her last "Performance and Development Review" prior to her termination did not mention her absenteeism, that her position was not filled on a permanent appointment basis after her discharge, and that there subsequently were cuts in the permanent employe library staff. With respect to the first point, this evaluation was structured to address complainant's performance on certain specific job-related responsibilities. Therefore, the absence of expressed concerns about attendance is not greatly significant, particularly in light of the fact that respondent had given complainant a number of warnings and reprimands throughout this period. As to the question of staffing after complainant's discharge, personnel cutbacks were made because of budgetary constraints, and this does not undermine the legitimacy of respondent's professed concerns about her attendance.

Complainant also argues that respondent's allegations of misconduct related to absenteeism -- unexcused absence, failure to call in, etc. -- were unfounded, and, inferentially, indicative of pretext. Complainant's reprimand

for unexcused absenteeism on December 12, 13, and 14, 1989, which was predicated on respondent's interpretation of complainant's physician's note that "he authorized you to return to work on December 12, 1989, but you failed to do so," (Respondent's Exhibit 40), was vindicated by Dr. Dickmeyer's testimony that that indeed was what his note meant, as opposed to complainant's contention that the note meant she could return to his office on December 12. With respect to the other periods of unexcused absence cited in the July 11, 1990, discharge letter (Respondent's Exhibit 52), the doctor's note dated May 5, 1988, (Complainant's Exhibit 6) which complainant apparently submitted to account for her absence from April 25-May 11, 1988, merely states that complainant "called in on Monday, 5-2-88, to get a refill of levsin. It was called to the drug store." Ms. McGlynn's July 25, 1988, letter to complainant (Respondent's Exhibit 9), enclosing a copy of the approved leave of absence states:

> As I explained to you on the telephone, and wish to reiterate here, your absence from work without medical verification, from June 10, 1988 to July 11, 1988, constitutes an unexcused absence of 19 days.

There is no medical verification that complainant was too ill to work in this time frame. Finally, with respect to the period of June 25, 1990 - July 11, 1990, complainant also never produced verification that she was unable to be at work due to illness notwithstanding that she had notice (Respondent's letters of June 25, 1990 (Respondent's Exhibit 49), and of July 2, 1990 (Respondent's Exhibit 51)) that respondent was contemplating discharge for unexcused absenteeism. While complainant had obtained a letter dated June 20, 1990, from Dr. Dickmeyer, which was provided to respondent prior to her discharge, the letter discusses complainant's general medical status, but does not address the period in question.[1]

Regarding complainant's failure to provide notice of absences from work, the specific instances cited in the discharge letter (Respondent's Exhibit 52) occurred on June 15, 18 and 29, 1990. The letter also referred to her failure to attend, without prior notice, the investigative and predisciplinary meetings

---

[1] Dr. Dickmeyer's testimony reflects that he last saw complainant on January 19, 1990. She was seen by another physician in his group on July 9, 1990. The record of that visit does not address whether complainant was able to work during the period in question, and the visit did not result in any documentation being sent to respondent.

held June 29, 1990, and July 7, 1990, respectively. Complainant testified that she provided notice of all of her absences, and respondent provided testimony that no notice was received.

It is difficult to determine whether such notice was provided. In a June 13, 1990, letter to complainant from her supervisor (Respondent's Exhibit 44), included the following:

> Since the time that you are absent from work has to be largely vacation or personal holidays since you don't have enough sick leave to cover it all, you are required to notify me before the start of a work day if you will be absent. Please try to reach me at home (563-5663) before 8:00.[2] If I cannot be reached there, call Mary Loli at work or leave a message on the answering machine at home or at the church (563-3889).[3]

The hearing of this matter was replete with testimony about telephone calls, messages, possibly defective answering machines, etc. In considering this evidence, it must be kept in mind that this case is not an appeal of complainant's discharge, in which respondent would have the burden of proof with respect to each allegation of misconduct alleged, and the issue would be whether there was just cause for the disciplinary action taken. Rather, this case involves a charge of discrimination brought by complainant, who has the burden of proof, and must establish by a preponderance of the evidence facts from which a conclusion can be drawn that respondent discharged complainant because she was perceived to be an alcoholic. Therefore, while the evidence concerning whether complainant called in on the days in question was muddled and may not have satisfied the burden of proof respondent would have in a discharge appeal setting, it does not satisfy complainant's burden in this proceeding, and does not come close to establishing pretext with respect to the discharge. Even if, arguendo, complainant had left messages that did not get recorded or passed on to her supervisor, there is no basis upon which to conclude that her supervisor did not believe in good faith that complainant had not called in. Respondent clearly had a strong basis to have discharged complainant solely on the basis of her acknowledged absenteeism. That the evidence supporting one of the

---

[2] Complainant's supervisor was on a work schedule that started at 8:30 a.m.

[3] This was where the supervisor's husband worked.

secondary allegations was not the strongest provides little, if any, support for complainant's charge that the reasons given by management for her discharge actually were a pretext for the real reason for the discharge -- her perceived alcoholism.

Complainant also argues that the requirement that complainant contact her supervisor in the manner set forth in the June 13, 1990, letter (Respondent's Exhibit 44), is probative of pretext, because no one else at the library was subjected to the same procedure. However, complainant was in an unusual position with respect to her excessive absenteeism and the exhaustion of her sick leave balance, so that further absences had to be attributed to personal holidays or vacation. Under these circumstances, the reporting requirement imposed by complainant's supervisor provides no indication of pretext.

Returning to the four-part analysis outlined in Conley v. DHSS, it has been established that complainant is a handicapped individual, and that she was discharged because of her handicap, to the extent that a good deal of absenteeism referred to in the discharge letter was attributable to her depression. At the third step, respondent has the burden to establish the affirmative defense provided by §111.34(2)(a), Stats.; i.e., that "the handicap is reasonably related to the [complainant's] ability to adequately undertake the job-related responsibilities of [complainant's] employment." Respondent has established this defense through complainant's pervasive absenteeism. Obviously, complainant could not adequately perform the responsibilities of her job when she was not at work.

The last step is to determine whether respondent satisfied its duty of accommodation under §111.34(1)(b), Stats. Complainant has contended that respondent should have provided her another leave of absence without pay as an accommodation. However, the Commission cannot agree that respondent had this obligation. See Passer v. DOC, 91-0063-PC-ER, 91-0119-PC-ER, 91-0144-PC (9/18/92):

> An accommodation normally is an alteration in the working environment or the provision of some special assistance that will enable the employe to perform the duties of his or her position, or the provision of an alternative work assignment that the employe can perform. The accommodation sought by complainant here [extension of a leave of absence] does not fall within either of these concepts. (citations omitted)

Even assuming arguendo that a leave of absence without pay could be considered conceptually to be an accommodation under certain circumstances, it would not be considered a reasonable accommodation under the circumstances of this case, where complainant's absenteeism was of long-standing duration, she had been granted a leave of absence in 1988 of approximately 3 1/2 months that did not resolve the problem, and all of her absenteeism could not be attributed to her depression.

Complainant for the first time in her reply brief contends that respondent should have sought to transfer complainant to another position at UW-Whitewater or another institution. While a transfer can be an accommodation pursuant to McMullen v. LIRC, 148 Wis. 2d 270, 434 N.W. 2d 830 (Ct. App. 1988), it would not be a reasonable accommodation under the circumstances of this case. At the time of the discharge, the most recent information that respondent had available was the June 20, 1990, letter from Dr. Dickmeyer (Respondent's Exhibit 48). This did not make any mention of a transfer as a medically efficacious course of action, but rather referred to a part-time leave of absence (which he referred to as already having been worked out) as "a reasonable course of action in view of her ongoing fatigue and anxiety." Given the pervasiveness and duration of complainant's absenteeism problem, the absence of any expert opinion that a transfer would have been medically indicated, and the fact that complainant failed to suggest a transfer at the time of her discharge, the Commission cannot conclude that respondent failed in its duty of accommodation by not having pursued on its own motion the idea of a transfer.

ORDER

This complaint of discrimination is dismissed.

Dated: March 19, 1993 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

AJT:rcr

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

Parties:

Jami Bell-Merz
Rural Route 3, Box G
Whitewater, WI 53190-9803

Katharine Lyall
President, UW
1700 Van Hise Hall
1220 Linden 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.