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RAYMOND R. CHAVERA,

Appellant/  
Complainant,

v.

Secretary, DEPARTMENT OF  
INDUSTRY, LABOR AND HUMAN  
RELATIONS,

Respondent.

Case Nos. 90-0404-PC  
90-0181-PC-ER

\* \* \* \* \*

FINAL ORDER

This matter is before the Commission following the promulgation of a proposed decision and order by the hearing examiner. The Commission has considered complainant's objections to the proposed decision and consulted with the examiner. At this time the Commission adopts the proposed decision and order as its final resolution of this matter, and adds the following observations.

Complainant contends that respondent's duty of accommodation under the FEA, pursuant to §111.34(1)(b), Stats., and its duty of making available alternative employment under the civil service code, pursuant to §230.37(2), Stats., extends outside the agency to the state as employer generally. In Schilling v. UW-Madison, 90-0064-PC-ER, 90-0248-PC (11/6/91), the Commission held that the reference in §230.37(2) to "appointing authority" means "the chief administrative officer of an agency unless another person is authorized to appoint subordinate staff in the agency by the constitution," §230.03(4), Stats. The Commission did not explicitly address the question of whether the duty of accommodation under §111.34(1)(b) extended beyond the parameters of the employing agency. In the instant case, it is unnecessary to reach this question, because Dr. Yost's medical report makes it clear that complainant simply was unable to work in a sedentary job at that time, and even if there had been a duty to consider alternative employment outside DILHR, complainant would have been unable to work in any capacity.

While Dr. Yost's opinion regarding complainant's capacity to work was directed at full-time employment, this undoubtedly was a function of the

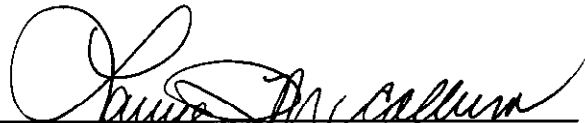
questions that he had been asked to address and the limitation on the authorization for release of medical information provided by complainant's counsel to the question of his ability to return to full-time state employment. It is clear from Dr. Yost's conclusions that complainant was unable to work at all. He stated, for example, that: "he is almost at a level where he can do very little ... he arrived on crutches and had a lot of difficulty changing positions, and seemed to be in extreme pain. I do not believe he could return to a full-time job at this point because of his current escalating symptoms and somewhat downward trend since May, 1990." The conclusion that he was unable to work at all is strongly reinforced by the fact that during his last period of employment with respondent (June 1988 - April 1989), he had been placed, at his request, in a half-time position, and had been unable to continue.

In conclusion, there is nothing in this record to suggest either that complainant could perform even a sedentary job of any kind, or that there was any likelihood of his condition improving. Under these circumstances, respondent had no obligation to continue him in a leave of absence status, and there simply was no accommodation available.

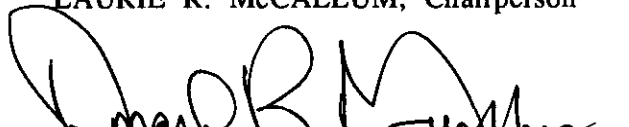
ORDER

The proposed decision and order, a copy of which is attached hereto and incorporated by reference, is adopted as the Commission's final disposition of this matter, and these cases are dismissed.

Dated: May 21, 1993 STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

DRM:rcr

  
DONALD R. MURPHY, Commissioner

Parties:

Raymond Chavera  
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Madison, WI 53713

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

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

**Petition for Judicial Review.** Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served per-

sonally, 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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Respondent.

Case Nos.    90-0404-PC  
                  90-0181-PC-ER

\* \* \* \* \*

PROPOSED  
DECISION  
AND  
ORDER

This matter is before the Commission on appeal of respondent's decision terminating appellant's employment and on complaint of race and/or handicap discrimination by respondent against appellant/complainant in regard to termination of employment. The cases were consolidated for hearing.

FINDINGS OF FACT

1. Appellant/complainant Raymond Chavera, since 1985 was employed as a Community Service Specialist 1, a classified civil service position, in respondent Department of Industry, Labor and Human Relations' (DILHR's) Division of Employment and Training Policy (DETP).

2. In 1982 Chavera was hired by the Governor's Employment and Training Office (GETO), which became DILHR's Division of Employment and Training Policy (DETP) in 1985. Prior to that, Chavera had been an employe in the DILHR Migrant Bureau.

3. In 1980 Chavera fell down a flight of stairs injuring his back, since then he has had chronic back pain.

4. After years of tests and workups -- 1980 - 1985, Chavera was diagnosed as having a large herniated disc, and in January 1986 underwent a laminectomy.

5. Mr. Chavera's employment history summary with respondent since his laminectomy is as follows:

Summary of Work History

<u>Year</u>	<u>Hours in Pay Status</u>	<u>Hours Not in Pay Status</u>
1986	1366.63	713.37
1987	490.00	1590.00
1988	564.50	1595.00
1989	375.00	1705.00
1990 to date	0	1744.00 (through 10/31)

Summary of Leaves of Absence

02/10/86 - 03/30/86	5 weeks
05/06/87 - 06/20/87	
06/20/87 - 09/01/87	
09/01/87 - 10/05/87	11 months
10/05/87 - 01/01/88	
01/01/88 - 02/28/88	
02/28/88 - 04/04/88	
05/15/88 - 06/01/88	2 weeks
05/12/89 - 05/11/90	
05/12/90 - 05/25/90	19 1/2 months
05/26/90 - 08/24/90	
08/24/90 - 12/31/90	

6. In a note dated January 9, 1987, Chavera's doctor informed respondent that Chavera was taking medication with side effects of drowsiness and therefore he would not be able to drive for more than 1 hour at a time. Also, the doctor advised that Chavera should not work more than 4 hours a day for at least 6 months or longer. Following the doctor's diagnosis, Chavera was not required to work more than a part-time schedule during early 1987.

7. On April 24, 1987, Dr. Huffer, Chavera's doctor wrote: Pt (Patient) having more back & LF leg pain. Studies are scheduled. Pt unable to work at least until mid-May.

8. On May 12, 1987, Huffer wrote that Chavera could return to work on May 18, but Chavera did not return to work.

9. On May 20, 1987, Chavera submitted to respondent an "Authorization for Absence" from Dr. Jeffrey C. Mackey, D.C., stating: Mr. Chavera is to remain off work until June 20, 1987.

10. In a report, based on a clinical examination, Dr. Huffer informed respondent that Chavera remained on regular medication, that he might require further surgery and that he should continue on leave of absence.

11. This report from Huffer was presented to respondent by Chavera with a request to extend his leave of absence to September 1, 1987, and respondent granted it.

12. At respondent's request, Chavera was examined by Dr. Thomas McCarthy, U.W. Hospitals and Clinics, but McCarthy did not make any assessment of Chavera's ability to return to work. McCarthy reported that Chavera was undergoing physical therapy and medication for residual low back pain, left leg neurologic dysfunction and bladder dysfunction.

13. In a sequence of doctors' notes, including a report from Mayo Clinic, requests for leave and approvals, Chavera's medical leave was extended to June 1, 1988.

14. Mr. Chavera returned to work on a half-time basis, based on written directive from his doctor that Chavera not work more than 4 hours a day.

15. After Chavera returned to work in June 1988, respondent approved a change in Chavera's position and assisted in a lateral move to a Program Analyst 3 position, eliminating car travel, an activity which exacerbated Chavera's back and leg pain.

16. Mr. Chavera never performed any work for respondent after April 1989.

17. Again through a series of doctors' notes and reports and leave approvals, Chavera was on medical leave from May 1989 to December 31, 1990.

18. In extending Chavera's medical leave to December 31, 1990, respondent directed Chavera to undergo a physical examination by Dr. John Yost, a doctor selected by respondent.

19. Dr. Yost's report, dated October 10, 1990, to respondent included the following: (Chavera) appeared like he was barely able to ambulate at the time of my exam ... his overall condition is very guarded. Yost stated that it would be hard to predict the end of Chavera's hearing, that functionally Chavea had gone downward since May and that he could not currently return to a full-time job.

20. On November 6, 1990, respondent wrote Chavera advising him of a pretermination meeting scheduled for November 13, 1990.

21. Mr. Chavera did not attend the pretermination meeting.

22. Respondent, by letter dated November 20, 1990, terminated Chavera's employment with the department, as of December 31, 1990, on medical grounds, based on Dr. Yost's report.

#### CONCLUSIONS OF LAW

1. The Commission has authority to hear this matter pursuant to §§230.44(1)(c) and 230.45(1)(b), Stats.
2. Respondent has the burden of proving appellant/complainant was discharged for just cause.
3. Respondent has satisfied its burden of proof.
4. Appellant/complainant was discharged by respondent for just cause.
5. Appellant/complainant has the burden of proving there is probable cause to believe that he was discriminated against by respondent on the basis of race and/or handicap.
6. Appellant/complainant has failed to sustain that burden.
7. There is no probable cause to believe appellant/complainant was discriminated against by respondent as alleged.

#### DISCUSSION

The issues in these cases are:

1. (Case No. 90-0404-PC) Whether respondent had just cause for termination of appellant's employment effective December 31, 1990.
2. (Case No. 90-0181-PC-ER) Whether there is probable cause to believe that respondent discriminated against complainant based on race and/or handicap in regard to the termination of his employment effective December 31, 1990.

#### Case No. 90-0404-PC

This is a civil service appeal under §230.44(1)(c), Stats., which provides that an appointing authority (employer) can terminate an employee of permanent status only if there is just cause. The evidence in this case shows that appellant/complainant Raymond Chavera was terminated by respondent because he was physically unable to work. For this reason, the Commission concludes that respondent satisfied its burden of proving "just cause" as expressed in Safransky v. Personnel Board, 62 Wis. 2d 464, 215 N.W. 2d 379 (1974). However, §230.37(2), Stats., places an additional burden on appointing authorities prior to terminating employees from service. Section 230.37(2) is as follows:



"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 a part-time rate of pay or at last resort, dismiss the employe from the service."

Respondent argues that it took the steps prescribed in §230.37(2), Stats., in handling Chavera's back and leg problems. This argument is supported by the evidence. Chavera was transferred to another position to accommodate this back and leg pain. Also Chavera was placed on part-time service. Also Chavera was granted medical leave from time to time during the course of his physical disabilities and for over 18 months just prior to termination. Finally, as provided in §230.37(2), respondent required Chavera to submit to a medical examination to determine fitness to continue in service.

Mr. Chavera argues that respondent failed to look for vacant positions outside his division. In support, he points to the deposition of Ellen Hansen (Appellant's Exhibit 4). Hansen was the director of the bureau in which Chavera was employed and was one of the people who assisted in drafting the termination letter. Others who assisted in drafting the letter were Gary Denis, Chavera's direct supervisor; Steve, Christensen, Director of the Bureau of Personnel; and Howard Bernstein, General Counsel. In her deposition, Hansen stated that she did not make any independent search into other divisions for positions Chavera was physically able to perform and that she did not know whether any job descriptions were sent to doctors for evaluation in relation to Chavera's physical condition. But Hansen also stated that employment in other divisions was discussed with the (DILHR's) personnel bureau and that it was concluded no position was physically less demanding than Chavera's current position. Lee Isaacson, DILHR Employment Relations Manager - Personnel, corroborated Hansen's statement regarding seeking other less demanding positions. Chavera's current position was a desk job and respondent had ordered a special chair to accommodate him.

We conclude the record sustains the decision of respondent. Contrary to appellant's contention, the evidence shows respondent did consider positions, including those outside appellant's division, but concluded, based on the doctor's evaluation, that no position was less physically demanding than his current position.

Case No. 90-0181-PC-ER

This case is a claim of race and/or handicap discrimination under the Wisconsin Fair Employment Act (WFEA) §§111.31 - 111.395, Stats. Appellant/complainant Raymond Chavera alleges there is probable cause to believe respondent discriminated against him because of his race and/or handicap in regard to its termination of his employment. The circumstances and facts of this case are the same as identified in Case No. 90-0404-PC. Similarly as in that case, Chavera argues that his physical disabilities were not accommodated, i.e., respondent did not look outside his division for a position, which required would accommodate his physical disabilities. Again as concluded in that case, such considerations were made by respondent, but Chavera was physically unable to function in any positions available to respondent.

No evidence was presented on the basis of race discrimination, nor did Chavera argue that point in his brief.

ORDER

Respondent's action discharging appellant/complainant is affirmed and Case Nos. 90-0404-PC and 90-0181-PC-ER are dismissed.

Dated: \_\_\_\_\_, 1993      STATE PERSONNEL COMMISSION

\_\_\_\_\_  
LAURIE R. McCALLUM, Chairperson

DRM:rcr

\_\_\_\_\_  
DONALD R. MURPHY, Commissioner

\_\_\_\_\_  
GERALD F. HODDINOTT, Commissioner

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