STATE OF WISCONSIN PERSONNEL COMMISSION

WILLIAM THOMAS, Complainant, v. Secretary, DEPARTMENT OF CORRECTIONS, Respondent. Case No. 91-0161-PC-ER	DECISION AND ORDER

NATURE OF THE CASE

This is a complaint of discrimination on the basis of arrest record and handicap that is before the Commission following a hearing on the merits.

FINDINGS OF FACT

1. Respondent hired complainant as a Social Worker 1 at the Kettle Moraine Correctional Institute (KMCI), effective August 11, 1991, with an original probation of six months.

2. KMCI management made certain special arrangements to assist complainant in the transition to employment at KMCI, such as allowing him to start work later than normal and helping him to find housing in the Plymouth area. Shortly after he started work at KMCI, he asked for and received time off to interview for a Social Worker 1 vacancy at another institution and arranged for another interview for a vacancy at yet another institution after normal work hours. However, KMCI management found out about the second interview, and was upset with complainant's behavior because he was interviewing with these other institutions immediately after his hire at KMCI, and after KMCI management had made considerable efforts to assist him in connection with him taking the job.

3. As part of his post-hiring orientation, complainant was given a large quantity of documents, which included agency work rules and disciplinary guidelines, all of which he read.

4. The DOC disciplinary guidelines (Respondent's Exhibit 3) provide at page 7:

> 3. Illegal Conduct
> (Reference DOC Work Rule #5)
>
> Employees are required to report arrests and/or convictions to the Appointing Authority. Where relatedness between employment and the illegal conduct can be established, the employee will be subject to disciplinary action. (emphasis added)

5. The DOC work rules (Respondent's Exhibit 12) do not specifically address failure to report arrests. Work Rule #1 prohibits: "[d]isobedience, insubordination, inattentiveness, negligence, or refusal to carry out written or verbal assignments, directions, or instructions." Work Rule #5 prohibits: "[d]isorderly or illegal conduct including but not limited to, the use of loud, profane, or abusive language; horseplay; gambling."

6. During the course of verbal briefings that complainant attended as part of the orientation process, employes were instructed that they were required to report arrests to management.

7. It was generally understood among both management and non-management employes at KMCI that it was necessary to report arrests to management, and that failure to do so amounted to a violation of work rules.

8. During the course of his employment at KMCI, complainant was involved in several performance deficiencies, which were documented in his October 22, 1991, Performance Planning and Development (PPD) report (Respondent's Exhibit 8), prepared by his supervisor (Richard Polinske), as follows:

> Mr. Thomas has demonstrated difficulties in implementing some very basic & routine case management functions. On 8/27/91, he not only failed to return six inmate files to the Clerical office but left them on top of a desk in an empty office. During his orientation, he was provided a binder and instructions for keeping up-to-date chronological logs of inmate/inmate related contacts. Mr. Thomas has stated that this was not done. Mr. Thomas recently, with an inmate present in his office, telephoned another staff person to discuss the inmate's issue. He

> conducted the conversation, questioning the other party, without the other party having prior knowledge that the inmate was present.

This document also referred to complainant's October 13, 1991, arrest, and complainant's failure to report it to management, see Finding #14.

9. On October 13, 1991, while off duty and outside KMCI, complainant was arrested for operating under the influence of an intoxicant in a motor vehicle, and was taken to the Manitowoc County jail.

10. Subsequent to this arrest, complainant discussed the arrest with a number of co-employes. The thrust of these conversations was to ask the co-employes if they thought it was necessary to report the arrest to management, and to request that they keep the information about the arrest confidential.

11. Complainant did not report his arrest to management. However, Ms. Krenke, Associate Warden-Treatment, eventually heard about the arrest through the institutional grapevine on October 16, 1991. Also on that date Ms. Krenke learned that many of the correctional officers were incensed about the situation because they perceived that management was taking no action with regard to the situation and it amounted to a coverup and disparate treatment of treatment staff (as opposed to security staff).

12. On October 17, 1991, complainant was interviewed by management and admitted that he had been arrested. He did not say anything about being an alcoholic at that meeting.

13. Ms. Krenke then met with Mr. Polinske and they decided that complainant's probationary employment should be terminated. They discussed the situation with Jack Kestin of the DOC Bureau of Personnel and Human Relations (BPHR), who concurred. Ms. Krenke and Mr. Polinske then met with Warden Marianne Cooke, who had the ultimate authority for the decision whether to terminate probation since she was the institution's appointing authority. She concurred in their recommendation and decided to terminate complainant's probationary employment.

14. Thereafter, a pretermination meeting was scheduled for October 22, 1991. Complainant appeared with Robert Peters, a union representative. Mr. Polinske began the meeting by reading complainant's PPD (Respondent's Exhibit 8), In addition to the section concerning complainant's difficulties

with case management quoted above at Finding #8, the PPD included the following:

> Mr. Thomas was recently assigned to provide the AODA module for the NEXUS program. Subsequent to this assignment, Mr. Thomas was arrested for Operating a Motor Vehicle While Intoxicated and having Open Intoxicants in the vehicle. These offenses are particularly egregious since there exists a reasonable relationship to the AODA assignment. In addition, Mr. Thomas failed to report the arrests as required. He not only failed to notify the administration but instructed other staff not to divulge the information.

Mr. Polinske then stated that management intended to terminate complainant's probationary employment but that complainant had the option of resigning in lieu of termination. After a discussion centering around the items in the PPD, complainant advised that he would not resign.

15. Mr. Polinske then gave complainant a letter of termination dated October 22, 1991, signed by the Warden (Respondent's Exhibit 9), which stated that complainant's employment "will be terminated effective October 22, 1991, due to your failure to meet probationary standards. Attached is the Performance Planning and Development Report [Respondent's Exhibit 8] which is your official notice of termination."

16. Complainant then advised that he had a drinking problem and had been attempting to make arrangements to get into an outpatient treatment program. He requested that he be allowed to seek treatment while his probation would be extended, to allow management an additional opportunity to monitor him. Respondent refused to reconsider its decision and continued with the termination of complainant's employment effective that date.

17. At all times material to this proceeding, complainant has been alcohol dependent.

18. Prior to the disclosure to management set forth in Finding #16, above, complainant had never revealed his alcohol dependency to KMCI management, nor otherwise alluded to a drinking problem, and it had no knowledge or belief that he was alcohol dependent.

19. Other than his alcohol-related arrest as set forth above in Finding #9, complainant had never exhibited any behavior of which management was aware that was symptomatic of alcohol dependency.

20. Complainant did not establish on this record that his alcohol dependency was causal with respect to his failure to have reported his arrest, and it is found that it was not. However, it is found that his alcohol dependency was causal, at least to some extent, with regard to his drinking on October 13, 1991, and his arrest on that date.

21. The factors motivating respondent's decision to terminate complainant's probationary employment were set forth in complainant's PPD (Respondent's Exhibit 8), the significant parts of which were quoted above in Findings #8 (performance issues) and #14 (concerns about his effectiveness in the AODA module under the circumstances of his arrest, and his behavior subsequent to the arrest, including his failure to have reported the arrest). Respondent's decision did not rely on complainant's alcohol dependency, of which it was not aware at the time of its decision, except to the extent that complainant's arrest and his alcohol dependency had some causal relationship.

22. KMCI management had a good faith belief that in failing to have reported the arrest as required by DOC's disciplinary guidelines, complainant had violated DOC work rules.

23. DOC policy with respect to probationary employment was that employes serving an original probationary period, such as complainant, would be terminated for a violation of a work rule that would constitute a disciplinary offense for a permanent employe, and that probationary employes were not dealt with through the use of progressive discipline.

24. The foregoing policy was applied uniformly with respect to employes on original probation, although there were cases at KMCI of employes who were on other than original probation, after having attained permanent status in class in a different position, who were not terminated after one work rule violation.

25. There are a number of employes at KMCI who have been diagnosed as alcoholics, with the knowledge of management, and who have continued in long-term employment.

26. While respondent's decision to terminate complainant's probationary employment rested in part on his arrest record and handicap (to the extent his handicap was causal with respect to his drinking and his arrest on October 13, 1991), it would have reached the same decision (termination) in the absence of consideration of the arrest record and handicap.

CONCLUSIONS OF LAW

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

2. Complainant had the burden of proof with respect to his claim of handicap discrimination to establish by a preponderance of the evidence that:

   a.) He is handicapped;

   b.) He was discharged because of his handicap.

3. Since complainant sustained his burden of establishing he is handicapped, and that he was discharged because of his handicap (to the extent that he was discharged because of his arrest and his drinking and the arrest were caused at least in part by his alcohol dependency), the burden of proof shifted to respondent to establish that the discharge was justified pursuant to §111.34(2)(a), Stats, which it did establish, and that it had discharged its obligations with respect to accommodation pursuant to §111.34(2)(a), Stats., which it did establish, and it is concluded that respondent did not discriminate against complainant on the basis of handicap in violation of the Fair Employment Act (FEA) in connection with his termination.

4. Complainant has the burden of proof with respect to his claim of arrest record discrimination to establish by a preponderance of the evidence that:

   a.) He had an arrest record;

   b.) His termination was based in whole or in part on his arrest record.

5. Complainant having sustained his burden of establishing that he had an arrest record and that his termination was based in whole or in part on his arrest record, the burden of proof shifts to respondent to establish by a preponderance of the evidence that it would have terminated complainant's probationary employment even if it had not considered his arrest record.

6. Since respondent satisfied its burden of establishing that it it would have terminated complainant's probationary employment even if it had not considered his arrest record, it is concluded that respondent did not discriminate against complainant on the basis of arrest record in violation of the FEA in connection with the termination of his probationary employment.

7. Since complainant did not prevail on this discrimination complaint, he is not entitled to recover attorney's fees under the FEA.

OPINION

HANDICAP CLAIM

A typical handicap discrimination case will involve analysis of the following issues:

> 1. Whether the complainant is a handicapped individual;
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> 2. Whether the employer discriminated against complainant because of the handicap;
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> 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");
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> 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.
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> Harris v. DHSS, 84-0109-PC-ER, 85-0115-PC-ER (2/11/88).

In the instant case, complainant has established he is a handicapped individual through the uncontradicted testimony of his state-certified chemical dependency counselor that complainant is alcohol dependent, which is a recognized handicap. See Squires v. LIRC, 97 Wis. 2d 648, 651, 249 N.W. 2d 48 (Ct. App. 1980).

With respect to the second point, complainant can establish that respondent discriminated against him on the basis of handicap by showing either that respondent's decision to terminate his probationary employment actually was motivated by his handicap (alcohol dependency), or, if the decision to terminate his probationary employment was motivated solely by a performance or conduct deficiency, that the deficiency was caused by his handicap, Jacobus v. UW-Madison, 88-0159-PC-ER (3/19/92), affirmed, Jacobus v. Wis. Personnel Commission, Dane Co. Cir. Ct. No. 92 CV 1677 (1/11/93).

To the extent that complainant is contending that respondent's decision was directly motivated by his alcohol dependency per se, as opposed to contending that respondent was motivated by performance or conduct issues caused by his alcohol dependency, this leads to the question of whether the respondent's stated reasons for termination were pretextual. There is a major barrier to a finding of pretextuality, in that there is almost no evidence that KMCI management knew about complainant's handicap prior to the time that he revealed this after having received his notice of termination at the October 22, 1991, meeting.[1] While it of course is possible that respondent inferred that complainant was an alcoholic from the fact of his arrest, this is no more than a possibility, and an insufficient basis for such a finding.

Turning to the alternative approach to establishing the second element, the only evidence in the record that would support a finding that complainant's failure to have reported the arrest was caused by his alcohol dependency is the testimony of Philip Caravello, complainant's chemical dependency counselor. However, this alone is insufficient to support a finding of causation. To begin with, his testimony was inconsistent even as to the question of whether complainant's failure to have reported the arrest was a symptom of his alcohol dependency. In response to the question on direct of whether complainant's "failure to report an OWI arrest to his employer on his part would have been a reasonable probability of being a symptom of his disease?" he answered, "Yes, it could." Tr. 79. On cross-examination, he testified that it was possible that complainant's failure to report the arrest also could not be the result of the alcohol dependency. Tr. 81. Then on redirect he answered "yes" to the question of whether the complainant's failure to report the arrest "has a reasonable probability of being a symptom of his disease." Tr. 82. However, it also has been found that respondent in fact relied on the arrest itself, in addition to complainant's failure to have reported it. Since the arrest was for alcohol-related traffic offenses, and the record establishes that complainant had been drinking before his arrest, it is reasonable to infer that his alcoholism was causal at least to some extent with respect to his drinking

[1] As will be discussed below under the heading of accommodation, the Commission does not find credible complainant's assertion that he disclosed his alcohol dependency at the October 17, 1991, investigatory meeting.

and the related arrest, although it is not possible on this record to make a finding as to the degree of causation.

Moving to the third step of the analysis, it follows that if complainant's alcoholism is considered causal with respect to his arrest, then, in the context of §111.34(2)(a), Stats., his alcoholism "is reasonably related to [complainant's] ability to adequately undertake the job-related responsibilities of [complainant's] employment." This conclusion is consistent with Squires v. LIRC, 97 Wis. 2d 648, 652, 294 N.W. 2d 48 (Ct. App. 1980), where the court held: "[n]othing in sec. 111.32(5)(f) [now §111.34(2)(a)] Stats., prevents an employer from discharging an employee who is an alcoholic and who because of his alcoholism is physically or otherwise unable to efficiently perform the duties required in his job." In the instant case, once it is found that complainant's alcoholism was causal with respect to his arrest, and that the arrest was at least a partial basis for the termination of complainant's probationary employment, then it follows that to the extent that complainant's alcoholism contributed to the arrest, it can be said that to that extent his alcoholism caused him to be unable to conduct himself in the manner required by management.[2]

There remains the question of accommodation. It is clear that an employer's obligation to provide a reasonable accommodation under §111.34(1)(a), Stats., does not come into play unless and until the employer either has knowledge of the handicap, or has sufficient information that it is under some kind of obligation to make further inquiry. In most cases, the handicapped employe informs the employer of the handicap. In the instant case, complainant did not inform respondent of his alcoholism until after he was handed his notice of the termination of his probationary employment at the end of his October 22, 1991, disciplinary hearing.

The Commission does not find credible complainant's assertion that he informed management of his alcohol dependency at the October 17, 1991, investigatory meeting. This assertion is not only contradicted by management accounts of this meeting, but also is inconsistent with the record of the subsequent October 22, 1991, disciplinary meeting. It essentially is uncontra-

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[2] Obviously respondent's reliance on the arrest raises another set of questions with respect to §111.335, Stats. ("arrest and conviction record"), but this is separate from the matter of handicap discrimination and will be discussed below.

dicted that after complainant refused to resign and was given a letter of termination that his union representative stated that "We were given a letter of termination before she [Warden Cooke] even knew this employe had a problem and was seeking help." (Respondent's Exhibit 7). (emphasis added) It also is essentially undisputed that complainant admitted at the October 22nd meeting that he had not reported his problem to management before then.

Basically, what occurred in this case is that complainant waited until after the eleventh hour, when management already had given him notice of his discharge, effective that day, to notify management of his alcohol dependency, notwithstanding that he had known for several days that he was "on thin ice" with respondent. Under the circumstances, respondent had no knowledge of the handicap prior to termination, and it did not violate its obligation of reasonably accommodating complainant's alcoholism.

This conclusion is supported by policy considerations. It would be unwise to permit an employe with an alcohol dependency of which the employer is unaware to be able to invoke the employer's duty of accommodation by holding out on providing notice to the employer until after the employer has acted to terminate his or her employment. In a practical sense, an accommodation has more meaning the earlier it is provided. Allowing a post-discharge notice of handicap to invoke the duty of accommodation has the potential of encouraging an employe from avoiding providing notice of his or her handicap until after he or she gets notice of discharge.

The Commission also cannot agree that respondent was required to have made an independent inquiry concerning possible alcohol dependency. The only evidence of which management was aware that complainant might have had a drinking problem was with respect to his OWI arrest. However, as complainant's chemical dependency counselor testified, while an OWI arrest is a recognizable warning sign of an alcohol problem, people without drinking problems also get involved in these situations. The duty of accommodation does not require an employer to attempt to ascertain the existence of a handicap when a single OWI arrest is the only indication the employer had that the employe is alcohol dependent. See Jacobus v. UW, 88-0159-PC-ER (3/1/9/92); affirmed, Jacobus v. WPC, Dane Co. Cir. Ct. Br. 12, 92 CV 1677 (1/11/93); wherein the court noted: "one could persuasively argue that to hold employers responsible for investigating handicaps that employes fail to disclose would

give rise to serious potential problems of placing an undue burden on employers and invading employee's privacy rights." p. 10, n. 9.

ARREST RECORD

The FEA prohibits discrimination on the basis of arrest record. §§111.321, 111.322, 111.335, Stats. Respondent contends that it did not rely on complainant's OWI arrest in connection with its decision to terminate complainant's probationary employment. However, there is considerable direct evidence to the contrary.

Richard Polinske, complainant's immediate supervisor, completed a PPD (Performance Planning and Development form) (Respondent's Exhibit 8) for complainant on October 22, 1991, the date of termination. In it, he states, inter alia:

> Mr. Thomas was recently assigned to provide the AODA module for the NEXUS program. Subsequent to this assignment, Mr. Thomas was arrested for Operating a Motor Vehicle While Intoxicated and having Open Intoxicants in the vehicle. These offenses are particularly egregious since there exists a reasonable relationship to the AODA assignment. In addition, Mr. Thomas failed to report the arrests as required. He not only failed to notify the administration but instructed other staff not to divulge the information.

Respondent contends that Polinske's reference to the arrest in the PPD "is describing the negative effect that conduct will have on his ability to perform as a Social Worker at KMCI; he is not describing a basis for termination of complainant's probation. Respondent's brief, p. 20. Respondent also urges that the Commission give particular weight to Mr. Polinske's remarks at the disciplinary hearing, which "were made before this action was filed, before he talked to any lawyers." Id. , p. 19. The Commission agrees that these contemporaneous statements should provide a more reliable indication of a person's subjective intent at the time than statements made later, after a complaint of intentional discrimination has been filed, and the matter has been prepared for hearing. However, in the Commission's opinion, Mr. Polinske's statements at the disciplinary hearing are consistent with a finding that the reference in the PPD indeed constituted part of management's decision to terminate complainant's probationary employment.

Respondent notes that in response to a statement from complainant's union representative that "you are terminating someone for drunk driving," Mr. Polinske replied that "[t]he focus is not on the offense but that you failed to report it, in fact you asked others not to report it," and made the additional statement that "[t]he issue is not the drunk driving charge, but the failure to report it." (Respondent's Exhibit 7). However, these statements came from Mr. Polinske only after management had been accused of terminating complainant because of the arrest. Prior to that, the transcript of the meeting reflects the following as the first thing that occurred: "Dick [Polinske] read William Thomas' PPD. Stated management's intention. Gave Bill the option to accept letter of dismissal or resign and preserve reinstatement rights." Mr. Polinske's reading of the PPD in that setting suggests that the reasons for termination were as set forth in the PPD. Then, in the context of discussing the performance issues identified in the PPD, complainant stated: "[i]t seems like I'm being 'railroaded' for drunken driving," and Mr. Polinske replied: "[t]hat is not correct. There is a nexus between the offenses and your AODA assignment." Furthermore, the October 22, 1991, termination letter signed by the Warden (Respondent's Exhibit 9), which was given to complainant at this meeting explicitly stated: "[a]ttached is the Performance Planning and Development Report <u>which is your official notice of termination</u>." (emphasis added).

In addition to relying on the arrest, respondent also relied on other factors, such as the failure to have reported the arrest, in deciding to terminate complainant's performance. Thus, this is a mixed motive case. In <u>Jenkins v. DHSS</u>, 86-0056-PC-ER (6/14/89), the Commission considered the standard of causation that should be utilized in a mixed motive case. The Commission noted that in <u>Price Waterhouse v. Hopkins</u>, 490 U.S. 228, 104, L. Ed. 2d. 268, 109 S. Ct. 1775 (1989), the Court declined to follow the approach, espoused by the employe, which essentially is what the Commission had utilized in the past-- i.e., that liability attaches once the employe demonstrates that an improper consideration played any part in the employment decision in question. <u>See, e.g., Smith v. UW</u>, 79-PC-ER-95 (6/25/82). The Commission's discussion in <u>Jenkins</u> included the following:

> In determining the weight to be accorded the U.S. Supreme Court's analysis of mixed-motive causation under Title VII in Price Waterhouse, it has to be particularly significant that in a case that produced four separate opinions, not one justice supported the 'in part' test of causation urged by the plaintiff (and to which this Commission has adhered-- i.e., that if an improper basis played any causative role in the employment transaction, the employer is liable, but may limit damages by showing that the action would have occurred even without the illegal taint.

Accordingly, the Commission decided to follow the Price Waterhouse plurality standard of mixed motive causation: "when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account." 490 U.S. at 258, 104 L. Ed. 2d. at 293.

In the instant case, respondent carried its burden of proving that it would have made the same decision to terminate complainant's probationary employment even if it had not taken complainant's arrest into account. Respondent's policy was to terminate an employe serving an original probationary period if the employe became involved in a work rule violation that would result in disciplinary action against a permanent employe. Failure to report an arrest was considered a work rule violation for which a permanent employe would be disciplined, and, therefore, for which an employe on original probation would be terminated. While complainant argues that the record does not establish that failure to report an arrest is a work rule violation, this contention is contradicted by a number of sources.

The DOC "Guidelines for Employee Disciplinary Action" (Respondent's Exhibit 3), which was provided to new employes, including complainant, as part of their orientation, specifically states at p. 7 that: "[e]mployes are required to report arrests and/or convictions to the Appointing Authority. Where a relatedness between employment and illegal conduct can be established, the employee will be subject to disciplinary action." Therefore, this imposes a requirement that employes report arrests. While the work rules themselves do not state specifically that employes must report arrests, this is by no means conclusive, as some of the work rules cover general categories of

misconduct and are obviously not intended to specify every possible violation, e.g.:

> All employes of the Department are prohibited from committing any of the following acts:
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> 1. Disobedience, insubordination, inattentiveness, negligence, or refusal to carry out written or verbal assign- ments, directions, or instructions.
>
> * * *
>
> 5. Disorderly or illegal conduct, including, but not limited to, the use of loud, profane, or abusive language; horseplay; gambling.
>
> * * *
>
> 7. Failure to provide accurate and complete information when required by management or improperly disclosing confidential information. (Respondent's Exhibit 12)

Since the respondent has a written policy requiring that employes report arrests, it does not require a strained reading of the rules to contend that a failure to report an arrest would be considered a violation of Work Rule #1 as disobedience or failure to carry out written instructions, as Mr. Polinske opined, Tr. 126. Even one of complainant's witnesses, Robert Peters, the union steward, referred to the failure to report an arrest as a work rule violation, Tr. 240, and did not argue to the contrary at the pretermination hearing. Finally, the question is whether respondent would have terminated complainant's probationary employment in the absence of reliance on the arrest, not whether respondent could prevail in arbitration or similar review of the termination.[3] While a particularly weak case for termination tends to undermine the bona fides of the employer's assertion that it would have terminated the employe in any event, this is not the case here.

Complainant also compares respondent's handling of his case to two other probationary employes. However, they were not similarly situated to

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[3] The termination of an employe on original probation is generally not susceptible of review, §ER-Pers. 13.08(1), Wis. Adm. Code; Board of Regents v. Wis. Personnel Commission., 103 Wis. 2d 545, 309, N.W. 2d 366 (Ct. App. 1981); and the employer does not have to establish "just cause" for such a termination, as would be required for a termination subject to §230.44(1)(c), Stats., and Reinke v. Personnel Board, 53 Wis. 2d 123, 191 N.W. 2d 833 (1971).

complainant because, among other reasons, they were not serving original probations and were entitled to more employment protection than complainant.

Finally, it should be noted that respondent's assertion it would have terminated complainant in the absence of reliance on the arrest is reinforced by evidence that management was unhappy with complainant because he had been interviewing at other institutions shortly after he had been hired and had been given considerable assistance by management in making the transition to employment at KMCI. This provided respondent with an added incentive to have terminated complainant's probationary employment.

Since respondent satisfied its burden of establishing that it would have made the same decision of terminating probationary employment even if it had not taken his arrest into account, it has avoided a conclusion that it is liable for a violation of the FEA. The prevailing case law establishes that under these circumstances, complainant is not entitled to FEA attorney's fees. In Watkins v. LIRC, 117 Wis. 2d 753, 755, 345 N.W. 2d 482 (1984), the Supreme Court referred repeatedly to the FEA's implicit authorization for the award of attorney's fees to the "prevailing complainant." In order to be a prevailing party, a complainant does not have to prevail on every issue that arises in the proceedings, but still must achieve substantial success, see Radford v. J.J.B. Enterprises, Ltd., 163 Wis. 2d 534, 550, 472 N.W. 2d 790 (Ct. App. 1991) ("the losing party is not entitled to a reduction in attorney's fees for time spent on unsuccessful claims, if the winning party achieved substantial success and the unsuccessful claims were brought and pursued in good faith." (emphasis added) (citations omitted)). In Radford, the Court of Appeals adopted the approach followed by the U.S. Supreme Court in Hensley v. Eckerheart, 461 U.S. 424, 435, 76 L. Ed. 2d 40, 51-52, 103 S. Ct. 1933 (1983). In Racine Unified School District v. LIRC, 164 Wis. 2d 567, 609, 476 N.W. 2d 707 (Ct. App. 1991), the court quoted the following language from Hensley:

> Many civil rights cases will present only a single claim. In other cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discreet claims. Instead the... court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.

> Where a plaintiff had obtained excellent results...the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit...The result is what matters.

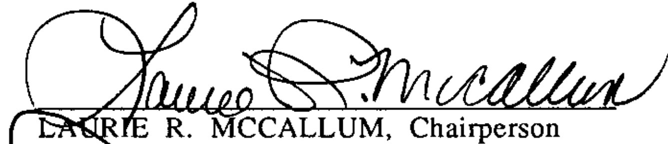
In Racine Unified School Dist., the court held that although the union prevailed on its claim of violation of §111.322(2), Stats., but did not prevail on its claim of violation of §111.322(1), it had "proved a violation of the WFEA, and was granted its requested relief." 164 Wis. 2d at 610. In this case, complainant neither established a violation of the FEA nor was granted any relief. Therefore, it follows that complainant is not entitled to attorney's fees under the FEA.

ORDER

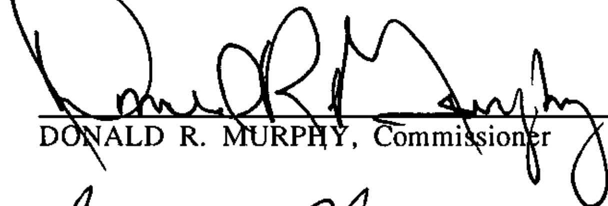
This complaint is dismissed.

Dated: April 30, 1993

STATE PERSONNEL COMMISSION



LAURIE R. MCCALLUM, Chairperson



DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

AJT:dkd

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

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

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

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