STATE OF WISCONSIN PERSONNEL COMMISSION

THOMAS BJORNSON,

Complainant,

v.

Chancellor, UNIVERSITY OF WISCONSIN - Madison (Center for Health Sciences),

Respondent.

Case No. 91-0172-PC-ER

DECISION AND ORDER

NATURE OF THE CASE

This case involves a charge of discrimination with respect to handicap and retaliation (Fair Employment Act activities) in connection with complainant's probationary termination.

FINDINGS OF FACT

1. Complainant was hired by respondent as a Building Maintenance Helper 2 (BMH 2) effective November 5, 1990, and continued his employment in that position until the termination of his (extended) probation effective November 1, 1991.

2. Complainant was hired as a result of a previous proceeding before this Commission. That proceeding involved a charge that respondent had refused to hire him on the basis of arrest/conviction record. Following a decision that there was probable cause to believe that discrimination had occurred, the parties reached agreement on a settlement that involved his rehiring.

3. Complainant's immediate supervisor at the time of complainant's termination was not then aware of that earlier proceeding, but management above his level was aware of it.

4. During his employment with respondent, complainant had an irritable colon syndrome. This condition generally was under control through the use of medication.

5. Respondent was aware generally of appellant's condition.

6. Complainant never requested an accommodation as such, although from time to time he requested more time to perform his assigned work. This request was related to his condition to some extent because of his more extensive need to use the bathroom. However, in his requests for more time he never explained to management that this was related in any way to his condition. Management never adjusted complainant's schedule to permit him more time to do his assigned tasks, although, as discussed below, it made a number of changes in his assignments, training, and supervision in an unsuccessful attempt to improve his performance to an acceptable level.

7. During his period of employment, complainant's performance was below the minimally acceptable standards for a probationary employe, both with respect to quantity and quality.

8. Complainant initially was assigned primarily to floor care work. Because of his performance problems with this work, he was reassigned to what management considered to be more basic janitorial work. However, his level of performance did not improve appreciably.

9. Complainant received a great deal more training and more intensive supervision than normal, including four performance evaluations and frequent quality assurance reviews. This also failed to result in an appreciable improvement in his performance.

10. At the end of his normal six months probationary period, his immediate supervisor, Eric Lauersdorf, recommended termination, and prepared a May 1, 1991, performance evaluation which reflected this decision. However, management above Mr. Lauersdorf decided to extend complainant's probation by an additional six months. This decision was motivated in part because respondent wanted to give complainant every change to pass probation, so as to avoid any appearance of retaliation. Complainant's performance continued to be poor after the extension of probation.

11. Complainant was involved in an incident on October 25, 1991, when he reached through a door and grabbed the wrist of a coworker who had knocked on the door. This was done with sufficient force to bruise her wrist and cause her to see a physician who provided her with a wrist brace and advised her to refrain from working for a week, which she did.

12. Complainant's probationary employment was terminated effective November 1, 1991, by a letter dated November 1, 1991 (Respondent's Exhibit 12).

Respondent based this decision both on the October 25th grabbing incident and on complainant's overall poor performance, although the same decision would have been reached on the basis solely of either ground. Respondent's decision to terminate complainant's employment was not related to either handicap or retaliation.

CONCLUSIONS OF LAW

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

2. Complainant has the burden of proof to establish that respondent discriminated against him on the basis of handicap or in retaliation for filing a previous complaint in connection with the termination of complainant's probationary employment, except to the extent that respondent has the burden of proof with respect to the issue of accommodation.

3. Complainant has failed to sustain his burden of proof and respondent has sustained its burden.

4. Respondent did not discriminate against complainant on the basis of handicap or in retaliation for filing of a previous complaint under the FEA in connection with the termination of complainant's probationary employment.

OPINION

Retaliation

The first stage of deciding the retaliation claim is to determine whether complainant has established a prima facie case — that is, facts which give rise to an inference of retaliation. Complainant has established a prima facie case by showing:

1) He filed a charge of discrimination regarding respondent's earlier refusal to hire him;

2) Respondent was aware of the charge;

3) Respondent took a negative personnel action against him (termination);

4) This action was taken in relatively close proximity in time to his earlier charge, thus giving rise to an inference that the action was motivated by his having filed the charge. See Chandler v. UW-LaCrosse, 87-0214-PC-ER, 88-0009-PC-ER (8/24/89).

At this point, the employer must respond to the prima facie case by articulating a legitimate, non-discriminatory rationale for its action. Respondent did this by showing that complainant's poor performance and his act of grabbing a co-employe's wrist were the basis for its act. This leads to the final stage which is to determine whether this basis respondent articulated for its action was actually a pretext for discrimination.

Complainant's case includes the contention that, in effect, his work record was not as bad as respondent contends, and that he should have received more frequent evaluations and a more explicit statement of management's expectations. However, the record reflects consistently negative evaluations of complainant's work by a number of supervisors. Furthermore, the supervisor who spent the most time directly supervising complainant was then unaware of his earlier complaint. The record also reflects that complainant received four performance evaluations in addition to which management completed many quality assurance program forms which were replete with specific comments about performance problems.

It is also contended that respondent over-reacted to the incident in which complainant grabbed a co-worker's wrist. On this record, this contention amounts merely to a difference of opinion. The coworker's wrist was bruised badly enough that a doctor recommended use of a brace and a week's absence from work. There is no basis for a conclusion that respondent's reliance on this incident was a pretext for retaliation.

Handicap

There apparently are two aspects to the charge of handicap discrimination. The first is the question of whether respondent wrongfully terminated complainant's employment because of his handicap. The second involves the question of whether respondent violated its duty of accommodation.

With respect to the first part of this claim, normally a prima facie case would include the following elements: 1) complainant was handicapped;[1] 2) he was terminated; 3) he had been performing satisfactorily. While

[1] This finding is based on complainant's irritable colon syndrome. He also testified about a temporary problem with his knee, but there was no medical documentation presented upon which to base a finding that this in fact constituted a handicap.

complainant established that he was handicapped, he failed to show that he had been performing satisfactorily, as discussed above. Even if one assumed a prima facie case, the only bases complainant relied on to attempt to show pretext were the same ones discussed above under retaliation, and, for the same reasons discussed there, fail to establish pretext.

As to accommodation, complainant never advised respondent that his performance problems were related to his physical condition. Under these circumstances, respondent was under no obligation to provide an accommodation. Furthermore, this record does not support a finding that complainant's handicap meaningfully contributed to his performance problems. Finally, even assuming there were a basis for some kind of argument that respondent should have looked for another position for complainant in lieu of termination under the authority of McMullen v. LIRC, 148 Wis. 2d 270, 434 N.W. 2d 830 (Ct. App. 1988), the grabbing incident was an independent basis for termination that had no possible relation to complainant's handicap.

In conclusion, the record reflects that complainant had a positive attitude toward succeeding at his work, but was unable to perform at a level management had a right to expect. Management on its part made a real effort with respect to training and supervision to attempt to enable complainant to succeed. There was uncontradicted testimony by Mr. Peck that the extension of complainant's probation was the first time in nine years that this had occurred. It also is significant that complainant's primary supervisor, who had had no involvement with, and was unaware of complainant's earlier charge of discrimination, recommended termination after six months, but was overruled by his superiors, who wanted to give complainant every chance to pass probation. There is no basis for a conclusion that respondent discriminated against complainant in connection with the termination of his employment.

ORDER

This complaint of discrimination is dismissed.

Dated: August 26, 1992 STATE PERSONNEL COMMISSION

AJT/gdt/2

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

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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.