affirming Jacobus v UW-Madison, 88-0159-PC-ER, 3/19/92

STATE OF WISCONSIN CIRCUIT COURT BRANCH 12 DANE COUNTY

JAMES D. JACOBUS,

PETITIONER,

vs. CASE No. 92CV1677

WISCONSIN PERSONNEL COMMISSION,

RESPONDENT.

MEMORANDUM DECISION & ORDER

BACKGROUND

Petitioner, James D. Jacobus, has brought a Ch. 227 administrative review challenging a March 23, 1992 determination by the respondent, Wisconsin Personnel Commission. The decision of the Personnel Commission under review found that petitioner was not subject to handicap discrimination under Wis. Stats., secs. 111.31-111.37, the Wisconsin Fair Employment Act (WFEA) when he was terminated from employment by the University of Wisconsin System (Madison). Petitioner asserts that the administrative decision should be reversed because it erroneously interprets the law and is not supported by substantial evidence in the record. I conclude that the administrative agency has not misinterpreted the law and that its decision has substantial evidentiary support in the record.

FACTS

The Commission adopted in its entirety an exhaustive and detailed set of findings proposed by the hearing examiner. Because the specific factual findings are not challenged on this review, they may be briefly summarized as follows.

Petitioner was previously employed as a maintenance helper at Mendota Mental Health Institute (MMHI). Because his work was not considered satisfactory, his MMHI supervisor, Mr. Scott, suggested he look for work at the University of Wisconsin-Madison Physical Plant. Mr. Scott, advised a U.W. Physical Plant supervisor, Sharon Gaulke, that Mr. Jacobus was a "slow learner" who needed one-on-one training. Mrs. Gaulke was told by petitioner's mother that he had experienced performance difficulties at his previous job and he needed a job where he could succeed. Neither the petitioner, his mother, nor Mr. Scott advised anyone at the U.W. that petitioner was mentally handicapped.

Petitioner was given extensive personal training in his new job duties at U.W. Physical Plant by his immediate supervisor, Mark Rice. Mr. Rice initially believed that Mr. Jacobus understood his job and was performing his job satisfactorily, albeit in a somewhat below average fashion. In a series of performance reviews, petitioner demonstrated varying degrees of improvement in his job performance. Subsequently, his work was evaluated as unsatisfactory.

In response to perceived shortcomings in petitioner's job performance, he was given different job duties and additional training. When asked by Mr. Rice if there was a reason for his problems, petitioner did not indicate there was any. Mr. Rice recommended that petitioner be terminated prior to the expiration of his probation.

Petitioner sought some assistance with his job difficulties from a DVR Counselor, Roger Worachek. Mr. Worachek assumed petitioner was mentally retarded or learning disabled after meeting him but was uncertain of this without confirmatory testing. Mr. Worachek contacted Mr. Rice to discuss petitioner's job difficulties two days after Mr. Rice

had recommended that Mr. Jacobus be terminated. Don Sprang, Physical Plant Personnel Manager, attempted to contact Mr. Worachek regarding Worachek's concerns but was unable to substantially connect with Mr. Worachek before Mr. Worachek left on a lengthy vacation.

Mr. Sprang met with petitioner to discuss the recommendation for termination. Sprang asked Jacobus whether there were any problems and he failed to mention any handicap or request accommodations. Petitioner was then terminated due to unsatisfactory job performance. The termination occurred before Mr. Worachek had further opportunity to speak with petitioner's supervisors.

After termination, a DVR psychological evaluation determined that petitioner has "borderline mental retardation"[1] with a Full Scale I.Q. of 72. Mr. Worachek concluded that petitioner needed a more structured job than the one he was offered by U.W. Petitioner then filed this complaint of handicap discrimination with the Personnel Commission.

The Commission found that petitioner was handicapped, in that he had a mental impairment which made achievement of certain of life's basic activities unusually difficult. However, the Commission determined that the employer was not aware of petitioner's handicapped status at the time of his termination from employment.[2] The Commission also

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[1]There is a dispute as to the professional propriety of such a diagnosis which need not be resolved on this appeal.

[2]The examiner noted that the employer was made aware of certain job performance limitations experienced by Jacobus but the examiner observed that, "Not every physical or mental impairment constitutes a handicap, only those impairments that are profound enough to make achievement unusually difficult." (Decision at p. 13).

found that the communication by the DVR counselor was not sufficient to put the employer on notice that Jacobus was handicapped.

The Commission rejected the argument that the employer should have been aware of petitioner's handicap status. The Commission focused on the fact that petitioner was himself, unaware that he was handicapped until his DVR evaluation and his DVR counselor only suspected his handicap status. The Personnel Commission gave weight to the fact that petitioner's supervisor, Mr. Rice, felt that petitioner did not have particular difficulty in learning tasks or following directions. The Commission rejected petitioner's argument that an employer has an affirmative duty to investigate possible handicaps in the face of denials by its employees.

The Personnel Commission determined that petitioner's termination was not a consequence of poor work performance as a consequence of his handicap. In rejecting this causal linkage, the Commission chose to give limited credibility to the psychologist who conducted an evaluation of Mr. Jacobus. The Commission did credit the testimony of another psychologist, Dr. McGivern, on the importance of testing for adaptive functioning in order to establish a causal linkage between petitioner's job performance difficulties and his mental handicap. Unfortunately, no such adaptive testing was adduced before the hearing examiner.[3]

Although it was not required to do so, the Commission went on to find that the employer had met the statutory exception in Wis. Stats., sec. 111.34(2)(a). Specifically, to

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[3]The Commission felt that petitioner's sometimes satisfactory and sometimes improving job performance also mitigated against finding a causal linkage between any mental handicaps and deficient job performance.

the extent petitioner was handicapped as described by the DVR counselor, the Commission determined that there was no discrimination because petitioner's handicap was, "...reasonably related to [petitioner's] ability to adequately undertake the job-related responsibilities of [petitioner's] employment..." Lastly, the Commission concluded that there was no failure to reasonably accommodate petitioner's handicap, even if the employer had been aware of the handicap.

STANDARD OF REVIEW

Because petitioner challenges none of the extensive factual findings made by the Personnel Commission, only its ultimate finding of no handicap discrimination, the standard of review to be applied to that conclusion takes on particular importance in this case.[4]

The petitioner acknowledges in his initial brief that a reviewing court "may defer somewhat to a Personnel Commission interpretation of a statute it administers." (Petitioner's Brief, p. 7). However, petitioner does not distinguish whether he is challenging an agency factual finding or a conclusion of law.[5] In petitioner's reply brief, he asserts that the agency's conclusion as to a question of law is entitled to no weight because the Commission has "only limited experience, technical competence and specialized knowledge"

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[4] "A standard of review frames the terms in which justification may be offered and thus delineates the boundaries within which argument may take place." O'Lone v. Estate of Shabazz, 482 U.S. 342, 357 (1982).

[5] The Petition for Review, on p. 2, challenges the Commission's order on the grounds that it erroneously interprets provisions of law and is not supported by substantial evidence in the record. See also Petitioner's Brief at p. 8. It is important to distinguish between claimed factual errors and claims of erroneous legal conclusions because different standards of review attach to each claim.

concerning this issue. (Reply Brief, p. 2).

Respondent extensively addressed the question of the appropriate standard of review. (Respondent's Brief, pp. 4-7). Respondent asserts that the ultimate conclusion reached by the Commission, subject of this review, is a mixed question of fact and law which is entitled to "great weight" on this review.

The distinction between questions of law and questions of fact is frequently not an easy one to make. In simple terms, factual conclusions relate to a recounting of significant, historical events, and legal conclusions denote the legal effect or disposition applied to those historical events.

"The construction of a statute and its application to a set of facts is considered a question of law. Hobl v. Lord, 157 Wis.2d 13, 20, 458 N.W.2d 536, 539 (Ct. App. 1990)." City of Muskego v. Godec, 167 Wis.2d 536, 545, 482 N.W.2d 79 (1992); Butzlaff v. Wisconsin Personnel Commission, 166 Wis.2d 1028, 1031, 480 N.W.2d 559 (Ct. App. 1992); William J. Wrigley Co. v. DOR, 160 Wis.2d 53, 69, 465 N.W.2d 800 (1991). Because petitioner has conceded that the Personnel Commission's findings of fact are "largely accurate" (Reply Brief, p. 3) and because this case distills to the appropriateness of the Commission's ultimate conclusion, the appropriate standard of review is the standard applied to review agency conclusions of law.

Our appellate courts have recently given somewhat uneven guidance on the standard of review to be applied to conclusions of law by administrative agencies. In a very similar legal context, the Wisconsin Court of Appeals recently attempted to clarify the appropriate review to be accorded to legal conclusions of the Wisconsin Personnel Commission in

interpreting the WFEA.

> Application of a statute or rule to a set of facts is a question of law; and the general rule is that we are not bound by an agency's conclusions of law. West Bend Educ. Ass'n. v. WERC, 121 Wis.2d 1, 11, 357 N.W.2d 534, 539 (1984). In some instances, however, we defer to an agency's legal conclusions and interpretation of statutes. William Wrigley, Jr. Co. v. DOR, 160 Wis.2d 53, 69, 465 N.W.2d 800, 806 (1991). Where, for example, the agency is charged by the legislature with the duty of applying the statute being interpreted, the agency's interpretation "is entitled to great weight." Lisney v. LIRC, 165 Wis.2d 628, 633, 478 N.W.2d 55, 56 (Ct. App. 1991), citing DILHR v. LIRC, 161 Wis.2d 231, 243, 467 N.W.2d 545, 549 (1991).
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> As indicated, Phillips's complaint asserts several claimed violations of the Fair Employment Act (WFEA), which generally prohibits discrimination in employment by reason of the employee's marital status, gender and sexual orientation. See secs. 111.321 and 111.36(1)(d)1, Stats. The personnel commission is charged by the legislature with the duty of hearing and deciding discrimination claims and applying the provisions of the act to particular cases. See sec. 111.375(2). We thus accord "great weight" to the commission's interpretation of the act and will uphold that interpretation unless it is clearly contrary to legislative intent. Lisney, 165 Wis. 2d at 633, 478 N.W.2d at 56. Indeed, we are bound to affirm the commission's interpretation if it is reasonable, even if another conclusion is equally reasonable. DILHR, 161 Wis.2d at 245, 467 N.W.2d at 550. Phillips v. Wisconsin Personnel Commission, 167 Wis.2d 205, 215-216, 482 N.W.2d 121 (Ct. App. 1992).[6]

Sec. 227.57(5) Wis. Stats., provides as follows:

> (5) The Court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action...

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[6]Petitioner argues in his reply brief that no weight should be given to the agency conclusion because this Court has as much expertise in applying the statute as the agency. The Phillips Court has specifically recognized the expertise of the Personnel Commission in applying the statute in question. Although the ultimate question is effectively a question of law which the agency has apparently not previously addressed, it is heavily based on detailed facts regarding the quantum of evidence required to put an employer on notice that one of their employees is mentally handicapped. This is an area relatively well suited to agency expertise. "Even though an agency may never have interpreted a particular statute against facts of first impression, because the agency has prior experience in interpreting the statute, the agency's decision will be accorded due weight or great bearing." William Wrigley, Jr. Co., 160 Wis.2d at pp. 70-71.

The statute in question, WFEA, is a remedial statute, and is entitled to a liberal construction to effectuate its policies and purposes. McMullen v. LIRC, 148 Wis.2d 270, 275, 434 N.W.2d 830 (Ct. App. 1988). The McMullen Court has suggested that because Wisconsin's scheme for combatting handicap discrimination differs from the federal schemes, the Court will not look to federal law for guidance. Ibid. at pp. 275-76. See also Racine Unified School District v. LIRC, 164 Wis.2d 567, 586-87, 476 N.W.2d 707 (Ct. App. 1991).

OPINION

There are three requisite elements underpinning a claim of handicap discrimination. One, the complainant must show that he is handicapped within the meaning of WFEA. Two, the employee must show that the employer discriminated on the basis of handicap. Three, the employer is unable to justify its alleged discrimination on the basis of the statutory exception contained in sec. 111.34(2), Wis. Stats. Racine Unified School District v. LIRC, 164 Wis.2d 567, 598, 476 N.W.2d 707 (Ct. App. 1991). There is no dispute that petitioner is handicapped under WFEA. Petitioner's administrative review focuses on the second element, specifically, a challenge to the Commission's finding that there was no discrimination by the employer on the basis of handicap.[7]

An employer's perception of an employee as mentally impaired can serve as a basis for handicap discrimination under WFEA if it is used to deny employment and the employee is otherwise qualified to do the job. Norris v. DILHR, 155 Wis.2d 337, 342, 455

[7]The third element, the statutory exception, need not be reviewed in light of petitioner's inability to establish the second element of discrimination based on handicap.

N.W.2d 655 (Ct. App. 1990). Petitioner argues at some length that his employer either knew or should have known he was handicapped by virtue of a mental impairment. Absent the employer's knowledge of the handicap, there can be no intentional discrimination.[8]

Petitioner relies on three basic premises in asserting that the employer knew or should have known that petitioner was mentally handicapped at the time he was terminated from employment. First, petitioner suggests that conversations with third parties put the University on notice of petitioner's handicap. Second, petitioner points to the employer's knowledge of his poor prior work history. Finally, petitioner relies on Jacobus' poor job performance while employed at U.W. as a basis for the employer to know that he had a handicap of mental retardation.

The difficulty with each of petitioner's arguments is that they all rely entirely on circumstantial evidence of the employer's knowledge of a handicap and each argument is subject to a competing inference that explains the petitioner's conduct on grounds other than handicap. The individuals that spoke to University employees or supervisors about petitioner talked in terms of his difficulties with employment or his being a "slow learner." No mention was made of any mental handicap or the type of mental impairment which makes achievement of basic life activities unusually difficult. Petitioner's poor job performance at MMHI and at UW can be explained by any number of factors other than mental handicap. Other such possible factors might include lack of interest, lack of

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[8]The U.S. Supreme Court has defined the concept of discriminatory intent as one in which the decision-maker, "selected or reaffirmed a particular course of action at least in part 'because of' not merely 'in spite of' its adverse effects upon an identifiable group." Personnel Administrator of Mass. v. Feeney, 422 U.S. 256, 279 (1979).

motivation, distraction, ineptitude, boredom, etc. The Commission's reliance on petitioner's occasionally satisfactory work performance and the failure of all concerned individuals to mention the existence of a handicap (even when inquiry was made of petitioner) are reasonable bases for the respondent to conclude that petitioner had not met his burden of establishing that the employer knew or should have known that Jacobus was handicapped.

The bottom line in this review is that respondent was forced to make a judgment call on largely undisputed facts. That judgment call implicated a choice between competing factual inferences and between competing policy judgments. The degree of scrutiny which an employer must give to ferreting out possible subtle mental handicaps which are not explicitly brought to the employer's attention is, indeed, a difficult policy judgment.[9] In my view, and in light of the direction of the Court of Appeals in Phillips v. Wisconsin Personnel Commission, 167 Wis.2d 205, 482 N.W.2d 121 (Ct. App. 1992), it is a policy judgment by an agency charged with administering the WFEA that should be given considerable deference by this reviewing court. Given the thoughtful and detailed attention addressed to this question by the Commission, I find no abuse of discretion by the respondent on this record.

ORDER

For the above-stated reasons, the decision of respondent finding no handicap discrimination on the part of the employer is hereby **AFFIRMED.**

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[9]One could persuasively argue that to hold employers responsible for investigating handicaps that employees fail to disclose could give rise to serious potential problems of placing an undue burden on employers and invading employees' privacy rights.

BY THE COURT,

MARK A. FRANKEL
CIRCUIT JUDGE

Dated: January 11, 1993