

STATE OF WISCONSIN

PERSONNEL COMMISSION

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PATRICIA A. LONGDIN,

Complainant,

v.

Secretary, DEPARTMENT OF
CORRECTIONS,

Respondent.

Case No. 93-0026-PC-ER

* * * * *

FINAL
DECISION
AND
ORDER

INTRODUCTION

A proposed decision and order was issued in this matter on March 27, 1995. The respondent filed objections, moved to reopen the hearing and requested oral arguments. In a ruling dated May 26, 1995, the Commission denied respondent's request to reopen the hearing. Oral arguments were made before the Commission on June 21, 1995.

The Commission considered the parties' arguments and consulted with the examiner. The Commission rejects certain portions of the proposed decision as noted and for the reasons stated in the alphabetic footnotes. In reaching its decision in this matter the Commission disregarded all factual information set forth in respondent's objections to the proposed decision which was not presented during the hearing.

This matter is before the Commission after a hearing on the following issues:

1. Whether the respondent discriminated against the complainant by refusing to accommodate her temporary disability in 1992-93.
2. Whether the respondent discriminated against the complainant because of her sex by not providing the complainant with a light-duty position at KMCI in 1992-93.

The parties agreed to reserve the issue of remedy. During the course of the hearing, the complainant also indicated that one aspect of her claim was that the respondent had discriminated against her by cutting off her worker's

compensation benefits. Respondent has filed a motion to dismiss based upon the exclusivity provision of the Worker's Compensation Act.

FINDINGS OF FACT

1. The parties stipulated to findings 1, 2, 8 and 9 that had been set forth in the initial determination issued on August 31, 1993:

1. The complainant is female. She works as a Correctional Officer at the Kettle Moraine Correctional Institution (KMCI), Plymouth, Wisconsin.

2. On September 12, 1992, the complainant injured her left shoulder while at work. The complainant's physician recommended that she return to work on September 21, 1992, with the following restrictions: (1) No direct inmate contact. (2) No repetitious work involving her left shoulder and no work with left shoulder flexed to 90 degrees or more. (3) No weapons firing. (4) No lifting of more than 10 pounds. The physician recommended that these restrictions remain in effect until October 21, 1992.

The parties further stipulated at hearing that these restrictions remained in effect throughout the period from September 21, 1992, to March 19, 1993.

8. Sometime during the late winter of 1992, the complainant underwent surgery. Her physician released her to return to work on March 19, 1993, subject to the restrictions of no use of her left hand and no direct inmate contact. The respondent says that it tried to accommodate these restrictions, but it was unable to do so because the restrictions were so stringent and all-encompassing.

9. By May 1993, the complainant had resumed her normal duties at KMCI.

2. Complainant underwent outpatient surgery on March 1, 1993, and the parties stipulated that complainant was unable to work for the respondent in any capacity for a period of three weeks following her surgery, i.e., until March 22, 1993, at which time she was permitted to return to work with the restrictions noted in ¶1(8.) above. (Resp. Exh. 1-72)

3. At all relevant times, the complainant, a first shift employee, has served as the vice-president of her union local, and has been active in union matters. At times, the union-management relationship has been strained.

4. Complainant's first visit to her physician, Dr. Timmermans, relating to the shoulder injury was on September 14, 1992. On that date, Dr. Timmermans initially directed complainant to be off work until September 17th and established a restriction that complainant "is to be having no inmate contact" upon returning to work. (Resp. Exh. 1-55) However, complainant advised Dr. Timmermans that "no inmate contact" would not allow her to work at all, and in a "Medical Absentee Certificate" dated September 18, 1992, Dr. Timmermans modified the restriction to "no direct inmate contact."

5. Since January of 1991, KMCI has had a policy to "facilitate 'light duty' for staff requiring a reasonable accommodation." (Resp. Exh. 10) The policy reads:

Staff with a documented need for a reasonable accommodation may be allowed modified job duties to work in a job, other than their regular position, consistent with their individual restrictions.

There were no other guidelines in terms of what constituted a reasonable accommodation. Each request was handled on a case-by-case basis.

6. KMCI Associate Warden of Security Thomas Nickel had overall responsibility for the security department at KMCI, including the Correctional Officers. That responsibility often included making light duty assignments. Mr. Nickel always discussed any light duty requests with the Personnel Manager, Colleen Zettler, and the Warden, Marianne Cooke, and in some cases obtained input from staff. Personnel Manager Zettler and Warden Cooke are females; Security Director Nickel and Administrative Captain Barber are males.^A Administrative Captain Ben Barber is also involved in terms of scheduling the officer once the decision had been made by others as to where the assignment would be.

7. Mr. Nickel considered various light duty placement options within KMCI, concluded that none met the complainant's restrictions, and learned that the Corrections Training Center in Oshkosh was short-staffed.

^A A sentence was added at the conclusion of finding of fact (FOF) #6, in order to clarify the record.

8. On September 23, 1992, KMCI's personnel manager, Colleen Zettler, informed the complainant that she was to report to the Corrections Training Center in Oshkosh on September 30, 1992, for her light duty assignment. Her primary duty there was to answer the phones and act as a receptionist.

9. The complainant was dissatisfied with the CTC assignment (Resp. Exh. 73) because she felt it inconvenienced her and resulted in certain additional travel, child-care and meal expenses. She filed contractual grievances regarding the assignment.

10. Throughout the period she was working at CTC, the complainant was permitted to attend union functions at KMCI, including grievances and labor-management meetings. (Resp. Exh. 19) Had respondent denied the complainant's entry to KMCI to attend these to these functions, there would have been a strong union response.

11. On several occasions while complainant was employed at CTC and attended a grievance or other meeting at KMCI, she remained at KMCI for the duration of her normal shift and worked in the mail room or in control center. This assignment was made by Capt. Blasnick and occurred without the knowledge of Zettler, Cooke or Barber.

12. In an October 26, 1992 response to one of complainant's grievances referenced in Finding 9, Ms. Zettler wrote: "Any time your restriction on inmate contact is lifted we will explore on-site light duty for you." (Resp. Exh. 1-59)

13. Officer Robert Peters, a union member and complainant's designated union representative, was told that if complainant had the restriction regarding inmate contact lifted, management would be in a position to accommodate her on light duty.

14. In a letter dated November 6, 1992 (Resp. Exh. 30), Ms. Zettler wrote complainant as follows:

I am writing in an effort to resolve the situation concerning your present restrictions.

Your doctor has specifically stated "no inmate contact" and again "no direct inmate contact".

Other officers who have been scheduled for light duty at KMCI have had limitations such as "no contact with violent situations"

or "limited inmate contact" or "may have limited inmate contact that is low risk", etc.

There is no post at KMCI that does not have direct inmate contact with the exception of the towers. Your physician also stated "no weapons firing", a restriction that eliminates the towers.

I again reiterate that anytime your restrictions are changed we will again explore an on-site light duty post for you.

15. Respondent's Worker's Compensation Coordinator, Diane Reinen, wrote Dr. Wells, complainant's orthopedic surgeon, on January 7, 1993, as follows (Resp. Exh. 36):

I have received your note on 01-06-93 stated Pat may "return to light work duties... with previous restrictions." I am requesting clarification of these restrictions from a previous physician. One of the restrictions Dr. Timmermans had stated was "no direct inmate contact." We do have light duty work available, but with limited inmate contact. Please let us know if she may work with limited inmate contact.

Enclosed please find a WC-4 Physician's Certification that you may use to list her limitations.

In response, Dr. Wells wrote (Resp. Exh. 35):

I have received your letter dated 01/07/93 regarding Pat Longdin. her restrictions at this time include no direct inmate contact, avoidance of overhead work activities. I'll be seeing her back in late February and hopefully we can remove these restrictions at that time.

16. In January, an employee in KMCI's clerical area resigned. On January 25, 1993, Colleen Zettler told the complainant that there was a vacancy in the clerical unit that might meet her work restrictions. Ms. Zettler described the duties as including filing and typing. Complainant stated that she didn't feel the work met her restrictions. Ms. Zettler understood this response to mean the complainant was declining the assignment.

17. The offer of employment in the clerical area was inconsistent with complainant's restriction against repetitious work with her left shoulder and against flexing that shoulder to 90 degrees or more. The filing would have been in floor to ceiling filing cabinets which would have required repetitious shoulder flexion beyond the permitted range.

18. In early February of 1993, complainant was notified by Bureau of State Risk Management in the Department of Administration, that her Worker's Compensation benefits were going to be terminated. The letter stated, in part:

Your treating doctor, Dr. Wells, stated that your work restrictions included no direct inmate contact and avoidance of overhead work activities. Your employer can accommodate those work restrictions.

On January 25, 1993, Colleen Zettler-Personnel Manager of Kettle Moraine CI, offered you a light duty assignment in the clerical unit of Social Services. This assignment complied with Dr. Wells' work restrictions; however, you chose not to accept this light duty assignment.

Therefore, because you refused the light duty work assignment, we will not accept further liability for worker's compensation disability benefits.

The letter arose from an interpretation of Dr. Wells' January 12, 1993, letter to the KMCI Workers' Compensation Coordinator which merely referenced the restrictions of "no direct inmate contact, avoidance of overhead work activities" and did not specifically mention the other restrictions set forth in stipulated finding 1, above. When complainant learned her benefits were being terminated, Dr. Wells sent clarifying correspondence to KMCI's Workers' Compensation Coordinator in which he indicated that all of the previous restrictions remained in place. This clarification meant that the January 25th clerical offer did not meet all of the restrictions, the benefits termination decision was withdrawn and her benefits continued without interruption.

19. Among the various assignments at KMCI which relate to complainant's light duty request are:

a. Guard towers. These duty assignments involve no inmate contact at all, but the employee must be able to use a weapon, and complainant did not meet this requirement.

b. Control center. This was a permanent posting, and displacement of the existing employee to accommodate someone in a light duty capacity would have generated strenuous objection from the union

c. A related assignment was to assist in scheduling. Much of this assignment was carried out in the control center.

d. Gatehouse. There was a great deal of construction work being carried out at KMCI commencing in the summer of 1992, and it was the union's position that additional staffing was needed at the gatehouse during this period. (Resp. Exh. 51) The existing posting at the gatehouse required climbing on vehicles, lifting hoods and trunks, using a metal probe to insure no inmates were hiding in the vehicles, and lifting packages to inspect them, as well as patting down inmates in work crews who passed through the sally port. During the construction period, KMCI typically did assign the administrative officer, Mr. Bailey, to assist at this post for a few hours a day during the periods of heaviest traffic.

e. Armory. This assignment would have required the officer to test-fire weapons, clean towers and carry supplies and carry boxes of ammunition in excess of 10 pounds.

f. Property. The typical assignment in property required significant interaction with inmates who were permitted in the property room so they could pick up their possessions which were stored there. The typical assignment also required lifting packages which often weighed in excess of 10 pounds. However, during the period of 1992 to 1993, the property area was inventorying the property of all inmates placed in Temporary Lock Up. This property was stored in a separate room that was effectively locked at all times, and there was no inmate contact when working on the TLU property. An Officer M-15, who had a broken hip and a lifting restriction, had been assigned this inventorying as a light duty assignment and another officer helped out by moving the objects to be inventoried. The property area and the mail room were located in the basement of the KMCI administration building.

g. Mail room. The work in the mail room involves opening, screening, and re-stuffing the envelopes and writing receipts for incoming mail. There is no significant lifting required and at least some of the work can be done with one hand. There is no inmate contact in the mail room itself during the first shift, although inmates walk past the mail room to pick up their property in the property area. The metal door to the mail room is supposed to remain closed, but that rule was not enforced. The decision whether to keep the door closed is discretionary with the staff assigned to the area.

h. Store. There are from 1 to 3 inmates assigned to work in that area.

i. Clerical area. This assignment is described in finding 16 and 17. The clerical area is located on the main floor of the administration building, on the left hand side of a large room with offices in the center as well as along the sides. Two inmates also perform clerical work. These inmates are located in an office along the right side of the room, adjacent to the room for the captains and lieutenants of the security force. Filing is done on open shelving, running from the floor to the ceiling, and files range up to 1.5 inches thick.

20. Other correctional officers, male (M) and female (F), who have been accommodated at KMCJ include the following:^B

a. Officer M-2 was accommodated in the tower in October of 1993. He had a restriction of "limited inmate contact" and a 10 pound lifting restriction.

b. Commencing in November of 1992, Officer M-3 was restricted to limited inmate contact because of a burn. He initially worked in the mail room and after his physical condition improved, he was assigned to property.

c. Officer M-4 was assigned to the clerical area in March of 1994, where he did filing. His restriction was simply "light duty."

d. From December of 1992 through February of 1993, Officer M-5 was restricted to "sedentary work," could not stand or walk, could not bend, squat, climb twist or reach, and had a 10 pound lifting restriction. He was assigned to the mail room, where he wrote receipts and went through letters.

e. Employee M-9 was employed in respondent's maintenance department and commencing in July of 1993, he was restricted to light/medium work with a 30 pound weight limit and "limited inmate contact." He was placed in the property and mail area at the same time as Officer M-15.

f. Officer M-10 had a weight restriction and limits on the amount of bending and stooping. He was barred from working around machinery. His light duty assignment, for a period of approximately 10 days in October or November of 1993, was to the clerical area.

g. Officer M-13 was placed in the mail room for two weeks commencing November 23, 1993, as a consequence of a "no running" restriction.

^B Changes were made to FOF #20 in order to more accurately reflect the record.

He was also assigned to property for approximately one week in November of 1993. At that time, he had a lifting restriction for his right arm, was prohibited from firing weapons, and had a "limited inmate contact" restriction.

h. Officer M-14 initially was placed in the mail and property area for a period which overlapped with Officer M-15 and then moved to the clerical area. Officer M-14's light duty lasted approximately two months commencing in November of 1993. He had a "sit down work only" restriction.

i. In June of 1993, Officer M-15 had the restriction of "sit down work only." He was assigned to the mail and property areas, primarily to the mail room. Then in November of 1993, KMCI received a second medical restriction of "no inmate contact." When the officer brought in this second restriction, Ms. Zettler informed him that it meant he could not work in the institution as a Correctional Officer at all. His physician then eliminated the second restriction and Officer M-15 remained in the mail room.

j. Officer M-18 was restricted to "no towers, no housing units and minimal inmate contact." He was placed in the mail and property area for one week in June of 1993.

k. Officer M-19's restrictions, commencing in December of 1993 were: No lifting above 20 pounds, limited twisting and stooping and no squatting, kneeling or crawling. Officer M-19 was accommodated by assignment to the canteen, which did include direct contact with an inmate-worker, and to the business office where he shredded records. The latter assignment also included direct contact with the inmate who provided the materials to be shredded and took away the bags of shredded materials.

l. Officer M-22 was also placed on light duty at an unknown assignment while under a "limited inmate contact" restriction.

m. In May of 1992, Officer M-25 shattered his elbow and had the following restriction: "No direct inmate contact - no contact with violent situations." Captain Barber advised KMCI supervisors of the officer's light duty assignment by memo dated May 18, 1992, which stated in part:

As of May 18, 1992, Officer [M-25] has returned to work. He will be on light duty until further notice. He will work from 8:00am to 4:00pm, with weekends off at this time. His duties will consist of working in the mailroom, property, gatehouse, administration

patrol, scheduling, visits, and the key room. He is not to have any direct contact with inmates.

By November of 1992, Officer M-25's restriction was changed to: "No heavy lifting, no throwing with left arm, and no inmate contact with potentially violent situations." In May, Officer M-25 was initially placed in the control room area and then was assigned to the stores operation when the stockkeeper became ill. The officer's disability was deemed permanent and he formally transferred into the stores position when it became vacant. He remains in the stores position. Respondent has invariably provided Officer M-25 with light duty during his period of restriction.

n. In October of 1992, Officer M-27 was restricted to only "limited (low risk) inmate contact" because of a twisted and bruised ankle and a possible broken rib. He was initially assigned to the mail room, but when he had difficulty reaching the mail slots, he was moved to a desk in the business office where he collated hazardous materials booklets and made copies.

o. Officer M-29 had a lifting restriction and a "no inmate contact when possible altercation is involved" restriction in December of 1991. The record does not show how his request was handled.

p. Officer M-30 was undergoing training on the 3rd shift at KMCI even though he was still technically an employee of CTC when, due to work restrictions, he was assigned to the control center at KMCI to process inmate conduct reports. Officer M-30's restrictions included a 20 pound lifting restriction and he was directed to elevate his leg as much as possible. This 3rd shift light duty assignment commenced on September 22, 1992, and continued to December 12, 1992. There was no inmate contact, no reaching and no repetitive motion involved at this assignment which involved coding various forms, separating them and stapling them.

q. Officer F-1 was restricted to predominantly sedentary work and was assigned to tower duty.

r. Officer F-3 was initially assigned to the mail or property room for a few days on light duty and then worked in the clerical area. Her restrictions are not of record.

s. Officer F-7's original restriction read: "May not have direct inmate contact" and no tower work. After the officer came in with this restriction, Ms. Zettler contacted a nurse at the officer's clinic who allowed the re-

striction to be modified to become "no direct inmate contact/limited inmate contact." Officer F-7 was placed in the clerical area commencing in November of 1993.

t. Officer F-8 was restricted from having any inmate contact at all and could not bend, lift or twist. For three months commencing February 24, 1992, Officer F-8 was assigned to the control center to help the scheduling officer. At a later time, Officer F-8 was placed on light duty in the clerical area. The record is not clear in terms of what her restrictions were at that time.

u. Officer F-12 was accommodated for at least two periods due to her pregnancy. In June of 1992, Officer F-12, who was pregnant, had the restriction of "no inmate contact." She was assigned to the tower. In October of 1992, Officer F-12 had the following restrictions: "No heavy physical work, avoid dangerous inmate contact." Earlier in June of 1992, this officer could do no lifting nor her regular duties. For one of these last two light duty assignments, Officer F-12 was initially assigned to the mail or property room for a few days and then moved to the clerical area where she did filing and typing. Officer F-12's move into the clerical area was at her own request after she was effectively given a choice between two sets of duties and was based upon her preference for the work hours associated with the clerical duties.

v. For approximately one month beginning February 22, 1993, Officer F-14 had a lifting restriction and was assigned to the clerical area.

w. Officer F-15 had a lifting restriction, other restrictions relating to standing and sitting, and the qualifying statement: "Inmate contact not recommended at this time." Light duty was provided for one week in December of 1992, at an unknown assignment.

x. Officer F-16 was pregnant in December of 1990 and worked with the following restrictions: 1) No direct inmate contact, only indirect contact, 2) lifting less than 50 pounds only, and 3) it was advisable that she be able to sit down and rest periodically. Officer F-16 was assigned to assist the scheduling officer in the control center for 2 to 3 weeks and then was assigned to perform storekeeper duties, which involved a lot of computer work and where she was assisted by one inmate worker. The officer interpreted her restriction on inmate contact to mean that she was to avoid breaking up fights. She also considered her assignment to be consistent with her restrictions.

21. Complainant is the only officer who requested light duty at KMCI and was not provided such an assignment.

22. [Deleted.]^C

CONCLUSIONS OF LAW

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

2. The Commission's jurisdiction over complainant's claim of handicap discrimination is superseded by operation of the exclusivity provision of the Workers' Compensation Act.

3. The complainant has the burden to establish that the alleged sex discrimination occurred.

4. Complainant failed to sustain^D her burden relative to the claim that respondent discriminated against her based on sex by not providing her with a light duty assignment (other than at the Correctional Training Center) in 1992-93.

DISCUSSION

Worker's Compensation Act Exclusivity Argument

During the course of the hearing in this matter,¹ the respondent indicated it would, in its post-hearing brief, move to dismiss based upon the exclusivity provision of the Worker's Compensation Act (WCA). Section 102.03(2), Stats., provides: "Where such conditions [for the employer's liability under the WCA] exist the right to compensation under this chapter shall be the exclusive

^C FOF #22 is deleted because there was insufficient basis in the record for determining that the respondent only made light duty assignments of females to the mail and property area until such time that a clerical area assignment became available.

^D This conclusion was changed as a result of the changes to the findings and for the reasons detailed in the discussion section of the Commission's decision. See especially the amended portions of the discussion section.

¹It would have been preferable had respondent raised this issue at an earlier point in the proceeding. However, the question of Worker's Compensation Act exclusivity is an issue of subject matter jurisdiction that can be raised at any time and cannot be waived. Powers v. UW-System, 92-0746-PC, 6/25/93.

remedy against the employer." Subsections 102.35(2) and (3), Stats., impose liability on an employer who, "without reasonable cause, refuses to rehire an employee who is injured in the course of employment." In its decision in Powers v. UW-System, 92-746-PC, 92-0183-PC-ER, 6/25/93, the Commission held:

The result of these provisions is that when an employer refuses to rehire an employee who is absent from work in connection with a WCA injury, the employee's exclusive remedy for the failure to rehire lies under the WCA, and the employee cannot also pursue a WFEA [Wisconsin Fair Employment Act] claim. Schachtner v. DILHR, 144 Wis.2d 1, 422 N.W. 2d 906 (Ct. App. 1988); Norris v. DILHR, 155 Wis.2d 337 N.W. 2d 665 (Ct. App. 1990).

Schachtner and Norris were undisturbed by the Court's ruling in County of LaCrosse v. WERC, 182 Wis 2d 15, 37, 513 N.W.2d 579 (1994).

In previous cases, the Commission dismissed handicap discrimination claims because the Commission's jurisdiction was superseded by operation of the exclusivity provision of the WCA. In Meinholz v. DOT, 90-0147-PC-ER, the complainant's handicap claim was dismissed where he alleged that he had injured his arm on August 15th, received medical clearance to resume using his arm on August 20th and then was given notice of his layoff on August 24th while someone else had been hired in his place. In Olson v. UW-Stout, 87-0176-PC-ER, 5/1/91, the Commission dismissed a handicap complaint where the complainant, a Building Maintenance Helper 2, did not work for the respondent for a period of 5 months because pain in his wrist was caused by or exacerbated by his use of a buffing machine and by mopping floors. Complainant alleged he was discriminated against when respondent did not permit him to return to work during the 5 month period. Complainant had received WCA benefits for the period of his absence.

Here, the complainant suffered an injury at KMCI on September 12, 1992, she returned to a light duty position at another location for the month of October, and then was on leave without pay until May of 1993. Respondent contends this leave was due to the absence of any work available that met the complainant's medical restrictions. Complainant underwent surgery late in 1992 and returned to her old position in May of 1993. Complainant received WCA benefits for the bulk of the period from her September, 1992 injury until she returned to work in May of 1993.

That portion of the Commission's decision in Powers set forth above suggests that *any* claim under the Wisconsin Fair Employment Act is preempted by the WCA exclusivity provision. Complainant raises both a handicap discrimination claim and a sex discrimination claim. Only the handicap claim is preempted. In Norris, 155 Wis. 2d 337, 342, the Court concluded that while the employee was prevented from claiming handicap discrimination with respect to a decision not to rehire him because of a job-related back injury, the employee could pursue a claim of Fair Employment Act discrimination based upon an allegation that the employer had perceived the employee as mentally impaired because of his mental retardation:

The record contains no evidence that Norris's alleged mental retardation is related to his back injury or to his work. DILHR argues that a refusal to rehire because of mental retardation is compensable under the Worker's Compensation Act because sec. 102.35(3), Stats., does not require that a refusal to rehire after an on-the-job injury be motivated by the injury. But DILHR's suggestion, if adopted, would require us to hold that a refusal to rehire for a discriminatory and non-work-related reason is not compensable under the Fair Employment Act simply because the refusal occurs after a work-related injury. We cannot believe that the legislature intended that result.

The Worker's Compensation Act is designed to compensate persons for work-related injuries. The Fair Employment Act is designed to eliminate the practice of unfair discrimination in employment against properly qualified persons because of various factors generally having nothing to do with a work-related injury. Sec. 111.31(2), Stats. The fact that an employer refuses to rehire a person after an on-the-job injury for a non-work-related reason has nothing to do with the injury and everything to do with discrimination prohibited by the Fair Employment Act.

The complainant's sex discrimination claim alleges an injury that is similarly unrelated to her injury suffered on September 12, 1992. She is entitled to have her sex discrimination claim reviewed and respondent's motion to dismiss is denied as to that claim.

Merits of Sex Discrimination Claim

Under the Wisconsin Fair Employment Act (FEA), the initial burden of proof is on the complainant to show a prima facie case of discrimination. If complainant meets this burden, the employer then has the burden of articulating a non-discriminatory reason for the actions taken which the com-

plainant may, in turn, attempt to show was a pretext for discrimination. McDonnell- Douglas v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973) and Texas Dept. of Community Affairs v. Burdine, 450 U.S.248, 101 S.Ct. 1089 (1981).

The complainant has established a prima facie case of sex discrimination. As a female, complainant falls within a category that is protected under the FEA. The complainant also has established, at least in terms of establishing a prima facie case, that she was qualified for at least some types of light duty assignments because the record reflects that she was able to satisfactorily perform her assignment at CTC. The complainant also established that she was the only person whom respondent was unable to accommodate in terms of light duty assignment.

Respondent contends that it has accommodated both women and men at various light duty positions within KMCI and that the complainant's restrictions did not match up with any of the light duty assignments that were available at KMCI. Therefore, respondent has met its burden of articulating non-discriminatory reasons for the actions it took. The next analytical step is to determine whether the complainant has met her burden to prove, by a preponderance of the evidence, that the legitimate, nondiscriminatory reasons that respondent has articulated to explain why it did not provide complainant with light duty assignments (beyond the CTC assignment) are a mere pretext for sex discrimination.

The initial question is whether any of the various light duty assignments at KMCI which complainant identified during the course of the hearing were consistent with all of the complainant's medical restrictions.²

Respondent has established that the complainant's restrictions were among the most restrictive of anyone requesting light duty. These restrictions are set forth in Finding 1-2. The key restriction of the four is "no direct inmate contact." According to Associate Warden Nickel, there was no assignment within KMCI where complainant could have been accommodated with this restriction, because there is "direct inmate contact" even when walking into the

²Neither party called complainant's physician as a witness, so the Commission does not have the benefit of the physician's statements to clarify or explain the medical restrictions he placed upon the complainant.

institution.³ "No direct inmate contact" is not the same thing as "no inmate contact."⁴ During the course of their testimony, both Warden Cooke and Administrative Captain Barber spoke as if the complainant was barred from having any inmate contact. Both testified that it was this "no inmate contact" restriction which was the key or governing limitation in assigning complainant to light duty. In contrast, both Mr. Nickel and Ms. Zettler correctly referred to the restriction as one of "no direct inmate contact." Ms. Zettler also testified that there is not much difference between "minimal", "indirect" and "limited" inmate contact, that "direct" refers to "directly dealing with inmates, giving them orders, etc.," and that "indirect" is such contact as one might have by just walking through the facility. Capt. Barber testified that no "direct" contact meant the officer could not become physically involved in any activity with inmates, i.e. could not break up fights or respond to any alarms or disturbances within the institution.

The Commission rejects the respondent's contention that "no direct inmate contact" effectively bars an officer from any assignment inside the fence at KMCI. Respondent's contention is inconsistent with its action of offering complainant a clerical position within KMCI's Administration Building. It is also inconsistent with the respondent's action of permitting the complainant within the facility for carrying out union business. In addition, the Commission equates a "no direct inmate contact" restriction with a restriction permitting "indirect inmate contact only." According to Ms. Zettler's testimony, an officer limited to "indirect" inmate contact with inmates would be allowed within the facility.

The remaining aspect of this issue is whether there were specific light duty assignments within KMCI which met the complainant's restrictions. The various assignments are listed in Finding 19. Complainant could not fire a weapon, so the guard tower was not a viable assignment. The armory assign-

³Captain Barber testified that complainant's restriction would not be met by a clerical assignment because of "constant inmate flow through the administration building."

⁴Complainant's physician had initially concluded that complainant could have "no contact" but, at complainant's request, it was changed to "no direct" contact. The fact that there was a change shows that the two standards are not interchangeable.

ment would have routinely exceeded complainant's lifting restrictions. Clerical assignments typically included filing responsibilities which were contrary to complainant's restrictions on repetitive movements and extending the injured shoulder. The control center and gatehouse assignments are rejected on other grounds, as discussed below, so it is unnecessary to consider the question of whether they were consistent with complainant's medical restrictions.

E The only remaining light duty assignment listed in Finding 19 is the property and mail area. This area is located in the basement of the Administration Building, the same building that houses the clerical unit. Respondent believed that the conditions that existed in the mail and property area did not meet the complainant's "no direct inmate contact" restriction. This belief was reflected in Ms. Zettler's testimony. Ms. Zettler testified that every time she had been in the mail and property area, there had been inmates around and that even though the rules required that the door to the mailroom be kept closed at all times, she had never been down to the mail room when the door had been closed. She also stated that inmates continually walked past the mailroom on their way to the property room, that there was a lot of inmate traffic in the area with no one in the hallway to supervise that traffic, and that the inmates assigned to perform cleaning had a break room in the same area where they were relatively unsupervised.

The Commission also notes that the complainant did not have the same medical restriction language as other officers who were assigned to the mail and property area. The key restriction for the complainant was that she was to have "no direct inmate contact." This was different language than the restrictions for the accommodated officers.

Respondent also established that other officers with a "no inmate contact" restriction (M-15) or a "may not have direct inmate contact" restriction (F-7), were required to get this restrictive language modified before they were allowed to perform any duties in the institution. These actions by the respondent support the view that the respondent viewed "no direct inmate contact"

E A portion of the Discussion section of the proposed decision and order is replaced (up to the double asterik) in order to better comport with the record and the Commission's rationale.

(in conjunction with the complainant's other restrictions) as being more restrictive than the restrictions of those officers who were accommodated in the mail or property area.

When the complainant was provided the opportunity to modify her restrictions so that they would comport with respondent's stated view of what was required for a light duty assignment, no changes were made to those restrictions (Findings 12, 13, 14 and 15).

As noted above, there is no testimony from the complainant's physician that complainant's restrictions could have been satisfied by any of the light duty assignments available at the institution. In this regard, it is noteworthy that her physician initially applied a "no inmate contact" restriction to the complainant, and, at complainant's insistence, modified the restriction to "no direct inmate contact" and it was the modified restriction which was considered by respondent (Finding 4). The fact that complainant's physician already had made one modification to the inmate contact restriction, the fact that complainant was told that additional modification of the inmate contact restriction could result in assignment to light duty at KMCI, and the fact that complainant's physician did not make additional modification nor did he testify that complainant could have performed the duties of any of the potential light duty assignments at KMCI all support the conclusion that respondent reasonably believed the complainant could not safely perform any of those light duty assignments during the time in question.**

The next issue is whether the complainant has met her burden of establishing that the failure to provide her a light duty assignment was based on her sex. The complainant was unable to establish discrimination with respect to most of the various assignments listed in Finding 19. As noted above, some of the assignments did not meet complainant's medical restrictions. In addition, the evidence shows that as to some of the other light duty assignments, females and males were treated equally. Two female officers (F-8 and F-16) were assigned to assist in the control center which effectively precludes any conclusion of sex discrimination as to that assignment. The Commission is also satisfied that the union's posture effectively precluded any management option of displacing an officer on a permanent posting (such as the control center) with a light duty officer. This conclusion meant that sex was not a factor with respect to using a permanent posting for accommodating an offi-

cer, such as the complainant, who had requested light duty. There is no record that anyone, male or female, had been assigned to assist in the gatehouse on light duty for a full shift. So even if the work there could have met the complainant's restrictions, there is an insufficient basis to conclude the respondent discriminated against the complainant because of her sex in not assigning her there on a daily basis. The record shows that there was heavy construction traffic during at least part of the period of the complainant's leave, but the record also shows that respondent assigned Mr. Bailey to provide assistance at the gatehouse during those periods each day when the traffic of construction workers and vehicles was heaviest. This assignment was consistent with Mr. Bailey's other duties and his availability for short periods during the day and does not support a finding of sex discrimination.

^F The remaining areas of light duty assignment are clerical and mail and property. The record shows that the respondent frequently assigned females (F-3, F-7, F-8, F-12, F-14) and males (M-4, M-10, M-14) to the clerical area as a light duty assignment.⁵

For the following reasons, the complainant has failed to meet her burden of proof in terms of showing that the failure to assign her to a position in the mail and property area during the period after her CTC assignment constituted sex discrimination.

1. As noted above, respondent reasonably believed that an assignment to the mail and property area would be inconsistent with complainant's very limiting medical restrictions.

2. Two officers, one male (M-15), with a "no inmate contact" restriction, and one female (F-7), with an initial restriction of "may not have direct inmate contact," understood that they could not work at all with those restrictions. They were able to have their restrictions modified which resulted in light duty assignments for both of them. Respondent consistently responded to similarly situated males and females.

^F A portion of the Discussion section of the proposed decision and order is replaced (up to the double asterik) in order to better comport with the record and the Commission's rationale.

⁵If the clerical area is viewed broadly so as to include the business office, the respondent's clerical assignments of males would also include M-19 and M-27.

3. The respondent did obtain a light duty assignment for the complainant, at CTC, that met all of complainant's restrictions as respondent understood them. Respondent's conduct of finding light duty for the initial period of complainant's restrictions supports the conclusion that they did not discriminate against her based on her sex when they concluded that there were no available light duty assignments at KMCI that met her restrictions.

4. Respondent had a record of providing light duty to both male and female officers at KMCI. In terms of the period after her CTC assignment, complainant was the only person not accommodated by light-duty assignment among 18 female KMCI employees.

5. Two of the three decision makers (Colleen Zettler, Thomas Nickel and Marianne Cooke) were women.

6. The proposed decision's finding of sex discrimination was based, in large part, on the factual finding that management only exercised its discretion on two occasions to assign light duty females to the mail and property areas and then, as soon as management could, it moved the two females upstairs to the clerical area. This finding was based on the following testimony of Officer Fugate, who had served as property sergeant for the eight year period ending in April for 1994, and had responsibilities over both mail and property:

Q Were there any female officers assigned?

A I think I had one, but am not sure if it was that period... Different times I have had one down there. They had one down there for a short time, maternity I think it was.

Q Was that [F-12]?

A She was down there only a couple days and then they put her somewhere else. [F-3] just recently was down there, before I went out of there, for a few days. Then he put upstairs to... doing other things in clerical.

Q Did they also move Officer [F-12] to clerical?

A Yes.

However, the testimony of F-12 shows that her move into the clerical area was at her own request after she was effectively given a choice between two sets of light duties. She preferred the work hours associated with the assignment to

the clerical area: "I went to 8 to 4, because I was getting too tired with 2:30 to 10:30." This testimony indicates that in at least one of the two instances when females on light duty moved from the mail and property area to the clerical area, the move was based upon the employee's preference rather than upon management efforts to bar females from light duty in the mail and property area. The record does not indicate whether the other female, F-3, requested to be moved from mail and property into clerical or whether respondent initiated that change.

The record also reflects that two males moved out of the mail and property area to other light duty assignments. Officer M-14 started in mail and property and later was reassigned to the clerical area and Officer M-27 was moved from mail to the business office when he had difficulty reaching the mail slots. Movement out of the mail and property area was clearly not based upon the sex of the officer.

7. Captain Barber's testimony established that, at one point in time, management was looking into placing the complainant into a position in the control center, which would have involved displacing the officer who was on permanent assignment to that post, at least on a temporary basis. This option was reviewed internally and was felt by management in Madison to be consistent with the bargaining agreement as long as it was for a period of less than 6 weeks. However, the union was strongly opposed to any displacement, of whatever duration. This was reflected in the labor/management meeting minutes of May 6, 1993 (Resp. Exh. 3):

IV. Reasonable Accommodations/Modified Duty - Union received copies of Ken Kissinger's response for clarification by Warden Cooke. Length of time for temporary reassignment would be 6 weeks or less only after other alternatives were exhausted.

Union Response: Union disagreed with Ken Kissinger's opinion and presented letter from Attorney Graylow which Warden Cooke will send to Ken Kissinger. Union states it is illegal to remove permanent employee from his/her posted and signed for position.

The findings show that by May of 1993, the complainant had resumed her normal duties at KMCI. The apparent effort to assign the complainant into the control center on a temporary basis, thereby displacing the officer who was

permanently assigned to that post, apparently occurred toward the end of the complainant's absence. While it is not clear when management broached the topic, it came up before the May 6, 1993, union/management meeting because the minutes indicate the union presented a "letter from Attorney Graylow." The record includes, as Comp. Exh. 56, an April 20, 1993, letter from Attorney Richard Graylow to Marty Beil, reflecting a telephone conversation on April 19th, discussing the effect of the Americans with Disabilities Act on the law of accommodation and stating that if "the State wishes to change accommodation patterns, practices and/or procedures, it must do so via bargaining with the union."

This effort by respondent to identify an alternative light duty assignment, as well as the offer made to the complainant to perform clerical work, undercuts a finding of sex discrimination, and shows that management fully explored all of the options available for placing the complainant on light duty, irrespective of her sex.

8. Respondent placed men in clerical positions, which complainant admitted were "stereotyped as female jobs."**

In reaching its conclusion relative to complainant's sex discrimination claim, the Commission has declined to accept the respondent's view that complainant's witnesses, many of whom were active in union matters, were biased and had an interest in "getting management," so that their testimony should not be credited. The Commission recognizes that union/management relations were strained but this situation does not mean that an employee's testimony is inherently unreliable. The Commission has weighed the testimony of all witnesses in reaching its conclusions in this matter.

Other matters

During the course of the hearing, the complainant stated that one aspect of her claim of discrimination was respondent's action of cutting off her worker's compensation benefits. This allegation of discrimination goes beyond the scope of the agreed upon issues as set forth at the beginning of this decision. Even if it could be concluded that the benefits allegation fell within the matters properly before the Commission, the record does not support a conclusion that the letter from the Department of Administration (Finding 18) was motivated by complainant's sex. A letter from complainant's physician suggested that the complainant's restrictions had been reduced. Respondent

offered her a vacancy in the clerical area which arguably met the remaining restrictions, complainant declined the assignment, and complainant was notified that her benefits would be terminated. They were restored once the complainant's physician indicated that all her previous restrictions remained in effect. The KMCI Workers' Compensation Coordinator and the author of the letter to complainant from DOA's Bureau of State Risk Management are females. There is no indication that the decision to terminate benefits was motivated by complainant's sex.

ORDER^G

This complaint is dismissed.

Dated: July 27, 1995

STATE PERSONNEL COMMISSION

KMS:kms
K:D:Merits-hcp/sex (Longdin)


LAURIE R. MCCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

Parties:

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Fond du Lac, WI 54935

Michael J. Sullivan
Secretary, DOC
P.O. Box 7925
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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 (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) may,

^G The Order is modified from the language in the proposed decision as a result of all the foregoing changes.

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.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.

2/3/95