STATE OF WISCONSIN PERSONNEL COMMISSION

LOIS L. VAN BLARICOM,

Complainant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 93-0033-PC-ER

DECISION AND ORDER

This matter is before the Commission on a complaint of handicap discrimination by complainant against respondent. To the extent any of the discussion constitutes a finding of fact, it is adopted as such.

FINDINGS OF FACT

1. Complainant, Lois Van Blaricom, began working for respondent, Department of Health and Social Services (DHSS), as an Institutional Aide at its Southern Wisconsin Center on September 15, 1983.

2. Southern Wisconsin Center (SWC) is one of respondent's three centers for the developmentally disabled and operates in its Division of Care and Treatment Facilities (DCTF).

3. SWC serves about 500 clients. These clients called "residents" are housed in 13 cottages, which are assigned either ambulatory or non-ambulatory residents. A few cottages are assigned both types of residents. Approximately 73 percent of the residents are non-ambulatory and approximately 20 percent have behavioral problems.

4. At all times relevant to this matter, Van Blaricom worked as a Resident Care Technician 2 (RCT 2)[1].

5. As an RCT 2, Van Blaricom, under the general direction of a supervisor, was responsible for providing, assisting and maintaining programs of care, treatment, training and daily living for residents in an assigned area. These activities included such tasks as lifting residents into

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[1] On December 4, 1988, complainant was promoted to Institutional Aide 2. Later, the position was renamed Resident Care Technician 2.

and out of bath tubs, beds and mobility equipment; pushing residents in mobility equipment; handling clean and soiled linen; assisting residents during evacuation; and assisting in restraining residents to prevent injury.

6. Van Blaricom worked on various shifts and in a variety of residential cottages. During the course of work, she incurred occasional injuries and disabilities -- some job-related, others not.

7. In June 1987, Van Blaricom had a modified radical mastectomy, which included the removal of one of the major muscles in her chest.

8. Van Blaricom remained off work on medical leave until March 23, 1988, when she began working on a limited 60 percent work schedule. Later, in October, this was reduced to 50 percent, and Van Blaricom worked a four-hour shift from 6:00 A.M. to 10:00 A.M. Before returning to work, Van Blaricom provided SWC with a written release from her doctor enabling her to return to work without any medical restrictions.

9. Van Blaricom remained on part-time until she decided to work third shift. This shift was from 11:00 P.M. until 7:00 A.M. the next morning.

10. The residents in Cottage 10, where Van Blaricom worked on the third shift, were ambulatory, except for one woman who was kept in a wheelchair, because she could take only a few steps without falling. Van Blaricom would help this woman to get in and out of her wheelchair when needed.

11. Van Blaricom's duties on third shift at Cottage 10 included doing laundry. This duty required Van Blaricom to push laundry carts loaded with approximately 100 pounds of laundry to and from the laundry room. Other wheelless linen carts of approximately 100 pounds had to be lifted by Van Blaricom and pushed out on the dock. These laundry duties occurred nightly.

12. Sometimes Van Blaricom was required to assist residents by pulling them up into a sitting or standing position.

13. Also, Van Blaricom was required to clean and mop the dining room, conference room, break room and living areas; clean the bathing area; and lay out the residents' clothes for the morning.

14. Complainant Van Blaricom had no problems handling her assigned duties on the third shift in Cottage 10.

15. On November 15, 1992, during the third shift, Van Blaricom was directed to Cottage 16 to fill in for an absent RCT. Van Blaricom objected, but it

was her turn to be "pulled" to another cottage. She had no exemption on record, so she complied.

16. Cottage 16 houses non-ambulatory residents and on many occasions during the day they need to be physically lifted by the attending RCT in the process of getting them from one place to another. Van Blaricom did not want to take on this task.

17. The next day Van Blaricom returned to work with a slip from her doctor, Mark D. Canty, M.D., indicating a lifting limitation of 10 pounds. Van Blaricom was not permitted to work.

18. On November 18 and 30, 1992, Van Blaricom's doctor wrote the employe health nurse at SWC and advised her that Van Blaricom should not be allowed to lift weights heavier than 25 pounds.

19. After receiving these letters, the employe health nurse, Janice Pozel, R.N., informed Van Blaricom that she must have a weight-lifting ability of 55 pounds before she could return to work.

20. On December 4, 1992, Pozel wrote Canty informing him that Van Blaricom's medical restrictions made it doubtful for her to continue in her job. Pozel asked Dr. Canty to provide some additional information about Van Blaricom's condition necessary for completing her workers benefit forms.

21. On December 4, 1992, Assistant Personnel Manager Tom Wall met with Van Blaricom and discussed job alternatives, including other positions, transfers, voluntary demotion and promotion and retraining.

22. On December 28, 1992, Dr. Canty raised Van Blaricom's lifting restrictions to 30-40 pounds, but this did not meet the 55-pound minimum lifting requirement.

23. By letter from the SWC Director, James Hutchison, dated January 19, 1993, Van Blaricom was advised that SWC intended to terminate her employment as a RCT 2 as of February 19, 1993, because she was no longer able to perform RCT 2 duties.

24. The letter contained Van Blaricom's position description and an Estimated Functional Capacities Form, which SWC asked Van Blaricom to have her doctor review with her, provide information about her ability to work and return by February 19, 1993.

25. In response, Dr. Canty submitted to SWC a report by Med. Rehab., Inc. of an occupational and physical therapy evaluation it made with respect to Van Blaricom's physical strength and capacity.

26. Regarding lifting restrictions, Med. Rehab. recommended that Van Blaricom should not push or pull in excess of 30 pounds, lift floor to waist in excess of 20 pounds, lift waist to overhead in excess of 15 pounds, or carry in excess of 15 pounds too far at any given time.

27. On February 5, 1993, the Personnel Manager, Katherine Jurgens, met with Van Blaricom and Sandra Dahlberg from respondent's Division of Vocational Rehabilitation to discuss other possible positions within the department for Van Blaricom. Jurgens explained to Van Blaricom that lifting requirements of at least 35 pounds made many jobs unavailable to her.

28. Jurgens also advised Van Blaricom that she could not accommodate the permanent weight restrictions listed in the Med. Rehab. report of December 10, 1992, but suggested she consider half-time clerical positions or limited term positions.

29. Formal physical requirement standards for RCT positions were first set by SWC on September 15, 1992. The standard for lifting was 55 pounds. This was approximately the same as the previous informal standard of 50-55 pounds.

30. SWC terminated Van Blaricom on February 19, 1993, because of medical restriction, which prohibited her from performing essential duties of her position and other available positions for which she was qualified.

CONCLUSIONS OF LAW

1. This matter is before the Commission under §230.45(1)(b), Wis. Stats.

2. Complainant has the burden to show that she was discriminated against by respondent on the basis of being handicapped in violation of the Wisconsin Fair Employment Act.

3. Complainant has failed to sustain her burden of proof.

4. Complainant was not discriminated against by respondent as alleged.

OPINION

Complainant filed a charge of discrimination with the Personnel Commission on February 23, 1993, alleging respondent had discriminated against her because of her age, handicap, and sex, and retaliated against her, all in violation of the Wisconsin Fair Employment Act. Subsequently,

complainant withdrew her claim of retaliation. Later, an initial determination by the Commission found probable cause to believe complainant was discriminated against by respondent only on the basis of handicap and singularly because respondent "refused" to reasonably accommodate complainant's handicaps. A more inclusive issue was agreed to by the parties. It was: Did the respondent discriminate against the complainant on the basis of her handicaps with respect to the decision to discharge her on February 19, 1993.

As stated in Boyton Cab Co. v. ILHR Dept., 96 Wis. 396, 291 N.W. 2d 850 (1980), the three points that must be established in a claim of handicap discrimination are: (1) that complainant is handicapped, within the meaning of the WFEA; (2) that the employer's discrimination was on the basis of complainant's handicap; and (3) that the employer cannot justify its alleged discrimination under the exceptions set forth in the WFEA.

§111.34, Stats., Handicap; exceptions and special cases, in relevant part, provides:

> (1) Employment discrimination because of handicap, includes,...
> (b) Refusing to reasonably accommodate an employe's ... handicap unless the employer can demonstrate that the accommodation would pose a hardship on the employer's program, enterprise or business.
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> (2) (a) ... it is not employment discrimination because of handicap to ... terminate from employment ... any individual ... if the handicap is reasonably related to the individual's ability to adequately undertake the job-related responsibilities of that individual's employment.

Subsection (2)(b) provides that evaluation of a handicap individual's ability to perform job-related responsibilities must be made on a case-by-case basis and not by a general rule of prohibition, and can include consideration of the present and future safety of the individual, the individual's co-workers and the general public. Under subsection (2)(c), if the employment involves a special case for safety to the general public, like (2)(b), you may consider this special duty of care on a case-by-case basis in evaluating the adequacy of the individual's job performance.

There is no dispute that Ms. Van Blaricom was handicapped or that she was terminated on the basis of her handicap. The particular question is whether respondent can justify its alleged discrimination on the basis of the

exceptions set forth in the law. It is within this context that complainant's assertions are considered.

In support of her claim, complainant makes three arguments: (1) that she was capable of performing, and did perform, the essential job functions of the RCT 2 position on third shift in Cottage 10; (2) that SWC failed to reasonably accommodate her by not allowing her to remain on third shift in Cottage 10, and not exempting her from the "pull policy;" and (3) that respondent's reliance on the weight lifting requirement for RCT 2 positions as a basis for termination was pretextual, because no such policy existed at the time of her termination.

Regarding complainant's first argument, complainant testified and presented documentary evidence establishing that she was performing her RCT 2 duties in Cottage 10. However, the particular question regarding work performance is whether complainant could safely perform such duties. The evidence shows that in November 1992, Dr. Canty advised SWC that complainant could not medically safely lift weights in excess of twenty-five pounds. Later, Canty increased complainant's weight lifting restrictions to 30 to 45 pounds. Later a Med. Rehab. diagnosis included a determination that complainant's maximum functional lifting strength was 15 to 20 pounds. By her own testimony, complainant acknowledges that her work required lifting in excess of 55 pounds. This evidence clearly establishes with some medical certainty that complainant could not safely perform the weight lifting requirements of her position.

Complainant's next argument that respondent could have accommodated her by allowing her to remain on the third shift in Cottage 10 and exempting her from the "pull policy"[2] is also faulty. The complainant testified that her daily routine in Cottage 10 included lifting in excess of 55 pounds. In addition, SWC had a forced overtime policy which required RCT's to occasionally stay on duty beyond the regular hours of their shift, work on another shift, and perform duty assignments not regularly required of them. Also, the evidence shows that complainant, like other RCT's, was required to respond to

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[2] In order to obtain federal funding, SWC is required to maintain minimal RCT staffing levels in its residential living units. One means used by SWC to comply with the requirement was to employ the "pull policy," whereby RCT's assigned to units, determined to be overstaffed, were shifted to units which failed to meet the staffing requirements.

emergency situations involving residents with behavioral problems. Often those emergencies required complainant to assist in lifting or restraining a resident. Clearly, exempting complainant from only the "pull policy" would not satisfy her medically determined weight lifting limitations.

The question to be answered here is whether SWC could have reasonably accommodated Ms. Van Blaricom by excluding her from the SWC "pull policy," forced overtime, participation in emergencies, and any other work activity requiring her to lift any weight in excess of the 25-pound limitation placed on her by Med. Rehab. or Dr. Canty's earlier 40-pound limitation. The effect of making these accommodations for complainant would be to establish a special RCT position for her and others in similar circumstances. The SWC Assistant Personnel Officer testified that exclusion from the pull policy would result in increased overtime costs, staffing problems, collective bargaining agreement conflicts, and lower employe morale. Thus, it is evident that requisite accommodation for complainant and other such RCT's would require exclusion from not only the pull policy, but many other duties, and would measurably exacerbate problems of cost, staffing, contractual agreements, and employe morale. It is also evident that this needed accommodation would eliminate an essential function of the RCT position. It would require creating a new position.

Complainant's argument of pretext is not substantiated by the evidence. Unrefuted testimony establishes that SWC's 55-pound weight lifting requirement for RCT positions was formally initiated on September 15, 1992, two months before the event which precipitated complainant's termination in February 1993. Prior to that, for some 20 years, SWC had an undocumented weight lifting requirement for such positions of about 50 pounds. In conection with the claim of pretext, complainant argues that respondent failed to perform tests or measurements to accurately determine the 55-pound weight lifting requirement for RCT 2 positions and failed to test new hires or current employes to ensure they could safely meet these requirements. The evidence shows that SWC established the 55-pound weight lifting requirement on the basis of observations of the work performed by RCT's, discussions with RCT supervisors, and the direct knowledge and experience of staff having as much as 15 years of employment at SWC. Afterwards, the 55-pound lifting requirement was established by dividing the average weight of the SWC resident by two -- the number of people needed in lifting residents. Other

testimonial evidence shows that SWC had for 20 years practiced a weight lifting requirement of 50-55 pounds for personnel working in resident units. Also, SWC's Personnel Manager testified that from January 1992 to January 1994 SWC had effected fourteen RCT terminations based on lifting and strength limitations. Again, the evidence on this point does not support complainant's claim of pretext.

Finally, although complainant does not contest this point, the evidence establishes that respondent after being presented by a medically determined weight restriction, discussed job alternatives and retraining with the complainant. No jobs suitable to complainant's physical limitations were available at SWC. Other discussions were had with complainant regarding external transfer, demotion and relocation.

The Commission believes that respondent has established that its decision to terminate the employment of complainant was not based on discrimination as prohibited by the Wisconsin Fair Employment Act.

ORDER

Complainant's claim of handicap discrimination against respondent with respect to termination of her employment at Southern Wisconsin Center is dismissed.

Dated: May 2, 1996 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DRM:rcr

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, 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 (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) 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.

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