STATE OF WISCONSIN PERSONNEL COMMISSION

MYRON LEDVINA,

Complainant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 93-0194-PC-ER

DECISION AND ORDER

NATURE OF THE CASE

This case involves a complaint of handicap discrimination under the Wisconsin FEA (Fair Employment Act), §§111.321, 111.322, 111.34, Stats. A Commission investigator issued an initial determination finding no probable cause to believe discrimination had occurred, and complainant appealed.

FINDINGS OF FACT

1. Complainant was employed in the classified civil service at Central Wisconsin Center for the Developmentally Disabled (CWC) in a represented position classified as a Resident Care Technician 2 (RCT 2) from October 20, 1969, until his termination for medical reasons as unable to perform his job requirements, effective February 8, 1993.

2. As a consequence of a non-work-related automobile accident which occurred on June 1, 1987, complainant developed a medical condition affecting his right shoulder. This condition required surgeries and rendered him physically unable to perform the duties and responsibilities of his job.

3. During the period between the injury and complainant's ultimate termination, he used up all his available leave, at his request was granted reductions in his work hours, and at his request also was granted medical leaves without pay from November 8, 1988, through December 23, 1988, and February 9, 1991, through May 9, 1991, and extended at his request through February 6, 1992.

4. Sometime in the spring of 1991, complainant spoke to CWC Personnel Assistant Sandra Catencamp, who was a friend, and told her as a

friend that he was interested in transferring to another position in state service. She advised him how to keep track of position vacancies, primarily through looking at postings for transfer and competitive job opportunities on bulletin boards. Complainant did scrutinize the bulletin boards, and applied for a number of jobs in state service, but this effort did not result in any job offers.

5. Complainant's employment status between February 6, 1992, when his formal medical leave of absence extension expired, and February 8, 1992, when his employment was terminated, was somewhat vague. Complainant had requested of respondent in the fall of 1991 that his employment be medically terminated. CWC consulted with DHSS personnel, which advised against this course of action because it was believed it could jeopardize complainant's retirement benefits. In reliance on this advice, CWC took no action at that time on complainant's termination request. During this period (February 6, 1992 - February 8, 1993), CWC considered complainant to be in an unofficial status of "assumed leave," because he neither had resigned nor was he on a formal leave of absence.

6. At some point during this period subsequent to February 6, 1992, CWC was advised by DHSS management that CWC had too many positions tied up by people who were unable to work, and for a number of reasons it was necessary to free up these jobs for the employment of people who would be able to work. At least in part because CWC management was aware that complainant had earlier requested termination, he was one of the first of such employes terminated in response to this directive.

7. In a letter to complainant dated January 28, 1993 (Respondent's Exhibit 7), the CWC Director informed complainant that due to his inability to perform the requirements of his job, he would be medically terminated effective February 8, 1993, unless he could provide medical information "which indicates that you are able to perform your duties, or indicate to us you are interested in other employment opportunities commensurate with your current medical condition."

8. In response to this letter, complainant on February 1, 1993, requested of CWC Personnel Assistant Sandra Catencamp a 50% clerical (preferably accounting) position with no typing, and early morning hours to accommodate a sleeping disorder related to his accident-related condition. He indicated he would consider a demotion or transfer to such a position in any

agency in addition to DHSS. Ms. Catencamp responded to his request by canvassing DHSS for available positions fitting complainant's criteria. She could not find any such available positions, and complainant was so advised, and that his employment therefore was terminated, in a letter dated February 9, 1993, from CWC director (Respondent's Exhibit 10).

9. Subsequent to the termination of complainant's employment, he received information from CWC about position vacancies, which did not meet the criteria set forth above. Notice of these vacancies were part of a CWC policy at the time of notifying medically terminated employes about vacancies at the institution.

10. CWC also sent complainant a January 21, 1994, letter (Respondent's Exhibit 12), which included the following:

> If you are interested in assistance locating a position for which you may wish to apply for reinstatement, please contact me. Perhaps we can get together to discuss what types of work you are capable of performing given your physical limitations, within the Department of Health and Social Services.

Complainant never responded to this offer.

CONCLUSIONS OF LAW

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

2. Complainant was, at all relevant times, a handicapped individual.

3. Respondent did not discriminate against complainant on the basis of handicap with respect to either his termination or failure to accommodate him.

OPINION

The parties stipulated to the following issues for hearing:

1. Whether respondent violated the Fair Employment Act by terminating complainant's employment on the basis of handicap and his medical condition.

2. Whether respondent violated the Fair Employment Act on the basis of handicap by failing to reasonably accommodate complainant's handicap in February 1993.

Conference Report dated October 31, 1994. These are related issues. A handicap discrimination case like this involves the following analysis: 1) Whether the complainant is handicapped; 2) Whether the employer terminated the complainant because of that handicap; 3) Whether the handicap prevented the complainant from being able to adequately perform the duties and responsibilities of the position in question (see §111.34(2)(a), Stats.); 4) If so, whether the employer has satisfied its duty of reasonable accommodation under §111.34(1)(b), Stats. See Harris v. DHSS, 84-0109-PC-ER, 85-0115-PC-ER (2/11/88). In this case, it is undisputed that complainant is and at all relevant times has been handicapped, that his employment was medically terminated because of that handicap, and that his handicap rendered him unable to perform the duties and responsibilities of his position. Therefore, respondent did not discriminate against complainant because of his handicap unless it failed in its duty of reasonable accommodation and this is the only real issue before the Commission.

Given complainant's physical restrictions, both he and respondent recognized that the only possible accommodation would be to place him in another job, which could be a reasonable accommodation, see McMullen v. LIRC, 148 Wis. 2d 270, 276, 434 N.W. 2d 830 (Ct. App. 1988). The record reflects that respondent attempted without success to find complainant another job within DHSS that met his extensive list of criteria (see Finding #8). While complainant contends in a general way that respondent failed to go far enough in its efforts in this regard, the record does not support his position, as there is no evidence either that there were any positions available within DHSS that would have satisfied complainant's self-articulated restrictions, or that respondent did not make an appropriate effort to canvass the agency for such jobs. This conclusion leads to the last aspect of the accommodation issue -- whether respondent had any obligation to have extended its efforts to have found complainant another position beyond the perimeter of DHSS. The record is clear that respondent did not do so, except to the extent it provided information to complainant about how to check generally available information concerning announced vacancies in other agencies.

This issue is resolved under these circumstances by the precedent established by the Commission's decision in Pellitteri v. DOR, 90-0112-PC-ER (10/24/94). The DHSS secretary has no statutory authority to appoint people to positions outside of DHSS. Therefore, this appointment to a position in another

agency could not be considered a reasonable accommodation under the FEA. Regardless of whether DHSS had an obligation under the FEA to have provided complainant with assistance in trying to find a job in another agency, it satisfied any obligation it may have had by providing him with information about how to learn about vacancies in other agencies.

It should be noted that some of complainant's concerns about how he was treated at CWC do not really come within the parameters of this FEA claim. For example, complainant was concerned about respondent's failure to have terminated his employment at the time he requested this in the fall of 1991. However, this was not part of the issue in this case, and in any event, there is absolutely nothing in this record from which to infer that respondent's failure to have terminated his employment at that time involved any intent to discriminate against him on the basis of his handicap. Therefore, regardless of whether one were to agree or disagree from the standpoint of personnel management with how respondent handled that request, it did not involve employment discrimination on the basis of handicap.

ORDER

The Commission having found that no discrimination occurred as alleged, this complaint is dismissed.

Dated: March 3, 1995 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

AJT:jan

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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