COURT OF APPEALS
DECISION
DATED AND RELEASED

June 1, 1995

NOTICE

No. 94-2674

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

RAYMOND R. CHAVERA,

Petitioner-Appellant,

v.

WISCONSIN PERSONNEL COMMISSION,

Respondent-Respondent.

APPEAL from an order of the circuit court for Dane County: GEORGE NORTHRUP, Judge. *Affirmed.*

Before Gartzke, P.J., Dykman and Sundby, JJ.

PER CURIAM. Raymond R. Chavera, a long-time, veteran state employee, was discharged by the Wisconsin Department of Industry, Labor and Human Relations December 31, 1990. The department's reasons therefor were

contained in its letter of November 20, 1990, which stated that Chavera was discharged because he was "unable to effectively perform the duties of [his] position." Chavera appealed to the Wisconsin Personnel Commission. He claimed that the department discharged him because of his handicap, contrary to the Wisconsin Fair Employment Act, §§ 111.31-111.395, STATS.

After a hearing, the Commission issued a final order May 21, 1993, which adopted the proposed decision and order of the hearing examiner. The Commission added its own "observations."

The Commission concluded that the department had unsuccessfully surveyed all available positions within the agency, and to avoid a claim of discrimination, it was not necessary that it survey all positions in all state agencies, at least not in this case. The Commission noted that the medical report of Dr. John Yost, a physician selected by the department to examine Chavera, stated: "I do not believe [Chavera] could return to a full-time job at this point because of his current escalating symptoms and somewhat downward trend since May, 1990." The Commission further concluded that Chavera could not work part-time because during his last period of employment with the department, June 1988 to April 1989, he had been unable to fill a part-time position.

The parties stipulated to the issues. In the just-cause discharge case, no. 90-0404-PC, they agreed that the issue was whether the department had just cause to terminate Chavera's employment. In the discrimination case, no. 90-0181-PC-ER, they agreed that the issue was whether there was probable cause to believe that the department had discharged him based on his race or his handicap or both.

Chavera relies on § 230.37(2), STATS., which provides in part:

> When an employe becomes physically or mentally incapable of or unfit for the efficient and effective performance of the duties of his or her position by reason of infirmities due to age, disabilities, or otherwise, the appointing authority shall either transfer the employe to a position which requires less arduous duties, if necessary demote the employe, place the employe on a part-time service basis and at a part-time rate of pay or as a last resort, dismiss the employe from the service.

Chavera claims he was unlawfully terminated because, although he was handicapped, his condition was improving, yet the department made no attempt to accommodate his handicap. He argues that a number of alternatives were available: part-time work; an alternative work schedule; a flex-time schedule; a transfer; an assignment to a less arduous position; and work in a demoted position.

The Commission does not argue that Chavera was not disabled. In fact, the Commission's position is that Chavera was unable to perform any work and therefore the department could not accommodate his handicap.

Chavera does not dispute the Commission's findings of fact. His sole claim is that because he was unable to efficiently and effectively perform the duties of his position by reason of his handicap, the department was required to "accommodate" his handicap. He argues that once the department concluded he was handicapped, the burden shifted to the department to explain its refusal to accommodate. *See Samens v. LIRC*, 117 Wis.2d 646, 664, 345 N.W.2d 432, 439 (1984). He contends that his termination was "not accommodation; this [was] execution."

Chavera claims that at the time of his discharge, the department had many jobs available. He argues that the department jumped to the last alternative available under § 230.37(2), STATS.--termination--without considering the intermediate steps. He emphasizes that the department did not attempt to search the rest of the department and other state agencies. He argues that the department was required to search beyond the department for employment which might have been suitable for him. He relies on *Schilling v. University of Wisconsin-Madison*, Nos. 90-0064-PC-ER and 90-0248-PC (WPC Nov. 6, 1991). Chavera reads *Schilling* to hold that the duty of accommodation under § 111.34(1)(b), STATS., extends beyond the "parameters" of the employing agency and includes the state as the employer. The Commission concluded that in this case, it was unnecessary to reach that question because Dr. Yost made it clear that Chavera was simply unable to work in a sedentary job, and therefore, even if there had been a duty to consider alternative

employment outside the department, Chavera would not have been able to work in any capacity.

Thus, this seemingly complex case narrows to the question whether the Commission correctly interpreted and applied Dr. Yost's opinion. There is no question of law involved in this case. The question is whether at the time of his discharge, Chavera's "health and physical condition was getting better daily." Chavera does not argue that the department had a duty to accommodate his handicap if that handicap prevented him from working at any position within the department or within other state agencies. Chavera did not present any medical evidence to support his claim that the department should not have employed the last resort of dismissal. However, the Commission made the following finding:

> Dr. Yost's report, dated October 10, 1990, to [the department] included the following: (Chavera) appeared like he was barely able to ambulate at the time of my exam ... his overall condition is very guarded. Yost stated that it would be hard to predict the end of Chavera's hea[l]ing, that functionally Chave[r]a had gone downward since May and that he could not currently return to a full-time job.

The Commission's findings of fact are conclusive if they are supported by substantial evidence in the record. ***Chicago, M., St. P. & P. R.R. v. DILHR***, 62 Wis.2d 392, 396, 215 N.W.2d 443, 445 (1974). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." ***Gateway City Transfer Co. v. Public Serv. Comm'n***, 253 Wis. 397,

405-06, 34 N.W.2d 238, 242 (1948) (quoting ***Edison Co. v. NLRB***, 305 U.S. 197, 229 (1938)). The weight and credibility of the evidence are matters for the Commission to evaluate, not the reviewing court. ***Bucyrus-Erie Co. v. DILHR***, 90 Wis.2d 408, 418, 280 N.W.2d 142, 147 (1979); *see also* § 227.57(6), STATS. When more than one inference can be reasonably drawn, the finding of the agency is conclusive. ***Vocational, Technical & Adult Educ., Dist. 13 v. DILHR***, 76 Wis.2d 230, 240, 251 N.W.2d 41, 46 (1977).

We need not decide which of the three levels of deference to an agency's interpretation of a statute apply, *see* ***Sauk County v. WERC***, 165 Wis.2d 406, 413-14, 477 N.W.2d 267, 270-71 (1991), because Chavera does not dispute that if he was totally disabled so that the department could not accommodate his handicap, the department would not have erred in terminating his employment.

Chavera's theory of his case becomes meaningless once the fact is established that he was so handicapped that he was totally disabled from performing any job within any state agency. Chavera's case hinges on his assertion that he was "slowly and steadily recovering from the effects of his handicap." However, Chavera failed to present any medical evidence to support that assertion.

By the Court.--Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.