

STATE OF WISCONSIN

PERSONNEL COMMISSION

ROBERT F. ROHLAND,
Appellant,

v.

**Secretary, DEPARTMENT OF
AGRICULTURE, TRADE AND
CONSUMER PROTECTION,**
Respondent.

FINAL DECISION AND
ORDER

Case No. 96-0080-PC-ER

NATURE OF THE CASE

This case involves a complaint of discrimination on the basis of conviction record in violation of §111.322(1), Stats.

FINDINGS OF FACT

1. Complainant was employed by respondent as an LTE (limited term employe) gypsy moth trapper from May 22, 1996, until his employment was terminated effective June 13, 1996.

2. The letter from respondent informing complainant of his termination (Respondent's Exhibit 28) included the following explanation for the transaction:

Recently, the Agricultural Resource Management Division became aware that you had been terminated from a permanent position with the department's Division of Food Safety in 1989. This information was not available to us at the time that you were hired and you did not inform us of this during your interview for the job.

3. Prior to this period of employment, complainant had been employed by respondent as a dairy inspector from May 1, 1978, until he submitted a letter of resignation effective January 1, 1989.

4. Complainant's resignation occurred after his supervisor had questioned several of appellant's weekly work reports, and on October 27, 1988, had specifically told him that a plant manager had told him (the supervisor) that on October 20, 1988, ap-

pellant had been in the plant for 15-20 minutes as opposed to the four hours stated on appellant's October 21, 1988 work report.

5. On May 29, 1990, complainant pled no contest and was convicted of a felony count of misconduct by a public employe and two counts of misdemeanor theft based on a complaint which alleged that he had falsely reported making dairy inspections that had not actually been performed while employed by the department during November and December of 1988.

6. Complainant has failed to establish that respondent was motivated by his criminal conviction record to terminate his LTE employment as a gypsy moth trapper, and the Commission finds that respondent's decision was motivated by appellant's previous work record with respondent, and specifically his falsification of work records.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.45(1)(b), Stats.
2. Complainant has the burden of proof to establish by the preponderance of the evidence that respondent's decision to terminate complainant's employment as an LTE gypsy moth trapper was motivated by complainant's conviction record.
3. Complainant has not satisfied his burden.

OPINION

In order for there to be a violation of the FEA (Fair Employment Act) in this case, the employer must have terminated complainant's employment "because of," §111.322(1), Stats., complainant's conviction record. The threshold question in this case is whether respondent's decision in 1996 to terminate complainant's employment was "because of" - i. e., motivated by -- complainant's conviction record. Complainant has the burden of proof, *see Puetz Motor Sales, Inc. v. LIRC*, 126 Wis. 2d 168, 172, 376 N.W. 2d 372 (Ct. App. 1985), and must establish this element of his claim -

it is not up to respondent to show that its decision was *not* motivated by complainant's conviction record. Complainant has not sustained his burden of proof.

Respondent presented testimony by its management that the decision to terminate complainant's LTE employment was based on his employment misconduct during his previous employment with the agency, and that it would have reached the same result regardless of whether he had been criminally convicted with regard to that underlying misconduct. Complainant essentially has not contradicted this evidence with any evidence that would tend to show the contrary. This is not the kind of case in which it could be inferred from the underlying employment misconduct or other circumstances that respondent's professed concern about workplace misconduct was pretextual, and that the real reason for the action must have been the employe's criminal conviction. To the contrary, the nexus of the criminal misconduct was misconduct by a public employe when complainant had been employed by respondent. Respondent had been concerned about complainant's false work reports, and pursuit of those concerns led up to complainant's resignation.

Not unexpectedly, complainant contends that there was no reasonable relationship between his LTE work and the employment misconduct that precipitated both his previous resignation and his criminal prosecution. Since he failed to establish that respondent terminated his LTE employment because of his conviction record, these contentions are not material.¹ However, the Commission observes as dictum that even if complainant had demonstrated that respondent had terminated his employment because of his conviction record, respondent would have been able to avail itself of the exception to the prohibition against conviction record discrimination.

Section 111.335, Stats., includes the following:

¹ If complainant had had an appointment that had been subject to the requirement of "just cause" for discipline, such arguments could be raised at a contract arbitration or a personnel commission hearing. However, in a conviction record complaint like this, complainant first must show that the termination was caused by his conviction record in order to be able to establish a claim.

(c) Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to . . . terminate from employment . . . any individual who:

1. Has been convicted of any felony, misdemeanor or other offense the circumstances of which substantially relate to the circumstances of the particular job.

Complainant takes the position that the two jobs in question are substantially different in terms of both their substantive work activities and their levels of responsibility. On the other hand, respondent contends that the LTE gypsy moth trapper job requires the employe to work independently, with little if any means of supervisory oversight to ensure that the employe is conscientiously checking the traps and accurately recording the number of moths trapped. Thus, while the jobs are dissimilar in content, they are similar in terms of the independence with which the work is performed, and therefore there is a relationship between the kind of criminal activity of which complainant was convicted, which involved falsifying work reports, and the potential for such activity in the LTE gypsy moth trapper position.

The law is clear that in considering an employe's conviction record, an employer can "consider the incompatibility between the personal traits exhibited in connection with the criminal activity in question." *Thomas v. DHSS*, Case No. 91-0013-PC-ER, 4/30/93, p. 6. *Gibson v. Transp. Comm.*, 106 Wis. 2d 22, 28, 315 N.W. 2d 858 (1982), exemplifies the type of analysis involved in a determination of whether the conviction record exception applies. There the Court was reviewing a decision to bar a person who had been convicted of armed robbery from licensure as a school bus driver. The Court held:

A conviction of armed robbery . . . requires that the person be found to have participated in the taking of another's property by threatening to harm them with a dangerous weapon. It thus indicates a disregard for both the personal and property rights of other persons. It also indicates a propensity to use force or the threat of force to accomplish one's purposes. The armed robbery conviction indicates personal qualities which are contradictory to the extreme patience, level-headedness and avoidance of the use of force which . . . are essential in a school bus driver.

Similarly, the convictions in the instant case indicate a lack of honesty and responsibility which is inconsistent with the need to function relatively independently in the LTE gypsy moth trapper position. This relationship is not negated by the substantive differences between the position complainant held when he engaged in the criminal activity and the position in question.²

² While complainant argued that respondent's approach would render him virtually unemployable by the state, respondent opinion was that the circumstances of complainant's conviction would not disqualify him from a position in which the employee did not function so independently - e. g., many office jobs.

ORDER

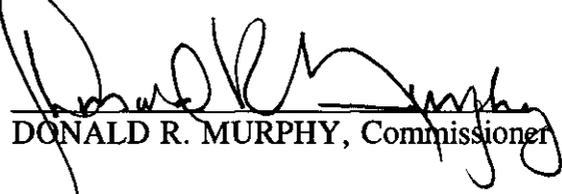
This complaint is dismissed.

Dated: March 26, 1997

STATE PERSONNEL COMMISSION

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LAURIE R. McCALLUM, Chairperson


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