

STATE OF WISCONSIN

PERSONNEL COMMISSION

MICHAEL W. ZANK,
Complainant,

v.

**President, UNIVERSITY OF WISCONSIN
SYSTEM (STOUT),**
Respondent.

FINAL DECISION AND
ORDER

Case No. 97-0049-PC-ER

NATURE OF THE CASE

This case is before the Commission on the following statement of issue for hearing: "Whether respondent discriminated against complainant on the basis of disability, including failure of accommodation, in connection with the termination of his employment at UW-Stout." Conference report dated July 22, 1998.

FINDINGS OF FACT

1. Complainant worked for respondent (UW-Stout) from 1982 to 1988 as a Building Maintenance Helper 2. In 1988 he transferred to a similar position at UW-Eau Claire (UWEC). He transferred from UWEC to a Custodian 2 position at UW-Stout Student Life Services (Housing) on September 3, 1996. His immediate supervisor at UW-Stout was Linda Anderson, who was a strict supervisor with high standards. Complainant's permissive probation was terminated effective September 28, 1996, after which he returned to his former position at UWEC without loss of or reduction in salary.

2. On August 8, 1996, prior to his transfer to UW-Stout, complainant had interviewed with Ms. Anderson, who showed him the CTKO residence halls for which he would be responsible, and explained the duties of the position and reviewed the position description (PD) with him. During the meeting, complainant did not indicate he would have any problems with the job, nor that he had any disabilities or need for accommodation.

3 On September 3, 1996, when complainant began employment at UW-Stout, during a routine orientation session at the Human Resources Department, he advised that he had a disability, but did not specify its nature. It was suggested he discuss his disability with his immediate supervisor, Ms. Anderson. He met with Ms. Anderson later that morning and during that meeting told her that he had two disabilities for which he needed accommodations—an allergy to bleach, and a short term memory problem. She asked him if there were anything in his personnel file concerning his disabilities, and he said there was not. She told him he would need to provide documentation of his disabilities before she could provide accommodations. She also advised him to take written notes or to use a tape recorder to record his job instructions. He said it (short term memory disability) was a bigger problem than that.

4. During his first week on the job, Ms. Anderson assigned another custodian (Pat Bautch) to work with complainant to orient him to the job. On September 9, 1996, Ms. Anderson asked Ms. Bautch how things were going. She told Ms. Anderson that complainant said he could not use bleach and that complainant wanted all of his instructions typed. Later that day, she told Anderson that complainant had not completed cleaning three rooms. Ms. Anderson was surprised that complainant, an experienced custodian, was having trouble completing assigned tasks that should have been readily completed. Ms. Anderson told Ms. Bautch that complainant could try using an alternative cleaning product for cleaning the showers, but that until complainant produced verification of an allergy to bleach, if there were complaints about mold and mildew in the showers, he would have to use bleach. Ms. Anderson also told Ms. Bautch that it was not necessary to provide complainant with typewritten notes, but that she should make sure complainant received a photocopy of her training notes, and Ms. Anderson made a copy of them for this purpose and this was done. There are 12 pages of these notes (Respondent's Exhibit #8), and they are very legible and appear to be detailed.

5. On September 17, 1996, complainant dropped off with Ms. Anderson a letter from a physician, confirming complainant's sensitivity to bleach products. Anderson informed him that she would order a vapor mask for him.

6. Ms. Anderson procured a mask that she had determined was the highest quality available mask for paint and vapor fumes short of a respirator. This was provided to complainant on September 19, 1996. If this mask had not proved sufficient, Ms. Anderson was willing to have gone to the next step, which would have been to obtain a respirator.

7. On September 20, 1996, Ms. Anderson inspected complainant's work and found numerous problems—e. g., dirty, sticky floors, dust balls, dangerous use and storage of a highly caustic acid-based toilet bowl cleaner, etc (see Respondent's Exhibit #10)—and met with complainant to discuss these problems.

8. Ms. Anderson was concerned about the quality of complainant's work, and his attitude, which did not seem to reflect any care about performing quality work. Following this meeting, Anderson later that day met with Wayne Argo (respondent's Director of Human Resources). They decided to terminate complainant because his work was very poor for an employe with his experience, and they believed it was unlikely from complainant's attitude that his performance would improve. Also, they knew that under the labor contract, complainant was entitled to restoration to his old job at UWEC if it were still open, which they confirmed was the case. They also knew that complainant would be working alone the following week, Ms. Anderson was scheduled to be off, and there was no one to oversee complainant's work, and they were concerned that some of complainant's mistakes—like the acid toilet bowl cleaner problems—could create a hazardous situation in the residence halls.

9. On September 27, 1996, complainant was given a termination letter which stated, in part, "This action has been taken upon the recommendation of your supervisor and Student Life Services management based upon your performance during the probation period." Because he had permanent status and was entitled to restoration to his previous position, complainant was directed to report to his old job at UWEC.

10. It was believed by respondent that complainant did a poor job of performing routine tasks and that his performance problems did not result from not remembering what to do.

OPINION

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 complainant may, in turn, attempt to show was a pretext for discrimination. *McDonnell-Douglas v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973), *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 25 FEP Cases 113 (1981).

Complainant contends that respondent terminated his probationary employment because of disability and failed to accommodate his disabilities. In a case of discrimination on the basis of disability of this nature, complainant can establish a prima facie case by showing that complainant is an individual with a disability, that he was performing his job satisfactorily, and that respondent terminated his employment and/or failed to accommodate his disabilities.

Complainant established that he was disabled to the extent that he had an allergy to bleach fumes, as he submitted in evidence a letter from an allergist to this effect, and the record establishes that this condition limited his capacity to work, *see* §111.32(8)(a), Stats. Complainant did not establish that he also had a disability of short term memory loss. This is a medical condition and would require some kind of medical evidence to establish it. *See Connecticut General Life Insurance Co. v. DILHR*, 86 Wis. 2d 393, 407, 273 N. W.2d 206 (1979). Although respondent had requested documentation of his disabilities, complainant only provided respondent with the letter from the allergist. He never produced documentation of his short term memory problem, and he did not submit any medical evidence of this kind at the hearing.

Complainant also did not show that his performance had been satisfactory. His supervisor had carefully documented many problems with his performance, and complainant himself admitted problems with his work performance. There is no basis for a finding that he

had been performing satisfactorily. Thus complainant did not establish a prima facie case of disability discrimination with respect to his termination.¹

Turning to the question of accommodation, since complainant never produced for Ms. Anderson any evidence of his short term memory condition, respondent had no obligation to have accommodated this disability.² With respect to the issue of accommodation of complainant's allergy, the record reflects that even before complainant produced medical verification of his condition, Ms. Anderson was willing to allow complainant to try use of a non-bleach product in the showers. Once she received his medical documentation, she promptly obtained a protective mask for him. While complainant contends this did not alleviate his bleach allergy, a respirator could have been provided if necessary.

The main thrust of complainant's case was that respondent should not have terminated his six month permissive probation within a month after he had started work at UW Stout, but should have given him more time to have learned the job. As discussed above, because complainant has neither shown at this hearing that he had a disability associated with short term memory loss, nor shown that he produced any documentation of that disability when that was requested by respondent, there was no legal obligation for respondent to have accommodated that condition. In any event, the record shows that respondent made an effort to assist complainant even though it did not have a legal obligation to have done so. Complainant was provided with 12 pages of Ms. Bautch's training notes. It appears that these notes should have provided guidance to complainant as he went about the performance of his duties. It also appears that many of his performance problems were not products of a short term memory problem but rather involved issues of execution, such as the floors that were not properly cleaned. Given all the circumstances in this record, including the fact that his old job at

¹ Even if a prima facie case were assumed, there would be no basis for a conclusion that respondent's rationale for complainant's termination was a pretext for disability discrimination.

² Complainant did not explain why he never produced documentation of his short term memory condition. He did not indicate that he wasn't given enough time to obtain the documentation, or that there were other circumstances which would have suggested that respondent had not handled the request for documentation in a reasonable manner.

UWEC was still open and available for his transfer back, respondent appears to have had a reasonable basis to have decided to terminate complainant's probation when it did.

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 a preponderance of the evidence that respondent discriminated against him on the basis of disability in connection with the termination of his permissive probation in September 1996.
3. Complainant has not sustained his burden of proof.
4. Respondent did not discriminate against complainant on the basis of disability in connection with the termination of his permissive probation in September 1996.

ORDER

This complaint of discrimination is dismissed.

Dated: July 20, 1999.

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STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

Parties:

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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.

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