

STATE OF WISCONSIN

PERSONNEL COMMISSION

BOBBY LOWE,
Complainant,

v.

**Chancellor, UNIVERSITY OF
WISCONSIN-MILWAUKEE,**
Respondent.

**RULING ON MOTION
FOR SUMMARY
JUDGMENT**

Case No. 98-0152-PC-ER

NATURE OF CASE

This case involves a complaint of disability discrimination in violation of the Wisconsin Fair Employment Act (WFEA), Subchapter II, Ch. 111, Stats. Respondent has filed a motion for summary judgment, claiming there are no substantial issues as to any material facts and respondent is entitled to judgment as a matter of law. A briefing schedule was set, ending on March 21, 1999. Complainant did not file a brief. The following findings of fact appear to be undisputed and are made solely for the purpose of deciding this motion.

FINDINGS OF FACT

1. Complainant Bobby Lowe began employment with respondent University of Wisconsin (UW)-Milwaukee in the Department of Residence Life on April 14, 1997, as a Custodian 2. During Lowe's employment at UW-Milwaukee, he was supervised by Steven Ellison.

2. On October 10, 1997, Lowe left work early, complaining of a dental problem and indicated he was going to a dentist.

3. At some point¹, Lowe was requested to obtain a medical certificate to verify his absence from work.

4. Bobby Lowe remained off from work and he did not provide his supervisor with a medical excuse for his absence.

5. By letter dated November 26, 1997, Lowe was advised to attend a pre-disciplinary meeting on December 2, 1997, because he had failed to report to work since October 10, 1997, and had not provided any medical excuse for his absence.

6. On December 11, 1997, the UW-Milwaukee sent Lowe a letter of termination. Lowe filed a discrimination complaint against the University with the Commission on August 12, 1998.

7. At the prehearing conference held by telephone on November 6, 1998, the issue proposed by the hearing examiner and agreed to by the UW-Milwaukee was:

Whether complainant was discriminated against on the basis of his disability when respondent terminated his employment in December 1997.

The University proposed the following sub-issues:

1. Whether complainant had a qualifying disability.
2. Whether complainant made a reasonable effort to request an accommodation.
3. Whether respondent failed to make a reasonable accommodation before terminating complainant.

¹ Discrimination complaint of complainant, dated August 10, 1997:

I was unable to work and had to go to a doctor . . . My supervisor, [Steve Ellison] told me to see a doctor and report back to work when I got a doctor's excuse.

Respondent's Exhibit 2: memorandum to Scott Peak from Steve Ellison, dated September 21, 1997:

10/10/97 – Bobby Lowe left work early complaining of a dental problem [was going to the dentist] and would bring in verification.

10/16/97 – I requested a medical certificate via telephone conversation with Bobby to his absence from work since 10/10/97

8. Complainant Lowe was required to file any objection to the proposed issue with the Commission within 30 days of the dated of the Conference Report. He filed no objections.

OPINION

In *Grams v. Boss*, 97 Wis. 2d 332, 338-339, 294 N.W.2d 473 (1980), the Court set forth the method of analysis for a summary judgment:

To make a prima facie case for summary judgment, a moving defendant must show a defense which will defeat the plaintiff. If the moving party has made a prima facie case for summary judgment, the court must examine the affidavits and other proof of the opposing party (the plaintiff in this case) to determine whether there exist disputed material facts, or undisputed material facts from which reasonable alternative inferences may be drawn, sufficient to entitle the opposing party to a trial (citations omitted).

On summary judgment the moving party has the burden to establish the absence of a genuine, that is disputed, issue as to any material fact. On summary judgment the court does not decide the issue of fact; it decides whether there is a genuine issue of fact. A summary judgment should not be granted unless the moving party demonstrates a right to a judgment with such clarity as to leave no room for controversy; some courts have said that summary judgment must be denied unless the moving party demonstrates his entitlement to it beyond a reasonable doubt. Doubts as to the existence of a genuine issue of material fact should be resolved against the party moving for summary judgment.

In support of the motion, respondent offers three arguments. First respondent argues that complainant has failed to show that his medical problem, which he identifies as "a gum disease," qualifies as a disability under the WFEA. According to respondent, a letter dated December 2, 1997, from complainant's doctor does not prove complainant has a WFEA protected disability; and that, in fact, the doctor said the gum condition did not affect complainant's ability to work.

Respondent cited no cases supporting its assertion that gum disease does not qualify as a disability under the WFEA. However, respondent provided the affidavit of complainant's supervisor, Steven Ellison, and a copy of a letter from complainant's

doctor Jon J. Pagenkopf, D.D.S., dated December 2, 1997. The three sentence letter written to complainant provides:

Based on our limited oral examination today I find that you have chronic periodontitis (gum disease) . . . My recommendation is for comprehensive oral and periodontal examination followed by appropriate gum therapy.

In the affidavit, Ellison stated that complainant brought the Pagenkopf letter to his December 2, 1997, pre-disciplinary meeting; that the letter did not answer his questions about complainant's ability to perform his job responsibilities; and that he asked for and received complainant's permission to call his doctor.

According to Ellison's affidavit, during a telephone conversation with Dr. Pagenkopf on December 3, 1997, he described complainant's duties to Pagenkopf, who told him that complainant's condition did not prevent him from performing any of his duties. In the discrimination complaint, complainant states, "I was diagnosed with a gum disease which caused an infection throughout my body. I was unable to work and had to go to a doctor through my HMO." Later, in a letter to the Commission, dated August 28, 1998, complainant states, "I had been in pain and sick a week before I asked to be off of work . . . when I went to emergency care, I was told I had an infection that had spread throughout my body."

We reject this argument of the respondent. The documents filed by respondent fail to clearly establish that there is no disputed issue as to any material fact. As previously noted, respondent cited no cases in support of his claim that a gum disease is not a disability protected under the WFEA. Also, the reported statement by Dr. Pagenkopf, was based on a "limited oral examination." However, Dr. Pagenkopf had recommended that complainant obtain a comprehensive oral and periodontal examination, which suggests that Pagenkopf had provided only a preliminary diagnosis of complainant's condition. Also, neither the letter nor the reported statement by Dr. Pagenkopf address complainant's claims of pain, sickness and an infection throughout his body. For these reasons we believe there is room for controversy regarding this genuine issue of fact.

Respondent next argues that complainant has not shown respondent discriminated against him because of a disability or that his alleged disability is sufficiently related to his ability to adequately perform his job responsibilities. Respondent asserts that complainant fails to meet his burden of proof when he fails to show that he was discharged “because” of his disability; that complainant was terminated after he failed to come to work for approximately seven weeks; and that, according to Dr. Pagenkopf, complainant’s condition did not prevent him from performing his job responsibilities. The Commission disagrees with this argument.

As stated in *Grams, id.*, the moving party on summary judgment represents that there is no disputed issue as to any material fact and that the case may be decided as a matter of law. Therefore, at this point, contrary to respondent’s argument, it is not necessary for complainant to prove his charge of discrimination. It suffices that complainant has pleaded facts, which if true, merit relief; and complainant has done that. The facts pleaded by complainant, and all reasonable inferences from them, must be taken as true. Whether complainant’s legal conclusions are correct, present mixed question of law and fact. This argument of the respondent highlights some of the unresolved material facts in dispute.

Lastly, respondent argues that if complainant could establish that he was disabled under the WFEA; that respondent discriminated against him because of his disability; and that his disability was linked to his ability to perform his job; that the Commission should still grant the summary judgment, since it did not fail to accommodate complainant. In support, respondent alleges that complainant never requested any accommodation; and that respondent first learned about the alleged disability on December 2, 1997, but the next day was disabused of the possibility by the reported statements of complainant’s treating dentist that complainant’s condition did not affect his ability to work. Also, respondent argues that, while complainant may argue respondent knew about his condition on October 10, 1997, when he left work complaining of a dental problem, respondent had no details of the problem; and

complainant failed to comply with requests by respondent, over the next seven weeks, for medical documentation.

The Commission believes this argument is unavailing. Similar to respondent's second argument, this argument is premised on questions at issue at a trial; i.e. (1) whether the complainant is disabled under the WFEA, (2) whether the respondent discriminated against complainant because of the disability, (3) whether the disability is "sufficiently" linked to complainant's ability to adequately perform the job, and (4) whether the respondent failed to reasonably accommodate the complainant's disability. *Harris v. DHSS*, 84-0109-PC-ER, 85-0115-PC-ER, 2/11/88 (also cited in *Miller v. DHSS*, 91-0106-PC-ER, 5/27/94). These arguments—arguments one, two and three—suggest a misperception of the nature and purpose of a summary judgment. See *Berna-Mork v. Jones*, 173 Wis. 2d 733, 496 N.W.2d 637 (Ct. App. 1992). Here, the documents submitted by the parties establish the existence of disputed issues of material fact. Therefore, the Commission can not consider the question of law.

Still, complainant should be aware that, at the hearing, he will have to prove he was disabled under the WFEA for the seven weeks he was absent from work. He also will need to show the reason for his termination was his disability rather than job abandonment.

CONCLUSION OF LAW

1. This matter is properly before the Commission pursuant to §230.45(1)(b), Stats.
2. Respondent has the burden to show that summary judgment should be granted.
3. Respondent has failed to sustain this burden.


ORDER

Respondent's motion for summary judgment is denied.

Dated: May 5, 1999.

DRM:rjb:980152Crul1

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner