STATE OF WISCONSIN PERSONNEL COMMISSION

ALLEN S. JOHNSON,
Complainant,

v.

Secretary, DEPARTMENT OF CORRECTIONS, and Secretary, DEPARTMENT OF EMPLOYEE TRUST FUNDS,
Respondents.

Case No. 99-0098-PC-ER

RULING
ON
MOTIONS
TO DISMISS

The Personnel Commission issued a ruling on August 25, 1999, addressing respondent Department of Corrections' (DOC) motion to dismiss for untimely filing and for lack of jurisdiction. At that time, DOC was the sole respondent in the case. The original complaint raised claims of discrimination based on color and disability and retaliation for engaging in whistleblower activities. The ruling identified 7 separate allegedly discriminatory/retaliatory actions (a through g) that were the subject of the complaint:

> a. The alleged physical assault by Captain Brunious on July 1, 1995; and respondent's failure to adequately investigate or take appropriate action as a consequence of this alleged assault;
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> b. Respondent's requirement that complainant undergo an independent medical examination (IME) in October of 1995; and the results of this IME.
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> c. Respondent's failure to pay complainant from October of 1995 through June of 1996;
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> d. Delays by the Department of Employee Trust Funds (DETF) in processing necessary paperwork relating to certain of complainant's claims, and the resulting failure to receive pay/benefits for a period of one year ending in September of 1998;

> e. DETF's failure to restore sick leave and vacation benefits used by complainant during 1997; complainant did not become aware that these benefits would not be restored until November of 1998.
>
> f. Complainant's allegedly involuntary medical retirement effective October 11, 1998.
>
> g. Respondent's location of alternative employment for complainant in November of 1998 in a Program Assistant 2 position which pays less than and is located further from his home than his previous Officer position.

The Commission's August 25th ruling dismissed complainant's whistleblower claim as untimely. It also dismissed 3 allegations under the Fair Employment Act (a, b and c) as untimely and dismissed 2 more (d and e) because they were allegations against the Department of Employee Trust Funds (DETF), a non-party. The remaining claims were premised on allegations of discrimination based on color and disability. Complainant filed an amended complaint of discrimination based on disability on February 28, 2000, seeking to add DETF as another respondent.[1] The amendment alleged DETF discriminated against complainant with respect to action e. At the same time, the complainant requested that his claims be processed by the Equal Employment Opportunities Commission (EEOC), rather than by the Personnel Commission. On April 20, 2000, the EEOC notified complainant that it was closing its file because it was "unable to conclude that the information obtained establishes violations of the statutes."

By letter dated August 23, 2000, the Personnel Commission notified complainant that it was adopting the EEOC's determination. Complainant filed a written appeal

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[1] In his amendment, complainant described his claim against DETF as follows:

> In November of 1998 E.T.F. informed me that I would not receive my vacation or sick leave back since I used it to supplement my pay when Department of Corrections stopped paying me. Debi Hornbeck said since I used my sick leave and vacation time they would not reimburse me but stated that if I did not use it at all I would be reimbursed til the day I was no longer paid. According to state statute 230.36 the state is responsible for paying the employee until the employee retires or he/she returns to work. Since the State of Wisconsin Department of Corrections have broken state laws E.T.F. argument is moot. Be-

of the Commission's action and a prehearing conference was conducted on December 7, 2000. The conference report includes the following information:

> During the course of the prehearing conference, the complainant was unable to clearly articulate the nature of the various discrimination claims he was seeking to pursue. Therefore, the examiner chose to rely on the language of the August 25th ruling as the basis for describing the complainant's allegations:
>
> 1. Whether respondent DETF discriminated against complainant on the basis of disability when it failed to restore sick leave and vacation benefits used by complainant during 1997
>
> 2. Whether respondent DOC discriminated against complainant on the basis of color or disability with respect to:
>
> a. Complainant's allegedly involuntary medical retirement, effective October 11, 1998.
>
> b. Respondent's location of alternative employment for complainant in November of 1998 in a Program Assistant 2 position which pays less than and is located further from his home than his previous Officer position.

Complainant was provided an opportunity to indicate, in writing, whether the language set forth in the prehearing conference report accurately described "the issues he has properly raised in this matter." By letter dated December 21, 2000, and received by the Commission on December 26, 2000, complainant sought to "clarify his position." He described his allegations as follows:

> 1) State of Wisconsin stopping 230.36 payments and refusal to pay medical bills. Both these issues were a continuous thing so when I filed it fell within the 300 days so the complaint is timely according to d[§ 14.136] (sic). If the state continued to break the law this defense is valid and the timely issue should be dropped. Also the state can not knowingly break the law once again making the complaint timely.
>
> 2) When I filed prior the DOC said I would have to file against DETF to receive my time back now the DETF says I have to file against the DOC to receive my sick leave and vacation time back either or I filed

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cause if they D.O.C. did not break the law I would have been receiving money so I would not have used my sick leave.

> in a timely matter against both agencies so I would like that returned as soon as possible.
>
> 3) Medical retirement and my argument based on color A Black Captain assaulted me adding to or causing my medical retirement and nothing was done even though I filed a complaint when in time limits.
>
> 4) Program Assistant 2 pay Employees with the state of Wisconsin have demoted and kept their pay. Yet I injured in line of duty do not. Also the travel should be taken into account as lost wages.
>
> 5) According to 230.36 I have 12 years to place a claim on injury in the line of duty Also the reasons given to stop my 230.36 pay and refuse more medical benefits was that I had a previous injury This injury was in 1992 that happened in the line of duty So the 12 year rule according to state statute 230.36 would apply Also since the 1992 injury I received a permanent disability to use that against me is breaking federal law, American Disabilities Act.

Respondents subsequently filed separate motions to dismiss. The parties submitted written arguments.

The Commission notes that the complainant appears *pro se* in this matter

For the purpose of ruling on the outstanding motions, the following facts appear to be undisputed:

1. Complainant has never been an employee of the Department of Employment Trust Funds (DETF).

2. Complainant has applied for, and received, benefits under programs administered by DETF.

3. Complainant suffered a knee injury while working for respondent Department of Corrections (DOC) as a correctional officer at Columbia Correctional Institution on April 10, 1992, resulting in time off work.

4. Complainant underwent arthroscopic surgery on his knee on April 22, 1993. As of December 3, 1993, he had returned to regular correctional officer work duties.

5. Complainant suffered a second work injury to his left knee on July 1, 1995. Complainant claims that this injury was due, at least in part, to the actions of

another DOC employee, Capt. Brunious, who is black, and that respondent failed to properly investigate and respond to the conduct of Capt. Brunious. This claim is the sole basis for complainant's allegation of discrimination based on color

6. Complainant received at least some salary and benefits from respondent DOC under §230.36[2] for the subsequent period he was unable to work.

7 Complainant contends he also used sick leave, vacation and other leave, for at least some of the period before he returned to work for DOC in November of 1998 as a Program Assistant 2. It is undisputed that complainant did not use such leave later than January of 1998.

8. Complainant's medical condition was such that his physician did not permit him to work with inmates.

9. Complainant filed one or more income continuation claims with respondent DETF.

10. Complainant underwent another arthroscopy procedure on December 7, 1995, and remained off work.

11. Complainant underwent a patellectomy (kneecap removal) on June 13, 1996, and remained off work.

12. On October 13, 1997, complainant's physician concluded that complainant had reached a healing plateau and that he had permanent "light work" restrictions, i.e. he could lift up to 20 pounds, could stand or walk for 1 to 4 hours in an 8 hour work day, sit 1 to 3 hours, drive 1 to 3 hours, use his hands but not feet for repetitive

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[2] Section 230.36, Stats., provides, in part:

> (2m)(a) If any of the following state employees suffers injury while in the performance of duties, the employee shall continue to be fully paid by the employing agency upon the same basis as paid prior to the injury, with no reduction in sick leave credits, compensatory time for overtime accumulations or vacation and no reduction in the rate of earning sick leave credit or vacation:
>
> 20. A guard or any other employee whose duties include supervision of inmates or wards of the state at a state penal institution

movements, could not squat or climb at all, but could occasionally bend, twist and reach.

13. Respondent DOC terminated complainant's §230.36 benefits when it received the physician's October 13, 1997, certification that complainant could return to "light duty" employment.

14. On November 26, 1997, complainant filed an application with DETF for duty disability benefits under §40.65, Stats.

15. On December 23, 1997, DETF received the required "Employer Certification" from the Department of Corrections, verifying that complainant had been injured while performing his duty and his monthly salary. Additional required information regarding complainant's application for duty disability benefits was received from other sources in subsequent months.

16. In a written notice dated September 2, 1998, DETF informed complainant that it "has approved your application for duty disability benefits."

17 On September 11, 1998, it issued a "Monthly Payment and Offsets" notice to complainant (Exh. K, pp. 53-54) that informed complainant: "Your check dated 10.1.98 will also include a retro payment of $10,261.43 for the months of February 98 through August 98." Attached to that notice was a "Notice of Right to Appeal to Wisconsin Retirement Board." Complainant did not file such an appeal.

18. Complainant resigned on September 21, 1998, in order to be able to receive duty disability benefits. Due to his work restrictions, complainant was unable to work as a correctional officer.

19. Kari Hoel, employed as an equal opportunity specialist in DOC's Bureau of Personnel and Human Resources was in contact with complainant during July and August of 1998 to assist him in finding alternative employment in DOC due to his medical restrictions. Complainant initially requested a position "up north" because he was considering relocating his family. Ms. Hoel looked at positions in northern Wisconsin correctional camps, probation and parole offices and at the Jackson Correctional Institution. Complainant then changed his mind and decided he did not want to relocate

his family. Ms. Hoel discussed a variety of positions with complainant, including Store Supervisor, Food Service Worker, Storekeeper, Locksmith, Maintenance Mechanic, Recreation Leader, Power Plant Operator, Facilities Repair Worker, Probation and Parole Agent, and Program Assistant. Ms. Hoel provided complainant with a packet of information that included the names of all State agency human resource directors so that he could contact other agencies in order to widen his job search. Complainant indicated to Ms. Hoel during one of their telephone conversations that he did not intend to contact the human resource directors at the other agencies because it would be too much work and they wouldn't help him very much. In late August of 1998, complainant indicated an interest in being placed in the Program Assistant 2 position at the DOC Monitoring Center. He did so because the Program Assistant 2 position did not involve any contact with inmates. It was the only job that fit within complainant's medical restrictions. Complainant knew that working in the PA2 position meant commuting from his home in Portage to Madison and knew it would be a demotion.

20. Complainant was reinstated with respondent DOC as a Program Assistant 2 with DOC's Monitoring Center in Madison, effective November 8, 1998. His pay on reinstatement was $11.378, while his previous rate of pay was at least $12.849. Complainant's former correctional officer job with DOC only required him to drive about 3 miles per day. The Program Assistant 2 job entails an additional 100 miles of travel per day to and from his work site.

21. While complainant continues to qualify for duty disability benefits, those benefits are entirely offset by his earnings from his employment for DOC in the Program Assistant 2 position.

22. On December 7, 1998, respondent DETF issued a "Monthly Payment and Offsets" notice to complainant (Exh. K, pp. 51-52) that informed him: "Your employer the Department of Corrections has informed this department that you returned to full-time employment in a general position. Based on this information, your 40.65 benefit is totally offset by those wages at this time." Attached to that notice was a

"Notice of Right to Appeal to Wisconsin Retirement Board." Complainant did not file such an appeal.

23. Complainant filed his complaint of discrimination with the Commission on June 3, 1999. He sought to add DETF as a party respondent when he filed a proposed amendment to his complaint on February 28, 2000.

OPINION

Even though the complainant has been provided several opportunities to clarify his allegations, it remains difficult to decipher them.

In attempting to ascertain complainant's allegations, the Commission has considered 1) its ruling dated August 25, 1999; 2) complainant's amendment filed on February 28, 2000; 3) the prehearing conference report from December 7, 2000; 4) complainant's submission dated December 21, 2000 (set forth on page 3 of this ruling); and 5) complainant's deposition taken by respondent on January 3, 2001. DOC submitted a transcript of the deposition as an attachment to its motion. Complainant's comments during the deposition help to provide a somewhat better understanding of complainant's contentions. The relevant portions of complainant's deposition are set forth below:

> Page 9
> A Okay. So when will I get a ruling as far as on the medical, I mean sick leave and vacation time?
> Q If the Department of Employee Trust Funds --
> A But it's also filed under the Department of Corrections.
> Q Well, [the Personnel Commission] dismissed that as saying that was -- I believe they did.
> A They couldn't have.
> Q As untimely.
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> Page 10
> Q And during that discussion [at a prehearing conference] I heard you say that you weren't contesting that anymore, that it was clear to you that you couldn't work as a correctional officer --
> A Correct.
> Q -- as of September 11, '98.
> A Correct. .

Page 11-12
A What I'm stating is that after my assault by an inmate I was also assaulted by Captain Brunious which happens to be black.
Q Okay.
A This added, if not caused, my medical retirement. Nothing was done even though I filed grievances and so on and so forth.
A And that's my only contention. I mean, that's what I'm arguing.
Q Your only contention the --
A Yeah, that --
Q This black guy contributed to your injury that led to your retirement, and nothing was done about it?
A Yes.

Page 13
Q But you don't believe that you were, the actual fact that you signed your resignation letter was caused because you were white?
A I signed that under -- as I said, I was forced to to get paid.

Page 14
A I believe if a white supervisor was to assault a black officer and nothing was done, do you thing that the same think would happen? I don't think so.

Page 15-16
Q [C]an you tell me of any situation that you're pointing to where you knew a black officer who, you know, worked at Columbia or anywhere else who was in the same situation you were who got [medical bills] paid?
A Okay. I cannot tell you -- all right. I cannot tell you for sure.
Q Okay.
A But I know that they broke the laws on all these.
Q Okay. And that's why you're in front of the Commission, right?
A What?
Q That's why you're in front of the Personnel Commission, is to pursue those grievances of yours?
A Exactly .

Page 26
A [The Program Assistant 2 position with DOC's Monitoring Center in Madison] is the only place that no inmate contact was given, so I, you know, as I said, not much of a choice.
Q So basically this was it. You had to come here?
A Yeah.

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A As I said, this is the only job that fit within the restrictions was here.

A That's the only reason I took this job is to get the permit partial disability .

Page 31
A I realize though afterwards that there are several other higher paying jobs that were never offered me in the Department of Corrections also.
Q What were they?
A Like working out as a contractor, security contractor for going to other states and for, you know, I mean, that don't have inmate contact.
Q Oh.
A I mean and within --
Q You mean like the guys who go to out-of-state prisons, the monitors?
A Yeah.
Q They go into the prisons and talk to the inmates and stuff. . . .

Page 33-34
Q Respondent's location of alternative employment for complainant in November of '98 in a PA2 position, that's this one, which pays less than and is located further from his home than his previous officer position, and you felt that that was discriminatory for some reason based on disability or that it was retaliation somehow?
A Well, disability as far as -- the only reason, as I said, I came to work here is because they refused to pay me for a year.

A They said it was due to a previous injury and not this injury, and then they said I don't get nothing and stopped paying me.
Q Okay.
A So in that respect, yes, I believe it's because of my disability they used it against me.

Page 37
Q So then you were on leave until you started working here. When was that?
A In '90 -- November of '98.
Q November of '98.
A And that's when I found out that's when they refused to pay back my medical, my [sick] leave and vacation time.

Page 38

A See what happened is when they stopped, they stopped paying me.
Q Okay
A They said I had a healing plateau.
Q Right.
A But that's -- if you look up State Statute 230.36, they have to pay me all the way up until either I retire or I get back to work. . .

Page 38-39
Q So once they said once you hit the healing plateau --
A Then they stopped paying me.
Q You're off the books?
A Well, they stopped paying me.
Q Paying you what?
A 230.36 benefits.
Q Okay
A And at that time what I did to supplement my income because I had no income at all coming in is to use my vacation and sick time.

A They paid me [from] the time where my medical, my sick leave and my vacation stopped.
Q So you exhausted those.
A Right.

Page 40
A [Y]ou use this 480 hours of sick leave and vacation after your 230.36 benefits stopped?
A Yeah, after they refused to pay me.
Q Right, right. And you feel that when you started this position here at the PA2 that that should have been restored to you?
A No. I thought that should have been restored prior to me getting this position. When they paid me back, I should have gotten my sick leave and vacation back.

Page 42
A Now, they should have paid me back to the date where they stopped, I mean, they stopped paying me.
Q Okay. For those nine months?
A No, the whole year.
Q Back to the 230.36 stop?
A Yeah. They stopped at the healing plateau. It's against the State Statute 230.36 to stop paying me. There is no such thing as a healing plateau. I mean, they can't use that for a stop payment on a 230.36 claim. So what they did was illegal in the first place. Instead they paid back to the point where my sick leave and vacation stopped

and refused to give me back my vacation and sick leave, which is like over $5,000 worth of pay.

Q Now, when you say they paid me back just for those nine months, who was they?

A See, that's where we get into this big thing. The DETF says it's the Department of Corrections. The Department of Corrections is saying it's DETF.

Q Did you get paid money for the nine months?

A I got paid, I got repaid for the nine months.

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A I mean, I think it's kind of unfair and hypocritical I mean that where a person does this and just I didn't you know, I don't like the pressure anymore and demotes can keep their pay. And I think through all this I have been treated very unjustly.

Q Okay. And that's your main beef, right?

A Well, they didn't even charge the inmate that attacked me. He went away free. Captain went away free. They only one that suffered through this is me.

Page 45

A I thought for sure that, yeah, because of my injuries and result of attack I'm forced to resign. That's my opening statement. I didn't have a choice to resign. I was forced to.

A They used my resignation letter to say that I didn't retire. I wasn't medically retired. I resigned, where it clearly says -- I mean, I put it right in front. I was forced to resign --

Q Okay.

A -- in order to get paid.

Page 46

Q Did the Department state to you that they require an employee to resign or be medically terminated for payroll purposes --

A Yes.

Q -- and start your reinstatement rights?

A They told me I had to send in a letter of resignation so I could get my 40.65 pay.

Page 47

A I should have been receiving 230.36 that whole time according to that state statute --

Q Okay.

A -- of that whole year when they said I hit my healing plateau and they quit paying me.

Page 49-50
Q But they gave you the PA2 job even though you probably couldn't have passed the test?
A Right.
Q That was a good thing.
A Well, but why not give me the better paying job, you know?
Q Okay. And you feel that -- is it your claim then on the disability side that they should have given you the better paying job?
A I believe so.
Q Is that disability discrimination?
A Well, I believe -- well, they require me not to take a test up here and not for down there.
Q Okay.
A Back to your question.
Q Yeah, my question is I guess, the department didn't make you take a test to get this PA2 job even though you wouldn't have passed it, and you said I wouldn't have passed the test for a higher paying job, why not give me the higher paying job. Do you feel that a department not doing that is discrimination against you based on your disability under state law?
A I think they had me over a barrel and did it. I had no other choice.

Based on its review of its previous ruling, complainant's amendment, complainant's deposition, the conference report, complainant's December 21st submission and complainant's brief dated February 20, 2001, the Commission understands complainant to have identified 5 claims. The Commission addresses those allegations separately.

1. Complainant contends he was discriminated against based on color because respondent DOC did not adequately investigate the actions of Capt. Brunious in 1995. Complainant claims that shortly after complainant had injured his knee on that date, Capt. Brunious caused him additional injury by moving complainant's knee. This is the complainant's sole allegation of discrimination based on color.

In its August 25, 1999, ruling, the Commission dismissed this allegation as untimely. In light of that ruling, the Commission will not consider this allegation further.

2. Complainant contends that respondent DOC violated §230.36 by refusing to provide him with some of the benefits to which he was entitled under that section. This contention, part of complainant's disability discrimination claim, consists of two components:

a) The decision to stop paying complainant §230.36 benefits, commencing on October 13, 1997, when complainant's physician certified he could return to light duty;

b) The failure to reimburse complainant for at least some of his medical bills.

Both of these allegations are claims that the Department of Corrections failed to comply with the requirements of §230.36, Wis. Stats.[3] Complainant has made no allegation that DOC's action in this regard was due to the complainant's status as a disabled individual. According to his deposition, complainant understands that he was entitled to receive §230.36 benefits until he retired or returned to work, irrespective of whether he has reached a "healing plateau." Complainant also stated that DOC justified its decision not to continue to pay him §230.36 benefits when it concluded that his absence from work arose from a prior condition rather than a work injury. Complainant's claims are that DOC violated §230.36, rather than that DOC treated him differently because of his status of being disabled. Therefore, these allegations fall outside of the

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[3] The Commission notes that pursuant to §230.36(4), Stats., "[a]n employee denied benefits under this section may appeal to the [Personnel] commission under s. 230.45(1)(d)." Pursuant to §ER 28.06, Wis. Adm. Code, such appeals must be filed "within 30 calendar days after being notified of such decision or within 30 calendar days from the effective date of the decision, whichever is later." In addition, the bargaining agreement for the period from May 20, 2000, through June 30, 2001, covering the Wisconsin State Employees Union and the State of Wisconsin provides, in part:

> 13/16/1 For the purposes of this section the provisions of s. 230.36(4), Wis. Stats., concerning appeals to the State Personnel Commission, shall not be applicable.
> 13/16/4 If an employe's claim for benefits under this section is denied by the appointing authority, the employe may, within thirty (30) calendar days, file an appeal at the Second Step of the grievance procedure provided under Article IV of this Agreement.

Commission's authority to review claims of disability discrimination filed under the Fair Employment Act and §230.45(1)(b), Stats.

3. Complainant contends that DOC was responsible for the "theft" of his leave (415 hours of sick leave, 28 hours of Saturday legal holiday, 80 hours of vacation, and 8 hours of personal holiday). Complainant contends he should not have been required to use approximately 500 hours of accumulated leave between the time of his 1995 injury until January of 1998. This contention is part of complainant's disability discrimination claim.

The Commission understands this to be another contention that the Department of Corrections failed to comply with the hazardous duty provisions in §230.36, Wis. Stats. Pursuant to §230.36(2m)(a), Stats.

> If [a covered employee] suffers injury while in the performance of duties, the employee shall continue to be fully paid by the employing agency upon the same basis as paid prior to the injury, with no reduction in sick leave credits, compensatory time for overtime accumulations or vacation and no reduction in the rate of earning sick leave credit or vacation.

Complainant has made no allegation that DOC's alleged action of requiring him to use leave was due to the complainant's status as a disabled individual. Complainant feels that DOC incorrectly administered the hazardous duty provisions. Therefore, this allegation also falls outside of the Commission's authority to review claims of disability discrimination under the Fair Employment Act and §230.45(1)(b), Stats.

4. Complainant contends he was forced to resign from the Department of Corrections on September 21, 1998, in order to receive duty disability benefits, and he contends this was unfair. This contention is part of complainant's disability discrimination claim.

Again, complainant has not articulated a claim of discrimination based on disability. He does not contend that he was treated differently by respondent because of his disability when he was required to resign from employment with DOC so that he

could receive certain benefits. He simply disagrees with one of the apparent qualifications for receiving duty disability benefits under §40.65, Wis. Stats., or with the interpretation of that qualification.

5. Complainant raises several claims relating to his reinstatement on November 8, 1998, to the Program Assistant 2 position at the Monitoring Center These contentions are part of complainant's disability discrimination claim.

a) Complainant claims that he should have been permitted to maintain his former pay rate when he took the Program Assistant 2 position on November 8, 1998. Complainant identifies Terri Donner, Dean Steinsrude and Sgt. Theresa Mueller as examples of persons who maintained their former pay rates when they were demoted.

b) Complainant feels that it was improper for respondent to reinstate him into a position that required him to commute 100 miles further than when he was employed as a correctional officer.

c) Complainant contends that in addition to offering him the PA2 position, respondent DOC should have offered to employ him as a security contractor, at a higher rate of pay.

In its reply brief, DOC states: "The respondent believes that under the *McMullen* test its placement of the complainant in the PA 2 position at the Monitoring Center was a reasonable accommodation of his disability." The question as to all three subissues in complainant's claim 5) is whether the Program Assistant 2 position was a reasonable accommodation within the meaning of §111.34(1)(b), Stats:

> (1) Employment discrimination because of disability includes, but is not limited to .
>
> (b) Refusing to reasonably accommodate and employee's or prospective employee's disability unless the employer can demonstrate that the accommodation would pose a hardship on the employer's program, enterprise or business.

In *McMullen v. LIRC*, 148 Wis.2d 270, 434 N.W.2d 270 (Ct. App. 1986), the Court of Appeals interpreted this language as follows:

> Having determined that "accommodate" should be broadly interpreted to include a transfer so as to effectuate the legislative intent, we examine the qualifications on the duty to accommodate. Our conclusion that the duty to accommodate may involve the transfer of an individual from one job to another does not mean that the employer must do so in every case. The statute requires only a reasonable accommodation. What is reasonable will depend on the specific facts in each individual case. Some considerations that may be considered in determining whether a transfer is a reasonable accommodation is the relationship between the two positions, their nature and physical location, and the handicapped individual's ability to perform the responsibilities of the second position. The foregoing list is illustrative rather than exclusive, and the specific considerations as to what composes a reasonable accommodation will have to be addressed on a case-by-case basis.

Respondent seeks summary judgment on the issue of reasonable accommodation. The question is whether there is a dispute of material fact.

The Commission uses the following standard in reviewing a motion for summary judgment:

> 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.
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> The papers filed by the moving party are carefully scrutinized. The inferences to be drawn from the underlying facts contained in the moving party's material should be viewed in the light most favorable to the party opposing the motion. If the movant's papers before the court fail to establish clearly that there is no genuine issue as to any material fact, the motion will be denied. If the material presented on the motion is subject to conflicting interpretations or reasonable people might differ as to its significance, it would be improper to grant summary judgment.

Grams v. Boss, 97 Wis.2d 332, 338-339, 294 N.W.2d 473 (1980), citations omitted.

In its reply brief, respondent states that Ms. "Danner" and Mr "Stensrud" were not similarly situated to complainant because both were part of the Career Executive program, while complainant's pay was governed by the bargaining agreement provision entitled "Pay on Downward Movements, Voluntary Demotions other than Demotions in Lieu of Layoff" on page 250, Appendix 3 of the contract. Respondent also disputes complainant's statement that it allowed Sgt. Mueller to maintain her former salary level when she voluntarily demoted from Correctional Officer 3 to a Financial Specialist 2 position. Respondent offered an affidavit by a Payroll Specialist and a copy of a computer-generated document to show that Sgt. Mueller's pay decreased from $16.999 to $12.499 when she demoted from a position as Sergeant at Columbia Correctional Institution to a Financial Specialist 2 position.

Because respondent's information about Ms. Danner, Mr Stensrud and Ms. Mueller and how complainant's pay was calculated was submitted as part of respondent's reply, complainant has not had a formal opportunity to respond. The Commission will provide the complainant 20 days from the day this ruling is issued to dispute[4] the respondent's information regarding Ms. Danner, Mr. Stensrud and Ms. Mueller and complainant's rate of pay. However, at this point, the Commission has no reason to question the accuracy of the respondent's information regarding the pay transactions for these three individuals or that the calculation of complainant's pay was governed by the applicable bargaining agreement, and the Commission will proceed to make its analysis on the assumption the complainant does not place that information into dispute.

When ruling on DOC's motion for summary judgment, the Commission takes into consideration the fact that complainant appears *pro se* in this matter. In *Balele v. UW-Madison*, 91-0002-PC-ER, 6/11/92, the Commission noted:

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[4] If complainant disputes DOC's statements that Ms. Mueller's pay was reduced from $16.999 to $12.499 upon her demotion, that Ms. Danner and Mr. Stensrud were both in the Career Executive program (so their pay was determined by that program rather than by the bargaining agreement that covered complainant's position), or that his rate of pay was adjusted according to the provisions of the bargaining agreement, he should file an affidavit and/or exhibits or should otherwise indicate the basis for his view.

> [C]ertain factors must be kept in mind in evaluating [a summary judgment] motion in a case of this nature. First, this case involves a claim under the Fair Employment Act with respect to which complainant has the burden of proving that a hiring decision, which typically has a multi-faceted decisional basis, was motivated by an unlawfully discriminatory intent. Second, complainant is unrepresented by counsel who presumably would be versed in the sometimes intricate procedural or evidentiary matters that can arise on such a motion. Third, this type of administrative proceeding involves a less rigorous procedural framework than a judicial proceeding. Therefore, particular care must be taken in evaluating each party's showing on the motion to ensure that complainant's right to be heard is not unfairly eroded by engrafting a summary judgment process designed for a judicial proceeding.

As noted above, the Commission has identified three separate claims relating to complainant's reinstatement. The three are treated in reverse order.

In claim 5.c), complainant contends that in addition to offering him the Program Assistant 2 position, DOC should have offered to employ him as a security contractor, at a rate of pay that would have been higher than complainant received as a correctional officer. In other words, complainant contends respondent should have accommodated his disabling condition by promoting him. Nothing in §111.34(1)(b), Stats., suggests that an employer must promote an employee in order to fulfill its responsibilities to reasonably accommodate. Case law under the related federal law, the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, clearly indicates that promotion is not required under that law. In *Bettis v. Dept. of Human Services*, 70 F.Supp.2d 865, 10 AD Cases 283.(CD Ill., 1999), the court held that an employer's refusal to give a disabled employee a promotion as a reasonable accommodation could not be a violation of the ADA and granted summary judgment. The court, relying on *Malabarba v. Chicago Tribune Co.*, 149 F.3d 690, 8 AD Cases 1505, 1513 (7th Cir. 1998), concluded that giving individuals with disabilities a promotion as a reasonable accommodation would go beyond the intent behind the ADA because it would give "an impermissible advantage to disabled workers to the detriment to non-disabled employees." 10 AD Cases 283, 286.

Respondent is entitled to summary judgment regarding claim 5.c) because reasonable accommodation under the Fair Employment Act does not require an employer to promote a disabled employee.

In claim 5.b), complainant contends his reinstatement was improper because it required him to commute much longer distances than in his former position. Complainant admits he accepted the *only* position, at the same or lower pay range, to meet his medical requirement that he have no contact with inmates.[5] There was simply no other position available and it is undisputed that he was unable to perform the responsibilities of his former position as a correctional officer. To the extent the complainant believes he had an absolute right under the Fair Employment Act to continue to work for DOC without commuting further than for his correctional officer position, he is incorrect. Section 111.34(1)(b), Stats., provides for "reasonable" accommodation and not more. There is no genuine issue of material fact based on the information at hand, and respondent is entitled to summary judgment as to this claim.

Complainant's first claim regarding his reinstatement is that his rate of pay should not have been reduced. However, it is undisputed that his pay on reinstatement was calculated according to his contract. He is unable to identify anyone who was reinstated to a position at a lower pay range yet was permitted to maintain his/her former rate of pay. Nothing in *McMullen* prohibits, as an accommodation, transferring an employee to another position at a lower rate of pay. Again, complainant admits he accepted the *only* position, at the same or lower pay range, to meet his medical requirement that he have no contact with inmates. There is no genuine issue of material fact based on the information at hand, and respondent is entitled to summary judgment as to complainant's rate of pay upon reinstatement.

Respondent DETF

Based upon all the submissions to date, the Commission is unable to identify any

[5] See page 26 of complainant's deposition.

claims that complainant wishes to pursue against DETF. The conference report from the prehearing conference on December 7, 2000, notes that complainant was "unable to clearly articulate" his claims. The examiner offered language from the Commission's August of 1999 ruling but gave complainant the opportunity to indicate if that language was accurate and, if not, to propose alternative language. The complainant's response[6] refers to DETF but does not specifically indicate complainant intends to contest an action by DETF. DETF then submitted its motion to dismiss. In the brief accompanying the motion, DETF noted:

> The DETF does not believe that the complainant's December 2000 letter substantially distinguishes or clarifies either his position or the issue statements for hearing. Accordingly, the DETF respectfully request that the Personnel Commission establish the two issue statements as set forth in the December 7, 2000 Conference Report as the issues for hearing.

The only reference to DETF in the two issues in the Conference Report is in issue 1.

> 1. Whether respondent DETF discriminated against complainant on the basis of disability when it failed to restore sick leave and vacation benefits used by complainant during 1997

Complainant filed a written response to the respondents' motions. The relevant portion of that response reads:

> This is in reference to the theft of my sick leave (415 hours), Saturday Legal Holiday (28 hours), vacation (80 hours), and personal holiday (8 hours). *The DETF is not responsible*. (Emphasis added.)

In light of his admission that DETF was not responsible for his use of leave, complainant has not identified any claims against DETF and it is appropriate to dismiss DETF as a respondent.

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[6] The relevant portions of complainant's December 21st letter are set forth on page 3 of this ruling.

ORDER

Respondent DETF is dismissed as a party.

Complainant is provided 20 days from the date this order is signed to supply information as specified in footnote 1 on page 18. If no such information is received, the Commission will grant DOC's motions to dismiss and its motion for summary judgment, as explained above.

Dated: May 24, 2001 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

KMS: 990098Crul1.2

JUDY M. ROGERS, Commissioner