

STATE OF WISCONSIN

PERSONNEL COMMISSION

\* \* \* \* \*  
 TERRY L. BURTON,  
                     Complainant,  
 v.  
 Secretary, DEPARTMENT OF  
 NATURAL RESOURCES,  
                     Respondent.  
 Case No. 82-PC-ER-36  
 \* \* \* \* \*

DECISION  
 AND  
 ORDER

NATURE OF THE CASE

Complainant filed a complaint of discrimination with the Commission on April 14, 1982, charging that the respondent had discriminated against him because of his handicap and/or creed. Following an investigation, an Equal Rights Officer issued an Initial Determination dated August 31, 1982, that there was no probable cause to believe that respondent had discriminated against complainant on the basis of his handicap and/or creed. Complainant filed an appeal of the Initial Determination on September 30, 1982. At a prehearing conference held on October 26, 1982, the matter was set for hearing on the following issue:

Whether there is probable cause to believe that respon-  
 dent discriminated against the complainant on the basis  
 of handicap and/or creed in terminating his employment.

This decision was prepared after the hearing was conducted and briefs were filed.

FINDINGS OF FACT

1. On March 6, 1978, complainant was hired as a Management Information Technician (MIT) by respondent. Complainant was based at the north central district office at Rhinelander and was supervised by Dale Urso.

2. Mr. Urso met with complainant on January 9, 1979, and advised him to get treatment for the alcohol problem which complainant admitted he "probably" had and told complainant his job would be in jeopardy if his absenteeism, tardiness, and inconsistent productivity continued. After this meeting, complainant met regularly with Mr. Urso to discuss his alcohol and physical problems and the progress he was making in dealing with these problems.

3. Complainant first acknowledged in the late spring of 1979 that he had an alcohol problem. Respondent granted complainant a 3-month leave of absence during the summer of 1979 to enable complainant to seek medical advice and treatment for his alcohol problem as well as for physical symptoms (numbness, loss of hearing, headaches, dizziness) he had been experiencing. As of the date that complainant's leave of absence commenced, complainant had used all his accumulated sick leave, personal holidays, and annual leave. Complainant returned to work after his leave of absence.

4. In December of 1979, complainant requested a lateral transfer to an MIT position at respondent's southern district office at Madison. Although Douglas Morrissette, the director of the southern district, was aware, through Mr. Urso and John Brasch, director of the north central district office, that complainant had an alcohol problem which had an

7. Complainant was not drinking during 1980 and his work was satisfactory during this time. In January of 1981, complainant began drinking again. Between January of 1981 and September 19, 1981, complainant used all of his accumulated sick leave, personal holidays, and annual leave -- a total of 276 hours of unanticipated and unscheduled absences. Complainant was the only MIT at the southern district office so these absences required that other staff be trained to assume some of his duties. None of the other staff were qualified to assume complainant's programming duties so this work could not be done if complainant were absent. During this period of time, complainant met with Mr. Stautz frequently to discuss his alcohol and other personal problems and the effect they were having on his work.

8. On June 5, 1981, complainant called Mr. Stautz at home and told him that he hadn't eaten for three days and was considering suicide. Complainant requested help and Mr. Stautz agreed to assist complainant in locating and enrolling in an alcohol treatment program. On June 10, 1981, complainant offered to resign. Mr. Stautz did not accept the resignation.

9. On June 8, 1981, Mr. Stautz, after consulting with local mental health experts, recommended that complainant enroll and participate in the Alcohol Prevention Education Center program at Madison General Hospital. Complainant agreed to participate in an interview with an APEC staff person and Mr. Stautz accompanied complainant to the interview. The APEC staff person advised Mr. Stautz that complainant could enroll on June 24, 1981. Mr. Stautz so advised complainant, and although complainant advised Mr. Stautz that he was uncomfortable with APEC's group approach to treatment, complainant did not indicate to Mr. Stautz that he intended not to enroll or participate. Mr. Stautz arranged for complainant's health insurance to

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APEC treatment. Primarily because of complainant's failure to acknowledge the need for APEC treatment, he was refused admission into the APEC program. Mr. Miller had advised complainant that he need not actively participate in group or spiritual rap sessions and that treatment could be successful without such active participation.

13. Upon being advised of his rejection by the APEC program, complainant contacted Mr. Stautz who came to the hospital to talk to Mr. Miller. Upon being advised of the reason for Mr. Miller's decision, Mr. Stautz advised complainant that discipline would probably be imposed. Complainant requested a 10-day leave of absence but Mr. Stautz denied the request.

14. In a letter dated September 17, 1981, respondent advised complainant that he was being suspended for ten days for failure to participate in the APEC program and that his employment status as of October 5, 1981, would be contingent upon his voluntary enrollment and participation in a treatment program acceptable to respondent.

15. When he returned to work on October 5, 1981, complainant advised Mr. Stautz that he would like to continue his treatment with Dr. Matkom. Respondent determined that this was not an acceptable treatment program because it was not adequately specific or structured. On or around October 5, 1981, complainant contacted Glenn Nelson, director of employment relations for the DNR. Mr. Nelson advised complainant that a termination letter dated October 5 had been prepared but that respondent had decided not to issue it pending submission of an acceptable treatment program.

16. On October 12, 1981, a meeting was held between Dr. Matkom, Mr. Nelson, Mr. Stautz, and complainant. Dr. Matkom advised Mr. Nelson and Mr.

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19. Later in the day on October 16, 1981, Mr. Stautz went to complainant's home to deliver a termination letter to complainant. Complainant refused to accept the letter and made threatening and abusive statements to Mr. Stautz. Mr. Stautz thereafter mailed the termination letter to complainant.

20. At all times relevant to this matter, complainant was an agnostic and was handicapped as a result of his alcoholism.

#### CONCLUSIONS OF LAW

1. This case is properly before the Commission pursuant to §230.45(1)(a), Wis. Stats., and § PC 4.03(3), Wis. Adm. Code.

2. The respondent is an employer within the meaning of §111.32(3), Wis. Stats.

3. The complainant has the burden to prove that there is probable cause to believe that respondent discriminated against him on the basis of his handicap and/or his creed in terminating him.

4. The complainant has not sustained his burden.

#### OPINION

There are three points essential to establishing that a person has been discriminated against in regard to employment due to a handicap:

1. The complainant must be handicapped within the meaning of the Wisconsin Fair Employment Act;
2. The complainant must establish that the employer's discrimination was on the basis of handicap; and
3. It must appear that the employer cannot justify its alleged discrimination under the exception set forth in §111.34(2)(a), Wis. Stats.

Boynton Cab Co. v. DILHR, 96 W2d 396, 291 NW2d 850 (1980); Squires v. LIRC, 97 W2d 648, 294 NW2d 48 (Ct. App. 1980).

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In an appeal of a no probable cause determination, a similar analysis is appropriate, although the ultimate burden on the complainant is less. The complainant need not establish that discrimination occurred, but rather, that there is reasonable ground for belief supported by facts or circumstances strong enough in themselves to warrant a prudent person in the belief that discrimination probably has been or is being committed. § PC 4.03(3), Wis. Adm. Code.

It is uncontroverted that alcoholism is a handicap within the meaning of the Wisconsin Fair Employment Act (Squires, supra), and that complainant was handicapped as a result of his alcoholism at the time of his termination.

The complainant must next prove that there is probable cause to believe that he was terminated because he was handicapped. The record clearly supports a finding that complainant was discharged primarily because of chronic absenteeism, tardiness, and low productivity. Complainant argues that these deficiencies resulted from complainant's handicap and, therefore, to terminate him on the basis of these deficiencies is discriminatory. Such reasoning is inconsistent with the language of §111.34(2)(a), Wis. Stats., that:

... it is not employment discrimination because of handicap to ... terminate from employment any individual ... if the handicap is reasonably related to the individual's ability to adequately undertake the job-related responsibilities of that individual's employment ...

and the finding of the Wisconsin Court of Appeals in Squires, supra, that the Fair Employment Act does not:

prevent an employer from discharging an employee who is an alcoholic and who because of his alcoholism is physically or otherwise unable to efficiently perform the duties required in his job.

Complaint further argues that:

1. the basis for the termination as set forth in the termination letter to complainant dated October 5, 1981, was complainant's failure to participate in certain alcohol treatment programs;

2. the termination letter does not mention deficiencies in complainant's work performance as bases for the termination;

3. since these treatment programs required by respondent were not reasonable because not tailored to complainant's unique treatment needs, failure to participate could not constitute insubordination and, therefore, failure to participate was not an allowable basis for the termination; and

4. it was discriminatory for respondent to base the termination on the failure of complainant to satisfy such unreasonable requirements since the imposition of such requirements was not a reasonable means of accommodating complainant's handicap.

First, respondent would not have required that complainant participate in these treatment programs but for the fact that his employment had been characterized by chronic absenteeism, tardiness, and low productivity. Complainant cannot plead lack of notice of these deficiencies as a result of the content of the termination letter since these deficiencies had been the subject of countless discussions between complainant and respondent over a period of several years. Complainant does not dispute the fact of the absenteeism, tardiness, and low productivity; nor his awareness that respondent was concerned about these deficiencies and the effect they were having on the agency, and required his participation in the programs in an effort to remedy the deficiencies; nor that complainant did not participate in these programs; nor that complainant and respondent understood that such participation was a condition of complainant's continued employment.

treatment by Dr. Matkom in 1981, up to the date of his termination. Respondent asked complainant to suggest alternative treatment programs. Respondent even accepted complainant's proposal to continue with Dr. Matkom but on a more structured and regular schedule. However, even this arrangement was not finalized because complainant decided not to sign an agreement to this effect which he had previously approved. Complainant alleges that he did not sign the agreement because he wanted a particular union representative to review it. In view of all the prior broken agreements and delays resulting from action or inaction on the part of complainant, it was not unreasonable for respondent to regard this as another broken agreement and another delay, particularly since complainant had never advised respondent, during the entire time that he and respondent had been discussing and attempting to deal with his alcohol problem, that he wanted union assistance, until the date he was scheduled to come in to the office to sign the agreement. Respondent had invested countless hours of valuable employee time and other agency resources in trying to help complainant deal with his alcohol problem. Respondent's proposals were rejected and complainant's treatment choices weren't working. Both the efforts that respondent had made to accommodate complainant's handicap and its decision that further accommodation would be inconsistent with the needs and priorities of the agency were clearly reasonable.

Complainant further alleges that respondent discriminated against him on the basis of his religious beliefs, i.e., because he was an agnostic, in the decision to terminate him. Complainant contends that he was not accepted into the APEC program in October of 1981 because his agnosticism

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prevented him from taking an active part in "spiritual rap" sessions and this rejection by APEC prevented him from complying with respondent's directive and was responsible for his termination. First of all, complainant was terminated primarily because of his chronic absenteeism, tardiness, and low productivity, not his failure to participate in the APEC program. This is illustrated by respondent's willingness to allow complainant to continue his treatment with Dr. Matkom, although on a modified basis relating to the structure not the substance of Dr. Matkom's treatment program, even after complainant's rejection by APEC. Second, complainant was rejected by APEC primarily because he indicated that he did not need the program. His proposal to passively participate in spiritual rap sessions was acceptable to APEC. There is no probable cause to believe that respondent's termination of complainant was based on his religious beliefs.

ORDER

This complaint is dismissed.

Dated: August 31, 1983 STATE PERSONNEL COMMISSION

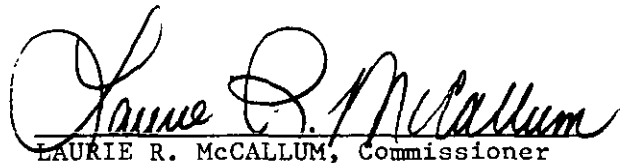
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