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 CARL BURNARD, \*  
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                   Complainant, \*  
 \*  
 v. \*  
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 Secretary, DEPARTMENT OF \*  
 ADMINISTRATION, \*  
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                   Respondent. \*  
 \*  
 Case No. 83-0040-PC-ER \*  
 \*  
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DECISION  
 AND  
 ORDER

NATURE OF THE CASE

This matter is before the Commission on an appeal pursuant to §PC 4.03(3), Wis. Adm. Code, of an initial determination of no probable cause, as to a complaint of handicap discrimination with respect to the respondent's failure or refusal to restore complainant to employment following leave without pay.

FINDINGS OF FACT

1. The complainant commenced employment with the respondent on October 24, 1974, as a Building Construction Superintendent, and continued in that capacity until he commenced a leave of absence without pay for medical reasons on January 29, 1979. At that time he was a Building Construction Superintendent 2.

2. During this period of employment as aforesaid, the complainant's overall work performance while he was on the job was generally good. The complainant had instances of unexcused absence and sleeping on the job.

3. The duties and responsibilities of appellant's position in summary were as follows, see Complainant's Exhibit 41:

Major job function is on-site supervision and inspection of the construction phase of State building projects to assure that they are constructed in accordance with the plans and specifications, within the budget and on schedule.

4. The nature of the aforesaid work and working environment in summary was as follows, see Complainant's Exhibit 37:

14. Position Summary

Work location is on various construction sites, where the work entails supervision and inspection of excavation, piping, scaffolding, carpentry, concreting, reinforcing and structural steel work, masonry, demolition, and many other operations which frequently are under hazardous construction conditions.

15. A. Quality Control

The BCS is an independent worker (without close, direct, daily supervision).

The BCS acts mostly on his own in tough, pressure situations, with public contractors. Daily the BCS is faced with making crucial engineering decisions in accepting or rejecting work. While construction is in progress, the BCS often conducts on-site tests, or gathers data for tests of construction materials and procedures.

The BCS must be self-motivating in a sometimes hostile environment of bad weather, difficult construction locations, and aggressive contractors.

B. Scheduling

As a construction representative for the State, the BCS must conduct himself gentlemanly, and coolly, in coordinating many contractors and subcontractors, who often have conflicting self-interests.

In helping to answer building problems and settling disputes, the BCS has to communicate readily with architects and engineers, as well as with contractors, material suppliers, and others in the building industry. The BCS is the key person in gaining cooperation among diverse prime contractors, while trying to maintain job progress.

The BCS is under constant pressure from project managers, owners, A/E's, contractors, supervisors, and the public, to keep the construction activities under control and on schedule.

5. During the aforesaid period of employment, there were a few disagreements between the complainant and his immediate supervisor, but these were not of a nature that would suggest a discriminatory animus with respect to handicap or perceived handicap on the part of the supervisor. The complainant's specific contentions and the commission's findings thereon are as follows:

The complainant alleges that Mr. Widen told the complainant on or about January 24, 1979, "Get your head screwed on straight;" that he told complainant around November 1978, that he did not consider complainant capable of taking on new assignments; that the complainant requested more work and/or new assignments, that around November 1978, he told complainant that he was going to be assigned a new building project, and that two or three days later he told the complainant that he would not be so assigned; that when complainant told Mr. Widen that he was consulting with a psychiatrist, Mr. Widen advised him not to do so; that Mr. Widen told complainant about April, 1975, that the complainant's six month probationary period could be extended; that Mr. Widen told the complainant that he was not being fair to his peers because Mr. Widen felt he could not assign more work to the complainant; that Mr. Widen told the complainant on or about January 22, 1979, that he did not approve of the way the complainant was living his life; that he told the complainant on or about October, 1978, that his firing had been considered for a year; and that Mr. Widen testified that wage raises were entirely a contractual matter, when, according to the complainant, Mr. Widen as Building Construction Superintendent III had authority over merit raises.

The Commission finds that the foregoing occurred as alleged by the complainant except for the allegations that Mr. Widen told the complainant to get his head screwed on straight, or words to that effect, that he advised the complainant not to see a psychiatrist, and that he told the complainant that he did not approve of the way he was living his life.

6. During the aforesaid period of employment, the complainant took leaves of absence in connection with hospitalizations which occurred November 14, 1977 - December 12, 1977, July 18, 1978 - July 23, 1978, and October 7 - October 8, 1978. Although at least part of these periods of hospitalization were associated with treatment for alcoholism, this diagnosis was doubtful. During one of these periods, he was involved in an alcoholism treatment program at the Madison General Hospital. In connection with this program, his immediate supervisor, Mr. Widen, attended evening sessions with the complainant. Mr. Widen did this on a personal basis, as opposed to as part of his job as a supervisor.

7. For a period of his last leave of absence, which began in January, 1979, the complainant was a client of the Division of Vocational Rehabilitation (DVR), and was involved in a program to provide him with work experience as a part of a program of rehabilitation.

8. As a part of this program, he worked from March-July, 1980, in a position made available by the Division of Facilities Management, DOA, as a Building Construction Contract Payment Processor. This work experience did not involve the payment of a salary by DOA. The work was clerical in nature at a considerably lower level than the complainant's Building Construction Superintendent job. There were occasions when the complainant failed to show up at work without notice, and he made an excessive number of careless

clerical errors in his work. His overall performance was such that if he had been a probationary employe, his supervisor would not have recommended his retention on a permanent basis.

9. During the aforesaid period, the complainant also was given a limited amount of work, under close supervision, involving building construction inspection in the field. However, the complainant did not respond to simple directions, and his performance generally was inadequate.

10. In September, 1979, the complainant was a client of the Division of Vocational Rehabilitation (DVR) in the Department of Health and Social Services (DHSS). The respondent and DVR consulted, and it was determined to permit the complainant to work as a building construction inspector on a half-time basis at a local construction project at Central Wisconsin Center. However, the complainant ultimately declined to participate.

11. By letter dated January 7, 1981, from the DOA personnel director, Patricia Kramer, Respondent's Exhibit 2, the complainant was advised, in part, as follows:

Your leave of absence from your position as Building Construction Superintendent 2 with the Wisconsin Department of Administration expired on December 31, 1980. Your leave was granted for illness.

We have not heard from you regarding your interest and ability to return to full-time employment as a Building Construction Superintendent, nor have we received a request from you to extend your leave of absence. If we do not hear from you by January 25, 1981, we will assume that you have resigned your position with the Department of Administration. Your resignation date formally would be December 30, 1980.

12. The complainant on January 23, 1981, verbally indicated that he wished to return to work. By letter dated January 26, 1981, from Ms. Kramer, Respondent's Exhibit 3, the complainant was advised in part as follows:

... the seriousness and length of your illness causes us to request medical and professional concurrence of your ability to perform your job functions. Therefore, Daniel Hilgendorf, Construction Superintendent

Supervisor, will call you earlier during the week of February 2, 1981, to make arrangement for those reports.

In the meantime, we will extend your leave of absence for medical reasons until you return. We will make this extension, unless we hear from you otherwise.

13. The complainant did not specifically tell the respondent not to extend his leave of absence and his leave of absence in effect was extended as aforesaid.

14. Subsequently, Mr. Hilgendorf received a letter dated February 20, 1981, from Dr. Brooke J. Thorner, a resident psychiatrist at the University of Wisconsin Center for Health Sciences, Respondent's Exhibit 4. This letter contained the following:

As you know I have been treating Mr. Carl Burnard, since September of 1979, for a mental disorder which left him unable to satisfactorily perform his job. Symptoms of this have in the past included paranoia, thought disorganization and depression. While these symptoms have greatly been alleviated by treatment, he is left with some residual paranoid feelings which may interfere with his functioning interpersonally. He also, at times, becomes quite anxious which hinders his ability to concentrate.

I understand that Mr. Burnard is again requesting employment with your department. Unfortunately, I am unable to provide any hard data as to whether he will be able to successfully perform his previous job responsibilities. However, his improvement over the past several months has been considerable, and he is continuing to make gains. In my opinion the only true test of his capabilities is one where he is again given the opportunity to work, and I support this.

If I can be of any further help, please feel free to contact me.

15. Because he felt this letter was too indefinite concerning the complainant's ability to return to work, Mr. Hilgendorf contacted Dr. Thorner by telephone on March 23, 1981. She indicated that his condition had changed since she wrote the aforesaid letter, that the change was not an improvement, and that he had quit taking medication. She conveyed the impression that he wasn't ready to go back to work.

16. By letter dated March 24, 1981, Respondent's Exhibit 6, Mr.

Hilgendorf informed the complainant in part as follows:

Our last contact with you was the telephone call you made from out-of-town, at which time you were told we still had no positive indication that you were ready to return to work.

We have no evidence of any change in the situation and are not planning to have you return to work at this time.

17. Subsequently, the respondent was informed of the termination of the complainant's social security benefits based on a determination, that he was no longer disabled, in a letter from complainant's attorney dated May 21, 1981, Respondent's Exhibit 7, which stated in pertinent part as follows:

As you are aware, Mr. Burnard would like to resume his employment with the State of Wisconsin, and has asked us to review his employment history and the circumstances under which he obtained a leave of absence in 1979.

Further, we wish to inform you that the Social Security Administration has terminated Mr. Burnard's disability benefits on the ground that he is no longer disabled. This has resulted in substantially reducing Mr. Burnard's income and, consequently, it appears that he would be entitled to return to work as his disability has ceased to exist.

Although this effective date was not stated in this letter, the complainant's social security disability benefits had been terminated as of December 31, 1980.

18. Thereafter, Ms. Kramer responded to the aforesaid letter by letter dated June 19, 1981, to complainant's attorney. Respondent's Exhibit 8, which contained, in part, the following:

We are interested in having Mr. Burnard return to his position as a Building Construction Superintendent. However, the seriousness and length of his illness cause us to request a medical statement, prior to his return to work, to support that he is able to perform his job functions. We make this request because of our concern for Mr. Burnard's safety, and that of others, on the job.

The Department of Administration will pay fees necessary to obtain the medical statement. Please let us know where Mr. Burnard would like to

have the medical examination given. We will try to identify a doctor and make arrangements which are convenient for Mr. Burnard.

19. Subsequently, Mr. Burnard responded in a letter dated June 29, 1981, Respondent's Exhibit 9, as follows:

Time and location for obtaining medical statement are entirely up to you.

20. Thereafter, Ms. Kramer arranged an examination with Dr. Brown, a psychiatrist. However, this appointment was cancelled after a July 13, 1981, telephone conversation wherein the complainant told Ms. Kramer that Dr. Brown was unacceptable because he previously had been examined and diagnosed<sup>1</sup> by Dr. Brown, and the complainant felt that this constituted somewhat of a conflict of interest. He and Ms. Kramer concurred that he should not be required to be examined by Dr. Brown. He indicated that he would prefer that Ms. Kramer select another doctor and get back to him.

21. Nothing further was done by the respondent to arrange a further examination. The complainant did not contact the respondent any further until June 14, 1982, when he submitted the following resignation:

Tendered herewith is my resignation based upon personal reasons.  
Respondent's Exhibit 10.

22. The respondent accepted this resignation by letter dated June 23, 1982: "We accept your resignation dated June 14, 1982, for personal reasons." Respondent's Exhibit 11.

23. The reason complainant resigned was because he had no money, and the resignation enabled him to obtain the funds credited to him in his retirement account.

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<sup>1</sup>The words "as alcoholic" have been deleted after the word "diagnosed" in the final draft in order to conform to the record, following consultation with the examiner and examination of the hearing record.



24. The reason the respondent did not restore the complainant to employment was because of a belief that he was not capable of safely and effectively performing the duties and responsibilities of his employment.

25. During the period from the commencement of the complainant's final leave of absence on January 29, 1979, until his resignation in June 1982, the complainant was unable to efficiently perform at the standards set by the employer, the duties and responsibilities required of a Building Construction Superintendent.

#### CONCLUSIONS OF LAW

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

2. The complainant has established that there is probable cause to believe he was handicapped under the Fair Employment Act and that the respondent did not re-employ him because of that handicap.

3. The respondent has established that its failure to re-employ the complainant was "reasonably related to the individual's ability to adequately undertake the job-related responsibilities of [his] employment," §111.34(2)(a), Stats., and that there was no reasonable accommodation of the complainant's handicap available.

4. There is no probable cause to believe that the respondent discriminated against the complainant because of handicap or perceived handicap in failing or refusing to re-employ him following his leave of absence that commenced in January 1979.

#### OPINION

In Samens v. LIRC, 117 Wis. 2d 646, 345 N.W. 2d 432 (1984), the Supreme Court set forth the method of analysis of a charge of handicap discrimination under the Fair Employment Act (FEA). The framework is supplied by a three-part test:

(1) That the individual is handicapped within the definition of the FEA, (2) that the individual has shown that the employer's discrimination was because of the handicap, and (3) that the employer's action was not legitimate under sec. 111.32(5)(f), Stats. 117 Wis. 2d at 658.

This is the approach that must be followed here, although in the context of whether there was probable cause, as defined in §PC 4.03(2), Wis. Adm. Code, to believe that discrimination occurred.

In this case, there is no question that the complainant was handicapped due to mental illness. The respondent's action in refusing to restore the complainant to his position was based on the perception that because of his mental illness he could not effectively and safely discharge the duties and responsibilities of his employment. The real question is whether the respondent's action was legitimate under §111.32(5)(f), Stats.

The Court's discussion of the third element included the following:

... the act was not intended to force employers to hire a handicapped individual in all situations... This concern is embodied in sec. 111.32(5)(f), which reads as follows:

'The prohibition against discrimination because of handicap does not apply to failure of an employer to employ or to retain as an employe any person who because of a handicap is physically or otherwise unable to efficiently perform at the standards set by the employer, the duties required in that job....' <sup>1</sup> 117 Wis. 2d at 661.

Typically, the application of this statute has involved situations where the employe or prospective employe could for the most part accomplish the day-to-day tasks required of the employment, but where the presence of a handicap, such as epilepsy, raises concerns about possible safety hazards.

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<sup>1</sup> Pursuant to Laws 1981, ch. 334, this provision is now §111.34(2)(a), Stats.: "...it is not employment discrimination because of handicap to refuse to... employ... 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...."

However, the plain language of §111.34(2)(a), Stats., as well as the reported cases, make it clear that inability to perform the tasks of employment is a reasonable basis for the refusal of employment.

In this case, the respondent refused to restore the complainant to employment because it believed both that he was unable to effectively discharge the required duties and responsibilities and that his employment would be unduly hazardous. The latter factor involved both public safety, which is inherent in the basic nature of the employment inspection of public works -- as well as the possible hazards to the complainant working on construction sites. There is no need to reach the question of the legitimacy of the safety concerns if it is determined that the complainant could not have performed the job effectively, as this above would be a basis for a conclusion of non-discrimination under §111.34(2)(a), Stats., See, Bucyrus-Erie Co. v. ILHR Department, 90 Wis. 2d 408, 423-424, 280 N.W. 2d 142 (1979); Samens v. LIRC, 117 Wis. 2d 646, 662, 345 N.W. 2d 432 (1984).

In this case, the complainant was given a leave of absence because of mental illness. Over a year later he participated in a vocational rehabilitation program which involved performing some work for the respondent. He was not able to adequately perform either work of a much lower level than that of his prior job, or limited work at a similar level. Not long after that, he requested a return to his prior employment. At this time, the respondent received a letter from Dr. Thorner (Respondent's Exhibit 4), which could not reasonably be construed as an indication that the complainant was well enough to perform his prior duties and responsibilities.

As you know I have been treating Mr. Carl Burnard, since September of 1979, for a mental disorder which left him unable to satisfactorily perform his job. Symptoms of this have in the past included paranoia, thought disorganization and depression. While these symptoms have greatly been alleviated by treatment, he is left with some residual paranoid feelings which may interfere with his functioning interpersonally. He also, at times, becomes quite anxious which hinders his ability to concentrate.

I understand that Mr. Burnard is again requesting employment with your department. Unfortunately, I am unable to provide any hard data as to whether he will be able to successfully perform his previous job responsibilities. However, his improvement over the past several months has been considerable, and he is continuing to make gains. In my opinion the only true test of his capabilities is one where he is again given the opportunity to work, and I support this. (emphasis supplied)

Furthermore, when Mr. Hilgendorf followed upon this with a phone call to Dr. Thorner, which occurred about a month later, her assessment of the complainant was more negative and indicated he had declined since the time of the letter.

The respondent at this point had no reasonable basis to expect that the complainant could adequately discharge the duties and responsibilities of his position, nor can the Commission conclude on the basis of the record made at the hearing that the complainant had such a capability.

The complainant has cited the determination by the Social Security Administration at the end of 1980 to terminate his disability benefits on the ground that he was no longer disabled. He testified that the basis of this determination was a conclusion that he was "employable." Since federal law defines disability as the "...inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment...", (emphasis supplied) 42 United States Code §§416 (1)(1), 423(d)(1)(a), it cannot be determined on this record whether the Social Security Administration decision was based on the conclusion that he was

employable in his old job, or whether he was employable in some other "substantial gainful activity."

On July 13, 1981, the complainant told Ms. Kramer that he did not want to be examined by the psychiatrist selected by the respondent. Ms. Kramer testified that she did not recall what followed in the conversation. The complainant testified that he asked her to select another psychiatrist and to notify him, and the commission's finding reflects this description of the conversation. Thereafter, there was no further contact between the parties until the complainant's resignation in June, 1982.

The respondent's failure to have arranged another examination of the complainant must be evaluated in the context of the third element of a handicap discrimination case -- whether the employer's action is justifiable under the exception to handicap discrimination, as set forth in §111.34(2)(a), Stats.

As discussed above, after Mr. Hilgendorf received the February 20, 1981, letter from Dr. Thorner, and had the March 23, 1981, conversation with her, it was reasonable for the respondent to have concluded that the complainant was suffering from a handicapping mental illness that was "reasonably related to the [complainant's] ability to adequately undertake the job-related duties of [his] employment...." In the opinion of the Commission, the respondent had no legal obligation at that time under the Fair Employment Act to have arranged another examination. It more or less follows that there was no obligation in the context of the Fair Employment Act to have arranged yet another examination after the complainant declined to be examined by Dr. Brown. Furthermore, based on the record made at the hearing, there is no basis for the Commission to have concluded that the complainant was capable

of performing the work in question at any time prior to his resignation in June of 1982.

The Fair Employment Act provision on handicap discrimination, imposes an obligation of reasonable accommodation:

(1) Employment discrimination because of handicap includes, but is not limited to:

\* \* \*

(b) Refusing to reasonably accommodate an employe's or prospective employe's handicap unless the employer can demonstrate that the accommodation would pose a hardship, on the employer's program, enterprise or business.

See also, Kleiner v. DOT, 80-PC-ER-46 (1/28/82).

Therefore, even in a case such as this, where the record reflects that the complainant was unable to adequately perform the job, the respondent still has a duty of accommodation, if an accommodation were possible and would not result in a "hardship" on the agency's program. Furthermore, it appears from the wording of the aforesaid subsection that the burden of proof with respect to the issue of accommodation is on the respondent/employer. Compare, Prewitt v. United States Postal Service, 27 FEP Cases 1043, 1054-1055 (5th Cir. 1981):

"The relevant EEOC regulation, 29 C.F.R. §1613.704, provides:

'(a) An agency shall make reasonable accommodation to the known physical or mental limitations of a qualified handicapped applicant or employee unless the agency can demonstrate that the accommodation would impose an undue hardship on the operation of its program.'

\* \* \*

Thus, under subsection (a) of this provision, the burden of proving inability to accommodate is upon the employer. The administrative reasons for so placing the burden likewise justify a similar burden of proof in a private action based upon the Rehabilitation Act. The employer has greater knowledge of the essentials of the job than does the handicapped applicant. The employer can look to its own experience, or if that is not helpful, to that of

other employers who have provided jobs to individuals with handicaps similar to those of the applicant in question. Furthermore, the employer may be able to obtain advice concerning possible accommodations from private and government sources....

Although the burden of persuasion in proving inability to accommodate always remains on the employer, we must add one caveat. Once the employer presents credible evidence that indicates accommodation of the plaintiff would not reasonably be possible, the plaintiff may not remain silent. Once the employer presents such evidence, the plaintiff has the burden of coming forward with evidence concerning his individual capabilities and suggestions for possible accommodations to rebut the employer's evidence.

As a practical matter, the respondent produced evidence of possible accommodation in connection with its involvement with DVR in providing work experiences for the complainant, while he was on leave of absence, as part of his rehabilitation program. The appellant was placed in a clerical position substantially below the position he filled before he commenced his leave of absence. He also was given some work that was equivalent to his prior job, but on a half-time basis and under close supervision. These are the kinds of things that might have been considered as at least possible accommodations following restoration. However, the complainant was unable to perform adequately in these situations. He has not suggested other means of accommodation. Based on the record before the Commission, it can only be concluded that the respondent did not fail in its statutory duty of accommodation.

The complainant has cited many particular incidents that he contends are probative of a bias or prejudice against him by the respondent's agents because of his handicap or perceived handicap. The most significant of these are with respect to Mr. Widen, the complainant's immediate supervisor. The Commission's specific findings with respect to these allegations are set forth in the findings of fact, above.

The Commission has considered all of the complainant's arguments in this area, as set forth in his post-hearing brief filed with the examiner. However, it does not feel it is necessary to address specifically each of these individual arguments -- suffice it to say that the great weight of the evidence supports the conclusion that the respondent's only concern with respect to re-employing the complainant was with his ability to do the job. The suggestion of bias or prejudice is also inconsistent with such things as its failure to have disciplined the complainant in connection with the undisputed instances of his absences and sleeping on the job, Mr. Widen's voluntary participation with the complainant in the alcoholism treatment program at Madison General, and the respondent's cooperation with DVR in providing a placement for the complainant, and arranging for him to perform work similar to his previous experience.

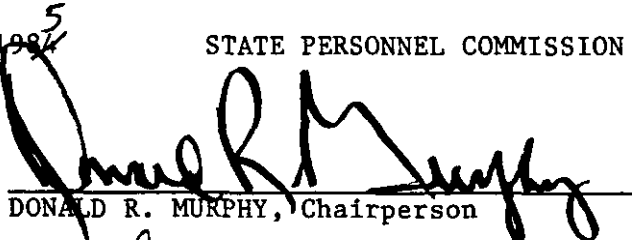


ORDER

The Commission having found that there is no probable cause to believe that the respondent discriminated against the complainant, this appeal is dismissed.

Dated: Jan-30, 198<sup>5</sup>

STATE PERSONNEL COMMISSION

  
DONALD R. MURPHY, Chairperson

  
LAURIE R. McCALLUM, Commissioner

  
DENNIS P. MCGILLIGAN, Commissioner

AJT:jmf  
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