

STATE OF WISCONSIN

PERSONNEL COMMISSION

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ROBERT PARRISH,

Complainant,

v.

Secretary, DEPARTMENT OF HEALTH
AND SOCIAL SERVICES [DEPARTMENT
OF CORRECTIONS],

Respondent.

Case No. 87-0098-PC-ER

* * * * *

DECISION
AND
ORDER

This matter is before the Commission on complainant's charge that respondent discriminated against him because of his handicap, in violation of the Wisconsin Fair Employment Act, §111.321-.395, Stats., when it discharged him. The following findings of fact, conclusions of law, decision and order are based upon the record made at a hearing on complainant's charges of discrimination against respondent. To the extent any of the decision might constitute findings of fact, it is adopted as such.

FINDINGS OF FACT

1. At all times relevant to this matter, complainant was employed by respondent as a Maintenance Mechanic 2 with Oshkosh Correctional Institution (OCI).
2. The respondent, the Department of Health and Social Services, is a state agency. When complainant was an employe there, it was responsible for providing a variety of health and social services including corrections.
3. In the fall of 1986, complainant applied for a Maintenance Mechanic 2 (MM2) position at OCI. He indicated on his job application form that he was handicapped and a veteran of military service.
4. The Department of Employment Relations (DER) listed complainant's name under the veterans preference heading and not the handicapped expanded cert listing on its Maintenance Mechanic 2 certification. To the left of the listing of complainant's name was the letter H, indicating complainant

had identified himself as handicapped, but he had not provided medical verification nor had it been requested.

5. Complainant was one of four applicants interviewed for the MM2 position at OCI. The three-member interview panel was not provided the DER certification list nor any information regarding the health of the applicants.

6. Complainant told the interview panel that he had developed a problem with his right arm while employed at Kimberly Clark, that currently it was much better and that it would be all right with proper care. This comment was noted by one of the panelists in his interview notes.

7. Complainant said he told the interview panelists he was hard of hearing, but none recalls him making that comment.

8. Complainant was selected and hired for the MM2 position on November 24, 1986. As a new employe, he was required to serve a six month probationary period, before becoming a permanent employe.

9. In summary, the description of complainant's position as indicated in his position description was as follows: This position, under the supervision of the Superintendent of Buildings and Grounds, is responsible for minor repairs and preventive maintenance work on mechanical machinery at Oshkosh Correctional Institution, a 300 bed medium security adult male institution. Work involves the inspection and analysis of equipment malfunctions, and the repair of appliances, refrigeration, heating, ventilating, and related equipment. This position provides supervision and training of inmates in mechanical maintenance and repair work assignments.

10. The majority of complainant's work involved minimal heavy work. On occasion the work might require the ability to lift 25 to 30 pounds.

11. Complainant, like other maintenance personnel, normally had at least two inmates assigned to him as trainee/help. These inmates were available to do any heavy work for complainant.

12. Complainant was supervised by Karl Peterson, Superintendent of Buildings and Grounds and Curt Bernd, Assistant Superintendent of Buildings and Grounds. Bernd was complainant's immediate supervisor.

13. Complainant worked with five other employes in the OCI maintenance department.

14. Maintenance department employes received work assignments through job orders. Maintenance received job orders from other OCI depart-

ments. These job orders were reviewed and approved by Mr. Peterson, then logged in by Mr. Bernd. Mr. Bernd would then place the job orders in the job order assignment box for the particular craft or maintenance function. As the work was completed, the employe would return, file the order as completed and pick up a new job order assignment.

15. Shortly after complainant began work at OCI, complainant's supervisor, Mr. Bernd, became dissatisfied with complainant's work performance. Bernd believed complainant was trying to do as little work as possible.

16. In February 1987, Mr. Bernd started taking notes on complainant's work performance. Between February 26, 1987, and March 19, 1987, Bernd noted several incidents of inappropriate work behavior by complainant. They are as follows:

On February 26 complainant took twice as long as necessary to install gun rack locking device on a particular patrol vehicle. After completing that assignment at 9:30 a.m., complainant failed to obtain additional work assignments from his supervisor for the remainder of the day.

On March 5, supervisor directed complainant to obtain a part number of a cartridge on an air compressor in another building. This was a fifteen minute job, which took complainant an hour to complete. Complainant was found in the kitchen break room drinking coffee by Mr. Peterson, who directed him back to the shop.

On March 6, complainant spent all morning cleaning air handlers and air compressors, a job which could be done in a much shorter time. Later at 2:30 p.m., complainant and another employe were assigned to put a loader on a tracker, a job which normally would take one half hour. They returned at 4:00 p.m.

On March 9, complainant was assigned to relight certain pilot lights. It took complainant two hours to complete an hour job.

On March 19, at approximately 3:30 p.m. as complainant's supervisor was driving up to C-Building, he observed complainant leaning against a pipe conversing with an inmate. When complainant saw his supervisor he began to get busy, moving quickly, as if working.

All of these job assignments were light-duty work.

17. After March 19, 1987, Mr. Bernd stopped making written notes of complainant's work performance. At that point, Bernd's supervisor, Karl Peterson, was aware of complainant's work performance and began counseling complainant through the practiced method of Performance

Planning and Development Reports (PPD's). Bernd continued to supervise complainant and advise Peterson of his observations of complainant's work performance. Over the next months prior to complainant's termination, Bernd noticed little change in complainant's work habits.

18. On several occasions between March 16, 1987 and May 22, 1987 — the date complainant was terminated — Karl Peterson had conferences with complainant to discuss complainant's work performance. Some of the noted meetings were as follows:

March 16, 1987, Peterson met with complainant and discussed two PPD's, covering complainant's work performance from the date of his hire to the date of the meeting. March 20, 1987, Peterson talked with complainant about his slowness in completing work assignments and returning to the shop for new assignments. Peterson also instructed complainant to stop harassing other employees.

March 27, 1987, Peterson admonished complainant about his failure to closely supervise his inmate assistants.

April 10, 1987, Peterson talked with complainant about his advice to other employees not to work so hard; his remarks to food service staff to obtain food and his inability to trouble shoot problems.

On May 14, 1987, Peterson talked with complainant about his failure to detect a gas meter by-pass valve was open, causing erroneous gas consumption readings; and his failure to determine an aerator was plugged, causing a faucet in Tower 4 to work poorly.

19. On May 22, 1987 Peterson met with complainant to discuss his final probationary PPD. In the PPD, Peterson noted that complainant continued to be unable to troubleshoot and make simple repairs. Complainant's written response included the comment that after being hired he developed bad hearing and a disability with his elbows.

20. Later on May 22, 1987, after a meeting, complainant was given a letter of termination. In the letter, respondent referred to complainant's failure to perform up to expectations or standards.

CONCLUSIONS OF LAW

1. This Commission has jurisdiction over these parties and these matters pursuant to §230.45(1)(b), Stats.

2. Complainant has the burden of proving respondent discriminated against him, on the basis of handicap, in violation of the Wisconsin Fair Employment Act (WFEA) with respect to its discharge of him.

3. Complainant has failed to meet his burden of proof.

4. Complainant was not discriminated against by respondent, on the basis of handicap, in violation of the WFEA in regard to his discharge.

OPINION

The complainant in handicap discrimination cases brought under the Wisconsin Fair Employment Act has the initial burden of proof as expressed in McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973). If respondent articulates a non-discriminatory reason for its action, complainant has the ultimate burden of proving respondent's articulated reason was a pretext and discrimination occurred. The Commission, in Harris v. DHSS, No. 84-0109-PC-ER, 85-0115-PC-ER (2/11/88), subscribed to a method of reviewing handicap discrimination cases, which is as follows:

- 1) Whether the complainant is a handicapped individual;
- 2) Whether the employer discriminated against complainant because of handicap;
- 3) Whether the employer can avail itself of the exception to the proscription against handicap discrimination in employment set forth at §111.34(2)(a), Stats. — i.e., whether the handicap is sufficiently related to the complainant's ability to adequately undertake the job-related responsibilities of his other employment.

Section 111.32(8) Stats. defines a "handicapped individual" as: an individual who:

- (a) Has a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work;
- (b) Has a record of such impairment; or
- (c) Is perceived as having such an impairment.

Complainant alleges he is handicapped by a hearing deficiency and tendonitis of both elbows.

In regard to complainant's alleged hearing handicap, no medical evidence was presented which established complainant had a hearing handicap as defined in WFEA. Complainant testified that his physician determined he had normal hearing in speech frequencies in the right ear and a slight loss in the left ear but not to the level of disability in terms of communicating with others. However, two of complainant's witnesses who also had hearing

problems, testified they believed complainant had difficulty hearing. Other witnesses, including one called by complainant, testified they never noticed complainant having any hearing difficulty when he worked with them. Complainant's immediate supervisor testified that complainant never complained of having a hearing problem and he saw no evidence of it. The unit supervisor (Superintendent of Buildings and Grounds), who frequently met with complainant to discuss complainant's work performance, testified complainant mentioned an inability to hear only once, in connection with his reason for failing a training course. At that time, complainant described the hearing problem as a condition caused by the flu. There was no evidence that complainant's supervisors were aware of complainant having a handicapping hearing condition until he informed his unit supervisor and others at the termination meeting. Complainant never filed a Handicap Self-Identification Survey form or used sick leave during his employment with respondent.

The Commission believes complainant failed to present sufficient evidence to establish that he had a hearing handicap, as handicap is defined in WFEA, during his employment with respondent; or that his supervisors perceived him as having a hearing handicap.

Complainant's claim of a problem with his right arm was known to respondent. At the job interview complainant told the interview panel of a previous problem with his arm, but said it was currently much better. A medical report, Appellant's Exhibit 10, indicates that in 1979 complainant underwent surgery to relieve persistent pain in his right elbow and that the pain reoccurred in 1982 along with some wrist pain. No other treatment on complainant's elbow was documented until December 29, 1986, when complainant was given an injection of Cortisone, Xylocaine and placed on a non-steroidal anti-inflammatory medication for tenderness in his left elbow. The anti-inflammatory medication was refilled periodically over the next year but complainant was not examined again until November 30, 1987. At that time, complainant's hand strength and reflexes were reported to have been "okay."

Complainant testified to wearing an arm band to support his arm, but said few people saw it because he was wearing long sleeve shirts. Seven employees, including two of complainant's witnesses and his two supervisors, all testified they were unaware complainant had any problems with his arms and never saw him wearing an arm support during his employment at OCI. Only

one witness, who said he wore a similar arm support, testified he observed complainant wearing an arm brace for a period of a week or more. Both he and complainant testified the unit supervisor made a remark about "a couple of cripples" when he saw them wearing arm supports. This reported remark was denied by the unit supervisor. Complainant never complained of any arm problem to his supervisor or declined to accept a job assignment because of physical discomfort in his arms.

The evidence shows complainant had surgery on his right arm in 1979 and experienced reoccurring pain in his arm and wrist in 1982. Except for complainant's comments of problems with his arms, no other medical evidence was presented about his right arm. The evidence shows complainant had no medically reported problem with his left arm from 1982 until December 1986, when he was injected with Cortisone, Xylocaine and provide a multi-fill prescription for anti-inflammatory medication. A November 11, 1987 medical examination of complainant's arms by his doctor resulted in an evaluation of "okay." From this evidence, the Commission would have to conclude that complainant did not meet his burden of proving he was handicapped or was perceived by respondent to be handicapped in regard to a disability with his arms.

If, contrary to the Commission's view, complainant did prove he was handicapped on the basis of both or either of the allegations, he failed to prove respondent discharged him for that reason. The clear evidence shows respondent discharged complainant because he failed to perform at the expected job performance level of a Maintenance Mechanic 2. In particular, the evidence shows respondent discharged complainant because his supervisors believed he was unable to determine the causes of mechanical breakdowns, he took too long to complete a job assignment, he did not perform jobs completely or accurately and he had a poor work attitude. Also, the evidence shows complainant received his work assignments in writing and most of the cited incidents of poor work performance involved the need for minimal physical strength. In addition, the evidence shows respondent was dissatisfied with complainant's supervision of inmate assistants and his violation of OCI policy, forbidding employe consumption of institution food, by going to the kitchen and obtaining coffee and donuts.

Complainant presented little evidence to establish respondent's stated reasons for discharging him were pretextual. Complainant's rejoinder consisted mainly of testimony, giving reasons for his actions which gave rise to the unsatisfactory job performance rating. The reasons given by complainant for his inadequate job performance did not include comments about failing to hear work instructions or not having enough strength in his arms to carry out work assignments.

In summary, complainant established that he had some hearing loss and some problems with his arms, but he failed to prove that these deficiencies were handicaps as defined in the Wisconsin Fair Employment Act. Had complainant shown he was handicapped, he failed to prove respondent discharged him for reasons related to any of his alleged handicaps. The clear evidence shows respondent's action was based upon complainant's unsatisfactory job performance. Complainant failed to show that he was handicapped, that he was discharged by respondent because he was handicapped, or that there was a link between his unsatisfactory work performance and his alleged handicap. Since complainant failed to make this showing, the Commission need not proceed to the third step of the Harris analysis.

For the reasons stated above and based on the record, the Commission must dismiss complainant's appeal.

ORDER


Complainant's charges of handicap discrimination in this matter against respondent are dismissed.

Dated: Order 23, 1990

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

DRM:gdt/2


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

Parties:

Robert Parrish
W7167 F.L. 2
Menasha, WI 54952

Stephen Bablitch
Secretary, DOC*
P.O. Box 7925
Madison, WI 53707

*Pursuant to the provisions of 1989 Wis. Act 31 which created the Department of Corrections, effective January 1, 1990, the authority previously held by the Secretary of the Department of Health and Social Services with respect to the position(s) that is the subject of this proceeding is now held by the Secretary of the Department of Corrections.