

* * * * *

GRANT KELLER,
 Complainant,

v.

Chancellor, UNIVERSITY OF
 WISCONSIN - Milwaukee,
 Respondent.

Case No. 90-0140-PC-ER

* * * * *

DECISION
 AND
 ORDER

This matter is before the Commission on a charge by complainant Grant Keller that the University of Wisconsin - Milwaukee terminated his employment with them in December 1989, because of his handicap, in violation of the Wisconsin Fair Employment Act, Subch. II, Ch. 111, Wis. Stats. The following is based on a hearing on complainant's complaint of discrimination.

FINDINGS OF FACT

1. The complainant, Grant Keller, was first employed by the State of Wisconsin as a Sheet Metal Worker at the University of Wisconsin - Milwaukee (UWM) June 2, 1979.
2. Keller worked at UW-Milwaukee continuously until 1983 when he was laid off.
3. In June 1986, Keller was recalled to work as a Limited Term Employee, then later returned to permanent status in August 1987.
4. In September 1987, Keller had a stroke and was hospitalized for six weeks.
5. During that period Keller began rehabilitative exercises and continued them after leaving the hospital.
6. The exercises included walking 2 to 4 hours a day, stair steps, bench presses, overhead presses, and arm curls, both single and double.
7. The stroke affected the left side of Keller's body and caused him to use a cane in 1987 and 1988.

8. As a consequence of his rehabilitation program, Keller progressed to the point where he could bench press up to 80 pounds, overhead press 40 pounds, single arm curl 16 pounds and double arm curl 30-35 pounds.

9. In February 1987, Dr. Richard Hodach, Keller's doctor, a neurologist, who oversaw his rehabilitation, by letter advised UWM that Keller could return to work provided he did not climb too high on ladders or do any work on the roof of a building.

10. In response to Dr. Hodach's letter, Loren Kohel, the UWM maintenance shops operations manager, sent Dr. Hodach Keller's job description and advised Hodach of his concerns about Keller's ability to perform job duties.

11. During this time, UWM decided to obtain a second medical opinion on Keller's condition and sent Keller to Dr. Steven Moore, an occupational medicine specialist.

12. Dr. Moore's evaluation of Keller consisted of an interview with Keller and reviews of a physical capacities test assessment report by a physical therapist, Keller's position description (PD) and copies of correspondence between Kohel and Dr. Hodach, including two letters from Dr. Hodach dated February 16, 1989 and July 10, 1989,¹ regarding Keller's condition.

13. Dr. Moore, in a letter to Kohel dated October 9, 1989, wrote that Keller lacked the physical abilities to perform all the duties of his job, that he would function best at ground level work clear of tripping hazards and that he was "unequivocally disqualified" from working on ladders or scaffolding.

14. Keller was not returned to his position as sheet metal worker, but prior to his termination on December 15, 1989, Kohel discussed alternate employment at UWM with him. Keller indicated only that he wanted to return to work as a sheet metal worker.

15. Keller's duties as a sheet metal worker are as described in his PD, which was provided to Dr. Hodach:

40% A. Remodeling of heating and ventilating systems.

25% A1. Construct ductwork, fittings and pipe and install according to plans and specifications.

¹ On July 10, Dr. Hodach wrote Mr. Loren Kohel, saying that he saw no reason why Keller could not return and try to perform his job.

- 15% A2. Make out estimates and material lists and work sheets.
- 20% B. Maintenance of ventilation systems.
 - 15% B1. Maintain and repair ductwork, fans and related equipment.
 - 5% B2. Measure and adjust air volumes to required levels.
- 20% C. Installation, maintenance and repair of flashings, gutters, downspouts and roofs.
 - 10% C1. Repair or replace flashings on buildings, around walls and conductors as per written or verbal instructions.
 - 5% C2. Repair gutters and downspouts.
 - 5% C3. Repair roof leaks.
- 20% D. Construction of various equipment, such as filter frames, belt guards and equipment guards.
 - 15% D1. Construct and install belt equipment guards to conform to OSHA standards.
 - 5% D2. Repair or replace various pieces of equipment such as kitchen utensils, filter frames and parts for metal furniture, etc.

16. Approximately 50 to 60 percent of Keller's work was fabrication and the remaining work was installation. Installation could require the use of ladders of various types and scaffolding.

17. Generally, hoists are used in conjunction with ladders to lift the fabricated piece to the place of installation. In some instances, while standing on a ladder, using a hoist, both arms must be free to fit the piece into place and fasten down or attach to the principal structure.

18. In early 1990, Keller engaged a Dr. John A. Roffers, M.D., Physical Medicine and Rehabilitation, to evaluate his physical condition relating to sheet metal work. In a letter to Keller dated March 5, 1990, Dr. Roffers wrote:

Thank you for bringing the materials regarding your attempts to return to work to my office for review.

I would have to agree with Dr. Moore's evaluation that I do not think it would be safe for you to return to your prior job should it require work on ladders or scaffolding. I am very impressed with your determination to return to gainful employment and I will be happy to assist you in

whatever way I can. I do not feel that more therapy or another evaluation is necessary at this time but I would be happy to discuss this further with you and with Dr. Hodack [sic] so that you would be able to return to work within certain requirements for the safety of you and your co-workers as well as for the liability of your employer.

Please contact me if I may be of further assistance.

19. After his discharge from UWM, Keller held five sheet metal worker positions: From June to September 1990, Bassett in Appleton, Wisconsin, fabrication and sheaving; Goethel, fabrication, winter 1990-1991; Flackt, Janesville, Wisconsin, field installation using step ladder; Fiberglass Systems, fiberglass fabrication; and Tweet-Gant, tool crib.

CONCLUSIONS OF LAW

1. This complaint of handicap discrimination is before the Commission pursuant to §230.45(1)(b), Stats.
2. Complainant has the burden of showing respondent discriminated against him in violation of the Wisconsin Fair Employment Act (WFEA) when it terminated his employment on December 15, 1990.
3. Complainant has failed to meet his burden.
4. Respondent did not discriminate against complainant when it terminated his employment on December 15, 1990.

DISCUSSION

The issue in this case is whether the respondent, University of Wisconsin - Milwaukee, discriminated against complainant, Grant Keller, on the basis of handicap when they terminated his employment on December 15, 1990, in violation of the Wisconsin Fair Employment Act (WFEA). In accordance with Samens v. LIRC, 117 Wis. 2d 646, 657-58 (1984), handicap discrimination can be established by showing that complainant is handicapped as defined in the WFEA, the employer rejected complainant because of his handicap and the employer's action was not legitimate under the WFEA.

It is undisputed that complainant is handicapped, that a stroke weakened the left side of complainant's body, particularly the left leg, causing him to have a limp. It is also undisputed that respondent terminated employment of complainant because it believed complainant's weakened physical condition rendered him unable to perform as a sheet metal worker at

UWM. The question is whether respondent's action meets the WFEA handicap discrimination exception, §111.34(2)(a), WFEA, which allows an employer to terminate employment, "if the handicap is reasonably related to the individual's ability to adequately undertake the job-related responsibilities of that individual's employment."

The evidence shows that the doctor's reports all express a concern with the strength of the left side of complainant's body. Dr. Hodach initially wrote of concerns about complainant's left leg and ability to maintain his balance, while climbing ladders and doing roof work. Five months later, Dr. Hodach wrote the operations manager of the UWM maintenance shops, saying that complainant is highly motivated to work and should be given a try. Specifically, Dr. Hodach wrote that he expected complainant to have no problems with required lifting or the cognitive ability needed for the job. Dr. Hodach did not mention complainant's left leg or his capacity to maintain his balance. In contrast, Dr. Moore, who evaluated complainant two months later, was clear in his belief that complainant could not safely carry with two hands and climb stairs simultaneously. Dr. Moore believed that putting complainant back on the job would represent an unreasonable risk of injury for complainant. Dr. Roffers, who of record was the last doctor to evaluate complainant, agreed with Dr. Moore's evaluation that it was not safe for complainant to return to his prior job if it required work on ladders or scaffolding.

Clearly, the general medical consensus of these three doctors was that it was problematical whether complainant could handle the physical demands of his former position at UWM. Two of these doctors believed that it was unsafe for complainant to return to his former position. Dr. Hodach testified² that complainant's high motivation was a "significant factor" in his view that complainant should return to work and try to perform his job duties. Dr. Hodach testified that it was obvious in watching complainant walk that he had deficits involving his left leg and that he believed they would never go away. Again, even though Dr. Hodach recommended complainant's return to work,

² Dr. Richard Hodach testified at an arbitration hearing between the parties on February 1, 1991. At issue was the subject termination. The transcript of that hearing was admitted into the record as Respondent's Exhibit No. 37.

he testified to some degree of uncertainty whether complainant could be fully successful in performing this work.

Section 111.34(2)(b), Wis. Stats., provides:

In evaluating whether a handicapped individual can adequately undertake the job-related responsibilities of a particular job, ... the present and future safety of the individual, of the individual's co-workers and if applicable, of the general public, may be considered.

After reviewing and reconciling the backgrounds, medical reports, method of evaluation and, as applicable, testimony of the three doctors who evaluated complainant's stroke and resultant physical deficits as they related to his job, the Commission concludes that complainant's deficits in his left leg are "reasonably related" to his ability to adequately perform his job as Sheet Metal Worker at UWM and that to return complainant to this job would be at the risk of his personal safety.

Another part of complainant's claim of handicap discrimination is the allegation that respondent failed to make "a good faith effort to accommodate" his handicap.³ Section 111.34(1)(b), Stats., provides:

Employment discrimination because of handicap includes but is not limited to: Refusing to reasonably accommodate an employee's or prospective employee's handicap unless the employer can demonstrate that the accommodation would pose a hardship on the employer's program, enterprise or business.

Insight into proper interpretation of this statute and the duty to "reasonably accommodate" an employee's handicap is provided in McMullen v. LIRC, 148 Wis. 2d 270 (Ct. App. 1988). The court in McMullen after recognizing that legislative intent mandated a liberal construction of the WFEA said:

The statute requires only a reasonable accommodation. What is reasonable will depend on the specific facts in each individual case.

And while that court said the duty to accommodate might involve transfer of employe it did not mean an employer had to do so in every case but that the issue of accommodation had to be addressed "on a case-by-case basis."

³ The burden of proof as to the accommodation issue is on the respondent. Vallez v. UW-Madison, 84-0055-PC-ER, 2/5/87.

Evidence regarding accommodation centered on complainant's return to work as a sheet metal worker. On this issue, complainant argues that he is capable of performing SMW duties utilizing a step ladder and a duct hoist and that this is not accommodation since step ladders and duct hoists are normal tools of the trade. This argument was touched on previously. However, the record clearly establishes that complainant's weakened left leg makes him vulnerable to injury when he is on a ladder and cannot use one arm to hold on to support himself, but must have both arms free to work. Instances of this kind occur frequently enough, even with the use of a duct hoist. The fitting of pieces of fabrication together, while employing a duct hoist, often require the use of both arms.

Next complainant argues that he should be given assistance in fitting sheet metal work from one of respondent's 200 maintenance staff employees. The record shows that normally assistance is given where more hands are required, but complainant's handicap presents the same problem of instability as with the duct hoist. It would be necessary for the assistant to stabilize complainant's left leg by holding on to him or by fitting the pieces together while complainant used one hand to connect the pieces and the other free to balance or support himself. While the task conceivably could be performed in this manner, this approach would be unwieldy at best, and the Commission does not believe respondent is required to provide such assistance or by not doing so violate the statutory requirement to "reasonably accommodate" complainant's handicap. In Rau v. UW-Milwaukee, 85-0050-PC-ER (2/5/87), the Commission said that it was not necessary for an employer to rewrite a position description or permanently assign some duties to other staff to accommodate a handicapped individual. Similarly in this instance the Commission does not believe respondent is required under the WFEA to provide complainant with an assistant in order for him to perform the duties of a sheet metal worker.

Also, complainant argues that respondent failed to make a "good faith" offer of alternate employment, but this position is unsupported by the record. Respondent's physical plant operations manager, Loren Kohel, testified that he had about six discussions with complainant, including one with union representative Robert Batzler, about jobs other than sheet metal work. Kohel testified that he concluded from these discussions that complainant was not

interested in any job suggested⁴ other than that of a sheet metal worker. Nothing in the record indicates that respondent's discussions with complainant about other positions were not genuine. Complainant was considered a very good worker prior to his stroke and there is no evidence of ill feelings between complainant and the Physical Plant staff or any one associated with respondent's decision to terminate complainant.


The Commission believes this record does not support a conclusion that respondent violated the WFEA when it discharged complainant.


ORDER

Complainant's complaint of handicap discrimination against respondent is dismissed.

Dated: June 21, 1994

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner

DRM:rcr

Parties:

Grant Keller
4585 North 126th Street
Butler, WI 53007

John Schroeder
Chancellor, UW-Milwaukee
Chapman Hall
Milwaukee, WI 53201

NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served per-

⁴ Facility Repair Worker III, Maintenance Mechanic II, generally positions in Physical Plant which did not include work on ladders, scaffolds or high places.

sonally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.)