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RICHARD L. KAFAR, *

Complainant, *

v. *

Secretary, DEPARTMENT OF *

HEALTH AND SOCIAL SERVICES, *

Respondent. *

Case No. 92-0076-PC-ER *

* * * * *

RULING ON
MOTION TO DISMISS
AND
FINAL ORDER

This matter was scheduled for hearing on June 21 and 22, 1993, on the following issue:

Whether respondent discriminated against complainant on the basis of handicap when they terminated complainant's employment as a Building Maintenance Helper 2 in March 1992.

On June 16, 1993, respondent filed a motion to dismiss for lack of subject matter jurisdiction. Respondent based its motion on the exclusivity provision of the Worker's Compensation Act. The scheduled hearing was postponed and the parties filed briefs on the motion.

It is undisputed that in 1986, while mopping floors, which was one of his responsibilities as a Building Maintenance Helper (BMH), complainant experienced pain in his left elbow. Complainant was off work because of the problem for approximately 6 months in 1986. For the period from his return until his termination in March of 1992, the complainant continued to be employed in his position but, for the most part, was not assigned mopping responsibilities. Complainant filed a Worker's Compensation claim for the 1986 injury. In 1991 he was paid approximately \$900 under that claim and ultimately the parties to that claim entered into a "Limited Compromise Agreement" in January of 1992, pursuant to which respondent agreed to pay an additional sum plus attorneys' fees and costs.¹

¹The original payment represented a 1% permanent partial disability of the left elbow and the additional payments represented "an additional 9% permanent partial disability as compared to amputation at the left elbow."

By letter dated February 27, 1992, respondent notified complainant of its intent to terminate his employment as of March 27, 1992 "due to continuing medical problems that preclude you from performing the job requirements of your position." Complainant contends that respondent "failed to accommodate him by deciding to stop assigning him tasks which did not involve repetitive arm movements, and by refusing to offer him a transfer to new duty assignments which he could do." (Complainant's brief) There is no contention that the termination decision was based on some medical condition other than the one which was the basis for the complainant's Worker's Compensation claim.

The facts of this case are analogous to those before the Commission in Powers v. UW, 92-0746-PC, 92-0183-PC-ER, 6/25/93. There, the complainant's employment had been terminated because of a medical condition which was the subject of a Worker's Compensation claim. The Commission concluded that the termination was the equivalent of a failure to rehire which is covered by the Worker's Compensation Act (WCA) and that remedy was the exclusive remedy pursuant to §102.03(2), Stats. The Commission distinguished its ruling in Johnson v. DHSS, 89-0080-PC-ER, 4/30/93, where it held that WCA exclusivity did not preempt its jurisdiction over a Fair Employment Act claim alleging that the employe had been denied a transfer as a result of handicap discrimination that was related to two short periods of missed work in connection with work-related injuries that had occurred several months before the transfer denial. In Powers, the Commission noted that it was dealing with a termination, which is equivalent to a failure to rehire for purposes of the WCA coverage, and there was no extended chain of "but for" causation as had been the case in Johnson. As to both of these distinctions, the instant case is identical to Powers.²

In his brief, complainant also offered the following arguments:

The decision to deny Kafar work which did not involve mopping occurred five years after the "injury." It is a decision which is claimed by Kafar to have been motivated by a personal conflict with a supervisor. It is a decision which was unexplained at the time by the Respondent. It was not, however, occasioned by the injury to Kafar but by intervening changes in

²In his brief, the complainant also cites Scherer v. Perry Corp., (LIRC, 1/18/90). In that case, the employer's actions being complained about (unfavorable work assignments, denial of a promotion and transfer to a less responsible position because of sex and retaliation) were distinguished from a refusal to rehire.

personal or administrative attitudes within the administration of the Southern Wisconsin Center.

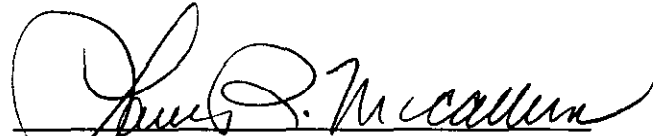
The complaint that is the subject of this ruling was filed under the Fair Employment Act alleging that the termination decision constituted discrimination based upon handicap, as reflected in the agreed upon issue for hearing. To the extent the complainant contends that the decision was motivated by some other reason, he could conceivably seek to pursue review of the termination decision under the applicable collective bargaining agreement.

ORDER

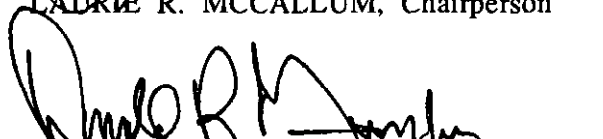
Respondent's motion to dismiss for lack of subject matter jurisdiction is granted and this matter is dismissed

Dated: July 22, 1993

STATE PERSONNEL COMMISSION


LAURIE R. MCCALLUM, Chairperson

KMS:kms
K:D:temp-9/93 Kafar


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

Parties:

Richard L. Kafar
33835 Hillcrest Drive
Burlington, WI 53105

Gerald Whitburn
Secretary, DHSS
P.O. Box 7850
Madison, WI 53707-7850

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-

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.