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JAMES R. EDDY,

Complainant,

v.

Secretary, DEPARTMENT OF
TRANSPORTATION,

Respondent.

Case No. 93-0009-PC-ER

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DECISION
AND
ORDER

NATURE OF THE CASE

The complainant filed a charge of discrimination on January 11, 1993, alleging that the respondent had failed to accommodate his handicap and had harassed him because of his age and handicap. On August 31, 1993, an Initial Determination (ID) was issued which found No Probable Cause to believe that the respondent had harassed him because of his age. The ID found Probable Cause to believe that the respondent had failed to accommodate the complainant's handicap and had harassed him because of his handicap. The complainant did not appeal the No Probable Cause portion of the ID. Accordingly, the matter proceeded to a hearing on the merits regarding the probable cause portion of the ID.

The hearing issues were defined by the parties at a prehearing conference held on December 21, 1993, as shown below.

1. Whether the respondent failed to accommodate the complainant's handicaps during the period of August through October 1992.
2. Whether the respondent harassed the complainant because of his handicaps in October 1992.

On June 7, 1994, a hearing was held in La Crosse, Wisconsin, before Adam C. Korbitz, Hearing Examiner. The post-hearing briefing schedule was held in abeyance for several months while the parties obtained a written

transcript of the proceeding. The final brief in the case was submitted on November 3, 1994. The complainant chose not to file a rebuttal brief.

FINDINGS OF FACT

1. The parties stipulated at hearing that the complainant suffers from motion sickness and that this disorder renders the complainant a handicapped person under the Fair Employment Act, sec. 111.32(8), Stats. The complainant's history of motion sickness is most likely due to a mild vestibular defect.
2. The complainant has worked for the respondent as a driver's license examiner since the late 1960s. The complainant's duties include administering tests to the general public for various types of driver's licenses. These include written tests, reviewing paperwork on medical verifications, vision tests and road tests. The bulk of the complainant's time is spent administering road tests.
3. Since 1975, the complainant has worked on the Tomah travel team. The Tomah travel team has no office as such. Members of the team meet at the state patrol barracks in Tomah and travel from there to various locations in west central Wisconsin, including Mauston, Friendship, Westfield, Tomah and Sparta. Travelling to these locations requires varying amounts of time. Some trips require more than one hour of travel.
4. In addition to the complainant, the Tomah travel team consists of Marjory McCaige, Dennis Austad and Elizabeth Clemmerson. During the time relevant to this case, Donald Reincke was the district manager and Wayne Close was the area supervisor and the complainant's first-line supervisor.
5. The complainant and the other members of the Tomah travel team travel in a state-owned van that is kept at the state patrol office in Tomah. There are two front seats and two bench seats behind the front seat. Until July 1992, the team was free to work out its own seating and driving arrangements within the van. Typically, the responsibility of

driving the van was rotated among the team members. Occasionally, the complainant would drive his own vehicle to a work site.

6. On average, the complainant has telephone contact with Wayne Close about once each day. Occasionally, Close will visit the team at one of its designated work stations.
7. The complainant's motion sickness occurs if the complainant sits in the back seat of the state van. The complainant's symptoms include nausea, upset stomach and disorientation. These symptoms, once they occur, can last as long as overnight. The severity of the symptoms depends upon the length of the trip.
8. Wayne Close, the complainant's supervisor, had learned of the complainant's motion sickness several years prior to July 1992. However, Close did not learn of the connection between the complainant's motion sickness and his riding in the back of the van until October 27, 1992, when the complainant told Close of the connection.
9. Until July 1992, the complainant would almost always ride in the front seat of the van. On those occasions when the complainant could not drive or ride in the front of the van, he would drive his own vehicle. This arrangement had been in effect for at least several years.
10. In July 1992, members of the Tomah travel team approached Wayne Close with concerns about the complainant's interaction with the team and his actions and attitude while at work. One of these concerns was that the complainant always sat in the front seat of the van.
11. On or about July 31, 1992, Wayne Close met with the complainant to discuss the concerns that had been brought to Close's attention by the other members of the travel team, including the desire of other members of the team to begin rotating the seating in the van. Close asked the complainant to try rotating seating in the van, and the complainant agreed to try rotational seating. Because of a history of conflict between Close and the complainant, the complainant perceived that, if he did not agree to rotational seating, Close would discipline him in some fashion. However, no such threat was ever actually made.

12. The team members rotated seating in the van during August, September and October of 1992. The new seating arrangement caused the complainant's motion sickness to reoccur. The complainant became ill when he had to sit in the back of the van, often becoming physically ill when he arrived at the designated work station. The complainant would often take antacids to settle his stomach.
13. At no time during August, September or October 1992 did the complainant lose any time from work because of his motion sickness, nor was he unable to perform all of his job duties.
14. At no time during August, September or October 1992 did the complainant inform Close that rotating seating in the van was causing his motion sickness to reoccur, nor did he request that the rotation cease.
15. On October 27, 1992, Wayne Close met the travel team at the Tomah test site. A team meeting had been scheduled for that morning. Wayne Close saw the complainant having trouble lifting some of the equipment and noticed that the complainant did not look well. Close approached the complainant and asked him what was wrong. Eddy replied that he did not feel well and was sick from riding the van from the station. After the team meeting, Close again asked the complainant what was wrong. Other members of the travel team were present when close again asked the complainant what was the problem.
16. After the team meeting on October 27, 1992, Close spoke with Don Reincke about the complainant's statement that riding in the back of the van was causing his motion sickness to return. Reincke directed Close to inform the complainant that he would begin riding in the front of the van on a temporary basis pending medical confirmation of the necessity of this accommodation. If a physician certified the necessity of this accommodation, it would be made permanent.
17. On October 29, 1992, Close telephoned the complainant at the Mauston station. Close asked the complainant to explain how a small shift in seating position in the van affected his motion sickness. Close arranged to meet with the complainant the next day at the Tomah station to discuss how the respondent intended to deal with the issue. The

complainant told Close that he intended to file a grievance against him and would not meet with Close unless he was accompanied by a union representative.

18. On October 30, 1992, Close arrived at the Tomah station and asked to speak with the complainant alone. The complainant objected that he did not want to meet alone with Close unless a union representative accompanied him. Close directed the complainant to meet with him. During this meeting, Close again asked the complainant how a small shift in seating position affected his motion sickness. Close told the complainant that, based on the information he had provided on October 27, 1992, he would be permitted, on a temporary basis, to ride in the front of the van; and once that the respondent received medical verification that such an accommodation was necessary, the accommodation would be made permanent. The complainant insisted that the request for a medical verification be reduced to writing, and it was. The complainant also insisted as a condition of his cooperation that the respondent agree to pay any costs. Close and Reincke agreed to these terms.
19. After the meeting between the complainant and Close on October 30, 1992, Close told the other members of the team that the complainant would be riding in the front of the van on a temporary basis. Close also told the team that this arrangement would be made permanent once the complainant provided medical certification of its necessity.
20. Shortly after his meeting with Close on October 30, 1992, the complainant sought the care of a psychiatrist. The complainant took a leave of absence and was on leave from the first week of November until January 29, 1993.
21. Sometime in December 1992, the complainant provided the respondent with a physician's statement verifying that he suffered from motion sickness and that the problem could be alleviated by riding in the front seat of a vehicle. Since the respondent received this statement, the complainant has been assigned permanently to drive or ride in the front seat of the state van.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction of this case pursuant to sec. 230.45(1)(b), Stats.
2. The complainant has the burden of proof except that the respondent has the burden of proof with respect to reasonable accommodation.
3. The respondent has sustained its burden with respect to reasonable accommodation.
4. The complainant has failed to sustain his burden.
5. The respondent did not refuse to reasonably accommodate the complainant's handicap.
6. The respondent did not harass the complainant because of his handicap.

OPINION

The two issues before the Commission are whether the respondent discriminated against the complainant on the basis of handicap in two respects. First, the complainant alleges that the respondent refused to reasonably accommodate his handicap during August, September on October 1992. Second, the complainant alleges that his supervisor, Wayne Close, harassed him because of his handicap on October 27, 29 and 30, 1992.

I. REFUSAL TO ACCOMMODATE

The first question before the Commission is whether the respondent failed to reasonably accommodate the complainant's handicap in August, September and October of 1992. Employment discrimination because of handicap includes a refusal to reasonably accommodate an employee's handicap, unless the employer can demonstrate that the accommodation imposes a hardship on the employer's program. Section 111.34(1)(b), Stats..

Section 111.34(1)(b), Stats., requires only a reasonable accommodation, and what is reasonable will depend on the specific facts in each case. McMullen v. LIRC, 148 Wis. 2d 270, 276, 434 N.W.2d 830 (Ct. App. 1988). Whether

or not a proposed accommodation is reasonable is a question of fact, and the specific considerations as to what composes a reasonable accommodation have to be addressed on a case-by-case basis. McMullen, 148 Wis. 2d at 276. In addition to the statutory requirement that the accommodation be reasonable, no accommodation is required if it would impose a hardship on the employer. McMullen, 148 Wis. 2d at 277. In other words, although a requested accommodation is reasonable, it may nonetheless work a hardship on a specific employer for various reasons. Whether or not a reasonable accommodation works a hardship to the employer is a factual determination; while there may be some overlap regarding the factors to be considered in determining whether an accommodation is reasonable and whether it imposes a hardship on a particular employer, the two are separate and distinct considerations that are to be addressed independently. McMullen, 148 Wis. 2d at 277.

It is undisputed that the complainant suffers from a handicap. The complainant asserts that the respondent violated its duty to accommodate his handicap by coercing him to accept rotational seating during August, September and October 1992. However, the hearing record shows that, while the complainant's supervisor, Wayne Close, was vaguely aware prior to July 1992 that the complainant suffered from motion sickness, he was unaware of the specific connection between riding in the back of the van and the illness. Further, the complainant made no effort to bring this fact to Close's attention until October 27, 1992. As soon as the complainant brought the connection to Close's attention, Close checked with his supervisor and, on his supervisor's orders, immediately instituted a temporary accommodation which satisfied the complainant. Once the need for that accommodation was verified by the complainant's physician, the respondent made the accommodation permanent.

Because of a history of difficulties with his supervisor, the complainant perceived Close's July 1992 request to rotate seating as an order that would result in discipline if refused. However, the complainant admitted that no such threat was ever made. It was purely the complainant's own assumption. The fact that the respondent immediately instituted a temporary accommodation once the complainant brought the problem to Close's attention in late October 1992 supports the conclusion that the July 1992 inquiry

regarding rotational seating was a request made without threat and without knowledge of the specific connection to the complainant's motion sickness.

The Commission concludes that the respondent's July 1992 request that the complainant try rotational seating was made without coercion and without knowledge of the connection to the complainant's motion sickness. The respondent's duty to accommodate did not arise until October 27, 1992, when the complainant brought to Close's attention the connection between his motion sickness and his sitting in the back of the van. Once the connection was made known, the respondent immediately instituted an accommodation that the complainant admits was reasonable. The respondent met its duty of reasonable accommodation.

II. HARASSMENT

The complainant also alleges that his supervisor, Wayne Close, harassed him because of his handicap on October 27, 29 and 30, 1992. This allegation is aimed at Wayne Close's interactions with the complainant as he investigated the complainant's October 27, 1992 complaint about riding in the back of the van and as he sought to achieve a resolution of that complaint.

While no cases in Wisconsin have specifically addressed the issue of harassment of persons with disabilities, the concept is well established in other areas of discrimination law. In the context of harassment due to protected class status, two conditions must be present in order for the Personnel Commission to find that the prohibition against discrimination in conditions of employment has been violated. First, the incidents of discriminatory harassment must be sustained (i.e., numerous and pervasive) and non-trivial (i.e., opprobrious or severe). Second, the employer must have failed to take reasonable steps to redress the injury resulting from the harassment or to prevent further harassment. See Laber v. UW-Milwaukee, Case No. 81-PC-ER-143 (11/28/84) (religious harassment), Yarbrough v. DILHR, Case No. 88-0103-PC (2/22/90) (racial harassment), North v. Madison Area Association for Retarded Citizens, 844 F.2d 401, 46 FEP 943 (7th Cir. 1988) (racial harassment). The court in North stated that for harassment to be actionable,

"it must be so severe and pervasive as to alter the conditions of employment and create an abusive working environment . . ."

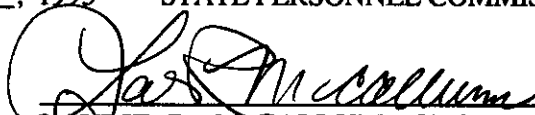
The hearing record does not support a conclusion that a few tense conversations between the complainant and Close amount to opprobrious or severe mistreatment. Close had a duty to investigate the complainant's complaint about riding in the back of the van and to work to achieve a resolution. The complainant was upset because he perceived he was being deliberately mistreated. There is simply no basis to conclude that the complainant's conversations -- it is not clear that they can even fairly be characterized as arguments -- were so severe and pervasive as to alter the conditions of the complainant's employment and to create an abusive working environment. Further, there is no basis to conclude that Close was motivated by any animus based on the complainant's handicap.

The respondent did not harass the complainant because of his handicap.

ORDER

This complaint is dismissed.

Dated: September 14, 1995 STATE PERSONNEL COMMISSION



LAURIE R. McCALLUM, Chairperson



DONALD R. MURPHY, Commissioner



JUDY M. ROGERS, Commissioner

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**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 (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) 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 personally, 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.)

2/3/95