

STATE OF WISCONSIN

PERSONNEL COMMISSION

DALE HAWKINSON,
Complainant,

v.

**Secretary, DEPARTMENT OF
CORRECTIONS,**
Respondent.

**INTERIM
DECISION
AND ORDER**

Case No. 95-0182-PC-ER

The Commission, having reviewed the Proposed Decision and Order and having consulted with the hearing examiner, has modified parts of the opinion, conclusions of law, and order sections of the Proposed Decision and Order to better reflect its view of the record and the basis for its decision. The Commission did not reverse or substantively revise any of the examiner's factual determinations. The reason for changing the proposed decision's conclusion regarding liability on the issue of accommodation is set forth below at note 1. This decision is final with respect to issues of liability and remedy.

NATURE OF CASE

This matter involves a charge by complainant, Dale Hawkinson, that the respondent, Department of Corrections, discriminated against him on the basis of his disability (including an alleged failure to accommodate a disability) or retaliated against him for having engaged in protected activities in violation of the Fair Employment Act, Subchapter II, Ch. 111, Wis. Stats., the whistleblower law, §230.80, et seq. Wis. Stats., and the public safety and health provisions, §101.055, Wis. Stats., when respondent allegedly failed to promptly supply complainant a chair with a headrest. A hearing was held and both parties filed post-hearing briefs.

FINDINGS OF FACT

1. Complainant, Dale Hawkinson, is a Correctional Officer at Waupun Correctional Institution (WCI), where he has worked for respondent for 20 years.

2. On June 20, 1994, complainant filed a complaint with respondent's Affirmative Action Office (AAO), alleging harassment/discrimination on the basis of disability. Specifically, complainant alleged he had been denied promotional opportunities and subjected to a hostile work environment based on disability.

3. The AAO investigated the complaint and on September 20, 1994, issued a case report on complainant's complaint of discrimination. Included in this report was a finding of no probable cause to believe that discrimination occurred. . .

4. Previously, on March 2, 1994, complainant had submitted a Disability Accommodation Report form to respondent for a chair with a headrest. In the September 15, 1994, AAO case report, the author, AA Compliance Officer Colleen Winston, stated that the department would provide complainant a chair with a headrest.

5. On December 20, 1995, complainant filed a charge of discrimination with the Personnel Commission, alleging respondent treated him differently than others in the terms and conditions of employment based on his disability, race and fair employment actions, in violation of the Fair Employment Act (FEA), the Family Medical Leave Act (FMLA) and the Public Employee Safety and Health provisions.

6. On January 11, 1996, complainant withdrew his claims of discrimination based on race and the FMLA, but amended his complaint to include whistleblower retaliation.

7. In late 1995 or early 1996 complainant contacted respondent's Affirmative Action Officer, Colleen Winston, about the chair accommodation. Winston did not know the chair had not been provided for complainant.

8. In a memorandum to Jeff Smith (WCI's Personnel Manager) dated January 28, 1996, Winston recommended approving complainant's request for a chair with neck and head support. She advised that Smith and complainant discuss chair vendors, then

have the information reviewed by complainant's physician to ensure the purchased chair would meet complainant's needs.

9. Subsequently, the chair was provided to complainant.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §§230.45(1)(b), (g), and (qm), Stats.

2. Complainant has the burden of proof and must establish by a preponderance of evidence that respondent discriminated against him based on disability or retaliated against him for engaging in protected activities under the FEA, the whistleblower law, and the public safety and health law in 1994-95, except that the ultimate burden of proof is on respondent with respect to complainant's failure of accommodation claim. *See, e.g., Vallez v. UW-Madison, 84-0055-PC-ER, 2/5/87.*

3. Respondent failed to satisfy its burden of proving that it accommodated complainant's disability within a reasonable period of time.

4. Complainant met his burden of proving that respondent retaliated against him in violation of the FEA with respect to respondent's failure to have provided complainant a chair with a headrest.

5. Complainant failed to meet his burden of proving that respondent harassed him on the basis of his disability, in violation of the FEA; or retaliated against him for whistleblowing and/or occupational safety and health reporting in 1994-95, in violation of §§230.80, et seq. and 101.055, Stats.

6. Complainant has the burden to prove that he is entitled to receive reimbursement for lost overtime pay as the appropriate remedy.

7. Complainant has failed to sustain this burden.

8. The appropriate remedy is a cease and desist order.

OPINION

The issue in this case is:

Whether respondent discriminated against the complainant based on handicap (including an alleged failure to accommodate a handicap) or retaliated against the complainant for having engaged in protected activities under the Fair Employment Act, the whistleblower law and the public employment safety and health provisions, when respondent allegedly failed to promptly supply complainant with a chair with a headrest.

In analyzing complainant's claims of discrimination under the Wisconsin Fair Employment Act, the Commission employs the method of analysis expressed in *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 5 FEP Cases 965 (1973), and *Texas Dept. of Comm. Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 25 FEP Cases 113 (1981).

I. Handicap (Disability) Discrimination

Respondent does not dispute that, as an accommodation for complainant's disability, respondent had agreed to provide complainant with a chair with a headrest. However, respondent did not provide the chair until after complainant filed discrimination charges with the Commission. Complainant argues that he did not receive the accommodation in a timely manner. The sole witness to testify concerning this issue was Affirmative Action Officer Colleen Winston. Winston testified to receiving the request for accommodation from complainant and conveying her recommendation to grant the request by telephone to Cindy O'Donnell, from complainant's employing unit, in late 1994. She also informed complainant of her recommendation for the chair. Winston did not know complainant had not received the chair until complainant brought it to her attention in his employee discrimination complaint filed with her office in November 1995. On January 28, 1996, Winston wrote WCI Personnel Manager Jeff Smith recommending a chair with a neck support for complainant. Prior to that time, no one from WCI contacted Winston to verify the need for the chair accommodation or clarify the particulars of the accommodation.

The record is absent any evidence indicating complainant notified anyone about the delay in receiving the chair, except as testified to by Winston. Absent any evidence by respondent explaining or justifying this lapse of time between Winston's assurance to complainant that he would be provided the chair and its eventual delivery to him, the Commission concludes that respondent failed to accommodate complainant within a reasonable amount of time.¹

No evidence was presented by complainant connecting this act of discrimination by respondent with the remedy he seeks. Correctional Officer Guy Vande Slunt, the only other witness in the hearing besides Winston, testified to keeping a record of overtime hours complainant could have worked during a two-week period—July 26 through August 12, 1996—while complainant was off work recovering from surgery. Vande Slunt, who compiled this record at complainant's request, did not know the cause, nature or reason for complainant's surgery. Complainant did not testify and did not present any evidence connecting his lost overtime pay with respondent's delay in providing him a chair with a headrest.

II. Whistleblower and Occupational Safety and Health Reporting Retaliation

The whistleblower law protects state employees from retaliation provided he or she discloses information identified in 230.80(5), Stats., using the procedures defined in §230.81, Stats.; and provided the alleged retaliator was aware of the disclosure. *Morkin v. UW-Madison*, 85-0137-PC-ER, 11/23/88. Similarly, the public employee safety and health law, §101.055, Stats., protects from retaliation public employees, who participate in protected disclosures of health or safety hazards. The method of analysis applied to these two laws is similar to that employed for retaliation claims under the FEA. See *Morkin*.

¹ The proposed decision failed to recognize that the employer has the burden of proof on the issue of accommodation. In light of the absence of evidence concerning the reason for the delay in obtaining the chair, allocation of the burden of proof is pivotal as to the question of liability on this claim.

Under the FEA, and here, complainant has the burden of establishing a prima facie case of retaliation. To establish a prima facie case of retaliation complainant must show that he engaged in a protected activity, that respondent was aware of this, and that he suffered an adverse employment action under circumstances giving rise to an inference of unlawful motivation. Here, complainant presented no evidence of having made a protected whistleblower or safety and health disclosure, and, as a result, his claim must fail.

III. Fair Employment Retaliation and Harassment

As stated above, a prima facie case of FEA retaliation is established by a showing that complainant participated in a protected activity, respondent was aware of this activity and subsequently took an adverse action against complainant, and there is a causal link between these activities and actions. Complainant did participate in FEA protected activities when he filed discrimination complaints with respondent's AA Office in June 1994 and with the Personnel Commission in November 1995; and the evidence supports the conclusion that respondent was aware of complainant's discrimination complaints. The act of retaliation which complainant asserts here is the delay in providing him with a chair with a headrest. The overlap in time between this delay and complainant's fair employment activities establishes a causal connection. Respondent's failure to explain or justify the delay leads to a conclusion that retaliation occurred as concluded above; however, complainant failed to present any evidence connecting his claimed remedy, i.e., reimbursement of lost overtime resulting from his surgery, with respondent's delay in providing him a chair with a headrest. Complainant also alleges harassment but fails to specify in the record any series of actions or events occurring in the work setting as the basis for this allegation and, as a result, it must fail.

IV. Complainant's Exhibit No. C.1A.

This exhibit is the record of overtime hours available to complainant in July and August 1996, which was prepared and testified to by Sergeant Vande Slunt. During the

hearing respondent objected to this exhibit and the hearing examiner reserved his ruling until after the briefs were filed. As argued by respondent, no evidence in the record connects this exhibit to the issues in this complaint. Therefore, the exhibit was not admitted into the record and was not considered in deciding this matter.

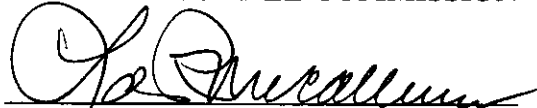
ORDER

Respondent is to provide any required or stipulated accommodations of complainant's disability within a reasonable period of time. The Commission retains jurisdiction of this matter to consider any application for fees or costs by complainant.

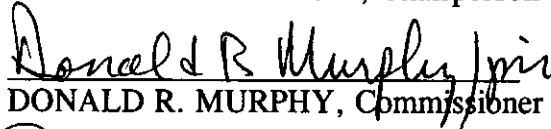
Dated: October 9, 1998.

DRM:rjb:950182Cdec2

STATE PERSONNEL COMMISSION



LAURIE R. McCALLUM, Chairperson



DONALD R. MURPHY, Commissioner



JUDY M. ROGERS, Commissioner

Parties:

Dale Hawkinson
N10201 Lakeland Rd
Fox Lake WI 53933

Michael J Sullivan
Secretary, DOC
PO Box 7925
Madison WI 53707-7925

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