

STATE OF WISCONSIN

PERSONNEL COMMISSION

EDWARD LEDWIDGE,
Complainant,

v.

**Chancellor, UNIVERSITY OF
WISCONSIN-MADISON,**
Respondent.

RULING ON
MOTION TO
DISMISS
CLAIM

Case No. 96-0066-PC-ER

This complaint, filed on June 26, 1996, alleges discrimination based on handicap and age with respect to respondent's failure to rehire the complainant for various positions during October and November of 1995 and February of 1996. Respondent moved to dismiss the handicap discrimination claim, contending it is barred by the exclusivity provision of the Workers' Compensation Act. The parties have filed written arguments.

The complaint states, in part:

On November 1, 1992, I was terminated from my position because of my disability/handicap, which had resulted from work-related injuries and surgical operations on my back and hips. . . . I then attempted to exercise my reinstatement rights by applying for several other positions with the UW-Madison.

Respondent premised its motion on complainant's "admission" that his handicapping condition "resulted from work related injuries." (Motion, page 1) In his response, complainant contended otherwise: "Although the Complaint does not describe the details of the surgical operations on Mr. Ledwidge's back and hips, he had several operations that were completely unrelated to his work injury." (Brief, pp. 1 - 2) Complainant supports this statement by referring to an October 24, 1996 letter from a physician to complainant's counsel. That letter reads, in part:

His back problems go back to 1979 when he underwent an L5-S1 laminectomy with bilateral fusion for spondylolisthesis at L5-S1 and an

L5-S1 herniated disk. This was done by Dr. Bogdanowicz, a neurosurgeon at Dean Clinic, and Dr. Rudy, and orthopedic surgeon at Dean Clinic. He then did quite well until the end of 1989 when he started having back pain again. This seemed to be related to carrying a heavy piece of acrobatic equipment down a stairway. I believe the date of this injury was 12-12-89. After a considerable consultation and evaluation, it was felt that this current pain and disability was caused by degenerative hip disease in the left hip. He underwent a total left hip arthroplasty on 4-2-91, performed by Dr. Pellegrino, an orthopedic surgeon at Dean Clinic. This surgery was followed by a work wellness program, in which he participated. During the recovery from this episode he developed an episode of acute cholecystitis, which required hospitalization. Subsequent evaluation found no hernia to account for this. He was referred to Dr. Zdeblick at the Department of Orthopedics at the University Hospital. He felt this was related to the patient's back and previous surgery. On 4-30-92 he underwent a revision laminectomy and foraminotomy of L5, a bilateral posterolateral fusion of L4-5, a posterior segment instrumentation of L4-5, and right iliac crest bone graft. He improved from this surgery, but continued to be bothered with left hip pain. Further evaluation suggested his left total hip was loosening up, so in 7/93 he underwent a revision of his left total hip by Dr. Pellegrino. As he was recovering from this, he continued to develop more abdominal problems and he underwent a laparoscopic cholecystectomy on 11-12-94 by Dr. Carl Sunby, a surgeon at Dean Clinic. Following this the patient actually was doing quite well under 10/95 when he developed acute diverticulitis which was treated medically, but did not resolve and turned into chronic sigmoid diverticulitis. He underwent a sigmoid colectomy in 1/96 for the diverticulitis performed by Dr. Ken Levin, a general surgeon at Dean Clinic.

Following this the patient was in relatively good health until 6-10-06 when he was seen with a two week history of right shoulder pain that was resistant to conservative management. In 9/96 he had an MRI which showed a herniated nucleus pulposus on the right at C5-6. He underwent a cervical discectomy by Dr. Bogdanowicz on 10-23-96. The patient is now post-operative. His surgery went well. He will follow the post-operative course set by Dr. Bogdanowicz with being in a hard cervical collar for 2 ½ weeks and then a soft cervical collar after that for 1-2 weeks.

This letter indicates the complainant has undergone the following surgical procedures:

1) Laminectomy with fusion in 1979; 2) total left hip arthroplasty in 1991; 3) revision

laminectomy and foramenectomy, bilateral fusion and bone graft in 1992; 4) revision of left hip in 1993; 5) cholecystectomy in 1994; 6) sigmoid colectomy in 1996; and 7) cervical discectomy in 1996.

The Commission has previously held that the exclusivity provision of the Workers' Compensation Act (WCA) bars consideration of a claim resulting from a personnel action which directly results from a work injury that was the subject of a Workers' Compensation claim. *Kafar v. DHSS*, 92-0076-PC-ER, 7/22/93; affirmed by Racine County Circuit Court, *Kafar v. Pers. Comm.*, 93 CV 1985, 6/10/94. Medical injuries which occur as a consequence of treatment of a work-related injury relate back to the original compensable event, so that the consequences of the medical treatment are the liability of the employer under the WCA. *Jenkins v. Sabourin*, 104 Wis. 2d 309, 311 N.W.2d 600 (1981). However, the WCA does not prevent a complainant from pursuing a handicap discrimination claim based on an allegation that a refusal to rehire was based upon injuries other than the complainant's work-related injuries, e.g. injuries incurred prior to commencing employment with the employer. *Van Zutphen v. DOT*, 90-0141-PC-ER, 5/1/92.

In the present case, there is an insufficient basis on which the Commission could conclude that complainant's handicap discrimination claim is based upon conduct arising from his work-related injuries and the medical treatment arising therefrom, rather than upon a handicap arising from one or more surgeries that did not result from his work-related injuries. Respondent's motion must be denied.

ORDER

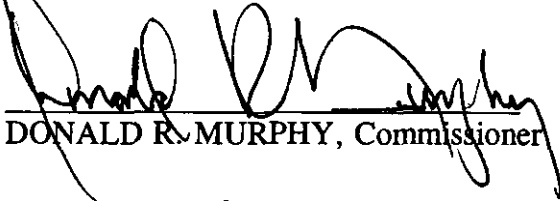
Respondent's motion to dismiss complainant's handicap discrimination claim is denied. Respondent is provided a period of 30 days from the date of this order, to supplement its answer in light of this order. The 30 day period may be revised at the discretion of the equal rights officer assigned to investigate the claim.

Dated: January 16, 1996

STATE PERSONNEL COMMISSION

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LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner