

**GEOFFREY L. HANSON,**  
*Complainant,*

v.

**Secretary, DEPARTMENT OF HEALTH  
AND FAMILY SERVICES,**  
*Respondent.*

FINAL  
DECISION  
AND ORDER

Case No. 97-0163-PC-ER

#### NATURE OF THE CASE

This is a charge of discrimination alleging respondent, Department of Health and Family Services (DHFS), discriminated against complainant because of his disability<sup>1</sup> or perceived disability when it terminated his probationary employment, in violation of the Wisconsin Fair Employment Act (WFEA), Subchapter II, Ch. 111, Stats.

#### FINDINGS OF FACT

1. Complainant's probationary employment as a Psychiatric Care Technician (PCT) at the Wisconsin Resource Center (WRC) began on June 24, 1996. Complainant was subject to a 12-month probationary period. On June 19, 1997, complainant's probationary employment was terminated.

2. The WRC is a medium security prison. It houses and treats both people who have been judicially committed as sexually violent persons, and criminal inmates transferred from the Department of Corrections (DOC) with behavioral problems and with mental health conditions in need of treatment at WRC. These people are dangerous and potentially violent.

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<sup>1</sup> This term was changed from "handicap" to "disability" in 1997 Wis. Act 112, effective April 30, 1998.

3. It is important that PCT's at WRC have good interpersonal skills and the ability to interact with both residents and co-workers without becoming angry.

4. On his job application, complainant neither identified himself as disabled, nor indicated that he had any type of disability.

5. Complainant's six month Performance Planning and Development (PPD) Report was completed by Psychiatric Care Supervisor (PCS) Marcia Klein and was dated August 30, 1996, through December 8, 1996. Complainant was given a rating of "satisfactory" in all areas. Ms. Klein discussed the PPD with complainant and they both signed it on December 8, 1996.

6. Ms. Klein had a tendency to give relatively high evaluations of employees.

7. PCS Leon Lipp took over complainant's supervision in January 1997 after Klein left that position.

8. Shortly after Lipp assumed this position, and over a period of a few months, PCT Julie Warzinski, a co-worker of complainant, related concerns about complainant's behavior to Lipp. Complainant's co-workers Sandy Franzen and Tim Thomas also related concerns about complainant's defensiveness, anger and other inappropriate interaction with both residents and co-workers.

9. An example of complainant's problematic interpersonal behavior is an incident that occurred on March 23, 1997, when complainant became upset when a co-worker who was in a glass-enclosed "bubble" and was responsible for opening locked doors did not immediately open a locked door, and asked complainant not to ring the call bell because he had seen him. Complainant engaged the co-employee in an argument and became agitated. This happened with an inmate present. When complainant was counseled by PCS Tom Schertz that the delay was not something that was uncommon, complainant continued in an agitated manner and insisted that the co-employee had been picking on him.

10. Another example occurred on March 31, 1997. Complainant told co-worker Warzinski and unit director Kris Timm that he was going to "stand

movement”—i. e., monitor the residents’ movement in the hall. Shortly after leaving the unit he returned, and in response to Timm’s comment that he hadn’t been gone long, complainant responded that he had been informed that there would be no movement. Just then patient movement was announced. Timm and Warzinski reacted with amusement at the irony of this situation. Complainant reacted by saying “what?” in a loud and angry voice. After returning to the unit from standing movement, complainant refused to speak to Timm and Warzinski.

11. After this March 31, 1997, incident with Timm and Warzinski (see Finding #10), Timm asked Warzinski whether complainant had behaved inappropriately on other occasions. At Timm’s request, Warzinski prepared a written statement (Respondent’s Exhibit R 119) which accurately summarizes a number of incidents of inappropriate behavior. These include the following:

a) On several occasions, complainant ignored resident altercations in the dayroom, claiming not to have noticed them.

b) While Warzinski was demonstrating to complainant how to fill out a receipt when a resident receives a check in the mail, complainant simply absented himself midway through the conversation and refused to speak to Warzinski the remainder of the shift.

c) Complainant became irate at Warzinski in the dayroom in front of patients, and told her she irritated him. When she asked him what was wrong, he reacted angrily and said “I’m 28 years old and I don’t need to put up with this shit.”

d) On numerous occasions, complainant told Warzinski he was going to do something to get a particular resident “riled up.”

e) Complainant made remarks to another resident about the resident’s thinning hair in apparent attempts to agitate the resident, or with inappropriate disregard of that possibility.

12. Another example of complainant’s inappropriate interpersonal behavior occurred on April 10, 1997. Complainant had been informed earlier by a resident that

PCT Mark Mortensen had referred to complainant's sister (who also was employed as a PCT at WRC) in a derogatory manner. Complainant confronted Mortensen in an agitated fashion about this, notwithstanding that complainant should have known that residents were prone to fabrication and attempts to create disputes between staff members. On the same day, complainant became angry with Mortensen over a relatively minor matter involving Mortensen not providing institutional apparel for an inmate complainant was escorting after the inmate's court appearance.

13. Other examples of complainant's inappropriate interpersonal behavior were accurately recounted by PCT Thomas. He described complainant as prone to defensiveness and anger. He had a tendency to become upset with residents.

14. Other examples of complainant's inappropriate behavior were accurately recounted by PCT Franzen. She said complainant frequently became angry with patients, as well as refusing to communicate with Franzen.

15. Complainant's nine month PPD was completed by supervisor Leon Lipp and was dated December 8, 1996, through March 20, 1997. Respondent's Exhibit R 107. Complainant was given a rating of "unsatisfactory" for the performance objective of "interacting with patients/inmates as an appropriate role model to promote the development of functional daily living and social skills and to facilitate positive behavioral changes." Mr. Lipp commented that complainant's interaction with others was usually good, but that sometimes he would react too defensively and emotionally. The remainder of complainant's ratings were "satisfactory." Mr. Lipp discussed complainant's PPD with him on March 25, 1997. Lipp counseled complainant about his defensiveness and emotional way of reacting toward others.

16. Lipp prepared a new PPD form (Respondent's Exhibit R 113) with revised objectives to cover the period subsequent to March 25, 1997, and both he and complainant signed the performance objectives part of the revised form on March 25, 1997. The new PPD had a new objective D: "Present yourself as an appropriate role model; Act professionally at all times adhering to the DHFS work rules." Sub-parts of this objective included D3: "Treat visitors, patients/inmates and their property with

respect,” and D4. “Treat staff members with respect; Use appropriate interpersonal skills.” Lipp added the new objective because he felt this area of performance (regarding interpersonal skills) had not been adequately addressed in the objectives section of the previous PPD.

17 Lipp closed out the PPD early, implemented a new one, and explained to complainant that he would be terminated if his performance did not improve. Lipp, who also completed this PPD (Respondent’s Exhibit R 113), gave complainant a rating of “unsatisfactory” for the performance objective D.4 of “treat staff members with respect; use appropriate interpersonal skills.” Mr. Lipp commented that complainant had “ignored interaction with unit manager and reacted unprofessionally with another PCT ” Complainant’s other ratings were “satisfactory,” although the comment on D.3 (“Treat visitors, patients/inmates and their property with respect”) was “Satisfactory— with reservations. Joking about riling patients up.” The results of the PPD were discussed with complainant and Mr. Lipp and complainant signed the PPD on May 5, 1997

18. On June 10, 1997, Lipp spoke to Karla Souzek, the WRC personnel manager He expressed concern about the impending (June 23, 1997) completion of complainant’s probationary period, because due to the schedules of complainant, Lipp and Timm, he and Timm had only a brief period to have evaluated complainant’s performance, and particularly whether he had improved in the area of interpersonal relations since the May 5<sup>th</sup> PPD review session. They concluded that if management had not been able to observe any improvement and if management did not feel comfortable that complainant could meet the performance standards for a PCT, complainant’s probationary employment should be terminated. This approach was consistent with Souzek’s long-standing philosophy for dealing with probationary employes. Lipp subsequently contacted other supervisors but none of them had made any further observations, pro or con, since May 5, 1997

19. Later on June 10, 1997, complainant participated in a softball game with some of the patients/inmates. Participating in recreational athletic sports with patients

is in violation of institution rules. During the game, complainant accidentally collided with another player. Complainant received a laceration above his eye that bled and required stitches.

20. By memo dated June 12, 1997, complainant was informed that an investigatory meeting was going to be conducted on June 18<sup>th</sup> regarding his participation in the softball game. Management determined that complainant would not be disciplined for participating in the softball game because it could not be established that he had received the directives that prohibited staff from participating in recreational athletic activities with inmates and patients.

21. At this meeting, however, respondent did state that complainant had violated Work Rule #1 in failing to complete all of his required room shakedowns for May. It was not unusual for other PCT's from time to time fail to conduct shakedowns without repercussions. However, due to complainant's borderline employment status at this point, it was not unreasonable for management to have raised this subject at this time.

22. On or about June 18, 1997, Lipp completed complainant's final PPD (Respondent's Exhibit R 114). This rated complainant unsatisfactory on three expectations—with regard to failure to show professional behavior in his interaction with staff members; failure to complete required room searches, and failure to demonstrate improvement with regard to aggressive and hostile behavior. The other areas were rated "satisfactory."

23. The next day, June 19, complainant was summoned to a pre-termination meeting. At this meeting, complainant was informed of the results of his final PPD, dated April 25, 1997, through June 15, 1997. Mr. Lipp commented that complainant had failed to show adequate professional behavior confronting various staff members, had failed to demonstrate improvement from his previous PPD regarding his sometimes aggressive and hostile behavior, and had failed to complete required room searches.

24. Respondent terminated complainant's probationary employment effective June 19, 1997

25. During the course of his employment at WRC, complainant spoke a number of times with co-workers and supervisors about his concerns regarding sores in his mouth. He stated he had concerns that the sores were pre-cancerous or cancerous.

26. Complainant was seen a number of times in 1997 by Dr Robert J. Bechard, an ear, nose, throat (ENT) specialist, with regard to complainant's concerns about throat problems. On February 28, 1997, complainant was seen by Dr Bechard after a referral from complainant's dentist concerning possible pre-cancerous lesions. Dr. Bechard's diagnosis was "Buccal mucosa irritation secondary to chewing tobacco." Complainant's Exhibit 8. He advised complainant to avoid chewing tobacco. Complainant subsequently saw Dr. Bechard several times<sup>2</sup> regarding similar concerns— i. e., bumps, lesions, etc., that complainant was concerned might be malignant. Dr. Bechard never told complainant any of these things were pre-cancerous, cancerous, or any other condition which would constitute a disability as defined by §111.32(8), Stats., and he never made such a diagnosis. He conducted a biopsy on July 21, 1997, the results of which were negative.

27 None of respondent's management employees ever had the opinion that complainant was suffering from any kind of condition which would be considered a disability as defined by § 111.32(8), Stats.

28. WRC has employed many persons with disabilities, including cancer, of which management was aware. At one time, over a period of eight or nine years, WRC employed a person who was known to have a long term blood related disease (a type of difficult to treat hepatitis).

#### CONCLUSIONS OF LAW

1. This matter is appropriately before this Commission pursuant to §230.45(1)(b), Stats.

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<sup>2</sup> March 11, May 27, June 3, July 21, and July 24, 1997

2. Complainant has the burden of proof to establish by a preponderance of the evidence that he was an "individual with a disability" as defined by §111.32(8), Stats., as the first element of a disability claim under the WFEA.

3. Complainant has not sustained his burden of proof.

4. Complainant was not discriminated against on the basis of an actual or perceived disability with regard to the termination of his probationary employment effective June 19, 1997

### OPINION

Under the WFEA, the initial burden of proof is on the complainant to show a prima facie case of discrimination. If complainant meets this burden, the employer then has the burden of articulating a non-discriminatory reason for the actions taken which the complainant may, in turn, attempt to show was a pretext for discrimination. *McDonnell-Douglas v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973), *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 25 FEP Cases 113 (1981).

Complainant contended that respondent terminated him because of a real or perceived disability. In the case of a discharge, the most common elements of a prima facie case are 1) that the complainant is a member of a class protected by the Fair Employment Act (here, a person with a disability), 2) that complainant was qualified for the job, 3) that despite complainant's qualifications, he was discharged, and 4) that subsequent to complainant's discharge, he was replaced by a non-disabled individual. *Id.*

Section 111.32(8), Stats., defines an "individual with a disability" as an individual who "(a) Has a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work; (b) Has a record of such impairment; or (c) Is perceived as having such an impairment." The first element is satisfied by showing "a real or perceived lessening or deterioration or damage to a normal bodily function or bodily condition, or the absence of such bodily function or bodily



condition.” *LaCrosse Police Comm. v. LIRC*, 139 Wis. 2d 740, 761, 407 N. W. 2d 510 (1987). Complainant has not demonstrated on this record such an impairment. The most he has shown is a temporary, intermittent condition of a relatively minor oral irritation, most likely caused by chewing tobacco. His ENT specialist never diagnosed any Lyme disease, cancer, or any blood disease or other condition which conceivably could meet the criteria for an impairment. Complainant asserted that he took some sick leave because of bleeding in the oral cavity<sup>3</sup> Merely because a condition (particularly one that has not been shown to be other than temporary) causes some absence from work does not make it “a lessening, or deterioration or damage to a normal bodily condition.” *Id.* At best, such absences run to the second element, that “the impairment either actually makes or is perceived as making ‘achievement unusually difficult or limits the capacity to work.’” *Id.* However, even if complainant had shown an “impairment,” brief absences from work neither make achievement unusually difficult nor limit the capacity to work. In the Commission’s opinion, the WFEA’s use of the term “limits the *capacity* to work” (emphasis added) connotes a more significant limitation than is caused by a brief absence from a temporary condition. Otherwise, the WFEA would cover a multitude of minor health issues from bumps and bruises to sinus infections.

Complainant also did not establish that respondent perceived him as a disabled individual. He argues that this was established because “DHFS had been informed [by complainant] that the sores may be cancerous and/or the result of a blood disease, conditions which have been found to constitute a disability under the WFEA.” Complainant’s post-hearing brief, p. 7 The record does not reflect that management, either individually or collectively, had formed the opinion that complainant actually had a blood disease or cancer. Complainant argues that such a perception by management is demonstrated by the fact that he was terminated right after the ball-playing incident that resulted in his bleeding from an injury to his forehead. The most that could be said in this regard is that the existence of such a perception would have been in the realm of

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<sup>3</sup> Complainant called in sick for this reason on May 28, 1997.

the possible. Complainant's concerns centered on the presence of cancer. There is not even an indication that anyone in management had any concerns about complainant having a disease communicable by bleeding (which apparently is implicit in complainant's argument).

Even if complainant had established that he was a disabled individual, and the other elements of a prima facie case under *McDonnell-Douglas*, he failed to establish that respondent's rationale for terminating his probationary employment was a pretext for discrimination on the basis of disability. Complainant's brief summarizes his contention as follows: "These incidents [alleged performance problems], however, were so insignificant and the evidence supporting them so inconsistent, contradictory, and unbelievable that the only rational conclusion to be drawn is that the incidents are a cover-up or pretext for discrimination." Complainant's brief, p. 9.

Complainant was on his original probation when he was discharged. Under the civil service system, an employe on probation can be terminated without the employing agency being required to demonstrate good cause for such action, as the transaction is not grievable or otherwise appealable at that point. It is far more difficult to discharge an employe once he or she has attained permanent status, because then the employer has the burden of proof and must establish just cause if the employe challenges the discharge. The issue before the Commission is not whether respondent had good cause to discharge complainant's probationary termination, or even whether the Commission would agree with respondent's decision from the standpoint of personnel management, but whether respondent was motivated in its decision by unlawful considerations of complainant's actual or perceived disability. However, the strength of respondent's showing in support of the termination decision is relevant to the extent that the flimsier the respondent's showing, the more likely it is that respondent's proffered reason is a pretext for discrimination. *See, e. g., Russell v. DOC, 95-0175-PC-ER, 4/24/97*

In the instant case, the record reflects a pattern of conduct by complainant that evidenced poor judgment and a volatility that justified management's concerns about his interpersonal relationship skills. Respondent called a number of witnesses from among

supervisors and complainant's fellow PCT's who were in a position to know about complainant's performance, and who testified credibly about his poor judgment and overall poor interpersonal relationship skills. Complainant called as witnesses a number of his co-workers who provided favorable testimony, but they had only worked with complainant on brief occasions. Complainant's efforts to downplay the seriousness of the incidents in which he was involved were unsuccessful. The record reflects that interpersonal relationship skills were extremely important to the safe and efficient operation of the institution. Also, management's philosophy was that it was very important to address any problems in this area during an employee's probationary period when the employment relationship could be terminated with much less difficulty than after the attainment of permanent status. Management certainly had a legitimate interest in focusing on complainant's actions in this area, and in terminating complainant's probationary employment when he failed to demonstrate any improvement in this area.

Complainant contends that one of the reasons he was discharged was his absences during the period between the May 5, 1997, performance evaluation session and his termination on June 19, 1997, and because some of his absences were attributable to the sores in his mouth, he effectively was terminated due to his disability, citing *Jacobus v. UW-Madison*, 88-0159-PC-ER, 3/19/92; affirmed by Dane County Circuit Court, *Jacobus v. Wisconsin Personnel Commission*, 92CV1677, 1/11/93. However, in *Jacobus* the employee was discharged because of performance problems caused by his disability. In the instant case, part of the reason for complainant's probationary termination was his failure to have demonstrated improved performance subsequent to the May 5, 1997, PPD review session. His attendance record per se was not a reason for the termination. However, part of the reason for his failure to show improvement during this period arguably related to his absences—i. e., it can be argued that if he had been at work more often during this period, he would have had more opportunity to have shown improved performance. This potential cause and effect linkage does not equate to an actual causal link between a disability and poor

work performance as required under *Jacobus, see, e.g.*, at p. 15: “[T]he record is unclear as to the actual effect that complainant’s handicap [borderline mental retardation] had on his ability to perform the duties and responsibilities of his BMH 2 position at the Physical Plant and, consequently, as to the causal effect between his handicap and his performance problem.”

The biggest problem area with regard to respondent’s case was the absence of documented problems with complainant’s performance during the first six months of his probation when he was supervised by Klein. This is probative of pretext. However, the weight of this evidence is offset to some extent by respondent’s evidence that Klein tended to be liberal in her performance evaluations, and it is substantially outweighed by the respondent’s large quantity of credible testimony and documentary evidence from a number of sources, including several of complainant’s co-workers.

In conclusion, complainant’s case fails at the prima facie case stage as he has not established that he was a disabled individual. Even if he had made this showing, he has not shown that respondent’s rationale for the termination of his probationary employment was a pretext for disability discrimination.

ORDER

This complaint of discrimination is dismissed.

Dated: July 27, 2000.

AJT:970163Cdec1

STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

  
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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