

EQUAL OPPORTUNITIES COMMISSION  
CITY OF MADISON  
210 MARTIN LUTHER KING, JR. BOULEVARD  
MADISON, WISCONSIN

Elizabeth Busto  
102 Exchange Street  
Cambridge, WI 53523

Complainant

vs.

Wisconsin Power & Light (WP&L)  
Post Office Box 192  
Madison, WI 53701

Respondent

ORDER

Case No. 20945

On September 25, 1989, the Hearing Examiner of the Madison Equal Opportunities Commission issued Recommended Findings of Fact, Conclusions of Law and Order in this matter. The Hearing Examiner determined that the Respondent did not discriminate against the Complainant in regard to employment based on her handicap. The Complainant filed a timely appeal and the parties were afforded the opportunity to file arguments on appeal.

Based on a review of the record, the Commission enters the following:

**ORDER**

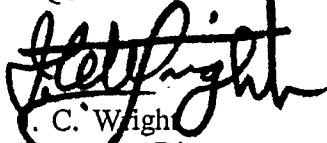
IT IS HEREBY ORDERED that the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order are upheld in their entirety.

Based on the Commission's finding that NO DISCRIMINATION OCCURRED, the Commission ORDERS the complaint dismissed.)

Commissioners Anderson, Gardner, Houlihan, King, McMurray, Ruben and Zuniga all joined in entering this order. Commissioner McFarland dissented.

Dated at Madison this 14<sup>th</sup> day of March, 1990.

EQUAL OPPORTUNITIES COMMISSION

  
J. C. Wright  
Executive Director

JCW:238

cc: Wisconsin Equal Rights Division

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RECOMMENDED FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND ORDER.  
- MEMORANDUM DECISION

Case No. 20945

On April 28, 1988 Elizabeth Busto filed a complaint of employment discrimination against Wisconsin Power & Light Co. (WP&L). The complaint charges that WP&L, the Respondent, unlawfully discriminated against Busto, the Complainant, because of her handicap - cocaine addiction - in failing to reasonably accommodate her handicap and in discharging her from her employment. An Initial Determination, finding probable cause to believe that WP&L had discriminated against the Complainant Busto, was issued on July 27, 1988. Conciliation was waived and the complaint was certified to the hearing examiner for hearing on August 11, 1988.

The hearing in this matter was held on June 6, 7 and 14, 1989 before MEOC hearing examiner Harold Menendez. The Complainant appeared in person and by her attorney, Jeff Scott Olson of the law firm of Julian, Olson & Lasker. The Respondent appeared by Debby Newton-Tainter, WP&L's Employee Services Manager, and by Attorney Barbara J. Swan.

On the basis of the evidence in the hearing record, the hearing examiner now makes the following:

## RECOMMENDED FINDINGS OF FACT

1. On August 1, 1986, Respondent WP&L hired the Complainant, Elizabeth Busto as an Application Development Specialist, a temporary position then expected to exist for two years. Busto was promoted to the permanent position of Application Development Specialist I on September 1, 1987. Busto's employment was terminated by WP&L on March 22, 1988.
2. WP&L's offices are located in the City of Madison, and Busto's employment was in the City of Madison.
3. Busto was a competent employee; she completed her assignments satisfactorily and on time and established a good working relationship with clients. She also got along well with her co-workers.
4. Despite her good performance, Busto was a problem employee. Beginning in early 1987, she began to have attendance problems. In March and April of 1987, Busto had used more sick leave than she had accrued. By October, she had a negative sick leave balance of 56 hours. A performance appraisal prepared by her supervisor, Chris Hart, on October 19, 1987 stated, "Lisa has had a problem with attendance this year and we are working with her to resolve this matter."
5. WP&L observes a progressive discipline policy. The first stage of discipline is counseling by a supervisor. The next stage is a formal written warning. Additional infractions result in the suspension of the offending employee. The fourth and final step is termination of employment.
6. Later in October, Hart met with Busto and advised her that her attendance was less than satisfactory. He and Busto agreed that Busto would make up 56 hours of work and Hart approved a schedule for making up the hours. In addition, Hart advised Busto that, for the next six months, she would be required to provide a physician's note for each absence due to illness. Hart also suggested that Busto contact WP&L's Employee Assistance Program.
7. Busto did not adhere to the make up schedule. On November 8, Hart advised her, by memo, that her next paycheck would reflect a deduction of wages for five

hours which Busto had failed to make up. Hart also advised Busto of the possibility of further discipline due to poor attendance, including the termination of her employment.

8. In a memo to Hart dated November 17, 1987, Busto requested that she be relieved from the make-up schedule and that the hours which she had not made up be deducted from her wages instead. Her request was granted.
9. Hart died in December. Busto's immediate supervisor thereafter was Chuck Frost.
10. Between November 30 and December 31, 1987, Busto was absent from work on 16 occasions, missing a total of 107 hours of work. She did not provide a physician's note for each absence.
11. On December 21, 1987, Chuck Frost requested a meeting with David Salzwedel, the Manager of Information Services, for the purpose of reviewing Busto's attendance and discussing further discipline.
12. Busto's family physician is Dr. George Gay. Busto visited Gay on several occasions in December of 1987. Although she had been using cocaine for some time, she did not tell Gay of her cocaine use in December. She did inform Gay of her cocaine use in February of 1988. Gay did not make any diagnosis or finding relating to Busto's cocaine use.
13. Gay made a diagnosis that Busto had chronic sinusitis. He also diagnosed a perforated septum and told Busto that cocaine use was one of the possible causes of a perforated septum. He did not however, diagnose the cause of Busto's perforated septum.
14. Busto told Gay she thought she needed counseling to help her deal with stress. Gay referred her to Mental Health Consultants.
15. Busto contacted Mental Health Consultants and was seen there for the first time on December 28, 1987. At Mental Health Consultants, Busto was seen by Michelle Norris, a clinic social worker. Busto also saw Norris on a total of eight occasions in January, February, and March of 1988.

16. Norris has a Master's Degree in Social Work. She does not hold any professional license or certificate.
17. After her December 28 session with Busto, Norris determined Busto was in need of therapy for depression. She also believed Busto might be dependent on cocaine and noted a need for an assessment to determine whether she was. As a result of her meeting with Busto on January 4, 1988, Norris concluded that Busto's major problem was her cocaine use. She suggested that Busto undergo an assessment for cocaine dependence and discussed various treatment options available at New Start, a drug and alcohol treatment program.
18. In January, Frost met with Salzwedel and Carolyn Creager of WP&L's Human Resources Department and the three developed a Sick Leave Action Plan which was presented to Busto in a memorandum dated January 26, 1988:

As you are aware, your overall attendance record has been a cause for concern. Your very recent attendance record has caused even greater concern as you were absent from work a total of 107 hours during a one month period (11/30/87-12/31/87). Of these 107 hours, 85.3 hours were not covered by your accumulated sick leave. Of the 85.3 hours, 15 hours were unaccounted for by a note or letter from your physician as required by Chris Hart (see attached schedule of dates).

Sick leave is a benefit and should be regarded as such. The intention of the sick leave policy is for an employee to accumulate available sick leave credit so that there will be no loss of pay in the event of a serious illness as well as providing coverage for the usual amount of short-term illness that may occur. Sick leave is not to be used as a means of extending vacation, holidays, or merely obtaining additional time off.

On two occasions (October 21 and November 6, 1987) Chris Hart had discussions with you regarding your attendance and the serious nature of strict compliance with the programs that he set forth.

Based on your recent attendance record, we must take action to remedy the situation and ask your cooperation with us by complying with the following action plan:

1. You have advised us that you are seeing a counselor for stress management and we want to encourage you to continue this counseling as long as you feel it necessary. We would also encourage you to seek assistance from WP&L'S Employee Assistance Program for this situation or other situations where the program could be helpful. Contact Carolyn Creager if you have questions regarding the EAP.

2. In order that we may better understand your medical condition, we want to initiate the Medical Director's report. As part of this process, your physicians will fill out forms with information regarding your medical condition which will be forwarded to WP&L's Medical Director. We need your assistance by:
  - A. Authorize the release of medical information by your attending physicians (by signing the top portion of form WPL-3544C). The required forms are attached.
  - B. Insure that a copy of WPL-3544C is delivered to each of your attending physicians in a timely manner.
3. Because your absence on 12/11/87, 12/14/87, 12/15/87 and 12/17/87 were not substantiated by the required medical evidence, fifteen hours will be deducted from your next paycheck.
4. Until further notice, any hours missed by future unplanned absences not substantiated by medical evidence will be deducted from your paycheck.
5. For any unplanned absence, you must notify your supervisor prior to the start of the work day on a daily basis and state the reason for your absence.
6. Currently your sick leave balance is -67.6 hours. For each month with no sick time you will earn back 6.6 hours. We request that you make every effort possible to correct your negative sick leave record.

I will review your record with you on a monthly basis. Be aware that if your record worsens we may need to take further action which may include suspension of sick leave or could result in termination of your employment with Wisconsin Power & Light.

Chuck Frost  
Information and  
Administrative Services

19. Busto had informed Frost she was in counseling for stress management. Busto had been using cocaine since the previous spring and was considering seeking treatment for her cocaine use, but had not told any of her co-workers or supervisors at WP&L about this.
20. Busto was also on probation for conviction of a crime, and was under an obligation to pay restitution in the amount of \$4,000.00 to the victim of her crime, a former employer. This was not known to anyone at WP&L prior to March 21, 1988.

21. In February of 1988, Busto borrowed \$2,500.00 from the Fort Community Credit Union. Although the full amount of the loan was to be applied to Busto's restitution obligation, Busto did not use the loan to pay restitution. Instead, she purchased large quantities of cocaine, which she used on the weekend of February 13 and 14 and on the morning of Monday, February 15, 1988.
22. Busto did not work at all the week of February 15-19, 1988. She called in sick on Monday, February 15, but did not call in on Tuesday the 16th.
23. On the afternoon of February 17th, Busto, now concerned that her job might be in jeopardy, contacted Debbie Newton-Tainter. Newton-Tainter was WP&L's Employee Services Manager, and the contact person for the Employee Assistance Program (EAP). Busto asked Newton-Tainter to help determine her employment status. She also told Newton-Tainter that she was chemically dependent, that she was in counseling and that she would be seeking treatment for this problem. She asked Newton-Tainter to keep her chemical dependency confidential.
24. Newton-Tainter then met with Frost and Salzwedel to discuss Busto's employment status. They reviewed Busto's attendance record, and considered terminating her employment because of her failure to heed prior warnings or abide by the Absence Control Plan. However, Newton-Tainter advised Frost and Salzwedel that Busto was ill and would be obtaining treatment for her illness, and that Busto had contacted the EAP. Consistent with WP&L's EAP policy, Busto's use of the EAP was taken into account, and it was determined that her employment would not be terminated, but that she would instead be suspended without pay for one day. In addition, Busto would not be paid for February 16 because she failed to call in sick that day.
25. Newton-Tainter contacted Busto by telephone on February 18 and advised her that she still had a job with WP&L but that she would be suspended without pay for one day and would not be paid for the day she failed to call in sick. She also offered to assist Busto in obtaining a leave of absence. Busto indicated that she would not need a leave of absence because she would receive her treatment as an outpatient, after working hours.



26. Busto served her suspension on Friday, February 19. When Busto returned to work on Monday, February 22, she met with Salzwedel, Frost and Newton-Tainter. She was given a Disciplinary Action memo written by Salzwedel on February 19. That memorandum summarized the disciplinary action taken - the suspension without pay, and the loss of an additional day's pay for not having called in one of the days she was absent - and advised Busto that her sick leave was suspended. Once again, she was advised that all medical absences were to be verified by a physician, and that all such absences would be treated as vacation or leave without pay, provided they were verified. In addition, the memorandum stated that in the event of any absence not approved in advance by a supervisor or verified by a physician, Busto's employment would be terminated.
27. On February 22 Busto told Norris she was scheduled for an assessment at New Start on March 2, 1988. Norris also spoke with Chuck Frost that day and informed him that Busto would be getting treatment at New Start. Frost knew that New Start is a drug and alcohol treatment center.
28. Busto asked Frost for permission to be absent from work on March 2, 1988 in order that she could go to New Start for her assessment. Frost granted her request.
29. Busto's assessment was conducted by Audrey Ryan. Ryan is an alcoholism counselor at New Start. Although she has had some training for counseling alcohol and drug dependent persons, she has not had any formal training and holds no professional license or degree.
30. Ryan's assessment of Busto was conducted for the purpose of determining whether Busto was eligible for admission to New Start's outpatient Beta program.
31. The primary criterion for admission to the Beta program is that an individual be able to abstain from drug or alcohol use for a measurable period of time. Based on information provided by Busto, Ryan recommended her admission to the Beta program. Busto was accepted and scheduled to begin participating in the Beta program on March 28, 1988.
32. On March 4 Busto left work early without the knowledge or permission of either Frost or her project leader. She left a note for her project leader stating that

- her son was ill and that she had been asked to take him home from school. In fact, Busto's son was not ill, nor had she been asked to take him home from school. Busto left work because she learned that her boyfriend was removing her belongings from the house they shared.
33. Busto did not go to work on March 7 because her son was ill. When she returned to work on March 8, Frost asked her to provide verification for her March 4 and March 7 absences. Busto told Frost that she left work on March 4 because she'd received a call from her son's school, was told he was ill and was asked to take him home. She also explained her son was ill on March 7. She agreed to obtain a note from the school to verify the March 4 absence. Busto eventually provided Frost with a physician's letter verifying her son's illness on March 7, but did not provide any documentation for her absence on March 4th.
  34. Busto had informed her probation agent of her cocaine use and he required her, as a condition of her probation, to periodically undergo a urine screening. Busto left work early on March 17 in order to meet her urine screening obligation. She had not asked for permission to leave early. Busto knew that Frost had observed her leaving early that day.
  35. On the morning of March 18, Busto telephoned Frost and left a message for him on his voice mail. The message was that she had been up all night and had been vomiting, had an upset stomach and diarrhea, and that she would not be going to work that day. Busto had been using cocaine the evening of March 17 and the morning of the 18th.
  36. When Frost telephoned Busto later on the morning of the 18th, she again told him she was experiencing those symptoms. Frost urged her to report to work if it was at all possible for her to do so.
  37. On Monday, March 21, 1988 Busto met with Frost and told him she was chemically dependent and that she was to begin treatment at New Start for cocaine dependency on March 23. She informed Frost that she was on probation. She also told Frost that her son had not been ill on March 4 when she left work early, and that she was not suffering from any of the symptoms she reported to Frost on March 18 when she called in, but had been earlier. Frost concluded

that her absences on March 4 and March 18 were in violation of the conditions imposed by Salzwedel's February 19 Disciplinary Action memorandum.

38. After speaking with Busto on March 21, Frost then met with David Salzwedel and Debbie Newton-Tainter. Frost reported that Busto had an unexcused absence on March 4 and that she had lied about the reason for that absence. He also reported that he had concluded that Busto's absence of March 18 was also unexcused. In discussing Busto's absences with Salzwedel and Newton-Tainter, Frost told them that Busto had informed him she was chemically dependent and that she was on probation.
39. On March 22, Busto met with Chuck Frost, David Salzwedel and Debbie Newton-Tainter and was informed that she was discharged from her employment.
40. Busto entered the Beta program on March 28, 1988. Philip Caravello is a chemical dependency counselor. He conducted the Beta program sessions attended by Busto. Caravello has bachelor's degrees in sociology, psychology, and mass communications and advertising. He has been a chemical dependency counselor since 1981. Caravello holds no professional degrees or licenses and does not appear to have had any formal medical training.
41. Busto completed the Beta program in spring of 1988 and satisfied the requirements of a follow-up "after-care" program connected with the Beta program.
42. WP&L observed its own progressive discipline plan and personnel policies in disciplining and discharging Busto.
43. Busto was discharged from her employment because of her unexcused and unverified absences on March 4 and March 18, and because she lied to her supervisor about those absences, not because of any actual or perceived chemical dependence or addiction, because she had been convicted of a crime, or because she was on probation.

## RECOMMENDED CONCLUSIONS OF LAW

44. The Respondent, WP&L, is an employer subject to the Madison Equal Opportunities Ordinance.
45. The Madison Equal Opportunities Ordinance prohibits discrimination in employment because of handicap or arrest or conviction record.
46. The Complainant, Elizabeth Busto, is a member of the protected class of persons who have a record of arrest or conviction.
47. An individual is handicapped if she has a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work; has a record of such an impairment; or is perceived as having such an impairment.
48. The Complainant has failed to prove by a preponderance of the evidence that she has a mental or physical impairment which makes achievement unusually difficult or limits the capacity to work.
49. The Complainant is handicapped in that she was perceived as having such an impairment by Respondent.
50. The Respondent did not discriminate against Complainant because of handicap.
51. The Respondent did not discriminate against Complainant because of arrest or conviction record.

## RECOMMENDED ORDER

52. IT IS HEREBY ORDERED the the complaint is, dismissed.

## MEMORANDUM DECISION

On March 22, 1988, Elizabeth Busto was discharged from her job with the Wisconsin Power & Light Company (WP&L). Busto, who claims she was handicapped by reason of chemical dependency, has charged that WP&L discriminated against her

in failing to reasonably accommodate her handicap and in terminating her employment. She has also charged WP&L with discriminating against her because of her conviction record. Busto has been convicted of a crime and was on probation while in the employ of WP&L.

Busto began working at WP&L in August of 1986. Her attendance began to deteriorate early in 1987. By October, her attendance problems merited mention in a performance appraisal prepared by Chris Hart, who was then her supervisor. Hart also met with Busto on October 21, 1987 to discuss her attendance. Their meeting was memorialized in a memo from Hart to Busto dated, October 27, 1987:

This is to document the conversation you and I had on October 21, 1987 concerning your absences over the past year.

We feel that your attendance has been less than satisfactory in the last twelve months. In March and April 1987 you had a negative sick leave balance. In the months that followed you have used sick leave as fast as you have accumulated it and have received permission to make up other time you had to take off.

We feel that you have abused the sick leave benefit and make up time privileges which leaves you owing the Company fifty six hours of time to be made up.

We remind you that sick time is to be used for employee illnesses only.

Because of your performance in the attendance area, you must make up the fifty six hours presently owed to the Company as set forth in the attached schedule.

For the period beginning October 26, 1987 and continuing to April 25, 1988, when you are absent because of illness you must bring a note or letter from a physician to confirm your illnesses.

Failure to comply in the strictest sense with the attached schedule for make up and use of sick time will result in stronger disciplinary measures being taken.

By November 8, Busto had failed to comply with the make-up schedule on at least three days and Hart, in another memo, advised her that her next paycheck would reflect a deduction of five hours she had failed to make up and that any further attendance problems would result in additional discipline up to and including termination of her employment.

Chuck Frost became Busto's immediate supervisor following Hart's death in December of 1987. Busto was absent from work for all or part of 16 days in December. She failed to provide doctor's excuses for four of those absences. Frost requested a meeting with David Salzwedel, the department manager, to discuss taking further disciplinary action against Busto. Frost and Salzwedel met with Carolyn Creager of WP&L's Human Resources Department and the three agreed on a Sick Leave Action Plan. The Plan acknowledged that Busto was seeing a counselor for stress management and encouraged her to continue to do so, and to contact WP&L's Employee Assistance Program (EAP) for assistance. Busto had informed Frost that she was in counseling for stress management. Although she had been using cocaine since the previous spring and was considering seeking treatment for her cocaine use, she had said nothing about this to anyone at WP&L.

As part of the Sick Leave Action Plan, Busto was also asked to sign forms authorizing the release of her medical records to WP&L, so that WP&L could determine her medical condition. The Plan also included the following disciplinary measures: Busto would not be paid for the four December absences which were not substantiated by medical excuses; she would be required to call in before the start of her workday on any day she was to be absent, and to state the reasons for the absence; and she would not be paid for any further absences for which she failed to provide a medical excuse. The Sick Leave Action Plan was recorded in a memorandum dated January 26, 1988, a copy of which was given to Busto. The memorandum advised Busto that her attendance would be reviewed monthly and that she would be subject to further discipline if her attendance problems did not abate.

Busto was absent from work from Monday, February 15 through Thursday, February 18, 1988. She called in sick on Monday morning but did not call in on Tuesday. On Wednesday afternoon, she contacted the EAP and spoke with Debbie Newton-Tainter, who is WP&L's Employee Services Manager and the EAP contact person. Busto told Newton-Tainter about her absences that week. She also told her that she was chemically dependent and that she was seeking treatment for her chemical dependence. She asked Newton-Tainter to help her determine her employment status. Newton-Tainter contacted Chuck Frost and David Salzwedel and informed them that Busto had called her and that she had a medical problem for which she would be getting treatment. It was decided that Busto would be suspended for a day, without pay, because she failed to call in sick on Thursday, February 16, but that she should not be discharged because she had

contacted the EAP for assistance. Busto was also (again) informed, both orally and in writing, that she would be required to call in on each day she was absent and to provide a doctor's statement to verify each absence.

On February 22, Frost learned that Busto would be seeking treatment at New Start. On March 2 Busto was absent from work with Frost's permission and went to New Start for an assessment. Busto left work early on March 4 and left a note for her project leader, stating her son was ill and that she was taking him home from school. The following week when Frost asked for verification of her March 4 absence, Busto told him she had received a telephone call from her son's school and had been asked to take him home; she agreed to obtain a note from the school. In fact, Busto's son had not been ill on March 4, nor had she received a call from the school. She left work because she learned that her boyfriend was removing her belongings from the house they shared. On the morning of Friday, March 18, Busto called Frost and left a message on his voice mail machine. The message was that she would not be in because she was vomiting and had diarrhea. When Frost telephone her later that morning, she reported the same symptoms to him. Frost urged her to come to work if it was at all possible for her to do so. Busto did not go to work that day.

Busto met with Frost on Monday, March 21 and told him that she had lied about her absence on March 4. She also told Frost that she was chemically dependent and was scheduled to begin treatment at NewStart on March 28, and that she had been convicted of a crime and was on probation. Frost questioned Busto about her March 18 absence and she admitted that she was not experiencing the symptoms she reported in her message to Frost or in her later conversation with him, but stated that she had experienced those symptoms on the evening of March 17 and early on March 18. Frost concluded that Busto could have come to work on March 18.

After his March 21 meeting with Busto, Chuck Frost met with Debbie Newton-Tainter and David Salzwedel. Frost told them that Busto had informed him she was chemically dependent and that she was on probation, and also told them Busto had lied about her absences of March 4 and March 18. On March 22, Busto was discharged from her employment.

## Handicap Discrimination Claim

The Madison Equal Opportunities Ordinance prohibits discrimination in employment on the basis of handicap, Sec. 3.23(7), Mad. Gen. Ord., unless the handicap is reasonably related to the individual's ability to perform the job in question. Sec. 3.23(7)(i) 2, Mad. Gen. Ord. The Ordinance also requires an employer to reasonably accommodate a handicapped individual unless such an accommodation would impose an undue burden on the employer. Sec. 3.23(7)(g), Mad. Gen. Ord. The term "handicap" is not defined in the Ordinance itself. However, both the Commission and reviewing courts have construed the handicap discrimination provisions of the Ordinance consistent with those in the Wisconsin Fair Employment Act (WFEA), Secs. 111.31, et seq., Wis. Stats.<sup>1</sup> This approach is supported by the similarity in the language and intent of the WFEA and the Equal Opportunities Ordinance (EOO).<sup>2</sup> Sutherland Stat. Const. Secs. 51.02, 51.03 (4th ed.) It is therefore appropriate to look to the WFEA's definition of handicap in determining whether an individual is handicapped within the meaning of the term as it is used in the EOO.

A handicapped individual is one who:

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1. See, e.g., Maxson v. MEOC, No. 84 CV 4150, Dane Co. Circ. Ct., Hon. A. Bartell (July 18, 1985); McFayden v. MEOC, No. 81 CV 3744, Dane Co. Circ. Ct., Hon. A. Bartell (Nov. 15, 1982); Joseph v. The Swiss Colony, Inc., MEOC Case No. 20989, Ex. Dec. (June 28, 1989); Steinbring v. Oakwood Lutheran Home, MEOC Case No. 2763, Ex. Dec. (Feb. 11, 1982); Siebert v. Backey & Assoc. Engineering, MEOC Case No. 2694, Ex. Dec. (July 8, 1981).
  2. The state legislature and the Common Council expressed similar goals in enacting, respectively, the WFEA and the EOO. Compare, Sec. 111.31(3), Wis. Stats. with Sec. 3.23(1), Mad. Gen. Ord. In addition, both the WFEA and the EOO prohibit the same types of discrimination and apply to employers, employment agencies, and labor organizations. Compare, Secs. 111.321-111.325, Wis. Stats. with Sec. 3.23(7)(a)-(f), Mad. Gen. Ord. Finally, the special handicap discrimination provisions of the WFEA and EOO are similar in language and virtually identical in their effect. Compare, Sec. 111.34(1)(6), Wis. Stats. with Sec. 3.23(7)(g), Mad. Gen. Ord. (reasonable accommodation provisions) and Sec. 111.34(2)(a), Wis. Stats. with Sec. 3.23(7)(i) 2., Mad. Gen. Ord. (discrimination not prohibited if the handicap is reasonably related to an individual's ability to perform a particular job).



- a. Has a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work;
- b. Has a record of such an impairment; or
- c. Is perceived as having such an impairment.

Sec. 111.32(8), Wis. Stats. The Supreme Court has recently explained the meaning of the term "impairment":

the element of 'impairment' is satisfied by showing either an actual lessening, deterioration, or damage to a normal bodily function or bodily condition, including the absence of such function or condition, or by showing that the condition perceived by the employer would constitute an actual impairment if it in fact did exist.

LaCrosse Police & Fire Com'n. v. LIRC, 139 Wis. 2d 740, 759-60, 407 N.W. 2d 510 (1987). An impairment, whether real or perceived, is not a handicap unless it "either actually makes or is perceived as making 'achievement unusually difficult or limits the capacity to work.'" 139 Wis. 2d at 760. The term "makes achievement unusually difficult" means "a substantial limitation on life's normal functions or a substantial limitation on a major life activity" ibid. (citation omitted). "Limits the capacity to work" refers to an individual's ability to perform the particular job in question. ibid.; Brown Co. v. LIRC, 124 Wis. 2d 560, 572, 369 N.W. 2d 735 (1985). The burden of proof in a handicap discrimination case initially rests with the complainant. She must prove that she is handicapped and that the employer discriminated against her because of her handicap. Brown Co., 124 Wis. 2d at 564 n.5. If she succeeds, the burden shifts to the employer to prove that the handicap is reasonably related to her ability to adequately perform the job. ibid.

The Ordinance requires an employer to reasonably accommodate a handicapped individual's handicap unless accommodation would pose an undue hardship for the employer. Sec. 3.23(7)(g), Mad. Gen. Ord. Thus, the Ordinance enables an otherwise qualified handicapped individual to obtain or retain employment by requiring that an employer eliminate or minimize any obstacles to the individual's successful performance of the job. It is apparent that an individual who does not actually have an impairment which makes achievement unusually difficult or limits the capacity to work is not in need of any accommodation in order to perform her job. It follows that the duty of reasonable accommodation does not arise unless an individual is actually handicapped. Thus, in order to prevail on a reasonable accommodation claim, a complainant must

prove the existence of an actual impairment. Joseph v. The Swiss Colony, Inc. MEOC Case No. 20989, Ex. Dec. (June 28, 1989); Cf., Williams v. Casey, 691 F. Supp. 760, 767 (S.D.N.Y. 1988) (proof of an actual impairment is an element of prima facie case of a reasonable accommodation claim brought under the Rehabilitation Act of 1973).

In Connecticut General Life Ins. Co. v. LIRC, 86 Wis. 2d 393, 273 N.W. 2d 206 (1979), the Supreme Court reversed a circuit court decision affirming a LIRC decision and order finding that the employer had discriminated against an employee who had a "drinking problem" on the basis of handicap. The Court reasoned that the term "drinking problem" could not be equated with the medical term "alcoholism." 86 Wis. 2d at 405-406. The court also observed that a finding of handicap by reason of alcoholism must rest on competent medical evidence: "[A]lcoholism is a disease. Its diagnosis is a matter of expert medical opinion proved by a physician and not by a layman." id. at 407 (citation omitted). Thus, under the Connecticut General holding, a complainant is required to prove the existence of an impairment through clear and competent medical evidence. As WP&L argues, Busto has failed to present such evidence.

There is no evidence in the record that any physician has ever diagnosed Busto to be addicted to or dependent on cocaine, made any finding that she was psychologically or physically dependent on cocaine, or that she suffered from any disease or physical or mental impairment related to her use of cocaine.<sup>3</sup> The Supreme Court has stated that volitional drinking cannot be classified as a handicap. Connecticut General, 86 Wis. 2d at 408. The same standard would presumably apply with respect to the use of other drugs. There is no evidence, aside from Busto's non-expert opinion, that her cocaine use was non-volitional. Michelle Norris, a clinical social worker, recorded a diagnosis of cocaine addiction in Busto's progress notes. Her testimony at the hearing was that she identified a need to rule out the possibility of cocaine addiction and later concluded that Busto's principal problem was her cocaine use. There is no evidence that Norris has had any training on chemical dependency, its diagnosis or treatment. She holds no professional degree or license, and she limited herself to encouraging Busto to seek an assessment of her drug use problem. Thus, her opinion, though characterized as a diagnosis, does not satisfy the guidelines set down in Connecticut General, supra. The same is true of the opinions of Audrey Ryan and Philip Caravello. Ryan is the alcoholism counselor at New Start who conducted Busto's assessment. Philip Caravello

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3. Dr. George Gay, Busto's physician, diagnosed that Busto had a perforated septum, but did not make any finding or diagnosis with respect to its cause.

conducted the counseling sessions which Busto attended. Although both have had some training and experience in the field, neither holds any type of professional degree or license, and their opinions are those of laymen.<sup>4</sup> There is no evidence that any individual admitted to New Start's outpatient program is, by definition, chemically addicted or dependent. Busto has thus failed to prove the actual existence of a handicapping impairment. Her reasonable accommodation claim is therefore dismissed.

There can be little doubt, however, that the three individuals who were involved in the decision to terminate Busto's employment perceived her to be handicapped. As early as January of 1988, Chuck Frost (Busto's immediate supervisor) and David Salzwedel (the department manager) knew Busto was in counseling for stress management. In February, Busto told Debbie Newton-Trainter, the EAP contact person and the Employee Services Manager, that she was chemically dependent and would be entering treatment. Newton-Trainter offered to assist Busto secure a leave of absence. She also told Frost and Salzwedel that Busto had medical problems and would be going into a treatment program. Also in February, Michelle Norris told Frost that Busto would be receiving treatment at New Start. Frost knew that New Start is a drug and alcohol treatment center. Frost also knew that Busto was going for an assessment on March 2, and gave her permission to be absent from work that day. On March 21, 1988, the day before her discharge, Busto told Frost she was chemically dependent. Frost testified that he was not surprised to hear this because, in his mind, he'd associated Busto's absences and her behavior with drug use. By March 22, David Salzwedel had also been told that Busto was chemically dependent. In short, the evidence establishes that Busto's employer believed she was addicted to cocaine and that her addiction had affected her ability to work. Busto is therefore a handicapped individual, 139 Wis. 2d at 760-61, and is protected by the ordinance from discrimination because of her (perceived) handicap.

It is equally clear that WP&L did not violate the ordinance in terminating Busto's employment. It is undisputed that she was frequently absent from work. WP&L's adherence to its own progressive discipline guidelines is well documented, as are Busto's violations of the conditions imposed at each stage of the disciplinary process. Busto was discharged due to her inability to perform her job to WP&L's standards - she could not be counted on to come to work every day. The ordinance does not prohibit

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4. Busto has not presented any evidence that the diagnosis of cocaine dependence by persons other than physicians is an accepted medical practice.

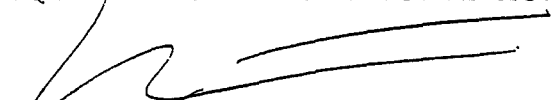
discrimination against a handicapped individual who is unable to perform her job. Sec. 3.23(7)(i)2. See also, Squires v. LIRC, 97 Wis. 2d 648, 652, 294 N.W.2d 48 (Wis. App. 1980).

Conviction Record Claim

Busto has also raised a claim of discrimination on the basis of her conviction record. The day before she was discharged, she informed Chuck Frost that she was on probation and that she had been convicted of a crime. This, too, was known to Newton-Tainter and Salzwedel at the time the decision was made to discharge Busto, but was not the reason for her discharge. By the time she told Frost about her conviction record, Busto had been disciplined repeatedly because of her poor attendance and had accumulated two unexcused absences in March. She had been warned in February that she would be terminated for any such absences. When it became apparent that Busto's absence on March 4th was unexcused, and that she'd lied about it to Frost, her fate was sealed. The evidence simply does not support Busto's claim that she was discharged because of her conviction record, rather than because of her repeated absences and her violation of the conditions imposed in the final disciplinary memo, which she compounded by lying to her supervisor.

Dated at Madison this 25 day of September, 1989.

EQUAL OPPORTUNITIES COMMISSION

  
Harold Menendez  
Hearing Examiner

HM:238-IA

cc: Jeff Scott Olson  
Barbara Swan

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