EG

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
Branch 12

STATE ex rel. ELIZABETH BUSTO,

Petitioner,

vs.

MADISON EQUAL OPPORTUNITIES COMMISSION,

Case No. 90CV1594

Respondent,

WISCONSIN POWER AND LIGHT CO.,

Intervenor-Respondent.

MEMORANDUM DECISION AND ORDER

Petitioner, Elizabeth Busto, has filed a certiorari petition seeking to review a decision by respondent, Madison Equal Opportunities Commission. (MEOC). MEOC, by order dated March 14, 1990 dismissed Ms. Busto's complaint that she had been subjected to handicap and conviction record discrimination in violation of secs. 3.23(7)(a) & (g), and 3.23(7)(i)(3)(b), Madison General Ordinances, when she was discharged from employment by intervenor-respondent, Wisconsin Power and Light Company. (WP&L).

Petitioner asserted that her discharge was based upon a cocaine addiction and that her addicted condition constituted a protected handicap under the ordinance. She also claimed discrimination on the basis of a criminal conviction. MEOC found that petitioner failed to establish by sufficient expert evidence that she was actually addicted to cocaine

and, therefore, handicapped. Although the MEOC did find that Ms. Busto was perceived as having a handicap, the Commission found that WP&L did not discriminate against her on the basis of either a handicap or a conviction record. Based upon my review of this record, I conclude that certiorari relief must be denied.

FACTS

This case generated an extensive factual record over the course of a three day hearing held before the respondent in June, 1989. Those facts are well summarized in the order of the hearing examiner and are not in substantial dispute. A copy of the examiner's decision is attached hereto and his factual findings are incorporated herein. Further facts will be set forth in the body of this opinion.

ORDINANCE INVOLVED

Madison General Ordinance 3.23(7)

> Employment Practices. It shall be an unfair discrimination practice and unlawful and hereby prohibited:
>
> > (a) For any person or employer individually or in concert with others to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's sex, race, religion, color, national origin or ancestry, age, handicap, marital status, source of income, arrest record or conviction record, less than honorable discharge, physical appearance, sexual orientation, political beliefs or the fact that such person is a student as defined

herein ....

> (g) For any person or employer, employment agency or labor organization to refuse to reasonably accommodate an employee's or prospective employee's handicap unless the employer can demonstrate that the accommodation would pose an undue hardship on the employer's program, enterprise, or business.

STANDARD OF REVIEW

This action was commenced as both a statutory and common law certiorari review. It is clear that only common law certiorari is appropriate. Standards for certiorari review limit this Court to determining whether the agency: 1) acted within its jurisdiction; 2) proceeded on a correct theory of law; 3) was arbitrary, oppressive or unreasonable; or 4) might have reasonably made the finding or order that it made based on the evidence. Hennekens v. River Falls Police and Fire Commission, 124 Wis.2d 413, 419, 369 N.W.2d 670 (1985). This review is more narrowly circumscribed than a de novo review. Implicit in this standard of review is that an administrative board is entitled to a certain degree of deference and lattitude in the judgments it makes in finding facts and applying the law to those facts. Petitioner's complaints focus largely on assertions that MEOC proceeded on incorrect theories of law.

Recent Wisconsin appellate decisions have narrowed the deference due to administrative agency interpretations of law. In Local 695 v. LIRC, 154 Wis.2d 75, 84, 452 N.W.2d 368 (1990), the Wisconsin Supreme Court held that where a legal question is involved and there is no showing of any special expertise or experience of uniform interpretation over a period of time, the agency's interpretation of law is to be accorded no

weight. See also, General Casting Corp. v. Winstead, 156 Wis.2d 752, 757, 457 N.W.2d 557 (Ct.App. 1990). Similarly where an agency is interpreting law emanating from another level of government, reviewing courts are not to accord any deference to the agency's legal interpretation. William Wrigley, Jr. Co. v. D.O.R., 153 Wis.2d 559, 556, 451 N.W.2d 444 (Ct.App. 1989). Because the MEOC was interpreting both state and federal law and because there is no showing of particular long-standing experience or expertise in this area, I conclude that little or no deference is due to the agency's legal conclusions.

Under principles of administrative review, MEOC's factual findings are entitled to deference, if supported by substantial evidence, as long as a reasonable mind could make the same finding as the agency. Madison Gas & Electric Co. v. P.S.C., 150 Wis.2d 186, 191, 441 N.W.2d 311 (Ct.App. 1989).

OPINION

1. Cocaine Addiction As A Handicap Under The Madison Ordinance

The MEOC decision does not squarely address the question of whether cocaine addiction constitutes a handicap under the Madison Ordinance. The Commission implicitly recognized that such a handicap could constitute a recognized handicap, as long as it was based on competent medical evidence. (Opinion at p.16). An examination of the law on this claim is an essential starting point for analysis.

There are no reported cases in Wisconsin addressing this particular question. Federal decisions have significantly reduced the opportunities for current drug users to make

claims for employment discrimination under federal law.[1]

The seminal case in Wisconsin involving a claim of handicap based on excessive use of intoxicants is Connecticut General Life Ins. Co. v. DILHR, 86 Wis.2d 393, 273 N.W.2d 206 (1979). The petitioner in Connecticut General, Gerald Bachand, filed suit with DILHR under Wisconsin's Fair Employment Act, § 111.31 et seq., Wis. Stats. Bachand claimed that as a result of his "drinking problem," he was discharged from employment in violation of the Act.

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[1] The Americans with Disabilities Act of 1990 (Pub L. No. 101-336, 140 Stat. 327 (1990)), although providing coverage for drug addiction, specifically exempts discrimination against current users of illegal drugs. The Rehabilitation Act of 1973, 29 U.S.C. §§ 791-794, provides protection for handicapped individuals who are defined as those who: 1) have a physical or mental impairment which substantially limits one or more of such person's life activities, 2) has a record of such impairment, or 3) is regarded as having such an impairment. 29 U.S.C. § 706(7) (1982). Regulations have construed physical impairment to include drug addiction. 29 C.F.R. § 323.3(b)(i)(iii) (1981). After the Act was construed to cover employees with histories of drug abuse in Davis v. Bucher, 451 F.Supp. 791 (E.D. Penn. 1978), Congress amended the Act in 1978 to exclude any person, "whose current use of alcohol or drugs prevents such individual from performing the essential functions of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property and safety of others." 29 U.S.C. § 706(7) (B) (1982). Although some federal courts have extended protection to well-functioning former drug addicts under the Act, other federal courts have been particularly hostile to handicap discrimination claims made by drug abusers.

> The notion that Congress would consider illegal drug abusers as a general group, to be "handicapped individuals" within the meaning of section 504 is antithetical to the goals of sound law enforcement and trivializes the commonly understood meaning of the word "handicapped." Burke v. New York City Transit Authority, 680 F.Supp. 590, 597 (S.D.N.Y. 1988).

Most federal courts have held that current drug users are not entitled to protection under the Act when their use of drugs prevents them from performing the duties of their job. Heron v. McGuire, 803 F.2d 67, 68-69 (2nd Cir. 1986). While federal precedents are not binding, their interpretation of similarly worded federal statutes may be persuasive. Riley v. Isaacson, 156 Wis.2d 249, 255, 456 N.W. 2d 619 (Ct. App. 1990).

The Wisconsin Supreme Court found that petitioner had presented insufficient evidence to sustain his claim of handicap discrimination. (See further discussion, infra., at p.7). The Court went on to discuss the distinction between "a drinking problem" and alcoholism. It noted that, "If his drinking was volitional it can hardly be classified as a handicap within the meaning of the anti-discrimination statute." Connecticut General 86 Wis.2d at p.408. The Court implicitly decided that a medically diagnosed disease of alcoholism could qualify as a handicap under the statute.

This proposition was made explicit in the case of Squires v. LIRC, 97 Wis.2d 648, 294 N.W.2d 48 (Ct.App. 1980). The Squires Court found that, on the basis of the record in that case, it was, "undisputed that the employee [was] handicapped by reason of his alcoholism." Squires did not prevail in his handicap discrimination claim because the Court of Appeals determined that he was fired as a result of poor job performance rather than his alcoholism. The Fourth Circuit Court of Appeals observed that nothing in the FEA, "prevents an employer from discharging an employee who is alcoholic and who, because of his alcoholism, is physically or otherwise unable to efficiently perform the duties required in his job." Squires, 97 Wis.2d at p.652.

Although Wisconsin has not yet recognized drug addiction as a protected handicap under state statute, I conclude that a logical extension of the rationale of the Connecticut General and Squires cases requires such a construction under a comparably-worded municipal ordinance. Other than the illicit nature of the activity surrounding the use of illegal drugs, there is no logical basis to distinguish between an employee whose alcoholism makes achievement unusually difficult or limits the employee's capacity to work

from an employee whose performance is adversely affected by a medically-diagnosed cocaine addiction. See *Note*, "Hidden Handicaps: Protection of Alcoholics, Drug Addicts, And The Mentally Ill Against Employment Discrimination Under The Rehabilitation Act Of 1973 And The Wisconsin Fair Employment Act," 1983 Wisconsin Law Review, 725, 735 n.63.

2. Did Petitioner Establish A Prima Facie Case That She Was Handicapped Under The Madison Ordinance?

The primary dispute in this case involves petitioner's challenge to the holding of the MEOC that Ms. Busto failed to meet her burden of proving that her condition was a handicap because she failed to introduce any medical evidence of cocaine addiction. Because petitioner's claim is predicated on the analytic similarity between a handicap of cocaine addiction and a handicap of alcoholism, the dictates of Connecticut General Life Ins. Co. v. DILHR, 86 Wis.2d 393, 273 N.W.2d 206 (1979) are compelling.

The complainant's proof of a "drinking problem" in Connecticut General was found insufficient to constitute a handicap. The Wisconsin Supreme Court was obviously concerned that volitional drinking that had not progressed to the point of "medically definable" alcoholism, could not be classified as a handicap under the state statute. Connecticut General, 86 Wis.2d at p.408. (emphasis added). Specifically the Court found that,

> Alcoholism is a disease. Its diagnosis is a matter of expert medical opinion proved by a physician and not by a layman. State v. Freiberg, 135 Wis.2d 480, 484, 151 N.W.2d 1 (1967). Supra, at p.407.

The Court emphasized that, "A conclusion that Bachand's handicap was alcoholism without competent evidence of a medical diagnosis to that effect would be error." Supra, at p.408.

The MEOC found that there was no evidence in the record of any physician having diagnosed Ms. Busto to be addicted to cocaine or her having psychological or physical dependence on cocaine or that she suffered from any disease or physical or mental impairment related to her use of cocaine. This factual finding is a critical one and one whose accuracy is not disputed on this review.

On the basis of this factual finding, the MEOC concluded that Ms. Busto had not met her burden of establishing a handicap under the Connecticut General decision. This legal conclusion is, in my view, an accurate application of the Connecticut General case and consistent with the law on this question from other jurisdictions. Following the Connecticut General decision, Wisconsin has continued to treat alcoholism as a disease in a variety of contexts. De La Matter v. De La Matter, 151 Wis.2d 576, 586, 445 N.W.2d 676 (Ct.App. 1989).

The State of New Jersey has also recognized alcoholism as a protected handicap. Clowes v. Terminex International, Inc., 109 N.J. 575, 538 A.2d 794, 803-804 (1988). Clowes was a case which was factually very similar to Connecticut General and to the instant case. Despite the presence of general medical testimony in the record as to the process and procedures for identifying alcoholism and hospital records of plaintiff's alcohol hospitalization, the New Jersey Court found that Clowes' evidence of handicap was inadequate:

> Conspicuously absent from the record is any testimony from a treating or examining physician that Clowes had been diagnosed as an alcoholic. Given the complexities of many of the diagnostic procedures involved, expert medical testimony is required to establish the fact of the employee's alcoholism. (Citing Connecticut General, supra.) (emphasis added).

Clowes, 538 A.2d at p.806.

The Clowes Court found that Clowes had failed to meet his burden of proving that he was a member of a protected class at the time of his discharge. See also Hazlett v. Martin Chevrolet, 25 Ohio St. 3d 279, 496 N.E. 2d 478 (1986). (Handicap based upon drug addiction defined as a, "...medically diagnosable, abnormal condition which is expected to continue for considerable length of time, whether correctable or uncorrectable by good medical practice, which can reasonably be expected to limit the person's functional ability..."). Contra, Consolidated Freightways v. Cedar Rapids Civil Rights Comm., 366 N.W.2d 522, 528-29 (Iowa 1985).

Petitioner makes several arguments in support of her position that she met her burden of proof as to her handicapped status. First, Ms. Busto asserts that respondent waived its argument that she is not handicapped by its answer. Petitioner suggests that WP&L's answer of a general denial is insufficient to contest Busto's status as handicapped under the ordinance.

It was petitioner's burden to prove her handicapped status under the ordinance. A respondent need not specify in its answer which element of proof it is contesting in submitting a general denial. The hearing examiner specifically inquired at the start of the hearing whether any matters were stipulated. (R. at p.43). There were no stipulations entered pertaining to petitioner's asserted handicap. There is no basis in this record for finding a waiver by WP & L of Busto's handicap status. See Gonzalez v. City of Franklin, 137 Wis.2d 109, 128-29, 403 N.W.2d 747 (1987).

Petitioner argues that her proof of cocaine addiction was adequate, even

without medical testimony. She relies on the testimony of three witnesses regarding her problems with drug use to satisfy her burden of showing that she was handicapped. Audrey Ryan is a certified alcoholism counselor[2], who worked as an intake specialist but has no formal training and no professional license or degrees. Philip Caravello is an alcoholism counselor who conducted Busto's assessment and some of her classes. Caravello has been a chemical dependency counselor since 1981 and has B.A. degrees in sociology, psychology and mass communications and advertising.

Ms. Ryan was asked to specify the nature of the counseling offered by the New Start program and the problems encountered by those who abuse cocaine. Ms. Ryan was never asked to describe the nature, extent, or parameters of Ms. Busto's drug problem, other than to mention that upon her completion of the Beta program, her prognosis was guarded, (R. at p.179). Complainant's assertion that her use of cocaine was nonvolitional is put in question by Ms. Ryan's recommendation of outpatient treatment on the ground that Ms. Busto was capable of and agreed to abstinence from cocaine. (R. at pp.181-82).

Mr. Caravello also described the Beta program. In addition, he testified that Ms. Busto was addicted to cocaine when she was at New Start and that cocaine addiction is an illness. (R. at p.210). He did not, however, describe how he made such a diagnosis nor what his qualifications were to make such diagnosis.

He made reference to the admitting diagnosis of cocaine dependence, a

[2] The certifying agency is not described in the record.

psychiatric disorder under DSM-III.[3] Caravello also described some of the physical processes which he believed were associated with cocaine dependence. (R. at pp.215-221). Caravello acknowledged on cross-examination that he saw the complainant as a co-counselor only on a group basis in a group of 30 individuals. (R. at p.228). He made no written notes on Busto's participation and recalled only that she was attentive in the group sessions.

Petitioner also presented testimony from a clinical social worker, Michele Norris. Ms. Norris had a bachelors and masters degree in social work and was employed in a private counseling practice. She held no professional licenses or certificates. This witness recommended New Start treatment to Ms. Busto. As of January, 1987, Ms. Norris made a diagnosis of cocaine dependence. (R. at p.352). She gave no explanation of how she reached that diagnosis or what qualified her to be able to make that diagnosis.[4]

Petitioner's medical record from the New Start program was received in evidence. (Ex. 33). That record contains an admitting diagnosis of cocaine dependence. (R. at p.723). Unfortunately, there is no indication of whether this diagnosis was made by one of the medical staff or one of the various paraprofessional counselors.

Under certain circumstances, the Rules of Evidence permit testimony to be given by "lay experts," as long as their testimony falls within their qualifications and

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[3] The diagnosis of cocaine dependence still requires a great deal of expert interpretation to be meaningfully applied by a fact finder. DSM-III-R (3rd Ed.-Revised) at p.168 provides that a psychoactive substance dependence may vary anywhere from mild to severe and may include those in either partial or full remission. The need to be able to distinguish between cocaine dependence and cocaine abuse may also be critically important in the context of a claim of handicap discrimination. See, Ibid, p.169.

[4] At one point, counsel for complainant objected to the witness' competence to visually determine whether the witness was high on cocaine. (R. at p.384).

experience. See Wis. Stats., § 907.01. However, certain matters are deemed so complex that the absence of expert testimony will be considered a failure of proof because the finder of fact must speculate in the absence of expert testimony. Cramer v. Theda Clark Memorial Hospital, 45 Wis.2d 147, 172 N.W.2d 427 (1970). Cases such as Connecticut General, supra, and Staples v. State, 74 Wis.2d 13, 20, 245 N.W.2d 679 (1976) make clear that questions regarding a diagnosis of alcoholism and an individual's ability to voluntarily control his/her drinking are proper subjects of medical expert testimony. Wisconsin has long held that lay witnesses are not qualified to testify on subjects requiring medical expertise. Wisconsin Telephone Co. v. Indus. Comm., 263 Wis.2d 380, 386, 57 N.W.2d 334 (1953); Leahy v. Kenosha Memorial Hospital, 118 Wis.2d 441, 452-53, 348 N.W.2d 607 (Ct.App. 1984) (limitations on nurse's ability to give medical opinions and diagnosis). The MEOC correctly concluded that complainant failed to meet her burden of proof to establish her handicap in the absence of expert medical opinion where the claimed handicap is necessarily grounded on a disease theory of illness.

3. Was The Employer Required To Meet A Duty Of Accommodation Where The Employee Was Perceived To Be Handicapped But Did Not Establish That She Was, In Fact, Handicapped?

Petitioner contests the holding of MEOC that a duty of accommodation arises only where the complainant demonstrates the existence of an actual handicap but not where there is only proof of perceived handicap. The hearing examiner concluded,

> 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 on 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.

This analytical reasoning process is sound and will be upheld on this review.[5]

Where Busto has succeeded in establishing only that she was perceived to be handicapped under the ordinance, she must show that she was fired, at least in part, as a result of the perceived handicap, as opposed to other legitimate unrelated business reasons, before the issue of accommodation to any perceived handicap arises. I conclude that the MEOC's decision that her termination from employment was based on her inability to perform her job to WP & L's standards by coming to work regularly is adequately supported in this record and forecloses any inquiry into the duty of accommodation.

Courts have uniformly rejected arguments that employees with drug and alcohol addictions are entitled to special treatment with regard to workplace rules on absenteeism. *Note*, "Hazlett v. Martin Chevrolet, Inc.: Will Ohio Employers Have Trouble 'Kicking the Habit?'" 19 Toledo Law Review 155, 179 (Fall 1987). Simpson v. Reynolds Metals Co., 629 F.2d 1226, 1231 n.8 (7th Cir. 1980) held that the fact that an employee's absences exceeded allowable sick leave or other leave limitations for nonalcoholic workers would be sufficient proof of impaired job performance to disqualify an employee from coverage under the Federal Act.

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[5] Under Federal law, the duty of accommodation arises with regard to "known physical or mental limitations of an otherwise qualified [employee]." 45 C.F.R § 84.12(a) (1982). (emphasis added).

This record is replete with repeated and chronic infractions by petitioner of various work rules relating to attendance. The employer extended a series of progressive disciplinary steps to attempt to gain her compliance with reasonable employment attendance requirements. The MEOC's factual conclusion that Ms. Busto was fired for legitimate business reasons unrelated to her perceived status as a handicapped person is a reasonable conclusion for a factfinder to reach and is entitled to deference on this review.

Petitioner's argument that her handicap served as the basis for conduct which lead to her termination is not persuasive. Busto suggests that her absenteeism and dishonesty were both caused by her cocaine addiction and therefore, cannot serve as a basis for her termination from employment. This argument ignores the requirement that petitioner be a "properly qualified" handicapped person to be eligible for protection in the first instance. See Brown County v. LIRC, 124 Wis.2d 560, 563, 369 N.W.2d 375 (1985); Squires v. LIRC, 97 Wis.2d 648, 652, 294 N.W.2d 48 (Ct.App. 1980). There was persuasive evidence that petitioner was simply unable to perform her job duties, whether due to her drug usage and/or other factors.[6]

4. Discrimination On The Basis Of Criminal Conviction.

Petitioner has not presented any argument challenging the finding that there was no discrimination on the basis of Ms. Busto's criminal record. In the absence of any argument from petitioner, this finding will be affirmed.

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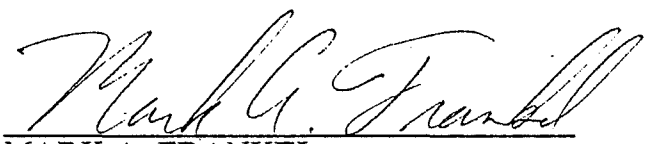
[6] Petitioner's absenteeism problem at WP & L predated her usage of cocaine. (R. at pp.265-66).

ORDER

For the above-stated reasons, petitioner's request for certiorari relief is hereby **DENIED** and the order of the Madison Equal Opportunity Commission is **AFFIRMED.**

BY THE COURT:



MARK A. FRANKEL
CIRCUIT JUDGE

Dated: January 9, 1991