COURT OF APPEALS
DECISION
DATED AND FILED

March 18, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-2119 **Cir. Ct. No. 02CV000372**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

SUSETTE HANLON,

PETITIONER-APPELLANT,

V.

BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Columbia County: JAMES O. MILLER, Judge. *Affirmed*.

Before Deininger, P.J., Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Susette Hanlon appeals an order affirming an administrative decision of the Board of Regents of the University of Wisconsin System (the Board). That decision affirmed Hanlon's dismissal from the University of Wisconsin-Madison's Physician Assistant Program (PAP). Hanlon

contends that her dismissal constituted discrimination on the basis of a disability, in violation of WIS. STAT. § 36.12 (2001-02).[1] We reject her arguments and affirm.

¶2 Hanlon enrolled in the PAP in 1998. Policies of the PAP required students to record a "C" grade in all classes. Hanlon failed to attain that grade in a course and was dropped from the program in May 1999, but then reinstated. In August 1999, she again received less than a "C" grade. This time administrators allowed her to continue in the program, on the condition that she take and successfully complete a related course. However, Hanlon failed to attain a "C" in that course, as well. Consequently, by letter dated December 28, 1999, an assistant dean of the UW Medical School informed Hanlon that because she had failed to attain the required grade in her makeup course, "I am sorry to tell you that you have not met the criteria for retention in the Physician Assistant Program and have been dropped from the professional program." The letter further advised her that she had the right to appeal this decision, and provided instructions on appealing.

¶3 Hanlon appealed and received a hearing before a faculty committee on January 19, 2000. On that date she informed the committee that she had been diagnosed with an asthma condition. On January 25, 2000, the committee issued a written decision affirming the termination. In part, that decision stated:

> The failing grade on the pharmacotherapuetics remediation exam is a continuation of marginal and poor performance. It was noted that this is the third time you have been dropped from the program for lack of academic progress.

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

> Several other instances were noted where you were allowed to continue with remediation or other considerations. The circumstances you described which led to your failing grade on the pharmacotherapuetics remediation exam represent continuing difficulty in the areas mentioned in the previous paragraph rather than the impact of a recent diagnosis of asthma.

¶4 Hanlon then appealed twice more, receiving adverse decisions from the Medical School Health Professions Programs' Appeals Committee, and the dean of the Medical School.

¶5 Hanlon next filed a complaint with The University's Equity and Diversity Resource Center (EDRC), alleging that the PAP discriminated against her by refusing an accommodation for her disability, and then terminating her. In an initial determination, EDRC criticized the PAP's handling of her termination appeal and referred her for a disability assessment by the University's McBurney Disability Resource Center. In its final decision the EDRC concluded that Hanlon was disabled while in the PAP, based on "multiple co-morbid conditions." However, it identified the relevant issues and resolved them as follows:

> **Issue I: Was Ms. Hanlon discriminated against on the basis of disability by her dismissal from the Program on December 28, 1999?** The facts support the determination that Ms. Hanlon was dismissed for failure to meet the academic requirements of the Physician Assistant Program.
>
> **Issue II: Was Ms. Hanlon discriminated against on the basis of disability when the Physician Assistant Program failed in the spring and fall of 1999 to refer her to Student Academic Development Program?** There is no evidence to support her allegation that the Program failed to refer her to the Student Academic Development Program for a discriminatory reason. The Program had no duty to provide Ms. Hanlon a reasonable accommodation because at the time she was a student in the Program they had no knowledge of her having or claiming to have a disability.

> **Issue III: Was Ms. Hanlon discriminated against on the basis of disability and denied a reasonable accommodation for a disability when the appeals of her dismissal were denied in January 2000, March 2000 and July 2000?** The record supports a determination that her appeals were appropriately reviewed and considered and that the decisions to deny her appeals were based on the Program's Retention Policy. The denials of her requests for readmission were consistent with the Program's past practices and with the need to protect the academic integrity of the Program. There is no basis to support Complainant's request for retroactive accommodation to retake an examination a third time after her dismissal from the Program.
>
> **In conclusion, EDRC finds no violation of the Americans with Disabilities Act or Section 36.12 Wis. Stats. This complaint is dismissed.**

¶6 Hanlon appealed the EDRC decision to the chancellor, who affirmed all of the prior administrative determinations. Her subsequent appeal to the Board of Regents met with the same result. The Board concluded that the PAP did not discriminate against her on the basis of a disability, that she did not inform the PAP of her disability in a reasonable or timely manner, that the PAP was not required to provide her an accommodation based on subsequent information about her disability, and that she was not denied due process during her administrative appeals.

¶7 The trial court, in turn, affirmed the Board of Regents on Hanlon's WIS. STAT. ch. 227 petition, and she appeals. The issues Hanlon presents are: (1) whether the Board properly determined that Hanlon was dismissed on December 28, 1999, when the PAP undisputedly had no notice of her disability, rather than on January 25, 2000, when the faculty committee acknowledged that she suffered from asthma; (2) whether, even if she was dismissed on December 28, 1999, the PAP waived the defense of lack of notice because it expressly considered her asthma in reaching its January 25, 2000 decision; and (3) whether

the PAP waived its lack of notice defense when it did not appeal the initial EDRC recommendation to evaluate her for a disability, which evaluation subsequently determined that she was disabled at the time of her dismissal.

¶8 There are no disputed issues of fact. Consequently, we review whether the Board erroneously interpreted or applied a provision of law. WIS. STAT. § 227.57(5) and (7). We may accord the Board's interpretation or application of the law great weight, due weight, or no weight, based on its knowledge of, responsibility for and experience in administering the law in question. *See* ***Bretl v. LIRC***, 204 Wis. 2d 93, 104-05, 553 N.W.2d 550 (Ct. App. 1996). Hanlon contends that we should accord the Board no deference in reviewing the application of the relevant disability law to the facts of her case. The Board argues that we should apply the due weight standard, under which we uphold the agency's decision if it is reasonable, and there is no interpretation or application that is more reasonable. *See* ***UFE Inc. v. LIRC***, 201 Wis. 2d 274, 286-87, 548 N.W.2d 57 (1996). However, we need not decide this dispute because the result would be the same under either level of deference.

¶9 We conclude that the PAP dismissed Hanlon effective December 28, 1999. The notification came from the student services and admissions office of the Medical School, and was signed by an assistant dean of the school. The plain and unambiguous language of the termination notice informed Hanlon that she was dropped from the program because she failed to meet the academic requirements. It advised her of the right to appeal and explained the appeal procedure. Less than a week later, she sent a letter to the program acknowledging that "I have been informed that I have been dropped from the professional program. I have also been informed of my right to an appeal, which follows." We conclude that, under any reasonable view, December 28, 1999, was the effective

date of Hanlon's termination. All further actions concerned review of that final decision.

¶10 Even if we agreed that Hanlon's termination did not occur until January 25, 2000, the result would be the same. Hanlon does not dispute that a finding of discrimination against a disabled student requires evidence that the institution knew or should have known of the disability. *See* ***Wynne v. Tufts Univ. Sch. of Med.***, 976 F.2d 791, 795-96 (1st Cir. 1992) (construing comparable federal disability law). She contends, however, that even if the PAP did not know of her disability on December 28, 1999, it certainly learned of that disability by the time the faculty committee issued its January 25, 2000 decision. The record does not support that contention.

¶11 Hanlon's appeal letter of January 3, 2000, provided various explanations for her academic problems, but makes no mention of any medical reasons for her difficulty. As for the January 19, 2000 hearing on her appeal, we have little information about what Hanlon told the PAP on that date inasmuch as no transcript or minutes of the hearing appear in the record. All that we know is what we can glean from her subsequent statement that "the only reason I shared [my asthma diagnosis] with [the committee] even then was due to their continued verbalization of concern regarding my prioritizing habits and studying for exams, as well as problems with taking multiple choice exams." In short, Hanlon has provided no basis to conclude that the committee know or should have known that she was suffering from "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." *See* 42 U.S.C. § 12102(2)(A). The only inference available from Hanlon's one-sentence account is that she mentioned asthma briefly, and reluctantly, as one of several reasons for her academic difficulty. Therefore, even if her termination did not occur until

January 25, 2000, the PAP acted on that date without notice of a disability that would require accommodation under the law.[2]

¶12 We also conclude that the PAP did not waive its lack of notice defense. Hanlon contends otherwise because the faculty committee considered her asthma on review of the December 28, 1999 termination, even though it did not have to do so. As noted, however, the committee neither considered nor had reason to consider her asthma as a "disability." Consequently, the committee did not waive its right to disregard Hanlon's disability for lack of prior notice, because it never had reason to deem her disabled.

¶13 Finally, we conclude that no waiver occurred during the EDRC proceeding. In its initial report on Hanlon's complaint, the EDRC concluded that once the committee

> decided to consider Complainant's physical condition, which may or may not have significantly affected her academic performance, a thorough evaluation under the applicable laws and policies should have been conducted. The appeals processes employed by the Physician Assistant program and the Medical School did not provide for an analysis to reach an accurate assessment regarding whether Complainant's requests for accommodations were reasonable.

The EDRC then referred Hanlon for an assessment and, according to Hanlon, the PAP waived its lack of notice defense by failing to appeal that conclusion and the subsequent referral. However, the EDRC's conclusion and referral carried no adverse consequences for the PAP. The EDRC's initial report did nothing more

[2] Hanlon does not dispute that a subsequent determination of disability does not require reversal of a decision made without notice of the disability. *See* ***Godwin v. Keuka Coll.***, 929 F. Supp. 90, 93-95 (W.D.N.Y. 1995).

than recommend further evaluation. Once that evaluation was complete, the EDRC issued its final report concluding that the PAP did not discriminate against Hanlon. She, and not the PAP, was the party aggrieved by the EDRC's final determinations in the matter.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.