

STATE OF WISCONSIN

PERSONNEL COMMISSION

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JANET WERMUTH,  
                    Complainant,

v.

Secretary, DEPARTMENT OF  
AGRICULTURE, TRADE AND  
CONSUMER PROTECTION,  
                    Respondent.

Case No. 82-PC-ER-47

\* \* \* \* \*

INTERIM  
DECISION  
AND  
ORDER

This matter was filed as a complaint of discrimination alleging harassment and discharge because of complainant's handicap. Respondent has filed a motion to dismiss for lack of prosecution and the facts set out below appear to be undisputed.

FINDINGS OF FACT

1. Complainant filed her complaint with the Personnel Commission on May 11, 1982 and alleged discrimination on the basis of a medical handicap. An investigation was conducted by a Commission equal rights officer who issued an Initial Determination of no probable cause on February 23, 1983. Complainant filed an appeal from that finding with the Commission on March 11, 1983. A prehearing conference was conducted on April 26, 1983, at which time an issue for hearing was agreed upon and a hearing was scheduled for June 3, 1983.

2. On May 31, 1983, complainant contacted both the hearing examiner and counsel for respondent by telephone, requesting an indefinite postponement of the June 3, 1983, hearing due to medical reasons. Respondent agreed to a postponement which was granted by the hearing examiner. The

examiner directed the complainant to contact the Commission by September 15, 1983 to confirm that she wished to proceed to hearing.

3. On September 16, 1983, the hearing examiner wrote a memo to the complainant. The memo read, in part:

Unless you respond, in writing and within 14 days of the date of this memo, and state that you want this matter to be held open and proceed to hearing, I will recommend that the Commission dismiss your complaint.

4. Complainant failed to respond within the requested 14 day period. However, she did telephone the examiner on October 6, 1983, who directed her to send a letter indicating why she desired a further continuance and why she was unable to respond within the 14 day period. In a letter dated October 6, 1983, and received by respondent and the Commission on October 14, 1983, the complainant requested a further indefinite postponement for medical reasons. The letter stated:

In regards to your letter dated on the sixteenth, I would like to reply, that I have been seeing a psychiatrist and also am taking drugs at the present (not Lithium but anti-depressants.) I do not feel at this time that I would like to go through another hearing. I think that I have a ways to go yet in terms of my health. I do not want to dismiss my complaint on the hearing though, if it is possible I would appreciate it if I may postpone it indefinitely as I do not know how things (health) will be, now, for me later.

\* \* \*

I would hope at some point next year to be able to continue this.

\* \* \*

I'm sorry I did not reply in fourteen days. I have been extremely ill with a virus or the flu or something for about a week now. When I reread your letter today I did not realize it had been that long. I do not want to dismiss the complaint because I firmly believe I am in the right.

5. On February 21, 1984, the hearing examiner directed a written inquiry to complainant regarding the status of the case and requested a

reply by March 6, 1984. Complainant's response was received by the Commission on March 14, 1984. It provided in part:

I am still in the care of a doctor and am on medication. I cannot give you a definite time as to when I would like a hearing, but I still do not want to drop it. I shall be getting back to you when I know more about my health.

6. On August 15, 1984, counsel for respondent received a telephone call from the hearing examiner regarding respondent's position concerning this complaint. Counsel responded that ample opportunity had been given to proceed with the case and since Ms. Wermuth had not gone forward to advance the matter to hearing and a decision by the Personnel Commission, the respondent would consider filing a motion for dismissal.

7. On October 22, 1984, the hearing examiner directed an inquiry to complainant regarding the status of her case and requested a reply by November 9, 1984. Complainant's sister, Mary Wermuth, responded in writing on complainant's behalf and indicated that complainant was currently hospitalized for psychiatric treatment in Salt Lake City, Utah. She further stated that it was uncertain as to how long complainant would require inpatient treatment but that it was clear complainant was unable to participate in a hearing. The reply was dated November 5, 1984, and was received by the Commission on November 7, 1984.

8. On July 12, 1985, respondent issued a motion to dismiss "for unreasonable neglect to proceed" pursuant to section 805.03, Wis. Stats. Due to an unexplainable delay in delivery or receipt and filing, the motion was not recorded as received by the Commission until August 23, 1985.

9. On February 3, 1986, the hearing examiner corresponded with Mary Wermuth requesting a reply within 20 days as to whether complainant was now in a position to proceed with her appeal.

10. On February 25, 1986, the Commission received a letter from Christopher Lange, M.D., of Salt Lake City which advised that complainant was under his care and that treatment requirements made it impossible for her to attend a hearing. Dr. Lange further advised that Ms. Wermuth would be in Wisconsin during the summer of 1986 and would contact the Commission about pursuing the matter at that time.

11. In a letter to respondent dated March 4, 1986, the examiner wrote:

In light of the attached letter [from Dr. Lange], I will take no further action on your motion [to dismiss] until October 1, 1986, unless you indicate that you wish to pursue it further at this time.

12. Complainant made no contact with either the hearing examiner or counsel for respondent during the summer of 1986.

13. On October 27, 1986, the hearing examiner corresponded with complainant's sister and again requested a reply within 20 days as to whether Janet Wermuth was in a position to proceed with her appeal.

14. A timely response was not received from either the complainant or complainant's sister, but on November 24, 1986, complainant advised the hearing examiner in a telephone conversation that she would know within approximately one week whether she would be moving back to Madison and whether she would be able to proceed with a hearing on her appeal.

15. Telephone contact was made with the complainant on several occasions during January of 1987 and complainant was provided a list of attorneys who frequently practice before the Commission. On January 30, 1987, a telephone conference call was scheduled for February 13, 1987. In that telephone conference call, the parties agreed to a hearing on May 28-29, 1987. The subsequent notice of hearing included the following statement by the examiner:

Given how long this case has been pending before the Commission and the fact that complainant now lives in Utah, will be moving to California early in March of this year and returns to Madison infrequently, postponement of the hearing date is unlikely. The complainant is advised that if she is to be represented by counsel at the hearing, she should proceed to retain counsel immediately and then should inform counsel of the unlikelihood of any postponements.

16. During the first few months of 1987, at least two attorneys contacted the Commission to request copies of relevant materials from the Commission's case file.

17. In a letter dated May 12, 1987, and received by the Commission on May 18, 1987, Dr. David Fogelson of the Encrino Psychiatric Medical Group wrote:

Due to Jan's current medical condition, she could not under go the stress of a workman's comp or disability hearing.

18. After a conference between the parties on May 18, 1987, at which time the complainant requested an indefinite postponement of the hearing and the respondent reasserted its motion to dismiss, the examiner advised the parties that the hearing scheduled for May 28 and 29 was effectively postponed (in light of the fact that the complainant was not going to be in Madison at the time of the hearing) without ruling on either the respondent's motion or the complainant's request.

19. On June 9, 1987, a telephone conference was held between respondent's representative, the examiner and Dr. Fogelson. The conference was held with the approval of the complainant and with a goal of obtaining clarifying information regarding complainant's condition and the prospects for being able to hold a hearing in the future. The examiner subsequently summarized Dr. Fogelson's comments as follows and without any corrections by the persons present or by the complainant.

Complainant's first visit to Dr. Fogelson was on April 8, 1987. Complainant is taking part in a research study, the purpose of

which is to determine whether an experimental drug, clomipramine can be helpful in controlling obsessive-compulsive disorder (OCD). The study covers a 15 month period. It is a "double-blind" study, meaning that neither the patient nor the physician know whether the complainant is actually receiving clomipramine or a placebo. At the end of the study, the "blind" is "broken" and the complainant will be provided the option of taking (or continuing to take) or not taking the experimental drug.

Clomipramine is not yet approved by the Food and Drug Administration for general prescription in the United States. The study in which the complainant is participating, the purpose of which is to obtain FDA approval for the drug, is one of the only ways the drug can be made available to patients in this country. However, clomipramine is used for treatment of depression and of OCD in Europe and in Canada and has been shown there to be the only medication that is effective for OCD. Also, studies in other countries have shown the drug to be more effective than the other standard treatments of either psychotherapy and behavioral therapy.

The complainant suffers from OCD. Hers is one of the most severe cases ever seen by Dr. Fogelson and is the most severe of any of the 28 persons involved in the clomipramine study with Dr. Fogelson. Complainant has classic obsessions-compulsions. She fears that somehow she is contaminated and will contaminate others. As a consequence, she repeats things and orders and rearranges things excessively. The complainant is among the approximately 30% of OCD patients who also suffer from depression. At times, the complainant has been highly suicidal, including a few weeks ago when she stated that if the clomipramine did not help her, she would commit suicide. Dr. Fogelson is convinced that if complainant were to proceed to hearing now, it could generate suicidal behavior.

Dr. Fogelson last saw the complainant on May 27, 1987. At that time, complainant's symptoms had not improved, although she is not far enough along in the study to determine whether she will have a good response to the medication.

Studies completed elsewhere indicate that if Ms. Wermuth is actually receiving clomipramine, there is approximately a 70% chance that she will respond to the drug. Within three months she would probably be well enough to undergo an administrative hearing.

Ms. Wermuth is currently on week 7 or 8 of the study. If she has not responded by week 12 of the study she can be transferred to another researcher who will "break the blind" to determine whether or not complainant was receiving the drug or a placebo. The researcher will then decide whether to continue Ms. Wermuth on the drug if she had actually been receiving it, or whether to place her on the drug if she had been receiving the placebo.

Within a total of 5 months, whether or not the complainant is now receiving the drug, it should be apparent if complainant has any chance of recovery based upon taking clomipramine.

20. Later on June 9, 1987, the examiner also spoke with Ms. Wermuth. She stated that she had wished to correct the implication in respondent's motion to dismiss that she had made no effort to retain an attorney. She stated that she had contacted four lawyers on the list of lawyers the examiner had provided to her earlier in 1987. She said that she had spoken with some of the lawyers and had left a message for the others to call her back, although they failed to do so. The complainant said that the lawyers either declined to take the case or said that they would not take the case unless they were paid by the hour. Complainant stated that she had sought to retain counsel on a contingent fee basis but that none agreed to that arrangement. She said she cannot afford to pay an attorney on an hourly basis.

#### OPINION

The respondent seeks dismissal of this matter for unreasonable neglect to proceed and the complainant seeks an indefinite postponement.

Respondent's motion is premised on s. 805.03, Stats., which provides in part:

For failure of any claimant to prosecute... the court in which the action is pending may make such orders in regard to the failure as are just.

This provision indicates that in deciding whether or not to dismiss an action for lack of prosecution, the court has substantial discretion. There is no similar provision specifically applicable to administrative proceedings, however a similar degree of discretion should be imputed to the Commission.

The facts set out above indicate that a hearing in this matter has been delayed over four years at the request of the complainant who currently suffers from both obsessive-compulsive disorder and depression. Her psychiatrist states that proceeding to hearing now could generate suicidal behavior. The facts also show that 1) in October of 1983, complainant was seeing a psychiatrist and was receiving anti-depressant medication; 2) in October of 1984, complainant was hospitalized for psychiatric treatment; and 3) in February of 1986, her physician wrote that she was under his care and that her treatment requirements made it impossible for her to attend a hearing.

The periods in between these specific dates over the course of the four year period have not been expressly accounted for by the complainant. However, nothing in the file suggests that complainant's obsessive-compulsive disorder and depression were simply periodic episodes rather than relatively constant conditions.

Complainant's medical condition during the four year period serves as a sufficient basis for denying respondent's motion.



Here, Dr. Fogelson has indicated that within five months, it should be discernible whether the complainant has responded to the clomipramine medication or whether she is among the minority who do not respond. If the complainant does not respond to the medication, the respondent may refile its motion to dismiss.

It is the complainant's responsibility to either represent herself, or have someone else represent her in proceedings before the Commission. An inability to pay for an attorney is not a sufficient basis for an indefinite postponement of a hearing.

ORDER

The respondent's motion is denied and complainant's request for an indefinite postponement of the hearing is granted with the following condition:

Within five months of the date of this order, complainant shall submit a physician's analysis including an opinion as to whether the complainant may safely appear at a hearing in this matter.

Dated: June 24, 1987 STATE PERSONNEL COMMISSION

  
DENNIS P. MCGILLIGAN, Chairperson

KMS:jmf  
JANE/3

  
LAURIE R. McCALLUM, Commissioner