STATE OF WISCONSIN PERSONNEL COMMISSION

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DAVID VALLEZ,

Complainant,

v.

Chancellor, UNIVERSITY OF WISCONSIN - MADISON,

Respondent.

Case No. 84-0055-PC-ER

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FINAL DECISION
ON PROBABLE CAUSE

This matter is before the Commission following the issuance by the hearing examiner of a proposed decision with respect to probable cause, the examiner having recommended that probable cause be found as to some issues and no probable cause be found as to the other issues. The Commission has considered the parties' objections and arguments with respect to the proposed decision and has consulted with the hearing examiner.

The proposed decision in finding #20 finds that Mr. Pinero of the Affirmative Action office said "we can play hardball too" when Mr. Vallez indicated that he might start legal action in an attempt to obtain an accommodation, and noted in the decision at p. 24 that the "...respondent offered no evidence that denied this statement was made."

The respondent now argues that Dr. Lavin's testimony about the meeting contradicts that Mr. Pinero made such a remark.

The record shows that Dr. Lavin testified that she doubted that such a remark had been made. However, she also testified at an earlier point in the hearing that her recollection of this meeting was hazy. There is more than adequate evidence to support the aforesaid language in finding #20. However, the discussion on p. 24 should be changed from "...respondent offered no

evidence that denied this statement was made..." to read "...respondent offered little evidence that denied this statement was made."

Respondent also argues that there is no evidence that Mr. Pinero had anything to do with the decision to put Mr. Vallez on leave of absence.

The record indicates that while Ms. Pfahler and Ms. Sensig did not place Mr. Pinero at the meeting where the decision was made, Dr. Lavin in fact stated he was there, albeit toward the end of the meeting. Since both Dr. Lavin and Mr. Pinero were from the same office, it seems that she would be more likely than the other two persons to remember whether Mr. Pinero was present.

However, since the only evidence that Mr. Pinero actually participated in the decision was Dr. Lavin's testimony, which was somewhat contradictory on this point, the following language in Finding #21: "Both Dr. Lavin and Mr. Pinero participated in this decision..." should be changed to read: "Both Dr. Lavin and Mr. Pinero were present at the meeting where the decision was reached, and Dr. Lavin participated in the decision...."

In any event, the record amply supports a finding that Mr. Pinero made the remark in question in the presence of Dr. Lavin, such a remark from management is highly probative of an inclination to retaliate, and the record contains sufficient support for the determination of probable cause as to retaliation with respect to Mr. Vallez's complaints about library dust.

The respondent further argues that the Commission should only consider the evidence as to complainant's condition that was available in 1984 when the decision was made to place him on leave of absence. As is discussed in the proposed decision, the material available to respondent at the time of the decision was not adequate to support a finding that complainant was unable to satisfactorily perform the duties and responsibilities of his

position due to handicap. Other evidence as to complainant's condition is in the record basically because respondent sought to introduce evidence concerning subsequent matters in an attempt to impeach or contradict the statements made by complainant and his doctors to the respondent at or before the point the decision was made. As discussed in the proposed decision, this attempt was unsuccessful.

ORDER

The Commission adopts as its final disposition of this matter at the probable cause stage the attached proposed decision and order, with the changes set forth above.

Dated: February 5, 1987 STATE PERSONNEL COMMISSION

DENNIS P. McGILLIGAN, Chairperson

DONALD R. MURPHY, Commissioner

LAURIE R. McCALLUM, Commissioner

JGF003/1
AJT:baj

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STATE OF WISCONSIN PERSONNEL COMMISSION

DAVID VALLEZ,

Complainant,

v.

Chancellor, UNIVERSITY OF WISCONSIN - MADISON,

Respondent.

Case No. 84-0055-PC-ER

PROPOSED DECISION AND ORDER

NATURE OF THE CASE

This is an appeal pursuant to §PC 4.03(3), Wis. Adm. Code, of an initial determination of "no probable cause." The stipulated issues for hearing were as follows:

> (1) Whether or not there was probable cause to believe that complainant was discriminated against on the basis of handicap in connection with his leave of absence commencing on May 29, 1984.
>
> (2) Whether or not there was probable cause to believe that respondent placed complainant on leave of absence commencing May 29, 1984, in retaliation against complainant's prior complaint of sex discrimination.
>
> (3) Whether or not there is probable cause to believe that respondent placed the complainant on leave of absence commencing on May 29, 1984, in retaliation for having made complaints about the effect of library dust on his allergies beginning with the first week of his employment in 1977 through May, 1984, in violation of §111.322(3), Stats.
>
> (4) Whether or not there is probable cause to believe that respondent placed complainant on leave of absence commencing May 29, 1984, in retaliation for complaining to his supervisor that a co-worker stated that if her husband spoke Spanish, he would have a job now, in violation of §111.322(3), Stats.

FINDINGS OF FACT

1. Complainant, an Hispanic male, was employed by the respondent in the classified civil service as a Watch Officer II at the Helen C. White library from December 4, 1977, through May 29, 1984, when respondent placed him on an indefinite unpaid leave of absence. Complainant subsequently submitted a resignation effective May 6, 1985, primarily to enable him to receive his retirement funds (Respondent's Exhibit 16).

2. The duties and responsibilities of complainant's position, in summary, included making rounds of the library, staffing the security exit that includes the electronic screening device that warns of patrons leaving without having checked out library materials, and other such activities. Overall, complainant was required to be mobile approximately 61% of the time, stationary 24% of the time, and a mix of getting up and sitting down activities approximately 15% of the time.

3. During the course of his employment as aforesaid, complainant's formal performance evaluations were always average or better.

4. Complainant had been afflicted with allergic rhinitis prior to his aforesaid employment with respondent. After beginning said employment, complainant suffered, on an ongoing basis, allergic reactions to library dust, molds, and other material in the library air, with nasal congestion, sinus problems, sore throats, and aches and pains resulting from low-grade sinus infections. Complainant received medical care for his condition which included various drugs that reduced the severity of his symptomatology. However, he continued to experience substantial discomfort from these symptoms throughout the aforesaid period of employment.

5. Complainant informed his supervisors of his allergic condition in 1978 and 1979, and in 1982 he circulated a petition among his co-employes

at the library which requested that management investigate the air quality at the library.

6. As a result of this petition, respondent set up a committee (of which complainant was a member) to study the air quality situation at the library, and had a number of studies done.

7. The UW-Madison Safety Department tested the library air and found that the dust particle levels were within general state and federal requirements.

8. The UW-Madison's chief mechanical engineer evaluated whether a "Space Guard Room Air Filter" could be installed in the reading room. His comments included the following:

> My own objection would be the noise of the unit at high speed. It is true that this equipment will remove chicken feathers, dust and even smoke. The problem is that this side stream filtration which means only part of the air goes thru the equipment. There is no one that can tell you exactly the number of units to install. The variables are too numerous to innumerate [sic] in a short letter; outside air & room air flow, number of smokers, placement of grilles (exhaust & supply) are just a few. When all is said and done the results will be graded in a subjective mode.
>
> The installation of one of these units would be about $1200 with approximately $20/filter change.
>
> The installation of one unit would be "window dressing". The installation of six units (est $5500) might make an impact worth doing.
>
> In my opinion this is not the way to solve the problem." Respondent's Exhibit 10 (attachment)

9. Another engineering expert associated with the mechanical engineering department, Dr. Frederick T. Elder, studied the problem. He noted the noise level and other aspects of utilizing Space Guard units, observing that "...they would not eliminate any alleged smoke problem; though, they would reduce the problem. One must realize the existing HVAC system would

continue to circulate air containing smoke to non-smoking areas." Respondent's Exhibit 10. He recommended reworking the air ducting from the smoking rooms to exhaust the air without recirculation.

10. After considering the studies and deliberating, the committee recommended on April 29, 1983, that the air ducts be reworked, that certain drapes be removed, that light panels and air ducts be cleaned, and that daily maintenance of the first floor be improved.

11. The library requested that the remodeling be done, but it was not funded by the campus remodeling committee. The cost of the re-ducting work was estimated at $25,000. It was determined that cleaning the drapes would destroy them and that replacement would cost $25,000. The light panels and air ducts were cleaned and some additional cleaning was done. Smoking eventually was banned in the library due to the passage of the state Clean Air Act.

12. In addition to the foregoing activities concerning the library air, respondent worked with complainant on an individual basis in an effort to alleviate or eliminate his problem with the library air. In 1983 he was offered a transfer to a similar position in the residence halls. However, he informed respondent that he did not want to leave Helen C. White library and that he would transfer only to the Elvehjem Art Center. It was determined that the incumbent watch officer at the Elvehjem did not wish to change jobs. Respondent also informed him that it would provide a filter mask as recommended by his physician, and the opportunity to take more frequent breaks outdoors. The complainant did not follow up on these offers.

13. In 1983, complainant complained to the library director, Ms. Senzig, and his supervisor, Ms. Lemanczyk, about what he perceived as Ms.

Lemanczyk engaging in "sexist cronyism" by socializing with female employes on breaks, lunch hours, etc. Management discussed the matter with Ms. Lemanczyk and thereafter Ms. Lemanczyk spent less time socializing exclusively with female employes.

14. Also during this period, complainant complained to Ms. Lemanczyk that a co-worker had said that if her husband spoke Spanish, he would have a job. Management told the co-worker to "tone it down" and there were no further complaints about her making any such remarks.

15. In early 1984, complainant began to experience joint pains in his left wrist and legs. This pain was caused by rheumatoid arthritis. The pain got progressively worse and performance of his duties became increasingly painful. The rheumatoid arthritis also had the effect of compounding or exacerbating the effects of complainant's allergic rhinitis symptomatology and making them more difficult for him to tolerate.

16. On April 11, 1984, complainant gave Ms. Senzig, a letter (Respondent's Exhibit 6) written by a rheumatology specialist, Dr. Hirsch, which stated as follows:

> Mr. Vallez asked that I write to you concerning his condition. He has been having problems with joint pains of late and appears to have an early form of rheumatoid arthritis. This is associated not only with pain in the joints but stiffness as well as some fatigue. As a result of that, we recommend that our patients try to get more rest than usual. If possible, Mr. Vallez should be allowed more time to be sedentary at work if this can be arranged.
>
> Please let me know if you have any questions.

17. By letter of May 15, 1984, to complainant, with a copy to Dr. Hirsch, Ms. Senzig responded as follows:

> At the end of April, I received a letter from Dr. Thomas J. Hirsch at the Dean Medical Center stating that you appear to have an early form of rheumatoid arthritis. The letter raises the question as to what part of your responsibilities could be sedentary.

> During the first week in May, the library again examined its needs for watchperson coverage. Forty percent of your responsibilities are general patrol duties, including opening and closing all three floors of the library, general patrol rounds of the building during your work shift, and walking to Memorial Library to get payroll checks. Thirty percent of your time is allocated to staffing the security exit of the library. This involves a fair amount of up-and-down activity as you respond to exit alarms or other problems that need the attention of the watchperson. The remaining thirty percent of your time is allocated to a variety of responsibilities which include a mix of mobile, stationary, and up-and-down activities. Overall, our analysis of the needs of the library require you to be mobile 60.8% of the time, up-and-down 15% of the time, and stationary 24.1% of the time.
>
> Another important factor of the watchperson responsibilities is the response to paging calls from library staff for your assistance. We would expect your to get to the place at which you are needed within three minutes. During periods when the library is very busy, this would probably require using the stairs rather than waiting for the elevator.
>
> If these assignments have an effect on your health, please document this for us. The general assumption is that you will continue your presently assigned responsibilities. Respondent's Exhibit 7.

18. In response, the complainant sent the following letter dated May 17, 1984, to Ms. Senzig and Ms. Lemanczyk:

> Notification of my particular handicap was made almost two months ago. The official date in writing was April 16, 1984.
>
> I believe at the present time my handicap is interfering with my ability to perform my duties. I've lost most of the use of my left hand. My legs hurt, which interferes with my patrols. My hands swell as I write this letter.
>
> Please familiarize yourself with the primary on Rheumatoid Arthritis. At this time I would like you to notify Luis Pinero of Affirmative Action of my condition. I would like a complete test done for placement in an appropriate slot some other place in the university.
>
> Please act on this request as expediently as possible. This condition is responsible for occasional absences and shortened work hours. Respondent's Exhibit 8.

19. Complainant also sent his supervisors a letter dated May 22, 1984, from his allergist, Dr. Kriz, which read as follows:

Re: David Vallez

TO WHOM IT MAY CONCERN:

This is to certify that David Vallez has had problems with allergies related to the dust in his work area at the library.

Exposure to this dust and molds has caused him to experience nasal congestion, sinus problems, sore throat distress and generalized aches and pains from low-grade sinus infections.

During the past several months, he has also developed rheumatoid arthritis and, because of the compounding effect of the arthritis, he has been less able to tolerate the symptoms provoked by his dust allergy.

I have recommended to David that the dust levels at work be restricted to a better degree or that his location be switched to an area that is relatively free of such dust. Respondent's Exhibit 2.

20. At some point during the period of this exchange of letters, complainant met with Dr Lavin and Mr. Pinero of the campus affirmative action office. During this meeting the complainant indicated that he might start legal action in an attempt to obtain an accommodation. In response, Mr. Pinero said "we can play hardball too."

21. Subsequently, respondent decided to place complainant on an indefinite leave of absence without pay, beginning May 29, 1984. Both Dr. Lavin and Mr. Pinero participated in this decision, which was conveyed to complainant by a letter dated May 29, 1984, as follows:

> We are responding to several letters we have received recently from you and two physicians regarding your inability to carry out the responsibilities of your position due to certain physical conditions you have described.
>
> A letter dated April 11, 1984 from Dr. Thomas Hirsch to Donna Senzig, Director of College Library, stated that you appear to have an early form of rheumatoid arthritis. The letter raises the question as to what part of your responsibilities could be sedentary. In responding to that letter, Ms. Senzig analyzed the situation in College Library and determined that the library needs require you to be mobile 60.8% of the time and up-and-down 15% of the time. Based on our communications with you these requirements surpass your restrictions.

In a second letter dated May 22, 1984, from Dr. Robert J. Kriz, we were informed that you have allergy problems related to the dust and molds in the College Library. Dr. Kriz recommends that the dust levels be restricted to a better degree or that your location be switched to an area that is relatively free of such dust. We are in the process of evaluating Dr. Elder's proposal to rework the return air ducting and an exhaust fan to the first floor of College Library. However, you have informed us that these changes will not accommodate your allergic condition.

We have also looked at the possibility of transferring you to a position in Memorial Library. However, positions there also require mobility and the ability to use your hands and you have stated that your arthritis prevents use of your hands. In addition, dust and mold are present in all libraries and are more prevalent in Memorial Library, an older building which houses a very large collection.

On May 17, 1984, you gave a letter to Donna Senzig and Mary Kay Lemanczyk, your immediate supervisor in College Library, which indicated that your present handicap is interfering with your ability to perform your duties because of the loss of the use of your left hand and your sore legs. You stated your condition is responsible for occasional absences and shortened work hours.

Based on the medical information you have provided us and on the May 17, 1984 letter you gave to Ms. Senzig and Ms. Lemanczyk, it is apparent that you are unable to satisfactorily perform the responsibilities of your position in College Library and the Library is unable to accommodate your restrictions. Therefore, we are putting you on an indefinite leave of absence beginning May 29, 1984. We will continue to look at other job possibilities within the General Library System. However, as was stated above, library jobs require mobility, use of hands and expose someone to dust and mold. The Classified Personnel Office has been contacted concerning the availability of positions on campus at comparable pay ranges into which you might be able to transfer. Because of your restrictions, however, the possibility for other campus jobs is extremely limited. Nevertheless open positions are being reviewed and you will be contacted if a job becomes available which you could possibly perform.

During the week of May 28, 1984, Donna Senzig and Sandra Pfahler will be unavailable. During this week any additional medical information you wish them to have should be given to Luis Pinero in the Affirmative Action and Compliance Office. If you provide additional medical information, it should delineate the restrictions on use of your hands. For example, are you able to sort books or cards? Are you able to push book carts of books or lift book bins? Your physicians should feel free to contact Sandra Pfahler to discuss your restrictions in regards to other positions.

> Enclosed are absence reports and leave without pay cards which you are to complete and submit to Donna Senzig each pay period while you are on leave. You can get additional cards from her. Submitting these cards each pay period will continue your eligibility as a university employe. As of May 13, 1984, you had 40.7 hours of vacation and 4.0 hours of sick leave available. You should contact Judy Wagaman at Room 330C, Memorial Library, (262-6177) if you wish to discuss your possible eligibility for income continuation or disability retirement.
>
> We will make every effort to find employment that will accommodate your restrictions. Respondent's Exhibit 1.

22. After complainant received this letter, he filed the instant complaint with this commission on the same day (May 30, 1984). He never responded to the part of the letter that discussed providing additional medical information.

23. The complainant subsequently pursued an uncontested unemployment compensation claim. As a part of that proceeding, Dr. Harrington submitted a UC 474 form, "Medical Report to Determine Unemployment Compensation Eligibility," Respondent's Exhibit 4. Under Section IV, "General Physical Ability to Work as of 5/25/84," Dr. Harrington checked the box marked "c" -- "The claimant can work but must limit the physical activities and/or hours of work. SPECIFY LIMITATIONS" Under the limitations section, he filled out subsection 2. as follows:

> 2. If the claimant must avoid or limit certain activities, please indicate. (No entry will mean the activity is not restricted.)

PHYSICAL ACTIVITY	Walking	Climbing	Standing	Sitting	Stooping	Bending	Pushing	Pulling
AVOID		X			X	X	X	X
LIMITED TO NOT MORE THAN THIS NUMBER OF HOURS PER DAY	1		1	6				

24. The complainant also pursued a worker's compensation claim. In connection with this proceeding, Dr. Kriz provided the following information in a letter to complainant's attorney for that claim:

> The answers to the questions you asked in that letter [of July 30, 1984] are as follows:
>
> 1. In your opinion is his dust allergy caused by or accelerated beyond normal progression by this exposure? Accelerated beyond normal progression when dust levels are high.
>
> 2. If yes, what percentage of permanent partial disability compared to total disability would you assign for the work-related allergy? Partial disability - 100% disability in dusty environments; 0% disability in non-dusty environments.
>
> 3. What work limitations would you put on him? Work in a place with as little dust as possible and preferably with an air purifier present in his work area. Respondent's Exhibit 19.

25. The workers compensation proceeding was resolved by respondent conceding liability for job retraining benefits which are only available if a claimant cannot return to his or her former job.

26. Dr. Kriz also had stated in a letter to Group Health Cooperative dated May 23, 1984, (Respondent's Exhibit 15), inter alia, that "David finds that he is unable to tolerate the generalized aches and pains, now that he has rheumatoid arthritis symptoms added to his previous problems. I, therefore, recommended that he approach his employer about being removed from the excessive dust in his work area, to help reduce his requirement for medications, and also to help reduce some of his continuing symptoms."

27. Up to the time complainant was placed on leave of absence, he was able to perform satisfactorily the duties and responsibilities of his position, although with difficulty and discomfort due to his rheumatoid arthritis and allergic rhinitis.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.45(1)(b), Stats., and §PC 4.03(3), Wis. Adm. Code.

2. The complainant has the burden of establishing probable cause except that the respondent has the burden of establishing no probable cause as to the questions of whether the handicap is reasonably related to the complainant's ability to undertake the job-related responsibilities of the complainant's employment pursuant to §111.34(2)(a), Stats., Samens v. LIRC, 117 Wis. 2d 646, 664, 345 N.W. 2d 432 (1984); and whether respondent has satisfied its duty of accommodation pursuant to §111.34(1)(b), Stats., Giese v. DNR, Wis. Pers. Commn. No. 83-0100-PC-ER (1/30/84).

3. There is probable cause to believe complainant was discriminated against on the basis of handicap in connection with his leave of absence commencing on May 29, 1984, but not in the sense of having been denied accommodation.

4. There is probable cause to believe respondent placed complainant on leave of absence in retaliation for having made complaints about the effect of library dust on his allergies beginning with the first week of his employment in 1977 through May 1984, including his threat in May 1984 to commence legal action to obtain an accommodation, in violation of §111.322(3), Stats.

5. There is no probable cause to believe respondent placed complainant on leave of absence in retaliation against complainant's prior complaints of sex discrimination or for complaining about a remark made by a co-employe that if her husband spoke Spanish he would have a job now.

DISCUSSION

Issue 1

The parties stipulated to the following as the first issue:

> "(1) Whether or not there was probable cause to believe that complainant was discriminated against on the basis of handicap in connection with his leave of absence commencing on May 29, 1984."

In a handicap discrimination case, the Commission follows the analysis set forth in Samens v. LIRC, 117 Wis. 2d 646, 658, 345 N.W. 2d 432 (1984), although obviously in the context of the probable cause standard, §PC 4.03(2), Wis. Adm. Code, as opposed to a decision on the merits.

Pursuant to Samens, there are three elements necessary to establish that an employe has been discriminated against on the basis of handicap:

> "(1) That the individual is handicapped within the definition of the FEA, (2) that the individual has shown that the employer's discrimination was because of the handicap, and (3) that the employer's action was not legitimate under §111.32(5)(f),[1] Stats."

In order to satisfy the first element, the complainant must satisfy the definition of "handicapped individual" set forth at §111.32(8), Stats.:

> "'Handicapped individual' means an individual who:
>
> (a) Has a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work;
> (b) Has a record of such impairment;
> (c) Is perceived as having such an impairment."

There is ample evidence that complainant was suffering substantial pain and discomfort, particularly after the onset of his rheumatoid arthritis, so as to have an "impairment which makes achievement unusually difficult or limits the capacity to work...." The respondent explicitly recognized this as early as February 16, 1983, in a letter to the

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[1] Now §111.34(2)(a), Stats.

complainant from the Office of Affirmative Action and Compliance, Respondent's Exhibit 5, which said that that office "recognizes that your allergies do represent a true impediment to your performance of you job."

As to the second element, it is undisputed that the respondent placed complainant on an indefinite unpaid leave of absence, because it perceived that he could not satisfactorily perform the duties and responsibilities of his position due to his allergic rhinitis and rheumatoid arthritis.

With respect to the third element, §111.34(2)(a), Stats., provides, inter alia, as follows:

> "Notwithstanding §111.322, it is not employment discrimination because of handicap to... terminate from employment... any individual... if the handicap is reasonably related to the individual's ability to adequately undertake the job-related responsibilities of that individual's employment...."

Applying this standard to the instant cases, if the complainant was unable to adequately perform his job because of his handicap, the termination would not be improper under the FEA.

The respondent's contention that the complainant could not adequately perform his job responsibilities was based substantially entirely on various communications from complainant and his doctors, primarily the April 11, 1984 letter from Dr. Hirsch, see finding #16, the May 22, 1984, letter from Dr. Kriz, see finding #19, the May 17, 1984, letter from complainant, see finding #18, and various other letters and documents which were not known to respondent when it made its decision, but which were offered as evidence to support the contention that the complainant was unable to perform adequately when he was terminated. While respondent expressed some concerns about complainant's actual performance, such as being late in answering calls on his paging device, it seems clear that his supervisors did not have a basis, in terms of observations or reports of

his actual performance, to have concluded that complainant's performance of the duties and responsibilities of his job was inadequate. Therefore, the question comes down to whether the various communications from complainant and his doctors are adequate to support a finding that complainant was unable to satisfactorily perform the duties and responsibilities of his position due to his handicap.

Ms. Senzig testified that in deciding to place complainant on an indefinite unpaid leave of absence, the respondent relied on three documents.

The first was the April 11, 1984, letter from Dr. Hirsch, Respondent's Exhibit #6, see finding #16. This letter does refer to "pain," "stiffness," and "fatigue." It recommends complainant try to get more rest than usual, and says "Mr. Valley should be allowed more time to be sedentary at work if this can be arranged." (emphasis supplied) However, it does not state that complainant was unable to perform his job duties and responsibilities at an adequate level.

The May 22, 1984, letter from Dr. Kriz, Respondent's Exhibit 2, see Finding #19, refers to complainant's symptomatology. It says "he has been less able to tolerate the symptoms...." (emphasis added). Dr. Kriz said he had recommended to David that the dust levels at work be restricted to a better degree or that his location be switched to an area that is relatively free of such dust." (emphasis supplied) While this letter makes certain recommendations in light of the discomfort complainant was suffering from the symptomatology, it does not say that complainant was unable to do his job or that it was a necessity that he be removed from its environment.

The May 17, 1984, letter from the complainant, Respondent's Exhibit 8, see Finding #18, does say that his handicap was interfering with my ability to perform my duties." (emphasis added). He goes on to say:

> "...I've lost most of the use of my left hand. My legs hurt, which interferes with my patrols. My hands swell as I write this letter... I would like a complete test done for placement in an appropriate slot some other place in the University.
>
> Please act on this request as expediently as possible. This condition is responsible for occasional absences and shortened work hours." (emphasis supplied)

The word "interfere" means "...to be in opposition, to run at cross-purposes...." Webster's Third New International Dictionary, p. 1178 (1981). A disability presumably could "interfere" with an employe's ability to perform his or her job without necessarily rendering the employe incapable of performing the job in an adequate fashion. The fact that there is some interference with the ability to perform cannot automatically satisfy the requirements of §111.34(2)(a), Stats., or this would gut the FEA's protection of the handicapped employe. That is, in order to meet the definition of a handicapped individual, the employe normally must have an impairment which "makes achievement unusually difficult or limits the capacity to work," §111.32(8), Stats. If any such difficulty in achievement or limitation satisfied the requirements of §111.34(2)(a), Stats., an employer presumably could refuse to hire, or could discharge, any handicapped individual.

Other parts of this letter concerning particular problems with complainant's legs and hands, and shortened work hours and occasional absences, are consistent with difficulty in work performance, but are not inconsistent with the complainant being able to perform his duties satisfactorily, albeit with pain and discomfort.

In addition to the evidence about complainant's status that was considered by respondent as part of the decision to place him on leave of absence, other evidence was presented at the hearing which arguably bears on the question of complainant's health and his ability to have performed the job in May, 1984.

The first such document is a May 23, 1984 letter from Dr. Kriz to complainant's doctors at Group Health Cooperative, Respondent's Exhibit 15, which includes the following:

> "...David finds that he is unable to tolerate the generalized aches and pains, now that he has rheumatoid arthritis symptoms added to his previous problems. I, therefore, recommended that he approach his employer about being removed from the excessive dust in his work area, to help reduce his requirement for medications, and also to help reduce some of his continuing symptoms." (emphasis supplied)

The underscored language arguably is inconsistent with the notion that complainant was able to satisfactorily discharge the duties of his position at the time he was placed on leave of absence. However, the significance of this language is somewhat diminished when it is considered in connection with Dr. Kriz's letter of the day before (May 22d) (Respondent's Exhibit 2). Both letters were based on the same examination (on May 22d) and Dr. Kriz testified that he had not changed his opinion about complainant's condition between the times he wrote these letters. In the first letter, he said complainant was "less able to tolerate the symptoms...." In the second letter he said complainant was "unable to tolerate" the symptoms.

Respondent contends in effect that the language in the second letter ("unable to tolerate') negates the language in the first letter ("less able to tolerate"). However, there is nothing in the language of the letters or the surrounding circumstances that compels that conclusion. Based on those factors, one could just as well argue that the language in the first letter

negates the language in the second letter. They were written more or less contemporaneously, except the first letter was closer in time to the actual examination upon which both letters were based. Furthermore, Dr. Kriz testified as follows:

> Q Okay. Did Mr. Vallez tell you during your examination of him that he was unable to tolerate the generalized aches and pains of his condition now that he has rheumatoid arthritis added to his previous problems or words to that effect?
>
> A I don't believe he mentioned that he could not tolerate it. I believe it was more of a situation where it was uncomfortable." T.S., Vol. X, p. 8.

Inasmuch as there is no reason inherent in the language of the two letters or the surrounding circumstances to credit one statement over another, the foregoing testimony of Dr. Kriz tips the balance in favor of crediting the first letter ("less able to tolerate") as the more accurate description of complainant's condition at the time.

The respondent also has sought to use certain statements made by complainant's physicians in connection with unemployment and workers compensation proceedings. Complainant has objected to this, arguing, in essence, that they have a specialized meaning restricted to the particular proceedings in which they were made. In the Commission's view, this argument goes to weight and not admissibility, as illustrated by the ensuing discussion of specific statements.

Respondent's Exhibit 4 is an unemployment compensation form ("UC-474 MEDICAL REPORT TO DETERMINE UNEMPLOYMENT COMPENSATION ELIGIBILITY") that was filled out by Dr. Harrington on June 14, 1984. In it, he indicated by filling in certain sections that the complainant could work "but must limit the physical activities and/or hours of work" by avoiding climbing, stooping, bending, pushing and pulling, and by limiting his walking and standing to one hour per day apiece and his sitting to 6 hours per day. In the area

for "GENERAL COMMENTS" Dr. Harrington wrote: "Patient is developing rheumatoid arthritis -- should be limited to sedentary work with above restrictions."

At the probable cause hearing, Dr. Harrington testified that in filling out the form this way, he was making a recommendation with respect to complainant's future employment and assuming a "worse case" situation:

> A "...I'm not so sure that as I read this that he couldn't have done more at that particular time. But I was trying to cover him if his situation worsened... T.S. V.IV, p. 13.
>
> * * *
>
> A "...I think that what I'm saying is that given the possibility that at this point in time that a person has rheumatoid arthritis, they have these present findings and functional impairments, the way I would interpret that form is I'm not only having to say this is this way right now. But I'm having to make a guess as to, I mean this is the difficulty we have with these kinds of forms. I'm having to make a guess as to where it's going to go from there. Because somebody may be making a decision based on that several months ahead of time or six months down the road. So what I really did in that situation was to create a sort of a worst case scenario as to where he would be if his arthritis progressed as opposed to responding well to treatment or resolving.
>
> Q So even though the form says the complainant can work but must limit the physical activities and/or hours of work specify limitations, you didn't mean must?
>
> A I didn't. I really didn't mean must at that point. No. I considered that to be what would be ideal or desirable. Id, pp. 26-27.

In Respondent's Exhibit 19, a letter of August 20, 1984, to complainant's attorney in the worker's compensation proceeding, Dr. Kriz stated that complainant had a permanent partial disability of 100% in dusty environments and 0% in non-dusty environments. However, he also testified that this statement assumed a "worse case" situation:

> A ...It's obviously a continuing between the 100% and the 0%. In other words, if you consider the dustiest of environments that would be considered as a 100% disability situation and

> if you could find a completely dust free environment I would consider there to be a 0% disability. And a continuing between those extremes.
>
> * * *
>
> Q Do you consider the library to be a dusty environment?
>
> A I would consider the library to be somewhere in between. And that there would be some variations in the library from one day to the next depending upon... traffic flow, air purification, dryness, dampness in the air, a lot of variables that determine the actual amount of dust that's in the air from day-to-day. T.S., V. 10, p. 15.

All in all, the complainant's physicians were able to provide reasonably convincing explanations for their seemingly inconsistent statements about complainant's condition. As discussed below, the Commission does not believe there was anything inherently contradictory or inequitable in complainant's pursuit of his unemployment and worker's compensation claims after the respondent placed him on unpaid leave of absence. However, the most important factor in assessing respondent's assertion that its action was covered by §111.34(2)(a), Stats., is that complainant's actual job performance had not been observed to have been unsatisfactory. Taking all these matters into consideration, and evaluating the evidence in the context of a decision on probable cause, the record does not support a determination that respondent's action placing complainant on an unpaid leave of absence was justified by §111.34(2)(a), Stats. Therefore, there is probable cause to believe that complainant was discriminated against on the basis of handicap in connection with his leave of absence commencing on May 29, 1984.

The respondent contends that there is something inherently inconsistent about the complainant having pursued (and eventually prevailed on the basis of respondent's concession of liability) a worker's compensation claim of disability and an unemployment compensation claim where he

asserted certain medical limitations on his capacity to work (see Respondent's Exhibit 4), and the instant discrimination complaint, where he is arguing that he was capable of doing his job satisfactorily at the time he was dismissed. See respondent's posthearing brief at p. 30:

> "...the complainant should not be permitted to make totally inconsistent representations in two different forums about his condition... the employer should not be induced into reliance on the UC and WC claim representations only to be sideswiped by new medical information at a hearing two years later."

The Commission is unable to agree with this proposition. The respondent took action in May 1984 to place the complainant on a leave of absence. This action necessarily was based on a determination that complainant was unable to adequately perform his job. While complainant contested this by filing the instant complaint, he was faced with the status quo of having been removed from his gainful employment with the respondent based on the determination that he was unable to do the job due to certain medical conditions which were aggravated by the condition of the air at the workplace. In light of this, it is difficult to understand how the respondent was somehow subjected to inequitable treatment by the complainant proceeding to pursue worker's compensation and unemployment compensation claims which involved assertions of disability.[2] By pursuing these claims, complainant in effect was following up on a status in which the respondent put him by its action in placing him on leave of absence. While in some respects the complainant is pursuing contradictory legal theories, this is improper neither inherently nor under the particular circumstances here involved. While these other claims possibly might have

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[2]The significance of the doctor's statements made in the course of the workers compensation and unemployment compensation proceedings were discussed separately above.

some materiality in any remedial stage of this proceeding, obviously that is not now before the Commission.

The complainant also has argued that respondent discriminated against him because of handicap by way of failure of accommodation.

Under the FEA, the employer has a duty of accommodation, §111.34(1)(b), Stats.:

> (1) Employment discrimination because of handicap includes, but is not limited to:
>
> * * *
>
> (b) refusing to reasonably accommodate an employe's... handicap unless the employer can demonstrate that the accommodation would pose a hardship on the employer's program, enterprise or business.

Obviously, the determination of whether an accommodation would pose a hardship on the employer involves a weighing of costs, benefits, and available alternatives.

The first aspect of the accommodation question has to do with the period when complainant was suffering only from the allergic rhinitis condition, and his handicap was less severe. The respondent took some steps to clean up the library atmosphere but stopped short of installing Space Guard air purifiers or otherwise reconfiguring the HVAC system. Respondent also offered complainant a transfer to a job in the same classification in a residence hall, which he declined. In addition, respondent offered to provide a breathing mask and to make arrangements to permit complainant to take more of his time or breaks outdoors. He did not follow up on these offers. Under all the circumstances, the Commission must conclude there is no probable cause as to this aspect of the accommodation issue.

To begin with, while it is doubtful there is any duty under the FEA to move an employe to a different job as a means of accommodation, see Carty

v. Carlin, 39 FEP Cases 1217, 1222 (D.Md, 1985), respondent's offer of a transfer is certainly material. An employer is not obligated to provide the exact accommodation requested by an employe, cf., American Postal Workers Union, San Francisco Local v. Postmaster General, 39 EPD ¶ 35,863 (9th Cir. 1986). Complainant was given an option to transfer that would have taken him to a position in the same classification and salary, but in a less dusty environment. However, he declined this for reasons of personal preference. He also declined to wear a breathing mask or to make arrangements to be out of doors more frequently on breaks. This must be taken into account in deciding whether respondent was obligated to have installed Space Guard air cleaners or take similar measures at not inconsiderable expense, with an increased noise level, and with no guarantee the measure would have had the desired effect on the environment. Under all the circumstances, it must be found that respondent did not violate its duty of accommodation.

The second phase of the accommodation issue involves the period after complainant developed rheumatoid arthritis. At this point, the problematical factors in the environment (dust, mold, etc.) were the same, but the rheumatoid arthritis had a compounding effect with respect to complainant's ability to tolerate the symptomatology. Again, the record indicates that the installation of Space Guard air purifiers or other major changes in the HVAC system would be expensive and of questionable efficacy. Although the respondent did not offer complainant a specific transfer during this period (the complainant earlier had expressed an interest in transferring only to the Elvehjem Art Center), presumably its offers to provide a breathing mask and to arrange for complainant to spend more of his break time outdoors were still good. There also is no probable cause to believe respondent

discriminated against complainant on the basis of handicap with respect to this aspect of recommendation.

Issue #2

The parties stipulated to the following as the second issue:

> "Whether or not there was probable cause to believe that respondent placed complainant on leave of absence commencing May 29, 1984, in retaliation against complainant's prior complaint of sex discrimination."

This issue has to do with complainant's verbal complaint about what he perceived as his immediate supervisor's "sexist cronyism" in connection with her work-related socializing with female employes.

In order for there to be a prima facie case, the necessary elements are that the complainant have engaged in protected activity under the FEA, that the complainant thereafter suffered an adverse employment action, and that there is some causal connection between the first two elements. See Grant v. Bethlehem Steel Corp., 622 F.2d 43, 22 FEP 1596 (2d Cir. 1980).

Under the FEA, an employe is protected against retaliation with respect to having, inter alia, "...opposed any discriminatory practice under this subchapter...." §111.322(3), Stats. Utilizing a liberal interpretation of the law, complainant's verbal complaint about "sexist cronyism" falls within the coverage of this subsection. The complainant suffered an adverse employment action -- being placed on indefinite leave of absence without pay. However, the record is bereft of any evidence that the complainant's verbal complaint was causal with respect to the decision to place him on leave of absence. There is strong evidence that the decision to place complainant on leave of absence was motivated by respondent's perception of complainant's medical condition or his other complaints concerning his handicap (as will be discussed below), or both. Therefore, there is no prima facie case as to this issue, and, even if a

prima facie case were assumed, the Commission would conclude there was no probable cause with respect to this aspect of the complaint.

Issue #3

The parties stipulated to the following as the statement of the third issue:

> "Whether or not there is probable cause to believe that respondent placed the complainant on leave of absence commencing on May 29, 1984, in retaliation for having made complaints about the effect of library dust on his allergies beginning with the first week of his employment in 1977 through May, 1984, in violation of §111.322(3), Stats."

With respect to this issue, there is a prima facie case. Complainant testified that shortly before he was placed on leave of absence, he conferred with Dr. Lavin and Mr. Pinero in the affirmative action office, and that after he (complainant) said that he might commence legal action to attempt to obtain an accommodation, Mr. Pinero said "We can play hardball too." The respondent offered no evidence that denied this statement was made.

Threatening to commence legal action to obtain an accommodation can be considered part of Mr. Vallez's ongoing complaints about his working environment, and protected under §111.322(3), Stats. The complainant thereafter was placed on leave of absence. Causality may be inferred from the closeness in time between the two events, as well as from Mr. Pinero's statement.

Respondent has articulated a legitimate, non-discriminatory rationale for its decision, as has been discussed under issue #1, above.

As to pretext, complainant testified unrebutted that Mr. Pinero said "We can play hardball too," when complainant talked about pursuing legal action to obtain an accommodation. Such a statement leaves little to the imagination and obviously is a strong indication of a readiness to

retaliate. Shortly after Mr. Pinero's statement, complainant was placed on an indefinite leave of absence without pay when, although there was considerable reason to believe he was suffering a great deal of pain and discomfort from his handicapping conditions, his actual performance of his job remained at a satisfactory level. These circumstances support a finding of probable cause as to this issue.

Issue #4

The parties stipulated to the following statement of the fourth issue:

> "Whether or not there is probable cause to believe that respondent placed complainant on leave of absence commencing May 29, 1984, in retaliation for complaining to his supervisor that a co-worker stated that if her husband spoke Spanish, he would have a job now, in violation of §111.322(3), Stats."

The analysis of this issue is similar to issue #2 (regarding complainant's complaint of "sexist cronyism"). The conclusion is the same -- i.e., no probable cause.

ORDER

Based on the foregoing determinations as to probable cause, the initial determination is affirmed in part and reversed in part, and this complaint is to proceed to conciliation and to a hearing on the merits, if necessary, as to those matters as to which probable cause has been found, i.e., with respect to issue #1 except as to accommodation, and with respect to issue #3. So much of the remaining matters in the complaint, as to which probable cause has not been found, are dismissed.

Dated: _____,1986 STATE PERSONNEL COMMISSION

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DENNIS P. McGILLIGAN, Chairperson

AJT:jmf
ID6/2

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DONALD R. MURPHY, Commissioner

_____
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