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DEBORAH RENZ,  
                   Complainant,

v.

Secretary, DEPARTMENT OF  
 HEALTH AND SOCIAL SERVICES,  
                   Respondent.

Case No.      88-0162-PC-ER

\* \* \* \* \*

DECISION  
 AND  
 ORDER

Nature of the Case

On October 16, 1988, complainant filed a charge of discrimination alleging that respondent had discriminated against her on the basis of handicap in its decision to terminate her probationary employment. On September 14, 1990, one of the Commission's Equal Rights Officers issued an Initial Determination finding Probable Cause to believe that discrimination had occurred as alleged. A hearing was held before Gerald F. Hoddinott, Commissioner, and the parties were permitted to file post-hearing briefs.

Findings of Fact

1. The complainant was appointed to a part-time Word Processing Operator 1 (WPO 1) position in the Administrative Support Unit of respondent's Division of Policy and Budget (DPB) effective November 23, 1987. The duties and responsibilities of this position primarily included production typing on word processing equipment for the professional analysts in DPB and providing back-up support to the DPB receptionist.

2. Upon her appointment to this position, appellant's work hours were 4:00 p.m. to 8:00 p.m. Effective December 6, 1987, appellant's appointment to this position became a full-time appointment and her hours changed to 10:00 a.m. to 6:00 p.m. Some time in February of 1988 but after February 2, 1988, appellant's hours were changed to 7:30 a.m. to 4:15 p.m. Subsequently, appellant was given the option of choosing a half hour lunch break instead of the

previous 45 minute lunch break. Appellant chose this option which changed the ending time for her work day to 4:00 p.m.

3. Appellant was involved in an automobile accident on Tuesday, February 2, 1988. Immediately after the accident, complainant was taken by emergency vehicle to a hospital where she was examined, provided a muscle-relaxant medication, and released. Complainant's symptoms at this time included neck pain and stiffness, back pain and stiffness, muscle spasms in her neck and back, painful pressure in her wrists, numbness in her hands and fingers, and headaches.

4. Appellant reported to work on February 3, 1988. She discussed the accident with her co-workers. Appellant notified Cynthia Daggett, her first-line supervisor, that she had been in an accident and that she was taking muscle-relaxant medication.

5. Appellant was required to serve a six-month probationary period in her WPO 1 position. At the time of her appointment and until February 5, 1988, her first-line supervisor was Ms. Daggett. On or around February 4, 1988, Ms. Daggett prepared an evaluation of complainant's work performance. This evaluation stated as follows, in pertinent part:

Line counts not formally measured, however, quantity of work is above level expected at this point. Proofreading skills are at the required level. More attention to detail regarding document storage and the more technical aspects of DOSF is needed.

Downtime is minimal, however, Debi needs to let supervisor know of unplanned absences.

Professional staff is pleased with Debi's work. Debi learned the DOSF software very quickly and was able to become a productive member of the word processing staff almost immediately. Clerical services have been provided as requested.

6. On January 8, 1988, complainant was required to appear in traffic court. This appearance took a longer period of time than complainant had anticipated and caused her to arrive at work 3 hours after she was scheduled to arrive. Complainant had not requested prior approval for this absence and had not notified Ms. Daggett that she intended to be absent for this purpose. Complainant did not telephone Ms. Daggett on January 8 to notify her that she

was going to be late. Complainant did notify Ms. Daggett of the reason for her absence upon her return to work that day.

7. On January 12 and 13, 1988, complainant was absent due to illness. Complainant did notify Ms. Daggett of the reasons for these absences in a timely manner.

8. Effective February 8, 1988, Barbara Blatterman became complainant's first-line supervisor.

9. Other than the emergency medical treatment rendered to complainant on the day of the accident, complainant first sought treatment for the injuries she had sustained in the accident on February 6, 1988, from Patrick Beyler, a chiropractor. Dr. Beyler's examination of complainant on February 6 indicated to him that she had sustained a whiplash injury to her spine which resulted in her symptoms of headaches, neck pain, numbness in both arms and hands, slight back pain, and pain between her shoulder blades. Dr. Beyler recommended a course of treatment which included the wearing of a soft neck collar for at least 4 hours during her work day and the wearing of wrist splints on both wrists during the work day on an as-needed basis. Complainant wore the soft neck collar as recommended and wore the wrist splints often at work after first recommended and for shorter periods of time thereafter. Dr. Beyler also recommended bed rest for a period of time but complainant indicated to him that she needed to work. Dr. Beyler told her that continuing to work full-time would prolong her recovery period. Dr. Beyler also told complainant that engaging in physical activities would aggravate her condition and prolong her recovery period and that she should take advantage of her non-working hours to rest. Complainant did not ask Dr. Beyler to contact respondent for any purpose. Dr. Beyler did not recommend that complainant not work on Wednesdays. During the period of her employment with respondent, complainant had four to seven appointments with Dr. Beyler during a typical week. Complainant tried to schedule these appointments with Dr. Beyler after work hours. On or after April 18, 1988, complainant provided to Ms. Blatterman a copy of a letter prepared by Dr. Beyler for complainant's attorney which stated as follows, in pertinent part:

Ms. Deborah Renz was seen in my office for evaluation and treatment for injuries sustained in an automobile accident on February 1 (sic), 1988. Her working diagnosis was acute, trau-

matic, severe cervical, thoracic, and lumbar spine subluxation, hyperextension strain and sprain with associated upper extremity radiculitis and contusion of the right SCM muscle. The patient's care consisted of spinal manipulation, cryotherapy, interferential therapy, cervical support and bedrest. The patient informed me that she was in a six (6) month training position as a word processor with the Wisconsin Department of Health Services and she felt that she could not risk the time off of her job. I told Ms. Renz at that time that working will prolong the healing sequence and if she does work she must use the cervical support for at least four (4) hours per day.

On February 17 and 24, Ms. Renz had to take off work because of the cervical spine pain.

10. Complainant first consulted a physical therapist relating to the injuries she had sustained in the accident on or around February 25, 1988. During the period of her employment with respondent, complainant had one or two appointments with the physical therapist during a typical week. As the result of the physical therapist's work schedule, complainant was required on occasion to see the physical therapist during her scheduled work hours. Complainant also had appointments with the physical therapist during her lunch hours, after work, or on Saturdays. The physical therapist's work hours corresponded with typical business office hours.

11. Complainant first consulted a neurologist relating to the injuries she had sustained in the accident on or around March 29, 1988. During the period of her employment with respondent, complainant had two or three appointments with the neurologist. The neurologist's office hours were 7:30 a.m. to 4:00 p.m.

12. During the period of time that Ms. Blatterman was serving as complainant's first-line supervisor, complainant discussed the scheduling of these treatment appointments with her and advised Ms. Blatterman that she would try to schedule these appointments so they would not conflict with her scheduled work hours.

13. On or around May 16, 1988, Ms. Blatterman completed an evaluation of complainant's work performance. The performance expectations, which had been reviewed with complainant during a meeting between Ms. Blatterman and complainant on March 10, 1988, were stated as follows on the evaluation form, in pertinent part:

- A1. Produce high quality documents with minimal error and in a timely fashion.
- A2. Ensure all work is proofread so that errors are identified and corrected.
- A3. Upon completion of one product, move quickly to next work request.
- A4. Continually increase knowledge of DOSF word processing equipment.
- A5. Maintain professional staff satisfaction with word processing services in regard to turnaround time and quality.
- A6. Maintain service oriented attitude.
- B1. Back-up division receptionist and other related duties as needed.
- B2. Ensure assignments are appropriately completed within prescribed deadlines.

Ms. Blatterman's evaluation of complainant's performance in regard to each of these factors was as follows:

- A1, A2. Debi is able to produce documents on DOSF but needs to concentrate on proofing each document to minimize errors.
- A3. This expectation is unsatisfactory. Needs to better utilize time.
- A4. Debi has learned more about the DOSF word processing equipment and has taken initiative to introduce herself to the WP Software which DPB is converting to within the next month.
- A5. Debi has been able to process requests in a timely fashion but this has been affected by a high volume of unscheduled absences.
- A6. Satisfactory--Debi willingly accepts word processing assignments when requested.
- B1. Debi satisfactorily performs reception duties and is pleasant in duties which is appreciated by all Division staff.
- B2. Whenever word process. requests are low, Debi needs to check with supervisor to see if there are other clerical related duties that are pending to better utilize work time and to limit personal phone calls.

Debi's overall performance is unsatisfactory due to the high volume of unscheduled absences, tardiness, lack of attention to detail, proofing and time utilization.

14. Bruce Faulkner, Deputy Director of the DPB, at Ms. Blatterman's recommendation, directed that the following letter, dated May 16, 1988, be prepared for the signature of Alan Fish, the Director of DPB:

This letter is to inform you of our intention to terminate your employment as a Word Processing Operator 1, effective May 20, 1988 due to your failure to meet probationary standards.

This action is being taken pursuant to Section ER-Pers. 13.08, Wis. Adm. Code and Section 230.28 of the Wisconsin Statutes which provides that you be informed of the reason for our decision to terminate your employment during your probationary period.

You are being afforded the opportunity to discuss the reason for termination at a meeting with Barbara Blatterman, Administrative Assistant 3-Supervisor, which has been scheduled for 3:30 p.m. on Wednesday, May 18, 1988. You may have a representative of your choice at this meeting. If you do not wish to have this meeting, please inform Barb before Wednesday afternoon.

15. Ms. Blatterman prepared, on or around May 16, 1988, a list of complainant's unscheduled absences during her probationary period. Of the 13 full or partial days of absence listed, two were days of illness prior to the date of the accident, one was the date of the accident, and 8 were days of illness or days on which treatment appointments were scheduled after the date of the accident. On February 24, 1988, complainant used 8 hours of sick leave and indicated when she called in the unit to give notice that she would not be there that day because her neck was swollen as the result of pushing another person in a wheelchair.

16. At a meeting with complainant on May 16, 1988, Ms. Blatterman presented complainant with a copy of the performance evaluation and reviewed it with her, with a copy of the letter from Mr. Fish, and with a copy of the list of unscheduled absences. Complainant refused to sign the evaluation because she did not feel it was an accurate reflection of the quality of her work performance.

17. Prior to the scheduled meeting of May 18, 1988, Ms. Blatterman prepared a summary statement relating to complainant's work performance which provided as follows:

- On May 4, incident of boyfriend coming in to work unit where a verbal argument ensued. Staff were afraid to enter room and other Division staff were able to hear because of the loudness. This was allowed to continue for approx. 25 minutes. Poor judgment in allowing this to continue at work site.

- Numerous observations of Debi standing at reception area visiting.

- Tardiness - continual tardiness in morning and no bother to make up the time (always leave at 4:15 if not before) \* 2/10/88 laid out expectations to unit as to how things should be handled

- limit phone calls was talked about
- socializing in unit and reception area
- special attention given to proofing to avoid redoing documents
- calling in procedures
- handling ASAPs supposed to be special attention (i.e., this a.m. ASAP which was not touched until 8:15)

#### Time utilization

An excessive amount of time on personal phone calls has been observed by staff and superv. and it is substantiated by local call list. Local calls increased (doubled) in Dec. This increase was noted after Debi's start date of Nov. 27 and has continued.

Never cleared today Dr.'s appt. with me. Indicated that you had appt. @ 1:00 and it would take 45 minutes.

1. Cause of disruptive behavior in the word processing unit due to the talking that is going on

- Dinah has made comments about the amount of visiting causing lack of concentration and hard to back to train of thought

- Karen has complained because of interruptions while trying to complete her work because you are talking to her and in order for her to hear, she has to turn around because she is hard of hearing and has said it's usually personal conversation. Has indicated that she feels production has dropped off because of interruptions of this nature

- Have had complaints that Community Work Services personnel and you have frequent social conversations which disrupt others in unit and also get Barb and Mark excited and they can get quite noisy

- Germaine has observed the increase in socializing in the unit and has become very frustrated

## 2. Quality of Work

Complaints of formatting and typos from various prof. staff

Ken Street  
Louise Hunt  
Cindy Daggett  
Germaine Leist (RPA)

DPB is not a complaining bunch of people and I have NOT received complaints regarding any other word processing operator.

It is necessary to achieve high quality work because of the caliber of people in DPB and the associations that DPB works with as well as considering the type of reports and other documents processed through the Division.

### WPC Local Telephone Usage

July 87	66
August	65
Sept.	64
Oct.	59
Dec.	123
Jan '88	108
Feb.	84
March	108

Debi hired 11/23/87

18. In attendance at the meeting of May 18 were complainant; Ms. Blatterman; Mr. Faulkner; a member of respondent's legal staff; complainant's attorney; and Ron Blascoe, an employee of DPB and a union steward who was serving as one of complainant's representatives. Mr. Blascoe started the meeting by stating that, in his opinion, due to the change in complainant's supervision, Ms. Blatterman hadn't had enough experience supervising complainant to fairly judge her performance; that the termination was surprising since each of complainant's evaluations prior to the final one had been positive and that a device like a concentrated performance planning and develop-



ment (PPD) program should have been attempted; and that respondent's primary problem with complainant's performance, i.e., the number of unscheduled absences, were the result of a temporary situation outside complainant's control and should be treated as a handicapping condition. Some time after Mr. Blascoe's presentation, Ms. Blatterman read her summary statement (See Finding of Fact 17, above) to the group. Because of her status as a probationary employee, complainant was not entitled to formal union representation or to a concentrated performance planning and development program. The only information relating to complainant's work performance that Mr. Blascoe had prior to the meeting was complainant's representation to him that she was being terminated for having a large number of unscheduled absences.

19. One of complainant's co-workers in the Administrative Support Unit at DPB was Beth Rettenmund. Ms. Rettenmund was hired as a part-time WPO 2 on February 29, 1988 and, during complainant's period of employment at DPB, worked from 3 p.m. to 7 p.m., i.e., her hours overlapped with complainant's from 3:00 p.m. until 4:00 or 4:15 p.m. Ms. Rettenmund testified at the hearing that complainant was not at the reception area more than other WPOs, that complainant did not use the phone more than the other WPOs; that she did not feel that complainant's work style was disruptive; that complainant did not talk more than the other WPOs; and that complainant did not make more errors than the other WPOs. Ms. Rettenmund also testified that, "Debi talked a lot about anything and everything while she worked"; that she herself did not use the phone in the unit every day but that she observed complainant using the phone at least once a day to call her daughter, her babysitter, to make personal social calls, and to call her physician or her physical therapist; that she would notice someone walking by her desk but would not necessarily notice the source of noise or talking in the unit; and that Ms. Blatterman told her, after complainant's termination, that she herself should not worry about losing her job since complainant was absent a lot and she hadn't been, and since certain analysts had complained about complainant's work but not about hers.

20. Another of complainant's co-workers in the Administrative Support Unit at DPB was Linda Bush, the DPB receptionist. Ms. Bush was employed in this unit during complainant's entire period of employment there. Ms. Bush's work station was located outside the room where the WPOs were located. Ms. Bush's work hours were 7:45 a.m. to 4:30 p.m. but she actually arrived at

work at 7:50 a.m. as the result of her bus schedule, i.e., 20 minutes after complainant was scheduled to arrive after complainant's schedule was changed some time in February of 1988. Ms. Bush testified at the hearing that she would notice the arrival time of the WPOs; that she would not notice if one of the WPOs spent more time in the reception area than the others; that complainant did not talk more than the other WPOs; that she would not notice if one of the WPOs was working through her lunch break; that complainant was late to work on occasion but not more frequently than the other WPOs and that the frequency of her tardiness increased after her automobile accident; that she had assumed, but did not know, that complainant was late for work because she was at "doctor's appointments;" and that complainant occasionally worked through her breaks to make up for the time she had been tardy. Ms. Bush accepted a position at the University of Wisconsin after Ms. Blatterman discussed with her aspects of her work performance at the DPB which Ms. Blatterman considered inadequate.

21. Another of complainant's co-workers in the Administrative Support Unit at the DPB was Karen Jensen who served in a WPO position in the unit from August of 1987 through October of 1989. Ms. Jensen worked from 7:30 a.m. to 4:00 p.m. or from 7:45 a.m. to 4:30 p.m. with a half hour for lunch and her work station was located near complainant's. Ms. Jensen testified at the hearing that, prior to February of 1988, she didn't recall complainant coming in late or leaving early and, after February of 1988, she didn't notice whether complainant came in late to work or left early except for "doctor's appointments;" that she observed complainant working through her breaks, including her lunch break; that she didn't notice complainant using the phone in the unit more often than the other WPOs and didn't notice that use of the phone in the unit was less after complainant was terminated; that it was "hard to say" whether any WPO talked more than any other but that, after complainant left, there was less talking among the WPOs; that she was "very angry" when she learned that complainant was terminated and "thought it was because of her talking--only think I could think of;" and that she did not notice her co-workers' comings and goings. During complainant's period of employment, Ms. Jensen was frequently absent from the work unit due to her participation in a training program and due to sick leave absences. After complainant was terminated, Ms. Jensen was frequently late for work due to

her pregnancy. During this time, Ms. Jensen would call in to the unit to advise Ms. Blatterman that she was going to be late, record the absence on her time sheet, and stay late to make up the time since she was aware that it was not permissible to use break time for that purpose. When Ms. Blatterman noted on Ms. Jensen's performance evaluation that she had "concern over use of sick leave," Ms. Jensen interpreted this as a criticism and concluded that she should strive to reduce her sick leave usage. Ms. Jensen was never told by Ms. Blatterman that any of the analysts had complained to Ms. Blatterman about the quality of Ms. Jensen's work.

22. Another of complainant's co-workers in the Administrative Support Unit of the DPB was Germaine Leist who worked as a Program Assistant primarily responsible for processing expense vouchers and general clerical duties. Ms. Leist's work hours were from 7:00 a.m. to 3:30 p.m. and her work station was located in the same room with the WPOs. Ms. Leist testified at the hearing that complainant was consistently late 5 to 10 minutes and occasionally late for a longer period of time; that complainant offered no consistent excuse for her tardiness and the nature of her excuses was the same before and after her accident; that she didn't know whether complainant made up the time that she was tardy; that complainant spent a lot of time on the phone engaging in personal phone calls; that complainant's personal phone conversations were with boyfriends, girlfriends, her attorney, chiropractor or babysitter; that she estimated that complainant made 60 personal calls a month using the unit phone; that complainant made significantly more phone calls and talked significantly more than the other WPOs; that complainant did not move directly from one task to another but, instead, would talk on the phone or with co-workers; that the amount of complainant's socializing increased steadily during complainant's tenure in the unit; that the complainant would frequently discuss her evening social activities in the unit and that the frequency of this occurrence did not change after the accident; that Ms. Jensen and Ms. Theis had commented to her regarding the disruption to the unit caused by complainant's talking; that certain analysts would bring to Ms. Leist, who served as the lead worker of the unit in Ms. Blatterman's or Ms. Daggett's absence, documents on which complainant had failed to make all the indicated changes and that analysts had not done so in regard to any other WPO; and that

complainant had done some of Ms. Leist's typing and had failed to make all the indicated changes.

23. Another of complainant's co-workers in the Administrative Support Unit of the DPB was Dinah Theis who functioned as a part-time WPO in the unit from July of 1983 until May 13, 1988. Ms. Theis's work hours were 8:00 a.m. to 4:00 p.m. or 8:30 a.m. to 4:30 p.m. on Mondays and Wednesdays and 8:00 a.m. to 12:00 noon on Fridays. Ms. Theis testified that complainant used the unit phone for personal phone calls more than the other WPOs and her conversations were usually with friends, her babysitter, or her attorney; that complainant talked more than other WPOs in the unit; that complainant initiated a great deal of talking in the unit, and that complainant initiated such talking even while others were working; that the unit radio was located on complainant's desk and that the radio was on louder and more frequently during complainant's tenure than it was before complainant started in the unit; that she found complainant's phone use, talking, and radio use disruptive to the work of the unit; that she complained to Ms. Leist about complainant's phone use, talking, and radio use; and that she raised her concern about complainant's phone use, talking, and radio use to Mr. Faulkner and Ms. Blatterman in her exit interview.

24. Ms. Blatterman held staff meetings approximately once a month for the employees of the Administrative Support Unit of the DPB. Complainant and the other WPOS attended these meetings. At the first meeting held by Ms. Blatterman on February 10, 1988, she advised those in attendance, including complainant, that personal phone calls had recently doubled and were to be kept short and limited to break time; that, if a WPO was working on a "rush" job, the WPO should not take the call but ask the receptionist to take a message; and that it was expected that unit employees would not engage in personal business during work time. In the meeting of April 27, 1988, Ms. Blatterman again expressed concern regarding the number of personal phone calls made from the unit phone; and commented that it was hard to provide coverage when people were absent.

25. Complainant was late for work more frequently and for longer periods of time than any of the other WPOs. Although some of these absences were related to complainant's treatment appointments and physical injuries resulting from the car accident, these were not the sole or overriding bases for

these absences. On one occasion, complainant told Ms. Blatterman that she was late because she had had trouble awakening her boyfriend. On another occasion, complainant told Ms. Blatterman that she had had trouble finding a parking space. On another occasion, complainant was late because her babysitter had overslept. Complainant testified at hearing that she was living with a female, not a male roommate, during her employment by respondent and wouldn't, therefore, have given the first excuse. However, the record shows that complainant did have a personal relationship with a male during this period of time who frequently gave her a ride to work or to health care appointments. Complainant also testified that she didn't have a car during her employment by respondent so wouldn't, therefore, have given the second excuse relating to finding a parking space. However, complainant later changed her testimony to indicate that she acquired a car about two months after her car accident, i.e., two months after February 2, 1988.

26. Complainant used the phone in the unit for personal calls significantly more than the other WPOs. Although some of these phone calls were related to the scheduling of treatment appointments, this type of call did not constitute a significant percentage of these calls.

27. Complainant initiated and engaged in non-work-related talking in the unit significantly more than the other WPOs. Complainant's talking as well as her use of the unit radio was disruptive to the work unit.

28. Complainant's work was returned to Ms. Blatterman and Ms. Leist by certain analysts due to complainant's failure to make all the indicated changes significantly more frequently than the work of the other WPOs. Ms. Blatterman brought this to complainant's attention by returning the relevant documents to her and explaining the basis for the analyst's complaint on at least five or six occasions.

29. Complainant used a significant amount of sick leave during her tenure at the DPB. The sick leave usage was primarily related to complainant's treatment appointments and the injuries she sustained in the car accident. Complainant did not consistently provide respondent with timely notice of these unscheduled absences, i.e., she did not consistently call in prior to the start of her scheduled hours or provide notice in advance of actually leaving work for appointments.

30. On May 4, 1988, a male friend of complainant's came into the work unit some time around 7:45 a.m. and created a disturbance by engaging in a loud shouting match with complainant regarding a personal matter relating to their relationship. This disturbance lasted at least 15 minutes. Ms. Blatterman was not in the unit at the time but learned of this disturbance from Ms. Daggett. Ms. Blatterman discussed this matter with complainant and counseled her not to let it happen again. Ms. Blatterman did not consider that complainant exercised good judgment in allowing this situation to occur or to continue as long as it did to interrupt the work of the unit.

31. Prior to recommending complainant's termination to Mr. Faulkner, Ms. Blatterman had discussed complainant's probationary work performance with Earl Kielley of respondent's Bureau of Personnel and Employment Relations. Ms. Blatterman inquired of Mr. Kielley whether he considered an extension of complainant's probation appropriate. Mr. Kielley indicated that such an extension is appropriate if a probationary employee's work performance has improved substantially toward the end of the probationary period and if the probationary employee's work performance is likely to improve to an acceptable level if an extension is granted. Based on Ms. Blatterman's impression that complainant's work performance had not changed during the course of her supervision of complainant, Ms. Blatterman and Mr. Kielley concluded that an extension of complainant's probation should not be granted.

32. Complainant initiated several discussions with Ms. Blatterman relating to her use of leave time. During the course of these discussions, complainant indicated to Ms. Blatterman that she needed to take time off to receive treatment for the injuries that she had sustained in the car accident; that she had received advice from one of her health care providers that she take time off from work but didn't do that because she didn't think that was necessary; and that she was experiencing hand pain, neck pain, back pain, and headaches. During these meetings, Ms. Blatterman indicated to complainant that her phone use was excessive; that she needed to call in her unscheduled absences in a more timely fashion; that she needed to cut down on talking and concentrate on her work; and that she needed to get to work on ASAPs, i.e., "rush" jobs, as soon as she arrived at work since she was the first WPO scheduled to arrive in the unit in the morning and she hadn't been doing this consistently. Ms. Blatterman also indicated a concern relating to complainant's

usage of sick leave and other leave. It was respondent's policy for a supervisor to raise the issue of leave usage with an employee if it reached a certain level.

33. Other than reporting to Ms. Blatterman that she was experiencing certain physical symptoms due to her injuries, e.g., hand pain, neck pain, back pain, and headaches, complainant did not indicate whether or how her injuries were interfering with her ability to perform the duties and responsibilities of her position. Complainant did not request a change in her duties and responsibilities, a change in her equipment, a change in her schedule, or any other work-related change after her accident. On one occasion, Ms. Blatterman inquired, due to complainant's frequent tardiness, whether complainant would like to work different hours. Complainant indicated in response that she preferred the hours she was working because she liked to leave early.

34. During those periods of time when Ms. Jensen was absent from the unit, Ms. Blatterman and Ms. Leist would closely monitor the workload of the unit and would obtain the assistance of other clerical units if they felt that it couldn't be effectively handled by the unit's remaining resources.

35. Complainant was aware or should have been aware that it was the policy of the unit and of respondent that time could not be made up by working through breaks or through a scheduled lunch break of a half hour. This policy was known by the other WPOs in the unit.

#### Conclusions of Law

1. This matter is appropriately before the Commission pursuant to §230.45(1)(b), Stats.
2. Complainant has the burden to prove that respondent discriminated her on the basis of handicap in terminating her employment.
3. Complainant has failed to sustain this burden.

#### Opinion

The issue in this case is:

Whether the respondent discriminated against the complainant on the basis of handicap with respect to the decision to terminate her employment as a Word Processing Operator 1 in May of 1988.

As the Commission stated in Harris v. DHSS, Case Nos. 84-109-PC-ER, 85-0115-PC-ER (2/11/88), a typical handicap discrimination case will involve the following analysis:

- (1) Whether the complainant is a handicapped individual;
- (2) Whether the employer discriminated against complainant because of the handicap;
- (3) Whether the employer can avail itself of the exception to the pro-scription against handicap discrimination in employment set forth at §111.34(2)(a), Stats., -- i.e., whether the handicap is sufficiently related to the complainant's ability to adequately undertake the job-related responsibilities of his or her employment (this determination must be made in accordance with §111.34(2)(b), Stats., which requires a case-by-case evaluation of whether the complainant "can adequately undertake the job-related responsibilities of a particular job");
- (4) If the employer has succeeded in establishing its discrimination is covered by this exception, the final issue is whether the employer failed to reasonably accommodate the complainant's handicap.

The first question then is whether complainant is handicapped within the meaning of the Fair Employment Act. Section 111.32(8), Stats., defines a "handicapped individual" as 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 an impairment; or
- (c) Is perceived as having such an impairment.

Although complainant experienced some discomfort and some limits on her range of motion, the record shows that this resulted in complainant having to make only minor adjustments in her work and life activities. The record does not show that this discomfort and limitation rendered "achievement unusually difficult" or in any significant way limited complainant's "capacity to work." In fact, complainant continued, after the accident, to use the same process and the same equipment to produce a work product of essentially equivalent quantity to that produced prior to the accident, and, in regard to work she completed, of essentially equivalent quality. In addition, complainant continued, after the accident, to manage her home, to care for her



daughter and to engage in evening social activities. The Commission concludes that complainant has failed to show that she was actually handicapped.

Complainant also argues that respondent perceived complainant to be handicapped. However, even though complainant wore a neck collar and wrist splints during part of each day and spoke of pain and other discomfort she was experiencing, the record does not show that Ms. Blatterman or complainant's co-workers were under the impression that these devices or discomfort were interfering in any significant way with complainant's ability to do her job and complainant never indicated to them that they were. The Commission concludes that the record does not show that complainant was perceived as handicapped by respondent.

If complainant had shown that she was handicapped or perceived as handicapped by respondent, the next question to be resolved under the Harris analysis is whether the respondent discriminated against the complainant because of her handicap. There are two ways that discrimination on the basis of handicap under this element of the analysis can occur. The first would occur if respondent's discharge of complainant had been motivated by complainant's handicap. The second would occur if respondent terminated complainant for performance reasons which were causally related to his handicap. Conley v. DHSS, 84-0067-PC (6/29/87).

In proving discrimination pursuant to the first model, complainant would first have to prove that respondent was aware or should have been aware of complainant's handicap. In the instant case, the record shows that respondent was aware that complainant was injured in a car accident and that these injuries resulted in pain and some limitation in complainant's range of motion.

The record does not show, however, that respondent's discharge of complainant was motivated by her physical condition. Respondent has articulated that complainant was discharged for frequent tardiness, failure to report her unscheduled absences in a timely manner, inappropriate use of the phone in the word processing unit, inappropriate and disruptive socializing in the unit, complaints by professional staff relating to the quality of her work, and frequent unscheduled absences. These reasons are legitimate and non-discriminatory on their face.

Complainant argues that these reasons were a pretext for handicap discrimination. In support of this argument, complainant first contends that she was not frequently tardy and, if she was, she made the time up. Testifying on her behalf in this regard were Linda Bush and Karen Jensen.

Ms. Bush, however, arrived at work 20 minutes after complainant was scheduled to arrive and could not have been aware, therefore, whether complainant, was tardy except in those instances where complainant was more than 20 minutes late. Ms. Bush testified that complainant was late to work on occasion but not more frequently than the other WPOs; that the frequency of complainant's tardiness increased after her car accident; and that she had assumed, but had not known, that complainant was late for work because she was at "doctor's appointments."

Ms. Jensen testified that she didn't recall complainant coming in late or leaving early prior to February of 1988 and, after February of 1988, she didn't notice whether complainant came in late to work or left early except for "doctor's appointments." Ms. Jensen, however, also testified that she did not notice her co-workers' comings and goings and she was frequently absent from the work place during this period of time and her work hours sometimes started at 7:45 a.m., 15 minutes after complainant was scheduled to arrive. In addition, the record shows that complainant did not have appointments with her neurologist or physical therapist prior to 7:30 a.m. because their office hours did not start that early in the morning and that complainant tried to schedule her chiropractic appointments after working hours.

In contrast, Ms. Leist, whose work hours started at 7:00 a.m., testified that complainant was consistently late for work and reported this fact to Ms. Blatterman. Although complainant contends that Ms. Leist's written record of complainant's tardiness indicated only five such instances, the record does not show that this written record was an exhaustive list of Ms. Leist's observations of complainant's tardiness and such a conclusion would be inconsistent with Ms. Leist's testimony.

The Commission finds that the preponderance of the credible evidence supports the conclusion that complainant was frequently late for work. Although complainant claims that she had the implicit approval of Ms. Blatterman to make this time up on the honor system, the record does not show that complainant made this time up. Complainant testified that she made

this time up by working through her lunch and other break times. However, complainant knew or should have known that this was not permissible. Not only was it common knowledge in the word processing unit but the record shows that Ms. Blatterman counseled her about working through her lunch hour on at least one occasion. In addition, the preponderance of the credible evidence in the record shows that complainant often failed to report her unscheduled absences by calling in at or before the beginning of her scheduled work hours, which was the required procedure. Complainant acknowledged in her testimony that her usual practice, when she arrived late at work, was to notify Ms. Blatterman at that time. There was further testimony in the record that, on some days when complainant called in sick, she did not do so until the work day was well under way. The record also reveals an incident relating to traffic court when Ms. Daggett was complainant's supervisor, i.e., before the subject car accident, when complainant again failed to provide timely notice of an absence.

In further support of her pretext argument, complainant contends that she did not use the phone in the word processing unit more than any of the other WPOs. Testifying on her behalf in this regard were Ms. Rettenmund and Ms. Jensen. Although Ms. Rettenmund testified that complainant did not use the unit phone more than the other WPOs, she also testified that she herself did not use the phone every day but that she had observed complainant using the phone at least once a day to call her daughter, her babysitter, to make personal social calls, and to call her physician or her physical therapist. Ms. Jensen testified that she didn't notice complainant using the phone in the unit more often than the other WPOs and didn't notice that use of the phone in the unit was less after complainant was terminated. Ms. Jensen was frequently absent (because of illness and to attend training) from the work unit during this period of time.

In contrast, Ms. Leist testified that complainant spent a lot of time on the phone engaging in personal phone calls with boyfriends, girlfriends, her attorney, chiropractor, or babysitter; that she estimated that complainant made 60 personal calls a month using the unit phone and, in her opinion, was the primary reason that phone calls from the unit phone had increased dramatically during the relevant time period; and that complainant made significantly more phone calls than the other WPOs. Ms. Theis testified that

complainant used the unit phone for personal phone calls more than the other WPOs and her conversations were usually with friends, her babysitter, or her attorney; and that she had raised her concerns regarding complainant's phone use with Mr. Faulkner and Ms. Blatterman during her exit interview. This testimony was later confirmed through Ms. Blatterman's testimony. The preponderance of the credible evidence shows that complainant used the unit phone for personal calls more than the other WPOs.

In further support of her pretext argument, complainant contends that she did not engage in talking regarding personal matters more than the other WPOs. Testifying in her behalf in this regard were Ms. Rettenmund, Ms. Bush, and Ms. Jensen. Ms. Rettenmund testified that complainant did not talk more than the other WPOs. However, Ms. Rettenmund also testified that "Debi talked a lot about everything and anything while she worked;" and that she would not necessarily notice the source of noise or talking in the unit. Ms. Bush testified that complainant did not talk more than the other WPOs. However, Ms. Bush's work station was not located in the word processing unit so she would not have been aware of the source of noise or talking in the unit. Ms. Jensen testified that it was "hard to say" whether any WPO talked more than any other. However, Ms. Jensen also testified that there was less talking among the WPOs after complainant left and that she was very angry when she learned that complainant had been terminated and "thought it was because of her talking--only thing I could think of."

Ms. Leist testified that complainant did not move directly from one task to another but, instead, would talk on the phone or to co-workers; that complainant talked more than the other WPOs; that complainant's socializing increased steadily during complainant's tenure in the unit; that complainant would frequently discuss her social activities of the evening before in the unit; and that Ms. Jensen and Ms. Theis had commented to her regarding the disruption to the unit caused by complainant's talking and she had reported this to Ms. Blatterman. Ms. Theis testified that complainant talked more than the other WPOs in the unit; that complainant initiated a great deal of talking in the unit; that complainant initiated such talking even while others were working; that she felt that complainant's talking disrupted the work of the unit; and that she reported these facts and impressions to Mr. Faulkner and Ms. Blatterman during her exit interview. This was confirmed by the testi-

mony of Ms. Blatterman. The Commission concludes that the preponderance of the credible evidence shows that complainant did engage in talking about personal matters more than the other WPOs and her talking disrupted the work of the unit.

In further support of her pretext argument, complainant contends that her work was as accurate and complete as that of the other WPOs. Although several of her WPO witnesses testified that they did not see more errors in complainant's work products returned by analysts for correction, the errors and complaints which concerned Ms. Blatterman were not in those documents returned to the word processing basket by analysts for correction but those brought to her by analysts because of special concerns they had regarding the quality of the word processing work done by the operator, particularly as it related to making the corrections identified by analysts. Ms. Blatterman testified that she did receive these complaints and could recall the names of at least two analysts who had complained. Ms. Leist testified that she had received such complaints from analysts in regard to complainant's work and she offered the names of two different analysts. Ms. Leist also testified that the work complainant had done for her had contained similar errors, i.e., the failure to make a significant number of indicated corrections.

Complainant denied that such errors had been brought to her attention by Ms. Blatterman at one point in her testimony but admitted later in her testimony that Ms. Blatterman "may" have done so. The Commission concludes that the preponderance of the credible evidence shows that Ms. Blatterman and Ms. Leist did receive such complaints from analysts regarding complainant's work, i.e., in making indicated corrections, and that the work product of complainant which formed the subject of these complaints failed to meet quality standards. The record also shows that, during this period of time, analysts did not bring the quality of the work of any other WPO to the attention of Ms. Blatterman or Ms. Leist; and that, during other periods of time, the work product of no other WPO has been the subject of such frequent complaints as complainant's.

In further support of her pretext argument, complainant contends that the fact that she was treated differently than other WPOs demonstrates pretext. Although the record does show that Ms. Bush was tardy on occasion, the record does not show that Ms. Bush was tardy as frequently as complainant. The

record also shows in this regard that Ms. Blatterman counseled Ms. Bush about this and, in fact, that Ms. Bush decided to accept a position at the University of Wisconsin which she had previously declined after Ms. Blatterman counseled her about her tardiness and other aspects of her work performance which Ms. Blatterman considered unacceptable. Although the record shows that Ms. Jensen was frequently tardy due to her pregnancy and to the illness of a child, the record also shows that Ms. Jensen notified Ms. Blatterman in a timely fashion when she was going to be late, properly recorded the fact on her time sheet, and properly made up the time in accordance with unit and agency requirements.. This situation is not equivalent to complainant's. Although the record shows that Ms. Jensen also had a large number of unscheduled absences and had been counseled regarding use of sick leave, Ms. Jensen's performance in the unit was not distinguished by excessive phone use and talking or by complaints from analysts concerning the quality of her work as complainant's was. As a result, this situation was not equivalent to complainant's either. Complainant has failed to show that she was treated differently than similarly situation WPOs.

Finally, in regard to her contention of pretext, complainant contends that the fact that Ms. Blatterman never pointed out deficiencies in her work performance prior to notifying her of her probationary termination demonstrates that the reasons given for complainant's termination were fabricated by Ms. Blatterman and were a pretext for discrimination. First of all, as discussed above, the record shows that the deficiencies in complainant's work performance offered by respondent as the basis for complainant's termination were as Ms. Blatterman represented them to be. Second, the record also shows that Ms. Blatterman mentioned to complainant her concerns regarding the frequency of complainant's unscheduled absences and regarding work returned to Ms. Blatterman with complaints from the analysts. Furthermore, the record shows that Ms. Blatterman, in the monthly staff meetings she held with unit staff, cautioned against using the phone in the unit for personal business or engaging in other personal business during work time. In addition, excessive talking and use of the phone for personal reasons and frequent tardiness with untimely notice are behaviors which are unacceptable in any job. It should not have been a surprise to complainant that engaging in any of these activities would be considered unacceptable by her superiors. Finally,

two behaviors which were cited by respondent as bases for complainant's termination, i.e., attention to detail and notification of unplanned absences, were mentioned by Ms. Daggett in her evaluation of complainant's performance on or around February 4, 1988.

Complainant has failed to show that the reasons offered by respondent for her termination were a pretext for discrimination.

In order to establish the existence of discrimination pursuant to the second model, it would be necessary for complainant to show a causal link between her handicap and her poor work performance.

Complainant argues that her tardiness was the result of her physical condition. However, the record does not show that one of the primary reasons for her tardiness was the fact that she was attending treatment appointments before work hours, i.e., her neurologist and her physical therapist did not have office hours at that time and complainant testified that she tried to schedule her appointments with her chiropractor after her work hours. Although the record does show that complainant experienced pain and stiffness in the morning after waking and that this required additional time in a hot shower and additional time stretching and dressing and performing her morning routine, there is not a sufficient causal connection between this and her frequent tardiness, i.e., this situation did not prevent complainant from getting to work on time or even make it unusually difficult. It appears that a minor adjustment in complainant's waking schedule would have resulted in her timely appearance at work. In addition, the record does not show that complainant's physical condition was the only reason for her tardiness but that she was late on certain days because her ride was late or her babysitter overslept, etc. Complainant has failed to show sufficient causal connection between her physical condition and her tardiness. In addition, complainant has failed to show any connection between her failure to notify respondent in a timely fashion that she was going to be late or absent and her physical condition, i.e., she has failed to show that her physical condition prevented her in any way from calling in to the unit in a timely fashion.

Although complainant contends that she used the phone in the unit primarily for purposes of scheduling treatment appointments, the record shows that this was not the primary purpose for which she used the phone in the unit. The preponderance of the credible evidence shows that

complainant used the phone in the unit to make calls regarding a variety of social and personal business subjects, of which scheduling treatment appointments was only one. Complainant has failed to show a sufficient causal connection between her excessive phone use and her physical condition.

There is clearly no connection between complainant's excessive talking in the unit and her physical condition.

Complainant alludes to a possible connection between the muscle relaxant medication she was taking and the discomfort she was experiencing and the quality problems with some of her work products. However, the types of complaints Ms. Leist and Ms. Blatterman describe don't relate to complainant's quality or quantity of work in general but to corrections of documents once they were typed. In addition, complainant performed the work satisfactorily some of the time but not all of the time. These two factors appear to militate against the conclusion that complainant's continuing use of medication and continuing discomfort were causally connected to her failure to produce quality work on occasion. Complainant also appears to attribute any errors she made to an increased workload due to Ms. Jensen's absences during this period. Not only does this argument run counter to complainant's contention that any such errors were due to her handicap but also to the showing in the record that any significant increase in workload was shifted to other clerical units.

Finally, complainant contends that most of her unscheduled absences were the direct result of her physical condition. The record shows this to be the case. However, the record shows that it was respondent's policy to raise the issue of sick leave usage with each employee whose level of usage had reached a certain point, regardless of the reason. In this regard, it should be noted that Ms. Blatterman raised the issue of sick leave usage with Ms. Jensen as well as complainant because both had reached and/or exceeded the threshold level. The record also shows that Ms. Blatterman was more concerned with complainant's failure to report her unscheduled absences in a timely fashion than with the absences per se. Finally, the record shows that the issue of complainant's unscheduled absences and failure to report them in a timely fashion was not the primary reason for complainant's termination.

The Commission concludes that complainant has failed to demonstrate pretext and has failed to show that she was discriminated against on the basis of her handicap.




If the complainant had shown such discrimination, the next question under the Harris analysis would be whether respondent can avail itself of the exception to the proscription against handicap discrimination in employment set forth at §111.43(2)(a), Stats., i.e., whether the handicap is sufficiently related to the complainant's ability to adequately undertake the job-related responsibilities of his or her employment. Such a conclusion would not be consistent with the record in this case which shows that complainant was capable of carrying out the duties and responsibilities of her position.

In view of the conclusions reached above, the Commission further concludes that respondent did not have a duty to accommodate complainant's handicap. It should be noted in this regard, however, that complainant never suggested or requested any accommodation and, when a change in complainant's work schedule was suggested by Ms. Blatterman in response to complainant's frequent tardiness, complainant turned it down.

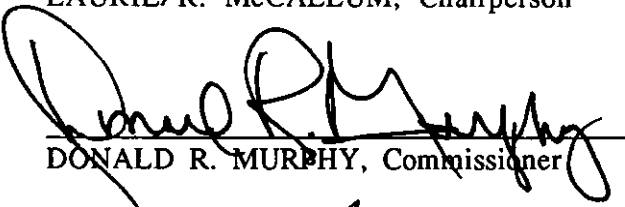
Order

This complaint is dismissed.

Dated: December 17, 1992 STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

LRM/lrm/gdt

  
DONALD R. MURPHY, Commissioner

  
GERALD F. HODDINOTT, Commissioner

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Gerald Whitburn  
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**NOTICE  
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW  
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION**

**Petition for Rehearing.** Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

**Petition for Judicial Review.** Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.