STATE OF WISCONSIN PERSONNEL COMMISSION

ROBERT CHIODO,
Complainant,

v.

President, UNIVERSITY OF WISCONSIN-SYSTEM,
Respondent.

Case No. 90-0150-PC-ER

RULING ON REMEDY

NATURE OF THE CASE

This case involves a complaint of age discrimination with respect to the failure to appoint the complainant on an acting basis to the position of director of academic computing at UW-Stout. On June 25, 1996, the Commission issued an interim order concluding that respondent was liable for having discriminated against complainant with respect to this transaction, and directing further proceedings with respect to remedy if the parties were unable to reach agreement thereon. While the parties were able to stipulate as to certain matters with respect to remedy, they were unable to reach a plenary settlement, and further proceedings were held. The Commission now addresses the issue of remedy.

FINDINGS OF FACT

1. The Commission incorporates by reference as if fully set forth the findings (#1-#25) adopted by the Commission by its June 25, 1996, order.

2. Footnote #2 on page 3 of the interim order is amended on the basis of the showing made in the remedy proceeding. This footnote states that complainant has another complaint pending (93-0124-PC) which challenges "Patterson's permanent appointment to the position in question." That complaint in fact did not challenge Patterson's permanent appointment to the position in question, which occurred in 1991, but

rather complainant's nonselection for the position in question after Patterson left it in 1993.

3. As set forth in Finding #13 in the June 25, 1996, decision, "following the announcement of Patterson's appointment [to the position in question] on July 9, 1990, complainant became ill and commenced a leave of absence which lasted until he returned to work at UW-Stout on November 14, 1991." Complainant requested to return from his leave of absence, supported by an opinion from his doctor that he could return to work, on July 11, 1991. After an independent medical evaluation requested by respondent, which verified complainant's medical fitness to return to work, complainant returned to work effective November 14, 1991.

4. Complainant was not medically fit to return to work at UW-Stout prior to on or about July 11, 1991.

5. Complainant's illness and concomitant need to take a leave of absence was caused by his reaction to the announcement of Patterson's acting appointment.

6. Following Patterson's appointment on an acting basis to the position in question (Computer Services Director), James Kiley was hired as the Executive Director of Computing and Telecommunications, effective April 1, 1991. In this position, Kiley supervised Patterson and two permanently-appointed employes in the positions of Director of Computer Users Support Services (Gordon Jones) and Director of Telecommunications and Technical Support Services (David Kaun).

7. A few months after Kiley's appointment, respondent decided to make a permanent appointment to the position of Computer Services Director (the position that Patterson was then filling on an acting basis). As noted in the interim decision (Finding #18), Womack effected Patterson's permanent appointment to this position without any kind of recruitment or competition and based on the belief Patterson had done a good job in an acting capacity. In making this decision, Womack sought and relied on Kiley's opinion that Patterson had done a good job and should remain in the

position on a permanent basis. No formal selection criteria were developed, and there was no posting or advertising with respect to respondent's intent to make a permanent appointment to this postion.

8. Based on complainant's demonstrated record of superior performance in essentially the same position that Patterson held on an acting and then permanent basis, and the other circumstances surrounding these transactions, as set forth in the records of the liability and the remedial proceedings, a preponderance of the evidence supports a finding that if complainant had been appointed on an acting basis to the position in question, he would have received a permanent appointment to that position and continued in that position, and the Commission so finds.

9. Complainant's actual and expected earnings, had he received the acting and permanent appointments to the positions, are as set forth in Exhibit C attached to complainant's post-hearing brief, as follows:

Fiscal Year	Expected Earnings	Actual Earnings
1990-91	$52,251	$1,746
1991-92	$57,320	$1,745 $30,373
1992-93	$59,200	$49,529
1993-94	$60,239	$49,917[1]
1994-95	$64,538	$52,034
1995-96	$66,726	$54,768
1996-97	$68,081	$56,224[2](through 12/96)

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.45(1)(b), Stats.

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[1] This figure has been changed from the proposed decision to correct a typographical error.
[2] This figure has been changed from the proposed decision to correct a computational error.

2. Complainant has satisfied his burden of proof with respect to establishing that he is entitled to back pay and benefits[3] calculated as if he had received the acting appointment to the position in question in July 1990, and then the permanent appointment to said position effective July 1, 1991, less in mitigation the actual amount of salary and benefits earned, offset by unemployment benefits paid to complainant; and to an appointment to the position in question when it next becomes vacant, or an appointment to a comparable vacant position, whichever occurs first, assuming he is then eligible and qualified therefore.

3. Respondent has failed to satisfy its burden of proof with respect to establishing that complainant failed to mitigate his damages.

4. Complainant is entitled to reasonable attorney's fees and costs. *Watkins v. LIRC,* 117 Wis. 2d 753, 345 N. W. 2d 482 (1984).

OPINION

One of the primary purposes of the WFEA is "that the person discriminated against should be 'made whole.'" *Anderson v. LIRC,* 111 Wis. 2d 245, 259, 330 N. W. 2d 594 (1983). The attainment of this objective "'requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.'" *Franks v. Bowman Transportation Co.*, 424 U. S. 747, 764, 47 L. Ed. 2d 444, 461, 96 S. Ct. 1251 (1976) (citation omitted).[4] In the instant case, the Commission has concluded that respondent discriminated against complainant on the basis of age with respect to its decision to appoint someone else on an acting basis to the Computer Services Director position. At this stage, the goal is to replicate to the

[3] The term "and benefits" is added to the proposed decision to make it clear that the back pay award includes both salary and benefits.

[4] "[I]t is appropriate to consider federal decisions under Title VII . . . for guidance in interpreting and applying the Wisconsin Fair Employment Act." *Anderson v. LIRC,* 111 Wis. 2d at 254.

extent possible where complainant would be in terms of his employment status, including salary and benefits, if the discriminatory act had not occurred.

In failure to hire cases, the employer typically is ordered to appoint the complainant to the next available vacancy in the position in question or a comparable position, with back pay and benefits from the time of the discriminatory act until the appointment, *see, e. g., Wolfe v. UW-Stevens Point,* 84-0021-PC-ER, 10/22/86. However, the instant case is somewhat unusual in that the appointment in question was acting in nature and lasted approximately one year. Respondent contends essentially that complainant's remedy runs at most only to the duration of the acting appointment[5] — i.e., complainant is entitled only to the salary differential he would have earned had he been in the position on an acting basis for the approximate one year period. On the other hand, complainant asserts that if he had received the acting appointment to this position, it is reasonably foreseeable that he also would have gotten the permanent appointment to the position, and thus in order to make him whole and put him in the same posture he would have been in had he gotten the acting appointment, he is entitled to a permanent appointment to the same (or comparable) position and continuing back pay until that occurs.

The general rule in this area is that "the burden of proof is upon the plaintiff [here complainant] to show the fact and extent of the injury and to show the amount and value of his damages." 22 Am Jur 2d *DAMAGES* §902, p. 923; *see also, e. g., Smee v. Checker Cab Co.,* 1 Wis. 2d 202, 207, 83 N. W. 2d 492 (1957). The specific approach to calculating the remedy in employment discrimination cases is set forth in 2 C. Sullivan, M. Zimmer & R. Richards, *Employment Discrimination (Second Edition),* §14.4.2 (1988) as follows:

> Since the backpay award compensates the discriminatee for her wage loss due to the unlawful discrimination, it is necessary to determine what the discriminatee's wages would have been but for the defendant's dis-

[5] Respondent also contends that complainant is not entitled to any salary differential because he was on a medical leave of absence throughout this period, while complainant asserts that because his medical condition was caused directly by the act of discrimination, this leave of absence should not interrupt his entitlement to relief. This issue will be addressed below.

> crimination. This requires the court to determine the positions the employee would have held, the period she would have occupied each position, and the remuneration she would have received in the absence of discrimination. To do this, the court must take account of a multitude of factors, including the qualifications and seniority of the claimant and other employees, and the layoffs, transfers, resignations, and promotions that would have impacted on the claimant's employment.
>
> The reconstruction of a discriminatee's employment history can frequently be facilitated by examining the actual employment history of the person who obtained the position denied to the discriminatee. Such an examination will reveal such data as the frequency and amount of raises, the time periods between promotions, and the susceptibility to and length of layoffs. Unless there is reason to believe the discriminatee's employment history would have been different, these data are highly probative of what the discriminatee's employment history would have been. Of course, if the evidence shows that the discriminatee's employment history would have differed in some particular, the court may discount this aspect of the actual employee's history. (footnotes omitted)

In the instant case, the initial decision on liability included the following finding:

> 19. The positions in which Patterson served with the titles of acting Director of Administrative Computing, acting Computer Services Director, and Computer Services Director, were essentially the same, with some minor differences. This also was essentially the same job complainant had filled on an acting basis in 1989 when Schuknecht was on his acting assignment. The day to day activities of these positions as variously entitled above, were essentially the same as those performed by complainant in his position of Associate Director of Computer Services, when he reported to Schuknecht when the latter was Director of Planning and Management Information.

This decision also found that complainant had always had very good performance evaluations, and that he "was substantially better qualified than Patterson" for the position in question. Finding #24. The permanent appointment was made without a formal selection process, and Patterson was given this appointment on the basis of his good performance in an acting capacity. Thus, complainant has made a strong showing, and there certainly is a preponderance of the evidence from which it can be in-

ferred and found, that if no discrimination had occurred, and complainant had received the acting appointment, he also would have received the permanent appointment as did Patterson, after the latter had received the acting appointment. The Commission has considered respondent's arguments against such a finding, but conclude they are not ultimately persuasive.

Respondent contends that the permanent appointment cannot be considered in the determination of an appropriate remedy because that appointment was never the subject of a charge of discrimination:

> Complainant passed up the opportunity to amend his charge of discrimination in the instant case, or to file a separate and distinct charge, to encompass respondent's selection of a permanent director in July of 1991. Because matters related to respondent's selection of a permanent director of Computer Services ("permanent director") in July 1991 were not included in the issue established for hearing, these matters were not adjudicated at the hearing in this case. Consequently, matters pertaining to respondent's selection of a permanent director in July 1991 must not be considered by the Commission as it fashions a remedial order in this case. Respondent's brief, p. 3.

This argument blurs the distinction between the liability and the remedial phases of this case. Once liability has been established for the first transaction—the acting appointment—the authority discussed above establishes that complainant is entitled to be made whole for the denial of the acting appointment—i. e., to be put as far as possible in the same place he would have been if the act of discrimination had not occurred. If the complainant can show by a preponderance of the evidence that a subsequent personnel transaction—e. g., a change in classification, a step increase on the completion of probation--would have inured to his benefit, he is entitled to have that figured into his remedy, *see, e. g., 2 B. Lindemann & P. Grossman, Employment Discrimination Law,* 1780 (1996):

> This core component [wages and salary] of back pay has been interpreted to include such items of lost compensation as overtime, shift differentials, commissions, tips, cost-of-living increases, merit increases, and raises due to promotions, so long as the plaintiff can prove that he or she would have earned those items absent discrimination. Courts will

> deny recovery of items, such as anticipated future pay raises, if they are too speculative or if the plaintiff did not adequately prove the actual loss of the items. (footnotes omitted)

There is no requirement that the employe also show that there was an additional act of discrimination with respect to the subsequent personnel transaction. The instant case may be factually different from most cases because Womack appointed Patterson first on an acting and then on a permanent basis, but this distinction does not affect that principle. Complainant is entitled to have the permanent appointment figured into the determination of remedy not if he can show that that appointment involved an act of discrimination, but if he can show to the requisite degree of predictability that it would have ensued if he had received the acting appointment.

This is not a case such as *Cantrell v. Knoxville Comm. Develop.*, 68 FEP Cases 536, 538-39, 60 F. 3d 1177 (6th Cir. 1995), where the kind of argument respondent makes would be more apropos. In that case, the plaintiff claimed he had been selected for a reduction in force because of race. The trial court based its back pay calculations on what the plaintiff would have earned prior to his termination in the absence of a different employment matter--the employer's disparate pay practices. The Court of Appeals held that this approach amounted to an attempt to address indirectly a non-actionable discriminatory act through the calculation of damages. Clearly, in *Cantrell* it could not be posited that if the plaintiff's employment had not been terminated his salary would have been increased. Contrariwise, in the instant case, it can reasonably be predicted on the basis of the record evidence that complainant would have received the permanent appointment if he had received the acting appointment.

Respondent also contends that it would be speculative to award any relief involving the permanent appointment:

> Although complainant asserts in his brief that he "clearly would have been made the permanent director in July of 1991," that assertion itself is pure speculation. There is absolutely no guarantee that complainant would have been promoted to a permanent directorship. During Rex Patterson's service as interim director, respondent reorganized its campus-wide computer services and hired an executive director . . . If com-

> plainant had been serving as the interim director at that time, instead of Rex Patterson, there is nothing in this record to support a conclusion that the newly hired executive director, Richard Kiley, would have been satisfied with complainant's performance as interim director under his supervision. Thus, there is no guarantee that executive director Kiley would have recommended complainant's appointment as permanent director in July of 1991. Respondent's brief, pp. 5-6.

Notwithstanding the reorganization, the position in question remained essentially the same. Since it was found that complainant had performed these duties in the past and had received very good performance evaluations, and that he was substantially better qualified for the position than Patterson, there is a great deal of evidence to support a conclusion that if complainant, rather than Patterson, had received the acting appointment, he (complainant) would have performed well enough in the position to have satisfied Kiley, and to have received the permanent appointment. It is correct, as respondent points out, that there is "no guarantee" that this would have happened. However, complainant's burden is to establish the necessary facts by a *preponderance* of the evidence, not to provide a "guaranteed" projection of what would have occurred in the absence of the discriminatory transaction.

The second primary issue related to remedy concerns the period when complainant was not at work while on medical leave. The first factual dispute with respect to this issue is whether the evidence supports a finding that respondent's appointment of Patterson as acting director caused complainant to become medically unable to work. The second factual dispute is, if so, how long the period of disability lasted.[6] In its post-hearing brief, respondent contends first that there was no causal relationship between the personnel transaction in question and complainant's medical leave, and second, that there is no reason that complainant could not have returned to work prior to the time he requested it.

With respect to the first question, essentially the only evidence is the medical records offered by complainant and the testimony of his physician, Dr. Stephen Brown.

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[6] Respondent's contention that complainant is not entitled to any backpay differential as a matter of law will be discussed below.

Dr. Brown testified that complainant initially began treating complainant on February 6, 1989, when complainant had suffered a heart attack (which was followed by an angioplasty). On July 9, 1990, after complainant heard about the personnel transaction in question, he was admitted to the hospital complaining of chest pains, and was hospitalized for two days. While he was not diagnosed as having suffered a heart attack then, Dr. Brown recommended he take a leave of absence from UW-Stout at that time because, as Dr. Brown testified at the liability hearing: "It seemed very evident from talking to him and what happened that he experienced extreme stress when exposed to the environment at Stout. I was afraid that it would . . . could lead to another heart attack. . . .I felt that it [the situation at UW-Stout] raised his stress and anxiety level to a degree that was dangerous to him." T., pp. 4, 18. Dr. Brown continued to serve as complainant's primary physician thereafter,[7] and in July 1991, provided medical clearance for complainant to return to work at UW-Stout.[8]

Thus, it is undisputed that complainant had a history of significant coronary disease, that he went to the hospital complaining of chest pain and an extreme reaction to having heard the news about the appointment, that he was hospitalized for two days, and that his physician was of the opinion that it was inadvisable for him to return to work at that time because of the possibility that the job-connected stress could cause another heart attack. While respondent points out that complainant's reaction to the news of the appointment did not cause him to have another heart attack, there is nothing in the record to raise any significant questions about the soundness of Dr. Brown's opinion that returning to work at Stout at that time was medically inadvisable because of the *risk* of another heart attack. Therefore, and even regardless of the allocation of the burden of proof on this issue, the record supports a finding that for medical reasons directly caused by the personnel transaction in question, complainant became unable to work on July 9, 1990, and that this condition continued at least to July 2, 1991.

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[7] Complainant also was referred to, and treated by, another physician in July 1990.

[8] Complainant ultimately returned to work at UW-Stout in November 1991 following some exchanges between the parties' counsel, and, at respondent's request, an examination by another doctor.

As to the second question (whether complainant could have returned to work earlier), the record reflects that complainant requested a return to work on July 11, 1991 (a few days after the date of Patterson's permanent appointment). The issue related to the period prior to this request runs to mitigation of damages, and the burden of proof with respect thereto is on respondent, *see, e. g., Kuhlman, Inc. v. G. Heilman Brew. Co.,* 83 Wis. 2d 749, 752, 266 N. W. 2d 749 (1978). This is a matter of mitigation because during this period complainant was neither working nor attempting to work in the position he had previously held. Thus his remuneration was less than it otherwise would have been, and he arguably failed to have done what he could have done to mitigate his damages. Respondent has a number of contentions with respect to this question.

Dr. Brown saw complainant in April 1991, and he had not examined him again when he rendered his opinion in July 1991 that complainant could return to work. Dr. Brown further testified on cross examination that when he saw complainant in April 1991, they did not discuss at that time whether he could return to work at UW-Stout, and that it was a "possibility" that complainant could have returned to work then. Also, the record reflects that complainant was employed part-time at an institution of higher learning in Ohio during part of the period he was on medical leave from UW-Stout. There also is nothing to suggest that the work environment for complainant at Stout ever changed during this period. These factors are consistent with a conclusion that complainant could have returned to work earlier than he did. However, there are other circumstances which weigh against such a conclusion.

While Dr. Brown did state it was a "possibility" that complainant could have been able to return to work earlier, his testimony makes it clear that this was no more than a bare possibility:

> Q And in fact based on the medical record as you know it . . . as you knew it at that time, if you were asked whether Mr. Chiodo could have returned or not, would you have a response?
>
> A I don't know that I can answer that. I don't think it would be fair to give an opinion at this point. . . I'm being asked to give an opinion now

> of whether I felt he could return to work at Stout in April of '91 and I don't feel I can give that opinion now. . . .
>
> Q [I]f we just focus on the period December 30 of 1990 to April of 1991, since you did not see him during this period of time and you were not aware of what his medical condition was, is it not a possibility that he may have been able to return to work during that period?
>
> A It's a possibility, yes. . . .
>
> Q [W]hen you answered his question with the phrase possibility, you are not saying that . . . it was likely or medically probable to a reasonable degree of medical certainty that he could have returned to the University of Stout during those periods . . . ?
>
> A That's correct. T., pp.15-16, 18.

In this context, little if any weight can be attached to Dr. Brown's "possibility" statement.

Complainant's employment in Ohio is of limited significance because complainant had been experiencing a reaction to a particular stressful situation atUW-Stout; Dr. Brown's opinion was that it was potentially dangerous to complainant to return to the stressful environment there.

Respondent's strongest argument is that nothing on this record explains what, if anything, changed between July 1990 and July 1991 that would explain why Dr. Brown (after not having seen complainant since April 1991) reached a different opinion regarding the medical feasibility of complainant returning to work at UW-Stout in July 1991. This factor detracts from the weight of Dr. Brown's testimony, but in the Commission's opinion, it does not lead to a conclusion that complainant in fact could have returned to work at Stout before he did. There is no requirement, even in judicial proceedings, for an expert witness to explicate the basis for his or her opinion. It has been observed that failure to do so can be expected to diminish the weight of the testimony:

> In theory, the proponent could qualify the witness, elicit the opinion, and then tender the witness for cross-examination without ever having

> delved into the underlying bases. This inquiry would be left to the opponent. While possible in theory, this is dubious trial advocacy. It is unlikely that a jury would be impressed by such testimony. 7 D. Blinka, *Wisconsin Practice—Evidence* §705.1 (1991).

Despite the lack of a completely articulated basis for Dr. Brown's opinion, it is not so bereft of support or foundation that it is completely without weight. Dr. Brown was certainly competent to render an opinion. Although he had not examined complainant since April, he had been treating him for some time before then, and it can be assumed he had some basis in his understanding of the patient and the surrounding circumstances for the opinion he rendered in July. Inasmuch as respondent has the burden of proof on this issue, and did not offer any contravening evidence thereon, such as another expert opinion, in the Commission's view the issue should be resolved in favor of complainant.

Respondent also contends that as a matter of law complainant is not entitled to back pay for this period. The general rule in this area is stated in 45C Am Jur 2d *JOB DISCRIMINATION* §2920 as follows:

> **Effect of physical incapacity to work.** Because a victim is entitled to backpay for losses attributable to only discrimination or other unlawful acts, victims have been denied backpay for the duration of a disability that rendered them unable to work after the violation, *if it was not caused by the wrongful conduct. . . .a disability that is the result of the discrimination will not end the backpay period.* (footnotes omitted, emphasis added)

For example, in *Maturo v. National Graphics,* 55 FEP Cases 325, 332, 722 F. Supp. 916 (D. Conn. 1989), the plaintiff experienced depression and other emotional problems as a result of sexual harassment, and as a result was unable to work for a period after she had been forced to leave her employment with the defendant. The court declined to disallow this period in the computation of back pay, noting that "her inability to work during those periods in which she was unemployed was the direct result of defendant's actions. She will not be penalized for failing to seek or to secure employ-

ment during those times." *See also, e. g., Nichols v. Frank*, 61 FEP Cases 1515, 1519 (D. Ore. 1991).

However, there is conflicting authority. For example, in *Bossalina v. Lever Bros.*, 47 FEP Cases 1265, 1267-68 (D. Md. 1986), aff'd. mem., 47 FEP Cases 1360, 849 F. 2d 604 (4th Cir. 1986), the plaintiffs in an Age Discrimination in Employment Act (ADEA) case failed to mitigate their damages and claimed "that they suffered such emotional distress from their discharge that they were unfit to look for other work." The court held:

> This excuse is insufficient as a matter of law. Damages for emotional distress are not recoverable under the ADEA. A plaintiff cannot circumvent that rule by indirectly making a claim for emotional distress in the guise of a justification for not fulfilling his duty to mitigate. (citations omitted)

In the Commission's opinion, the most appropriate course under the WFEA is to follow the former (and apparently majority) line of authority, which does not result in the penalization of the employe for an inability to work which is caused by the employer's discriminatory act. The WFEA, like the ADEA, does not provide for the recovery of compensatory damages for emotional distress or similar injuries. *See, Yanta v. Montgomery Ward & Co., Inc.*, 66 Wis. 2d 53, 62-63, 224 N. W. 2d 389 (1974). "'Compensatory damages' refers to a monetary award intended to redress injuries such as mental distress, humiliation, deprivation of a civil right or out-of-pocket expenses. The phrase *does not* include awards of backpay . . . ." 2 C. Sullivan, M. Zimmer & R. Richards, *Employment Discrimination,* §15.1 (1988) (emphasis original). If the award of backpay does not come under the heading of compensatory damages for emotional distress or other injuries, it is difficult to see how *not* reducing a back pay award because an employe is unable to work because of a medical disability caused by the employer's misconduct would constitute a "back door" approach to awarding compensatory damages for emotional distress. Unlike an award of compensatory damages, the refusal to cut off back pay under these circumstances does not involve a determination that a certain amount of money will compensate a claimant for emotional distress or

other injuries. Rather, it is a legal conclusion that the employe's "make whole" back pay award will *not* be diminished by a disability that has been proximately caused by the act of discrimination. That conclusion is in keeping with the oft-repeated admonition that "the provisions of the Fair Employment Act must be liberally construed to accomplish the purpose of the Act . . . e. g., to make the prevailing complainant 'whole.'" *Watkins v. LIRC,* 117 Wis. 2d 753, 762-63, 345 N. W. 2d 482 (1984).

ORDER

This matter is remanded to respondent to implement the remedy set forth in the conclusions of law, above. Complainant will have 30 days from the date of service of this order to submit a motion for fees and costs pursuant to §PC 5.05(2), Wis. Adm. Code.

Dated: July 2, 1997

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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