STATE OF WISCONSIN PERSONNEL COMMISSION

ARLENE RENTMEESTER,

Appellant,

v.

Executive Director, WISCONSIN LOTTERY, [Chairperson, WISCONSIN GAMING COMMISSION],

Respondent.

Case No. 91-0243-PC

INTERIM DECISION AND ORDER

ARLENE RENTMEESTER,

Appellant/ Complainant,

v.

Executive Director, WISCONSIN LOTTERY, [Chairperson, WISCONSIN GAMING COMMISSION],

Respondent.

Case Nos. 92-0152-PC
92-0182-PC-ER

FINAL DECISION AND ORDER

This matter is before the Commission following the promulgation of a proposed decision and order by a hearing examiner pursuant to §227.46(2), Stats. The Commission has considered the parties' written objections and arguments with respect to the proposed decision, and consulted with the hearing examiner. The proposed decision and order, with a few minor changes, will be adopted as the Commission's final disposition of this matter.

Many of complainant's objections to the proposed decision are essentially conclusory contentions that more weight should have been given to her evidence than respondent's. Some of the more specific arguments will be specifically addressed.

With respect to management's failure to provide a cruise control vehicle on October 15, 1991, complainant first argues as follows:

> The hearing examiner failed to take into account that the assignment of a cruise control-equipped vehicle to FSR's performing longer routes was a matter of standard policy, and that Ms. Rentmeester should not have been required to even request a cruise control-equipped vehicle for longer routes, much less need to provide medical justification. The hearing examiner erroneously concluded that Ms. Rentmeester needed "medical verification" in order to get a cruise control-equipped vehicle for a longer route despite the standard policy. No other FSR had to provide medical information. Objections, p. 6.

Complainant was not required to obtain medical verification for the use of a cruise control vehicle per se; the form respondent's personnel office sent her on October 2nd was to have been sent to DOA for the conversion of her regularly assigned van to cruise control.[1] She was permitted to use cruise control vehicles for longer routes on October 2nd, 7th and 9th, when the form had not been returned, and cruise control vehicles had been available. The fact that other FSR's had not been required to get medical verification is not significant, because there is nothing in the record to suggest anyone else requested cruise control for medical reasons, and in addition, they all already had cruise control in their regularly assigned vehicles because, unlike complainant, their normal routes were long enough to meet the mileage requirement for cruise control.

Complainant also contends: "a spare vehicle with cruise control was kept in the Lottery parking lot all day on October 15, and was only 'not available' because management had fictitiously determined that was 'not available.'" id. Complainant has not cited any credible evidence in the record that supports this contention, and the Commission is aware of none.

Complainant also states that "the use of a cruise control-equipped vehicle had been preapproved by management prior to October 15, 1991, and that management was rescinding its prior authorization without any reason other than discriminatory intent." id., pp. 6-7. The Commission agrees that the record supports a conclusion that management told complainant on October 14th that she would be doing the Door County route on October 15th, and that she would be allowed to use a cruise control vehicle (as she had been three times in the past). However, as discussed below and in the proposed decision,

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[1] If her regularly assigned vehicle had been converted to cruise control, it presumably would have been available whenever complainant was assigned to longer routes, and she would not have had to use a different vehicle on those occasions.

respondent did articulate a reason for its decision, and this was not shown to have been a pretext for an intent to discriminate against her because of her handicap, or to retaliate against her because of any protected activity. That management previously had told complainant she would be able to use cruise control adds little if anything to complainant's attempt to show pretext. It is significant in considering the pretext issue as to this incident, that respondent already had granted complainant use of a cruise control vehicle on the three previous occasions she had requested one. This is hardly consistent with the intent complainant ascribes to respondent to discriminate against her because she had identified herself as a handicapped individual with M.S. and had requested cruise control as an accommodation.

With respect to the October 16th incident when complainant had a 3:30 doctor's appointment to attempt to obtain verification that cruise control was indicated to accommodate her medical condition,[2] and she was assigned to a route outside Green Bay, complainant contends that "the lottery's actions were a blatant attempt to frustrate [her] ability to obtain a reasonable accommodation by attempting to prevent her from seeing her doctor." Complainant's objections, p. 7. However, complainant was not prevented from taking sick leave for this purpose, and it was unlikely that she could have kept this appointment under DOA fleet guidelines even if she had been assigned to Green Bay that date.

Complainant also states:

> Moreover, the hearing examiner erroneously stated that the Lottery determined that Ms. Rentmeester could not visit a doctor during her work hours on October 16 because of a change in FLSA status on October 14, 1991. It is not known where the hearing examiner obtained this information, but the fact is that the FLSA status was changed on September 8, 1991, as shown in Attachment 1[3] to this Brief. Moreover, other FSR's had been allowed to see doctors for non-worker's compensation treatment during work hours after September 8, 1991. (See Elizabeth Gallenbeck testimony, Tr. 585.) Id., pp. 7-8.

The hearing transcript reflects testimony by Mr. Walsh, respondent's Director of Sales, that: "a lot of that [change in policy] changed on October 14

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[2] As mentioned above, management requested this certification for DOA in connection with the installation of cruise control in complainant's regularly assigned vehicle.

[3] This document was not offered at the hearing.

as we moved from exempt to non-exempt status," Tr. 494; that: "as of October 14, 1991, Diane Harmelink and I had put out a memo and the status of a field retailer specialist or FSR's at the time went from exempt to non-exempt," Tr. pp. 472-73; and that:

> There was what I would call an unwritten policy, that people were requested, number one, to schedule doctor's appointments, either early in the day, on weekends, or after work, and that especially became true again after October 14 when we moved from exempt to non-exempt status and they became hourly employees. Tr., p. 496.

He also testified that before Ms. Sonnenberg and Mr. Fitzsimmons took over as acting co-managers of the Green Bay district,[4] this policy had not been enforced:

> Prior to September 24 you probably could have done most anything in the Green Bay District office as far as going to see a physician.
> Frequently from what I understood Gary has told us on different occasions that he would let people go and pretty much self-schedule during the course of the day. id.

With respect to respondent's decision to put complainant on leave with pay status pending clarification of her driving restrictions, complainant states in her objections as follows:

> First, the hearing examiner erroneously concluded that being sent home with pay and being prohibited from visiting her retailers and customers was not discriminatory. The United States Supreme Court has determined that any change in the "terms, conditions or privileges of employment" which occurs because of discrimination is a violation of law. Hishon v. King & Spaulding, 467 U.S. 69 (1984). Id., p. 9.

This misstates the discussion in the proposed decision, which concluded that the employer's action of temporarily placing complainant on leave with pay status under the circumstances was not an adverse or negative employment action. The proposed decision then goes on to discuss, assuming arguendo an adverse employment action, whether it was discriminatory because of an illegal motivation. Citation to Hishon begs the question; the WFEA, like Title VII, makes it an act of employment discrimination "to discriminate against any individual in terms, conditions or privileges of employment ... because of any basis enumerated in s. 111.21." §111.322(1), Stats. The initial question

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[4] This occurred in late September, 1991, Finding #7.

presented here is whether respondent's act of placing complainant on leave with pay under these circumstances implicates a term, condition or privilege of employment. In Hishon, the Court only held that partnership in a law firm could constitute a term, condition or privilege of employment, the decision as to which would have to be made without regard to gender. That decision provides little guidance as to the question involved in this case.

In Spring v. Sheboygan Area School Dist., 865 F. 2d 883, 48 FEP Cases 1606, 1607 (7th Cir. 1989), a case decided under an analogous provision in the ADEA (Age Discrimination in Employment Act), the Court held: "To establish a violation of the ADEA, therefore, a plaintiff must prove that she suffered a materially adverse change in the terms or conditions of her employment because of her employer's discriminatory conduct." (emphasis in original) (citation omitted). The Court upheld a grant of summary judgment dismissing the employe's claim that a reassignment from the principalship of one school to the dual principalship of two other schools constituted age discrimination. The decision addresses the employe's contention that the reassignment was a "public humiliation" by noting that "public perceptions were not a term or condition of Spring's employment." id., 48 FEP Cases at 1608.

In the instant case, complainant was temporarily placed on leave with pay while her supervisors sought clarification of her medical restrictions. She was not required to use her sick leave or any other type of leave. She has not established that being in this status had any negative effect on her employment, although she testified about her subjective reactions of feelings of anger, frustration, stress and lowered self-esteem. Tr., 52-53. The Commission agrees with the determination in the proposed decision that there was no adverse or negative employment action.

Complainant goes on to argue that:

> Second, the hearing examiner erroneously concluded that the Respondent's reason for sending Ms. Rentmeester home (confusion as to the meaning of the doctor's certificate) was not a pretext. However, the hearing examiner neglected to note that this so-called "ambiguity" was not the original basis for its action which the Respondent cited to a Federal Court on October 31, 1991. (Complainant's Ex. 32) In that written explanation, the Respondent said that the reason it sent Ms. Rentmeester home was because Rhonda Ellman had been placed on Ms. Rentmeester's route. id.

This case involves two essentially discrete transactions -- temporarily placing complainant on leave with pay, and reassigning the Green Bay route to Ms. Ellman. The proposed decision reflects at page 23 that the reassignment was made on October 15th, prior to October 17th, which was the date complainant was temporarily placed on leave with pay after she arrived at work with the doctor's certificate concerning her driving restrictions. Mr. Walsh's memo does not address why complainant was placed on leave with pay status, but rather addresses why Route #3028 had been reassigned to Ms. Ellman.

As discussed below, the Commission agrees with the determinations in the proposed decision both that Mr. Walsh's assertion concerning the need to reassign Ms. Ellman to the Green Bay route because of her weight restrictions did not have a basis in fact, and that it is far more likely that any adverse action against complainant involved motivations related to the pre-existing labor-management dispute rather than having been motivated by the facts that complainant requested and pursued a handicap accommodation, and that she identified herself as a handicapped individual with M.S. To the extent that Mr. Walsh's statement concerning the weight restriction could be connected to the matter of temporarily placing complainant on leave with pay on October 17, 1991, the Commission would reach the same conclusions.

Complainant also argues that the proposed decision "neglected to note that, despite being 'confused' as to the doctor's certificate, the respondent subsequently reassigned Ms. Rentmeester to her route based on an identical certification from her neurologist. (Complainant's Exhibit 17) The hearing examiner failed to explain how the memo could be 'ambiguous' on October 17, but not 'ambiguous' on December 9, 1992." Complainant's objections, p. 10. This objection completely misstates the record. Complainant was reassigned to her original Green Bay route when she returned to work on November 18, 1991, following her disciplinary suspension, which was prior to December 9, 1992, the date on Complainant's Exhibit 17. This reassignment had been preceded by another letter from Dr. Mahoney dated November 14, 1991, which did provide clarification of her driving restrictions, see Findings 36-38. The December 9, 1992, certificate was provided several months after this complaint was filed. The record does not reflect the reason it was prepared.

Complainant further contends that "respondent's actions clearly violated the law by taking adverse action prior to obtaining sufficient medical evidence to justify its action. (See Appellant/Complainant's Reply Brief, pp. 6-

22.)" This is apparently a reference to a line of cases cited by complainant, such as Auto Workers v. Johnson Controls, 499 U.S. 187, 113 L. Ed. 2d 158, 111 S. Ct. 1196 (1991), which complainant cites for the proposition that "an employer cannot made [sic] an adverse employment decision without first obtaining specific evidence demonstrating that there is sufficient justification for their decision. If an employer's decision is based on a fear of safety for the employee or the public, then it must rely on specific medical evidence to substantiate that fear." Complainant's objections, p. 14. As discussed above, the Commission has concluded that the action of temporarily placing complainant on leave with pay under the circumstances was not an adverse employment action. This is not a case like Auto Workers v. Johnson Controls, where the employer's policy actually excluded all women who were either pregnant or capable of becoming pregnant from the opportunity to work in jobs which did or could subject them to lead exposure, which was clearly an adverse employment action.

With respect to Mr. Walsh's request for the diagnosis date of complainant's M.S., complainant states that the examiner "incorrectly concluded that St. Mary's v. Hicks, 125 L. Ed. 2d 407 (1993), dictates that discrimination cannot be found merely by a finding of pretext. That case, and others following it, indicate that all of the facts and circumstances of a particular case, including the finding of a pretext, can establish discrimination." Objections, p. 11. The proposed decision observed at page 25 that "a conclusion of discrimination is not mandated by a finding of pretext. See St. Mary's Honor Center v. Hicks, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993); Kovalic v. DEC. Intl., Inc., 161 Wis. 2d 863, 876-78, 469 N.W. 2d 224 (Ct. App. 1991)" (emphasis added). This is consistent with the authorities cited. In Kovalic, the Court held that a plaintiff cannot "prevail without any evidence to establish -- or even to infer -- that the pretext was a pretext for discrimination." 161 Wis. 2d at 876. The Court went on as follows:

> [A] plaintiff may, through indirect proof, establish liability without presenting any evidence of actual discrimination. But ... in cases where a plaintiff establishes pretext and the employer's decision remains unexplained, "the inferences from the evidence produced by the plaintiff *may* be sufficient to prove the ultimate fact of discriminatory intent" ... once his or her *prima facie* case "falls away" upon the employer's offer of a non-discriminatory reason for the discharge, the plaintiff "must then prove ... that the reasons ... were not [the employer's] true reasons but were merely a *pretext for discrimination.*"

> ... to prevail upon a showing of pretext alone, a plaintiff must establish that the pretext existed to mask the employer's discriminatory motive.... "the plaintiff must show not only a false reason but also a causal chain in which race or another forbidden criterion plays a dispositive role," ... the "pretext" that will support a finding in the plaintiff's favor is not simply a "poorly founded" reason, or even an attempt to "hide some other offense, such as violation of a civil service [requirement] or a collective bargaining agreement," but must be a "pretext for discrimination." ... "'[s]howing that the employer dissembled is not necessarily the same thing as showing 'pretext for *discrimination*.'" 161 Wis. 2d at 876-78. (footnote and citations omitted) (brackets in original).

On consideration of all the circumstances, the Commission agrees with the proposed decision that while Mr. Walsh's pursuit of complainant's diagnosis date was not made for the purpose of evaluating her request for accommodation, complainant did not establish that his action was motivated by either her protected activities or her M.S.

The circumstances surrounding this matter include an ongoing, bitter, and rancorous dispute between management and a group of employes including complainant. The Commission agrees with the proposed decision's conclusion that it is far more likely that Mr. Walsh's motivation emanated from the employes' dispute with management. Contrary to complainant's assertion that there is no basis in fact for this conclusion, the record is replete with references to the state of animosity, mutual distrust, and gamesmanship that pervaded labor-management relations during this period of time. For example, Marilyn Hoffman, a Program Assistant 3 in the Green Bay office, and neither a member of management nor the group in conflict with management, testified as follows:

> Before Mr. Sonnenberg and Mr. Fitzsimmons were brought in as co-acting district sales managers, we had two factions in our office, and the issue that they were divided on was the FLSA hearing, the lawsuit, whatever is associated with that.
>
> There was a lawsuit that was going to be filed with some of the state-wide FSR's, and some people in our district, while they might have agreed with perhaps some of the principles involved and not particularly care for the way it was being dealt with, there was a group of people who were supportive of a former DSM.
>
> Q Who was that?
>
> A. Gary Cravillion. They were running -- they were attempting to run a game on the state. They -- it was extremely manipulative.
>
> They knew they did -- they didn't care about their jobs. What they were interested in is what happened on the lawsuit and how they could make management's life in Madison miserable, and I heard them testify to that often. I heard them say that.

> Once Mr. Cravillion was removed from office, there was a lot of anger because he was not there anymore, and my observations were when John and Steve came in, they were attempting to get a handle on the way the district was run, the policies that were sent up from Madison through them, they tried to implement. Tr., p. 454.

There was a good deal of other testimony about this situation. Some of complainant's witnesses testified that in their opinion, management employed an intimidating management style. For example, Dan Brunmeir characterized Mr. Fitzsimmons' management style as "[f]ear and intimidation" as evidenced by: "several occasions I noticed where he would provoke employees to be concerned, threatening them, shaking fingers, harsh language." Tr., p. 210. He characterized Mr. Walsh's management style as "[d]ictatorial, authoritarian." Tr., p. 215. Paul Hilmes testified that "the demeanor of the management co-acting DSM's were very antagonistic, combative, especially Mr. Fitzsimmons." Tr., p. 231. Cyneth Dahm, respondent's personnel manager during the period in question, who was called as a witness by complainant, testified that she had heard Mr. Fitzsimmons "can be a very abrasive person," Tr., p. 291, and that grievances had been filed because of his demeanor.

In conclusion on this point, complainant made her initial request for accommodation on October 2, 1991, which was within about a week after Mr. Cravillion had been suspended and replaced by acting co-DSM's Sonnenberg and Fitzsimmons, who worked in close consultation with Madison. This was in the midst of the turmoil in the agency in which Mr. Cravillion and a group of employes including complainant, and central management had been involved. There is a great deal of evidence to support the proposed decision's finding that respondent was not motivated in its actions by complainant's handicap or her protected activities, and the Commission concurs in this finding.

For somewhat similar as well as other reasons, the Commission concludes that respondent's reassignment of Rhonda Ellman to the Green Bay route was not motivated either by complainant's handicapping condition or her pursuit of a handicap accommodation request. Mr. Walsh's stated rationale (Ms. Ellman's weight restriction) for the reassignment in his October 31, 1991, memo (Complainant's Exhibit 32) was inconsistent with the evidence adduced at the hearing. However, this reassignment occurred prior to October 17,

1991,[5] which was when complainant first advised management that shorter routes were medically advisable in connection with her M.S. Thus at that point in time -- i.e., before October 17th -- respondent knew that complainant had requested cruise control as an accommodation, but she had not mentioned a request for shorter routes. This weighs against the possibility that in reassigning the Green Bay route to Rhonda Ellman, respondent was motivated by an intent to discriminate against complainant, when it was not aware at the time of her subsequent medically related request for this route. Additionally, as discussed above, if there had been an ulterior motive for this reassignment, it was far more likely to have been connected to the labor-management turmoil than the facts that complainant had identified herself as handicapped and had requested cruise control as an accommodation.

The proposed decision on page 31 "also concludes that complainant failed to establish a pattern or practice of retaliatory harassment against her because of her protected activities." In her objections to the proposed decision, complainant asserts that in determining whether there was a pattern of illegal harassment, the Commission should consider the perspective of the handicapped individual. She also contends that: "[s]imply because harassment was occurring for other reasons does not justify, or increase the burden of proof, of handicap harassment." Complainant's objections, p. 13.

As noted in the proposed decision:

> In a disparate treatment or retaliation case, an employer is not liable unless it is established that the employer acted intentionally because of the employe's protected status. See Intl. Brotherhood of Teamsters v. United States, 431 U.S. 324, 335, 52 L. Ed. 2d 396, 415, 97 S. Ct. 1843, n. 15 (1977):
>
> > "Disparate treatment" ... is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. (emphasis added) (citation omitted)

Proposed decision, p. 32.

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[5] In addition to the discussion of this factual matter in the proposed decision at p. 23, this finding is supported by Mr. Sonnenberg's explicit testimony, Tr., p. 400.

As has been discussed above, the record does not establish that any alleged acts of harassment were taken against complainant because of any protected activities or because of her status as a handicapped individual.

With respect to complainant's contention concerning the standard to be applied in determining whether illegal harassment has occurred, the cases she cites -- Ellison v. Brady, 924 F. 2d 872, 54 FEP Cases 1346 (9th Cir. 1991), and Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486, 54 FEP Cases 83 (M.D. Fla. 1991) -- are hostile environment sexual harassment cases involving sexual advances by a co-worker and exposure to pornography, respectively. The type of handicap discrimination case that would be more or less analagous to those cases would be where the complainant alleges a hostile environment consisting primarily of derogatory remarks about her handicap. In the instant case, complainant's claim appears to fit more into the type of case exemplified by Hall v. Gus Construction Co., 842 F. 2d 1010, 46 FEP Cases 573, 576 (8th Cir. 1988), where the Court held that a sexual harassment claim could involve incidents of harassment and unequal treatment that are non-sexual in nature "that would not have occurred but for the fact that [plaintiffs] were women." (emphasis added). Again, complainant has not satisfied her burden of proving that respondent's acts were motivated by her protected activities or her status as a handicapped individual. Laying to one side the issue of causation, regardless of which theory of harassment might be utilized, and taking into consideration complainant's status as a handicapped individual under the test she advances, complainant has not made out a case that "a reasonable person in the same or similar circumstances would find the challenged conduct intimidating, hostile or abusive" on the basis of these findings concerning what occurred.

Complainant also contends the Commission should place great weight on the testimony of Ms. Dahm, respondent's personnel manager at the time, that in her opinion respondent discriminated against complainant, contrasting her expertise and experience against that of respondent's line management employes. The Commission must apply the law to the facts that can be determined from the evidence presented at the hearing in deciding whether complainant has satisfied her burden of proving that illegal discrimination occurred. Ms. Dahm had a different opinion from management regarding the way that complainant's request for accommodation should have been handled. The Commission agrees with some of the opinion she expressed at the hearing

-- e.g., that Mr. Walsh's request for complainant's diagnosis date was irrelevant to her accommodation request, and that complainant's request to be reassigned to her original route was a reasonable accommodation. The Commission disagrees with other opinions, based on the facts that were established at this hearing, as has been discussed throughout this decision. Also, the record reflects that at the time of this hearing, Ms. Dahm was a plaintiff in a lawsuit against respondent, a "'fact which in the light of human experience might reasonably engender hostility toward the party, or affect the witness with partisan feeling ... 181 AM JUR 2d Witnesses §561." Showsh v. DATCP, 87-0201-PC (11/28/88), reversed other grounds, Showsh v. Wis. Pers. Comm., Brown Co. Cir. Ct. 89CV445 (6/29/90); affirmed by Court of Appeals, 90-1985 (4/2/91). Under all the circumstances, consideration of Ms. Dahm's opinions does not lead to any different result here.

With respect to the issue of whether respondent denied complainant an accommodation, complainant points out a discrepancy between the statement on page 33 of the proposed decision that "Prior to that date [when she requested cruise control on October 15, 1991], her request for cruise control had been granted on the days she had requested longer routes," (emphasis added), and Finding #10, which states she "was allowed to use a cruise control-equipped vehicle on October 2, 1991, as on October 7th and 9th when she also was assigned to longer routes than her usual Green Bay route." (emphasis added). Clearly this part of the sentence on page 33 of the proposed decision is erroneous and will be corrected to read: "Prior to that date, her request for cruise control had been granted on the days she had requested it when she was assigned to longer routes."

Complainant also argues that if giving complainant an office assignment (refurbishing ticket dispensers) "was a reasonable accommodation, it destroys any rationale for ordering Ms. Rentmeester home on October 17 -- she could have been assigned to 'refurbishing dispensers' on that date." Complainant's objections, p. 14. It is unclear what point complainant is making here. The proposed decision correctly characterizes both these temporary reassignments -- temporary leave with pay and refurbishing dispensers -- as "what was in effect light duty" constituting a reasonable accommodation. Proposed decision, p. 34. It follows that either of these temporary reassignments (assuming there were dispensers that needed

to be refurbished) would have been reasonable accommodations on October 17th, albeit complainant objected to both of them.

Furthermore, there is nothing in the FEA that is inconsistent with an employer proceeding in a reasonable manner to clarify an employe's medical restrictions when the employe requests an accommodation. Even, assuming arguendo that complainant's temporary reassignments to leave with pay and to refurbishing dispensers were not considered reasonable accommodations, under the circumstances respondent's actions do not necessarily amount to a denial of the accommodation that ultimately was granted on November 18, 1991, when complainant returned to work after her disciplinary suspension and after having provided a letter from her doctor clarifying her medical restrictions.

With respect to the allegation of whistleblower retaliation, the proposed decision concludes that on this record there was only one of complainant's communications covered by this law -- her communication with her attorney which occurred at some point on or shortly before November 14, 1991. Complainant contends that when she sent Rep. Krug a copy of her October 26, 1991, memo to Ms. Dahm (Complainant's Exhibit 29), this was a covered communication of "information" pursuant to §§230.80(5) and (7), Stats.[6] Complainant argues that this letter "'provided information' concerning 'violation of state and federal laws' (the Fair Employment Act), the 'substantial waste of public funds' (relating to the hiring of LTE's), and 'mismanagement' (the Lottery's wrongful, negligent, arbitrary and capricious actions toward Ms. Rentmeester in October of 1991)." Complainant's objections, p. 15. However, §230.80(5) does not define "information" as any information concerning a law violation or mismanagement. Rather, the law defines

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[6] (5) "Information" means information gained by the employe which the employe reasonably believes demonstrates:

(a) A violation of any state or federal law, rule or regulation.

(b) Mismanagement or abuse of authority in state or local government, a substantial waster of public funds or a danger to public health and safety.

* * *

(7) "Mismanagement" means a pattern of incompetent management actions which are wrongful, negligent or arbitrary and capricious and which adversely affect the efficient accomplishment of an agency function. "Mismanagement" does not mean the mere failure to act in accordnace with a particular opinion regarding management techniques.

"information" as: "information gained by the employe which the employe reasonably believes demonstrates" (emphasis added) a law violation or mismanagement. It seems clear the law requires more for a disclosure of "information" than a disclosure of any information which has any relationship to the subject matter of a violation of law or mismanagement. The whistleblower law was enacted to protect employes who disclose relatively significant matters, not employes who may happen to copy a legislator on correspondence concerning a personnel transaction in which the employe is involved, which at some point gives rise to a claim that the civil service code or some other employment law was violated. At the same time, the law does cover information which the employe reasonably believes demonstrates a violation of "any state or federal law, rule or regulation." (emphasis added) §230.80(5). This is a remedial statute and should be liberally construed. See, e.g., Wisconsin Bankers Assn. v. Mutual S&L Assn., 96 Wis. 2d 438, 451, 291 N.W. 2d 869 (1980). The law should not be interpreted as requiring that for a disclosure of information the employe recite in detail why he or she believes a law was violated. Also, any particular communication must be considered in the context in which it occurs.

The complete text of the memo in question reads as follows:

> I am writing with regards to the instruction given to me, by Steve Sonnenberg on October 17, 1991, that I am not to report to work and will remain on pay status until Madison receives clarification of my Certificate To Return To Work. Per your directions, during our October 18, 1991 conversation, I requested additional information from Dr. Thomas Mahoney, see attached.
>
> Because of my disability, I cannot drive for extended periods of time or over long distances. However, as Dr. Mahoney states in his Certificate, "Arlene can drive safely a maximum of 30 minutes or 25 miles from the Green Bay office".
>
> The route I have been assigned to on a daily basis since August 29, 1988, namely route 3028, reasonably accommodated my disability and permitted me to work without any undue limitations.
>
> The purpose of this letter is to clarify that, and to request that I be reassigned to route 3028 immediately.
>
> Please let me know if you need any further information.

Complainant does not state in this memo that she believes that respondent is in violation of the FEA. However, put in the entire context of what was occurring

at the time including complainant's testimony that she sent a copy of this memo to Rep. Krug because she "had talked to her office previous about my being dismissed from my route, or my being dismissed from work," Tr., p. 62, there is enough evidence from which it is reasonable to infer that there was a disclosure of information as defined by §230.80(5).

While it is concluded that complainant did establish a prima facie case under the whistleblower law, this does not result in a different finding with respect to the question of whether respondent's actions after October 29, 1991, when Ms. Dahm forwarded the memo to line management, were motivated by an intent to retaliate because of complainant's exercise of her rights under the whistleblower law. In the context of the circumstances surrounding the Green Bay district during the period in question, complainant's act of copying a legislator on this letter is unlikely to have added much to the tension that already was extant. Again, to the extent that any of management's explanations for its actions after October 29th could be deemed to have been pretextual, it is far more likely respondent was motivated by complainant's role as part of a group of employes which had been engaged in a bitter, contentious struggle with management, as discussed above, rather than by this disclosure under the whistleblower law.

In its objections to the proposed decision, respondent contends that the proposed decision's conclusion that the predisciplinary proceedings were inadequate failed to consider that the situation with respect to the alleged striking incidents involved violence and the need to act expeditiously. Respondent contends that this consideration supports a conclusion that less elaborate procedures were necessary than otherwise would have been the case.

It is correct that "[t]he formality and procedural requisites for the hearing can vary, depending on the importance of the interests involved and the nature of the subsequent proceedings." Boddie v. Connecticut, 401 U.S. 377, 378, 91 S. Ct. 780, 786, L. Ed. 2d (1971). Laying to one side for the moment the Court's observation in Cleveland Bd. of Education v. Loudermill, 470 U.S. 532, 545-46, 84 L. Ed. 2d 494, 505-06, 105 S. Ct. 1487 (1985), that "in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending with pay." (footnote omitted), the evidence in the instant case does not give rise to a finding that management acted as it did with respect to the procedures followed because of

concern about the threat of further violence at the time of the alleged incidents. As set forth in the proposed decision, at page 36, Mr. Walsh's "rationale for not conducting a predisciplinary hearing with respect to the second incident is that after complainant's statement in the first hearing that she did not recall the first incident, 'I found it hard to imagine how she could obviously remember the second incident when she couldn't remember the first.' T., p. 484." As to the first alleged incident, Mr. Walsh did give complainant a hearing that was defective because of the failure to have provided any explanation of the evidence against her. Respondent has not suggested that there was any reason why this additional information could not have been provided.

ORDER

The proposed decision and order, a copy of which is attached hereto and incorporated by reference, is adopted as the final disposition of this matter by the Commission, with the following changes.

1. On page 18, second full paragraph, third line, the term "probable cause" is changed to "prima facie case." These cases were heard on the merits, and the reference to probable cause clearly was inadvertent.

2. On page 30, footnote 17, the following words were omitted in printing and are hereby added: "things like that addressed to them like you did," she answered, "Up to that point, no. Not that I know of." id.

3. On page 33, fourth full paragrph, third line, "she had requested longer routes" is changed to "she had requested it (cruise control) when she was assigned to longer routes." This conforms the decision to the findings and corrects what appears to have been a drafting oversight.

4. Beginning on page 15, the last sentence on that page and the first paragraph on page 16 are deleted for the reasons set forth above at pages 13-15, and the latter discussion will constitute the Commission's opinion on this issue instead of the deleted material.

Dated: May 27, 1994 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

AJT:rcr

Parties:

Arlene Rentmeester
1967 Hillview Drive
Green Bay, WI 54302

John Tries
Chairperson, WGC *
P.O. Box 8979
Madison, WI 53708

* Pursuant to the provisions of 1991 Wis. Act 269 which created the Gaming Commission effective October 1, 1992, the authority previously held by the Executive Director of the Wisconsin Lottery with respect to the positions that are the subject of this proceeding is now held by the Chairperson of the Gaming Commission.

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.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.

STATE OF WISCONSIN PERSONNEL COMMISSION

ARLENE RENTMEESTER,

Appellant/
Complainant,

v.

Executive Director, WISCONSIN LOTTERY [Chairperson, WISCONSIN GAMING COMMISSION],*

Respondent.

Case Nos. 91-0243-PC
92-0152-PC
92-0182-PC-ER

PROPOSED
DECISION
AND
ORDER

NATURE OF THE CASE

This matter involves appeals of two suspensions and a decision at the third step of the noncontractual grievance procedure concerning a verbal reprimand, and a complaint of discrimination on the basis of handicap and retaliation under both the FEA (Fair Employment Act, Subchapter II, Chapter 111, Stats.) and the Employe Protection law (Subchapter III, Chapter 230, Stats.)

FINDINGS OF FACT

1. Complainant commenced employment with respondent (then called the Wisconsin Lottery) on August 15, 1988.

2. Complainant was employed as a Field Service Representative (FSR) in the Green Bay District, which was headquartered in the City of Green Bay. Appellant's duties and responsibilities as an FSR included driving to various retail outlets to deliver tickets and to perform administrative, marketing, and related tasks.

3. There were nine FSR routes in the Green Bay District. Complainant had been assigned a route (#3028) when she started employment with respondent that covered Green Bay and its environs.

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* Pursuant to the provisions of 1991 Wis. Act 269 which created the Gaming Commission effective October 1, 1992, the authority previously held by the Executive Director of the Wisconsin Lottery with respect to the positions that are the subject of this proceeding is now held by the Chairperson of the Gaming Commission.

4. The Green Bay district had 10 state motor vehicles -- two sedans and eight vans. All were equipped with cruise control devices except the van assigned to complainant. Complainant's vehicle was not equipped with a cruise control because she had the shortest route in the district and it did not meet respondent's mileage standards for the installation of a cruise control.

5. In September 1989, a physician diagnosed complainant as having multiple sclerosis (MS). She continued to have this condition throughout the relevant timeframe. It was common knowledge in the district that complainant had MS. She had identified herself as disabled by filling out a form (Complainant's Exhibit 9) disseminated by respondent as part of a "Disability Self-Identification Survey" conducted by respondent in July 1991. Complainant did not identify the specific disability (MS) on this form.

6. Complainant had not experienced any problems from her MS with respect to performing her route until September or October 1991 when she began to experience numbness and tingling in her hands and feet and having them "go to sleep" after driving the van for extended periods.

7. In the latter part of September 1991, Steve Sonnenberg and John Fitzsimmons became the acting co-managers of the Green Bay district, and, as such, complainant's supervisors.

8. On October 2, 1991, Mr. Sonnenberg and Mr. Fitzsimmons told complainant that she would have to take the route that covered Sheboygan that day. That route involved approximately 3 hours, 20 minutes of driving, with the longest single period of driving of approximately one hour and 19 minutes duration. Complainant's usual route that day would have involved approximately one hour and 54 minutes of driving, with the longest stretch of approximately 20 minutes.

9. Complainant asked Mr. Sonnenberg that she be allowed to use a cruise control vehicle[1] in connection with her MS. He said that she could use a cruise control-equipped vehicle.

10. Complainant was allowed to use a cruise control-equipped vehicle on October 2, 1991, as well as on October 7th and 9th when she also was assigned to longer routes than her usual Green Bay route.

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[1] Complainant at the same time requested a vehicle also equipped with a tilt steering wheel. Since this aspect of her request does not appear to be relevant to her claims, it will not be discussed further.

11. Respondent sent complainant a "Disability Accommodation Request Form" under cover of an October 2, 1991, memo from Donna Dusso of the WGC personnel office (Complainant's Exhibit 10). The memo included the following:

> Enclosed is a Disability Accommodation Request Form. This form is forwarded as a result of your request to Steve Sonnenberg and John Fitzsimmons, Acting Co/District Sales Managers, to have cruise control installed in your van due to health problems you are experiencing.
>
> Please complete the attached disability accommodation request form. Include a detailed explanation of the following:
>
> 1. Working conditions that provoke the problem.
>
> 2. Circumstances that cause pain.
>
> 3. The length of time involved with the problem.
>
> 4. The effect on your ability to perform your job, etc.
>
> 5. A contrast between past vehicles driven with current vehicle assigned to you.
>
> 6. How you accommodate this problem in your own personal vehicle.
>
> The form should be returned to me. We will need a doctor's statement and a letter from your supervisor.
>
> The information will be forwarded to the Transportation Director at the Department of Administration for consideration as soon as we receive the form.

12. Complainant wrote an October 10, 1991, memo to Mr. Sonnenberg (Complainant's Exhibit 12) which included the following:

> The October 2, 1991 memo from Donna Dusso regarding the Special Accommodation Request requires information from me, in addition to a statement from my doctor and a letter from my supervisor.
>
> As I will be doing this at the State's request, I need to know what my pay status will be during the time spent at the doctor's office, as well as travel time incurred. My clinic is directly located on the return from my last retailer to the district office and I have scheduled an appointment for Wednesday, October 16, 1991 at 3:30 P.M.

13. On Monday, October 14, 1991, following the completion of complainant's usual route, Mr. Sonnenberg told her that she was assigned to a

longer route involving Door County on Tuesday, October 15, 1991, and also that she would be doing her usual route in Green Bay the following day (October 16, 1991).

14. On the morning of October 15, 1991, she was told by Mr. Fitzsimmons and Mr. Sonnenberg that a cruise control-equipped vehicle would not be available for her that date for the Door County route. Complainant did not work that date but took sick leave.

15. On October 15, 1991, and again on the morning of October 16th, appellant was told by Mr. Sonnenberg and Mr. Fitzsimmons that she was assigned to another outlying route for October 16th. If she had performed that route, she would not have been able to make her 3:30 P.M. doctor's appointment. She did not work on October 16th but took a day of sick leave and went to her doctor's appointment.

16. Based on the amount of time complainant usually took to perform her usual Green Bay route, it was very unlikely she could have finished her usual route, returned to the office, and made her 3:30 appointment if her route had not been changed.

17. Respondent's policy did not permit employes to use their state vehicles to go to doctor's appointments in the manner complainant had requested, although this policy had been violated frequently in the Green Bay district prior to October 14, 1991, when the FSR's FLSA (Fair Labor Standards Act) status changed from exempt to non-exempt.

18. Complainant saw her doctor as scheduled on October 16, 1991. He gave her a "certificate to return to work" dated October 16, 1991 (Appellant's Exhibit 14). This form reflected that she was able to return to work on October 17, 1991, that her illness was MS, and the following "comments:" "Arlene can drive safely for a maximum of 30 minutes or 25 miles from the Green Bay office." He also recommended to her verbally that she stay on the shorter routes.

19. Complainant presented this document to Mr. Sonnenberg and Mr. Fitzsimmons the morning of October 17th. She also told them about the doctor's recommendation that she stay with the shorter routes.

20. After consulting with higher-level management in Madison, Mr. Sonnenberg told complainant that management in Madison needed to contact her doctor to attempt to clarify ambiguous material on the certificate, that she would not be given a route at that time but for the time being would be placed

on leave with pay until clarification had been received. Complainant asked him how she would know that respondent had received that clarification, and he said that he would call her.

21. Complainant also requested a written memo reflecting her status during this period. After again checking with Madison, Mr. Sonnenberg advised her that a memo would not be issued, but that she could have witnesses to his verbal statement. Complainant obtained the presence of two co-workers as witnesses.

22. Complainant remained away from work on leave with pay from October 17th until November 6, 1991, when she returned to work.

23. In a memo to Cyneth Dahm, respondent's personnel director, dated October 26, 1991 (Complainant's Exhibit 29), and copied to Rep. Shirley Krug, complainant stated as follows:

> I am writing with regards to the instruction given to me, by Steve Sonnenberg on October 17, 1991, that I am not to report to work and will remain on pay status until Madison receives clarification of my Certificate To Return To Work. Per your directions, during our October 18, 1991 conversation, I requested additional information from Dr. Thomas Mahoney, see attached.
>
> Because of my disability, I cannot drive for extended periods of time or over long distances. However, as Dr. Mahoney states in his Certificate, "Arlene can drive safely a maximum of 30 minutes or 25 miles from the Green Bay office".
>
> The route I have been assigned to on a daily basis since August 29, 1988, namely route 3028, reasonably accommodated my disability and permitted me to work without any undue limitations.
>
> The purpose of this letter is to clarify that, and to request that I be reassigned to route 3028 immediately.
>
> Please let me know if you need any further information.

Enclosed with this memo was an October 21, 1991, letter from complainant's doctor (Complainant's Exhibit 21), which included the following:

> At this point I would recommend and suggest the return to her normal full time work status of forty hours a week, with very limited exposure to overtime.
>
> Along with this recommendation comes the necessity to limit prolonged driving times. With her health issues at stake it appears that driving times over thirty minutes or twenty-five miles does cause a problem

> with her MS. If it continues to be exacerbated this could cause a long-term flare up and could possibly contribute to a motor vehicle accident.
>
> As long as she keeps her driving time and distance to within thirty minutes or twenty-five miles from the Green Bay office, I feel this does not cause a risk, but prolonged exposure to longer drives could have serious repercussions.

24. In the meantime, Ms. Dahm had been consulting with Donald Walsh, respondent's Director of Marketing and the supervisor of Mr. Fitzsimmons and Mr. Sonnenberg, regarding complainant's situation. In a letter from Mr. Walsh dated October 17, 1991, he stated as follows:

> Arlene Rentmeester submitted a Certificate to Return to work indicating work restrictions and an illness identified as M.S.
>
> The work restrictions are noted as "30 minutes" and it is difficult to determine if the next word is "an" or "or", then "25 miles." We have determined her physician to be Dr. Thomas L. Mahoney, 900 S. Webster Avenue, DePere, WI 54115. His phone number is (414) 437-0431.
>
> Would you please follow up on this issue. As Steve and John were unable to determine how to accommodate her work restrictions, she was sent home on leave with pay for the day, pending a determination of how to implement the restrictions and more conclusive information on her illness.

Ms. Dahm replied by a memo dated October 23, 1991 (Complainant's Exhibit 25), which included the following:

> While I have not discussed Arlene's situation with you and may not have all the facts, one immediate solution to resolve this problem would be to assign Arlene the Green Bay route she has run for the past three years without incident. Then no reasonable accommodation would be necessary. This solution costs the Lottery nothing and would also eliminate the need for additional LTE costs to replace Arlene who, I understand, is still on leave with pay.
>
> A copy of our request of Dr. Mahoney is being sent to Arlene since she must authorize medical release of the information we are requesting. As soon as I receive any additional information, I will let you know....

25. In an October 25, 1991, memo from Mr. Walsh to Ms. Dahm (Complainant's Exhibit 28), he pointed out that there was nothing in complainant's personnel file indicating that she had a disability or needed an accommodation, and stated as follows:

> If Arlene has had multiple schlerosis for some time, I would conclude that based upon nothing in her personnel file requesting a special accommodation, that the diagnosis of multiple schlerosis was medically determined prior to her employment with the Lottery. Had she identified this to our Agency, we could have responded accordingly.
>
> It is extremely important that you request information from Arlene's doctor regarding the diagnosis date for multiple schlerosis; I am requesting that you contact him regarding this.

26. By memo dated October 29, 1991, to Mr. Walsh and Mr. Mrazik (Director of Operations) (Complainant's Exhibit 30), Ms. Dahm forwarded complainant's October 26th memo requesting return to work on Route 3028 (Complainant's Exhibit 29) and the October 21st letter from her doctor (Complainant's Exhibit 21) (see Finding #23, above). She pointed out that Dr. Mahoney's letter was written before she (Ms. Dahm) had the opportunity to have requested the additional information. She also stated that in her opinion the information on diagnosis date requested by Mr. Walsh was irrelevant to the accommodation issue, and that in her role as affirmative action officer she was limited to asking relevant health questions and would not pursue that question with Dr. Mahoney.

27. On October 31, 1991, complainant testified in a federal proceeding in the United States District Court for the Western District of Wisconsin. Complainant's testimony covered the accommodation request she had made with respect to her MS.

28. At the commencement of her cross-examination, the defendant's attorney handed her a copy of a memo from Mr. Walsh to Mr. Sonnenberg and Mr. Fitzsimmons dated October 31, 1991 (Complainant's Exhibit 32) and stated that the document resolved the accommodation issue. This memo included the following:

> As you are aware, we have received a request for special accommodation for route #3028 to be assigned to Arlene Rentmeester. Recent events have necessitated the break-up and re-assignment of FSRs to complete our Sales mission.
>
> During these events it came to our attention that Ms. Rentmeester has a physical disability which her physician says necessitates special accommodation. As you know, we also had Rhonda Ellman who needed a special route accommodation limiting her weight lifting to 10 lbs. Rhonda's request was approved prior to our knowledge of Arlene's disability.

> Since Rhonda Ellman will be removed from weight restrictions effective Thursday, October 31, 1991, I request you then reassign route #3028 to Arlene Rentmeester.
>
> Both of you are to accompany Ms. Rentmeester for a one-week period for a time study evaluation of her route.[2] As you are aware, we have reduced throughout the Lottery the requirements of paper work and extra duties previously necessary in the FSR position. The time study analysis should allow Ms. Rentmeester the same opportunities other FSRs have to service their accounts.

29. On November 5, 1991, complainant called Mr. Sonnenberg. He told her to come to work on November 6th.

30. Complainant came to work on November 6th. She was not given the assignment of running a route but was assigned to cleaning lottery ticket dispensers. This is an activity that has been assigned to other FSR's from time to time. Later that morning she was given a memo dated November 6, 1991, from Mr. Walsh (Complainant's Exhibit 36) which stated:

> On Monday, November 4, 1991, I presumed you would return to your work assignment on route #3028. As you may recall, in Federal Court, in the presence of Judge Crabb you were given an October 31, 1991 memo from me to Steve Sonnenberg and John Fitzsimmons regarding your route assignment. It stated that effective Thursday, October 31, 1991, I request the reassignment of route #3028 to you (Arlene Rentmeester).
>
> I am contacting Dr. Mahoney this morning and requesting immediate clarification of driving times over 30 minutes or 25 miles which could cause a problem as a result of your MS. As soon as I receive clarification, your route assignment will take place. Until then, Mr. Sonnenberg and Mr. Fitzsimmons will give you a work assignment at the Lottery office which will require you to refurbish dispensers.

31. Later during the day on November 6th, complainant allegedly was involved in two incidents of striking Mr. Sonnenberg.[3]

32. Following the first alleged incident, Mr. Walsh telephoned complainant. The conversation was recorded and transcribed (Respondent's Exhibit I), and included the following:

---

[2] Management never carried out this time study.

[3] Because the Commission concludes that respondent did not provide adequate due process to complainant prior to imposing suspensions for these alleged incidents, and therefore must rescind the suspensions, it will not address the substantive issue of whether there was just cause for the suspensions.

Walsh:	I want to let you know that I have received a phone call in regards to disciplinarian action that I may take here at the Lottery. I'm going to tape the phone conversation that we are having. I wanted to give you an opportunity to respond to the situation that happened in Steve's office.
Rentmeester:	I was in Steve's office several times this morning.
Walsh:	Well, the incident with the slap to the head. I just want to here [sic] your side of the story.
Rentmeester:	May I be advised as to what I am being accused of?
Walsh:	Did you slap him to the head?
Rentmeester:	No. I did not slap him to the head. I brushed my hand on his hair.
Walsh:	OK. That that is what I am curious that's what I'm curious to know. I want to hear I want to hear what you're saying happened.
Rentmeester:	I don't even recall the incident.
Walsh:	You don't recall the incident.
Rentmeester:	No. If you could refresh me, that would probably help.
Walsh:	I am not here to refresh your recollection, Arlene. I want to hear your side of the story. Your side of what happened in the office from the time you went in to the office when that particular incident occurred.
Rentmeester:	Don, I don't recall that.

33. Following this interview, respondent imposed a two-day suspension without pay.

34. Subsequently on November 6, 1991, complainant allegedly struck Mr. Sonnenberg again. Mr. Walsh imposed a five-day suspension without pay on this occasion. He did not provide any hearing to complainant before imposing this second suspension because he believed it would be a futile gesture because of complainant's statement during the first interview that she did not recall the first incident.

35. As a result of these suspensions, appellant was denied a discretionary performance award in 1992.

36. The request for information from Dr. Mahoney referred to in Finding #30 generated the following response in a letter from Dr. Mahoney to Mr. Walsh dated November 14, 1991 (Complainant's Exhibit 44):

> I am writing this in regard to your recent fax inquiry regarding Arlene's working restrictions. At this point in time, the driving restriction is felt to be reasonable at thirty minutes at a time and/or twenty-five miles at a time. Certainly there are variables that can not be accounted for and until they occur, i.e., twenty-five miles taking thirty-seven minutes, but that is understandable. At this point in time, rest periods felt to be necessary, be the standard working breaks, i.e., up to fifteen minutes in the morning and afternoon and up to forty-five minutes for a lunch break. As far as the exact date of diagnosis, this was in the past and is felt to be more under the doctor/patient confidentiality and therefore you should discuss this with Arlene. It would be at her discretion to inform you of this. As far as when she was advised to request special accommodations, this appeared to be necessary only after a change in her previous work assignment.

37. During her suspension, complainant retained counsel. By a letter to Mr. Walsh dated November 14, 1991 (Complainant's Exhibit 55), her attorney advised that she was ready to return to route 3028 upon her return to work on November 18th, and requested to be notified if that was not Mr. Walsh's intention. This letter also forwarded Dr. Mahoney's November 14th letter (Complainant's Exhibit 44), referred to above in Finding #36.

38. Upon her return to work on November 18th, complainant was returned to the performance of Route 3028.

39. After complainant returned to work on November 18th, she observed that her desk and van appeared to have been gone through, and she was missing certain items of personal property. This was reported to management. Another FSR, Dan Brunmeir, reported a similar situation (someone going through his file cabinet) to management at this time. Complainant was unaware of management taking any action in response to her complaint.

40. Mr. Fitzsimmons and Mr. Sonnenberg instructed complainant not to initiate contacts with retailers on November 29, 1991, the day after Thanksgiving, but to remain at headquarters and clean and refurbish ticket dispensers. This was in keeping with respondent's standing policy, which was based on the fact that this day was one of the busiest days of the year for retailers.

41. On January 8, 1992, complainant was in the vault checking out tickets when she was advised she had a phone call. She left the vault area,

went to her office to take the call, and then returned to the vault area. Mr. Fitzsimmons, speaking loudly but not shouting, told her that she should not walk out of the vault while in the process of checking out tickets, but should concentrate on getting her tickets checked out and secured in her vehicle.

42. On January 11, 1992, complainant attempted to FAX a memo to Nick Pierce of respondent's Internal Security in Madison, concerning the incident referred to in the preceding paragraph. Complainant gave this memo to a program assistant in the Green Bay office for FAX transmission. Mr. Pierce subsequently advised her that he never received this document.

43. On or about January 10, 1992, complainant received a letter that had been written to her by State Representative Shirley Krug (Complainant's Exhibit 59) requesting that complainant appear and testify January 15th at a legislative committee hearing in Madison on respondent's security and control procedures with respect to complainant's knowledge of "certain practices at the Wisconsin Lottery." She gave this letter to Mr. Sonnenberg with the request that she be allowed to take time off to attend that hearing. Complainant subsequently became aware that other employes in the Green Bay office somehow became aware of this letter.

44. On January 3, 1992, complainant reported to Mr. Piper in the presence of Mr. Sonnenberg and Mr. Fitzsimmons that her state vehicle had sustained hit-and-run damage while parked in the lot at the district headquarters. Mr. Sonnenberg inspected the vehicle, which was undamaged beyond normal wear-and-tear for this type of vehicle. Respondent took no further action with respect to complainant's report.

45. On January 23, 1992, a fire occurred in a state vehicle assigned to FSR Sandra Elkins. During the course of the investigation of this fire by the Green Bay Police and Fire Departments, Mr. Sonnenberg (who had extinguished the fire with a portable fire extinguisher) made a statement that was summarized in the police report as follows:

> Cravillion [formerly District Sales Manager who had been discharged] and Rentmeester are being investigated by the State Att. General's office for possible violations while employed by the state ... Sonnenberg said Cravillion and Rentmeester have threatened Elkins and himself....

Police Department Incident Report (Complainant's Exhibit 63). He also stated that he "did not see Arlene [complainant] by van or on property." Fire

Department report (Complainant's Exhibit 63). The departments ultimately concluded after their investigation that the fire had been caused accidentally by a faulty ignition switch.

46. Mr. Sonnenberg questioned complainant concerning her time report for February 12, 1992 (Complainant's Exhibit 65), which, as originally submitted, reflected that she twice was at two different accounts at the same time. Complainant submitted an explanantion that this was due to a clerical error -- times at two accounts were mistakenly listed as 2:30 - 2:41 and 2:43 - 2:54, rather than 12:30 - 12:41 and 12:43 - 12:54 -- and respondent took no further action regarding this matter.

47. As a result of the November 6, 1991, alleged striking incident, complainant was given certain negative comments on her June 1992 annual performance evaluation and was denied a discretionary award at that time.

48. Prior to and throughout the entire period during which the events described in the above findings occurred, there existed a substantial amount of contentiousness and animosity between respondent's management and a group of FSR's, including complainant, who were involved in a lawsuit against respondent concerning the Fair Labor Standards Act (FLSA).

CONCLUSIONS OF LAW

Case No. 91-0243-PC

1. This matter is properly before the Commission pursuant to §230.44(1)(c), Stats.

2. Respondent has the burden of proof.

3. Respondent failed to provide a predisciplinary procedure consistent with the requirements of the due process clause of the Fourteenth Amendment to the U.S. Constitution, and these suspensions must be rejected.

Case No. 92-0152-PC

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

2. Complainant has the burden of proof.

3. Mr. Fitzsimmons' actions did not violate respondent's work rules, and respondent's handling of this noncontractual grievance must be sustained.

Case No. 92-0182-PC-ER

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

2. Complainant has the burden of proof on all issues except handicap accommodation. Vallez v. UW, 84-0055-PC-ER (2/5/87).

3. Respondent did not retaliate against complainant for activities protected by §§230.81 or 111.322(3), Stats., or discriminate against complainant on the basis of handicap in violation of §§111.322(1) or 111.34, Stats.

OPINION

Case No. 92-0182-PC-ER

The Commission first will address complainant's charges of retaliation. She alleges she was retaliated against both for requesting a handicap accommodation, in violation of the FEA, and for disclosing certain information, in violation of the "whistleblower" law. Since the method of analysis is relatively similar for both forms of retaliation after the prima facie case stage, both claims will be considered together after the prima facie case analysis. The basic approach to analysis of this kind of case has been set forth as follows:

> The method of analysis applied in prior Whistleblower retaliation cases is similar to that applied in the context of a retaliation claim filed under the Fair Employment Act (FEA). Under the FEA, the initial burden of proof is on the complainant to show a prima facie case of discrimination. If complainant meets this burden, the employer then has the burden of articulating a non-discriminatory reason for the actions taken which the complainant may, in turn, attempt to show was a pretext for discrimination....
>
> To establish a prima facie case for a claim of retaliation under the Fair Employment Act, there must be evidence that 1) the complainant participated in a protected activity and the alleged retaliator was aware of that participation, 2) there was an adverse employment action, and 3) there is a causal connection between the first two elements. A "causal connection" is shown if there is evidence that a retaliatory motive played a part in the adverse employment action. See Jacobson v. DILHR, Case No. 79-28-PC, (4/10/81) at pp. 17-18, and Smith v. University of Wisconsin-Madison, Case No. 79-PC-ER-95 (6/25/82) at p. 5. Similar standards apply to a claim of retaliation under the whistleblower law except that the first element is typically comprised of three components: a) whether the complainant disclosed information using a procedure described in §230.81, Stats.; b) whether the disclosed information is of the type defined in §230.80(5), Stats.; and c) whether the alleged retaliator was aware of the disclosure. As to the second and

> third elements, the definitions of "disciplinary action" in §230.80(2), Stats., replaces the term "adverse employment action" when reviewing a whistleblower complaint. Morkin v. UW-Madison, 85-0137-PC-ER (11/23/88); aff'd., Dane Co. Cir. Ct., Morkin v. Wis. Personnel Comm., 89CV0423 (9/27/89).

Accordingly, the Commission must first determine under the whistleblower law whether there were disclosures of information of the nature and in the manner set forth statutorily, and whether the alleged retaliators were aware of the disclosures.

The complaint of discrimination alleges that complainant was retaliated against because of her testimony on October 31, 1991, in federal court "against my employer with respect to wage and hour issues and my employer's refusal to accommodate my handicap." Laying to one side whether the substantive nature of the testimony constitutes covered "information" as defined by §230.80(5), Stats., this testimony is not covered by the whistleblower law, because the manner of the disclosure, as reflected on this record, does not fit within any of the categories enumerated in §230.81, Stats.:

> (1) An employe with knowledge of information the disclosure of which is not expressly prohibited by state or federal law, rule or regulation may disclose that information to any other person. However, to obtain protection under s. 230.83, before disclosing that information to any person other than his or her attorney, collective bargaining representative or legislator, the employe shall do either of the following:
>
> (a) Disclose the information in writing to the employe's supervisor.
>
> (b) After asking the commission which governmental unit is appropriate to receive the information, disclose the information in writing only to the governmental unit the commission determines is appropriate. The commission may not designate the department of justice, the courts, the legislature or a service agency under subch. IV of ch. 13 as an appropriate governmental unit to receive information. Each appropriate governmental unit shall designate an employe to receive information under this section.
>
> (2) Nothing in this section prohibits an employe from disclosing information to an appropriate law enforcement agency, a state or federal district attorney in whose jurisdiction the crime is alleged to have occurred, a state or federal grand jury or a judge in a proceeding commenced under s. 968.26, or disclosing information pursuant to any subpoena issued by any person authorized to issue subpoenas under s. 885.01. Any such disclosure of information is a lawful disclosure under this section and is protected under s. 230.83.
>
> (3) Any disclosure of information by an employe to his or her attorney, collective bargaining representative or legislator or to a legislative committee or legislative service agency is a lawful disclosure under this section and is protected under s. 230.83.

There is nothing in this enumeration that covers complainant's federal court testimony. In appellant's brief at pages 32-33, her attorney expands the alleged disclosures beyond the one set forth in her complaint:

> Arlene made the proper request for an accommodation for her handicap. When the Lottery refused, and began pressuring her and attacking her for making that request, Arlene informed her supervisors, the Lottery Personnel Director, and a State Legislator (Shirley Krug), and she testified in federal court about the Lottery's conduct, and she retained attorneys to defend her right to a reasonable accommodation and her right to be free from discrimination, harassment, and retaliation. As a result of Arlene's opposition to the Lottery's practices, and as a result of her communications with these persons, the Lottery engaged in the discriminatory conduct and harassment described above in violation of §§111.322(3) and 230.83, Stats.

Since there is no further specification of exactly which communications in the record constitute lawful disclosures under §230.81, Stats., this presents some difficulty in analysis. However, the Commission has examined each communication in this record that arguably fits within this enumeration.

As discussed above, complainant's testimony in federal court is not covered by §230.81, Stats.

Sections 230.81(1) and (3) cover disclosure of information to a legislator. However, the only specific communication with Rep. Krug alleged on this record is that complainant sent her a copy of her October 26, 1991, memo to Ms. Dahm (Complainant's Exhibit 29). In essence, this memo states that she has been on leave with pay status pending clarification of her "certificate to return to work," that she is enclosing a copy of a new letter from Dr. Mahoney, that her previously-assigned route (3028) reasonably accommodated her handicap, and that she requested immediate reassignment to that route. This communication does not constitute "information" as defined by §§230.80(5) and (7), Stats., which provide:

> (5) "Information" means information gained by the employe which the employe reasonably believes demonstrates:
> (a) A violation of any state or federal law, rule or regulation.
> (b) Mismanagment or abuse of authority in state or local government, a substantial waste of public funds or a danger to public health and safety.
>
> * * *

> (7) "Mismanagement" means a pattern of incompetent management actions which are wrongful, negligent or arbitrary and capricious and which adversely affect the efficient accomplishment of an agency function. "Mismanagement" does not mean the mere failure to act in accordance with a particular opinion regarding management techniques.

Rather, this memo represents part of complainant's effort to return to work on Route 3028. As such, it may be said to be related to an alleged violation of state law -- i.e., the FEA. The memo neither states that a law has been violated, nor appears to constitute an effort to disclose unlawful activity. Rather, it is part of complainant's continuing effort to return to work on Route 3028.

The Commission also has perused all the other written communications from complainant to respondent, and has not found any that qualify as disclosures pursuant to §230.81, Stats.

Disclosures to an employe's attorney are covered under the law. §§230.81(1), (3), Stats. It is reasonable to infer that complainant related to her attorney the facts concerning respondent's handling of her request for accommodation, which led to the November 14, 1991, letter from her attorney to respondent (Complainant's Exhibit 55). The facts concerning the denial of complainant's accommodation request fit within the §230.80(5)(a), Stats., definition of "information": "information gained by the employe which the employe reasonably believes demonstrates ... a violation of ... state ... law." Furthermore, respondent was aware of complainant's disclosure to her attorney because of having received the November 14, 1991, letter (Complainant's Exhibit 55) from her attorney. Therefore, complainant has established the first element of a prima facie case of whistleblower retaliation.

The second element requires that there have been a disciplinary action, as defined at §230.80(2), Stats.:

> (2) "Disciplinary action" means any action taken with respect to an employe which has the effect, in whole or in part, of a penalty, including but not limited to any of the following:
> (a) Dismissal, demotion, transfer, removal of any duty assigned to the employe's position, refusal to restore, suspension, reprimand, verbal or physical harassment or reduction in base pay.
> (b) Denial of education or training, if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation or other personnel action.
> (c) Reassignment.
> (d) Failure to increase base pay, except with respect to the determination of a discretionary performance award.

Some of the allegations of events that occurred subsequent to November 14, 1991, probably do not fit within this definition of disciplinary action. However, since these events will in any event be discussed in the context of complainant's allegation that respondent engaged in a pattern of retaliatory harassment in response to her request for accommodation -- i.e., FEA retaliation -- which results in a conclusion of no liability, the Commission will not address this issue of whether the post-November 14th allegations meet the definition of disciplinary action. In a somewhat similar vein, the Commission will not address specifically the issue of whether complainant has satisfied the third element of a prima facie case (whether there appears to be a causal connection between the disclosure and the disciplinary action). This is partially because of the need to examine these items under the FEA retaliation claim in any event, and partially because of the principle that once a case has been tried fully on its merits, the ultimate issue of whether discrimination occurred should be addressed, rather than the question of whether the third element of a prima facie case has been established, see United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 715, 75 L. Ed. 2d 403, 103 S. Ct. 1478 (1983)[4]

With respect to complainant's claim of FEA retaliation, §111.322(3), Stats., provides that it is an act of employment discrimination to "discriminate against any individual because he or she has opposed any discriminatory practice under this subchapter or because he or she has made a complaint, testified or assisted in any proceeding under this subchapter." Complainant undoubtedly falls within the coverage of this provision with respect to her own handicap by her pursuit of handicap accommodation through a number of layers of management. In addition, it should be noted that any discrimination against an employe because of a request for an accommodation would be subsumed within the FEA's proscription of handicap discrimination per se in §111.34(1)(b), Stats. Since management was aware of complainant's request

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[4] A similar approach could not be taken with respect to the first two components of the first element of whistleblower retaliation (Whether the employe disclosed information as defined by §230.80(5), Stats., and whether it was disclosed in the manner provided by §230.81, Stats.), if this case involved only the whistleblower retaliation claim, because these are statutorily-mandated requisites to liability under the law, not just an approach to analysis provided by the courts in their application of the statutory law.

for accommodation at the time it was made, the first element of a prima facie case has been established.

The second element of a prima facie case of retaliation is that the employer took an adverse employment action against the employe. As discussed above, while it is questionable whether some of the 24 alleged incidents of retaliation constitute adverse employment actions, since complainant has alleged a pattern of harassment, it will be assumed that even the incidents that appear relatively insignificant in isolation could contribute in the aggregate to a significant pattern of harassment, and that all the incidents which were found to have occurred satisfy the second element. It should be noted that some of the allegations of harassment actually are the component parts of a single act rather than individual acts, and will not be addressed separately. For example, the seventh alleged act of harassment (refusing to follow the opinion of the agency affirmative action officer to reinstate complainant to her usual route) is not a specific act of harassment separate from the respondent's refusal to reinstate her to that route.

As to the third element, the relatively close relationship in time between the request for accommodation and the various alleged acts of discrimination is sufficient at the prima facie case stage. See Ruff v. OCS, 87-0005-PC-ER (9/26/88). In addition, as discussed above, the case has been heard and briefed on the merits, and it is appropriate to address the ultimate issue of discrimination rather that the subsidiary question of the existence of a prima facie case.

The Commission will review the alleged incidents of harassment in the context of the second and third stages of the McDonnell Douglas analysis -- i.e., whether respondent has articulated a non-discriminatory reason for its action, and whether complainant has shown that the articulated reasons were actually a pretext, and the employer actually was motivated by an intent to retaliate because of complainant's protected activities.[5] The discussion of the

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[5] It should be kept in mind that the timeframe for whistleblower retaliation begins to run on November 14, 1991, which is when respondent became aware of the only activity on complainant's part (disclosure of information to an attorney) covered by the whistleblower law. However, there would not be a different result even if the October 26, 1991, memo copied to complainant's legislator (Complainant's Exhibit 29) were deemed a covered disclosure of information.

allegations of discriminatory harassment will utilize (in parentheses) the numbering used in complainant's reply brief at pp. 23-24.[6]

(1.) Complainant alleges that Mr. Fitzsimmons abrasively shouted at complainant on October 14, 1991, that she was not handicapped. Complainant has the burden of proof. Her allegation was denied by Mr. Fitzsimmons. In the Commission's opinion, there is no basis to assign a greater credibility to either party with respect to this issue, and therefore the Commission has not found that this incident occurred as complainant alleged. Therefore, there is no need for further analysis.

(2.) Complainant alleges that respondent refused to allow her use of a cruise control-equipped vehicle on October 15, 1991, as a reasonable accommodation. While, as discussed below, it cannot be concluded on this record that cruise control was a reasonable accommodation, this does not eliminate the potential viability of complainant's claim that her request for cruise control was denied as part of a pattern of harassment. Complainant testified that on the morning of October 15, 1991, she was told that "I could not use the spare [cruise control-equipped] vehicle, that it was not available for me that day." T. p. 36. Mr. Sonnenberg testified that: "I am not sure on that date if all of the vehicles were in the office or if some were being serviced. There might not have been any other vehicle there that wasn't being used." T., pp. 381-82. Based on the statement made to complainant at the time, and Mr. Sonnenberg's vague recollection, it can be concluded that respondent has at least articulated a legitimate, non-discriminatory reason for having denied complainant a cruise control-equipped vehicle on October 15, 1991 -- for logistical reasons, none was available.

By way of attempting to show pretext, complainant has not disputed that the spare vehicle was not available, but rather argues that respondent could have reassigned her a cruise control-equipped vehicle that was assigned to one of the other FSR's. While this is a plausible argument, it does not carry complainant's burden of proof to establish pretext under the circumstances. Respondent had provided the spare vehicle on three earlier occasions when it

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[6] The complaint contains some open-ended allegations of retaliatory conduct -- i.e., "in my continuous relationship with my supervisors ... other forms of harassment by my supervisors," and in her reply brief she refers to the 24 item enumeration as a "summary of some of the incidents." However, this list does appear to cover all the items in question, and therefore will be used in this opinion.

had been available. As of October 15th, respondent had no medical verification of either complainant's handicap or that cruise control was a reasonable accommodation.[7] Under these circumstances, respondent's failure to have reassigned a vehicle from another employe for complainant's use on October 15th provides little evidence that respondent's real motive in not granting complainant's request for cruise control was an intent to retaliate against her for having requested an accommodation in the first place.[8]

(3.) Respondent's refusal to allow complainant to run her usual route (3028) on October 16, 1991, so she could keep a 3:30 doctor's appointment.

The record on this point is somewhat confusing. Complainant testified that on the morning of October 14th she was told by management that she would be allowed to do her regular route on the 16th because that would allow her to keep her doctor's appointment, but that on the morning of the 16th she was told she had an out-of-town route. She also testified that she talked to the DSM's about stopping at the doctor's office on the way back to the office after the last stop on her regular route, or first returning to the office and using her personal car to return to the doctor, but that they denied both options. It is not clear when this conversation occurred. In any event, Mr. Sonnenberg testified that after he received her memo regarding the appointment (Complainant's Exhibit 12), he asked her if she would be finished working by the time of the appointment, and she said "yes," and also offered to start early and work through her breaks to this end. He testified that it was not possible to start early because of the need to have tickets checked out, and that he did not think she could finish her route, get back to the office to pick up her own car, and return to the doctor's by 3:30, because of how long it had taken her to do her run in the past. He also testified that there was a policy against using a state vehicle to go to a doctor's appointment, unless it was in connection with a worker's compensation matter. On the other hand, complainant testified that in her opinion, she could have finished the route in time to have made the 3:30 doctor's appointment. Mr. Fitzsimmons testified that he told complainant, in

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[7] Complainant had been sent a disability accommodation request form on October 2, 1991, to be submitted to DOA in connection with a request to have her permanently-assigned vehicle equipped with cruise control. Her next doctor's appointment was on October 16th. As discussed below, it was never established that cruise control was an accommodation with respect to her MS.

[8] The conceptually separate question of whether the denial of cruise control on October 15, 1991, was a denial of a reasonable accommodation in violation of §111.34(1)(b), Stats., is discussed below.

response to her request, that she could not go to the doctor's during the course of her route, but she would have to complete her route, take the rest of the day off, and then go to the doctor's. He further testified that she said that she could not do that, that most days she was not back to the office until 3:30 or 4:00, and therefore she decided to use sick leave on the day in question. Neither he nor Mr. Sonnenberg could remember whether complainant at some point was assigned to an out-of-town route on the day in question. In any event, it can be concluded that there was an adverse employment action when, regardless of what role the route assignment played in this matter, at some point complainant requested, and respondent denied her, the opportunity to run her regular route on October 16th and visit the doctor on the way back.

Respondent has articulated a legitimate, non-discriminatory reason for this by pointing out that this was against the policy on the use of state vehicles. Complainant has not demonstrated that this was pretextual based on other employes who had done this, because Mr. Sonnenberg and Mr. Fitzsimmons only took over as acting DSM's in late September, and prior to October 14, 1991, the FSR's had been in a different FLSA status which also had a bearing on management's approach to this issue. If, in fact, management assigned her to the out-of-town route prior to the dialogue between complainant and the DSM's discussed above, this would not change the foregoing conclusion because of respondent's testimony that in their opinion complainant could not have completed her Green Bay route in time to have made the 3:30 appointment anyway. While complainant testified that she thought she could,[9] on this record this amounts to a difference of opinion which does not give rise to conclusion that respondent's explanation was pretextual.

(4, 5, 7, 8, 11.) These alleged acts of harassment[10] all relate to respondent's action, after it received Dr. Mahoney's "Certificate to Return to Work"

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[9] It was not clear from her testimony whether she was saying she could have returned to the office and still have kept her doctor's appointment, or whether she was referring to stopping on the way back to the office, see T., p. 40.

[10] 4. 10/17/91 Suspending Arlene "until further notice" after receiving Dr. Mahoney's "Certificate to Return to Work."

5. 10/17/91 Refusing to call Dr. Mahoney to "clarify" certificate.

* * *

(Complainant's Exhibit 14), of placing complainant on leave with pay pending clarification of the certificate, and of the related action of failing to return her to work before it did.

The Commission notes preliminarily that it has difficulty concluding that placing complainant on leave with pay status -- i.e., she was not required to use sick leave or other leave time -- pending respondent's attempt to evaluate her accommodation request, could be considered to be an adverse employment action. Complainant attempted to relate this action to potential problems in meeting certain performance goals. That the temporary reassignment of her route would have had this effect appears somewhat speculative. Furthermore, the record does not show that in the event there was any effect on complainant's performance evaluations or salary as a result of the approximately one-month period that she was not at work and her usual route was handled by others.[11] Complainant also contended that she was humiliated by having been placed in this status. This may have been her subjective state of mind, but in the Commission's opinion, under an objective test, placing an employe on leave with pay status under these circumstances would not be considered to be a negative employment action.[12]

Assuming, arguendo, that respondent's act placing complainant on leave with pay from October 17 to November 7, 1991, was a negative employment action, it is necessary to distinguish it from the related but separate

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7. 10/25/91 Refusing to follow opinion of affirmative action officer who determined that Arlene should be "immediately reinstated."

8. 10/31/91 Misrepresenting to Judge Crabb that 10/31 Walsh memo reinstating Arlene would "resolve the issue" (of retaliation), and later refusing to reinstate Arlene without additional medical information (concerning diagnosis date).

* * *

11. 10/31 - 11/06/91 No call back to work until 11/06 despite memo. Complainant's reply brief, pp. 23-24.

[11] Negative comments on complainant's June 1992 performance evaluation were solely the result of the alleged striking incident, see T., pp. 326-27.

[12] Complainant's attempt to call certain of her retailers to testify concerning the FSR's who filled in for her during this period was denied on relevance grounds. There is no basis on this record to believe their testimony would have added anything probative with respect to these matters.

action of reassigning complainant's regular route to Rhonda Ellman.[13] Despite a good deal of confusion in the record, it can be concluded that this reassignment was made prior to October 17th, when complainant was placed on leave with pay, and was a separate transaction from placing complainant on leave with pay. Ms. Ellman's time reports (Complainant's Exhibit 92E) show that she was assigned "local routes" commencing on October 15, 1991, and that she had been released by her doctor to return to work on October 11, 1991 (the previous Friday) after having been unable to work due to a work-related injury (Complainant's Exhibit 92D).

Respondent articulated a legitimate, non-discriminatory reason for having sent complainant home on October 17, 1991, on leave with pay status because of its explanation that in management's opinion Dr. Mahoney's note -- "Arlene can drive safely for a maximum of 30 minutes or 25 miles from the Green Bay office" (Complainant's Exhibit 14) -- was ambiguous. Complainant's primary basis for arguing that this explanation was a pretext for retaliation against complainant because she requested an accommodation is to contend that the note is not ambiguous. On its face, the note is somewhat ambiguous because it is not clear what the restrictions mean in the context of complainant's job. For example, does this mean that she could drive for 30 minutes, stop at a retailer for 5 minutes, and drive for another 30 minutes, etc., or must there be a longer interval between the 30-minute periods?[14]

Another arguable indication of pretext is that management never contacted Dr. Mahoney by phone in an attempt to clear up their questions about the certificate. As to this point, complainant has not sustained her burden of proof as to having advised management that she would be agreeable to this approach,[15] and in addition it was not unreasonable under the circumstances for management to have wanted the clarification in writing.

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[13] The issue of the reassignment of complainant's route to Ms. Ellman will be discussed below.

[14] Dr. Mahoney's subsequent November 14, 1991, letter (Complainant's Exhibit 44), advises that as long as the driving periods are not substantially exceeded, the only breaks necessary would be the "standard" ones -- i.e., 15 minutes in the mornings and afternoons and 45 minutes for lunch.

[15] See, for example, the October 23, 1991, memo from Ms. Dahm to Mr. Walsh (Complainant's Exhibit 25): "Arlene is very hesitant to give us permission to contact her doctor for more information since she feels she has already provided the information requested."

Another argument complainant makes with regard to pretext is that respondent's acts were contrary to the advice of its personnel director and affirmative action officer, Ms. Dahm. For example, in an October 23, 1991, memo to Mr. Walsh (Complainant's Exhibit 25), she states:

> While I have not discussed Arlene's situation with you and may not have all the facts, one immediate solution to resolve this problem would be to assign Arlene the Green Bay route she has run for the past three years without incident. Then no reasonable accommodation would be necessary.

In a later memo from Ms. Dahm, dated October 29, 1991 (Complainant's Exhibit 30), which was written after she had received Dr. Mahoney's October 21, 1991, letter (Complainant's Exhibit 21) (which essentially reiterated what had been in his earlier certificate) she stated: "His [Dr. Mahoney's] memo is forwarded to you for your consideration in assigning a route so Arlene can return to work ... If further information is received from Dr. Mahoney, I will forward it immediately. However, I hope the information he has already provided is enough to assign Arlene a route and return her to work." While the difference of opinion between line management and Ms. Dahm does provide some evidence of pretext, this must be weighed against the fact that the interpretation of complainant's driving restrictions was not a subject that was particularly within the province of the personnel director.

Another factor that weighs significantly over this entire issue is that complainant was placed on leave with pay during this period. Even if one were to accept the theory that this could be considered as an adverse employment action in the context of an alleged pattern of harassment, the lack of any real negative impact on complainant has to be considered in deciding whether management's professed concerns were really a pretext for discriminating against complainant for having requested an accommodation. It seems inconsistent with complainant's contention that management conjured up the alleged concern about Dr. Mahoney's note in order to discriminate against complainant because she had requested and pursued a handicap accommodation, that they would send her home on leave with pay and utilize LTE's as part of her route coverage while pursuing the matter with her doctor.

In conclusion on this subject, complainant has not sustained her burden of proof with respect to establishing that respondent's professed concerns about her driving restrictions were pretextual, and that respondent

was really motivated by a desire to retaliate against complainant because of her actions with respect to an accommodation when it placed her on leave with pay pending clarification of Dr. Mahoney's certificate.

(6.) Complainant alleges Mr. Walsh's request of Dr. Mahoney for complainant's diagnosis date was an act of retaliatory harassment. While this action was part of the matter just discussed of putting complainant on leave with pay, it also could constitute a separately cognizable negative employment action in the context of complainant's allegation of a pattern or practice of retaliatory harassment. Respondent has articulated a legitimate, non-discriminatory reason for requesting this information through Mr. Walsh's testimony on cross-examination that he sought this information because he "was trying to look for a way to find out if she did genuinely have MS and a disability. That was simply all I was trying to do." T., p. 519. When further questioned about what difference it would make whether the diagnosis was made before or after she accepted employment, he further testified: "It would have made a difference from the standpoint of falsification of records, yes." id. While the record supports a finding that the primary purpose of Mr. Walsh's inquiry about the diagnosis date was an attempt to ascertain whether complainant falsified her original employment application, it does not follow from this finding that his motivation for this attempt was an intent to retaliate against complainant because she had requested a handicap accommodation, which is the only issue before the Commission at this point. To the extent it can be said that respondent's explanation for the inquiry as to diagnosis date was pretextual, this is a case where the record reflects that management was motivated by something other than complainant's actions under the FEA, and a conclusion of discrimination is not mandated by a finding of pretext. See St. Mary's Honor Center v. Hicks, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993); Kovalic v. DEC, Intl., Inc., 161 Wis. 2d 863, 876-78, 469 N.W. 2d 224 (Ct. App. 1991). There was testimony from a number of witnesses that there existed at the time in question an ongoing, rancorous, and contentious struggle between management and a group of employes which included complainant. It is far more likely that Mr. Walsh was motivated in his inquiry by this dispute than by the fact that complainant had requested and pursued a handicap accommodation.

(9, 12.) These allegations relate to respondent's decision to reassign complainant's regular route to Rhonda Ellman. Respondent has articulated a legitimate, non-discriminatory basis for its action by evidence

that this was done to accommodate Ms. Ellman's work-related injury. In her effort to establish pretext, complainant has shown by evidence presented at hearing that there was no connection between route assignments and lifting restrictions -- i.e., no particular route would accommodate a weight restriction better than another; weight restrictions were accommodated by the manner in which lottery tickets were packaged. This calls into question Mr. Walsh's statement in his October 31, 1991, memo to the Green Bay DSM's (Complainant's exhibit 32), which was shown to complainant during the federal court proceeding that date, and which included the following:

> As you are aware, we have received a request for special accommodation for route #3028 to be assigned to Arlene Rentmeester. Recent events have necessitated the break-up and re-assignment of FSRs to complete our Sales mission.
>
> During these events it came to our attention that Ms. Rentmeester has a physical disability which her physician says necessitates special accommodation. As you know, we also had Rhonda Ellman who needed a special route accommodation limiting her weight lifting to 10 lbs. Rhonda's request was approved prior to our knowledge of Arlene's disability.
>
> Since Rhonda Ellman will be removed from weight restrictions effective Thursday, October 31, 1991, I request you then reassign route #3028 to Arlene Rentmeester. (emphasis added)

At the hearing, both Mr. Walsh and Mr. Sonnenberg testified that Ms. Ellman was reassigned to complainant's previous route so she would be able to attend certain therapy sessions related to her worker's compensation injury, which was consistent with a policy that worker's compensation-related treatment could be done on state time. Complainant contends that this rationale is also pretextual, pointing out that there were other routes besides complainant's to which Ms. Ellman could have been reassigned and still have kept her therapy appointments. Respondent had some arguments as to why a local route would have been preferable in any event.

In conclusion on this point, to the extent that respondent's explanation for reassigning complainant's regular route to Rhonda Ellman is considered pretextual, this is also a situation where it is far more likely that management's real motivation for its action had to do with the dynamics of the labor-management turmoil discussed above than because complainant requested and pursued an accommodation for her handicap. Therefore, it is concluded that

this reassignment was not an act of retaliation taken because of complainant's pursuit of her accommodation request.

(10.) This allegation of harassment relates to Mr. Walsh's order to the DSM's set forth in the October 31, 1992, memo (Complainant's Exhibit 32) that they both accompany complainant for a week to do a time study evaluation of her route. This might well be considered a moot point because it was established that there was no room in complainant's van for both DSM's, and the time study never actually took place. However, respondent articulated a legitimate, non-discriminatory rationale for this order by explaining that the time study was related to the October 14, 1991, change in FLSA status, and management felt it prudent to have both supervisors present so there would be an additional witness in the event of any dispute related to the contentious labor-management situation discussed above. Complainant failed to demonstrate that this explanation was pretextual. Complainant contends that she was the only FSR singled out for such a study, but since the study was never done anyway, this is not particularly significant.

(13.) This allegation of harassment involves complainant's assignment when she returned to work on November 6, 1991, to clean and refurbish dispensers. Respondent satisfied its burden on this issue by testimony that this work was routinely required of other FSR's on days when they were not on the road covering their routes. This explanation was not shown to be pretextual.

(14, 15.) Complainant alleges that the charges of striking Mr. Sonnenberg were mere fabrications by respondent as acts of retaliation. Accordingly, this allegation is closely related to complainant's appeal of the suspensions pursuant to §230.44(1)(c), Stats., which was heard on a consolidated basis with her other cases. While the Commission concludes, as set forth below, that the predisciplinary process management provided was deficient in terms of procedural due process, the appeal of the suspensions was heard in a plenary manner and evidence was presented concerning the allegations of striking Mr. Sonnenberg. This evidence fails to show that respondent's allegations were pretextual.

Complainant admits touching Mr. Sonnenberg on the two occasions, but denies striking him as management alleges. Rather, she asserts with respect to the first incident that it was a friendly gesture, and as to the second, she was merely demonstrating what had occurred the first time. While her testimony and management's conflict, it cannot be concluded that respondent's charges

and account of these incidents are pretextual. Complainant stresses that there was no physical evidence of a blow to Mr. Sonnenberg, such as cuts or bruises, and that no criminal charges were filed. This evidence is entitled to some weight, but is not inconsistent with light striking. Respondent did not accuse complainant of having hit Mr. Sonnenberg with great force. Another factor that weighs against a conclusion of pretext is that complainant's credibility on this issue was undermined by her statement in the interview with Mr. Walsh shortly after the first incident that she could not recall the incident after she first stated she brushed her hand on his hair (Respondent's Exhibit I, transcript of predisciplinary interview). Also, there was a witness (Marilyn Hoffman) outside the office where the second incident occurred, who did not see the alleged striking but who perceived from complainant's demeanor just before it allegedly occurred that there was going to be an altercation and went to get Mr. Fitzsimmons. In conclusion, there was enough evidence in support of respondent's contentions that it cannot be concluded that respondent fabricated these accusations as a pretext for retaliation against complainant because she requested and pursued a handicap accommodation.

(16.) Complainant alleges that respondent prevented complainant from selling "Holiday Doubler" tickets to retailers on November 27, 1991, despite prior approval. The record reflects that it was respondent's policy that FSR's normally not visit retailers on the day after Thanksgiving because it was the busiest day of the year. There is no basis upon which to conclude that complainant was treated differently or that management's explanation was pretextual.

(17.) Complainant alleges that during her disciplinary suspension (November 7-15, 1991), her desk and van were searched, personal items (pictures and cards) were taken, and management failed to follow through on her complaint about this. Management denied having gone through her things and stated that her complaint had been referred to the lottery security officer in Madison. The record does not reflect what, if anything, was done after this. Another FSR made a similar complaint. There is no basis on this record for a conclusion that what occurred is attributable to an attempt by respondent to harass complainant in retaliation for having requested and pursued a handicap accommodation request, or for having made a disclosure to her attorney.

(18.) Complainant alleges that Mr. Fitzsimmons harassed her by yelling at her in the vault area on January 8, 1992. (This is also the subject of her noncontractual grievance, Case No. 92-0152-PC.) There was conflicting evidence as to how loudly Mr. Fitzsimmons was speaking on this occasion. The record supports a finding that he was speaking loudly but not yelling.[16] Regardless of who was right or wrong on the issue of whether it had been appropriate for complainant to have left the vault area in the midst of taking this phone call, Mr. Fitzsimmons was expressing a legitimate view of management and this was not a pretext for retaliating against complainant because she requested and pursued a handicap accommodation or because she made a disclosure to her attorney.

(19.) Complainant alleges that respondent harassed her by intercepting her outgoing mail. This allegation involves complainant's testimony that on January 8, 1992, she gave a memo regarding her allegation that Mr. Fitzsimmons had harassed her (the vault incident) to a program assistant for FAX transmission to Nick Pierce, respondent's deputy security director in Madison, but that he never got it. There is no evidence in the record regarding how or why this document did not reach its intended destination. There is an insufficient basis for a conclusion that management caused this to happen, no less that it was done in order to harass complainant because of her protected activities.

(20.) Complainant alleges that she gave Mr. Sonnenberg on January 10, 1992, a letter from Rep. Krug, asking her to appear and testify at a legislative hearing concerning respondent's operations, in connection with a request for time off that day, that she intended that the matter be confidential, and that Mr. Sonnenberg divulged the letter to other employes in an attempt to generate hostility against her. Assuming that Mr. Sonnenberg did not keep this letter confidential, the Commission does not believe this could be considered an act of harassment. This letter concerned a legislative hearing which presumably would be open to the public and the media. Furthermore, complainant did not ask Mr. Sonnenberg to keep the matter confidential, she just assumed it was somehow implicit in the nature of the transaction.

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[16] It is noted in this context that a number of witnesses testified that Mr. Fitzsimmons tended to be loud and abrasive in his dealings with employes, this would militate against a conclusion that he was singling out complainant by his demeanor on this occasion even if he had been yelling.

(21.) Complainant alleges that on January 20, 1992, respondent failed to investigate her complaint of damage to her state vehicle. Mr. Sonnenberg testified that he examined her vehicle and found no damage beyond what he considered to be normal wear and tear. There is no basis for a conclusion that this incident involved harassment or retaliation because of complainant's protected activities.

(22.) Complainant asserts that Mr. Sonnenberg falsely implicated her as an arsonist with respect to a fire that occurred in another FSR's (Sandra Elkins') state vehicle. The statement which Mr. Sonnenberg made to the Green Bay Fire Department (Complainant's Exhibit 62), included the following: "I did not see Arlene by van or on property ... I have no idea who or what started fire." His statement to the police department is summarized in its incident report (Complainant's Exhibit 63): "Cravillion [previous DSM] and Rentmeester are being investigated by the State Att. General's Office for possible violations while employed by the state ... Sonnenberg said Cravillion and Rentmeester have threatened Elkins and himself." When Mr. Sonnenberg was asked at the hearing whether he had ever been physically threatened by complainant, he referred to the alleged striking incidents on November 6, 1991, as a physical threat. As discussed above, respondent's allegations about this incident have not been found to have been either fabricated or pretextual. There is nothing in the record to contradict the other remarks he made about complainant with respect to that fire. Therefore, it is concluded that respondent's handling of this fire did not constitute an act of harassment or retaliation against complainant because of her protected activities.

(23.) Complainant alleges that respondent accused her of submitting a false time report on February 12, 1992. It is undisputed that the time report was inaccurate. In the memos that were exchanged between Mr. Sonnenberg and complainant, he was questioning not only what complainant characterized as obvious clerical errors that engendered an overreaction, but also what he perceived as "skipping around and not following your proper stop order." Memo from Mr. Sonnenberg to complainant dated February 13, 1992 (Complainant's Exhibit 64). Complainant has not established that she was

treated differently than other employes similarly situated,[17] nor that management's handling of this matter constituted harassment or retaliation because of her protected activities.

(24.) Complainant alleges that respondent prepared an inaccurate performance evaluation, and used this to deny a discretionary performance award, in June 1992. This performance evaluation and performance award denial reflected the alleged striking incidents of November 6, 1991. The Commission has already determined that these allegations were neither fabricated by management nor pretextual. Since they were the direct cause of the performance evaluation and discretionary performance award denial, the Commission further concludes that the latter were neither pretextual nor part of an effort to harass and retaliate against complainant because of her protected activities.

The Commission also concludes that complainant failed to establish a pattern or practice of retaliatory harassment against her because of her protected activities. As discussed above, the record reflects that the atmosphere between management and a segment of the employes, which included complainant, was tense and antagonistic prior to her request for accommodation and disclosure to her attorneys.[18] In the Commission's opinion, management was attempting to "play hardball" in this context when Mr. Walsh attempted to check on complainant's diagnosis date. It seems likely that in the absence of this atmosphere, the relationship between complainant and management would have been far less adversarial. However, the adversarial and contentious nature of the relationship does not on this record amount to a pattern of harassment by management, no less a pattern of harassment motivated by complainant's pursuit of a handicap accommodation, or by her disclosure to her attorney.

With respect to complainant's allegations of handicap discrimination, these fall into two categories -- denial of accommodation and disparate treatment. Before addressing these matters specifically, it should be noted that

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[17] When asked if other FSR's had made clerical errors in the past, she said, "I believe so," T., p. 110, and when asked if they had had "memos and things like that addressed to them like you did," she answered, "Up to that point, no. Not that I know of." id.

[18] While the presence of this atmosphere was unmistakable, it is far beyond the scope of this proceeding to attempt to say "who started it" or which side, if either, was more at fault for its existence.

there is a significant legal difference between handicap accommodation denial and handicap or retaliation disparate treatment. A complainant does not have to show any discriminatory intent to establish a claim of denial of accommodation. That is, if an employer fails to provide a reasonable handicap accommodation, and cannot establish the affirmative defense of hardship under §111.34(1)(b), Stats., it is liable regardless of whether it acted in good faith and with no intent to discriminate. In a disparate treatment or retaliation case, an employer is not liable unless it is established that the employer acted intentionally because of the employe's protected status. See Intl. Brotherhood of Teamsters v. United States, 431 U.S. 324, 335, 52 L. Ed. 2d 396, 415, 97 S. Ct. 1843, n. 15 (1977):

> "Disparate treatment" ... is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. (emphasis added) (citation omitted)

The obverse of the foregoing is that even if an employe is not entitled to a particular condition of employment as an accommodation pursuant to §111.34(1)(b), Stats., the deliberate refusal to provide that condition of employment to a particular employe because of the employe's protected category (e.g., race, sex, handicap) or because the employe has engaged in protected activity covered by §111.322(2), Stats., constitutes prohibited disparate treatment of that employe.

The analysis of complainant's allegations of disparate treatment because of handicap in many respects tracks the analysis of the retaliation claims discussed above, because they apparently involve the same personnel transactions or conditions of employment, and both types of claims use the McDonnell-Douglas type of analysis, albeit with different prima facie cases.

A typical prima facie case of disparate treatment discrimination, which can be used for a handicap claim, consists of the following elements:

1) the complainant is a handicapped individual;

2) the complainant experienced an adverse condition of employment;

3) the adverse condition of employment occurred under circumstances that give rise to an inference of discriminatory motive. See,

e.g., Sischo-Nownejad v. Merced College Dist., 934 F. 2d 1104, 56 FEP Cases 250 (9th Cir. 1991).

In this case, complainant has established that she is handicapped. As discussed above, where she has sustained her burden of proof and established that the things she alleged occurred actually did occur, the elements of a prima facie case are either present or will be assumed to be present for the purposes of analysis and because the case has been fully tried, see U.S. Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 75 L. Ed. 2d 403, 103 S. Ct. 1478 (1983).

At this point, the analysis of complainant's handicap disparate treatment claim pretty much tracks the analysis of her retaliation claims, which were discussed above. For essentially the same reasons, the Commission concludes that respondent did not engage in disparate treatment against complainant because of her handicap.

The Commission next will address complainant's claim of denial of handicap accommodation. As was noted above, it is undisputed that at all relevant times complainant has had MS and has been a handicapped individual. She claims that she was denied two separate accommodations -- use of a vehicle equipped with a cruise control for longer routes, and assignment to a route involving short driving periods.

With respect to the cruise control question, this was only at issue on one day -- October 15, 1991.[19] Prior to that date, her request for cruise control had been granted on the days she had requested it (cruise control) when she was assigned to longer routes. After that date, when she presented a doctor's certificate on October 17, 1991, (Complainant's Exhibit 14), that only mentioned restrictions on the amount of driving and did not refer to cruise control, she did not make any further request for cruise control.

The issue as to cruise control must be resolved against complainant because the record evidence establishes that the only accommodation medically indicated or advisable for complainant's MS was a driving restriction. None of the documents submitted by complainant's doctor refer to cruise control as an accommodation or work limitation, nor did her neurologist characterize it as such in his testimony (Complainant's Exhibit 15, deposition used by stipulation). Also, complainant never discussed cruise control with her physicians. Since cruise control was not a reasonable accommodation,

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[19] See complainant's reply brief, p. 3.

respondent did not violate §111.34(1)(b), Stats., by failing to provide complainant a cruise control-equipped vehicle on October 15, 1991.[20]

After complainant brought the first doctor's certificate (Complainant's Exhibit 14) to work on October 17, 1991, her request for accommodation changed from cruise control to assignment exclusively to her original, relatively short route (3028). Respondent's response to this request was to place her on leave with pay pending clarification of what it perceived as ambiguity in the limitations set forth on Dr. Mahoney's certificate. This status continued until November 6, 1991, when she returned to duty. On that date, she was assigned to refurbishing dispensers. She then was on disciplinary suspension from November 7-15, 1991, after which she was reassigned to her previous route.

In the Commission's opinion, respondent did not refuse to accommodate complainant's handicap in violation of §111.34(1)(b), Stats. As was discussed above, complainant first requested a limitation on the amount of driving required on October 17, 1991. During the period while respondent was attempting to clarify the meaning of Dr. Mahoney's driving restriction, it did not assign her to driving a longer route than she had normally driven. Rather, complainant was placed on leave with pay until November 7, 1991, when she was assigned to refurbishing ticket dispensers. An employe is not entitled to the exact accommodation requested, see Vallez v. UW-Madison, 84-0055-PC-ER (2/5/87); Baxter v. DNR, 165 Wis. 2d 298, 310, 477 N.W. 2d 648, n. 9 (Ct. App. 1991); American Postal Workers Union v. Postmaster General, 39 EPD Para. 35, 863 (9th Cir. 1986). While reassignment exclusively to her regular route was on this record a reasonable accommodation, see McMullen v. LIRC, 148 Wis. 2d 270, 434 N.W. 2d 830 (Ct. App. 1988), this does not mean it was the only reasonable accommodation. There is no reason why temporary reassignment to what was in effect light duty should not also be considered a reasonable accommodation.[21]

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[20] As noted above, this is a separate issue from the question of the denial of cruise control as disparate treatment or retaliation, discussed above.

[21] As discussed above, under disparate treatment/retaliation, the Commission rejects any contention that these temporary reassignments would not be considered a reasonable accommodation because of a potential impact on complainant's performance goals and discretionary performance award.

Case No. 92-0152-PC

This is the appeal of the noncontractual grievance concerning the alleged verbal harassment in the vault area on January 8, 1992. As was discussed above under the heading of the retaliation complaint, in the Commission's opinion Mr. Fitzsimmons was expressing a legitimate management point of view on this occasion. Complainant contends that respondent's actions on this occasion violated respondent's work rules which prohibit "[t]hreatening or intimidating others or using abusive or profane language toward others," (Complainant's Exhibit 39), as well as respondent's "prohibitions of discrimination and harassment," which defines harassment as: "any unwelcome verbal abuse or physical contact that interferes with an individual's work performance or that creates an intimidating, hostile or offensive work environment. This includes unwanted sexual advances, the use of demeaning language, and ethnic or racial slurs or jokes." (Complainant's Exhibit 38). There is no question but that Mr. Fitzsimmons' action on that occasion did not fall into the foregoing definitions. The only potential violation of these policies would be if he had been yelling or otherwise carrying on in a manner that would be considered abusive. The Commission has found that he was speaking loudly but not yelling, and will sustain respondent's dismissal of complainant's noncontractual grievance concerning this matter.

Case No. 91-0243-PC

This is an appeal pursuant to §230.44(1)(c), Stats., of the two suspensions that were imposed on November 6, 1991. Complainant contends that she was not given the predisciplinary process that is required by the due process clause of the Fourteenth Amendment to the United States Constitution. If this is so, the discipline must be rejected. McCready & Paul v. DHSS, 85-0216, 0217-PC (5/28/87). In McCready, the Commission cited Cleveland Bd. of Education v. Loudermill, 470 U.S. 532, 546, 84 L. Ed. 2d 494, 506, S. Ct. 1487 (1985), which includes the following summary of the nature of the hearing required:

> [T]he pretermination "hearing," though necessary, need not be elaborate ... The essential requirements of due process ... are notice and an opportunity to be heard. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. The tenured public employe is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. (citations omitted)

In the instant case, the first incident on November 6, 1991, was followed by a predisciplinary hearing which Mr. Walsh conducted over the phone.[22] He then issued a two-day suspension. The second incident occurred later the same day after the issuance of the two-day suspension. Mr. Walsh then issued a five-day suspension without holding a predisciplinary hearing on the second incident. His rationale for not conducting a predisciplinary hearing with respect to the second incident is that after complainant's statement in the first hearing that she did not recall the first incident, "I found it hard to imagine how she could obviously remember the second incident when she couldn't remember the first." T., p. 484. Regardless of whether his opinion was well-founded, there has been no authority cited that omitting a hearing under such circumstances is constitutionally acceptable, and the Commission is aware of none. Therefore, it is clear the second suspension must be rejected on procedural due process grounds.

With respect to the first hearing on the first incident, the entire substantive part of the hearing is as follows:

Walsh:	I want to let you know that I have received a phone call in regards to disciplinarian action that I may take here at the Lottery. I'm going to tape the phone conversation that we are having. I wanted to give you an opportunity to respond to the situation that happened in Steve's office.
Rentmeester:	I was in Steve's office several times this morning.
Walsh:	Well, the incident with the slap to the head. I just want to here [sic] your side of the story.
Rentmeester:	May I be advised as to what I am being accused of?
Walsh:	Did you slap him to the head?
Rentmeester:	No. I did not slap him to the head. I brushed my hand on his hair.
Walsh:	OK. That that is what I am curious that's what I'm curious to know. I want to hear I want to hear what you're saying happened.
Rentmeester:	I don't even recall the incident.

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22 This conversation was taped and transcribed, and the transcript was entered into the record as Respondent's Exhibit I.

Walsh:	You don't recall the incident.
Rentmeester:	No. If you could refresh me, that would probably help.
Walsh:	I am not here to refresh your recollection, Arlene. I want to hear your side of the story. Your side of what happened in the office from the time you went in to the office when that particular incident occurred.
Rentmeester:	Don, I don't recall that.
Walsh:	You don't recall that.
Rentmeester:	No.
Walsh:	OK. So you can, you can offer no further evidence or conversation to me that can help me in away [sic] make any kind of decision with regards to any disciplinarian action that I may take.
Rentmeester:	I could talk to Steve and he could help me refresh my memory. Could you hold on?
Walsh:	No. I, I am, not here, this is not to get into a contest with you and Steve. I am here to interview you on an individual basis to find out what you recall from the particular incident.
Rentmeester:	I don't even recall that there was an incident.
Walsh:	Alright [sic]. Well, that is all that I need to know then. Thank you very much.

When measured against the minimum requirements outlined in Loudermill, above, this interview is deficient in that respondent failed to provide any "explanation of the employer's evidence." Loudermill, 470 U.S. at 546, 84 L. Ed. 2d at 506. See also Brock v. Roadway Express, Inc., 481 U.S. 252, 264-65, 95 L. Ed. 2d 239, 252, 107 S. Ct. 1740 (1987):

> These cases [Loudermill and Arnett v. Kennedy, 416 U.S. 134, 40 L. Ed. 2d 15, 94 S. Ct. 1633 (1974)] reflect that the constitutional requirement of a meaningful opportunity to respond before a temporary deprivation may take effect, entails, at a minimum, the right to be informed not only of the nature of the charges but also of the substance of the relevant supporting evidence. If the employer is not provided this information, the procedures implementing §405 contain an unacceptable risk of erroneous decisions.

Accordingly, the initial suspension must also be rejected on procedural due process grounds.

ORDER

Case No. 91-0243-PC

Respondent's actions suspending complainant without pay for two days on November 7-8, 1991, and for five days on November 11-15, 1991, are rejected on procedural due process grounds, and these matters are remanded to respondent for action in accordance with this decision.

Case No. 92-0152-PC

Respondent's handling of this grievance is affirmed and this appeal is dismissed.

Case No. 92-0182-PC-ER

This complaint of discrimination is dismissed.

Dated:_____, 1994 STATE PERSONNEL COMMISSION

_____
LAURIE R. McCALLUM, Chairperson

AJT:rcr

_____
DONALD R. MURPHY, Commissioner

_____
JUDY M. ROGERS, Commissioner

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* Pursuant to the provisions of 1991 Wis. Act 269 which created the Gaming Commission effective October 1, 1992, the authority previously held by the Executive Director of the Wisconsin Lottery with respect to the positions that are the subject of this proceeding is now held by the Chairperson of the Gaming Commission.