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CAROL A. DEPAGTER,  
Complainant,

v.

Chancellor, UNIVERSITY OF  
WISCONSIN - MADISON,

Respondent.

Case No. 93-0003-PC-ER

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DECISION  
AND  
ORDER

This matter is before the Commission pursuant to a Motion to Dismiss filed by respondent on March 15, 1993. The parties were permitted to file briefs and the final brief was filed with the Commission on June 28, 1993.

The following facts are derived from information supplied by the parties and appear to be undisputed:

1. On January 15, 1992, complainant filed a charge of discrimination with the Commission alleging that respondent had discriminated against her on the basis of handicap and sex when it terminated her employment as a Security Supervisor 1 and had violated the Family and Medical Leave Act (FMLA) in regard to a request filed by complainant under the FMLA. This charge was assigned Case No. 92-0018-PC-ER.

2. Due to the time constraints imposed on the Commission by the FMLA, the Commission separated the FMLA and the handicap charge from the sex charge and created a separate case file for the sex charge (Case No. 92-0089-PC-ER).

3. In regard to her charge of handicap discrimination, complainant alleged that respondent had discriminated against her due both to a psychological disability (depression, migraine headaches, and panic attacks) and a physical disability (traumatic arthritis of the left ankle).

4. In an Initial Determination issued on April 28, 1992, one of the Commission's Equal Rights Officers concluded that "[t]here was no probable

cause to believe that complainant was discriminated against on the basis of handicap, either physical or psychological, either while she worked for respondent or when she was terminated from her position as a Security Supervisor 1" and that "[t]here was no probable cause to believe that complainant was denied any rights under the Family and Medical Leave Act with respect to her medical leave of absence from her job duties." The investigator also concluded that complainant's charge of handicap discrimination based on her psychological disability was pre-empted by the exclusivity provision of the worker's compensation law.

5. This Initial Determination was mailed to complainant's home address on April 28, 1992, accompanied by a letter which stated as follows, in pertinent part:

If you feel that this "no probable cause" determination is in error and if you wish to have a hearing on the issue of probable cause, then you must, within 30 days of the date of this letter, file a letter of appeal with the commission. The appeal must be in writing. The letter should specifically state the grounds on which it is based. You should include your name, the case number and a statement that you request a hearing on the "no probable cause" determination. The appeal must be actually received by the Commission within the 30 calendar day period rather than merely having been mailed within that period. §PC 2.07(3), Wis. Adm. Code.

If a written request for hearing is not received by the Commission within 30 calendar days, you should assume that the Commission will dismiss your case.

6. Complainant did not file an appeal of this Initial Determination within the specified time period. As a result, the Commission issued an order dismissing Case No. 92-0018-PC-ER on June 10, 1992. Complainant did not file a timely petition for rehearing nor a timely petition for judicial review in regard to this dismissal order.

7. Some time subsequent to May 27, 1991, complainant applied for worker's compensation benefits based on her psychological disability. This application was denied based on a conclusion that her psychological disability was not work-related. Complainant appealed this denial in February of 1992. Subsequently, she and respondent entered into a "Limited Compromise Agreement" which states as follows, in pertinent part:

There is a bona fide dispute between the parties as to whether the applicant's job stress was over and above that sustained by any

other state employee or supervisor. Therefore, the parties, subject to the approval of the Department of Industry, Labor and Human Relations, agree to a compromise settlement as follows: For all claims for compensation and medical expense before February 12, 1991 [sic, correct date is 2/12/92], the employer will pay \$6,494 to the employee and in addition for medical expenses to Carol DePagter for mileage \$188.50; to Carol DePagter for reimbursement of prescriptions \$381.66; to Dean Medical Center \$184. Jurisdiction is reserved for claims for compensation and medical expense after 1/12/92.

8. On January 5, 1993, complainant filed a charge of discrimination with the Commission alleging that she was discriminated against on the basis of her handicap of post-dramatic (sic) stress in relation to her December 15, 1991, termination by respondent.

9. In an affidavit signed on June 23, 1993, Dr. Barbara J. Brigham, a licensed psychologist who has been treating complainant since at least May of 1991, states as follows:

As a result of her recurrent major depression and panic attacks, Ms. DePagter has suffered significant losses in her ability to concentrate on a given task, as well as her ability to organize her thoughts. She is subject to feelings of being "overwhelmed," during which time it is difficult or impossible for her to concentrate on a given subject.

Since May, 1991, DePagter's symptoms have sometimes improved in a particular household duty or task, only to intensify with regard to other tasks or duties.

For this reason, Ms. DePagter's underlying diagnosis of recurrent major depression and panic attacks has remained unchanged since May, 1991.

While I do not believe Ms. DePagter to be legally incompetent, it is my professional opinion that she has been unable to manage the ordinary affairs of her life from May, 1991 to the present as a result of her mental illness.

10. *Complainant represents in her brief on the Motion that, due to her psychological condition, she was unable to retain counsel to pursue this matter without assistance from her husband.*

11. Complainant listed James R. DePagter at the same address as the home address she listed for herself as a contact person in both the January 15, 1992, and the January 5, 1993, charges of discrimination she filed with the Commission.

12. In a meeting held with respondent's representatives on November 20, 1991, to discuss the status of her employment, complainant was represented by Attorney Helen Schott. Complainant was still represented by Ms. Schott, at least in relation to her worker's compensation claim, in September of 1992.

13. On November 30, 1992, complainant contacted the Commission by phone to advise that Attorney Richard Graylow would be representing her in Case No. 92-0089-PC-ER.

14. Attorney Graylow indicated at the time of filing that he would be representing complainant in Case No. 93-0003-PC-ER. Attorney Graylow or one of his associates has represented complainant in this case continually since that time. Complainant states in her brief that she took her husband with her to the meeting with Attorney Graylow at which she retained his services because she did not feel she would be able to understand the discussion due to her illness.

Case No. 93-0003-PC-ER involves essentially the same subject matter as one of the charges in Case No. 92-0018-PC-ER, which was dismissed by order of the Commission dated June 10, 1992, and is no more than an attempt by complainant to revive that charge. However, the mechanism established by Chapter 227, Stats., for triggering such a revival, i.e., the filing of a timely petition for rehearing, was not utilized by complainant. Although complainant argues that the time period for filing a petition for rehearing in Case No. 92-0018-PC-ER should be equitably tolled due to her mental illness, she cites no authority for her contention that the Commission has the authority to reassert jurisdiction over a case once the time period for filing a petition for rehearing in the case has expired and the Commission is not aware of any such authority. Although complainant cites authority for the equitable tolling of statutes of limitations, this authority appears to be inapposite to the situation under consideration here, i.e., the reassertion of jurisdiction by a quasi-judicial administrative body once that body's jurisdiction over the case has been extinguished as the result of the expiration of the statutory time limit for filing and acting upon a petition for rehearing. Respondent is correct in asserting that a quasi-judicial administrative body such as the Commission has only that authority specifically granted to it. In the absence of a grant of

authority to reassert jurisdiction after a case has been dismissed and the period for granting a rehearing has expired, the Commission necessarily concludes that it does not have such authority. The Commission's earlier decision would apparently have res judicata effect on this case as well.

Even if the Commission were to conclude that it had such authority and it chose to exercise it here, the handicap discrimination claim presented by complainant is pre-empted by operation of the exclusivity provision of the worker's compensation law. [See, Powers v. UW, 92-0183-PC-ER (6/25/93)]. Although complainant urges the Commission to overrule or ignore decisions of the Court of Appeals in this area (See Schachtner v. DILHR, 144 Wi. 2d 1, 422 N.W. 2d 906 (Ct. App. 1988; Norris v. DILHR, 155 Wis. 2d 337, 455 N.W. 2d 665 (Ct. App. 1990)), the Commission, as an administrative body, is clearly in no position to do this and believes that Schachtner and Norris are controlling here. In opposition, complainant cites a 1911 case. It would clearly be absurd for the Commission to rely upon an 80-year-old case which predated both the Fair Employment Act and the current language of the exclusivity provision in favor of cases recently decided by the Wisconsin Court of Appeals.

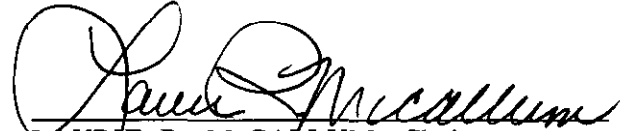
Order

Respondent's Motion to Dismiss is granted.

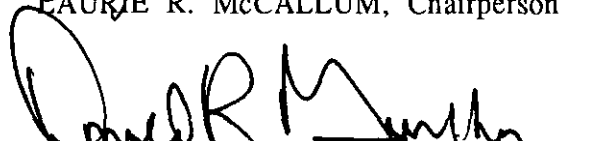
Dated: \_\_\_\_\_, 1993

July 22

STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

LRM:lrn

  
DONALD R. MURPHY, Commissioner

  
JUDY M. ROGERS, Commissioner

Parties:

Carol DePagter  
611 Olympic Street  
Sun Prairie, WI

David Ward  
Chancellor, UW-Madison  
158 Bascom Hall  
500 Lincoln Drive  
Madison, WI 53706

**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.