



he was also concerned about the effect on the fetus's development of the lead content of the air in the indoor firing range. Lieutenant Hanson requested that Susan Riseling, Chief of the Department of Police and Security, join the conversation. Chief Riseling told complainant that the decision whether to shoot a firearm on the firing range was a decision that complainant and her physician would have to make; and that Chief Riseling would arrange to have the air in the firing range cleaned and to allow complainant to shoot by herself in the firing range. Chief Riseling also advised that complainant could not perform Police Officer patrol duties after December 22, 1994, if she had not re-qualified to carry a firearm. Complainant stated that she would like to complete the training which was scheduled to end on January 19, 1995, and then go on light duty. Complainant completed her firearm re-qualification on December 15, 1994.

4. On January 15, 1995, complainant approached Lieutenant Hanson and advised him that she was interested in light duty and wanted to know what her options were. In response to this, Lieutenant Hanson scheduled a meeting for January 20, 1995, which was attended by complainant, Lt. Hanson, Sgt. Edith Brogan, and Security Supervisor Mike Gruber. At this meeting, complainant was offered a light duty assignment in the crime prevention program. Complainant's patrol schedule was then 4:00 p.m. to 2:00 a.m. with rotating days off and she requested to remain on those hours. Because the supervisors of the crime prevention program felt that it was necessary to have some supervisory oversight of complainant's crime prevention activities and their work schedules ended no later than 5:00 p.m. each weekday, complainant was offered a schedule of 4:00 p.m. to 12:00 midnight Monday through Friday. Those present, including complainant, agreed to this schedule as well as to the fact that complainant would begin this light duty assignment on Monday, January 23, 1995; that she would report to Sgt. Brogan and Supervisor Gruber; that she would share an office in the crime prevention unit; and that she could continue to carry a firearm as long as she remained qualified to do so. Within a few hours after the meeting had ended, complainant telephoned Lt. Hanson and indicated that the 4:00 p.m. to 12:00 midnight schedule on weekdays was not satisfactory since it would result in extra child care expenses for her family and loss of income since she would lose night and weekend differential pay, and because her husband couldn't adjust his work schedule to coincide with this light duty schedule. It would have been of greatest benefit to the

crime prevention program for complainant to have worked a straight day shift Monday through Friday.

5. When Chief Riseling learned that complainant had a problem with the light duty schedule she had been offered and that there seemed to be some confusion on complainant's part or some intent by complainant to mischaracterize the nature of respondent's light duty offer, she directed Captain Richard Hartwig to review the entire scope of programs he supervised to determine if there was a way to accommodate complainant's scheduling concerns and then to meet with complainant to discuss her light duty request. Captain Hartwig met with complainant on January 25, 1995, and a schedule of 6:30 a.m. to 2:30 p.m. on Mondays and 4:00 p.m. to 12:00 midnight Tuesdays through Fridays was established as the result of their discussion. Captain Hartwig understood from the meeting that complainant was requesting light duty and seeking not to continue on patrol duty. As the result of the meeting, Captain Hartwig caused to be prepared a "Special Order" stating that complainant was relieved of her patrol assignment effective January 27, 1995, and assigned to the crime prevention section effective January 20, 1995. A "Special Order" is the means by which staff of the Department of Police and Security communicate certain information, including scheduling and assignment changes.

6. On or around January 26, 1995, complainant filed a leave without pay request citing pregnancy as the basis for the request. Chief Riseling consulted Ed Corcoran of the UW-Madison Classified Personnel Office who advised her that pregnancy alone could not serve as the basis for granting maternity leave. Chief Riseling communicated this information to chief union steward Schubring who discussed it with complainant.

7. On or around January 26, 1995, complainant filed a leave without pay request citing leg and back pain and numbness as the basis. Complainant provided medical verification of this condition on or around February 6, 1995, and her request was approved effective February 8, 1995. Complainant requested that her leave without pay commence on February 28, 1995.

8. Complainant applied for income continuation benefits on January 30, 1995. Complainant received income continuation benefits during the period of time she was on leave without pay.

9. Beginning January 27, 1995, and continuing during February of 1995, complainant was absent from work and used accrued vacation and sick leave to cover these absences.

10. In a memo to Chief Riseling dated March 25, 1995, complainant stated as follows, in pertinent part:

On 3/20/95 I spoke with you by telephone and advised you that my doctor advised that I could return to work on April 17, 1995, when my medical leave is up. The doctor stated I could return on a half-time basis (see attached letter), and you advised that you would let me know if I would be allowed to return on a half-time basis.

11. The letter from complainant's physician attached to this memo was dated March 13, 1995, and stated as follows, in pertinent part:

After Valerie Bower's medical leave is up she may return to work on a trial basis. She may do light duty work and she may work half time.

This trial is to last two to three weeks. If she can tolerate working half time light duty she may continue to do that work until she returns from maternity leave.

If you have further questions about Ms. Bower's work restrictions, please contact me.

12. In a letter to complainant dated March 24, 1995, Captain Hartwig stated as follows, in pertinent part:

The information regarding your request for half time work has been forwarded to me. You have had discussions with your supervisor, Chief Riseling, Capt. Hettrick and me concerning your ability to perform as a police officer due to medical reasons and risks to you and your fetus during your pregnancy. It is important at this point for you and your doctor to update us on your ability to work and give us a plan for what you intend to do for the next six months. I understand conditions can change, we can address changes as necessary, but we must develop a plan for the operation of your shift during your absence and must also develop plans for other sections of the department that may be affected by your ability to give assistance.

At the present we do have a light duty assignment available for you on a 40 hour per week basis. Following is the description of that assignment which was provided to you last week:

\* \* \* \* \*

By Tuesday, April 4, 1995, please provide me with the following information in writing.

- 1) It is my understanding that you are currently on medical leave without pay. Provide verification of your leave status.
- 2) Indicate whether you are submitting a request for leave extension or a request to return to work.
- 3) If you are requesting to return to work provide me with a medical clearance statement allowing you to return to work in the light duty capacity described above.
- 4) If there are modifications to the light duty assignment that we should consider, have your doctor provide the specifics in writing.
- 5) Any medical statement must verify that the doctor has reviewed the light duty job description contained in this letter.
- 6) Provide me with a written statement outlining your general leave plan for the next six months.

13. In a letter to Captain Hartwig dated March 29, 1995, complainant stated as follows, in pertinent part:

I received your letter, dated March 24, 1995, on March 27, 1995. I will answer as many as your questions as I can, however, I am not certain I can get the doctor's statement by April 4, as you are requesting.

In answer to your questions:

#1 Yes, I am currently on a medical leave. Bernie should have a copy of that leave request form.

#2 I am submitting a request to return to work on a half-time basis.

#3 Doctor's note was dropped off on March 26, 1995.

#4 & #5 Am currently working on getting that from the Doctor.

#6 I am planning on taking maternity leave when I have the baby. I am planning on taking 6-8 weeks maternity leave, but that will all depend on how everything goes.

I am planning on returning to work on April 17, 1995 on a half-time basis. Please let me know by April 5, 1995 if this is an option.

14. On or around March 31, 1995, complainant provided to Captain Hartwig a letter from her physician which stated as follows, in pertinent part:

I hope this will help define the restrictions which will enable Valerie Bower to continue to work through the rest of her pregnancy.

Ms. Bower may do the light duty work as outlined in your letter to her of March 24, 1995. This includes working half the number of hours a week that she normally would doing clerical work, receiving telephone complaints, assist Court Services, writing reports, and using her training and experience as a police officer in other appropriate assignments. She will not be expected to remain in one position (sitting or standing) for long periods of time.

Ms. Bower has lumbosacral strain and sprain producing pain in her proximal left leg and pain around her left groin. This is due in part to pressure on the nerves of her lumbosacral plexus from her enlarged uterus.

I hope this gives you the information you need about Ms. Bower's medical condition. Please contact me if I have left any important questions unanswered.

15. In a letter to complainant dated April 5, 1995, Captain Hartwig stated as follows, in pertinent part:

I have reviewed your request and have read the letter written by your physician, Ivy J. Dreizin, MD. Clarification was needed concerning what Dr. Dreizin meant by "half the number of hours per week." She returned my call on April 3, 1995 and explained that you would probably not be able to work more than four or five hours per day and not more than twenty hours per week. She further explained that with the type of nerve injury you have, pain would be the limiting factor.

\* \* \* \* \*

This light duty assignment will begin on April 17, 1995 and continue through June 1995. The duties, approved by your physician, will remain the same as stated in my letter of March 24, 1995, with the exception that your work week will be no more than 5 hours per day and 20 hours per week. Your schedule will be 6:00 a.m. to 10:00 a.m., Monday through Friday. Business attire will be appropriate for this assignment. Your supervisor will be Sgt. Vern Denzer.

16. Complainant returned to work on the basis described in Captain Hartwig's April 5 letter.

17. Complainant gave birth on July 5, 1995; and returned from maternity leave on January 3, 1996.

18. Sgt. Brogan had requested light duty during her pregnancy in 1991. Respondent placed Sgt. Brogan on light duty after she made a light duty request; Sgt. Brogan was never ordered to go on light duty; and Sgt. Brogan was not permitted to specify her duties, schedule, or supervisors for her light duty assignment. A "Special Order" was issued by respondent when Sgt. Brogan's assignments and schedule changed when she went on light duty. Sgt. Brogan and complainant were the only two Police Officers in the Department of Police and Security to be pregnant during the course of their employment.

19. Respondent does not have a policy which requires pregnant Police Officers to go on light duty or to take leave.

20. Captain Hartwig has not requested that other employees returning from medical leave verify for him their leave status; and has not requested that other pregnant employees disclose to him their leave plans for the following six months.

#### Conclusions of Law

1. This matter is properly before the Commission pursuant to §230.45(1)(b), Stats.
2. Complainant has the burden to show that she was discriminated/retaliated against as alleged.
3. Complainant has failed to sustain this burden.

#### Opinion

The issues to which the parties have agreed are as follows:

1. Whether respondent's light duty policy for pregnant Police Officers discriminated against the complainant on the basis of sex/pregnancy and whether such policy constitutes a valid BFOQ plan.
2. Whether respondent retaliated against complainant for exercising her rights under the Family and Medical Leave Act (FMLA) relative to her return to light duty work request in March-April 1995.

In regard to the first issue, the record does not show that respondent had a policy, as alleged by complainant, which required pregnant Police Officers to go on light duty or to take leave. Such a conclusion is consistent not only with the testimony of Chief Riseling and other supervisors in the Department of Police and Security, but also with the testimony of Sgt. Brogan

who was placed on light duty during her pregnancy only upon her request and who was not required to take leave. Complainant attempts to show that, even if there was no blanket policy, such a policy was applied to her individual situation. However, the record here shows that complainant notified her supervisors of her desire to be placed on light duty, and that it was their clear understanding that she had made a request to be taken off patrol duty and placed on light duty for the duration of her pregnancy. Complainant attempts to show that she was ordered to light duty by respondent because her transfer to a light duty assignment was encompassed within a "Special Order" caused to be issued by Captain Hartwig. However, the record shows that a "Special Order" was simply a communication mechanism utilized by the Department of Police and Security to notice changes such as those in schedules or assignments. Complainant's contention that she wished to remain on patrol duty if a suitable light duty schedule was not offered her and that she communicated this to her supervisors is further undermined by the fact that, when she continued to object to the proffered light duty schedule, she chose to go on medical leave rather than to remain on patrol duty. Respondent's policy of placing pregnant Police Officers on light duty only upon their request is not discriminatory, and respondent's actions in response to complainant's request for light duty did not treat her differently than the only other pregnant Police Officer in the Department of Police and Security and did not discriminate against her on the basis of her sex or her pregnancy.

In regard to the second issue, complainant alleges that Captain Hartwig's request for additional information after she had filed her request to return to work on light duty at the end of her scheduled medical leave was retaliatory. The fact that complainant filed a cognizable request for FMLA leave and it was granted by respondent does not appear to be disputed. Although the record does show that the requested information at issue here was not elicited by Captain Hartwig from other employees returning from medical leave, complainant has failed to show that any of these other employees' situations were comparable to hers. It has to be recognized here that complainant's leave situation was complicated in relation to the leave situations described in the record for other Police Officers in the Department of Police and Security--she had requested and agreed to and then declined a light duty assignment; she had requested and been granted a medical leave based on a condition which her physician had indicated was exacerbated by



her pregnancy; while she was on this medical leave and before the end of her pregnancy, she had requested a return to work on light duty; she had indicated that she intended to take maternity leave after the birth of her child but had not indicated how long a leave she was intending to take; and the numerous restrictions placed by complainant's physician on her work assignments were not comparable to restrictions which had been placed on the work assignments of other Police Officers returning from medical leave. The only other Police Officer in the Department of Police and Security who had been pregnant while assigned to law enforcement duties was Sgt. Brogan. However, the record does not show that Sgt. Brogan had taken medical leave during her pregnancy or had any medical problems during her pregnancy.

Complainant first objects in this regard to Captain Hartwig asking her to verify her leave status, contending that this information was already available to respondent. Simply asking an employee to verify their leave status rather than having a supervisor research such status does not rise to the level of an "adverse employment action" within the context of a retaliation charge, and it is concluded that complainant has failed to show retaliation here.

Complainant next objects to Captain Hartwig's request for verification whether she was requesting a leave extension or a return to work. Complainant points to Captain Hartwig's statement in his letter acknowledging that she was requesting "half time work" as evidence that he already knew what she was requesting and his request for this same information despite this knowledge constitutes evidence of retaliation. However, it should also be noted here that the note from her physician that complainant provided as part of her request indicated that "[a]fter Valerie Bower's medical leave is up she may return to work on a trial basis." Although it was clear from complainant's correspondence with respondent that she was requesting a return to work, it was not clear from the information provided by her physician that this was the intent. Complainant has failed to show that the requested clarification was retaliatory.

Complainant's third objection is to Captain Hartwig's request for medical clearance from her physician. Although the record does show that complainant had provided a list of proposed light duty assignments parallel to those contained in Captain Hartwig's March 24, 1995, letter to her physician prior to the physician writing the March 13 note, the record does not show that this information was relayed by complainant or by her physician to

respondent and it is not apparent from the physician's very general note of March 13 that she had reviewed this list in preparing her note. In addition, the record shows, in regard to the only other somewhat similar situation cited, i.e., that relating to the return to work of Police Officer Jean Vanden Bogart after medical leave for a jaw condition, Ms. Vanden Bogart provided clearance from her physician before her return which specified what her light duty restrictions would be. Although the record does not show that follow-up information was required from her physician, the record also does not show that the information obtained from the physician was not sufficiently specific for respondent to determine the scope of Ms. Vanden Bogart's light duty restrictions. Ms. Vanden Bogart's physician indicated in the medical clearance statement that her work assignments were required to avoid any circumstance that might involve receiving trauma to her facial area. Such a statement did not introduce questions such as those relating to the length of time that the employee could perform certain tasks as complainant's initial medical clearance statement did and the situations are not parallel as a result. Complainant has failed to show retaliation here.

Complainant next objects to Captain Hartwig contacting her physician without her authorization, to clarify the physician's March 31, 1995 letter. However, in both the March 13 and March 31 letters from the physician, she invites Captain Hartwig to contact her and provides no notice to Captain Hartwig that she would consider such contact a violation of physician-patient privilege or objectionable for any other reason. It should also be noted that the March 31 letter, which precipitated the telephone contact by Captain Hartwig to the physician, contains the language "long periods of time" which was not quantified and fails to indicate how long complainant could be expected to work each day. The record indicates that the purpose of Captain Hartwig's contact was to clarify these two points. Complainant has failed to show retaliation in regard to this objection.

Finally, complainant objects to Captain Hartwig's request for complainant to provide an outline of her general leave plan for the following six months. It seems axiomatic that an operation such as the Department of Police and Security which is required to provide 24-hour-a-day law enforcement services for the UW-Madison needs to know what staff resources will be available to provide these services. Not only has complainant failed to show that she was similarly situated to other employees from whom this

information was not solicited but also that respondent did not have a legitimate business purpose in requesting this information. Complainant has failed to show retaliation in regard to this objection.

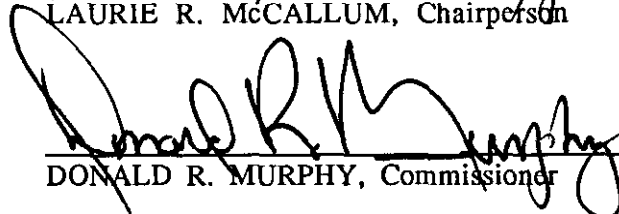
Order

This complaint is dismissed.

Dated: August 15, 1996 STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

LRM:rcr

  
DONALD R. MURPHY, Commissioner

  
JUDY M. ROGERS, Commissioner

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

**Petition for Rehearing.** Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) 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.)

2/3/95